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BOOK REVIEW

PHENOMENON OF DIGITAL PLATFORMS AND LEGAL REGULATION

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РЕЦЕНЗИЯ НА КНИГУ

ФЕНОМЕН ЦИФРОВЫХ ПЛАТФОРМ И ПРАВОВОЕ РЕГУЛИРОВАНИЕ

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Ключевые слова цифровые платформы, цифровые услуги, использование данных, защита данных, цифровое право

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Introduction

This book presents us with an enormous, admirable wealth of ideas and thought processes about platforms, their development, legal regulation, and possibilities for legal science and practice, but also the difficulties of understanding new technology-related phenomena and regulation in their context. It assembles chapters by an impressive number of authors from different countries, in excellent English, and has been published by a renowned publisher. A general review of the literature suggests to me that there is currently no book on offer with similar breath. The number of times the book has been downloaded, namely more than 15,000 at the time of this writing, is a tribute to the importance of the topic and the content of this book.

The following summary of its content with some further ideas by no means intends to be comprehensive, but rather focuses on some general and methodological considerations.

The numbers in the parentheses below refer to pages, and the mention of page numbers rather than authors is by no means meant to be complete or to the detriment of the authors.

Approach to Regulation of Platforms

The chapters of the book confirm how difficult it is to even be clear about what the current scholarly discussion is, or should be about, and for obvious reasons, related clarity would be a precondition for getting an understanding of what regulation would be appropriate and whether phenomena are covered that are not yet clear but likely to emerge given what is to be expected, taking likely technical and economic developments into account. Accordingly, the actual approach to regulation, the issues to be regulated, the most suitable approach to regulation, as well as the likely consequences of the regulations that have been or are likely to be introduced, are not overly clear. This is in spite of the chapters referring to many interesting, related approaches and remarks, and, again, I am not aware of any more comprehensive approach to the topic. To go into more detail, the book does contain references to timid (page 68) and inadequate (page 86) government responses, which it links to developments generally not allowing for (page 89) or being too quick to allow for the implementation of regulation (page 149), as well as the development of platforms posing intricate issues (see page 4). The book also alludes to the possibility of deriving criteria from Russian or Eurasian law (page 204), the very definition of platforms potentially leading to conclusions (pages 70, 250), variations in regulation (page 82), the many relevant criteria (page 84), and how potential regulations must deal with new demands, such as sustainability (page 5), so it would appear that scientific studies are required to adequately understand the issues (page 181). In addition, the number of existing laws and legal mechanisms that must be taken into consideration is said to be substantial (page 9). Law is frequently referred to as coming into existence based on custom: starting out as soft law, then turning into semi-hard law, and finally becoming standard law (pages 15 and 54), which begs the question: to what extent are successful systems able to influence law in a manner to support their business?

A more general approach to definitions, presumably with a view to establishing common terms for the phenomena being addressed, simply stresses the importance of having a definition of platforms and relevant ecosystems (pages 80 and 82). The likelihood of controversies concerning the topics (page 85) is also noted.

Given the systems of the platforms being referred to (pages 3 and 9), as well as the number of forms of access to those platforms that exist, the scope of interaction they allow is referred to as global (page 21), and it is natural to believe that national law is to be replaced or complimented

by international law (see pages 59, 64 and 9), while it is unclear how the appropriate level of decision making (by international institutions, countries working together, big countries taking the lead) would be determined, particularly taking into account the different relation platforms have to various countries (see page 50).

Market capitalization (noted in page 51) and the number of platforms (page 80) are mentioned as being an indication of arising issues, and it appears natural for antimonopoly bodies to take charge of regulation in general (page 69) or to believe that dominance in a market requires a reaction (page 69). At the same time, there does not seem to be much clarity about the delineation of the markets reviewed by authorities or the markets to be reviewed. Also while, in many contexts, it is stressed that the platforms have changed our lives, it does seem very likely that it would be possible to return to how life worked before these platforms existed. The question also arises as to whether those old markets, for instance, for advertisements that are predominantly distributed by newspapers, are still relevant. More narrowly, there is little to be found on the influence platforms have on supply chains, or even on complaint mechanisms and the rules governing disputes, which would presumably be frequently influenced by legal service platforms nowadays. Also, there seems to be surprisingly little evidence that anti-monopoly regulation or actions have met with any success or even demonstrated any effect on the markets they were intended to influence.

The above discussion on regulation seems to confirm the perception that can also, *mutatis mutandis*, be applied to a number of further topics, which will be discussed in more detail below: namely that the very emergence of platforms leads to the structure of the discussion changing, or at least leads to issues being presented in a different manner. However, if addressed in a more conventional manner, these issues and topics could be put into context more easily: namely the context known from previous discussions, and, in this context, the novelty of new phenomena, particularly platforms, could become evident more easily. To be more specific, a social network with a substantial market position may trigger reactions that are typical for dominant players, and while the use of this social platform will by no means be as important as, for instance, the supply of water, some of the rules for natural monopolies may be deemed useful in regulating this social network. From a more general perspective, it may well be that the acceleration of technological progress also requires us to revisit a notion that has may not have been discussed in as comprehensive a manner as it should have been: namely that science should not assume that it has comprehensive command of its own methodology, and should rather be open to revising this methodology on an ongoing basis.[1]

Employment or Contracting?

Given how many people have contact with platforms in some manner and are at least partially making use of a platform in one way or another, it is natural to discuss the rules on social protection that are already in place, which may or may not lead to satisfactory results for the people involved and the general population, and expand this discussion to what is to be expected in the foreseeable future. For instance, it could well be that unemployment will increase due to progress

[1] For obvious reasons, a full discussion of this topic is not possible here. I only note that I have been impressed by one of the masterminds of economic research and economic policy in postwar Germany, Eucken, in the review of his theory by Petersen (2019), pages 48ff using as a description of his method the term "morphology", which in itself is not further defined. Taking the example of the work of the eminent and, to my mind, insufficiently recognized German scholar Joachim Gernhuber as reference, I believe to soon be able to demonstrate another approach to legal science having to, on an ongoing basis, satisfy itself that it comprehensively covers the legal phenomena at hand.

in digitalization, leading to the likelihood that people will require various state sponsored subsidies or protection. Of course, it would be useful to expand this angle of examination to cover the current and potential role of trade unions in protecting employees and self-employed workers,[2] and to examine whether related regulation requires amendment if it is to accommodate the specifics of platforms. In contrast, of course, regulation can try to apply limits, for example, by creating rules limiting the permissible size of commissions to specific types of parties involved with platforms,[3] and the overall effect of such limited limitation would be of interest for other types of regulations.

Tellingly, the importance of related issues seems to be confirmed by the specifics, sheer number, and intricacy of criteria to be reviewed in different jurisdictions when making a decision on whether an employment relationship is in place,[4] as opposed to an independent contractor relationship. Accordingly, it is not surprising to read about the specific features with respect to various platforms which are relevant (page 90), as well as differences among countries (page 99), developments over time (pages 93*ff*), and the importance of direction rights of the platform (page 35).

Regulation and Characterization of Service

Interestingly, it does not seem to be immediately apparent what the services provided through platforms are or how they are to be defined. However, the differences from the traditional way of working together, referred to as collaborative economy (page 14), sales taking place (page 78), responsibility for products (pages 65*ff* and 70) or services sold (page 72) are noted. There is also reference to regulation that could lead to services collapsing (87), licensing requirements for providing services (page 86), in particular, drivers found through a platform (page 88), and the specifics of marketing (page 153). Cross-border payments (page 132) and related issues (page 131), the importance of platforms in daily life (page 142), and qualitative changes by platforms (page 17) are also discussed.

Of course, when comparing, in a very general matter, the above to what one remembers from when more traditional areas of the law are applied — for example, what is discussed under the title of law of obligations (Schuldrecht, *obyazatelstvennoe pravo*) in civil law countries — one does not find much about rules or discussions about implementing the very functions of the platforms, for example: on how law helps the granting of the ability to read, post, and access posts or personal profiles at a given moment or over time, the transport of messages, their interruption, be it because of malfunction, a change in user policy, the transparency of the placement, or the effect of placing marketing material, as well as on the openness of platforms to political or other various types of business influence,[5] such as the infringement of the secrecy of communications for political or security reasons.

[2] I have partially explained their role in Gutbrod, M. (n.d.). *About Managing Legal Reform (German).* Academia. Retrieved July 4, 2023, from https://www.academia.edu/18503022/About_Managing_Legal_Reform_German_

[3] Like the ones referred in Stogova E. (2023, April 24). *Vlasti ogranichat komissii agregatorov ot prodazhi biletov v teatry [The authorities will limit the fees of aggregators from the sale of tickets to theaters in Moscow].* RBK. https://www.rbc.ru/technology_and_media/24/04/2023/64466c879a7947eef66dc9a7?from=from_main_2

[4] The novel presentation used in Waas and Heerma von Voss (2017) for, inter alia, the difference between the contract for works and the employment contract. This study highlights the intricacy of the problem, in my dissertation (Gutbrod, 1993), pages *26ff*, it took me almost 10 pages and the collection of hitherto unassembled Brazilian material to provide for a similar summary which was clearly influenced by there being a compensation for the termination of trade and franchising agreements in Germany.

[5] See discussion of a recent example being Users being held hostage to business and political views of platforms. Lauer C. (2022, November 11). *Elon Musk fährt Twitter gerade voll gegen die Wand — will er die Plattform mit Absicht zugrunde*

In addition to what traditionally would be referred to as contractual obligations, procedural practice may also deserve attention. The ability to identify counterparties, for instance, for disputes involving libel or platforms purposefully offering goods from sellers in other jurisdictions in order to avoid consumer claims, could serve as examples.

Not least, whether or not compensation is adequate for the service provided may be an issue to be reviewed.[6] For instance, the timing of the service may be more important in the platform economy than it was at the time the Civil Codes were drafted.

Linking this civil law discussion to the market structure considerations discussed earlier, one could imagine that some of the approaches taken for the quality of services — for instance for it to be free of so-called 'hate speech' — would also have to deal with the benefit of leaving quality standards to the discretion of the platforms in order to increase the chance of further development and encourage new players, as well as, for example, whether demanding the implementation of systems, for instance systems that block hate speech or pornography, provide for barriers to market entry, and whether it is reasonable to believe that related procedures (self-enforcement or enforcement through state courts) demonstrate effectiveness over time.

When, more broadly comparing the current debate to earlier ones, it is striking how many issues are no longer considered to belong to the spere of civil law, with 'the right to be forgotten' on the internet being just one small example. Before the emergence of platforms, a comparable right and the relevant demands would have been a natural part of the life of the contract. Now, it is naturally seen as being part of data protection law. Trying to compare today's perspectives to history, the following general assessment comes to mind: "Legal regulations for contracts are not drafted on the basis of theories. As a rule, they are developed with a constant eye on the reality of the practice they are tasked to regulate."[7] While in the reality before platforms, or at least before mass contracts emerged, this "eye on reality" would most likely be the one of those who had to deal with such contracts. In the case of platforms, it appears that these types of practitioners are more difficult to find, and, in particular, taking the considerations above into account, the practical views alluded to would no longer be sufficient. It is striking how much Gernhuber's further assessment of the benefit of regulation applies to what platforms would benefit from: "In theory, in a legal system that provides for freedom of contract, regulating contracts through statutory regulation is superfluous; the *lex contractus* is sufficient to settle all relevant questions. In practice, both the development of a general law of obligations and the regulation of individual types of contractual obligation in a special law of obligations have proven to be necessary in view of a contractual practice in which the parties hardly ever take up questions of the general law of obligations and in the area of the special law of obligations draft extensive regulations only in the form of the contract of adhesion and in highly specialized individual contracts (for instance relating to equipment purchase agreements, but even then are not overly concerned about

richten? [Elon Musk is driving Twitter straight into the wall — does he want to ruin the platform on purpose?]. Business Insider. https://www.businessinsider.de/politik/elon-musk-faehrt-twitter-gerade-voll-gegen-die-wand-will-er-die-plattform-mit-absicht-zugrunde-richten-a/

6 See discussion of the related regulatory options in Lange (1990).

7 I am citing Gernhuber (1994), § 7 IV 3, S. 153 here in my free translation, not only to make his views better available, but also because I believe that few similar assessments exist. The German equivalent of the English is: „Vertragsordnungen werden nicht theoretisierend entworfen. Im Regelfall werden sie entfaltet mit stetem Blick auf die Lebenswirklichkeit, deren Regelung ihre Aufgabe ist."

completeness."[8] Indeed, and further to what has been set out above, it does very much seem that attention to contracting, where platforms are concerned, is one sided with respect to the operator of the platform, and the operator of the platform will initially be very interested in attracting as many users as possible by using amenable contractual provisions, with the likelihood being that this approach will be reversed during the life of the contract. Even more thinking about how to better position the parties for a meaningful determination of contractual obligations seems to be warranted. Possible modern examples of drafting contracts with the stated aim of protecting consumers, but with a possible view to establishing a level playing field,[9] can be found in § 305 BGB (contract of adhesion), § 651a BGB (travel agreement)[10] and § 491 BGB (consumer credit agreement).

Data Use and Protection

Interestingly, digital data is identified as the key factor for the operation of platforms (page 20). The importance of the related data value chain is also proposed as a metric (page 78), the turnover related to that data is noted (page 4), and examples are given (page 204). Not much can be found about, what would appear to me, to be the core of the business of platforms: namely the algorithms they use, specifics about the consequences the use of AI, and what the much talked about cookies really are. In a sense, while, as mentioned, the book presents us with a great multitude of facts, this multitude does not immediately make it possible to confirm or disprove the notion that the discussed platforms have largely transformed data into the oil of the future and monetized them, as predicted.

In contrast, when discussing data protection, one seems to return to a known normal, with quite some detail being cited (page 152) and GDPR emerging as a key regulation (pages 152*ff*) that might be an obstacle to newcomers from having success (page 153). Among specific issues requiring regulation, requirements for using an image (page 190), ownership issues (page 81), and the effect of platforms on media (page 206) are discussed, although protection of reputation is not discussed in much detail. Other new dangers, including scammers (page 188), and new emerging terms, such as IP addresses or bloggers (page 189), appear to require a special assessment.

Government Support for Platforms

Incentives in Russia (pages 160*ff*), as well as Glonass and Gosuslugi, are mentioned as examples (23), and the interest by Central Banks (page 131) is noted. Furthermore, how governments are using platforms to improve their educational systems is described in a very general manner (page 176), while more detail is given to various different countries (page 178), particularly the US (page 179) and Estonia (page 179), from which one can conclude that governments are primarily focusing

[8] Gernhuber (1994), § 7 IV 4, S. 154: The German original which I freely tranlated into is: „Theoretisch bedarf vertragliches Schuldrecht in einer Rechtsordnung, die Schuldvertragsfreiheit gewährt, keiner gesetzlichen Regelung; die lex contractus hat ggf. allein alle Fragen zu regeln. Praktisch ist sowohl die Ausbildung eines Allgemeinen Schuldrechts als auch die Regelung einzelner Schuldvertragstypen in einem besonderen Schuldrecht notwendig angesichts einer Vertragspraxis, in welcher die Parteien Fragen des Allgemeinen Schuldrechts kaum je aufgreifen und sich im Bereich des Besonderen Schuldrechts zu umfangreicheren Regelwerken nur im Formularvertrag und im hochspezialisierten Einzelvertrag (etwa: im Industrieanlagengeschäft) bereitfinden, aber auch dann um Vollständigkeit nicht besorgt zu sein pflegen."

[9] Gernhuber (1983) § 3 I 1 2, S. 17.

[10] A long time ago, I planned to compare the German Civil Law based system with the Russian licensing system, but never got beyond a draft.

on education and other already existing processes. At the same time, it would be interesting to understand whether the technical abilities that are emerging are also being used for innovation in education, for instance, for an enhanced use of grading systems so as to have a basis from which to target specific weaknesses.

Conclusion

When generally reflecting on what one can read in this book, one is reminded of a sort of contemporaneous history, of a display of details that are necessary but not sufficient for the many developments we have witnessed and are still likely to witness.

References

1. Gernhuber, J. (1983). Bürgerliches Recht (2. Auflage) [Civil law (2nd ed.)]. C. H. Beck.
2. Gernhuber, J. (1994). Das Schuldverhältnis (2. Auflage) [The law of obligations (2nd ed.)]. C. B. Mohr (Paul Siebeck).
3. Gutbrod, M. Handelsvertreter und Vertragshändler nach brasilianischem und deutschem Recht [Commercial agents and authorized dealers under Brazilian and German law]. [Doctoral dissertation, München Universität]. Peter Lang.
4. Lange, H. (1990). Schadensersatz-Richterrecht oder Gesetzesreform? [Compensation for damage — judicial law or legal reform?] In K.W. Nörr (Ed.), 40 Jahre Bundesrepublik Deutschland — 40 Jahre Rechtsentwicklung: Ringvorlesung der Juristischen Fakultät der Universität Tübingen 1989 [40 years of the Federal Republic of Germany — 40 years of legal development: Lecture series of the law faculty of the University of Tübingen 1989] (pp. 143-158). J. C. B. Mohr (Paul Siebeck).
5. Petersen, J. (2019). Rechtsordnung und Wirtschaftsordnung nach Eucken [Legal system and economic system according to Eucken]. De Gruyter. https://doi.org/10.1515/9783110666229
6. Waas, B, & Heerma von Voss, G. (Eds.). (2017). Restatement of Labour Law in Europe: Vol I: The Concept of Employee. Hart Publishing.

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