

# Five maxims for platform regulation from the consumer perspective

## The Advisory Council for Consumer Affairs (SVRV)

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# Five maxims for platform regulation from the consumer perspective

The Advisory Council for Consumer Affairs has developed five maxims which platform regulation in the consumer interest should follow:

## 1. *Platforms serve different functions and must be regulated accordingly*

There are many platforms and many kinds of platform. They perform important tasks and offer a wide range of functions that are both desirable and helpful to the consumer. But the performance of these functions can be problematical. Where this performance necessitates regulation, however, it always means that it is the function rather than the platform itself that needs to be addressed. Only a differentiated approach can determine which platform functions pose which legal questions. From a legal perspective, two fundamental distinctions must be drawn here:

(a) Is the platform an autonomous operator or an intermediary?

We need first to distinguish between platform functionalities performed by the platform itself and functions in which it acts merely as an intermediary. Thus, for example, purchase contracts or other agreements may be concluded directly with the platform provider. Also, if a content ranking-system exists the platform can rank content itself on the basis of specific criteria. Alternatively, users may conclude contracts with other users via a platform. Here, the platform acts as an intermediary.

(b) Diversity of the intermediation role

In regard to this intermediation role, it is important to distinguish between transactional, informational and interactional functions (bearing in mind that there may be other platform functions not yet covered and that functions may be performed on the platform both centrally and at a more subordinate level). As a rule, platforms will perform several functions in tandem. With function-centred regulation, a platform must confine itself to the operations relevant to the functions it provides. So even on a platform that combines multiple functions, it must be possible to apply function-centred regulation easily and effectively without neglecting the consumer interest. Intermediation functions can be described as follows:

(aa) Transactional functions enable (private or business) users to perform transactions, for example contracts, with other (private or business) users. Transactional functions of this kind are to be found on e.g. trading platforms for goods or services. On the other hand, the function of merely sending someone via a link to a platform where transactions can be performed does not count as a transactional function.

(bb) Informational functions enable users to search actively for information on content available online. They tell the user where this content is to be found online, but the user can access it only by clicking through from the platform to the content in question. Informational functions are thus limited to search functions. They link to information, but do not provide the information themselves.

(cc) Interactional functions enable users to communicate with other users via the platform, share opinions and make content publicly accessible. Interactional functions are provided, for example, by social media platforms and video sharing platforms, but can also

be provided – as a subsidiary function – by other platforms, for example in commentary functions. With regard to the different kinds of content which can be provided on platforms with interactional functions, it should not be excluded that these different types of content may be regulated differently in detail, for example because certain media requirements apply only to specific types of content.

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## 2. Function- and risk-oriented regulation

Regulatory measures must be proportionate. Accordingly, they must take into account both the power of various functions and the varying performance capabilities of platforms. The duties of care existing hitherto in German law do this. They form the basis for the liability of the perpetrator in unfair competition law and the “Störer” (a co-liable party) e.g. in intellectual property law, copyright law (prior to transposition of the Digital Single Market Directive) and media law. This is a system of regulation based on the risks inherent in the business model of the platform and its specific functionalities, where considerations of proportionality also constantly play an important role. Likewise, it follows from considerations of proportionality that there must be tighter regulation of platforms where any neglect of consumer interests caused by the breadth of their specific functions has a more significant impact than would be the case with platforms of a narrower coverage. As the existing law already recognises, for example when the amount of financial compensation for infringement of moral rights is determined, the harm done to consumer rights and interests is far greater and longer-lasting here. Regulation shaped by duties of care thus provides a considerable degree of case-by-case fairness, but legal certainty can be assured only by additionally setting basic liability parameters that are systemic.

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## 3. Recognition of interactional functions as public communication spaces

Platforms with particularly wide coverage and with operations centred on the interactional function have become crucial to civil society. They provide a public communication space, with some of them potentially influencing the visibility of product and service offerings. The regulator must take due account of this. Nevertheless, it is equally important to realise that there can be no such thing as full neutrality and objectively correct representation. It is imperative that existing obligations are met, for example guaranteed access rights and minimum quality standards, and minimum quality standards include compliance with existing legal requirements such as those of data protection. The regulator must, above all, ensure that there are adequate avenues of legal redress for consumers, together with consumer-oriented platform design. Consumer-friendly reporting systems and complaints-handling mechanisms, for example, are especially important to consumers when it comes to the exercise of their rights.

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## 4. Clear delineation of the legal framework

Use of non-specific legal terms and general clauses makes for better case-by-case fairness, whereas specific rules create greater legal certainty. Consumer-oriented regulation requires both elements. Therefore, the legal framework must be clearly delineated, whilst the regulatory methods that have predominated hitherto, with open wording and numerous general clauses, must not be abandoned. However, these methods should be widened to include blacklists of

banned practices and/or provisions, for example the unwarranted blocking of opinions on platforms. Here too, account must be taken of the platform's functionality. Policymakers should not look to case law for a clearly defined and reliable legal framework, since case law takes years to build. Revision of the relevant provisions of the Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB), currently under discussion in Germany, is an important first step in the right direction, but it is unlikely to be enough.

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## *5. Consideration of Member States' regulatory competence*

The EU can regulate platform tasks and functions only through the exercise of its internal market powers under Article 114 TFEU. Platform liability is determined by the e-Commerce Directive (ECD). However, when the ECD was approved in 2000, these platforms looked very different from the way they look now. Facebook, for example, was not founded until 2004, and Google had nowhere near the breadth of coverage it has today. The various platform functionalities raise legal issues which affect other areas as well as the internal market and thus cannot be fully resolved using the EU's internal market powers. All future regulatory measures by the EU must take into account and preserve the powers which Member States still possess to shape the public space. Nevertheless, where legislation can be based on the exercise of internal market powers under Art. 114 TFEU, in the interests of a digital single market in Europe, the overriding goal should be optimum harmonisation of the legal framework and the avoidance of regulatory fragmentation.

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The Advisory Council is independent and is based in Berlin. As from the beginning of 2015, the Council generally meets on a monthly basis.

The chair of the Advisory Council is Professor Peter Kenning.