

# The Power of App Stores and Their Normative Orders

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in: Matthias C. Kettemann (ed.), How Platforms Respond to Human Rights Conflicts Online. Best Practices in Weighing Rights and Obligations in Hybrid Online Orders (Hamburg: Verlag Hans-Bredow-Institut, 2022)

# The Power of App Stores and Their Normative Orders

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## Introduction

Social networks like Facebook, TikTok or Twitter moderate the content that is published on their platforms. The networks delete content, block accounts (sometimes even those of government leaders) or tag content with notices that it could be false information. This practice takes place in the area of tension between the freedom of expression of those affected and the protection of the general public from dangerous or illegal content.

If one looks at the chain of process steps on the way from the development of a social network to the deletion of certain content, it becomes apparent how many other actors are involved in the dissemination and removal of content. These actors set law through the terms of use of their respective services, which is close to state law and the terms of the social networks in its importance for the exercise of freedoms. The app stores of Google and Apple, for example, hold such a powerful position. The Play Store (Google) and App Store (Apple) have a combined market share of 94% in sales and 91% in downloads of mobile apps.<sup>1</sup> This makes app developers dependent on the distribution through the app stores: If an app is not available here, it will hardly be able to reach users and thus sales on mobile devices.

Most recently, a case from Russia came to light when Google and Apple removed<sup>2</sup> a "Navalny App" from their stores that the Russian opposition had used to facilitate "tactical voting" and the identification of opposition candidates.

In the super election year 2021, more people than ever before are forming their opinions on the internet. Therefore, it is of particular importance for democratic processes to also analyse the companies behind the social networks and their content governance.<sup>3</sup> This study summarises the legal framework for content governance by app stores. In doing so, it looks at the particularities in the comparison of content governance by social networks and app stores. In particular, with regard to the EU Commission's drafts of the DSA and DMA, the question is answered as to whether national or European law can provide suitable answers to the problems of content governance through app stores.

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<sup>1</sup> Figures from 2013: maclife.de, <https://www.maclife.de/iphone-ipod/software/app-stores-im-vergleich-google-fuehrt-bei-anzahl-der-downloads-apple-hingegen-b>

<sup>2</sup> <https://www.reuters.com/world/europe/google-apple-remove-navalny-app-stores-russian-elections-begin-2021-09-17/>

<sup>3</sup> See in detail: Matthias C. Kettemann, Vincent Hofmann, Julius Böke, Max Gradulewski, Jan Reschke and Leif Thorian Schmied, Superwahljahr 2021: Gesellschaftlicher, Medialer und Rechtlicher Rahmen, <https://leibniz-hbi.de/de/blog/superwahljahr-2021-gesellschaftlicher-medialer-und-rechtlicher-rahmen>.

## Market power of the app stores

Google and Apple seem to be well aware of their great market power, which is reflected in their market behaviour: Both stores charge a 30% commission on all sales generated in their stores and on so-called in-app purchases (paid transactions made in the app without going directly to the app store). Developers were also prohibited from pointing out cheaper options outside the App Stores. Apple even only allowed payments via ApplePay.

Resistance is rising against this economic behaviour. The game developer Epic Games (Fortnite) is suing against the business practices in the USA. In the ruling of 10.09.2021, against which Epic Games has appealed, Apple is not considered a monopolist on the app market. Therefore, the commission was not criticised by the court.<sup>4</sup> However, it was decided that Apple may no longer prohibit its developers from referring to cheaper offers outside the App Stores. South Korea recently passed a law that prohibits commissions of 30% as well as the prohibition to refer to cheaper offers.<sup>5</sup>

## Content governance through app stores

The app stores do not only make economic demands on the apps they distribute. The app stores also have an impact on the developers in terms of content. For example, Google and Apple banned Parler, a popular network among right-wing extremists and supporters of the storming of the Capitol, from their stores because it did not sufficiently moderate the content published there.<sup>6</sup> Parler then tried to comply with the App Stores' guidelines and is now available again in the Apple App Store. The app is not yet available on Google.<sup>7</sup> The app "Unjected" also disappeared from the stores because of the accusation of not taking sufficient action against the spread of false information.<sup>8</sup> Unvaccinated people could exchange and date each other, which is why the app was nicknamed "Tinder for vaccination opponents". On Telegram, the app stores presumably even take action against individual channels. For example, the channels of the far-right conspiracy theorist Attila Hildmann were probably blocked in the Android and iOS versions of the app under pressure from the app stores.<sup>9</sup>

The app stores' approach to misinformation and hate speech bears the dangers that also lurk in the moderation of content by social networks: How is it decided, especially in the case of content that is not illegal but nevertheless "harmful", what is deleted and what is not? In other words, who decides what is harmful and how? Especially in connection with false information, the question arises: What is truth and who decides about it, and how can I, as a user, defend myself against decisions?

## Legal framework

The deletion of an app interferes with the fundamental rights of the app operators and users. The operators are initially affected in their freedom of occupation under Article 12 (1) of the German Basic Law.

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<sup>4</sup> usatoday.com, Epic Games appeals Apple court ruling over App Store.

<sup>5</sup> arstechnica, South Korea law forces Google and Apple to open up app store payments, <https://arstechnica.com/gadgets/2021/08/south-korea-law-forces-google-and-apple-to-open-up-app-store-payments/>.

<sup>6</sup> welt.de, Parler: Internet platform popular with right-wingers no longer accessible.

<sup>7</sup> nbcnews.com, Apple reinstates Parler app, stands by initial ban.

<sup>8</sup> rnd.de, Unjected: App stores ban dating app for vaccination opponents.

<sup>9</sup> faz.net, Access to Telegram channels of Attila Hildmann blocked.

Depending on the content of the blocked app, the operators' freedom of expression (Article 5 (1) sentence 1 of the German Basic Law) may also be violated if the operators themselves use their app to disseminate or form their own opinion. The users' freedom to express and form opinions is also violated when apps are used in this way. However, this must be decided for each app individually and depends on the functions the app offers and the extent to which it is important for the expression or formation of the users' opinions. The size of the platform behind the app or its specialisation in a particular topic plays a role. However, app stores as private companies are not directly bound by fundamental rights. These only have an indirect effect on the relationship between users and companies. This is because the measures taken by the app stores against individual apps are also an expression of the entrepreneurial freedom of the app stores, Art. 16 EU-GRCh. As private companies, they can basically sell or block whatever they want. However, in a case concerning Facebook, the Federal Supreme Court ruled that due to their strong influence, especially on freedom of expression, they had to take the fundamental rights of users into account to a particular extent.<sup>10</sup>

In contrast to the moderation of social networks, the app stores can technically only remove the entire app from their stores. Targeted intervention against individual illegal content is not possible, which also affects legal content and content against which the app stores' blocking should not be directed. However, the content published by users can remain available even after an app has been excluded, be it via web versions, the store of the respective competitor or, in the case of Android, via alternative app stores. "Only" the reach of content is reduced by the measures of the app stores. However, depending on the collapse in reach, this can be tantamount to deletion.

Deleting or blocking is not the only effective means used by the app stores. Since even a temporary removal from the stores can lead to massive losses in sales, developers try to prevent such measures through compliant behaviour.<sup>11</sup> This was demonstrated by Telegram, where individual channels in the apps distributed via the App Store and Playstore were blocked, presumably due to pressure from the app stores.

The app stores have laid down the basis for such measures in their rules for the use of the stores. Together with the norms of state order, these form the applicable set of rules for "content governance" by the app stores.

## Private orders

### Apple

In its "App Store Review Guidelines", Apple has defined in which cases apps are not allowed or are blocked. According to these guidelines, apps with user-generated content must have established a content governance system and be able to take measures against users such as blocking profiles or deleting content. Apple refers to "offensive content" and "abusive users", against which the app operators must take action. An automatic system must also be set up to check users' content for "objectionable material" and prevent it from being uploaded. The app must also offer a way for users to easily contact it.

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<sup>10</sup> BGH, judgements of 29 July 2021 - III ZR 179/20 and III ZR 192/20.

<sup>11</sup> Previously unpublished interview by Christina Dinar (HBI) with Sven Voges (PlanetRomeo) from 10.08.2021, "Every time a block means that you are not found over the certain period of time, ... in some cases it costs 2 weeks or it took 2 weeks until we were back in and that means 2 weeks of sales that fall away".

Apple thus remains vague, in particular what "offensive content" is, is not specified. The guidelines become more detailed when it comes to banning specific content. These rules apply regardless of whether the content is distributed by users or the developers of the app. "Apps should not include content that is offensive, insensitive, upsetting, intended to disgust, in exceptionally poor taste, or just plain creepy." The last part of the "just plain creepy" provision in particular makes it clear how much leeway Apple gives itself in evaluating the apps. These prohibited contents are explained in the following paragraph. However, this is only done on the basis of examples in a non-exhaustive list.

The App Store Review Guidelines thus form only a little specific basis for the question of which content will not be found in the App Store or will be deleted from it again.

## Google

Google's terms and conditions for the Play Store also prohibit some content for apps distributed through the Play Store.<sup>12</sup> The prohibited content is divided into the categories of bullying and harassment, sensitive events, violence, hate speech/ incitement of the people, as well as pornographic content and vulgar language. The various generic terms are also specified, along with some examples. There is also soft wording in Google's terms and conditions, which leave Google itself some room for manoeuvre in deciding. For example, "dangerous activities" may not be shown or favoured, and events such as natural disasters may not be treated with "insensitivity". Especially topics from the area of "sensitive content" can often be the subject of journalistic reporting or controversial debates, which could thus have a hard time in apps distributed via the Play Store.

Google's conditions on pornographic content are particularly noteworthy. This is only allowed "if it serves primarily educational, documentary, scientific or artistic purposes and is not superfluous." What content is superfluous and when is not defined and remains at Google's discretion.

## Interim conclusion

The standards set by Apple and Google for the deletion of apps leave much room for interpretation. This is understandable in view of the enforcement of norms: the app stores use the space they have created themselves in enforcing the norms, whereby the broadest possible framework means more flexibility. And not only are the app stores' conditions opaque, the practice of "moderation" by the app stores also reveals little system.<sup>13</sup>

## State order

### Antitrust law

The already mentioned market share of almost 100% of Google and Apple in mobile apps also poses some risks in terms of antitrust law. The antitrust measures against the app stores relate, in the nature of antitrust law, to the economic consequences of the companies' dominance and do not directly address their "content governance". Thus, they cannot by themselves provide an answer to the content governance issues raised.

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<sup>12</sup> Google Play, Developer Policy, Content Restrictions.

<sup>13</sup> VPN apps in Russia and China were examined: Verweris et al, Shedding Light on Mobile App Store Censorship, <https://dl.acm.org/doi/10.1145/3314183.3324965>.

Nevertheless, reducing the economic power and thus the dependence of developers on the app stores is a crucial building block for reducing the importance of moderation decisions by the app stores.

In various countries, proceedings are underway against the app stores, in which they are accused of abusing their dominant market position.<sup>14</sup> The specific cause is, among other things, the commission model of the app stores. Apple and Google charge a flat rate of 30% for every paid transaction.<sup>15</sup> Apple also forbade its app developers to allow other payment methods apart from its own ApplePay service. The developers were also not allowed to point out that the app or services that could be purchased via in-app purchases could be purchased more cheaply outside the iOS infrastructure.<sup>16</sup> In addition to civil lawsuits, the competition authorities in both the USA and the EU took action against the app stores due to this market behaviour.<sup>17</sup> As mentioned above, in the lawsuit against Epic, a US federal court prohibited Apple from preventing developers from referring to cheaper distribution channels. And South Korea passed a law that, among other things, bans commissions of 30%.

### German media law

In national media law, the Network Enforcement Act (NetzDG) and the State Media Treaty (MStV) provide the framework for content governance in internet media.

However, the NetzDG that applies to social networks does not apply to app stores. This means that the comprehensive obligations to delete illegal content do not apply to them, nor does the obligation to publish a report on the deletions and profile blocks that have taken place.<sup>18</sup>

The regulations for media intermediaries contained in the State Media Treaty, on the other hand, also apply to app stores. This obliges them to be transparent and non-discriminatory. What initially sounds like a solution to the problems of "content governance" is, however, hardly suitable for regulating this complex of issues. The ban on discrimination only applies to the selection of journalistic and editorial content. Journalistic-editorial content can also be found on social networks. However, alongside non-professional content, this only makes up a part of the published content. It can therefore be assumed that the apps of social networks themselves are not to be classified as journalistic-editorial content. However, even if one were to assume such a classification, this would hardly mean a difference. Discrimination is defined in Section 94 (2) MStV and is a systematic deviation from the self-given rules at the expense of journalistic-editorial content. Since the self-given norms of the networks are extremely vaguely formulated, it will hardly be possible to establish a systematic violation of these very norms. Accordingly, the MStV's prohibition of discrimination is empty in the case of app stores.

The said transparency obligation is limited to the obligation to disclose the criteria of the recommendation algorithm and the criteria when an app is blocked or removed, thus again: the self-imposed standards of

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<sup>14</sup> EU: europa.eu, Antitrust: Commission Investigates Apple's App Store Rules and Apple Pay Behaviour, USA: businessinsider.com, Google Faces Nationwide Antitrust Lawsuit Over Android App Store.

<sup>15</sup> cnbc.com, How the Apple-Epic court ruling could affect Google.

<sup>16</sup> Sources

<sup>17</sup> europa.eu, Antitrust: Commission investigates Apple's App Store rules and Apple Pay behaviour.

<sup>18</sup> A comprehensive summary of the legal situation for social networks can be found here: Hans Bredow Institute for Media Research, THE LEGAL FRAMEWORK OF THE ONLINE FEDERAL ELECTION CAMPAIGN: AN OVERVIEW OF THE LEGAL OBLIGATIONS OF PARTIES AND PLATFORMS.

the app stores. The MStV does not provide for an obligation to publish a transparency report on moderation practices, nor does it provide for an obligation to remove content.

Thus, German national media law does not provide an effective legal framework for regulating "content governance" by app stores.

## European legislative projects

At the European level, the drafts of the Digital Services Act (DSA) and Digital Markets Act (DMA) in particular provide for fundamental changes to the legal situation in digital markets. New rules will also apply to app stores in the future.

### DMA

The DMA, which is still in draft form, provides for competition law measures that are intended to limit the economic supremacy of the app stores, among others. The focus here is on the classification as a so-called gatekeeper. According to Article 3 of the DMA, this refers to very large tech companies that have a strong influence on the EU internal market as providers of central platform services, hold a strong position as intermediaries (e.g. through their user numbers) between commercial users and end users, and occupy an established and permanent position (duration of business activity). The app stores of Google and Apple belong to very large tech companies and, due to their enormous market power, are also of particular importance within the EU for the mediation of customers to the developers of mobile apps. It is therefore likely that they will be classified as gatekeepers.

The DMA provides for some new regulations for gatekeepers. According to Art. 5 lit. f, gatekeepers should be prohibited from forcing business customers and end users to register for additional services. Accordingly, it would be possible in future to use Android without a Gmail account. Users must also be able to uninstall pre-installed software and apps if they are not absolutely necessary for the functioning of the operating system. This also includes the app stores themselves.

Personal data of customers may only be linked to other data of third party providers with explicit consent (Art. 5 lit. a). Users may also not be automatically registered with other services.

According to Art. 6 lit. a, gatekeepers may no longer use such non-public data of business users and their end users in competition with business users if this data was generated through the use of the gatekeeper platform. Also, data obtained from the distribution of apps would have to be shared with developers. Business customers and end users of gatekeepers should have the right to data portability and real-time access to this data. Business customers should have free real-time access to data about their sales, customers, etc. (Art. 6 lit. h and i). This should reduce the data gap between business users and platforms.

Similarly, app stores may not prohibit app developers from offering their products at lower prices outside the app store (Art. 5 lit. b DMA).

Gatekeeper operating systems must in future also allow third-party providers to install apps on the system (Art. 6 lit. c). This regulation would force Apple to open up to alternative app stores, as is standard on Android devices or PCs.

The DMA thus primarily opposes the market power of the app stores. In particular, the dominance over the data obtained should be reduced and the associated enormous competitive advantage of being able to respond ideally to the wishes of customers should be diminished. The market for mobile apps should also

be opened up to app store providers other than Apple and Google. This has an indirect effect on the quasi-content moderation of the app stores: The less dependent the developers are on the app stores, the less incisive their moderation decisions are for the developers.

However, it is noteworthy that Google's Android operating system is already open to third-party apps. Nevertheless, the market share of the Play Store is very high. The possibility of bypassing the Play Store alone theoretically offers the chance of app distribution that is self-sufficient from Google. However, removal from the App Store still leads to major financial losses and loss of reach. Nevertheless, this measure in combination with the other measures limiting the dominant position of the App Stores should lead to a decline in the market power of Google Play Store and Apple's App Store in the long run.

## DSA

Unlike the DMA, the DSA directly regulates the content governance of app stores. Explicit rules such as information and transparency obligations can be found there. The DSA provides for different obligations for different categories of service providers. These are hosting service providers, intermediary service providers, online platforms and very large online platforms.

According to recital 13 of the draft DSA, online marketplaces are to be classified as intermediary services, online platforms and hosting service providers. Due to the large number of users, the Google and Apple app stores are also to be classified as very large online platforms.<sup>19</sup>

First of all, according to Art. 13, 23 and 33, app stores must publish a transparency report every six months, which must disclose the measures taken against content. This includes content classified as illegal as well as content that violates the terms of use. Official orders for deletion and reports from users about unauthorised content must also be disclosed here. Article 14 obliges a procedure in which users can report content as violations of state law or the terms of use.

If content, i.e. in the case of app stores an app, is blocked or deleted, the user (app operator) must receive a justification for the decision. This should form the basis for an internal complaint. A complaint system must be set up in accordance with Art. 17 and may not be carried out exclusively by computer systems. Such a procedure is already offered by the app stores. However, this does not consistently lead to a substantive discussion of the operators' concerns.<sup>20</sup> In order for this to be different in the future, the procedure will be supplemented by the dispute resolution body according to Art. 18. Those affected by decisions of the app stores have the possibility to appeal to an impartial dispute resolution body, which can make binding decisions for the platforms. This leads to an impartial review of the app store's decision and thus safeguards the rights of users. The fees of such a procedure may only cover the actual costs and are only to be borne by the user in the event of a decision in favour of the app stores.

As very large online platforms, app stores must undergo a risk assessment to determine whether they pose a systemic risk to, among other things, the exercise of fundamental rights, Art. 26. In order to counteract such risks, they can take measures according to Art. 27, which provides, among other things, for cooperation

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<sup>19</sup> Market shares of iOS and Android in Germany: statista.com, <https://de.statista.com/statistik/daten/studie/251737/umfrage/marktanteil-des-apple-iphone-am-smartphone-absatz-in-deutschland/>; Smartphones sold in Germany: statista.com, <https://de.statista.com/statistik/daten/studie/77637/umfrage/absatzmenge-fuer-smartphones-in-deutschland-seit-2008/>

<sup>20</sup> Previously unpublished interview by Christina Dinar (HBI) with Sven Voges (PlanetRomeo) from 10.08.2021, on Google: "you also don't have a direct contact person, you kind of have an anonymous complaint hotline that you can contact, where you then also have to deal with someone else every time".



with trustworthy whistleblowers or an adjustment of moderation practices. Whether the very large online platform adequately counteracts the risk it poses to the protected interests mentioned in Art. 26 is assessed at least annually by an independent body, which must be paid by the platforms.

The DSA regulates in great detail the requirements of content governance by online service providers. It was recognised that the big question of content governance, who is allowed to decide what is publicly accessible, does not only concern the social networks themselves. The dispute resolution procedure under Art. 18 takes away some of the interpretative sovereignty of online platforms as to what content is to be classified as "harmful". Whether the requirement that only the costs actually incurred by the user are to be charged in the event of a defeat really keeps the threshold for proceedings low is doubtful for private users. However, such a procedure is still interesting for commercial users and the costs are low compared to the losses due to an absence from the app store. However, this is another problem of dispute resolution: Every day that an app is unavailable costs money and users. It is doubtful that proceedings under Art. 18 DSA will be fast enough to protect the developers' interest in a quick decision. As for state courts, this should be taken into account through a form of summary proceedings. It is true that the dispute resolution procedure does not affect the legal process before state courts. Developers therefore continue to have recourse to civil (summary) proceedings. However, the idea of the dispute resolution procedure to reduce hurdles to disputes with the platforms should also apply to urgent decisions and be taken into account in the corresponding procedure.

In particular, the obligation to justify a decision, the obligation to transparency of content governance and also the dispute resolution procedure are sensible instruments of the DSA, which steer the area of tension of content governance (what is removed when, who decides this and what can users do about it) in a good direction for app stores as well. As with the DMA, the DSA is still no more than a draft and the final wording, especially the concrete requirements for transparency reports or content governance systems, will have a decisive influence on the effectiveness of the legal instruments. However, the further legislative process could also bring positive changes such as the introduction of an expedited procedure for dispute resolution or the introduction of fixed contact persons within the framework of the complaints procedure, which would be welcome.

## Outlook for other actors

In addition to the app stores, other players are influencing the distribution of content. For example, onlyfans recently announced that the service would no longer tolerate pornographic content in the future. This was due to pressure from payment providers who threatened to stop processing payments to onlyfans if the app continued to distribute pornographic content.<sup>21</sup> The dispute between pornhub and payment providers Visa and Mastercard was similar. Pornhub also changed its terms of use because they were accused of distributing illegal content such as child pornography or rape videos.<sup>22</sup>

Similarly, technical infrastructure providers can influence networks. These services, such as cloud services or DNS services, can make networks completely inaccessible. Also with these actors acting in the background, the entrepreneurial freedom of the service provider meets the freedom of the platform

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<sup>21</sup> politico.eu, Adult content creators in the lurch as OnlyFans bans porn.

<sup>22</sup> cnbc.com, OnlyFans bans sexually explicit content.

operators and, depending on the size of the network, also the fundamental rights of the users active on the platform.

According to media reports, the server service Amazon Web Services will introduce a tool for content governance that recognises and removes prohibited content automatically. This is intended to abandon the practice, which has so far been inefficient and dependent on reports from users.<sup>23</sup>

This issue again raises the fundamental question: Who should be allowed to interfere and how? Due to the enormous reach of platforms, they also have an enormous significance for the protection of certain fundamental rights. Even pornographic platforms shape (for better or worse) an understanding of sexuality. On the one hand, it is of course welcome if action is taken against videos of rape or child pornographic material is stopped. This is indisputable in terms of content and the removal of illegal content is in the public interest. Criminal laws in Germany were passed by democratically legitimised legislative bodies. However, when it comes to legal content, this democratic legitimacy is lacking if private actors decide independently on its dissemination. For example, the dating app Planet Romeo was banned from the app stores because of an emoji consisting of a cucumber and two tomatoes.<sup>24</sup>

Since social networks have become important instruments for opinion formation and expression, not only the networks themselves must be held accountable, but also their treatment by providers operating in the background must be considered in regulation. This has already been done to a welcome extent by the European legislative projects. In the final formulations of the previous drafts, however, particular attention should be paid to ensuring that such services continue to be covered by the directives. It should also be reviewed whether other influential players such as payment service providers in their function as content moderators should be covered by the new legislative proposals.

## Conclusion

The current legal situation grants app stores extensive freedom. They are neither subject to the German NetzDG nor does the German MStV provide for effective measures. However, this will change with the introduction of DSA and DMA. If the guidelines are adopted in their current form, this will mean significant hurdles for the business practices of app stores. In particular, the obligation to publish transparency reports and the restriction of economic power, especially the obligation to allow alternative app stores, are crucial building blocks in strengthening the rights of users and app developers to form and express opinions. When defining a complaints process, it should be considered from a regulatory point of view that the current processes theoretically offer sufficient participation, but in practice do not give much voice to the concerns of app developers.

The attempt to influence the legislative process is already in full swing because of the drastic legal changes.<sup>25</sup> From the perspective of content governance that protects the rights of all stakeholders, it is to be hoped that the existing draft will not be softened further.

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<sup>23</sup> The Verge, Amazon is planning more aggressive moderation of its hosting platform AWS.

<sup>24</sup> Previously unpublished interview by Christina Dinar (HBI) with Sven Voges (PlanetRomeo) from 10.08.2021, on Google: "- our app has been blocked so please take out this picture (cucumber and tomatoes)".

<sup>25</sup> lobbycontrol.de, DSA/DMA: How Big Tech wants to prevent new rules for digital platforms.