

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Implications of E-commerce for Competition Policy - Note by Germany****6 June 2018**

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1. The fast spread of the internet and the resulting continuing growth of online trade have brought significant changes for many distribution structures. New online distribution models often lead to a more efficient production and distribution of goods, with a trend towards lower prices and higher quality. The internet widens the reach of manufacturers and retailers both in terms of products and the geographic dimension because they cannot only sell more products, but also offer a wider range of goods in a larger area of distribution. The same is true for so-called Internet of Things solutions and intermediary business-to-business ('B2B') solutions for industrial companies, their suppliers and their customers in the form of digital trading platforms.

2. In view of the competitive significance of the internet and its potential to increase efficiencies to the companies' and the consumer's benefit, the German Competition Authority ('Bundeskartellamt') has to ensure that possible restrictions of e-commerce activities and barriers to competition do not restrict e-commerce in an undue manner.

3. This submission provides a short introduction into horizontal aspects of e-commerce that may raise competition concerns (1.). Vertical restrictions (2.) and unilateral conduct as high-profile enforcement activities within the e-commerce sector (3.) are discussed. Finally, the novel tasks and investigatory powers of the Bundeskartellamt in the field of consumer protection that were introduced with particular regard to the digital economy are being presented (4.). The submission closes with conclusions (5).

1. Horizontal cooperation

1.1. Introduction

4. Competition authorities are at the forefront of the digital economy. Germany is one of the most important and most rapidly growing areas for e-commerce in Europe. As a consequence, e-commerce represents a key area of the past and present enforcement practice of the Bundeskartellamt under the German Act against Restraints of Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen', 'GWB').

5. The rapid growth of e-commerce highlights the necessity to take a closer look at potential efficiencies and competition barriers originating from horizontal practices. From a competition law perspective, possible concerns include, inter alia, the role of price-monitoring software solutions and algorithms for dynamic pricing in light of the risk of collusion, potential market sharing in the e-commerce sector and the possibility of an anti-competitive information exchange via intermediaries such as online trading platforms.

1.2. B2B platforms

6. Under the auspices of the emergence of the so-called Internet of Things the Bundeskartellamt is increasingly faced with requests for consultation regarding intermediary business-to-business solutions used by industrial companies, their suppliers

and their customers in the form of digital trading platforms. Such cooperation may entail efficiency gains, and the Bundeskartellamt is generally willing to discuss the criteria for a lawful implementation of such projects with the parties if the relevant framework is already suitable for a concrete assessment. The actual analysis largely depends on the competitive structure of the relevant markets, the nature of the products or services concerned or the concrete aim of the cooperation. Hence, the outcome of the competitive assessment is highly contextual. The Bundeskartellamt's mission is to keep the relevant markets open, protect a competitive market structure and ensure that such projects do not serve as a cover-up for industry-wide collusion to the detriment of consumers.

7. Against this background, the Bundeskartellamt recently had no objections to plans by steel distributor Klöckner to set up a B2B online trading platform for the sale of steel products.¹ Both steel manufacturers and traders will operate as suppliers on the platform. Both groups are to some degree competitors of Klöckner. With two subsidiaries Klöckner itself will also be active on the platform as a supplier. In addition, Klöckner will continue to operate its own online shop. The platform is primarily intended for existing customers of the suppliers, but it is also to offer new customers easy access to the market via the online marketplace. The offer of steel products via an electronic trading platform will however also increase transparency, which can make agreements easier or even unnecessary if conclusions can be drawn about the future pricing strategy of individual traders. This applies to both the suppliers competing with one another as well as to the connection between the company group and the operator, the Klöckner group.

8. After talks with the Bundeskartellamt, Klöckner modified its original plans so that the project no longer raises competition concerns relating to anti-competitive information exchange and the above mentioned increase in market transparency. Based on the indications given by the Bundeskartellamt, the platform was technically designed in such a way that customer-specific data is only available to the relevant distributor/customer and cannot be accessed by other users that are active on the platform. Prices will only be visible on the platform after a customer has logged in, and new customers will only be able to see a supplier's price once they have logged in and identified themselves with their VAT number. Furthermore, Klöckner has improved the organisational separation between the operator of the platform and the Klöckner group. This will ensure that no potentially sensitive market and company data are exchanged between the platform operator and the rest of the Klöckner group. Ultimately, the Bundeskartellamt exercised its margin of discretion and decided not to raise any objections to the launch of the B2B online trading platform.

2. Vertical aspects of e-commerce

2.1. Introduction

9. The above mentioned features of e-commerce intensify competition, which in turn puts particular pressure on traditional brick-and-mortar distribution structures. Vertical

¹ Bundeskartellamt, press release of 28 February 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/28_02_2018_Kloeckner.html?nn=3591568.

restraints are on the rise in the e-commerce sector in Germany for a number of reasons.² Firstly, competition has increased in online markets and there is a tendency towards lower prices. With the internet and the emergence of e-commerce, the number of retailers the individual consumer can choose from has substantially risen. Secondly, the internet gives manufacturers a better overview of the prices at which retailers offer their products. Monitoring is easy. This has favoured an increase of retail price maintenance ('RPM'). The Bundeskartellamt sent clear signals by imposing high fines in a couple of cases.

10. Besides a broad understanding of the anti-competitive effects of RPM in the public debate, other restrictions of online sales are often considered necessary to prevent online dealers from free-riding more easily and effectively than ever before on the services provided by the brick-and-mortar trade, in particular consumer advice. The online trade has also been repeatedly blamed for alleged "price-dumping of branded goods" and resulting turnover losses incurred by the brick-and-mortar specialist stores.

11. A controversial subject of debate in this connection is the extent to which investments made by manufacturers to build their brand image have a positive effect on competition and have to be protected by vertical restraints. From an economic point of view, restrictions of intra-brand competition could be justified by the need to protect one's brand image. A key argument in favour of this is the fact that a brand image can perform a necessary signalling function to overcome information asymmetries between manufacturers and dealers on the one hand and end customers on the other. This is conceivable, for example, if the quality of the products in question cannot be reliably judged by customers even after their purchase (so-called credence goods). If it were not possible to reduce information asymmetries, e.g. through advertising, customer advice or warranties, end consumers would only be prepared to pay a price for credence goods that they would have to pay for lower quality products, and not the price which, in the manufacturer's view, is necessary for producing better quality products.

12. Against this background, many brand manufacturers in various sectors have introduced selective distribution systems, which also contain regulations for online sales by their dealers, or modified existing selective distribution systems. According to the manufacturers, these systems are intended to alleviate coordination problems in the sale of their goods resulting from different interests or information asymmetries within the value chain.

13. To achieve this aim they have often considerably restricted admission to their distribution system or considerably restricted online sales. Competition authorities have an important role to play in reviewing distribution systems. They have to distinguish between restrictions to address legitimate concerns by manufacturers about the quality of distribution and restrictions imposed in order to reduce price pressure from online competition on the merits.

14. Recent examples of the Bundeskartellamt's decisional practice show the growing importance of more sophisticated strategies of vertical restraints in online markets. An example is the *ASICS*³ case discussed below where a combination of measures were put

² For a detailed discussion of the economic and legal background of vertical restraints in online markets see Bundeskartellamt - Vertical Restraints in the Internet Economy, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2.

³ Bundeskartellamt, decision of 26 August 2015, B2-98/11.

in place, like the prohibition of third-party platform sales, prohibition of price comparison websites and certain restrictions of online advertisement.

2.2. RPM

15. The Bundeskartellamt's past case practice on vertical restraints focused to a great extent on cases of resale price maintenance. As restrictions of competition by object, such RPM measures usually violate Article 101(1) TFEU and do not fall under the European Vertical Block Exemption Regulation ('VBER'), because they deliberately restrict the possibility of customers to set their sales prices themselves, thus constituting a hardcore restriction within the meaning of Art. 4(a) VBER. The general scepticism towards RPM under German and EU competition law reflects its severe anti-competitive potential as the intended price stability may facilitate collusion and eliminate intra-brand price competition. Individual exemptions are possible since the relation between the competitive restraints and potential efficiency gains may vary in different contexts. The launch of a new product and a coordinated short-term low price campaign under a franchise system are among the scenarios in which concrete efficiency claims may be put forward for the RPM in place.⁴ However, problems in a vertical distribution chain (e.g. double mark-ups) can often also be addressed by less restrictive means.⁵

16. In recent times, there have been a number of cases where companies tried to preserve a uniform retail price level and, inter alia, counter the price pressure from online sales. The decision whether or not to open an investigation procedure concerning a suspected restriction of competition from RPM by the Bundeskartellamt is partly influenced by the degree and the scope of the vertical price fixing in place, and by its widespread impact on the market due to the actual enforcement of such measures by the market participants in question.

17. The Bundeskartellamt imposed fines totalling 4.4 million euros on five furniture manufacturers and four managers for enforcing RPM in the sale of furniture.⁶ They had implemented RPM by means of various measures such as price targets, joint boycotts and a strict system of monitoring the retailers' pricing strategies that also relied on the retailers' participation. These measures were supplemented in some cases by special "rules of play" for online sales, the aim of which was to establish a solid and stable price architecture in the market. Compliance with these rules was monitored and enforced with the threat to withhold supply or to terminate the supply contract.

18. Another case concerned the clothing industry and involved several elements of price control.⁷ According to the Bundeskartellamt's findings, Wellensteyn, a manufacturer of branded clothing, set its retailers minimum sales prices and prohibited them from

⁴ See COMMISSION NOTICE, Guidelines on Vertical Restraints, para 225.

⁵ With regard to the economic background see also Bundeskartellamt, Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, pp.9 et seq., available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.

⁶ Bundeskartellamt, decisions of 3 August 2016, 4 November 2016, 30 November 2016 and 15 December 2016, B1-164/13; B1-167/13; B1-87/14; B1-47/15.

⁷ Bundeskartellamt, decision of 21 July 2017, B2-62/16.

reducing prices. These measures were combined with an outright ban of online sales. Any retailer found deviating from this strategy was threatened with a refusal to supply, which was also implemented in several cases. The retailers that complained to Wellensteyn about their competitors' price reductions usually received feedback from Wellensteyn telling them that the reduction had been withdrawn, and in many cases checks were carried out to establish whether prices had actually been raised as promised. A leading retailer, P&C Düsseldorf, accepted these conditions and even asked Wellensteyn to take measures against price undercutting by other retailers since manufacturers and retailers often share a common interest in the enforcement of RPM.

19. Wellensteyn also banned its customers from selling Wellensteyn products online. This general ban on online sales in itself already constituted a hardcore restriction under Section 4 (b) of the VBER. However, in this case, it could not be regarded as separate from the overall price maintenance strategy because its ultimate purpose was to ensure price maintenance and the practices complemented and reinforced each other. Accordingly, the Bundeskartellamt based the calculation of its fines on a single offence and imposed fines totalling 10.9 million euros on the two companies. Since there are indications for similar price fixing practices in the textile sector and other industries, the previously described decisions send a strong signal to manufacturers and retailers that the Bundeskartellamt is very vigilant regarding the implementation of RPM in offline and online markets.⁸

2.3. Dual Pricing

20. Dual pricing systems can represent another price-related restriction directed specifically against online sales. In a dual pricing system, a retailer is granted different purchase prices (directly or indirectly, e.g. by offering differentiated rebates), depending on whether he intends to sell the product online or over the counter. From the retailer's perspective, the manufacturers' selling prices ('MSP') are variable costs that have a direct bearing on the setting of their own prices. By increasing the difference between the two prices beyond a significant level, a manufacturer could actually gain the power to influence the retailer's choice of a sales channel for the sale of his products. By setting an unattractive MSP for online sales a manufacturer would be able to reduce the retailer's online sales or even prevent him from building up an internet distribution system in the first place. For this reason, dual pricing falls under Article 4(b) VBER.

21. Dual pricing systems often specifically target online sales. They were at the core of several Bundeskartellamt proceedings starting in 2013. In one of these cases, GARDENA, a garden product manufacturer, granted retailers discounts which differentiated between the forms of distribution.⁹ Its sales price for retailers depended on whether the product was sold online or in the retailer's store. The staggered discounts were structured in such a way that only brick-and-mortar retailers were able to benefit from the full discount. The proceedings could be discontinued after GARDENA agreed to give up this general price discrimination against online sales.

⁸ With regard to offline sales see also Bundeskartellamt, Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.

⁹ Bundeskartellamt, decision of 27 November 2013, B5-144/13.

22. In the same year the Bundeskartellamt stopped Bosch und Siemens Hausgeräte GmbH from introducing a new discount system for its dealers that put so-called hybrid dealers at a disadvantage who sold household appliances in both their brick-and-mortar stores and online shops.¹⁰ On account of the discount system, the more turnover hybrid dealers generated via their online shops, the lower the discount they received. The discount system thus created incentives for the dealers to limit their online sales.

23. A similar scenario was the subject of the Bundeskartellamt's proceedings against LEGO in 2016.¹¹ According to LEGO's discount system, retailers could only obtain the highest number of discount points through sales in offline stores because several criteria applied exclusively to the brick-and-mortar trade, e.g. the number of metres of available shelf space. This meant that, in many cases, even retailers which fulfilled LEGO's conditions in online sales obtained lower discounts than those which were exclusively active in offline sales. In the view of the Bundeskartellamt, a manufacturer can of course set quality standards for the distribution of its products and also grant its retailers different discount levels for different services. However, it may not put the online sales distribution channel at a structural disadvantage. Due to the Bundeskartellamt's intervention the company stopped its discrimination between sales channels and introduced alternative or additional discount criteria for online sales which were adapted to the particular features of this distribution channel.

24. From the aforementioned string of cases it becomes clear that the Bundeskartellamt will closely monitor whether certain manufacturers generally offer less favourable conditions for products sold online to the detriment of unrestricted competition in e-commerce.

2.4. Restriction of online sales in selective distribution systems

25. Conditions set by manufacturers as to the framework for online distribution can also considerably hinder online sales. This applies for example to cases where manufacturers have recourse to a combination of platform bans and bans on price comparison sites as well as complementary measures in order to restrict their authorised dealers' freedom to compete in e-commerce, thereby harming intra-brand competition. Such tactics often seek to largely prevent end customers from finding the online offers of authorised dealers. As a result, manufacturers could be able to succeed in securing the lion's share of e-commerce for themselves.

26. In its *ASICS*¹² decision the Bundeskartellamt took a closer look at prohibitions placed on authorised dealers regarding price comparison engines, sales via third party platforms and the use of brand names. By the end of 2012, running shoes manufacturer ASICS had introduced a selective distribution system in Germany which provided for restrictions (i) on the use of the ASICS brand name for online advertising, (ii) on

¹⁰ Bundeskartellamt, press release of 23 December 2013, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_12_2013_Bosch-Siemens-Haushaltsger%C3%A4te.html?nn=3591568.

¹¹ Bundeskartellamt, press release of 18 July 2016, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html.

¹² Bundeskartellamt, decision of 26 August 2015, B2-98/11.

cooperation with price search engines and (iii) on sales via online marketplaces. In the course of the proceedings, ASICS gave up the three prohibitions and ceased to apply them.¹³ The Bundeskartellamt nevertheless adopted a declaratory decision to illustrate its assessment for other manufacturers who use comparable clauses in their distribution systems.

27. By the practice referred to above, each of the authorised distributors was prohibited from adopting measures to improve the visibility of their online stores for end customers. The per se prohibition of the use of brand names limited their possibilities to conduct online advertising with reference to the fact that they sell ASICS products. As a result, it was more difficult for customers who were looking for these products to find them. The per se prohibition of supporting online price comparison engines hindered access to a sales channel that was of particular significance for end customers. Thus, the two prohibitions restricted the intensification of competition on price. In the Bundeskartellamt's view, they constitute restrictions of competition by object within the meaning of Article 101 (1) TFEU/Section 1 GWB that were also not exempted from the prohibition on the grounds of the CJEU's so-called *Metro*¹⁴ case-law.

28. According to the assessment of the Bundeskartellamt, the additional ban on sales via online marketplaces could have been a restriction of competition by object, but this question was not included in the substantive part of the decision. Since each of the other prohibitions referred to above qualify as a hardcore restriction that led to the unlawfulness of the entire distribution system, it was possible to leave this question open.

29. Under appeal, solely the per se ban of price comparison engines became subject to judicial scrutiny, and the Bundeskartellamt's qualification of this clause as a restriction by object was first confirmed by the Düsseldorf Higher Regional Court.¹⁵ The court stated that the *Pierre Fabre*¹⁶ case-law of the CJEU was clear on this matter. The prohibition deprived the retailers of an advertising and sales possibility. The court highlighted that the prohibition could also not be justified on the grounds of protecting the company's brand image and pre-sale services because consumers of running shoes did not necessarily need or want such services or, if so, could obtain the relevant information themselves via the internet.

30. Finally, the Federal Court of Justice upheld the Bundeskartellamt's decision and ruled that ASICS may not forbid its dealers from using price comparison engines.¹⁷ According to the decision, per se prohibitions which are not tied to quality requirements are illegal. The Federal Court of Justice emphasized that in view of the large range of

¹³ With regard to the termination of proceedings against adidas in a similar scenario see Bundeskartellamt, decision of 27 June 2014, B3-137/12.

¹⁴ ECJ, judgment of 25 October 1977, Case 26/76, para 21 – Metro I.

¹⁵ See Bundeskartellamt - Press Release of 6 April 2017, available at:

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/06_04_2017_Asics.pdf?__blob=publicationFile&v=3.

¹⁶ CJEU, judgment of 13 October 2011, Case C –439/09 –Pierre Fabre.

¹⁷ See Bundeskartellamt - Press Release of 25 January 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/25_01_2018_Entscheidung_Asics.html?nn=3591568.

products available on the internet and the large number of suppliers, price comparison engines are of key importance for consumers. In the court's view they enable those consumers who have already decided on a specific product to search selectively for retailers and good conditions. Due to the combination of online restrictions in the case, it was not ensured that consumers had sufficient access to the online offer of the authorised dealers.

31. The Federal Court of Justice's judgement was issued shortly after the CJEU had laid down its landmark ruling in the *Coty*¹⁸ case. In light of the CJEU's decision, which clarified that luxury goods manufacturers may prohibit their authorised dealers from selling their goods on online marketplaces under a selective distribution system, the Federal Court of Justice found that the infringement of competition law by ASICS' *per se* ban of price comparison engines was so obvious that the case did not need to be submitted to the CJEU (so-called '*acte claire*').

32. The Federal Court of Justice relied on the factual differences since the distributors in *Coty* were allowed in principle to advertise online on third-party platforms and to use online search engines. Whereas the authorised dealers could thus effectively be found by consumers, that possibility was seriously hampered in the *ASICS* case referred to above. The development illustrates an important implication of competition law enforcement and policy with regard to e-commerce, i.e. the necessity to keep access to customers on online distribution channels open in order to safeguard a fair chance to compete for authorised dealers and manufacturers. Actual visibility for the market players and the avoidance of an e-commerce "eco system" that is *de facto* reserved for manufacturers and a few handpicked (often non price-aggressive) retailers, are key in this regard.

2.5. Price Parity Clauses

33. Under price parity clauses or across platform parity agreements ('APPAs'), the operator of an online platform often obliges suppliers or dealers from one market side to offer the other market side (e.g. end consumers) their most favourable price or conditions if they sell through the platform. The clause thus targets the final selling price.

34. Price parity clauses not only restrict companies in a vertical relationship; by setting a price reference with regard to other competitors they often also have a horizontal effect.¹⁹ Although under a price parity clause suppliers are still free to set their prices, they are no longer able to set different prices for different sales channels in order to react to, e.g., differing distribution costs or differing levels of competitive pressure. The clauses can lead to a distortion of competition at the platform operator level: If low commission rates are not reflected in the sales prices on the platform, this can reduce the incentive for platform operators to engage in price competition or raise entry barriers for newcomers. The reason for the reduced incentive is that a platform cannot lower its provisions to enable vendors to offer cheaper prices, which would possibly extend the platform's market reach. If a platform has a market position that makes it indispensable, it is able to maintain an excessive level of commissions with one market side despite cheaper sales alternatives, because the other market side cannot benefit from the cheaper offer and has

¹⁸ CJEU, judgment of 6 December 2017, Case C –230/16, –*Coty*.

¹⁹ See also OECD, HEARING ON ACROSS PLATFORM PARITY AGREEMENTS, Note by Germany, DAF/COMP/WD(2015)56.

therefore no incentive to switch to another platform. In addition, price parity clauses lead to a standardization of certain competition parameters, which can be conducive to collusion.

35. In November 2013, the Bundeskartellamt terminated its proceedings against Amazon for enforcing price parity clauses on its online trading platform after the company had agreed to give up the clauses.²⁰ The proceeding was conducted in close cooperation with the former OFT. The clauses largely prevented sellers on Amazon's Marketplace platform from offering their goods elsewhere online at lower price. The prohibition related both to other e-commerce platforms and to retailers' own online shops. The price parity clause had an effect on both sides of the market of the platform's operations, which is often the case on multi-sided platform markets. Finally, Amazon decided to abandon the clause not only for Germany and the UK, but for the whole of Europe. This case illustrates the role of national competition authorities in applying EU competition law and setting standards in these markets.

36. The Bundeskartellamt also started comparatively early to tackle the best price clauses of hotel booking platforms. The *HRS*²¹ decision against the online travel agent ('OTA'), adopted in December 2013, was the first decision in Europe against APPAs used by hotel booking platforms. Under appeal, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's decision that the best price clauses are illegal.²²

37. The subsequent *Booking*²³ decision of the Bundeskartellamt concerned the implementation of a so-called "narrow" price parity clause. Under this clause Booking allowed the hotels to offer their rooms cheaper on other hotel booking portals and on offline sales channels, but still prescribed that the prices which they displayed on their own websites could not be lower than those shown on Booking's hotel portal (narrow best price clause). The Bundeskartellamt found that the clause would, in practice, have the same effect as wide APPAs because it still eliminates the competitive pressure exerted by the direct online distribution channel of the hotels. Although hotels were free to differentiate prices on several platforms, their incentives to do so were limited as they would have to undercut the price on their own sales channels in order to comply with the narrow best price clause. In both hotel booking cases the Bundeskartellamt came to the conclusion that the claimed efficiency gains were not sufficiently substantiated. In particular, the parties did not sufficiently demonstrate that other remuneration models, which raised less competition concerns, could not be implemented. The *Booking* decision is currently under appeal to the Düsseldorf Higher Regional Court.

²⁰ See Bundeskartellamt - Press Release of 26 November 2013, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html.

²¹ Bundeskartellamt, decision of 20 December 2013, B9-66/10.

²² See Bundeskartellamt - Press Release of 9 January 2015, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html?nn=3591568.

²³ Bundeskartellamt, decision of 22 December 2015, B9-121/13.

3. Abuse of dominance

3.1. Starting point

38. Not every company that is "big" or economically significant holds a dominant position within the meaning of antitrust law. Still, dominant companies are subject to stricter obligations than companies that are active in a competitive environment.

39. On the one hand internet markets are often highly dynamic, and business and consumers benefit from digitalisation, innovative business models and high market dynamics. On highly dynamic markets the Bundeskartellamt is usually reluctant to intervene. On the other hand digital markets are frequently characterised by direct and indirect network effects and strong economies of scale. Therefore they are often highly concentrated. In many cases, competition is rather for the market than on the market. But sometimes even competition for the market is limited and high market concentration is persistent over long periods of time. The risk of market tipping further speaks in favour of intervention, but against the background of the aforementioned general trade-off it is difficult to judge whether or not to intervene. All in all, the current reality of the digital economy suggests that some of the big tech companies constantly accumulate market shares and account for a substantial part of the overall annual growth in e-commerce. Accordingly, the control of unilateral conduct is crucial and one of the most challenging enforcement areas for competition authorities within the e-commerce sector to date.

40. The possible externalities that the market leaders may impose on their users, suppliers and vendors reach from the leverage of market power and the exploitation of a gatekeeper status to the excessive collection of data. Some of those practices are well-known to antitrust enforcers whereas others appear as novel features of the digital transformation of our economies that require conceptual groundwork and a high degree of awareness from an antitrust perspective.

41. *Ongoing investigations*

42. In light of the developments described above, the Bundeskartellamt is currently investigating Facebook's practices regarding user data in an administrative proceeding. The Bundeskartellamt is closely cooperating with data protection authorities as regards the data protection aspects of the case. Social networks are data-driven products. Where access to the personal data of users is essential for the market position of a company, the question of how that company handles these data has become a relevant issue also for competition authorities.

43. In this pilot case the Bundeskartellamt communicated at the end of 2017 its preliminary view that Facebook is dominant on the German market for social networks and that Facebook is abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user's Facebook account.²⁴ These third-party sites include firstly services owned by Facebook such as WhatsApp or

²⁴ Bundeskartellamt – Background information on the Facebook proceeding, published on 19 December 2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6.

Instagram, and secondly websites and apps of other operators with embedded Facebook APIs. The Bundeskartellamt differentiates between user data that are generated through the use of Facebook and user data obtained from third party sources. With the current proceeding the Bundeskartellamt is not examining the use of data generated by the use of Facebook's social network itself. On principle, competition concerns do not arise where, as part of a business model which is based on a company offering a product or service for free and monetising this through targeted advertising, data that are generated through the use of the product or service are used for advertising activities. Users have to expect a certain processing of their data if they use such a free service, and they can considerably influence the extent to which their data are being collected within the network.

44. According to the preliminary findings Facebook has a dominant position in the German market for social networks. Several smaller operators of social networks as well as Google+ belong to this market. Professional networks such as LinkedIn and Xing, as well as messaging services such as WhatsApp and Snapchat and other social media such as YouTube or Twitter, are not part of this relevant product market as they serve a complementary need from the users' perspective. According to the Bundeskartellamt's investigations, German users predominantly use social networks to stay in touch with friends and acquaintances within Germany.

45. In the *Facebook* proceedings the role of direct and indirect network effects is of particular importance for the assessment of market power as these effects contribute to entry barriers. On account of network effects users are practically "locked in" and the market entry of new competitors is further impeded. A competitor has to have reached a critical number of private users to successfully enter the market with an ad-financed product. Without such a critical number the product will not be sufficiently attractive for the advertising side. Direct network effects, however, make it difficult to reach such a critical number of users. In the *Facebook* case, the direct network effects lead to economies of scale which, in turn, lead to cost savings which give Facebook a competitive edge. A parallel use of social networks ("multi-homing"), which could have a de-concentration effect, could not be found by the Bundeskartellamt. Facebook has a quasi-monopoly with more than 90 per cent of user-based market shares.

46. According to the Bundeskartellamt's preliminary findings Facebook has superior access to the personal data of its users and other data that are relevant for both the product design and the possibility to monetise the service. The lack of access to comparable data resources can constitute an additional barrier to market entry.

47. The authority's preliminary view is that when Facebook, as a dominant company, operates this business model, it must consider that its users cannot switch to other social networks. Participation in Facebook's network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the "whole package" or doing without the service. In the Bundeskartellamt's preliminary view, Facebook's terms of service are inappropriate and violate data protection provisions to the disadvantage of its users. Furthermore, in view of the company's dominant position it cannot be assumed that users effectively consent to this form of data collection and processing. The use of exploitative business terms is a type of exploitative abuse covered by German competition law. The application of data protection principles for the competition law assessment in the current case is backed by case-law of the German Federal Court of Justice on Section 19(1) GWB, in particular by the *VBL Gegenwert II* and *Pechstein* decisions by the Federal Court of Justice in which

the Court ruled that the general clause of Section 19(1) GWB can also be used to establish that a company is using exploitative business terms.²⁵

48. Possible outcomes of the proceeding are the termination of the case, the offer of commitments by the company or a prohibition by the competition authority. A decision on the case is not expected before summer 2018.

4. Consumer protection

4.1. Reform of national law

49. The 9th Amendment to the GWB, which was promulgated on 8 June 2017, included new provisions that seek to enable the Bundeskartellamt to react to developments in the digital economy and add a novel subject matter to its portfolio. Since its entry into force, the Bundeskartellamt can launch a sector inquiry where there is a reasonable suspicion that consumer law provisions have been severely violated, such as the Act against Unfair Competition ('Gesetz gegen den unlauteren Wettbewerb', 'UWG') or legal requirements for general terms and conditions. Hence, such inquiries can now also be launched with a view to consumer protection if there is reason to suspect that significant, permanent or repeated infringements have occurred which affect a large number of consumers. While the Bundeskartellamt must respect existing powers of other federal authorities in the field of consumer law, the novel powers seek to improve existing possibilities to identify and assess possible violations of law. When conducting sector inquiries, the Bundeskartellamt can use all of its investigative tools known from antitrust proceedings, with the exception of on-site inspections. The new investigative tools for consumer protection support the monitoring of the digital economy in which it only takes one illegal measure by a company to harm millions of consumers. In addition, the Bundeskartellamt can now act as *amicus curiae* in court proceedings relating to such infringements.

4.2. Ongoing sector inquiries

50. To meet its new responsibilities, the Bundeskartellamt has set up a new decision division for consumer protection.²⁶ The Bundeskartellamt is conducting sector inquiries in the following fields relating to e-commerce:

- Online price comparison websites
- Smart TVs, and
- Online advertising.²⁷

²⁵ The above mentioned Background Paper on the *Facebook* proceeding includes a more detailed presentation of the rulings.

²⁶ See Bundeskartellamt - Press Release of 12 June 2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/12_06_2017_Abteilung%20V.pdf?__blob=publicationFile&v=3.

²⁷ This sector inquiry was not launched on the basis of consumer protection grounds but relates to the overall context of e-commerce.

51. Using this competence in the field of consumer protection for the first time, the Bundeskartellamt is currently conducting a sector inquiry which concerns online price comparison websites active in the area of travel, insurance, financial services, telecommunications and energy.²⁸ The inquiry focuses on rankings, financing, corporate links, reviews, availability or relevant market coverage, in order to uncover and specify possible violations of consumer law provisions.

52. Furthermore, the Bundeskartellamt launched another sector inquiry to shed some light on how producers of so-called “smart TVs” handle user data.²⁹ In so doing, the Bundeskartellamt takes a particularly close look at the terms of contract used by manufacturers.

53. Another sector inquiry that is not based on the powers for consumer protection but part of the authority’s traditional task of gathering market information under competition law, targets online advertising.³⁰ The inquiry will focus on the effects of current and foreseeable technical developments on the market structure and the market opportunities of the various players. It will examine the significance of different technical services and the way in which they function. These include options for measuring visibility, collecting data and preventing fraud as well as services more on the level of the actual marketing and procurement of ad spaces.

54. At the end of each sector inquiry, a final report on the findings will be published. At the moment, the Bundeskartellamt has no enforcement powers in the area of consumer protection law and it remains to be seen whether further legislative action will confer consumer law powers to the Bundeskartellamt which are comparable to those existing for antitrust infringements.

5. Conclusions

55. Digitalisation and the competitive assessment of horizontal and vertical e-commerce practices are currently among the most important issues for competition authorities around the world. This enforcement area has brought to light many novel questions on how competition law should be applied in these days.

56. The pace of the evolution of e-commerce, the risk of long-lasting market tipping and the far-reaching scope of anti-competitive restraints suggest that the risk of under-enforcement may be higher than the risk of over-enforcement in these markets.

57. The establishment of a level playing field between distributors and manufacturers for access to customers on online distribution channels requires competition authorities to

²⁸ See Bundeskartellamt - Press Release of 24 October 2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/24_10_2017_Vergleichsportale.pdf?__blob=publicationFile&v=2.

²⁹ See Bundeskartellamt - Press Release of 13 December 2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/13_12_2017_SU_SmartTV.pdf?__blob=publicationFile&v=2.

³⁰ See Bundeskartellamt - Press Release of 1 February 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html.

carry out a constant balancing exercise. They have to distinguish between restrictions to address legitimate concerns by manufacturers about the quality of distribution and restrictions imposed in order to reduce price pressure from online competition on the merits. Actual visibility/findability is of outmost importance in this regard.

58. The novelty of unilateral practices to the detriment of consumers cannot exclude the finding of an abuse if these practices manifest the exercise of market power by a company in a dominant position. Competition authorities need to be prepared to take on pilot cases in order to respond to the new anti-competitive perils that the features of the digital economy have brought to light. The mere claim of a general tendency towards an online market dynamic is not an end in itself.

59. As to consumer rights in digital markets, individuals may face many difficulties in adequately enforcing their rights. If private enforcement reaches its limits, a certain degree of public consumer rights enforcement could be a useful supplement. The well-established investigatory powers against antitrust infringements could serve as an inspiration for other regulatory areas of law such as consumer protection.