

# Competition policy: The challenge of digital markets

Special Report No 68

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## Contents

Foreword.....	1
Summary.....	3
1 Introduction .....	13
2 The economic characteristics of internet markets.....	15
2.1. The dynamic development of digital goods and markets.....	15
2.2. Competition on digital markets.....	18
2.2.1. Platforms as central elements of digital markets .....	19
2.2.2. Determinants for platform competition .....	21
2.2.3. Market definition and the market power of platforms.....	23
2.2.4. Summary .....	26
3 Data and its relevance for competition .....	27
3.1. The significance of big data .....	27
3.2. Data collection on the internet .....	29
3.3. The purposes of data collection.....	30
3.4. The legal framework of data collection and commercialisation.....	31
3.5. Competition policy implications.....	33
3.5.1. Adjustment and improved enforcement of data protection standards.....	33
3.5.2. Enhancing consumer rights .....	35
3.5.3. More extensive consideration of data in competition proceedings .....	36
4 Online advertising markets.....	37
4.1. Types of online advertising.....	37
4.1.1. Search-based advertising .....	38
4.1.2. Non-search-based advertising .....	39
4.1.3. Mobile advertising .....	41
4.2. The market definition of online advertising space.....	42
4.3. Potential competition problems on the online advertising market .....	44
4.3.1. Exclusive contracts .....	44
4.3.2. Combining advertising space services and related services.....	45
4.3.3. Scarcity of advertising space .....	46
4.3.4. Concentration of advertising-relevant data.....	47
4.3.5. Different data protection standards .....	47

4.3.6.	Different regulation of advertising according to media genres.....	48
4.3.7.	A lack of cooperation opportunities to achieve reach.....	48
5	Search engines.....	50
5.1.	On the modus operandi of general search engines.....	50
5.2.	The economic significance of search engines.....	51
5.3.	Concentration tendencies on markets for search platforms.....	52
5.3.1.	Market definition and market shares.....	52
5.3.2.	Factors affecting market concentration and market dominance.....	55
5.4.	Potential competition problems on the markets for search platforms.....	58
5.4.1.	Search platforms as the “gatekeepers” of the internet.....	58
5.4.2.	Expansion tendencies of search platforms.....	61
5.4.2.1.	Incorporating search services in other software and device platforms.....	62
5.4.2.2.	Incorporating new services and contents to increase platform attractiveness.....	62
5.4.2.3.	Preferential treatment of the platform's own services.....	63
5.5.	On the need for regulatory action.....	65
5.5.1.	No need for purely preventive regulation.....	65
5.5.1.1.	No need for a divestiture instrument regardless of abuse.....	65
5.5.1.2.	No need for regulation of the search algorithm.....	66
5.5.1.3.	No need to communitise the search engine infrastructure.....	67
5.5.2.	Promoting the development of standards as a sensible activity.....	68
5.5.3.	Refining the copyright pertaining to indexed contents.....	69
6	Social networks.....	70
6.1.	Concentration tendencies.....	71
6.1.1.	Market definition/market shares.....	71
6.1.2.	Factors determining market concentration and market domination.....	72
6.2.	Potential competition problems.....	73
6.2.1.	Incentives towards collecting excessive amounts of user data.....	73
6.2.2.	Expanding supply.....	75
6.2.3.	Refining the product portfolio.....	75
6.2.4.	The legal assessment of the potential for abuse.....	77
6.3.	On the need for regulatory action.....	78
6.3.1.	No need to amend competition law.....	78
6.3.2.	The need to enhance data protection.....	78
6.3.3.	The need to refine consumer protection.....	79

7	Electronic trade (e-commerce) .....	81
7.1.	Market players .....	81
7.2.	Developments in e-commerce .....	82
7.3.	Concentration tendencies in German e-commerce .....	85
7.3.1.	Market definition and market shares of online dealers .....	85
7.3.2.	The market definition and market share of trading platforms .....	86
7.3.3.	Factors of market concentration and competition assessment .....	88
7.4.	Potential competition problems in e-commerce .....	89
7.4.1.	Buyer power in e-commerce .....	90
7.4.2.	Vertical integration of trading platforms .....	91
7.4.3.	Bundling and preferential treatment of services belonging to the platform .....	92
7.4.4.	Market power risks below the level of market dominance .....	92
7.4.5.	Vertical distribution restrictions .....	93
7.4.5.1.	Price-related distribution restrictions (in particular price parity clauses) .....	94
7.4.5.2.	Non-price-related distribution restrictions (in particular prohibitions to use third-party platforms) .....	97
7.4.6.	Trading restrictions within the EU .....	102
8	The legal perspective: Protection of undistorted competition in the digital economy .....	104
8.1.	Merger control on online markets not yet sufficiently effective .....	105
8.1.1.	The need to verify the notification requirements .....	105
8.1.2.	The need to refine the substantive assessment criteria .....	108
8.1.3.	Taking account of the platform interdependences when identifying relevant markets .....	108
8.1.4.	Taking platform-inherent concentration tendencies into account .....	110
8.1.5.	Taking account of the combination of data stocks .....	111
8.2.	Risks of abuse of market power due to shortcomings in the enforcement of the law .....	111
8.2.1.	The need to improve the framework of the law on abuse .....	112
8.2.1.1.	Refining the principles on market dominance and relative market power .....	112
8.2.1.2.	Refining the principles on abuse .....	113
8.2.1.3.	Overcoming some serious shortcomings in procedural law .....	114
8.2.2.	Improving the protection of market-relevant individual rights .....	117
8.2.2.1.	The potential for abuse ensuing from the unlawful exploitation of third-party content and data .....	117
8.2.2.2.	Refining and enforcing market players' individual rights .....	120
9	The influence of digitalisation in other economic areas .....	121
9.1.	The need to adjust the regulatory framework .....	122
9.2.	A need for additional regulation (in particular in the media domain)? .....	125

9.3. Political support for adjustments of existing business models and products to the digital economy (“Industry 4.0”) ..... 128

9.4. Promotion of innovative business models where competition fails ..... 129

10 Summary of the policy recommendations ..... 131

## List of figures

Figure 2.1: The most valuable start-ups the world (in USD billion) .....	16
Figure 4.1: Market developments in online advertising in Germany (in EUR million) .....	38
Figure 4.2: Market development of mobile advertising in Germany (in EUR million) .....	42
Figure 5.1: Shares of search queries of search engines in Germany (in %) .....	54
Figure 5.2: Traffic sources of the most-visited websites in Germany (in %) .....	59
Figure 5.3: Traffic sources of travel websites in Germany (in %).....	60
Figure 6.1: Most-visited social networks in Germany (page views in millions) .....	72
Figure 7.1: B2C E-commerce turnover in Germany (in EUR billion) .....	83

## List of tables

Table 1: Spread of search queries in selected countries (in %) .....	53
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## Foreword

**V1.** With its Special Report titled “Competition policy: The challenge of digital markets”, the Monopolies Commission is submitting a detailed analysis of the structures of digital markets in terms of competition economics and competition law. With this report, which is drawn up under its own discretion, it is borrowing from its XXth Biennial Report from 2014, in which it took up a position for the first time regarding the competition-, privacy- and consumer protection-related questions on digital markets. This Special Report is to help characterise the role played by competition policy on digital markets and to show what can be done. The focus is on the question of whether the current legal and regulatory framework is sufficient to be able to counter the competition-related challenges of digitalisation.

**V2.** Particular attention is paid to the analysis of the economics of digital markets, to the relevance of data for competition, as well as to platform services. Furthermore, the Monopolies Commission examines the impact of the dynamic development of new internet-based business models on classical markets and the market system that is prevalent there.

**V3.** While preparing its Special Report, the Monopolies Commission has sought discussions with a large number of experts and market players. To this end, a meeting of experts took place on 14 November 2014 with representatives from academia and from the Federal Cartel Office. The Monopolies Commission wishes to thank Prof. Dr. Andrea Lohse, Professors Dr. Ralf Dewenter, Dr. Wolfgang Kerber, Dr. Torsten Körber, Dr. Boris Paal, as well as Dr. Gunnar Kallfaß from the Federal Cartel Office, for their contributions to the discussion.

**V4.** The Monopolies Commission held two non-public oral hearings on 4 December 2014, which focused on data and online advertising, as well as on search services. The following attended the hearing:

- AdAudience GmbH
- Bundesverband Deutscher Zeitungsverleger (BDZV) e. V.
- Bundesverband Digitale Wirtschaft (BVDW) e. V.
- Deutsche Telekom AG
- Euro-Cities AG
- Google Inc.
- The Hamburg Commissioner for Data Protection and Freedom of Information
- Microsoft Deutschland GmbH
- SUMA-EV
- Verband Privater Rundfunk und Telemedien e. V.

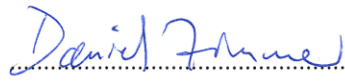
**V5.** The Monopolies Commission held other meetings with representatives of Axel Springer SE, Bertelsmann SE & Co. KGaA, Boston Consulting Group GmbH, Google Inc. and the Microsoft Corporation.

**V6.** Some of the companies and associations that were heard submitted written statements to the Monopolies Commission, in addition to their oral statements. Written statements were also received from the Bundesverband Deutsche Startups e.V., the Bundesverband Onlinehandel e.V. (BVOH) e. V., eBay International AG, Facebook Inc., guenstiger.de GmbH, Händlerbund e. V., ProSiebenSat.1 Media AG, the Verbraucherzentrale Bundesverband (VZBV) e. V. and Yelp Deutschland GmbH.

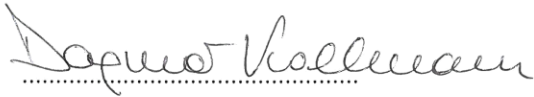
**V7.** Moreover, there were many contacts and discussions between the competent staff of the Monopolies Commission and representatives from various companies and associations. The Monopolies Commission wishes to thank all involved for their contributions.

**V8.** The Monopolies Commission extends its thanks its research associates Daniel Richter, Nils-Peter Schepp, Dr. Alexander Steinmetz and Dr. Thomas Weck, who were in overall charge of compiling the report.

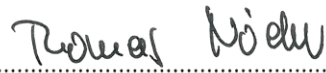
Bonn, 1 July 2015



Daniel Zimmer



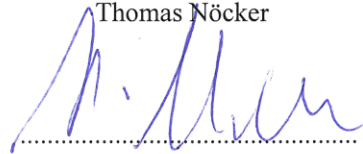
Dagmar Kollmann



Thomas Nöcker



Achim Wambach



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## Summary

**S1.** Digitalisation has initiated profound structural changes that affect virtually all areas of life. Companies, consumers, politics, and society as a whole face new challenges in light of the ever growing use of digital services. Competition policy is called upon to address these developments and, if necessary, to adjust the existing competition law (paras 1-4).

**S2.** This report by the Monopolies Commission aims to make a contribution to these important developments and the ensuing debate. It evaluates if and to what extent there is need for action in terms of competition law and regulation, taking into account the economic characteristics of digital markets and the significance of data for digital business models in selected areas of the digital economy (paras 5-14).

### **The economic characteristics of digital markets**

**S3.** Digitalisation has changed commercial behaviour in various ways. Computers, and thus digital processes, are part of almost every single transaction today. This enables cost reduction, the collection and analysis of data as well as personalised product and service offers. Business opportunities have multiplied. The reduction of costs and – in many cases – low barriers to entry have intensified competition in many areas, led to reduced prices and sometimes narrowed price differences (para. 15).

**S4.** While digitalisation has and continues to contribute to a very dynamic evolution of markets and competition, concerns are being raised vis-à-vis the powerful market positions of some key players in digital markets. Many of these companies offer their services as intermediaries on multi-sided (“n-sided”) platforms. These platforms generally display a number of characteristics which have important implications for the actions of companies, competition and, hence, for competition policy. Effective and adequate economic analysis is complex. Conventional methods, considerations and correlations do not suffice in the analysis of online platforms (paras 16–33).

**S5.** The unique characteristics of multi-sided platforms pose a significant challenge for competition policy. Competition authorities and courts of law (legal institutions) are required to take into consideration the fundamental interrelations and the complexity of multi-sided platform markets when assessing individual cases. It is important to consider all sides of a platform in the analysis, and to fully determine the direct and indirect network effects with regard to their economic significance (paras 34–44).

**S6.** As digital business models and markets evolve, companies often expand their activities into new markets or business areas. For example, Google has broadened its activities beyond its origins focussing on search engines into related business areas including operating systems, hardware, and household technology. More recently, activities such as the development of telecommunications infrastructure and of autonomous mobility systems have been added. One of the objectives of such widespread expansion could be the accumulation of additional data volumes that may be relevant for the success of changing business models (paras 22–23).

**S7.** Extending the breadth and depth of access to information and applications to users enables companies to respond to user preferences ever more effectively, thereby aiding product development and innovation. That said, it may be problematic from a competition policy perspective if dominant companies extend their positions of power from one market into other markets, for example through bundling product ranges and leveraging market power. Developments such as these may result in the stable, long-term, overarching systems, controlled by one key player – with the risk of capturing (locking in) users (paras 23–24).

**S8.** Highly concentrated digital market places are often characterised by competition, as defined by Schumpeter, i.e. a company in a temporarily dominant position is, or may be, replaced by another one. In such cases, companies are highly incentivised to innovate, despite high market concentration. Even in the event of lasting high concentration, this situation can be efficient due to network effects (paras 45–50).

**S9.** Other characteristics of digital markets can contribute to or impede market concentration. Long-term concentration appears to be less of an issue in highly innovative and dynamic market segments. The competitive nature of these markets should limit the need for state intervention generally. While the need for state intervention is expected to be a rare occurrence in dynamic environments, the relevant public institutions, notably the competition authorities, must act quickly if required in specific cases (paras 51–53, 54–61).

**S10.** The significance of (user) data is a key feature of digital markets and digital business models. Having control over and being able to analyse large volumes of data can be a crucial competitive advantage, particularly as such data are frequently in the exclusive possession of individual companies. Data can be used for e.g. the personalisation of services and products as well as to create or improve these, Companies can process data to display targeted advertisements online. In some cases users give their consent to provide access to relevant data, most commonly when they register for particular services online. Often data are collected without explicit consent though, e.g. data are collected using various tracking technologies which track users' position and internet activity. From a data protection perspective, notably the use of personal data can give rise to problems (paras 64–83).

### **Data and their relevancy for competition**

**S11.** In general, the increasing use of data and the associated additional information can have positive welfare effects. Consumers benefit from new products and from the personalisation of services. Companies can, for instance, optimise stock-keeping or better align advertising campaigns. In other cases however, the increased collection of data can result in negative welfare effects. This can be to the detriment particularly of consumers that are insufficiently informed of the use and application of their data and who are not aware, for example, of the possibility of price differentiation on the internet based on observable characteristics or habits. The possibility to individualise insurance tariffs based on the increased access to data can likewise have negative welfare effects, for instance if such data reveal risks that can only be insured at high premiums (paras 69–83).

**S12.** The collection and commercial use of data are limited under data protection law. In turn, data protection law is based in a fundamental right of defence towards the State. However, beyond that protection is provided with regard to the commercial use of data. Currently, it is still undecided whether and to what extent an individual is entitled to exercise any rights over the potential asset value of personal data – and, thus, over the use and exploitation of such data – beyond the individual's fundamental right of defence. The award of undisputed, absolute rights would be advisable (paras 84–90).

**S13.** The increasing significance of data requires action from a competition policy perspective. A first important measure would be to harmonise national data protection standards – the stringency of data protection law can impact the possibilities of collecting and analysing large volumes of data, and thus the competitive success of companies. In order to avoid distortions of international competition and to achieve a competitive level playing field, the Monopolies Commission advocates the timely enactment of the planned General Data Protection Regulation. With regard to its substance, data protection standards should not be lowered. With regard to enforcement, a supervisory structure, that guarantees stringent enforcement of data protection law, should be implemented. This would help ensure that European companies are not disadvantaged vis-à-vis non-European ones. The Monopolies Commission welcomes the coordinated approach used by the data protection officers when they enforce the data protection rules towards companies with EU-wide activities (paras 91–100).

**S14.** As to the often asymmetric distribution of information between companies and consumers, it appears advisable to strengthen the position of consumers. In order to enable users to exercise more effective control with regard to the use of their data, legislation could require mandatory user consent in cases of collection and commercialisation of user data (opt-in). However, potentially negative effects on business models relying specifically on data collection, e.g. in the area of online-advertising, should be taken into account. Furthermore, the introduction of data portability rights, as planned in the aforementioned General Data Protection Regulation, enables the mitigation of lock-in effects and gives users more control over the use of their data. The introduction of collective lawsuits by consumer associations could contribute to a better enforcement of existing data protection rules (paras 101–107).

**S15.** The importance of data for the commercial success of companies should be taken into account more prominently in competition proceedings. This is particularly important in merger control proceedings – frequently relatively new internet service providers, characterised by low turnover, but potentially highly valuable data inventories, are acquisition targets. In contrast, aspects entirely related to data protection should be addressed outside competition law proceedings (paras 108–110).

## Online advertising markets

**S16.** The fact that services are often provided to the consumer free of charge is another phenomenon of digital (platform) services, such as search engines or social networks. These services are mostly financed via advertising, which is presented to consumers when they use the service. In multi-sided platform markets, the platform side of online advertisements (online ads) is often the only one where profits are achieved (para. 111).

**S17.** The market for online advertising is very dynamic and has grown considerably in the past years. Depending on the study one refers to, the German market volume in online advertising was approximately EUR 4.7–5.1 billion in 2013. The competition authorities commonly subdivide the market for online advertising into search-based and non-search-based advertising. Search-based advertisements are displayed to the user in text form in addition to the search results, based on the previously entered search term. Search-based advertising is the top-selling form of online advertising in Germany, with a sales volume of approximately EUR 2.5 billion. All other forms of online advertising can generally be grouped together as non-search-based advertising. The so-called display advertising, such as banner advertisements and pop-ups, is particularly relevant – it can be displayed on any web page and can be adapted, for example, to the content of web pages. With a sales volume of roughly EUR 1.3 billion, display advertising is the second-most important form of online advertising (paras 112–134).

**S18.** When defining relevant markets, the European Commission distinguishes offline and online advertising. In addition, it generally distinguishes between search-based and non-search-based advertising in principle, although it has left the market definition in that respect open in its decisions so far. The different functions and the different targeting precision of search-based and non-search-based online advertising are referred to as the main reasons for defining different markets for online advertising. The European Commission has also left open to what extent mobile advertising must be distinguished from other online advertising (paras 135–137).

**S19.** The strong increase in the collection and analysis of data as well as new technological developments have triggered rapid changes, particularly in the area of display advertising, enabling an increasingly precise targeting of advertisements. In that regard, a certain convergence between search-based and non-search based advertisements can be observed. To what extent both types of advertising must be considered as separate markets, or should rather be included in the same market, can only be determined in each individual case. Since a relevant product market should principally comprise all substitution options, the relevant cases need also to be examined as to whether online advertising and individual types of offline advertising can be substituted for one another (paras 138–141).

**S20.** In assessing the market position of individual companies with regard to the provision of online advertising space, the multi-sided nature of the business model must be taken into account as these companies act as intermediaries between advertisers and users. Apparently high shares in providing advertising space are not sufficient evidence for a dominant market position, as it is necessary to take into account all relevant sides of the platform for the complete competitive assessment. Even if individual suppliers of online advertising space are of particular importance for advertisers and have high shares in individual advertising segments, this does not, in itself, provide a basis for determining the actual competitive position of these companies (para. 142).

**S21.** Competition concerns can arise when individual companies have a disproportionately strong market position in the online advertising market. For instance, it is conceivable that such companies negotiate exclusive contracts restricting competition, that they bundle the provision of advertising space and need to opt for other services, or that they limit advertising space beyond what is justified in the competitive situation. Competition problems such as these can be difficult to detect, but they can generally be tackled through the application of the existing competition rules (paras. 143–160).

**S22.** Similarly, competition problems can result from the increased importance of data for displaying targeted advertising. This is particularly true for the so-called real-time advertising, i.e., the auctioning of advertising space in real-time just before the placement of advertisements. The increased concentration of advertising-relevant data can potentially raise issues, particularly when platforms automatically buy and sell advertising space, acting as intermediaries between advertisers and content providers. The competition authorities should monitor the possible concentration of data in individual steps of the value creation chain in online advertising (paras 161–163).

**S23.** Due to the crucial relevance of data for online advertising, varying national data protection standards can distort competition. While the harmonisation of data protection standards should, in principle, be welcomed, one needs to appreciate that the strictness of data protection laws can impact the efficiency and the structure of the advertising market. In particular, very strict data protection rules could impair individual forms of customer advertising, force individual suppliers to exit the market and even cause higher market concentration in some areas of online advertising (paras 164–166).

**S24.** Distortions in competition can also be the result of differing advertising rules for different types of media. For instance, traditional broadcasters are currently subject to the regulation of advertising air time, which limits their freedom in broadcasting advertisements and puts them at a disadvantage, in that respect, vis-à-vis pure internet-based media. Such competitive disadvantages for advertising broadcasting by traditional broadcasters should be removed. Air time rules for traditional media service providers should be reduced or even abolished. In contrast, extending the existing air time regulation to internet media is not warranted (paras 167–170).

**S25.** Customer reach is a central factor that influences competition between the suppliers of online advertising space, since advertisers invest in internet portals with a broad reach to maximise reach. In order to compete with large international internet service providers, several (German) content providers tried to cooperate and bundle their customer reach to become more attractive for advertisers. These ventures were prohibited by competition authorities in some cases. To the extent that relatively narrow market definitions may have been decisive factors in leading to a prohibition, it appears appropriate to review market definitions used in the past, particularly as the media business is increasingly shifting into the internet. However, no general statements are warranted, as potential effects on competition and substitutive relations must always be assessed in the individual case (paras 171–174).

### **Search engines**

**S26.** Search engines constitute a particularly important area of the digital economy. Since its inception in the 1990s, online search has developed into one of the preeminent business segments, thereby generating top sales in the internet economy. In 2013, worldwide turnover in search engine advertising amounted to more than USD 48 billion. In view of the amount of information available in the internet, search engines play a central role for internet users, who are searching, for operators of web pages who aim to make content more easily accessible, and for online advertisers who aim to optimise targeted advertising. Thus, search engines contribute significantly to lowering transaction costs, which accrue e.g. in form of search costs on the users' side and in form of advertising costs on the side of content providers (intermediation service) (paras 175–181, 184–187).

**S27.** A distinction is commonly made between search engines answering general search inquiries (so-called horizontal search) and specialised search engines for so-called vertical searches. Combining more than 90 percent of search inquiries regularly, the largest share of horizontal inquiries in Germany is answered by Google. However, it would be premature to associate this high user share with corresponding market power; it is necessary to take all sides of the platform and their interdependencies into account. In addition, specialised search engines can partially substitute the search results of general search engines. Whereas general search engines are typically used for many searches, other specific search inquiries including some commercially relevant inquiries are often made through specialised search engines, including inquiries concerning products, hotels and restaurants. As a result, the market definition depends on individual circumstances (paras 182–183, 188–197).

**S28.** Quality is a decisive factor between competing search engines; it is the expected quality of search results that makes a user choose a search engine. The more data a search provider can access, the better the display of search results and search advertisements. The resulting learning effect may contribute to tendencies towards concentration since the higher quality of the search results makes more users rely even more on certain search engines; this, in turn, leads to increasing advertising revenues. That said, switching between search providers is relatively easy and possible without a user incurring additional costs, which has a disciplining effect on search providers (paras 198–220).

**S29.** Competition issues can arise in the area of general search in a number of cases. Since search engines control the users' access to websites, a dominant search provider can abuse its position, for example by preferring its own vertical search services when displaying search results, or by arbitrarily refusing to list a website in the search index. In that

regard, however, it must be taken into account that search providers must be granted a certain amount of leeway in the creation of their search index. Competition problems can also occur whenever a search engine displays the content of other providers, notwithstanding their intellectual property (IP) rights (so-called scraping). This can be even more significant when the content provider is dependent on the search engine (paras 220–257).

**S30.** Nevertheless, the Monopolies Commission does not consider regulation to prevent abuses to be appropriate at present. Regulation of search algorithms to ensure search neutrality is not advisable for a variety of reasons. Any public control over search algorithms would, provided it was technically feasible, require considerable public funds. And even if technology allowed algorithms to be reviewed, it would still be difficult to prove manipulation. In that context, it must be considered that the operator of a given search engine does not need to manipulate the search algorithm in order to take advantage of the preferential display of its own services: knowing the algorithm already enables the operator to design the websites for its own services so that they rank higher more easily in the generic list of results (paras 258–260, 267–268).

**S31.** Similarly, an obligation to disclose the search algorithm cannot be recommended. If the search algorithm were publicly known, website operators would be able to optimise their sites in a way that would impair the display of search results according to their relevancy. Finally, an obligation to disclose or share the web index with competing search engines cannot be recommended either, because this would remove incentives to create and update the index on an ongoing basis. Similar considerations apply to the sharing of user data, which would require substantial technological and regulatory efforts. This option would also arouse data protection concerns if companies were to share personal user data (paras 259, 269–280).

**S32.** In the Monopolies Commission's view, the separation of general and specialised search services, as has been proposed occasionally, would not be an adequate measure to effectively mitigate potential market distortions. Currently, a measure of this nature would appear to be disproportionate. A divestiture could only be considered if the relevant search platform had an irreversibly robust market power. In contrast, as long as chances exist for the stimulation of competitive forces, one must advise against such a serious intrusion into existing company structures, the more so as rationalisation advantages would be thwarted and existing advantages of scale and scope, though being to the users' benefit, would disappear (paras 261–266).

**S33.** That said, the Monopolies Commission suggests strengthening the enforcement of the rights of other market participants. In this context, it recommends examining regulatory provisions requiring the providers of internet services, including search engines, to make technical pre-adjustments to prevent the violation of other market participants' rights (e.g., copyrights or privacy rights), for example through automatic requests for the rightholder's approval. Furthermore, concerning the settings of devices and systems, it seems sensible to introduce technical standards and regulations which would enable users to actively select search providers and special search services, either via applications (apps) for mobile devices or in the browser (paras 281–283).

**S34.** The copyright rules concerning the rights of owners of internet IP should be developed further. Introducing rules at the EU level can make sense, on the one hand to improve protection of copyrighted material (e.g., books, images) against the exploitation of that material by others, and on the other hand – unrelated to the competition risks existing at search providers – to clarify which conditions copyright owners have to fulfil when enforcing territorial restrictions of national copyrights with technical means (so-called geo-blocking) (paras 284–287).

## **Social networks**

**S35.** Apart from search providers, social networks provide important digital services to many users of the internet. Social network services such as Facebook, Xing or Twitter are central features of the modern internet, which is marked by user interaction (Web 2.0), and are important platforms for communication and for creating and sharing content. While social networks offer a vast variety of different features, such as functions and their applications, a significant amount of user interaction is concentrated on Facebook, whose network currently combines 1.4 billion users worldwide (paras 288–292).

**S36.** On the market for social network services, concentration tendencies primarily follow pronounced network effects. The more members a social network has, the more attractive it is for the individual member. Another contributing factor

is the lack of interoperability between different social networks. Where users of various networks cannot communicate across platforms, they have an increased incentive to join the largest network. An established provider's large user base is a barrier to the market entry of other providers. Unlike, for example, in the case of search providers, switching costs for users are relatively high, creating a lock-in effect as users cannot transfer their contacts, personal data and content easily when switching providers (paras 293–305).

**S37.** User data play a central role in the business models of many social networks. This can lead to conflicts of interest between network providers and users regarding the exploitation of user data, e.g., for advertising purposes. The Monopolies Commission focuses on questions of data and consumer protection in this context primarily, but there are also reasons to assume that dominant providers can use the lock-in of users to exact farther-reaching acceptance of the collection and exploitation of personal data than what could be expected in situations of effective competition. In this context, rules regarding the “right to be forgotten” and others concerning data portability in the planned General Data Protection Regulation are of particular importance (paras 306–325, 334–335).

**S38.** From an antitrust point of view, the potential for abuse by dominant social networks can be relevant in two ways: on the one hand, the operators of social networks may foreclose competitors, for instance by hindering other companies from providing services to users, or by extending their services in an anticompetitive manner (exclusionary conduct). On the other hand, when such companies collect data excessively and curb the ability of users to limit such data collection, this could potentially constitute an abuse as well (exploitative abuse) (paras 326–329).

**S39.** In the Monopolies Commission's view, there is no need to adapt the competition rules regarding social networks. In particular, it does not appear necessary to broaden the scope of the special press and broadcasting merger control regime in Germany (§ 38 GWB) to cover social networks. That said, it seems sensible to introduce additional legal measures which would require internet service providers to inform users better with regard to the scope of any user consent, and which would strengthen the users' abilities to enforce their privacy rights individually. The Monopolies Commission suggests examining whether internet users should be awarded a special and enforceable statutory right of choice, entitling them to either refuse any use of their data for advertising purposes and to use the relevant service anyway, with advertisements not adapted to the user, or to accept the use of their data for advertising purposes and to receive advertisements adapted to their preferences (paras 330–342).

**S40.** In any event, the approach of traditional consumer protection, which only requires information to be provided to the user, should be reviewed and most likely be replaced by a more differentiated approach. In particular, measures should be taken to increase the conciseness and relevance of standard terms and conditions. Similar to the rules concerning paid orders in electronic commerce (§ 312j of the Civil Code [*Bürgerliches Gesetzbuch – BGB*]), contract-related information should be event-oriented, also where users use services free of charge. Furthermore, legislators may consider limiting the use of all-encompassing general business terms with regards to personal data. The General Data Protection Regulation contains reasonable provisions to that end (paras 340–341).

## **E-commerce**

**S41.** Online trade in products and services (e-commerce) has gained a significant position economically. Online trade between businesses and consumers (B2C e-commerce) has grown strongly over the past years. For Germany, e-commerce had a market volume of about EUR 39–44 billion net of taxes, and a share of roughly 9–10 percent in retail sales in 2014, depending on the source. Irrespective of the actual market figures, a further increase in the share of e-commerce in retail sales is to be expected (paras 343–346, 352–358).

**S42.** A large share of German e-commerce is transacted via trading platforms or online market places, such as Amazon Marketplace or eBay. Trading platforms are two- or multi-sided platforms where online dealers (sellers) and consumers (customers) connect. A third side of the platform can be comprised of advertisers. For consumers, trading platforms offer many advantages, for example higher market transparency and product choice, a higher level of confidence with regard to internet transactions, and the option to enter into cross-border transactions. On the dealers' side, particularly small dealers profit from lowered barriers to market entry, better access to relevant customers, and potentially additional services such as payment and shipment processing (paras 347–351).

**S43.** An adequate market definition is necessary to assess the market position of individual companies in e-commerce from a competition perspective. In that context, one must take into account that online dealers may compete with stationary (“brick-and-mortar”) dealers, depending on the product. High market shares of individual dealers in e-commerce, thus, do not necessarily mean a high market share in the overall product market. With regard to trading platforms, the market definition must take into account the multi-sided business model and the possibilities to use substitutes on all sides of the platform. It is likely that trading platforms compete on both the consumer and the dealer side with price comparison sites which link to the online shops of individual online dealers (paras 359–372).

**S44.** In some areas of e-commerce, there is evidence of increased market concentration. This is particularly true for trading platforms. The concentration in this area is primarily due to strong indirect network effects and scale effects, each of which restricts the ability of new suppliers to enter the market. Nevertheless, indications exist that market entry is possible, particularly where the offer is sufficiently differentiated. The scope of action in competition is further reduced by the fact that the dealer and consumer groups of demand are able to use multi-homing, in other words, to use several platforms simultaneously, though this option is restricted due to reputation effects on the seller's side (paras 359, 373–383).

**S45.** Competition problems can arise in e-commerce to the extent that individual dealers have buyer power. In addition, competition problems may result from the vertical integration of trading platforms and online dealers, the bundling and favouring of the platform's own services, vertical restraints, and restrictions of cross-border trade. Furthermore, risks associated with market power can exist below the level of market dominance. In principle, the Monopolies Commission does not see a need for legislative changes in e-commerce. Potential competition problems can be tackled with the existing competition rule framework (para. 384).

**S46.** Problems of buyer power can arise in e-commerce as they do in stationary trade. Buyer power exists where dealers are able to obtain better prices and conditions from their suppliers than would be available under competitive conditions, or if they obtain better prices and conditions than similarly situated competitors without any apparent reason. To the extent that buyer power exists in individual segments of e-commerce, competition infringements can be addressed under the existing competition rules. For instance, abusive purchase practices are prohibited under the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) (paras 385–390).

**S47.** Furthermore, competition problems can arise in e-commerce in cases of vertical integration, where, for instance, the operator of a platform is also a seller on that platform and thus competes with other sellers on the platform. In such cases, the platform operator may be incentivised to advertise his products offer more prominently. In addition, the platform operator may be able to monitor other dealers' transactions, add high demand, high volume products to his own portfolio, and potentially even foreclose customer access to other dealers. Furthermore, the platform operator may accumulate additional data, for example to make more targeted product recommendations and to thereby improve the quality of his own platform and hence his own position in competition with other platforms. The welfare effects of such behaviour are not immediately clear. At least in the short term, competition between trading platforms is likely to be increased, and potentially lower purchase prices are passed on to consumers, should competition exist at the level of the dealers. Nevertheless, the competition authority should monitor such conduct to prevent potential foreclosure in the longer run (paras 391–395).

**S48.** Like other companies, online dealers and trading platforms have an incentive to favour their own services or products or to bundle them. For instance, a trading platform may impose the obligation on independent dealers to use additional services of the platform such as its payment system. Such types of bundling should only pose risks to competition if the company using them has market power. To what extent product bundling or the preferential treatment of a company's own services is anticompetitive must be assessed by the competition authorities in the individual case (paras 396–398).

**S49.** Aggressive growth strategies can be observed in some areas of e-commerce. Some companies try to increase their turnover in short periods of time, even accepting losses, possibly with the intention of becoming a standard supplier for certain services and to bind customers. Under national law, the abuse rules can apply to such growth strategies even below the level of market dominance (§ 20 GWB). That being said, the Monopolies Commission currently sees no reliable evidence that the aforementioned strategies might amount to anticompetitive behaviour (paras 399–403).

**S50.** Vertical restraints on online distribution systems are highly relevant for competition in e-commerce, particularly price parity clauses and prohibitions to use third-party platforms. Price parity clauses are often imposed by platform operators and restrict dealers in offering their products outside the specific platform at a lower price or at better conditions. Dealers or sellers remain free, however, to set levels of pricing as they wish. The effects of price parity clauses have not been explored sufficiently with regards to economic effects so far. In principle, they may lead to higher sales commissions and end-customer prices and be a means to foreclose market entry by other platform operators. At the same time, however, price parity clauses ring-fence contract-specific investments and prevent opportunistic pricing, thereby potentially having efficiency-enhancing effects. Their ambivalent nature mitigates against applying a per-se prohibition to such clauses. Instead, the conditions under which the clauses apply and the market characteristics should be assessed in the individual case. To prevent distortions of competition, moreover, the competition authorities should observe and pursue cases of similar nature in parallel. A consistent approach within the European Union would be appreciated (paras 404–417).

**S51.** Prohibitions to use third-party platforms are imposed mainly by brand manufacturers within or outside selective distribution systems and restrict the dealers' ability to sell products via trading platforms. Manufacturers pursue their key objective to exercise influence on the distribution and presentation of their products. It is not feasible to draw general conclusions regarding the admissibility of third-party platform prohibitions, therefore, a case-by-case analysis is required. In this analysis, the extent of existing interbrand competition between manufacturers, as well as issues with regard to efficiency related to the protection of the brand image need to be considered. In particular, jurisprudence of the European courts with regard to trademark cases is not taken into account sufficiently when competition authorities assess third-party platform prohibitions (paras 418–437).

**S52.** Cross-border trade restrictions are another important factor with regards to competition policy. Language barriers, national consumer preferences, higher costs for transnational shipments and potentially divergent national rules on data protection and other aspects can impede cross-border trade, even within the European Union. In that respect, the Monopolies Commission welcomes the European Commission sector inquiry into e-commerce, its objective being the abolition of identified competition restrictions in order to create an EU wide digital market (paras 438–443).

The legal perspective: Protection of undistorted competition in the digital economy

**S53.** Competition law is directed towards the abolition of distortions in competition and is intended to protect the digital economy as a system of undistorted competition. Questions have been raised as to whether the existing legal instruments are sufficient to protect competition and the rights of market participants. The Monopolies Commission does not see a need to fundamentally call into question the existing legal framework. Nevertheless, it is necessary to develop the current legal framework further and to enforce the law in order to ensure undistorted competition (paras 444–450).

**S54.** However, the Monopolies Commission does not consider the existing legal framework to be sufficiently effective in the important field of merger control. The acquisition of a company with low turnover can cannot be captured under current notification requirements of EU and German law, even in cases where the acquired company holds commercially valuable data, or has a considerable market potential for other reasons. Therefore, the Monopolies Commission recommends complementing the existing merger control thresholds based on turnover by additional notification requirements based on the transaction volume. Such an amendment is necessary to close legal gaps: acquisitions of companies that did not achieve high turnover in the past may give rise to concerns from a competition policy perspective. In the digital economy, the purchase price often reflects the economic potential of an acquisition target better than the turnover generated previously. The Monopolies Commission makes further recommendations to enable the development of criteria for the assessment of concentrations on internet platforms (paras 451–479).

**S55.** Abuses of digital market power are the subject of lively public discussion. Reasons for this discussion are that access to data has become a key factor in product development and innovation, and that data collection and the use of data by third parties give rise to many complex questions regarding the protection of competition and of individual rights (copyrights, data and consumer protection) (paras 480–483).

**S56.** The abuse of a dominant position is possible in more than one way. On the one hand, competitors can be foreclosed (exclusionary abuse); on the other hand, the value added by other market participants can be exploited (exploita-



tive abuse). In addition, both types of abuse can be mixed, containing exclusionary and exploitative elements (para. 496).

**S57.** Currently, the discussion surrounding the potential of exclusionary abuses in the digital economy is centred on two types of practice, namely

- Forms of access foreclosure on the internet; and
- The leveraging of market power, e.g. by favouring own services, through exploitation of third-party content and data to the detriment of competitors, or by impeding supplier changes by the customers (advertisers/users) (para. 497).

**S58.** It is conceivable that such abuses of market power also include exploitative elements as is the case, for example, where third-party content and data are exploited (where the exploitation takes place to the detriment of content suppliers and data owners) or, in some cases, where customers are disadvantaged when switching suppliers (e.g., where customers are excessively bound through restrictions on data portability). Apart from that, observers see a potential of exploitative abuses through artificial capacity constraints regarding advertising spaces or simply through the excessive collection and use of data. On platform markets, the dynamics of the market development and the characteristics of the platform (e.g., the scope of data collection and use, the type of network effects) are decisive factors influencing the degree to which any legal abuse potential exists (paras 498–502).

**S59.** In the Monopolies Commission's view, there is currently no need for statutory action with respect to substantive competition law. The competent competition authorities and courts should develop the legal principles on the abuse of a dominant position in individual cases further. Nevertheless, the Monopolies Commission takes the position that the dynamics of the digital economy, in essence, do not require a legal standard diverging from existing legal principles (paras 484, 487–495).

**S60.** In contrast, the Monopolies Commission sees a need to strengthen the instruments for the enforcement of competition law. The design of abuse proceedings particularly at the EU level raises concerns with regard to competition policy and fundamental legal issues (paras 486, 503–508).

**S61.** The Monopolies Commission proposes that the European Commission apply the instrument of interim measures more often in abuse cases in the digital economy. As a test for the use of interim measures, it suggests to determine whether material changes in the market (see Article 9(2)(a) of Regulation 1/2003) are to be expected within two years, a frequently chosen assessment horizon for foreseeable developments in competition. Furthermore, the Monopolies Commission suggests transforming the commitment procedure automatically, or on reasoned third-party request, into a termination and penalty procedure under Articles 7 and 23 of Regulation 1/2003 upon the expiry of adequate periods (paras 509–513).

**S62.** The Monopolies Commission deems it necessary that the competition-related measures mentioned above be supplemented by additional measures to improve the enforcement of the individual rights of content providers and users within the digital economy. The Monopolies Commission is of the view that an illegal exploitation of third-party content and data may indeed constitute an abuse of market power, among others. Nevertheless, remedying deficits of legal protection with regard to content and data is an issue that should primarily not be handled using the competition rules, but by improving the legal options available to market participants to enforce market-relevant individual rights. In that context, the issues should be addressed generally and not specifically in view of the behaviour of dominant companies (paras 485, 514–533).

### **The influence of digitalisation in other economic areas**

**S63.** The digitalisation of the economy consists not only of the development of the platform services analysed primarily in this Report. Digitalisation also links the digital economy and the remaining parts of the economy in various forms. Apart from widening the markets for products and customer services, labour markets have also become larger – though still to a lesser extent (paras 534–535).

**S64.** In this report, the Monopolies Commission concentrates its assessment on the competition policy implications of the market activities of internet platforms, and does not analyse questions going beyond that issue in detail. That said, the Monopolies Commission has worked out general principles that should be observed in its view when politics attend to the digitalisation of the broader economy (paras 536–537).

**S65.** First, the Monopolies Commission emphasises that regulatory adjustments may become necessary whenever new suppliers with innovative business models (e.g., in the sharing economy) or products enter regulated markets. Consequently, the Monopolies Commission advocates an – on-going – re-assessment of the regulatory framework in the areas impacted by the digital economy. Insofar as adjustments are necessary, the relevant rules should generally be homogeneous across the relevant product and geographic markets to obviate an artificial fragmentation of markets. Such a fragmentation may be justified by divergent regulative and cultural objectives, but only to an extent that is necessary and adequate to reach the relevant objectives (paras 538–549).

**S66.** Furthermore, the Monopolies Commission points out that the measures currently envisaged at the EU level will be adopted in areas of competence that have generally been reserved to the Member States to date (telecommunications and media regulation, civil law/consumer protection, data protection and IP rights, tax law). In that regard, a discussion on the precise regulative objectives seems necessary, which may justify continued national regulation instead of a harmonisation on the European level. Apart from that, the Monopolies Commission takes the view that the regulation at the federal level and in the *Länder* probably exceeds what is necessary in various areas. The Monopolies Commission finds that regulation with regard to media should be revised fundamentally (paras 550–551).

**S67.** In a second step, the Monopolies Commission analyses the potential of additional regulation of service providers in the digital economy. A discussion on such regulation is currently taking place, mainly with respect to internet services providing information to internet users. Concerning internet services, acting as intermediaries for or displaying information digitally (so-called “new” media), there is a risk – outside the potential need for a regulation oriented at competition law, which is discussed in other sections of this report – that the users' formation of an opinion could be impaired insofar as information rendered by the services is relevant for forming an opinion. The Monopolies Commission takes the view that an additional regulation of internet services intended to create a level playing field can only be justified to the extent that the risk of a manipulation of opinion is comparable in the case of these internet service providers and the non-internet-based providers with whom they compete. Particularly in relation to internet services providers whose product offer is oriented at user preferences, it is indispensable to make a critical assessment of to what extent this is the case (paras 552–568).

**S68.** As a third point, the Monopolies Commission addresses the political support of adjustments to existing business models and products to the digital economy (so-called “Industry 4.0”), highlighting that potential competition risks may exist in areas whose development is of prime importance from an industrial policy perspective. These risks must be observed when designing political measures – the key objective is to minimise the risk from the outset that political measures distort competition as a side effect (paras 569–573).

**S69.** Finally, the Monopolies Commission takes a position regarding the question of public financial support for innovative business models that target business areas in which competition appears to fail. The targeted funding of companies may be welcome from a competition policy perspective, for instance because these measures could help stimulate dynamics in markets with limited or no competition, or because it is crucial to aid the development of new markets. The latter case can exist where competition fails and where this market failure cannot be remedied without interference by the State. In the areas of the digital economy, such market failure is seen particularly in the funding of young innovative companies (start-up financing). In its Digital Agenda, the Federal Government has committed itself to directing its development policy to the lowering of market entry barriers under observance of the principles of undistorted competition. Under these conditions, the Monopolies Commission has no objections to the declared strategy of financing young innovative companies from a competition policy perspective (paras 574–577).

## **Policy recommendations**

**S70.** The Monopolies Commission summarises its policy recommendations in a concluding chapter (paras 578–602).

# 1 Introduction

**1.** Digitalisation has sparked profound structural changes that affect virtually all areas of life. There is even talk at times of a digital revolution. These changes pose new challenges for enterprises, consumers and policy-makers as well as society.

**2.** Competition is the central driver of digital change; at the same time, digitalisation in turn is causing competition to intensify in many fields. Many changes are occurring in economic activity, with consumers benefiting from innovative products and services. These are increasingly being provided online, and hence become accessible at any time or place. A major element of many services is the fact that they are provided free of charge.

**3.** The most important tasks of policy-makers include guiding structural change by creating suitable frameworks. The Federal Government is currently tackling this challenge among other things within its Digital Agenda. The Agenda particularly aims to expand high-performance broadband infrastructures to ensure the universal availability of digital services, to guarantee security and protection for society and companies (data and consumer protection), as well as to promote the digital economy, for instance by making it possible to interconnect production processes (“Industry 4.0”).

**4.** The public debate has particularly centred for quite some time on companies such as Google, Facebook or Amazon, which are perceived as the winners of digitalisation, and which particularly symbolise structural change. Privacy advocates and consumer protection authorities criticise how these and many other companies deal with users' personal data. Competitors complain of unfair business practices and the formation of monopolies. More intervention on the part of the competition authorities is called for in many cases. The discussion also focuses on whether the available set of competition tools is at all adequate to achieve effective control.

**5.** In an initial preliminary investigation contained in its XXth Biennial Report, the Monopolies Commission commented on competition and related data protection and consumer protection-related questions in the internet economy.<sup>1</sup> The present Special Report takes a more detailed position on these and other aspects of the digital economy. The Monopolies Commission wishes to contribute to a better understanding of the role of competition policy on digital markets and to point out what can be done.

**6.** Many providers of digital services employ a business model which is based on bringing together various groups of users on a platform. First, the general characteristics of platforms are presented as the basis of competition-policy analyses of specific platforms (Chapter 2). These have major implications for the conduct of companies and for competition, and hence for a competition policy analysis.

**7.** Another feature of the internet economy is the significance of the collection and processing of data, which is critically important for many digital business models (Chapter 3). Many new products and services have emerged, favoured by the development of new technologies for the storage and processing of large volumes of data (“big data”). The role played by data in digital competition is therefore explored.

**8.** The second side of many platform services is online advertising (Chapter 4). The corresponding markets are subject to rapid change, which is reflected in the report. Besides the question of the market definition, which is highly significant when it comes to assessing companies' competitive positions, the report explores potential competition-related problems and distortions which may result from the conduct of the market players themselves or from regulation.

**9.** Furthermore, the most important types of platform services are studied, starting with a description of the functional and economic significance of search engines, together with the concentration tendencies that can be identified on search markets (Chapter 5). Based on that description, what follows is a discussion of the potential competition restrictions on the search engine market and the regulatory measures that can be considered in order to protect competition.

**10.** The report then reflects on developments in social networks (Chapter 6). This chapter also outlines the concentration tendencies that can be observed, identifies potential competition restrictions that are recognisable according to the present state of market developments, and discusses regulatory action to protect competition. Additionally, the rela-

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<sup>1</sup> Monopolies Commission, XXth Biennial Report, A competitive order for the financial markets, Baden-Baden 2014, para. 65.

tionship between protection of competition and media regulation is illustrated, which gives rise to questions, in particular in social networks.

**11.** E-commerce is investigated (Chapter 7) as the third important field of platform services. Concentration tendencies, in particular on trading platforms, are traced, and major causes for them are revealed. This leads to a presentation of some of the competition problems that may arise in e-commerce. Particular attention is paid to restraints which manufacturers and various platforms impose on dealers and other market players.

**12.** There follows a discussion of problems in competition law that arise in the digital economy in general (Chapter 8). On the basis of the fundamental principle of the protection of undistorted competition, the shortcomings of the existing merger control law are revealed and suggestions developed for action to be taken to remedy these shortcomings. Furthermore, proposals are developed for more efficient abuse supervision of positions characterised by market dominance.

**13.** Finally, the report explores the consequences of digitalisation for those markets on which classical services and goods are offered (Chapter 9). New digital business models are changing these markets and challenging existing regulations. The Report indicates where amendments to the regulatory framework may become necessary.

**14.** The Monopolies Commission submits policy recommendations in each of the areas discussed where the existing regulatory framework does not take adequate account of the interests of the digital economy in competition-policy terms. Its results and recommendations are summarised in the final chapter (Chapter 10).

## 2 The economic characteristics of internet markets

**15.** Digitalisation has changed commercial behaviour in many ways. Computers, and thus digital processes, form part of almost every single transaction nowadays. This can take place via a simple cash register or in a highly complex data processing centre. While these processes were originally introduced for accounting purposes, today they provide many options over and above book-keeping, such as enabling cost reductions, the collection and analysis of data as well as personalised product and service offers. The development of the internet has considerably expanded the existing potential for economic activity. This chapter presents the economic characteristics of digital markets and analyses the impact these have on competition policy in general.

### 2.1. The dynamic development of digital goods and markets

**16.** Many observers consider the primary characteristic of the internet economy to be its high rapidity of change and its highly dynamic nature. A glance at the market values of the largest listed companies in the world reveals that it is particularly companies from the digital economy that have succeeded in creating high company values in a relatively short time. Apple alone is currently valued at more than USD 500 billion, and therefore has a larger market capitalisation than Volkswagen, Siemens and Bayer together. Google, Amazon, Facebook and eBay have been in existence for less than 25 years, but already have market capitalisations which are comparable to those of German DAX companies.

**17.** In addition to the young established companies, such a dynamic nature can be particularly seen among start-ups. The world's highest-value start-ups are almost all operating in the digital economy (cf. Figure 2.1). Investments in the shape of company holdings have risen by an average of almost 20 percent per year in Germany since 2009, and the digital economy plays a major role here.<sup>2</sup> From the German point of view, the highly positive development in Berlin should be particularly underlined here. This city has established itself as a leading venue in Europe for investing in start-ups, second only to London.<sup>3</sup>

**18.** The dynamic nature of this sector is also revealed in many other places. There is a constant flow of new products and services entering the market. Product life-cycles, i.e. the periods from the introduction of a new product until its removal from the market, are becoming ever shorter, as are research and development cycles.

**19.** The high level of innovation activity on digital markets is favoured by low barriers to market entry. Digitalisation, and the internet in particular, has reduced a whole range of economic costs, and by a considerable margin in some cases: costs for designing and distributing products and services, costs for procuring and providing information, costs for collecting and using data on consumer preferences and conduct. Through such cost reduction companies can set up and expand their operations very quickly.<sup>4</sup> In addition, whereas high investment costs can frequently make a market entry difficult, such costs have in recent times increasingly become variable costs in certain parts of the digital economy. This is the case where computing power or storage space can be rented by companies to fit their needs, for instance thanks to new technologies (e.g. cloud computing) or open source software. This reduces potential investment risks, thereby making market entry easier.

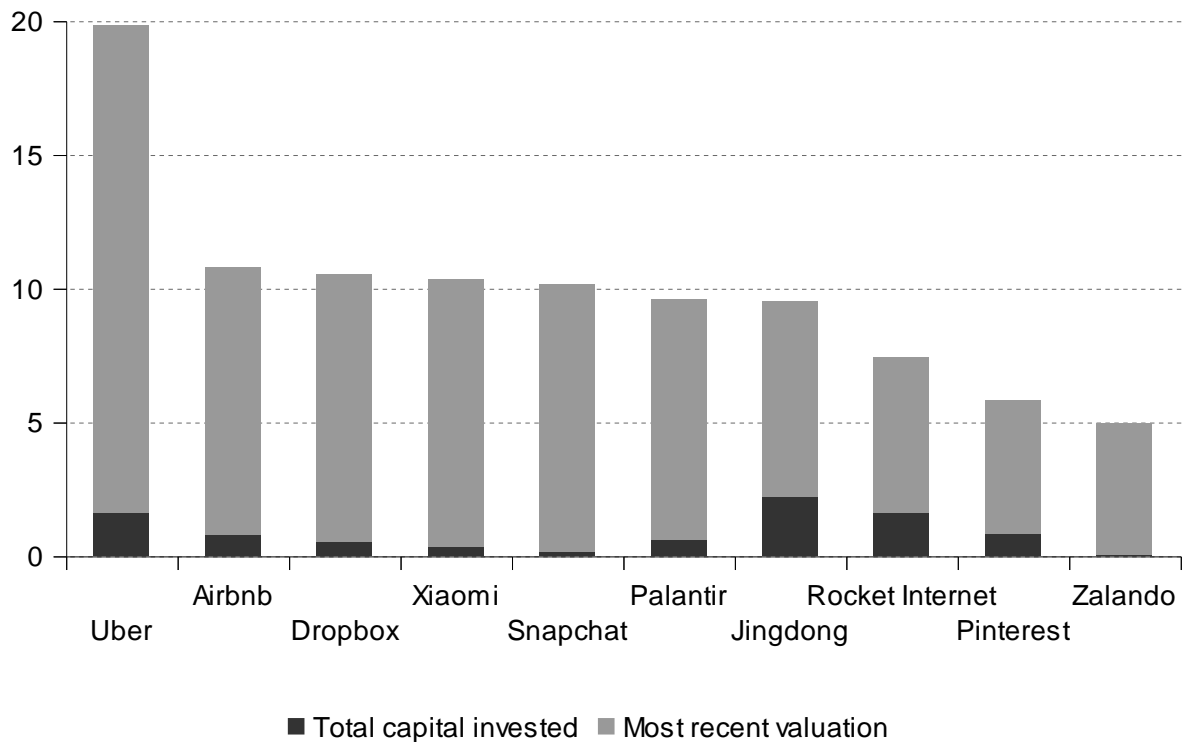
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<sup>2</sup> German Private Equity and Venture Capital Association (BVK), *Der deutsche Beteiligungskapitalmarkt 2014 und Ausblick auf 2015*, Berlin, 23 February 2015.

<sup>3</sup> Federal Association for Information Technology, Telecommunications and New Media and BVK, press release of 6 March 2014: *Venture-Capital-Investitionen in IT-Start-ups legen leicht zu*.

<sup>4</sup> For instance, Facebook grew to more than 500 million users at a time when fewer than 500 engineers were working at the company.

**Figure 2.1: The most valuable start-ups the world (in USD billion)**



N.B.: Unlisted companies in which loan capital was invested in the past three years and which are valued at 1 billion USD or more by venture capital firms

Sources: Own illustration based on DowJones VentureSource, The Wall Street Journal, The Billion-Dollar Startup Club, 2015, <http://graphics.wsj.com/billion-dollar-club/>, Statista 2015

**20.** Furthermore, the internet makes it possible to adapt (customise) supply to customer-specific requirements to a great degree. This has been established via many new business models in advertising, search services or commercial platforms where users for instance are presented with individual suggestions.

**21.** These changes have made a major contribution to a highly dynamic, highly innovative development among internet-based sectors and companies. These sectors show immense innovation processes through which new products and ideas come into being and existing products are continuously developed and improved.<sup>5</sup> This has led to digital business models some of which are quite distinct from those of conventional sectors. And these business models continue to develop apace.

**22.** As digital business models and markets evolve, companies often expand their activities into new markets or business areas. Such cases mostly entail companies which are highly successful in one field quickly expanding their activities into neighbouring fields. This expansion can serve to expand the company's portfolio for users, or indeed to integrate services from other levels of the value chain in the company. Expanding the portfolio vis-à-vis users means that user preferences can be better accommodated than was previously the case. Moreover, the expansion of corporate operations can promote the development of new products or deliver synergies on existing markets. Such expansion can take place here both on immediately adjacent digital markets and on presumably distant markets that are not internet based and cannot be attributed to the actual core field of the company.

**23.** An impressive example of widespread expansion is Google, which has broadened its activities beyond its original function as a search engine into related business areas including browsers (Chrome), operating systems (Android),

<sup>5</sup> Levin, J., The Economics of Internet Markets, NBER Working Paper Series 16852, 2011.

hardware (Nexus), and home automation (Nest). Activities such as the development of telecommunications infrastructure (Fiber) and of autonomous mobility systems (Google Car) have been added more recently. However, other large companies operating in the digital economy have considerably expanded their digital business segments via their own developments or acquisitions as well. For instance, the social network Facebook has expanded its activities by virtue of a total of 40 acquisitions, including the WhatsApp messaging service and the Instagram image service. The hardware and software manufacturer Apple has invested in marketing music (iTunes) and books (iBooks), and also for instance in cloud computing (iCloud), in map services (BroadMap) and in data analysis (Topsy). One of the objectives of such widespread expansion could be the accumulation of additional data volumes that may be relevant for the success of business operations.

**24.** It may be problematic from a competition policy perspective if dominant companies extend their positions of power from one market into other markets, for example by bundling product ranges (“leveraging market power”). Developments such as these may in the long term also result in overarching systems that are controlled by one group of companies – with the concomitant risk of capturing (locking in) users. Where this occurs, competition takes place, from the user’s perspective, no longer between individual internet services, but only with regard to the earlier, hard-to-alter decision to opt for a specific system.

**25.** The changes in transactions are among the major consequences of digitalisation. These changes have manifested themselves in a drastic reduction in transaction costs. For instance, search costs for customers are considerably reduced by innovative providers such as Amazon, search engines such as Google or price comparison and intermediary portals such as idealo, HRS or eBay. Digitalisation has thus created new ways to bring customers and products together, and to place more information at their fingertips. Customers and suppliers can obtain market information more simply and more quickly than ever before. Information-related transaction costs and the effort to overcome geographical distances are considerably reduced. Thus, it becomes comparatively easy to offer services worldwide. This process has been accompanied by the advent of innovative business models and markets that take advantage of new technologies. This creates new markets for advertising and financial trading, market places for services and used goods, opportunities to provide experience reports and recommendations as well as other customer information.<sup>6</sup>

**26.** The reduction in search and general transaction costs arising from digitalisation has intensified competition in many areas, has led to reduced prices and has sometimes narrowed price differences.<sup>7</sup> This has lowered barriers to entry and put dominant players under pressure. For instance, roughly 80 percent of the publicly traded holdings in the USA that were listed on the New York Stock Exchange were still traded on the floor of the New York Stock Exchange in 2005. This share had fallen to only 25 percent as early as 2009 as a result of the accelerated introduction of electronic trading places, with a large share of the trading on the New York Stock Exchange also being carried out electronically at this time. Additionally, no trading place had a market share of more than 20 percent.<sup>8</sup> All in all, market forces operate more quickly. Inefficient companies find it harder to penetrate the market, and have to leave it more quickly. At the same time, one may expect – wherever possible – that there will be rapid market entries if high yields can be achieved.

**27.** Moreover, online markets facilitate more flexible, dynamic sales mechanisms such as auctions.<sup>9</sup> Auctions do tend to entail higher transaction costs than fixed prices, since the seller has to bring competing buyers together, but this increase on the internet will tend to be slight. Bids can be placed regardless of where the bidder is. What is more, the considerable advantage of auctions is that they constitute an efficient pricing mechanism and facilitate competition between buyers if the supply is limited.<sup>10</sup> This applies both to trading platforms and to marketing advertising space on the internet.

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<sup>6</sup> Dellarocas, C., Reputation Mechanisms, in: Hendershott, T. (ed.), *Economics and Information Systems*, Handbooks in Information Systems, Vol. 1. Amsterdam and Boston 2006, pp. 629-660.

<sup>7</sup> Ellison, G./Ellison, S. F., Lessons about Markets from the Internet, *Journal of Economic Perspectives*, 2005, S. 139-158.

<sup>8</sup> Securities and Exchange Commission, Concept Release on Equity Market Structure, 17 CFR Part 242, 2010.

<sup>9</sup> Bajari, P./Hortacsu, A., The winner's curse, reserve prices, and endogenous entry: empirical insights from eBay auctions, *RAND Journal of Economics*, 2003, pp. 329-355.

<sup>10</sup> Einav, L./Farronato, C./Levin, J. D./Sundaresan, N., Sales Mechanisms in Online Markets: What Happened to Internet Auctions? (No. w19021), National Bureau of Economic Research, 2013.

**28.** However, the dynamic nature of many internet-based business models throws up particular challenges also for competition policy. Given these circumstances, the trend should be towards limiting the need for state intervention on these markets. Yet, in a dynamic environment, the institutions too have to act quickly. The consequence of the dynamic nature of the markets is that the market boundaries shift. The relevant market must hence be repeatedly re-defined. In many cases, a comparison with a situation in the past will be of little use; instead, an estimate will have to be made in order to identify the relevant environment as to how it could develop in future. The online advertising market could be mentioned as an example, where increasing data use has made advertising space available to address specific customers, i.e. space which was previously less suitable for this purpose. Users who are interested in cars are no longer only shown advertising for cars on relevant websites, but also on other pages once they have been recognised as being interested in cars through cookies which register the sites that they have visited. In other words, digital advertising space is becoming more interchangeable.

**29.** While digitalisation has made market entry easier and has intensified competition, the further development of the law has not always kept up with the development of innovative products and business models. On all markets of the internet economy, competition can be distorted by the fact that the lack of adjustment of the existing law to the developments of the internet economy hinders or even prevents innovative business models (cf. Chapter 9).

## **2.2. Competition on digital markets**

**30.** While digitalisation has helped in many cases to bring about a highly dynamic development of markets and competition, concerns have been voiced about the dominant positions held by some companies. For instance, competition authorities such as the European Commission and the U.S. Federal Trade Commission have initiated proceedings, for instance to investigate the business practices of Google and other well-known internet companies (cf. Chapter 5). Furthermore, users of services are sceptical as to the market power of companies such as Facebook. Some internet services such as Google, Facebook, YouTube, eBay, Skype and Amazon have prominent positions in their business sectors, which in some cases leaves little room for competition.

**31.** The position of some companies, along with the highly dynamic development of digital markets, raises the question as to the degree to which (particular) competition problems arise on these markets, and whether competition law as it stands is able to address concerns as these build up. The determinants of well-functioning competition on digital markets are analysed below against this background.

**32.** The central question from the point of view of competition policy is not so much whether individual companies have a particularly predominant position in competition, but rather why this is the case.<sup>11</sup> Furthermore, it is vital to ascertain whether this position is temporary or permanent in nature. There is therefore a need to determine the extent to which companies are protected against competition by market entry barriers or other market characteristics, or rather are (continuously) successful in competition by virtue of superior products and services, and through successful innovations. In economic terms, the latter situation is characterised by competition as defined by Schumpeter, in which one temporary monopoly follows another and this process is driven by innovation. A contrasting situation would be characterised by a monopolistic company attempting to close off its market through anticompetitive conduct. From a competition-policy point of view, we analyse below which markets tend towards which situations.

**33.** In order to be able to judge the extent to which competition challenges exist on digital markets, we start by analysing how these markets differ from conventional, “analogue” markets. To this end, this section starts with a discussion of the most important characteristics of digital markets in general. This portrayal constitutes the foundation for explaining the frequently high market concentrations. A particular focus is placed here on the theory of multi-sided platforms.<sup>12</sup> A

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<sup>11</sup> Haucap, J./Wenzel, T., Wettbewerb im Internet: *Was ist online anders als offline?*, DICE Ordnungspolitische Perspektiven No. 16, 2011. Haucap, J./Heimeshoff, U., Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization? *International Economics and Economic Policy* 11(1-2), 2014, pp. 49-61.

<sup>12</sup> Multi-sided platforms are frequently labelled as two- or multi-sided markets. However, since the multi-sided nature is a characteristic more of a business model and less of a market, the first term will be used in the following. Classic contributions on the theory of two-sided platforms were made by Rochet, J. C./Tirole, J., Platform competition in two-sided markets, *Journal of the European Economic Association*, 1(4), 2003, pp. 990-1029; Rochet, J. C./Tirole, J., Two-sided markets: A progress report, *The RAND Journal of Economics*, 37(3), 2006, pp. 645-667; Armstrong, M., Competition in two-sided markets, *The RAND Journal of Economics*, 37(3), 2006, pp. 668-691; Rysman, M., The economics of two-sided markets, *The Journal of Economic Perspectives*, 2009,



platform is usually an intermediary bringing together various groups of users so that they can interact economically or socially.<sup>13</sup> This service enables a considerable economic benefit to be generated. Such platforms have a vital role to play on digital markets. Business models such as search services, social networks, trading and intermediary platforms or operating systems have the characteristics of a platform. Advertising frequently constitutes one side of such platforms. However, platforms are also found outside the online domain, for instance in payment transactions, mobile telecommunication, financial trading or advertising-funded media.

### **2.2.1. Platforms as central elements of digital markets**

**34.** Platforms have several general properties which have major implications for companies' conduct and for competition, and hence for competition-policy analyses.<sup>14</sup> For competition policy, the existence of multi-sided platforms hence has a vital impact which is, and indeed must be, taken into account by the responsible institutions in question.<sup>15</sup> However, it must be considered here that, despite these general properties of digital markets, quite pronounced differences exist between the individual digital sectors and business models, and that it is therefore virtually impossible to make sweeping statements in terms of competition policy.

**35.** Many important characteristics of conventional, that is one-sided, business models cannot be applied to multi-sided platforms. A difference which is important in terms of competition policy compared to conventional markets is the fact that, even where competition is incomplete, prices can appear on a platform at or even below the marginal costs (cf. para. 25). For this reason, many established methods of competition policy cannot simply be applied to platforms.

**36.** Unlike conventional markets, competition intensity on digital markets is frequently (if not always) determined by direct and indirect network effects. Direct and indirect network effects on platform markets favour concentration on these markets and are hence a major aspect of competition-policy analyses.

**37.** Direct network effects relate to the size of the network, and exist where the benefit that a customer obtains from the provision of a service increases directly with the number of customers the service has. Classic examples of fields with strong direct network effects are telecommunication networks, such as classical telephony or Skype. These services become more attractive the larger the number of users is, i.e. the more households have a telephone or are on Skype, since the communication opportunities increase along with the number of users. Accordingly, networks which already have a large user base attract further customers. When it comes to digital markets, direct network effects are highly significant, in particular for social networks or communities such as Facebook, Instagram, Pinterest, Xing or Flickr, or for communication platforms such as Skype or WhatsApp.

**38.** Unlike direct network effects, indirect network effects occur when a rising number of users of one side of the market make the use of the platform more attractive for another side of the market.<sup>16</sup> Accordingly, a platform and, respectively, a market are usually referred to as two-sided or multi-sided when indirect network effects play a vital role.<sup>17</sup> In this situation, users of one side of the market benefit indirectly from a rising number of users of the same side, as this attracts further users from the other side of the market, which in turn makes using the platform more attractive to the first set of users. A trading platform such as eBay is all the more attractive for sellers the more potential buyers use the platform: since the probability of being able to sell the product rises as the number of users increases, and competition among

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pp. 125-143. The term "platform" used in media regulation (sections 2(2) No. 13, 52 ff. of the Interstate Broadcasting Agreement) deviates from this understanding of platforms.

<sup>13</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., para. 14.

<sup>14</sup> Evans, D. S./Schmalensee, R., The Industrial Organization of Markets with Two-Sided Platforms, *Competition Policy International* 3 (1), 2007, pp. 151–179. Evans, D. S./Schmalensee, R., Markets with two-sided platforms, *Issues in competition law and policy (aba section of antitrust law)*, 2008. Evans, D. S./Schmalensee, R., The antitrust analysis of multi-sided platform businesses, in: Blair, R./Sokol, D. (eds.), *Oxford Handbook on International Antitrust Economics*, Oxford University Press 2013.

<sup>15</sup> OECD Competition Committee, Two-Sided Markets, DAF/COMP(2009)20, 2009, <http://www.oecd.org/daf/competition/44445730.pdf>, retrieved on 29 April 2015.

<sup>16</sup> Katz, M. L./Shapiro, C., Network externalities, competition, and compatibility, *The American economic review*, 1985, pp. 424-440. When one takes a closer look, a distinction needs to be made between two types of indirect network effects or externalities: Externalities in utilisation and externalities in membership. The present report takes an abstract view of this more detailed analysis.

<sup>17</sup> Peitz, M., *Marktplätze und indirekte Netzwerkeffekte*, *Perspektiven der Wirtschaftspolitik* 7, 2006, pp. 317-333.

buyers for the product within the auction increases the anticipated sales price, the anticipated sales proceeds increase. On the other hand, such a platform is all the more attractive for potential buyers the more sellers are active and the larger the selection of products on offer is.

**39.** Indirect network effects lead to price formations on the platforms which differ widely from those of one-sided business models.<sup>18</sup> Platform operators frequently set the prices for the groups of users asymmetrically. Hence, a business model that is practised on two-sided platforms is equivalent to one side of the market being subsidised by the other.<sup>19</sup> The costs are then usually paid by the side of the market which is less price sensitive, so that platform operators generate the lion's share of their turnover on the side of the market with the least price elasticity.<sup>20</sup> Considerable asymmetries may hence occur in the prices between the sides of the market, so that one group of users pays prices that are below the marginal costs. Furthermore, the price asymmetries can ensure that the bundling of products by platform operators enhances welfare if this gives networks greater latitude and they can balance out prices.<sup>21</sup>

**40.** Price asymmetries are particularly pronounced on digital platforms. It is actually customary here for one side not to pay any costs at all. Services such as e-mail, cloud storage, searching, providing communication facilities, or software products such as browsers, video players and document viewers, are typically provided to users free of charge. The advertisers' side then frequently pays a large share of the platform costs. In this regard, most online platforms are primarily or even exclusively financed through advertising.

**41.** Platforms may display not only market failure in the classical sense<sup>22</sup> as a deviation from a complete market, but also a further type of market failure. Traditional market failure (resulting from asymmetric information, externalities, sub-additivity, etc.) also leads to general overpricing on platforms. In the case of platforms, additionally, the market outcome may not be adequate, and hence the market may fail if platforms do not select the price structure that would be optimal for welfare.<sup>23</sup> The analysis of such distortions is highly complex, and competition policy has so far hardly addressed this type of market failure.<sup>24</sup>

**42.** When it comes to the problems of market power, and hence of traditional market failure, indirect network effects, as has been described, frequently cause platform markets to tend towards concentration. Having said that, not every platform market is highly concentrated. For instance, there is competition between platforms for online travel portals, hotel reservation platforms, real estate, vehicle and job exchanges, among dating portals, credit cards, newspapers and magazines, shopping centres and financial trading places, and this is intensive at times. This shows that indirect network

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<sup>18</sup> Weyl, E. G., A price theory of multi-sided platforms, *The American Economic Review*, 2010, pp. 1642-1672.

<sup>19</sup> Accordingly, two-sided platforms and markets are in some cases defined on the basis of this asymmetric pricing: "A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board" (Rochet, J. C./Tirole, J., 2006, loc. cit.).

<sup>20</sup> The asymmetric structure of prices reflects the way in which the platform operator addresses the coordination problem which he faces. Because of the interaction between user groups on both sides of the market, the simultaneous establishment of user bases on both sides is necessary for the functioning of a platform. Because each side of the market appreciates a large number of participants on the other side, the operator faces a "chicken-and-egg problem" when establishing a platform since in order to attract customers on one side he must first of all have built up as broad a user base as possible on the other (cf. Caillaud, B./Jullien, B., Chicken & egg: Competition among intermediation service providers, *RAND Journal of Economics*, 2003, pp. 309-328). Asymmetric pricing makes the utilisation of the platform highly attractive for the user group which pays a very low price, so that customers can be attracted, which in turn makes the utilisation of the platform attractive for users from other sides.

<sup>21</sup> Rochet, J. C./Tirole, J., Tying in two-sided markets and the honor all cards rule, *International Journal of Industrial Organization*, 26(6), 2008, pp. 1333-1347. A comparable outcome can thus be determined by the multi-homing opportunities: Choi, J. P., Tying in Two-Sided Markets with Multi-Homing, *Journal of Industrial Economics*, 58(3), 2010, pp. 607-626.

<sup>22</sup> Cf. Fritsch, F., *Marktversagen und Wirtschaftspolitik: Mikroökonomische Grundlagen staatlichen Handelns*, Vahlens Handbücher der Wirtschafts- und Sozialwissenschaften, 9th ed., Vahlen, 2014.

<sup>23</sup> Cf. Evans, D. S./Schmalensee, R., 2013, loc. cit. pp. 11-12. A distortion in prices vis-à-vis the optimal structure emerges because the platform operator takes marginal users as an orientation, while the average user is relevant for welfare-optimal pricing. This type of distortion is comparable with the sub-optimal quality selection of a company which has market power (cf. Weyl, E. G., 2010, loc. cit.).

<sup>24</sup> An exception is formed by the analyses on credit cards, cf. European Commission, Cases 34.579 and 40.049 – *MasterCard*; 39.798 – *Visa*.

effects by themselves do not cause a high level of market concentration or even monopoly formation, and that further aspects play a major role (cf. Section 2.2.2)

**43.** From an economic point of view, it is not clear whether competition between platforms actually increases welfare, while this is almost always the case for one-sided business models as long as there is no natural monopoly. Even if the existence of several platforms does not entail duplicating fixed costs, indirect network effects may cause the parallelism of platforms to be inefficient.<sup>25</sup> Accordingly, a monopolistic platform maximises network effects, and hence efficiency, since all market participants can coordinate via one platform. Furthermore, the network effects frequently make it unavoidable for operators to establish very large platforms so that they become attractive for users. Hence, high levels of market concentration found among platforms – in particular where they only exist on one side of the market – cannot be interpreted in the same way as on conventional markets, where there are no network effects.

**44.** However, high levels of market concentration emerging because of network effects are not a new phenomenon, nor are they one that is restricted to the internet. A concentration of trade in one trading place can be observed frequently, and is often economically efficient as this helps reduce search costs. Strong network effects can hence lead to concentrated markets, while ensuring that this high degree of market concentration is efficient.

### **2.2.2. Determinants for platform competition**

**45.** All in all, it can be found that, first, the link between market concentration and welfare effects for platform markets is ambiguous. The increase in welfare typically seen on other markets as competition increases does not always apply to platforms. Furthermore, not all platform markets tend towards strong concentration. The now classical analysis of Evans and Schmalensee (2007) postulates that five effects in particular determine the process and the level of market concentration on platforms and hence competition between platforms:<sup>26</sup>

- network effects
- scale economies
- congestion
- platform differentiation (in particular as a result of heterogeneous user preferences)
- multi-homing<sup>27</sup> and/or provider switching and the related costs.

**46.** All other things being equal, indirect network effects and scale economies (advantages due to size or output) cause greater market concentration (cf. Section 2.2.1). The relevance of these effects varies from one platform to another. Economies of scale are a characteristic which is common on digital markets since the cost structure is frequently typified by relatively high fixed costs and low variable costs.<sup>28</sup> For instance, for many trading and intermediary platforms most of the costs are caused by the management of a database, while additional transactions entail virtually no extra costs. Economies of scale and indirect network effects are hence common characteristics of digital markets and limit the latitude for competition between platforms.

**47.** Additionally, however, there are three central characteristics which counteract platform concentration. One major aspect here is the possible restriction of use for one side of the market. This can be caused by limited capacities in the classical sense, but also by a restriction of the number of users selected by the platform operator, for instance because of negative external effects. Such restrictions occur not only on the side of the consumers of a service, but also on another platform side. Frequently, for instance, the space for ads is limited, among other things because too much advertising annoys users and hence can reduce the usefulness of the platform for users.<sup>29</sup> Negative external effects from addi-

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<sup>25</sup> Cf. Caillaud, B./Jullien, B., 2003, loc. cit.

<sup>26</sup> Cf. Evans, D. S./Schmalensee, R., 2007, loc. cit. Table 2.

<sup>27</sup> Multi-homing refers to the possibility for users to use several platforms in parallel.

<sup>28</sup> However, new technologies such as cloud computing can also result in the high investment costs which are typically incurred on market entry becoming variable costs to some degree – at least for the early phase of a company's development.

<sup>29</sup> Bagwell, K., The economic analysis of advertising. Handbook of industrial organization, 3, 2007, pp. 1701-1844.

tional users may also cause the platform operator to limit the capacity of the platform. For instance, heterogeneous user groups on intermediary portals (dating portals<sup>30</sup>, auction platforms) may considerably increase the search costs. Advertising for dating portals explicitly points out the restriction to a certain user group – for instance academics – since this makes it easier to find a suitable partner. Auction platforms may also be simpler to use if only users with comparable interests and knowledge are using them. Accordingly, self-selected restriction to a user group may make a platform particularly attractive because of the high degree of user homogeneity resulting from this. This also applies for instance to targeted advertising in the advertising industry. If a platform offers only capacities for a restricted number of users, there is room for competitors.

**48.** A second characteristic which is closely linked to the capacity restrictions and which favours competition between platforms is the possible heterogeneity of platforms in their service range on one side itself, which is the degree of possible product differentiation between platforms. Similar to the self-selected capacity restrictions, this potential differentiation can emerge from the heterogeneity of the user groups. For news sites or other information portals, it is almost always obvious that user preferences are heterogeneous, and hence that differentiated providers become established. This differentiation can be horizontal (different offers of comparable quality) or vertical (different-quality offers). Therefore, the greater the heterogeneity of users is, and the easier platforms are able to differentiate in their service range, the more varied this range will be, and the less concentration there will be. Here, digitalisation enables services to be adapted to customers' needs at a low cost and global demand to be served, so that products can be differentiated on internet-based markets with relatively few resources. Against the background of differentiation as a competition-promoting aspect, exclusive contracts may also be helpful since they permit a relatively small platform to attract users to whom the corresponding exclusive service is particularly important.<sup>31</sup>

User heterogeneity can hence help counteract network effects and facilitate competition between platforms. Strong heterogeneity, on the other hand, causes this platform competition to be less intensive. In extreme cases, the platforms are so strongly differentiated on one side that no competition pressure emanates from one platform to the other.

**49.** The third central factor which strengthens platform competition is the existence of a possibility to use several platforms at the same time (multi-homing). If users of a platform side are not able to multi-home, this side forms the “competition bottleneck”<sup>32</sup>. The possibilities to multi-home depend among other things on the costs of changing and on whether fixed costs are charged to use a platform. The costs can be charged as an actual flat-rate monetary payment, or as a non-monetary expense incurred by users for instance by virtue of their having to first learn to navigate the platform. When using an online travel agency, for instance, platform users incur virtually no costs when changing platform operators. Multi-homing is simple for travellers and is widely used. Flight and hotel providers thus customarily post their services on more than one platform. By contrast, the costs involved in changing communication services and social network providers are high in most cases since contacts are not identical across different platforms. Changing costs can be incurred for instance in e-mail services through the need to transfer contact and communication data. Another type of changing cost is incurred on some platforms by the acquiring of reputation by users (e.g. on eBay). This reputation is built up gradually when one uses the platform, and cannot be transferred to other platforms. On the seller side, users of a platform, e.g. eBay, may thus have virtually no multi-homing options if they sell individual items. High changing costs can ultimately result in users remaining on a platform which they would otherwise not choose to use (lock-in effect). Innovative competitors are then unable to generate market share even if their technology and their products or services are superior. This creates dynamic market inefficiencies.<sup>33</sup>

**50.** Competition between platforms is considerably influenced by these factors. While the scale of the related effects can differ widely between sectors and platforms, as a matter of principle these aspects play a more important role on digital markets than on other markets.

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<sup>30</sup> The restriction to a specific user group – academics in most cases – is explicitly used as a sales argument for dating portals.

<sup>31</sup> Lee, R. S., Vertical integration and exclusivity in platform and two-sided markets, *The American Economic Review*, 103(7), 2013, pp. 2960-3000.

<sup>32</sup> Armstrong, M., 2006, loc. cit.

<sup>33</sup> Farrell, J.,/Klemperer, P., Coordination and lock-in: Competition with switching costs and network effects, *Handbook of industrial organization*, 3, 2007, pp. 967-2072.

**51.** These characteristics are complemented by other factors which can promote or counter market concentration. These include the role played by innovations and the general dynamic nature of the markets. Innovative and dynamic fields tend less towards long-term concentration. The intensive competition for markets and the high level of market transparency force companies to be highly innovative, thus leading to short product life-cycles and rapidly changing markets. The innovativeness of internet platforms thus takes on a major role in competition. When it comes to the strong market position of Google, it is presumed that this is less the outcome of indirect network effects than of economies of scale and scope, as well as – not lastly resulting from these advantages – an attractive product portfolio for customers (cf. Chapter 5).<sup>34</sup> Additionally, further effects, such as the interoperability and compatibility of goods or the design of the legal institutions, play a major role when it comes to market concentration.

**52.** On many digital markets, strong competitive pressure emanates not only from actual competitors, but is also exercised by potential competitors. This is the case where only low market entry barriers exist, despite network effects. The dynamic competition development is then typically characterised by a process of creative destruction as defined by Schumpeter. Here, a dominant company is continually subjected to extensive competitive pressure from smaller or potential market players. The basis of such a process is formed by innovations which are pushed forward by enterprises with the goal of establishing themselves on the market. A process can hence be created in which one temporarily dominant position is regularly replaced by another one. And if no replacement were to be observed in such a scenario, this would be the consequence of the dominant player regularly defending its position with new products and processes. Regardless of which company is successful, incentives to innovate are high for all the companies involved, so that the process can be efficient and there does not have to be a competition problem.

**53.** We should also consider that the competition to which a platform sees itself exposed cannot only emanate from a platform which is active on the same platform sides. Rather, each company which is active on at least one side of the platform concerned exerts competition pressure on the platform. As stated above, for instance, one side of many digital platforms is that of advertisers, as can be seen from the many companies that offer advertising space on this side (cf. Chapter 4).

### **2.2.3. Market definition and the market power of platforms**

**54.** The fundamental service provided by a multi-sided platform is the ability to facilitate a beneficial interaction between economic players belonging to different groups. The links between the user groups and the products and services which are offered to the individual groups must be analysed if a market that is relevant under competition law is to be defined and the market power of the platform ascertained.

**55.** Three major consequences of indirect network effects are to be explicitly considered in the analysis of potential competition restrictions:

- First, the positive reverberations between the sides of a platform arising through the externalities must be taken into consideration. If prices or qualities of the products and services change on one side, this has a direct impact on how this side is used, and hence indirectly impacts the utilisation of the other sides, which in turn influences the users on the side originally affected by the change. Given positive indirect network effects, the reaction of the users on the affected side is therefore more marked on the whole than the direct reaction to the change in the supply.
- Second, competition to which a platform is exposed on one side of the market can restrict latitude and market power on all sides of the platform. A platform which makes a strategic decision in competition on one side which directly affects only customers of this side must also take account here of the reactions of competitors on the other platform sides. If a platform for instance increases the prices of one side, thus accepting that it may lose users, it must also be taken into account that these users will switch to a competing platform and in turn make this platform more attractive for customers of other platform sides. This therefore also creates incentives for other users than those on the side directly affected by the price increase to switch to the competing platform.

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<sup>34</sup> Manne, G. A./Wright, J. D., If search neutrality is the answer, what's the question, *Columbia Business Law Review*, 2012, pp. 151-239; Argenton, C./Prüfer, J., Search engine competition with network externalities, *Journal of Competition Law and Economics*, 8(1), 2012, pp. 73-105.

- Third, indirect network effects may restrict the substitutability of the products and services for users, and thus considerably raise market entry barriers for platforms. However, a successful platform has already reached a critical mass of users on all sides of the market, and benefits from the positive feedback of the user groups. A market newcomer first needs to reach this critical mass, and in order to do so may need to convince users to switch platforms. This is difficult since a platform with few users offers fewer positive externalities, and hence is less attractive to users. Opportunities to differentiate and multi-home have a vital role to play for the substitutability of the products and services.

**56.** The characteristics of platforms have a considerable impact on the methods that are used to ascertain market power. Market power is customarily defined as the possibility for a company to conduct itself independently vis-à-vis other market players to an appreciable degree.<sup>35</sup> It is mostly deduced from this that a company has market power if it is able to increase prices to a level far above a competitive level. However, the asymmetric price structures of platform markets lead to a situation in which the prices or margins and mark-ups on one side of the market do not directly permit conclusions to be drawn as to the market power of the platform on this side or on its market power as a whole.

By contrast, a platform's profitability and profit margin offer a more suitable measure of market power as they measure the extent to which the platform is able as a whole, taking all effects into account, to set prices on all sides in the overall view such that a profit can be generated that is higher than in the case of functional competition. It is a complex challenge in practice to determine and evaluate profitability.

The calculation of market shares as an indicator of market power which is customary in practice in competition law is unsuitable for platforms. It may be that a platform's market shares can be calculated for each side, but these shares may diverge widely for the different sides of the market. Without taking the indirect network effects into account in detail, it is not possible to draw conclusions from these shares regarding the actual market power of a platform. What is more, platforms, in particular those on digital markets, often offer their goods free of charge on one side, so that the frequently demanded calculation of value-orientated market shares is not possible.<sup>36</sup>

**57.** All in all, it is true for platforms even more than for one-sided business models that one should not rely on one single method in order to determine market power. Mechanical approaches and the triggering of thresholds for quantitative benchmarks should certainly not be used as the sole or primary procedure to determine market power. There is, rather, a need to pursue diverse methods to achieve a reliable finding. Competition restrictions must be examined here in depth, taking the indirect network effects into account.

**58.** The characteristics of platforms make it clear that it is not permissible to look at one single side of the platform in isolation when one evaluates the competitive impact and the market power of a platform. Accordingly, from an economic perspective, one side of the platform cannot be defined as a separate market when one delineates the market.<sup>37</sup> Rather, it is always also vital in order to evaluate the market power of a platform to see how the participants of the other sides react to a change on a specific side. Competitive pressure on one side can restrict the latitude available on the other side. Since, however, the competitive situation may differ widely between the respective sides of the platform, the individual sides nonetheless must be examined separately first in order to derive from this the market power of the platform. The reverberations between the platform sides must also be considered in this context. Furthermore, as stated above, it is not unusual for a platform to have no direct competitors in the sense that no other platform is active on

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<sup>35</sup> Cf. European Commission, Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ EU C45 of 24 February 2009, p. 7, para. 10; in German law also section 18(1) and (3) and section 20(1), of the German Act Against Restraints on Competition – ARC [*Gesetz gegen Wettbewerbsbeschränkungen – GWB*].

<sup>36</sup> This problem always occurs, albeit less markedly, on platforms where user groups cross-subsidise one another and the price correspondingly fails to reflect the value of the good.

<sup>37</sup> Cf. Argentesi, E./Filistrucchi, L., Estimating Market Power in a Two-Sided Market: The Case of Newspapers, *Journal of Applied Econometrics*, 22(7), 2007, pp. 1247-1266. Evans, D. S., The Antitrust Economics of Multi-Sided Platform Markets, *Yale Journal on Regulation*, 20(2), 2003, pp. 325-381. Wright, J., One-Sided Logic in Two-Sided Markets, *Review of Network Economics*, 3(1), 2004, pp. 44-64; Weyl, E. G., 2010, loc. cit.; Dewenter R./Rösch, J./Terschüren, A., *Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen*; *Neue Zeitschrift für Kartellrecht (NZKart)*, 2014, pp. 387-394.

identical platform sides. Nonetheless, this platform may be subject to considerable competitive pressure, for instance from platforms which are only active on individual sides, or from conventional companies.

**59.** In principle, when one defines the market of multi-sided platforms, econometric models can be used which explicitly take account of the interdependences of the demands from the different sides of the platform.<sup>38</sup> However, their practical applicability is limited because of the large amount of data needed and the effort involved in modelling. It appears to be best suited for the practice of the competition authorities to, in particular, expand established procedures for market definition to multi-sided platforms – at least in selected cases. Thus, various proposals to expand the concept of the SSNIP test<sup>39</sup> offer ways to depict changes in a platform's total profit, taking account of the demand elasticities and of the indirect network effects.<sup>40</sup> Yet, these expansions also require much more information and are considerably more complicated in their application than the variant for one-sided markets. What is more, a hypothetical price increase cannot be considered if – as for instance with search services – no pecuniary price is charged. For such cases, it is proposed to consider a quality reduction instead of a price increase, such a procedure being contingent on the existence of a measurable quality standard, which cannot always be defined. Furthermore, the SSNIP test is hardly suited to define dynamic markets on which it is less the price and more the quality and product innovations that constitute major competition determinants. All in all, there is still considerable research to be carried out when it comes to developing econometric procedures which can and should be extensively used in the practice of competition authorities. In this regard, and as stated above, it is essential for the practical application to always include all sides of the platform in each analysis.

**60.** Specifically in the framework of merger control, it is also vital to consider the interdependences between the various sides of the market.<sup>41</sup> The expansion of the concept of upward pricing pressure (UPP)<sup>42</sup> provides a way here to estimate unilateral effects empirically.<sup>43</sup> However, extremely extensive data volumes are required in order to calculate this measure for multi-sided platforms. As well as estimating the reaction to a change in the price in terms of demand for the product considered, demand characteristics of all sides of the platform need to be portrayed, and this not only with regard to the prices, but also in relation to the indirect network effects. Hence, the reactions in demand to a change in the utilisation of the other sides of the platform must also be estimated. In this regard, the application of the expansion in UPP is extremely laborious for the competition authorities. Nonetheless, it is essential to also take the multi-sided nature of platforms into account when it comes to merger control. Thus, because of the network effects it actually cannot be ruled out that merging platforms without obtaining efficiency gains causes the prices to fall on all platform

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<sup>38</sup> Cf. for instance Filistrucchi, L./Klein, T.J./Michielsen, T., *Assessing Unilateral Effects in a Two-Sided Market: An Application to the Dutch Daily Newspaper Market*, *Journal of Competition Law and Economics*, 8(2), 2012, pp. 297-329. Fan, Y., *Ownership consolidation and product characteristics: A study of the U.S. daily newspaper market*, *The American Economic Review*, 103(5), 2013, pp. 598-1628.

<sup>39</sup> The SSNIP test (Small but significant and non-transitory increase in price) examines customers' reaction to a lasting increase in the prices of the products in question, presumed to be small but not insignificant.

<sup>40</sup> Filistrucchi, L./Geradin, D./Van Damme, E., & Affeldt, P., *Market definition in two-sided markets: theory and practice*, *Journal of Competition Law and Economics*, 10(2), 2014, pp. 293-339.

<sup>41</sup> Song, M., *Estimating Platform Market Power in Two-Sided Markets with an Application to Magazine Advertising*, mimeo, 2013, earlier version: *The Bradley Policy Research Center Financial Research and Policy Working Paper No. FR 11-22*, 2011. For an overview cf. Evans, D. S./Schmalensee, R., 2013, loc. cit. pp. 23 ff.

<sup>42</sup> The upward pricing pressure (UPP) test offers an alternative to the traditional concentration-based analysis of the effects performed in the context of merger control. The concept was developed by Joseph Farrell and Carl Shapiro, Farrell, J./Shapiro, C., *Antitrust evaluation of horizontal mergers: An economic alternative to market definition*. *The BE Journal of Theoretical Economics*, 10(1), 2010, ISSN (Online) 1935-1704, DOI: 10.2202/1935-1704.1563. The UPP test is used to examine whether a merger will tend to be accompanied by a price increase or a price reduction for a product observed. Two contrary effects are weighed up against one another here. On the one hand, the incentive to carry out a unilateral price increase based on the partial internalisation of volume outflows by the other merger partner, and on the other hand the incentive to reduce prices which may result from merger-related efficiency gains. The UPP is calculated on the basis of the "diversion ratio", which is the absolute margin per sales unit of the respectively other merger partner, as well as the reduction of costs per sales unit which may result from the efficiency gains emanating from the merger (e.g. positive benefits of scale). The UPP can be used to avoid problems occurring in practice such as the definition of the relevant market on markets with differentiated products since no market definition is necessary. What is more, the intensity of competition between merging companies is accounted for.

<sup>43</sup> Affeldt, P./Filistrucchi, L./Klein, T. J., *Upward Pricing Pressure in Two-sided Markets*, *The Economic Journal*, 123(572), 2013, pp. 505-523.

sides.<sup>44</sup> Even if this effect may be rather unlikely in practice, it nonetheless makes it very clear how important it is to bear in mind the platform characteristics in competition policy and that conventional views and contexts cannot necessarily be applied to platforms.

**61.** All in all, the assessment of the market power of multi-sided platforms is a major challenge for competition authorities and decision-makers. Many of the conventional methods cannot necessarily be applied, and new methods are relatively underdeveloped and require complex analyses to be performed.

#### **2.2.4. Summary**

**62.** The growing practical relevance of multi-sided platforms is a major challenge in terms of competition policy. Accurate economic analyses of the competitive situation are much more complex than those of one-sided markets. However, neglecting the fundamental contexts and complexity may lead to grave mistakes being made in the assessment. It is important to include all sides of a platform in the analysis and to comprehensively consider the indirect network effects which link the sides of the platform.

**63.** It is not possible in the context of the above competition analysis of digital markets in general to provide concrete, blanket competition-policy statements or to go so far as providing detailed recommendations for action for the cartel authorities' analysis. The aspects portrayed must be considered separately and in detail when one analyses search engines, social networks, trading platforms and other business models. And even if only little competition can be observed in some fields, it is unclear whether this constitutes a temporary or a lasting situation. Many digital markets reveal competition as defined by Schumpeter in which a temporarily dominant position is replaced by another, or could be replaced comparatively easily. Innovation incentives are very strong in such cases, despite considerable market concentration. Even given a sustained high level of concentration, this situation may well be efficient because of network effects.

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<sup>44</sup> Chandra, A./Collard-Wexler, A., Mergers in Two-Sided Markets: An Application to the Canadian Newspaper Industry, *Journal of Economics & Management Strategy*, 18, 2009, pp. 1045-1070.



### 3 Data and its relevance for competition

64. A typical characteristic of many business models in the digital economy is the collection and commercialisation of data. The increasing generation and collection of data in the context of digitalisation is indeed impressive. A study from 2013 for instance found that roughly 2.5 quintillion ( $10^{18}$ ) bytes were being generated worldwide every day at that time and that 90 percent of the data volume existing in the whole world had been created in the two years previous to that. It was further forecast that the data volume generated worldwide would at least double every two years in the future.<sup>45</sup>

65. Because of their considerable significance, data is already being regarded as the new currency of the digital age in some cases. Looked at somewhat more soberly, it is above all an important input factor which is necessary, or at least advantageous, for the provision of many online services, as these could otherwise only be offered at an inferior quality standard. Unlike many other raw materials, data can as a matter of principle be used again and again without wearing out; in other words it is basically non-rivalising in terms of its utilisation. However, it is quite frequently the exclusive property of individual companies which decide how it is to be used and which can preclude other companies from using it. Having control over and being able to analyse massive volumes of data can thus be a crucial competitive advantage.

66. Below, we provide a brief overview of the nature of and the extent to which data is collected and commercialised and how significant it is for digital business models. The competition-policy significance of such data stocks and possible consequences for competition policy is also discussed.

#### 3.1. The significance of big data

67. A topic which has received particular public attention is the extensive collection, storage and linking of data triggered by increasing digitalisation. The discussion mostly centres on the phenomenon of “big data”. The term has not been conclusively defined, but basically refers to datasets that are so big that they can no longer be collected, stored, processed and analysed by classical database software tools.<sup>46</sup> To characterise the phenomenon of big data, as a rule reference is made to the “3Vs” – volume, variety and velocity. These describe the algorithmic analysis of particularly vast data volumes (volume) from the widest variety of sources and formats (variety) at maximum velocity (velocity) which has only been made possible by digitalisation.<sup>47</sup> What is more, big data is frequently used as a catchword subsuming both the technologies used to collect, process and link massive, complex data volumes, as well as the business models which this involves.

68. Big data differs from former analysis methods not solely by virtue of its more extensive data volumes, but also the form taken by the data analysis is actually changing as well. Classical data analyses thus aim to answer concrete questions, using data that are as standardised and precise as possible. In comparison, big data also facilitates the analysis of different, non-standardised data using forecast models and algorithms. This makes it possible for instance to combine text, audio or video data to examine and recognise potential patterns, trends or modes of conduct. Both the data volume and the intelligence of the data processing are factors that are critical for the success of big data analyses.<sup>48</sup> The latter are based in particular on various machine learning techniques.<sup>49</sup> The particular significance of large data volumes may explain why, according to press reports, some companies also store data on the off-chance without a pre-defined purpose, only to possibly analyse it at a later date.<sup>50</sup> This involves collecting, storing and linking highly varied data, including personal data, from a vast range of different sources. These include multimedia and text data, as well as financial market data, and they come from mobile devices, desktop computers or sensors in household appliances, among other sources.

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<sup>45</sup> Cf. PwC, *Big Data – Bedeutung. Nutzen. Mehrwert*, June 2013, p. 7.

<sup>46</sup> Cf. *ibidem*, p. 9.

<sup>47</sup> Cf. Kraus, H., *Big Data – Einsatzfelder und Herausforderungen*, Arbeitspapiere der FOM, No. 41, Essen, October 2013, pp. 3 f.

<sup>48</sup> Cf. *ibidem*, pp. 4 ff.

<sup>49</sup> Cf. Varian, H.R., *Big Data: New Tricks for Econometrics*, *Journal of Economic Perspectives* 28(2), 2014, pp. 3-28.

<sup>50</sup> Cf. e.g. Hofmann, T./Schölkopf, B., *Vom Monopol auf Daten ist abzuraten*, *FAZ* of 29 January 2015.

**69.** The collection, processing and evaluation of large data volumes is customary in many fields today, and is not restricted to the online services which attract particular attention.<sup>51</sup> Big data technologies are primarily used with the aim of optimising business processes, increased profitability through cost reduction, as well as greater customer orientation. In logistics, for instance, it is possible to precisely track and optimise routes through geo-localisation or to optimise stocks. In marketing, conduct patterns can be recorded and analysed, enabling customers to be approached individually, for instance by sending them customised offers to their smartphones when they are out shopping.<sup>52</sup> It may moreover be possible to discover new trends and market potentials. Not least, big data is also used for research purposes, for instance in medicine for cancer research.

**70.** These advantages contrast with the potential disadvantages, as well as societal challenges, posed by big data. These particularly include the ways in which personal data is handled, as well as the lack of transparency for many users regarding their collection, processing and evaluation. For instance, many fear “transparent” users. Studies which have used Facebook likes, cellphone metadata or websites visited to successfully draw up user profiles which were rather informative in some cases<sup>53</sup> show that this fear is not entirely far-fetched, albeit these user profiles are as a rule anonymous or pseudonymised, and hence cannot easily be used to reveal the individual's identity. However, by linking several data sources, a much more detailed profile can be established and at least an approximate identification facilitated. As a matter of principle, the risk moreover exists of false conclusions being drawn because of the erroneous attribution of certain characteristics or modes of conduct to a specific individual. These may have a real impact in extreme cases, such as where a bank turns down a loan application or if entry to a particular country is refused. Against the background of these new possibilities, privacy groups are demanding stronger enforcement of data protection law, which is aimed at restricting companies and states with regard to their ability to collect and commercialise personal data.

**71.** The opportunities to carry out analyses associated with big data can have a direct impact on the welfare of individual users. This emerges in particular from the fact that the conduct of the individual can be better observed and followed up. It is for instance already possible today to set car insurance tariffs which measure the observed individual conduct in road traffic, or health insurance tariffs where the contributions depend on the results of the electronic monitoring of fitness and nutritional data.<sup>54</sup> Moreover, particularly on the internet, companies can use information on their users to draw conclusions as to their presumed willingness to pay, and can price products individually. This leads to different users being offered the same products at different prices. The impact of these and similar possibilities on social welfare is unclear from an economic point of view.<sup>55</sup>

**72.** All in all, it can be stated that the increased analysis of data may lead to an individualisation of products and prices which can be advantageous for some users but disadvantageous for others. However, particularly the collection, processing and evaluation of personal data also pose social policy questions, such as to what degree the utilisation of personal data or price differentiation according to users' individual characteristics should be permitted. These questions are ultimately for policy-makers to answer. In any case, sufficient transparency for consumers should be ensured so that they are aware of the utilisation and significance of their data. In accordance with its mandate, the Monopolies Commission primarily focuses below on competition-policy aspects.

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<sup>51</sup> This enables for instance supermarkets to also collect information on their customers' offline shopping habits by issuing loyalty cards.

<sup>52</sup> Cf. Kraus, H., loc. cit., pp. 8 ff.

<sup>53</sup> For an overview of various studies cf. Christl, W., *Kommerzielle digitale Überwachung im Alltag*, Cracked Labs, Institut für Kritische Digitale Kultur, Study commissioned by the Chamber of Labour (*Bundesarbeitskammer*), Vienna, November 2014, pp. 14 ff.

<sup>54</sup> In the “S-Drive” telematic car insurance tariff offered by Sparkassen DirektVersicherung, a telematics box is installed in the insured person's vehicle which records data on driving habits. This data is used to award an overall score which may lead to a premium discount of five percent. Generali-Versicherung's “Vitality” health insurance tariff, which has not yet been introduced in Germany, issues coupons and premium discounts rewarding a healthier lifestyle. For this, an app is used to transmit data to the insurance company, among other things on sports activities and on eating habits.

<sup>55</sup> Cf. also paras. 80 et seq. on possibilities for price differentiation and potential welfare impacts.

### 3.2. Data collection on the internet

**73.** A large number of companies operating on the internet collect data. This data may as a matter of principle be very different as to the form it takes, and may be available both publicly and non-publicly. However, of particular significance to the companies is user data that is created in interaction between users and online services and websites, and as a rule is at the exclusive disposal of these companies. Such user data can be both the main product and accrue as a by-product of the transaction. This is for instance data on websites that have been visited, search terms that have been searched for or purchasing conduct as well as location, device and browser data. Furthermore, in particular services which require users to register may collect additional data on sociodemographic characteristics such as place of residence and age, or on users' interests. The data collected may be additionally enriched by purchasing third-party data and attributing it to the data already available.

**74.** The data collected by the companies may be personal. Personal data<sup>56</sup> may be roughly broken down into content data and inventory, traffic and usage data. Content data primarily includes data that the users provide deliberately, and mostly voluntarily, when using online services. An example of this is profile information, images and other media which users provide in social networks. Inventory, traffic and usage data is by contrast frequently generated and collected without users' knowledge. It serves among other things to first of all facilitate online services technically, and is frequently generated as a by-product of the interaction between users and the service. For instance, when a website is visited, the IP address of the internet connection is communicated, which makes it possible to approximately localise the user, but is also needed for communication between the web server and the web browser. Apart from technical aspects on which the transfer of such personal data is based, this may also reveal information on websites visited and on users' interests on the internet. This enables companies to for instance store data on visited websites or information on the time spent on a site.

**75.** "Cookies" are particularly relevant for the collection of (personal) data on the internet.<sup>57</sup> These are small text packets that are stored on the internet user's web browser when visiting websites and allow him/her to be recognised. "First-party cookies" are stored by the visited website itself in the user's web browser in order for instance to store user settings or manage the shopping basket. They are relatively unproblematic in data protection terms. "Third-party cookies" and "tracking cookies", which can be placed when a website is visited, not by the site itself but by third-party providers whose content is embedded in the website, are different. These cookies enable the tracking of internet users on various websites, and permit information to be collected on the websites visited and combined to form (anonymised) user profiles. Third-party cookies are in particular used by companies in the advertising sector which use the information they obtain on users' interests to display the most targeted advertising possible or to sell it to other companies. "Social plugins" are another such application. These are integrated into many websites outside a social network, and include the Facebook Like button. They first and foremost enable users to bring the content of third-party websites to the attention of other users. However, the operators of the social networks themselves use them not least to monitor their members' conduct outside the social network and to collect additional information on their interests.

**76.** We have described only a few of the possibilities available to companies to collect a wide variety of data on their users on the internet. However, this already makes it clear that the collection of also personal data without users' explicit consent is likely to be not the exception, but in fact the rule. The stipulations contained in section 15 of the Telemedia Act on user protection are hence obviously a paper tiger in this regard. Having said that, users are not defenceless when it comes to the collection of personal data, but can counteract it by using appropriate software or regularly deleting cookies. In terms of the laws on data protection, the collection of such extensive data stocks in individual companies may be objectionable, in particular if they are combined with further data from their own online services or with third-party data from other companies. As a matter of principle, such linking of datasets also facilitates the creation of extensive user profiles.

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<sup>56</sup> Section 3(1) of the Federal Data Protection Act (BDSG) defines personal data as "any information concerning the personal or material circumstances of an identified or identifiable individual (the data subject)". The term is not used below in this strict sense as defined under data protection law.

<sup>57</sup> In addition to cookies there are also other tracking methods, such as "fingerprinting".

### 3.3. The purposes of data collection

**77.** Companies generally pursue highly specific goals when they collect data on the internet. Depending on their business model, a range of different interests may be paramount. As a matter of principle, it is possible to distinguish in this regard between providers of online services and advertising companies, though some companies operate in both fields.

**78.** The collection of data and the monitoring of internet users within and outside their own services first and foremost enables online services to conduct an extensive analysis of users' activities. They can use this information to continually optimise and personalise their products and services. What is more, they can identify potential trends from such data and thus develop new products and services which are particularly relevant for users. The ability to collect and evaluate data is hence a central driving force for the innovativeness of these companies.

**79.** The possibility to optimise services by using data becomes particularly apparent from the increasing personalisation. Examples of such personalisation can be found in a number of online services. For instance, online shops can give product recommendations on the basis of previously purchased or viewed products; search engines can display hit lists on the basis of users' search history and location, and social networks can show contents that are tailored to the interests of their members. Many internet users appreciate the advantages of such personalisation. Furthermore, for the companies themselves, personalisation can result in customer retention, which is to their advantage.<sup>58</sup> Such a high degree of customer retention is only problematic from a competition policy perspective if it is the consequence of barriers to change and lock-in effects, for instance because users have only restricted opportunities to take data with them to another online service (lack of data portability).

**80.** Extensive data utilisation can result in individual user groups being placed at a disadvantage. We have already mentioned in this context the potential for price differentiation in online shops through collecting and combining different data, enabling companies to draw conclusions as to the willingness of individual consumers and groups of consumers to pay and to commercialise them better through personalised prices.<sup>59</sup> The phenomenon of price differentiation is nothing new as such. For instance, companies in the transport sector today already charge different prices depending on the time of day, demand situation or reservation period. Price differentiation is hence a major element of many companies' revenue management. What is new is the possibility for personalised price differentiation on the internet which uses consumers' observed characteristics and habits, and hence allows prices to be set more and more precisely using the respective willingness of the consumer to pay for the product. In economic terms, such a price differentiation may increase welfare, for instance by serving groups of customers who would not have bought without this differentiation. However, new social questions and questions relating to consumer protection law may arise as this differentiation may place at a disadvantage in particular consumers who are less sensitised with regard to the utilisation of their data. What is more, welfare may suffer if companies can for instance identify users while collecting data who are unaware of the possibilities for price discrimination afforded by their data. In this case, companies can select a different price structure for such users, and can for instance set lower basic prices which motivate them to purchase a product, while at the same time increasing the additional costs for the utilisation of the product. The excessive demand created by these poorly informed users may lead to welfare losses.<sup>60</sup>

**81.** Welfare losses may furthermore arise from the abovementioned introduction of data-based insurance tariffs. Improved data availability leads to each insured party paying a premium which is adjusted in line with their individual risk in place of an average premium, with the risk of paying more than before. However, this additional "premium risk" for the insured parties is not compensated for by any direct efficiency gains. Hence, more information can also have a negative impact on welfare (Hirshleifer effect<sup>61</sup>) and be detrimental to transactions that benefit society as a whole. Furthermore, the individualisation of insurance tariffs may run counter to the actual concept of insurance, namely to spread different risks.

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<sup>58</sup> Cf. Shapiro, C./Varian, H.R., *Information Rules: A Strategic Guide to the Network Economy*, 1999, pp. 32 ff.

<sup>59</sup> Cf. Office of Fair Trading, *The Economics of online personalised pricing*, OFT Report No. 1488, May 2013.

<sup>60</sup> Cf. Heidhues, P./Közegi, B., *Using Information about Naivete to Price Discriminate*. 27 March 2014.

<sup>61</sup> Cf. Hirshleifer, J., *The private and social value of information and the reward to inventive activity*, *American Economic Review* 61(4), 1971, pp. 561–574.

**82.** Apart from the described possibility to optimise and personalise online services, the collection and analysis of data are of considerable significance for companies that are active in online advertising. These include, primarily, companies that are specialised in online advertising which do not have any direct contact with the internet users themselves, and for instance position advertising using data that has been collected, but secondly also vertically integrated, diversified companies such as Google, which offer services both to internet users (search engine, social network, etc.) and to advertisers (advertising networks, etc.). While in the former case the data is collected in particular via cookies and other tracking technologies which permit cross-website tracking of internet users, in the latter case user data can be additionally collected via the interaction between users and the online service. However, the goal of data collection and utilisation is in each case to use it to post advertising that is as targeted as possible.

**83.** Since the posting of targeted advertising increases the probability that consumers will buy, both advertisers and providers of advertising space are interested in this kind of advertising. Such ads are vital for many online services which largely finance their – frequently free – services via advertising. Were the advertising companies to make less use of data, and hence advertising to be less relevant, this might also have a negative impact on the provision of such free services. Not least, however, consumers too could benefit from individualised advertising – at least in comparison with non-targeted advertising – since this might be perceived as less vexatious, or even as informative.

### **3.4. The legal framework of data collection and commercialisation**

**84.** The collection and commercialisation of data are subject to restrictions which emerge from data protection law. At the level of non-constitutional law, data protection law fleshes out the terms and procedures for the protection of fundamental rights, in particular of the so-called general right of personality. The general right of personality is an expression of human dignity and of the freedom to act (Art. 1 § 1 in conjunction with Art. 2 § 1 of the Basic Law [*Grundgesetz* – GG]). It protects all conduct which is relevant to the development of personality, in particular with regard to self-determination (including the right to informational self-determination), privacy and self-portrayal.<sup>62</sup> In particular the right to informational self-determination and the aspect of privacy define which data of a person are protected by fundamental rights (personal data).<sup>63</sup> Additional protection of non-personal data emerges from the fact that the integrity and confidentiality of information technology systems may also be relevant in terms of fundamental rights.<sup>64</sup> It is then possible to derive stipulations for the utilisation<sup>65</sup> of data from the relevance of the aspect of self-portrayal in terms of personality.<sup>66</sup>

**85.** Data protection law has its roots in a right of defence towards the State, which is an expression of fundamental rights. However, it goes beyond this right of defence in the sense that it also provides for protection against data being used in economic contexts.<sup>67</sup> This has taken on ever greater significance given the increasingly extensive collection and commercialisation of data that has taken place in recent years.

**86.** The criticism has become louder that data protection law is high in prohibitions and inflexible, and hence that while it serves the (necessary) protection of those concerned, it permits insufficient scope for innovations; as a result, in particular the analysis of mass data (big data) is made difficult, which is not justified with regard to economic development and to the benefit to society that was associated with such analyses. It is therefore necessary, according to such criti-

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<sup>62</sup> Federal Constitutional Court (*Bundesverfassungsgericht*), Judgment of 5 June 1973, 1 BvR 536/72 – *Lebach*; Judgment of 15 December 1983, 1 BvR 209/83 and others – *Census*, BVerfGE 65, 1 ff.

<sup>63</sup> Cf. section 3(1) of the Federal Data Protection Act.

<sup>64</sup> Federal Constitutional Court, Judgment of 27 February 2008, 1 BvR 370/07 and others – *Online searches*, BVerfGE 120, 274 ff.

<sup>65</sup> The term is defined in this Special Report in the broadest sense, i.e. in derogation from the statutory definition contained in section 3(5) of the Federal Data Protection Act.

<sup>66</sup> In addition to this constitutional protection, cf. Art. 8 in conjunction with Art. 51 of the EU Charter of Fundamental Rights; Art. 8 ECHR and Convention No. 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

<sup>67</sup> Cf. section 1(2) No. 3 of the Federal Data Protection Act.

cism, to strike a better balance and be more flexible in order not only to guarantee the necessary data protection, but also to facilitate innovation.<sup>68</sup>

**87.** In competition-policy terms, the respective configuration of data protection by legislature (inflexible or flexible) must be accepted as long as it does not unduly distort competition. The question as to what level of data protection is optimal in terms of economic theory can in any case not be answered in general terms. In particular, economic findings in this regard can only be applied in individual cases. Hence, the Monopolies Commission refrains from responding to the criticism that has been voiced.

**88.** That being said, the question has also not yet been resolved as to the degree to which data protection law provides legal protection of data as property. It is postulated that, according to the case-law, the individual does not have a right in the sense of absolute, non-restrictable control of “his/her data”.<sup>69</sup> There is consensus that a duty of protection incumbent on the State can also exist in the event of informational power asymmetries.<sup>70</sup> Nonetheless, it remains unclear whether and to what extent individuals, over and above their right of defence that is established in terms of fundamental rights and the right to protection which this entails, are also entitled to exercise any rights over the potential asset value of personal data, and hence over the use and commercialisation of such data.<sup>71</sup>

**89.** The award of undisputed, absolute rights, wherever possible, would be advisable in terms of competition policy. It is not clear here from an economic point of view what form of attribution of the rights of disposal leads to the most efficient market equilibrium. There is in any case considerable political discretion when it comes to the shaping of data protection law. However, in the interest of legal clarity, it is recommended to lend detail to the rights of disposal within the framework of the data protection regulations.

**90.** Regardless of the existing legal uncertainty, data protection law does contain a number of principles which are to be taken into account in the further evaluation in terms of competition economics and competition law. In particular, the collection and processing of data or the utilisation of personal data is only permissible when founded on a legal basis or if the data subject has consented (section 4(1) of the Federal Data Protection Act). Furthermore, the storage, modification or use of personal data is only permissible for the purposes for which they were stored (section 14(1) of the Federal Data Protection Act). A change of the purpose, in turn, is contingent on there being a legal basis, the data subject having consented or another legal justification being applicable (section 14(2) of the Federal Data Protection Act). The planned European General Data Protection Regulation is to refine and supplement these principles, not least by means of more effective information obligations in data processing.<sup>72</sup> The Federal Government will be pushing for the rapid adoption of the General Data Protection Regulation.<sup>73</sup>

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<sup>68</sup> Katko/Babai-Beigi, *Accountability statt Einwilligung?*, MMR 2014, 360 ff. Peifer, *Verhaltensorientierte Nutzeransprache – Tod durch Datenschutz oder Moderation durch das Recht?*, K&R 2011, 543-547.

<sup>69</sup> Kramer in: Auernhammer, BDSG, 4th ed. 2014, section 4 No. 6 referring to Federal Constitutional Court, Judgment of 15 December 1983, 1 BvR 209/83 among others – *Census*, BVerfGE 65, 1 ff.; Federal Constitutional Court, Judgment of 23 October 2006, 1 BvR 2027/02 (Insurance consent; “no de facto ownership right”).

<sup>70</sup> von Lewinski in: Auernhammer, BDSG, 4th ed. 2014, Introduction, No. 63.

<sup>71</sup> Cf. Nuremberg Higher Regional Court, Order of 23 January 2013, 1 Ws 445/12; Saxon Regional Labour Court, judgment of 17 January 2007, 2 Sa 808/05; Halle Regional Court, judgment of 5 December 2013, 5 O 110/13; Bavarian Superior Regional Court, judgment of 24 June 1993, 5St RR 5/93.

<sup>72</sup> Cf. in particular Art. 6 § 1, 4, Art. 8, 12, 14, 20, 22-23, 28, 31-34, 40 ff., 73 ff. (in particular Art. 79 f.) of the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), CKOM(2012) 11 final, on the scope of the protection provided under the General Data Protection Regulation. On the current stipulations of EU law cf. in particular Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 November 1995, p. 31. E---privacy Directive 2002/58/EC, OJ L 201 of 31 July 2002, p. 37, applies for the most part only to classical telecoms and not to internet service-providers.

<sup>73</sup> Federal Government, statement on the XXth Biennial Report of the Monopolies Commission 2012/2013, Bundestag printed paper (BT-Drs.) 18/4721, paras. 11-12.

### 3.5. Competition policy implications

91. The above information has shown that the collection of extensive data stocks and their evaluation are part of the everyday operations of many service-providers on the internet. At the same time, a vast number of internet users benefit from the increased utilisation of data in the shape of personalised services, which in some cases are even free, as well as a highly dynamic competitive environment where innovation is constant. That being said, because of the increased utilisation of personal data, there is a need for action under competition policy.

#### 3.5.1. Adjustment and improved enforcement of data protection standards

92. The collection and commercialisation of a wide variety of data is the norm on the internet. However, particularly the automatic transmission of data to companies (e.g. by using cookies) repeatedly causes reservations on the part of privacy advocates and sections of the public. There are fears, for instance, that detailed user profiles will be created encompassing not only shopping habits, but also political, religious or sexual preferences. In this light, it is first and foremost the job of data protection law to create unambiguous regulations for the digital world specifically indicating which data may be collected and to what degree they may be evaluated.

93. In competition-policy terms, it should be noted that the relative rigour of data protection law can impact companies' competitiveness, and hence also their innovativeness. Where the ability to collect and evaluate large data stocks is vital to success in competition, companies that are subject to less stringent data protection standards are likely to have a competitive advantage. It may be basically presumed that companies will make use of the opportunities granted to them to collect and process data. As such, competition to maintain higher data protection standards is also conceivable, but so far at least such competition tends to be more the exception than the rule. The extent to which this is due to ignorance on the part of many consumers regarding the collection and processing of their data, or actually to the superiority of "data-rich" business models, must remain unresolved here.

94. However, this does not mean in terms of competition policy that data protection standards should be lowered. Market players do frequently claim that they are at a disadvantage in competition with U.S. companies, in particular as a result of the stricter German data protection law.<sup>74</sup> Instead of reacting to this by lowering data protection standards, efforts should be made to enforce existing regulations. Independently of this, as a matter of principle the aim should be to harmonise data protection regulations, ideally at global, but at least at European level, in order to create a level playing field in this regard and to avoid distortions of competition resulting from different data protection standards. Various attempts have been made and are still being made in this regard at European level.

95. Thus, first of all the "Cookie Directive" deserves to be mentioned, which was adopted at European level back in 2009, and which originally was to have been transposed into national law by 25 May 2011.<sup>75</sup> No explicit transposition has taken place in Germany so far, but the Federal Government and the European Commission are presuming that German law is already in line with the stipulations of the directive.<sup>76</sup> The directive provides in particular for the explicit consent of internet users to the use of tracking cookies, tracking pixels and similar techniques. It hence aims to replace the opt-out approach that applies to the storage of specific cookies with an across-the-board opt-in approach. However, the directive was transposed non-uniformly by the individual Member States – if at all.<sup>77</sup> Explicit consent to the utilisation of

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<sup>74</sup> For instance, in the *Deutscher Startup Monitor 2013*, 57 percent of respondents from the ICT sector claimed that German data protection had a negative effect on their performance, while only 18 percent stated that its effect was positive. In the *Deutscher Startup Monitor 2014*, roughly 30 percent of all respondent companies referred to the current data protection regulations as a major to extremely grave obstacle to their business activities. cf. *Deutscher Startup Monitor 2013, 2014*, <http://deutscherstartupmonitor.de>, retrieved on 2 March 2015.

<sup>75</sup> Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation OJ EU L 337 of 18 December 2009, p. 11.

<sup>76</sup> Cf. Huber, D., *Verwendung von Cookies nur noch bei ausdrücklicher Einwilligung der Nutzer?*, 31 March 2014, <http://www.it-recht-kanzlei.de/cookies-einwilligung-datenschutz.html>, retrieved on 2 March 2015.

<sup>77</sup> This is caused in particular by recital 66 of the directive, in accordance with which a browser configuration permitting cookies to be used could suffice as general user consent.

cookies is now necessary in the majority of EU States, such as in the Netherlands or in Spain. The opt-out approach has been chosen for instance by Finland and Luxembourg.<sup>78</sup> Consequently, the directive has not contributed towards the adequate harmonisation of European data protection law with regard to cookies and other methods.

**96.** The transposition problems associated with the Cookie Directive show that, in order to create uniform European data protection standards, the instrument of a directly applicable regulation is preferable as a matter of principle. This is the only way to guarantee that the same standards apply to all European companies and that distortions of competition are avoided in this regard. Against this background, the planned European General Data Protection Regulation, which is to substitute the Data Protection Directive dating from 1995<sup>79</sup> and lead to the approximation of data protection standards in the EU, is also welcome. A further advantage of this regulation would be that it would presumably also cover companies which are domiciled outside the EU but offer their services within the EU (minimum contacts principle). By adopting the General Data Protection Regulation, hence, not only would it be possible to establish data protection standards which appropriately take account of the changes caused by digitalisation, but at the same time a competitive level playing field would be created for companies in the internet sector. In this regard, the view of the Federal Government is to be concurred with, namely that existing data protection rules must also be effectively enforced vis-à-vis non-European companies which offer goods and services within the EU.<sup>80</sup> The timely enactment of the European General Data Protection Regulation is advocated. With regard to its substance, data protection standards should not be lowered.

**97.** The Monopolies Commission considers the planned enactment of the General Data Protection Regulation to give reason to also examine the competences system in data protection law. A distinction should be made here between the following. Where data protection law protects citizens and holders of fundamental rights in the form of a defence right against the State, the principle of subsidiarity may provide strong arguments for granting competence solely to the national data protection authorities.<sup>81</sup> By contrast, where data protection law protects citizens as market players against the collection of data and their commercialisation by companies, it must be considered that companies frequently operate on cross-border markets and much data may also be commercialised across borders.

**98.** The existing competence regulations, and also those planned in the General Data Protection Regulation, do not adequately account for this market context. On the one hand, the General Data Protection Regulation facilitates access to the data protection authorities by virtue of the possibility to complain to the national data protection authority and the principle of a central contact point.<sup>82</sup> This obviates the need – as was previously the case – to turn to the authorities of various Member States, depending on whether the company in question, apart from its main domicile in the EU, also has a branch particularly in the home country of the seeker of legal protection. What is more, the General Data Protection Regulation is also intended to provide greater harmonisation of procedural rules than the previous law did. On the other hand, data protection procedures in cross-border cases are still likely to entail considerable practical difficulties (language, duration of the proceedings because of coordination between authorities, cross-border enforcement of sanctions). These practical difficulties may not only considerably harm legal protection, but also lead to inconsistent enforcement of the data protection law that has been approximated in the General Data Protection Regulation. This may cause a fragmentation of the desired single digital market which is problematic in terms of competition policy.

**99.** The experience gained in the enforcement of competition law suggests a dual structure for the enforcement of data protection law vis-à-vis companies: the Member States' data protection authorities should have competence for cases that are of regional significance (regional or national market); by contrast, in cases that are of significance beyond this

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<sup>78</sup> For an overview of the transposition of the Cookie Directive in individual Member States cf. e.g. Hinzpeter, B., "Cookie-Directive" in *Europa*, Computerwoche, 7 January 2015, <http://www.computerwoche.de/a/cookie-richtlinie-in-europa,2518064>, retrieved on 2 March 2015.

<sup>79</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 November 1995, p. 31.

<sup>80</sup> Cf. Federal Government (*Bundesregierung*), statement on the XXth Biennial Report of the Monopolies Commission 2012/2013, Bundestag printed paper 18/4721, para. 11.

<sup>81</sup> Art. 4 § 1, 5 § 3 TEU.

<sup>82</sup> Art. 51 ff., 73 § 1 of the Proposal loc. cit. (para. 1); EU Council, memorandum of 26 March 2015, 7466/15, Annex II. cf. in particular section 1(5) of the Federal Data Protection Act on the current law in Germany.



(cross-border market) – in particular in those which are of Union-wide significance – a central authority should have competence which has the expertise and resources that are needed to also effectively enforce European data protection standards vis-à-vis digital-economy companies that operate globally.

**100.** The Monopolies Commission is nonetheless aware that the European data protection authorities already take the market circumstances into account under the present law wherever possible. In particular, the coordinated approach taken by data protection authorities when prosecuting breaches against data protection by providers operating Europe-wide is to be welcomed in this regard.<sup>83</sup>

### **3.5.2. Enhancing consumer rights**

**101.** A fundamental problem when it comes to the extensive collection and commercialisation of private data on the internet is the asymmetric distribution of information between providers and consumers. As a rule, it is therefore virtually impossible for many internet users to understand which companies are collecting and evaluating what data and whether they are being linked with other data records. Moreover, many users may be unaware of the commercial value of their private data.

**102.** However, there are already multifarious ways today of restricting the transmission of specific data to companies if this is not wanted. Examples here include regularly deleting cookies and other data stored in the web browser.<sup>84</sup> What is more, it is possible to generally block the creation of (certain types of) cookies in the browser settings. Such settings are as a matter of principle relatively easy to implement, but not all internet users know this.<sup>85</sup> Apart from these possibilities for data-minimising utilisation of the internet, some companies also offer the possibility to have data records that were created in the past deleted and to generally block the collection of data via an opt-out.

**103.** In order to enable users to have more effective control of their data, the legislature could consider more frequent utilisation of the opt-in approach. Accordingly, companies would have to obtain users' explicit consent in order to store and evaluate (personal) data. As has been stated, such an opt-in approach has for instance been introduced regarding the storage of certain cookies in several countries.

**104.** For reasons related to data protection, more frequent utilisation of the opt-in approach in place of the opt-out approach appears to be desirable as a matter of principle. However, from a competition policy point of view, it should be pointed out that the obligatory consent of users to the collection and evaluation of their data could lead to certain business models receiving preferential treatment. Particularly with regard to the advertising market, companies likely to benefit from this operate services where there is obligatory registration and thus can obtain users' consent to data utilisation during the registration process. In comparison, advertising companies which are not in direct contact with users but collect data through anonymous tracking might draw the short straw given such a development. All in all, it is recommended to examine in detail for what type of data utilisation users' explicit consent is actually to be obligatory.

**105.** A further approach towards strengthening consumer rights would be to introduce the right to data portability that is envisioned in the planned European General Data Protection Regulation.<sup>86</sup> This is to oblige companies to enable stored customer data to be transferred to other companies and/or to make these data available to users for forwarding to the new provider. The competitive impact of such a right depends decisively on its specific structure. Where it primarily covers content data which users have agreed to provide to the company, in competition terms this could lead to a welcome weakening of possible lock-in effects. This would make it less simple for providers of online services, for in-

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<sup>83</sup> Cf. in general the Resolution of the 87th Conference of Data Protection Commissioners of the Federation and the *Länder* of 28 March 2014 on major principles of this coordination.

<sup>84</sup> This at least applies to non-browser-dependent HTTP cookies. "Flash cookies" are more difficult to delete, and may enable users to be further tracked although they have deleted their HTTP cookies. Some more recent browsers can however be set up to delete some of these cookies.

<sup>85</sup> A further possibility is for instance to use proxy servers which pass the enquiries of internet users on to another IP address and hence hide the identity of the user.

<sup>86</sup> Cf. Art. 18 of the European Commission's Proposal of 25 January 2012 for a Regulation on the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

stance, to unilaterally adjust terms and conditions for use which might involve further access to data since they might have to fear losing users.

**106.** Even greater impact might result from the right to data portability if this included not only contents directly provided by users, but also of usage data generated within the interaction between the online service and its users, such as click data or information on page views. However, such a right to data portability could be equivalent to redistributing rights given that, in many cases, it is by no means clear who holds the rights to the data in question. So far, companies claim such data exclusively for themselves as a rule. This very exclusivity of data which were created directly by or with the aid of users is criticised because it was said that this would create commercialisation monopolies which constitute an obstacle to innovation. Against this background, in some cases it is proposed that consumers should only “lend” their data to companies and that they should be able to delete it via standardised interfaces or to make it available to other services at any time.<sup>87</sup>

**107.** Also, in order to further strengthen consumer rights, policy-makers could take action to enforce the applicable data protection law better. The introduction of collective lawsuits by consumer associations would be welcome in this context.<sup>88</sup>

### **3.5.3. More extensive consideration of data in competition proceedings**

**108.** The Monopolies Commission discussed in its XXth Biennial Report whether the possibility of access to data by companies should be considered more extensively for the examining of competition law issues.<sup>89</sup> This might in particular be justified by the fact that – as illustrated in this chapter – data is increasingly becoming a competition factor for companies and can be regarded as a kind of “raw material” for digital business models. As has been illustrated, data is relevant here not only to allow the more targeted placing of online advertising, but also for the constant perfecting of existing online services and the development of new ones.

**109.** In terms of competition economics, it appears necessary to give greater consideration to data, in particular in the context of merger control, since here relatively new internet services with so far only low turnover, but potentially highly valuable data inventories, may frequently be bought up by established groups. Competition authorities have recognised the need to also consider aspects of data concentration when assessing a merger. For instance, in the case of *Facebook/WhatsApp*, the European Commission recently examined the impact of the merger on the possibility of data access for the purpose of subsequent utilisation for the advertising market.<sup>90</sup> Here, the Commission not only explored the status quo, which is that WhatsApp has not collected any user data, but over and above this examined the hypothetical case in which WhatsApp were to commence collecting user data. The Commission found here that, even in the latter case, there would be no concentration of advertising-relevant data on Facebook which would be problematic in terms of competition law, since many other companies were also collecting extensive data. The merger was finally approved without competitive concerns.

**110.** It should be emphasised that competition authorities have so far only examined the impact of a greater data concentration on the position on the advertising markets. The significance of data for the perfecting of existing products and the development of new ones, as well as possible data protection aspects, by contrast, are not in the focus of the authorities’ examination.

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<sup>87</sup> Cf. e.g. Hofmann, T./Schölkopf, B., *Vom Monopol auf Daten ist abzuraten*, FAZ, 29 January 2015.

<sup>88</sup> Cf. Federal Ministry of Justice, Draft Bill of 13 February 2015 for an Act to Improve Civil Law Enforcement of Consumer-protection Provisions of Data Protection Law, *Bundesrat* printed paper (*BR-Drucksache*) 55/15. Collective lawsuits by consumer associations are already possible in Austria. For instance a collective lawsuit is already pending in Vienna against Facebook; cf. [http://www.europe-v-facebook.org/sk/pa\\_de.pdf](http://www.europe-v-facebook.org/sk/pa_de.pdf).

<sup>89</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 51 ff.

<sup>90</sup> European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 164 ff.

## 4 Online advertising markets

**111.** The advertising market plays a special role on the internet since it is frequently the side of multi-sided platform markets on which profits are achieved. In fact, online advertising is the central source of revenue for a large number of online services and website operators, and in many cases also the only way to make a profit. True, there are alternatives to financing via advertising, in particular via the provision of paid content. However, according to sectoral representatives, the willingness to pay of many internet users is not particularly pronounced yet.

**112.** The market for online advertising is highly dynamic, and has become more significant in recent years. Publicly available market data on online advertising turnover is inconsistent, and varies depending on the source due to different collection methods. Accordingly, the information presented in this chapter is also only to be understood as an orientation.<sup>91</sup> According to information from IAB Europe, the online advertising market volume in Europe increased by almost 12 percent, from approx. EUR 24.4 billion in 2012, to reach approx. EUR 27.3 billion in 2013.<sup>92</sup> The market volume in Germany grew by roughly 10 percent in the same period to reach approx. EUR 4.7 billion in 2013.<sup>93</sup> According to the Circle of Online Marketers (Online-Vermarkterkreis, OVK) within the German Association for the Digital Economy (Bundesverband Digitale Wirtschaft, BVDW), roughly 25.5 percent of net advertising investment in Germany was accounted for by the internet as an advertising medium in 2013. Only television achieved a larger share, at 28.4 percent.<sup>94</sup>

**113.** Given the considerable significance that advertising has for most online services, the online advertising market is discussed in greater detail below. To this end, first of all the structure of the online advertising market is outlined, focusing on the prevalent advertising formats. Then, the market definitions set by the competition authorities regarding the provision of online advertising space are examined more closely in economic terms. Also, potential competition problems in online advertising are indicated.

### 4.1. Types of online advertising

**114.** Online advertising can be sub-divided according to a number of criteria. A distinction that is frequently made, and which is also applied below, is by search-based advertising, which is presented in addition to search results – next to them and above them – and non-search-based advertising, which for instance includes display and in-stream video advertising.<sup>95</sup> Other types of advertising are online classified advertising and online small ads. These are attributed to non-search-based advertising, but can also be shown as a separate category.

**115.** According to information from IAB Europe, the largest share of the European market volume of EUR 27.3 billion in 2013, at EUR 13.4 billion, was accounted for by search-based advertising.<sup>96</sup> Display advertising accounted for EUR 9.2 billion, and online classified advertising and small ads accounted for EUR 4.6 billion.<sup>97</sup> A market volume of online advertising coming to approx. EUR 4.68 billion is shown for Germany, approx. EUR 2.56 billion of which is accounted for by search-based advertising, EUR 1.32 billion by display advertising and EUR 0.8 billion by online classified advertising and

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<sup>91</sup> Differences in the sales figures presented for online advertising may be caused in particular by whether they are expressed as gross or net advertising investment. Gross advertising investment is constituted by advertisers' expenditure on placing advertisements pure and simple, not including production costs or any discounts that are granted. Net advertising investment is the sum of gross advertising investment minus discounts and intermediaries' fees. They constitute the turnover of the advertising media. However, the turnover illustrated below is not strictly orientated in line with this definition.

<sup>92</sup> Cf. IAB Europe/IHS, AdEx Benchmark 2013, July 2014, p. 13. The information is based on gross advertising investment invoiced by content providers, including commission fees and after taking into account discounts on list prices. Production costs and supranational advertising expenditure are not included.

<sup>93</sup> Cf. *ibidem*, p. 15.

<sup>94</sup> Cf. OVK, Online Report 2014/02, 10 September 2014, p. 9. Internet advertising here includes turnover from display advertising and search-based advertising. The net advertising investment considered includes commission fees.

<sup>95</sup> Cf. European Commission, Decision of 11 March 2008, M.4731 – *Google/DoubleClick*, paras. 11, 16-17, 48 ff., 70 and 95 ff.

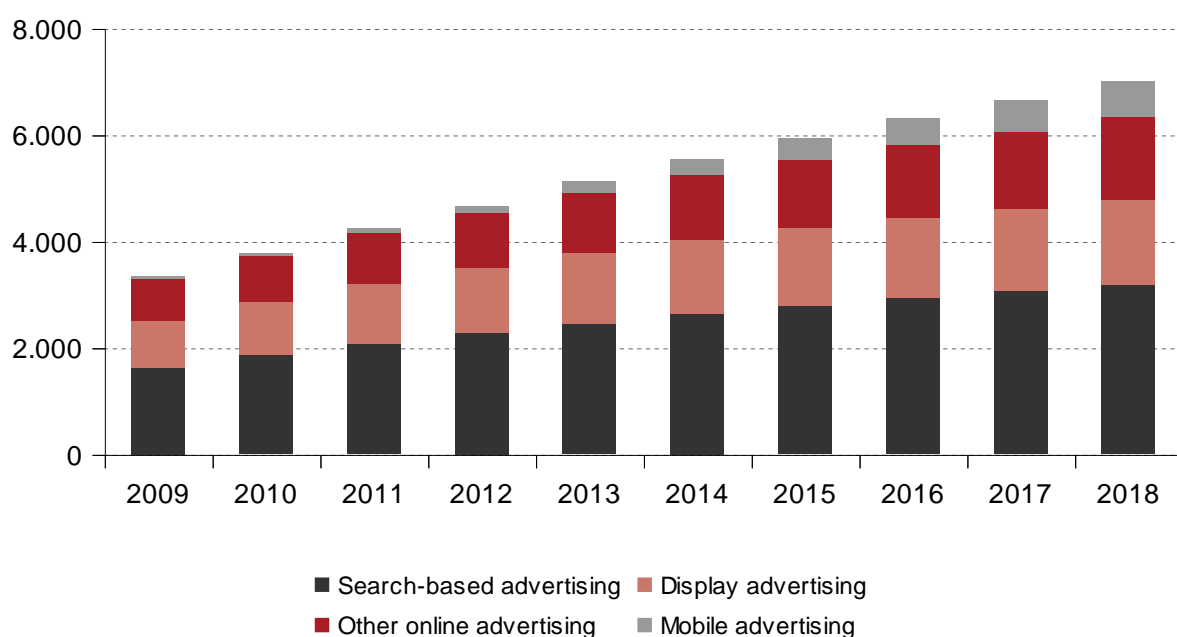
<sup>96</sup> The worldwide turnover of search-based advertising was more than USD 48 billion in 2013. Cf. PwC, Outlook insights: an analysis of the Global entertainment and media outlook 2014–2018, <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2014/internet-advertising.pdf>, retrieved on 28 April 2015.

<sup>97</sup> Cf. IAB Europe/IHS, AdEx Benchmark 2013, July 2014.

small ads. Similar values for Germany are also shown by PwC.<sup>98</sup> Accordingly, the market volume of stationary online advertising in 2013 was EUR 4.9 billion, approx. EUR 2.45 billion of which was accounted for by search-based advertising, EUR 1.35 billion by display advertising, EUR 0.9 billion by online classified advertising and small ads, as well as EUR 0.2 billion by video advertising. An additional market volume of EUR 213 million is shown for mobile advertising. The market volume of all online advertising in Germany (stationary and mobile) is forecast to reach roughly EUR 7 billion in 2018. Figure 4.1 illustrates the turnover development of individual forms of online advertising in Germany from 2009 to 2018.

**116.** The most important forms of advertising are briefly outlined below. To this end, in addition to search-based advertising, display advertising is explored as the most important form of non-search-based advertising. What is more, because of its growing significance, the market development of mobile advertising is examined. There is no detailed analysis of other forms of online advertising such as online small ads.

**Figure 4.1: Market developments in online advertising in Germany (in EUR million)**



N.B.: The data refer to net sales

Source: Own illustration based on PwC, German Entertainment and Media Outlook: 2014-2018, December 2014

#### 4.1.1. Search-based advertising

**117.** Search-based advertising is displayed, mostly in text form, in addition to the search results obtained when using search engines, on the basis of the search term that has been entered. Search-based advertising is particularly significant for advertisers since users reveal their specific interest by entering the search query, and advertising can thus be displayed particularly precisely for a specific group of internet users. Search-based advertising is hence particularly well suited to persuade people to purchase a specific product.

**118.** Advertising space in search-based advertising is awarded via an auction procedure as a rule. In a second-price position auction, advertisers can bid on specific search words (keywords). In accordance with the auction mechanism, the winners of the auction (if there are several advertising spaces) need to pay the price which the respectively second-

<sup>98</sup> Cf. PwC, German Entertainment and Media Outlook: 2014-2018, December 2014. The data represents net sales and is based on data from the online marketing circle in the BVDW (OVK), the German Advertising Federation (ZAW) and Ovum.

to-highest bidder (and next in line) had bid, but only if a user has indeed clicked on the advertising (“cost-per-click” - CPC).<sup>99</sup>

**119.** The market for search-based advertising naturally covers primarily operators of horizontal search engines, that is those search engines which search the internet as a whole and are not restricted to specific categories. The high level of concentration on the search engine market in Germany – Google is estimated to have a 90 percent share of search queries – accordingly also impacts the availability of search-based advertising. Google Adwords is the market leader here by far. For advertisers who wish to invest in search-based advertising, there is hence virtually no way to escape Google in Germany if they wish to obtain optimum reach.

**120.** This exceptional position of Google in search-based advertising is also likely to be reflected in advertising turnover. Google does not show any official turnover figures for Germany in its business report.<sup>100</sup> However, it can be presumed that the lion's share of search-based advertising turnover is accounted for by Google in Germany because of its market position.

#### **4.1.2. Non-search-based advertising**

**121.** Non-search-based advertising can be understood to largely encompass all types of online advertising which are not search-based advertising. This particularly includes “display advertising”, which is shown on arbitrary websites and for instance can be aligned to websites' respective content. Increasing significance attaches to social media advertising which is shown in social networks. Further types of non-search-based advertising include audio or video advertising (instream advertising) as well as – depending on the definition – online small ads. The following information focuses on display advertising as the currently most important form of non-search-based advertising.

**122.** Display advertising can contain graphical advertising, text, images, animations or videos. The best-known forms include banners and pop-ups. Unlike search-based advertising, display advertising was originally used mainly to underpin brand recognition and brand awareness because it offers fewer targeting possibilities<sup>101</sup>, such as the context of the visited website or the user's IP address, as well as the possibility to use graphical advertising elements. That being said, this form of advertising has changed considerably in recent years thanks to improved targeting possibilities based on user behaviour, so that the difference in terms of the effectiveness of search-based and non-search-based advertising is likely to have decreased.

**123.** Traditionally important players on the market for display advertising include advertisers that wish to advertise on the internet, as well as website operators (publishers), who provide advertising space for a fee, in particular intermediary media agencies, marketers, ad networks and ad exchanges.<sup>102</sup> Media agencies particularly support major advertisers in planning, placing, evaluating and paying for advertising. As representatives of many publishers, marketers combine their advertising space to achieve a greater reach and market it to advertisers and media agencies with the aim of putting the advertising inventory to optimal use. Similar to marketers, advertising networks also bundle publishers' advertising space, but unlike the latter for instance also take on very small publishers. Advertising networks are used in particular to market publishers' unfilled space. Where appropriate, this advertising space is enriched to include further data and targeting methods and sold to advertisers. Ad exchanges are online market places which facilitate the purchasing and sale of advertising space in an auction procedure, also across various advertising networks. The advertising is then delivered via “adserver”, which moreover document the number of clicks or advertising impressions.

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<sup>99</sup> This is a highly simplified illustration of how search-based advertising is auctioned. Cf. on this e.g. Edelman, B., Ostrovsky, M./Schwarz, M., Internet Advertising and the Generalized Second-Price Auction: Selling Billions of Dollars Worth of Keywords, *American Economic Review* 97(1), 2007, pp. 242-259; Varian, H.R./Harris, C., The VCG Auction in Theory and Practice, *American Economic Review* 104(5), 2014, pp. 442-445; McAfee, R.P., The design of advertising exchanges, *Review of Industrial Organization* 39(3), 2011, pp. 169-185.

<sup>100</sup> Google only shows separate turnover in its business report for those countries which account for at least ten percent of its worldwide turnover. In 2013, this was only the USA (45 percent) and the United Kingdom (10 percent), but not Germany.

<sup>101</sup> Targeting refers to deliberately approaching internet users on websites.

<sup>102</sup> Cf. with the following information Schroeter et al., *Die Zukunft des Display Advertising. Intelligenter – automatisierter – effizienter durch Real Time Bidding*, 2012.

**124.** The targeting of classical display advertising is largely aligned to the advertising environment, i.e. the contents of the websites themselves. These contents are used to draw conclusions on the target group that is to be reached. Hence, this form of environment advertising has only limited accuracy, and leads to advertising wastage. Unlike search-based advertising, classical display advertising was frequently invoiced according to the number of ad impressions (“cost-per-impression” - CPI). Now, performance-orientated invoicing models such as cost-per-click are also prominent in display advertising.

**125.** The increasing collection and commercialisation of data, as well as technological developments, are currently leading to changes in display advertising. This is specifically reflected in better possibilities for targeting which enable individual users to be approached directly, as well as in the increasing auctioning off of advertising space in real time (real-time advertising). Given the still relatively young audience and behavioural targeting, certain ads are linked to a user profile and then offered on an auction marketplace where advertisers can bid for this user profile. The advertisements posted by the auction winner are then shown to this user (profile).<sup>103</sup> Thus, audience targeting enables advertisers to focus on specific user (profiles) on the basis of which targeted advertising can be shown on different websites. This reduces advertising wastage in comparison to environment advertising.

**126.** The continuing technological development of the display advertising market has led to changes in the value creation chain in this field. Alongside the classical market players mentioned above, players and platforms have originated which make audience targeting and real time advertising possible at all. Even though a clear distinction is lacking, so-called supply-side platforms (SSP), demand-side platforms (DSP) and data-management platforms (DMP) which have originated recently should be mentioned here in particular. SSPs permit publishers and marketers to improve their management of available advertising space and to offer it to several advertisers combined via a single interface. In order to spread publishers' advertising space as widely as possible, SSPs are linked with several ad exchanges as a rule. Similarly, DSPs enable advertisers and agencies to purchase advertising space combined via an interface from various providers automatically. For this, they are also frequently linked with several ad exchanges. Hence, while SSPs and DSPs ultimately compete with classical advertising networks, DMPs are platforms that collect, aggregate, evaluate and trade in third-party data. Such data (user profile data) may be used by DSPs among others to make advertising delivery more targeted and reduce advertising wastage.<sup>104</sup>

**127.** The development of the above-described audience targeting and real-time advertising could have far-reaching consequences for the display advertising market. Since this will ultimately make it possible to place targeted advertising, regardless of the concrete advertising environment, advertising space becomes more interchangeable, and advertising environments become less significant. This heightens competition between providers of different advertising spaces and restricts pricing opportunities. The reduced significance of the advertising environment facilitated by the ability to target precisely might in particular place providers of premium content under pressure, i.e. websites with content that is particularly interesting for advertisers which in the past were able to demand a higher price for their premium environment. This development appears to be relevant particularly for providers of journalistic content since the drafting of high-value journalistic content usually entails higher costs.

**128.** Furthermore, the current significance of display advertising might change. While in the past this was still used largely to increase brand awareness, it can now also be used in a targeted fashion to inspire users to make direct purchases (“performance-orientated advertising”). Display advertising is hence likely to increasingly compete with search-based advertising and hence to put competitive pressure on it.

**129.** Finally, it should be pointed out that the field of display advertising is less concentrated than search-based advertising. Since display advertising in principle can be placed on any website, advertisers have a large number of advertising space providers at their fingertips. However, the high level of fragmentation on the provider side of advertising space should not deceive us: the high-reach websites and portals are particularly significant for advertisers when it comes to posting ads.

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<sup>103</sup> Cf. Schroeter, A. et al., *Real Time Advertising. Funktionsweise – Akteure – Strategien*, September 2013, p. 12.

<sup>104</sup> Cf. ibidem, pp. 15 ff.

**130.** Moreover, it should be noted that there is no “single” display advertising market. In fact, the competitive situations at the individual stages of the value creation chain should be analysed separately in a comprehensive competition examination. It should be taken into account here that some market players operate at several stages of the value creation chain with regard to their products and services. One example is Google, which is an important provider not only in search-based advertising but also in display advertising, placing its various products at almost all stages of the value creation chain. Google for instance operates an advertising network (Google Display network), an adserver (DoubleClick), an ad exchange and a supply-side platform (DoubleClick Ad Exchange), as well as a demand-side platform (DoubleClick Bid Manager).

#### **4.1.3. Mobile advertising**

**131.** A sub-category of online advertising is constituted by mobile advertising, which is displayed on smartphones and tablets in particular. Differences vis-à-vis classical online advertising consist in particular in the smaller size of the displays on the devices used and the increased utilisation of apps in place of browsers. The latter means that placing advertising on mobile devices largely concentrates on apps. These apps transmit data to advertising firms, which use them to adjust ads in line with usage habits. Many companies have now found ways of placing mobile ads efficiently. One example of this is Facebook, which now makes more than two thirds of its advertising revenue through mobile advertising.<sup>105</sup>

**132.** The market for mobile advertising is currently developing in a highly dynamic manner, and in 2013 was approx. EUR 14.6 billion worldwide. About EUR 7.1 billion of this was accounted for by search-based advertising, EUR 6 billion by display advertising and EUR 1.4 billion by “messaging advertising”.<sup>106</sup> Sales of mobile advertising in 2013 were approx. EUR 2.5 billion in Europe, approx. EUR 1.4 billion of which were accounted for by search-based advertising, approx. EUR 1 billion by display advertising and EUR 161 million by messaging advertising.<sup>107</sup> It is reported for Germany that the market volume for mobile advertising in 2013 was approx. EUR 213 million.<sup>108</sup> A market volume of EUR 65 million was shown in 2013 for mobile display advertising, and EUR 107 million was forecast for 2014, which would correspond to a growth of 65 percent.<sup>109</sup> No precise information on mobile search-based advertising is publicly available for Germany. The International Advertising Bureau shows a market volume of EUR 109.6 million for both 2012 and 2013.<sup>110</sup>

**133.** The fact that the market volume of mobile advertising appears to be small in Germany in comparison to the European figures is most likely due to the very high market volume in the United Kingdom. At roughly EUR 549 million, mobile display advertising in the UK had already reached a share of approx. 25 percent of total display advertising in 2013, compared to only 4.9 percent in Germany.<sup>111</sup> At approx. EUR 686 million and a share of approx. 16.8 percent of total search-based advertising, furthermore, the market volume for mobile search-based advertising in the United Kingdom was much higher than in Germany.

**134.** Mobile advertising is also forecast to undergo dynamic growth in the future. According to a study by PwC, worldwide market volume will grow by more than 27 percent per year by 2017, and hence to a good USD 27 billion. This corresponds to a share of 15 percent of the entire online advertising market, which is forecast to account for a market vol-

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<sup>105</sup> Cf. Spiegel Online, *Erwartungen übertroffen: Facebook steigert Umsatz und Gewinn - dank Smartphone-Werbung*, 29 January 2015, [www.spiegel.de/wirtschaft/unternehmen/facebook-steigert-gewinn-a-1015557.html](http://www.spiegel.de/wirtschaft/unternehmen/facebook-steigert-gewinn-a-1015557.html), retrieved on 2 February 2015.

<sup>106</sup> Cf. IAB Europe/IAB/IHS, *Global Mobile Advertising Revenue 2013. The State of Mobile Advertising Around the World*, August 2014, [http://www.iabeurope.eu/files/6714/0793/5581/IAB\\_Europe\\_Global\\_mobile\\_advertising\\_revenue\\_2013\\_report\\_IHS\\_template.pdf](http://www.iabeurope.eu/files/6714/0793/5581/IAB_Europe_Global_mobile_advertising_revenue_2013_report_IHS_template.pdf), retrieved on 28 April 2015. The data represent gross turnover including commission fees and after taking into account discounts.

<sup>107</sup> Cf. *ibidem*.

<sup>108</sup> Cf. PwC, *German Entertainment and Media Outlook: 2014-2018*, December 2014. The information represents net sales and is based on data from Ovum.

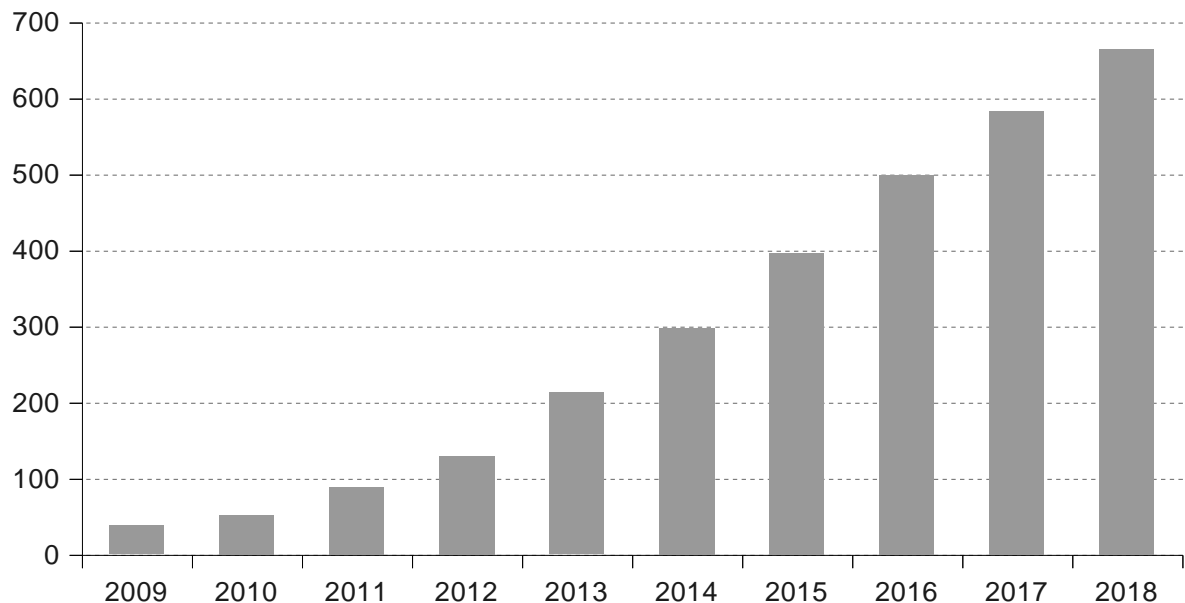
<sup>109</sup> Cf. OVK, *MAC Mobile-Report*, 2014/02, 10 September 2014; IAB Europe/IHS, *AdEx Benchmark 2013*, July 2014.

<sup>110</sup> Cf. IAB Europe/IHS, *AdEx Benchmark 2012*, August 2013; IAB Europe/IHS, *AdEx Benchmark 2013*, July 2014.

<sup>111</sup> Cf. IAB Europe/IHS, *AdEx Benchmark 2013*, July 2014.

ume of approx. USD 185 billion in 2017.<sup>112</sup> The International Advertising Bureau is forecasting a global market volume for mobile advertising of as much as USD 41 billion by 2017, 17 percent of which is to be accounted for by Europe.<sup>113</sup> According to estimates, the turnover of mobile advertising in Germany will grow by an annual average of 25.6 percent between 2013 and 2018, and will be roughly EUR 665 million in 2018.<sup>114</sup> This makes it the fastest-growing form of online advertising. Figure 4.2 shows the (anticipated) market development from 2009 to 2018.

**Figure 4.2: Market development of mobile advertising in Germany (in EUR million)**



N.B.: The data refer to net sales

Source: Own illustration based on PwC, German Entertainment and Media Outlook: 2014-2018, December 2014

## 4.2. The market definition of online advertising space

**135.** A much-discussed topic when it comes to evaluating the competitive situation in online advertising is the question of the market definition for the provision of online advertising space. The specific issue is whether the online advertising market actually constitutes a separate advertising market that is separate from other media genres, and if it does, whether this must be further sub-divided by forms of advertising. The previous practice of the competition authorities, and of the European Commission in particular, is portrayed and discussed below. The information is restricted to certain trend statements since concrete statements on the market definition can always only refer to specific individual cases, and ideally should be based on an empirical analysis.

**136.** The European Commission has presumed in its previous rulings that online and offline advertising constitute different de facto markets. This presumption is based above all on the fact of the markets having different characteristics.<sup>115</sup>

<sup>112</sup> Cf. Busch, U., PwC study. *Mobile Werbung: Umsatz steigt bis 2017 auf 27 Milliarden Dollar an, Werben & Verkaufen*, 5 June 2013, [http://www.wuv.de/digital/mobile\\_werbung\\_umsatz\\_steigt\\_bis\\_2017\\_auf\\_27\\_milliarden\\_dollar\\_an](http://www.wuv.de/digital/mobile_werbung_umsatz_steigt_bis_2017_auf_27_milliarden_dollar_an), retrieved on 27 February 2015.

<sup>113</sup> Cf. The Boston Consulting Group, *The Connected World. The Mobile internet Economy in Europe*, Study commissioned by Google, December 2014, p. 16.

<sup>114</sup> Cf. PwC, *German Entertainment and Media Outlook: 2014-2018*, December 2014. The information represents net sales and is based on data from Ovum.

<sup>115</sup> European Commission, Decision of 11 March 2008, M.4731 – *Google/DoubleClick*, paras. 44 ff.; Decision of 18 February 2010, M.5727 – *Microsoft/Yahoo! Search Business*, para. 61; Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 75 and 79.



Accordingly, online advertising is said to aim more towards achieving a direct reaction from customers, being able to be placed in a more targeted fashion and its success being more directly measurable. What is more, the invoicing procedures of online and offline advertising differ. While online advertising is said to facilitate invoicing by the concrete number of times that the pages are viewed, this had to be estimated when it came to offline advertising.

**137.** With regard to online advertising, the European Commission furthermore distinguishes as a matter of principle between search-based and non-search-based advertising, but has so far left open the market definition in its case-law. In concrete terms, it points out that search-based advertising largely serves to lead internet users directly to the advertisers' websites, while non-search-based advertising is used to establish brand awareness. What is more, search-based advertising was said to have better targeting possibilities, albeit continually improving targeting was also said to be possible using non-search-based advertising. Therefore, it was said to be possible to observe a coming together of the two forms of advertising, so that they might be substitutable from an advertiser perspective. From the point of view of website operators, by contrast, the two forms were said not to be interchangeable, but to in fact complement one another.<sup>116</sup> Moreover, the European Commission repeatedly examined the extent to which mobile advertising was to be distinguished from other online advertising, but also did not set any final market definition in this regard.<sup>117</sup> In geographical terms, the general market for online advertising was defined either by the country or language boundaries of the European Economic Area.

**138.** The market definition set by the European Commission for the provision of online advertising space is not without its detractors. People have for instance complained about the fact that it is based not on the actual substitution relations, but above all on market properties. However, this is said not to be sufficient to presume that there are separate markets. Rather, the European Commission is said to leave the decisive question open, namely whether the individual forms of advertising exert a disciplining effect on one another when it comes to pricing.<sup>118</sup>

**139.** This criticism appears to be justified. For instance, the European Commission's market definition is based among other things on the presumption that the precise targeting of advertising is a central differentiation criterion. This may well be true, but it does not mean that the two forms of advertising cannot compete with one another on price. In fact, one can presume that the less targeted form of advertising is thus cheaper. This applies as a matter of principle regardless of whether invoicing takes place via cost-per-click or cost-per-impression methods. In the view of the advertisers, ultimately, what is important is the return which can be realised via the advertising, depending on the investment needed to achieve this (Return on Investment – ROI). Those who suffer disadvantages as a result of less accurate targeting are hence above all the providers of this advertising space because they receive less for placing an ad.<sup>119</sup> Nonetheless, it should be taken into account that there might be groups of users who can only be reached via specific advertising space, and hence are not interchangeable from the point of view of advertising customers.

**140.** Independently of this kind of criticism, it should be pointed out that the further development of the forms of advertising portrayed above, in particular in display advertising, should be taken into account in future decisions adopted by competition authorities. As already mentioned, these new technologies make it possible to target internet users more precisely and in some cases to even address them individually. This leads not only to a situation in which providers of advertising space compete with one another more intensively because the advertising environment is less significant, but approximates display advertising as a whole more closely to search-based advertising. This convergence should be taken into account within the de facto market definition, especially since it is in particular the ability to approach users individually that was previously regarded as the main definitional characteristic. This applies all the more since the European Commission already pointed out in its decision in *Google/DoubleClick* that search-based and non-search-based

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<sup>116</sup> European Commission, Decision of 11 March 2008, M.4731 – *Google/DoubleClick*, paras. 54-55.

<sup>117</sup> European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 78-79 and the earlier rulings quoted therein (para. 74).

<sup>118</sup> Cf. Ratliff, J.D./Rubinfeld, D.L., Online Advertising: Defining Relevant Markets, *Journal of Competition Law & Economics* 6(3), 2010, footnote 72.

<sup>119</sup> Cf. *ibidem*, pp. 680 ff.

advertising were becoming more similarly effective, and that there might be a certain degree of substitutability between the two forms from an advertiser's point of view.<sup>120</sup>

**141.** Moreover, it cannot be ruled out that online and offline advertising too will continue to come closer together, and will be more and more substitutable from the point of view of some advertisers. This certainly appears to suggest itself given the strong growth in online advertising in comparison to many forms of offline advertising. In economic terms, it should be pointed out in this regard that it only makes sense to sub-divide the advertising market by media genres if they really are not substitutable, for instance because the intended advertising effect and the target audience can be largely reached via a specific medium. A study for the Swiss advertising market for instance suggests that individual forms of offline and online advertising are very much substitutable, so that the advertising market which holds de facto relevance covers several media genres from an advertiser's point of view.<sup>121</sup> However, at the same time, it should be taken into account that the substitution relationship may operate in one direction only. For instance, online advertising may be a substitute for print advertising, but print advertising may not be a substitute for online advertising. This once more confirms the need formulated at the beginning for an analysis of the competitive situation which takes individual cases into account.

**142.** The above considerations should be taken into account when it comes to defining a market for online advertising space. What is more, it should be considered when evaluating the market positions of individual companies when providing online advertising space that these operate as intermediaries between advertisers and internet users. This two-sided nature of the business model must be taken into account in the market definition and when evaluating market positions. Allegedly large shares on one side of the platform, in this case when providing online advertising space, can thus not be taken as proof of dominant positions since the market definition must take all relevant sides of the platform into account. This applies regardless of the already limited informative value of market shares. Even if individual providers of online advertising space are particularly significant to advertisers and these account for large shares of individual types of advertising, it is not yet possible to say anything about the de facto competitive position of these companies.

### **4.3. Potential competition problems on the online advertising market**

**143.** Several potential competition problems arising in online advertising are illustrated below. It should be noted here that some of this information is only relevant if a company actually has market power.

#### **4.3.1. Exclusive contracts**

**144.** As is also the case in other fields, a wide variety of different contractual terms and conditions are stipulated in contracts between advertisers and providers of, for instance, advertising space in order to establish a business relationship. Problems may ensue under competition law from long-term or particularly restrictive exclusive contracts.<sup>122</sup> This is the case if advertising platforms impose contractual restrictions on the advertising partners with regard to the possibility to transfer advertising campaigns to competing platforms, and concerning the cross-platform management of advertising campaigns.

**145.** Such exclusive contracts may lead to an artificial increase in advertisers' switching costs and limit their opportunities for multi-homing, i.e. the opportunity to use several advertising platforms at the same time. This reduces, firstly, competition intensity between the individual advertising platforms. Secondly, locking advertisers in to a provider of advertising space may lead to higher prices. The locking of the market caused by an increased difficulty to switch between contracting partners is likely to occur in particular if – as with many advertising-financed platforms – it is a market

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<sup>120</sup> European Commission, Decision of 11 March 2008, M. 4731 – *Google/DoubleClick*, paras. 12 and 53.

<sup>121</sup> Cf. Slembeck, T. et al., *Wettbewerbssituation im Schweizer Werbemarkt. Volkswirtschaftliche und kartellrechtliche Analyse der Entwicklungen im Schweizer Werbemarkt*, report by ZHAW commissioned by KE Media, 2013, p. 41.

<sup>122</sup> Cf. European Commission, Guidelines on Vertical Restraints, OJ EU C 130 of 19 May 2010, p. 1, paras. 129 ff., in particular para. 133 (there on "single branding").

that is characterised by network effects and which a dominant company is able to “tip” in its favour through its conduct, or on which it can consolidate its position.<sup>123</sup>

#### **4.3.2. Combining advertising space services and related services**

**146.** The business model of multi-sided platforms aims to include all relevant sides of the platform. The quality of the services offered to users is vital for making the platform attractive to advertising customers and generating turnover. If users and advertising customers are not sufficiently retained by a specific platform, this entails the risk that the platform operator may lose and gain market shares relatively quickly. Here, the attractiveness of the platform is as a rule of vital significance in competition from a user’s perspective.

**147.** At the same time, there are incentives to tie advertising customers to the platform, for instance by the contractual arrangements. This can take place by virtue of the platform operator, where possible, marketing the provision of advertising space via different services or for various devices together (bundling).

**148.** The extent to which the bundling of different advertising opportunities constitutes a bundling of different products or purely an extension of existing products may be difficult to ascertain in each individual case. For instance, a certain convergence of the products and services on offer on the online advertising markets can be observed. There are for instance indications that the presumption of separate search-based and display advertising markets may have become obsolete.<sup>124</sup> That being said, there may continue to be advertising space which is not exchangeable from the point of view of advertising customers because of its being linked to specific services and of the concomitant attractiveness generally or for specific groups of users (e.g. advertising on a search site with advertising in a social network). What is more, there is a mixing of functions within the value creation chain on the display advertising market.

**149.** Should there be separate demand, the services offered by a platform operator may initially be bundled to offer only a combined product. In the same way, as a matter of principle, all platform operators who market advertising space may bundle advertising space for individual device types or specific user services (in the case of Google e.g. YouTube) for which there is a separate demand.

**150.** In order to achieve bundling, advertising products can be combined for different services to form an overall product which is marketed uniformly, or by giving a discount to the advertising customers when they accept the combined products and services. Alternatively, advertising space for different device types can be marketed together.

**151.** The bundling of different forms of advertising may be positively assessed in economic terms if such bundling constitutes an added value for the advertising customers, which cannot be provided to them in another form. If competition works well, only bundling which entails an added value for the advertising customer constitutes a competitive advantage for the platform operator.

**152.** In contrast, the situation is less clear if well-functioning competition exists only to a limited degree. This is particularly the case if the platform operator is dominant. Such a situation provides incentives for the platform operator to use its leeway ensuing from market dominance to maximise profit. This may entail the provider deliberately bundling either its supply of services within the value creation chain, or the supply of advertising space in order to thus artificially concentrate demand on itself. This may enable it also to benefit by including services which are not competitive.

**153.** Bundling which is abusive in the legal sense is contingent on the company being dominant with regard to the bundled product. The bundled product must be a separate product, and not simply a product extension.<sup>125</sup> The products must be effectively bundled so that those active on the demand side can only purchase them together and not only as needed. The bundling must have a foreclosing effect, and even then is only abusive in the event of services “which, by

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<sup>123</sup> European Commission, Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ EU C 45 of 24 February 2009, p. 7, paras. 20 and 36.

<sup>124</sup> Cf. European Commission, Decision of 11 August 2008, M.4731 – *Google/DoubleClick* on the previous definition of online advertising markets.

<sup>125</sup> Cf. GC, Judgment of 17 September 2007, T- 201/04 – *Microsoft*, European Court Reports 2007, II-3601, paras. 918 ff.

their nature or according to commercial usage, have no connection with the subject of such contracts” (Art. 102(d) TFEU). Finally, overriding efficiencies may rule out abuse.<sup>126</sup>

**154.** It is virtually impossible to estimate the potential for abuse through bundling given that the market development is highly dynamic and unclear overall. However, in view of the fact that most successful internet platforms – apart from trading platforms – largely fund their services via advertising, it also cannot be ruled out that a platform operator that is dominant on the advertising site may have considerable incentives to establish and expand this market power through bundling.

**155.** Such practices on the part of a dominant platform operator are likely suitable to have appreciable foreclosure effects in individual cases. This is suggested not least by the fact that advertising customers may be willing to accept bundling since this enables them to avoid using non-established services that have uncertain prospects for success. This may constitute a significant impediment to new services. At the same time, exploitation effects cannot be ruled out given that advertising customers may only need advertising for specific user services or on certain types of devices.

**156.** Bundling several advertising products to achieve leverage in terms of market power is not necessarily justifiable in view of efficiency considerations given that the advertising customers eventually pay more than if they were able to choose between competing advertising products or than could actually be justified given their specific needs.

### **4.3.3. Scarcity of advertising space**

**157.** A potential competition problem with regard to online advertising is the possibility that providers of advertising space might make such space scarce in order to maximise their advertising revenue. The consequence of this may be that ongoing demand is no longer met, or only at prices which are higher in the long run.<sup>127</sup>

**158.** Providers of advertising space basically have two possibilities to make their advertising space scarce, while in practice it is likely that both variants will frequently occur in combination. First, the number of available advertising spaces may be directly limited by controlling volume, thus setting a limited number of advertising spaces in advance. Second, the number of advertising spaces may be limited by setting reserve prices in an auctioning process. The reserve price is the minimum price which advertising customers must pay to place ads. If the reserve price is not met, this leads to a scarcity of advertising space.

**159.** With regard to the auctioning of search-based advertising, theoretical analyses have shown that the optimal reserve price is positive.<sup>128</sup> If advertisers submit bids below the positive reserve price set by the companies, a scarcity of advertising space may result. Further theoretical studies show that a positive reserve price may serve to enhance welfare since it blocks advertising where consumers are insufficiently likely to find their product. At the same time, a profit-maximising reserve price may also place consumers and advertisers in a worse position under certain circumstances.<sup>129</sup>

**160.** Setting reserve prices within companies' revenue management must be considered as normal business and competition conduct. However, from a competition policy point of view, a scarcity of advertising space may cause problems if companies have market power and are for instance able to restrict the number of advertising spaces over and above a competitive level by setting excessive reserve prices. This is likely to be the case in particular if a company is able to provide advertisers with advertising space which they consider not to be substitutable by advertising space obtained from other providers, for instance because a certain group of customers can only be reached via this provider. Since advertising customers can thus only place ads at higher prices, a scarcity of advertising space is likely to constitute exploitative abuse in such a case. However, it is likely to be difficult to identify and sanction such abusive conduct since it

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<sup>126</sup> An exception applies if the commercial usage has been established by the dominant company itself; Cf. GC, Judgment of 6 October 1994, T-83/91 – *Tetra Pak*, European Court Reports 1994, II-755, para. 137.

<sup>127</sup> European Commission, Decision of 26 November 2008, 39.388 and 39.399 – *German Electricity Wholesale Market and German Electricity Balancing Market*, paras. 28 ff.; Decision of 12 April 1999, 30.373 and 37.143 – *P & I Clubs Pooling Agreement*, OJ L 125 of 19 May, p. 12, para. 128; Decision of 16 September 1999, 35.134 – *Trans-Atlantic Conference Agreement*, OJ L 95 of 9 April 1999, p. 1, para. 554.

<sup>128</sup> Cf. Gomes, R./Sweeney, K., Bayes-Nash equilibria of the generalized second-price auction, *Games and Economic Behavior* 86, 2014, pp. 421-437.

<sup>129</sup> Cf. Athey, S./Ellison, G., Position Auctions with Consumer Search, *The Quarterly Journal of Economics* 126(3), 2011, pp. 1213-1270.

will be virtually impossible to determine what quantity of advertising space is optimum and what level of scarcity is hence abusive.

#### **4.3.4. Concentration of advertising-relevant data**

**161.** Competition-related problems in online advertising may ensue from the increasing significance of data for the entire value creation chain. Problems could particularly result in this context from a concentration of advertising-relevant data in individual companies – regardless of possible data protection law considerations. Where the quality and quantity of data increasingly become a factor that is critical for the success of placing targeted advertising, concentration in this field may have considerable competitive feedback effects on the online advertising market. This particularly applies if individual companies have exclusive access to particularly relevant data volumes, for instance because of direct interaction with users.

**162.** The degree to which concentration of advertising-relevant data that is a problem from a competition point of view already exists in individual fields of online advertising today cannot be estimated because of a lack of publicly available data. In the case of *Facebook/WhatsApp*, on the basis of information from an external provider, the European Commission pointed out for illustration purposes that Google has the largest share of data collection across the web, at approx. 33 percent, followed by Facebook at approx. 6.4 percent.<sup>130</sup> However, these data collections were not made for the purpose of the case at hand, nor are they based on a competitive market definition, for instance with regard to the provision of user data for placing online advertising. Accordingly, the information may make it clear that some companies are particularly active when it comes to the collection of user data, and in this regard that there is a certain concentration in this area. However, competition policy statements cannot be made on this basis. In order to do so, it would be necessary to examine which of the data that has been collected can be used to place ads and for which stage of the value creation chain such data is particularly relevant. This would enable an analysis to be carried out of the distribution of the respectively relevant data among the individual market players.

**163.** Regardless of the actual extent, competition-related problems appear to be possible as a result of increasing data concentration, for instance with regard to the platforms for the automatic purchase and sale of advertising space interposed between advertisers and publishers which are active in real-time advertising in particular. For instance, the ability of individual platform providers to provide more targeted ads on the basis of a larger data stock may lead to these being able to attract both more advertisers and also more providers of advertising space. This would go along with the ability to collect additional advertising-relevant data, meaning in turn that more advertisers and website operators could be attracted. Where such a chain of effects, based on network effects, exists on individual steps of the value creation chain in online advertising, it appears fundamentally possible that only a limited number of dominant providers emerge in these areas. Possible data concentrations should therefore be observed against the background of potential competition problems and investigated in greater detail within competition law proceedings that are related to online advertising.

#### **4.3.5. Different data protection standards**

**164.** As has been stated, it is highly significant for the advertising industry to also collect and process personal data in order to place targeted advertising. Data protection standards which are inconsistent internationally and exhibit different levels of stringency constitute a potentially competition-distorting factor in this regard given that they enable companies to use data for the purpose of online advertising to varying degrees, and hence limit their market opportunities in different ways. In this regard, reference is frequently made to German data protection law, which being stricter than U.S. standards is said to constitute a competition disadvantage for German companies.

**165.** In terms of competition, uniform data protection standards make basic sense for the online advertising market, which is central to many business models in the interest of preventing international competition distortions.<sup>131</sup> However, it needs to be pointed out that the relative rigour of data protection law may impact the efficiency and structure of the advertising market. In particular, under particularly strict data protection law, individual forms of advertising methods

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<sup>130</sup> European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, para. 188. The information is based on data from the Ghostery Panel which were collected from January to March 2013, and show the frequency with which panel participants interacted with different tracking applications.

<sup>131</sup> See on this paras. 93 ff.

which particularly rely on data such as audience or real-time advertising, may be hindered. This may in turn impact competition in online advertising. It is not the job of competition law or of the legislature to protect individual business models, in particular if they are based on possibly undesirable modes of conduct such as excessive collection of user data. Nonetheless, negative competition effects ensuing from any tightening up of data protection regulations – for instance by means of the planned European General Data Protection Regulation – should be at least taken into consideration.

**166.** One example of this is the model of pseudonym data processing as it exists in Germany. This model makes it possible to process advertising-relevant data without direct user consent. This model is essential for many companies in the online advertising sector since they do not have direct contact with internet users which would enable them to obtain consent to the processing of the data. If this possibility to process data were to cease to apply, and if internet users needed to opt in explicitly, this could lead to market players leaving the market if they were virtually unable to directly approach users. This might place those advertising companies or services at an advantage which require users to register, and which are able to obtain within their terms and conditions consent to even more comprehensive data utilisation for advertising purposes. Potential consequences would be a greater market concentration in individual fields of online advertising, as well as an increasing spread of registration portals.

#### **4.3.6. Different regulation of advertising according to media genres**

**167.** Regulatory restrictions apply to the placing of advertising, both for internet-based media (“telemedia”) and for non-internet-based (below: conventional) media. In particular, there is a principle of separation of editorial contents and advertising. For internet-based media, this is stipulated in section 58(1) of the Interstate Broadcasting Agreement (Rundfunkstaatsvertrag), as well as in section 6(1) No. 1 of the Telemedia Act (Telemediengesetz), for conventional broadcasting media in section 7(3) of the Interstate Broadcasting Agreement. What is more, there are for instance stipulations for conventional broadcasting media when it comes to the maximum permissible advertising air time (section 7a(3), as well as sections 16 and 45 of the Interstate Broadcasting Agreement). The goals pursued by advertising regulation are, first, to prevent there being too much advertising on (private) television, and second to protect the context of programmes in terms of their content and to avoid misleading consumers.

**168.** Given the greater regulation of conventional broadcasting media and the shift of media events on to the internet which has been going on for years, demands have arisen to reduce the advertising regulations applying to conventional media, and in particular to abolish quantitative advertising rules. There have also been calls to create appropriate regulations for purely internet-based media.

**169.** The Monopolies Commission issued statements on media regulation in its XVIth Biennial Report.<sup>132</sup> That report already favoured reducing and even abolishing advertising air time rules in order to counter discrimination of advertising-funded private television vis-à-vis public and paid television. The reasons which it gave for this were that viewers would switch to alternative services if there were to be too much advertising, and the channels would have a vital interest in not losing viewers as a result of excessive advertising.<sup>133</sup>

**170.** The Monopolies Commission repeats at this juncture the recommendations which it made at that time to reduce or even abolish the advertising air time rules applying to conventional broadcasting media. This could reduce existing competition disadvantages of conventional broadcasting media when placing advertising vis-à-vis purely internet-based media. However, it is not appropriate to expand the existing advertising time regulation to purely internet-based media.

#### **4.3.7. A lack of cooperation opportunities to achieve reach**

**171.** One aspect which is particularly significant with regard to competition between providers of online advertising space on the internet is the reach that the services can achieve. The reach of the individual website operators is of central significance for advertisers when it comes to the distribution of their advertising money among individual online

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<sup>132</sup> Cf. Monopolies Commission, XVIth Biennial Report, More Competition in the Services Sector As Well, Baden-Baden 2006, para. 823; also, Monopolies Commission, XIIth Biennial Report, Extensive Implementation of Market Opening (*Marktöffnung umfassend verwirklichen*), Baden-Baden 1998, paras. 538 ff.

<sup>133</sup> Cf. Monopolies Commission, XVIth Biennial Report, loc. cit., para. 823.

advertising media. In order to reach as many users as possible, the lion's share of this money goes to high-range portals, which can hence further improve their products or offer better contents and further expand their reach. The reach of the online portals is a central competition factor in this regard which is also considered as a market entry barrier in some cases. In order to enable providers to achieve greater reach, some voices have called for more cooperation to be permitted among content-providers so that they can combine this reach and achieve a critical mass.

**172.** Reference should be made in this context for instance to the joint venture project that was prohibited by the Federal Cartel Office titled “Amazonas”, a joint video-on-demand platform of RTL interactive GmbH and ProSiebenSat.1 Media AG.<sup>134</sup> The two media companies had planned to establish a joint platform to access the programme content of both groups of channels. This would have enabled them among other things to achieve greater customer reach, and hence to become more attractive for advertisers. However, the cooperation project was prohibited by the Federal Cartel Office among other reasons because the groups of channels had a dominant duopoly on the television advertising market. This market was said to also include “in-stream video advertising”, i.e. advertising which is shown via videos that are streamed on the internet.

**173.** The companies criticised the decision of the Federal Cartel Office among other things in terms of the market definition that was carried out. It was said that the providers concerned were now competing with international online services such as the video portal YouTube. A market definition based on the German television advertising market was said hence to be too narrow. In its XIXth Biennial Report, the Monopolies Commission considered the prohibition by the Federal Cartel Office to be justified since the proposed venture would have led to competition restrictions.<sup>135</sup> However, it has not made a direct statement in this context on the criticised market definition.

**174.** Regardless of the concrete individual case, the dispute regarding the video-on-demand platform “Amazonas” shows that the previously justified market definitions for conventional markets (outside the internet) might have to be reconsidered for the internet age. It can certainly be queried whether a market definition restricted to the German-language TV advertising market might be restricting the relevant market too much considering the increasing shift of media events on to the internet. Having said that, it is not possible to generalise in this regard. Instead, as has already been stated elsewhere, it is necessary to specifically examine the individual case and existing substitution relationships (in particular indirect network effects).<sup>136</sup>

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<sup>134</sup> Federal Cartel Office, Order of 17 March 2011, B6-94/10 – “Amazonas”.

<sup>135</sup> Cf. Monopolies Commission, XIXth Biennial Report, Strengthening Competition in Retailing and Services, Baden-Baden 2012, paras. 733 ff.; see also on this case also Monopolies Commission, XXth Biennial Report, loc. cit., paras. 1051 ff.

<sup>136</sup> Cf. Chapter 2 for an economic perspective on this, and also para. 471 for a legal perspective.

## 5 Search engines

**175.** Search engines play a central role, first, for internet users who are seeking information and, second, for website operators whose contents become easier to find with the help of search engines, as well as for online advertisers who place targeted search-based advertising. Since its inception in the 1990s, the market for online searching has become the strongest-selling market on the internet.<sup>137</sup> Worldwide search engine advertising revenue topped USD 48 billion in 2013, and the market is expected to gain further economic significance.<sup>138</sup>

**176.** The considerable significance of the search engine market was reflected not least in the major interest expressed by a broad public in the European Commission's antitrust investigations. The Commission initiated formal proceedings in 2010 against the search engine operator Google Inc. because of possible abuse of a dominant position in online search.<sup>139</sup> The complainants include the French Ejustice.fr search engine, the Foundem price comparison portal and Microsoft's Ciao portal, as well as the Federation of German Newspaper Publishers and the Federation of German Magazine Publishers, Axel Springer and Deutsche Telekom. The following four specific business practices of Google are being investigated:

- favourable treatment, within Google's web search results, of links to Google's own specialised web search services as compared to links to competing specialised web search services;
- use without consent of original content from third-party web sites in specialised web search services;
- agreements that oblige website operators to obtain all or most of their online search advertisements from Google; and
- contractual restrictions on the transferability of search engine advertising campaigns to rival search advertising platforms and the cross-platform management of search engine advertising campaigns.

**177.** Google does not yet appear to have addressed all of the European Commission's concerns through the commitments which it has submitted.<sup>140</sup> There is particularly critical discussion of proposals as to preferential treatment of its own services. In a resolution to the European Commission, "given the potential development of search engines into gatekeepers and the possibility they have of commercialising secondary exploitation of information obtained", the European Parliament called to "consider proposals aimed at unbundling search engines from other commercial services".<sup>141</sup> The resolution is no more than a recommendation, and is hence not binding on the European Commission.

**178.** There have also been critical voices from among German policy-makers about Google in particular which led to a cross-party letter being addressed to the European Commission from several Federal Ministers. The letter contains proposals for the regulation of powerful platform operators going beyond banning abuse: (i) the obligation to display rival services free of charge, (ii) the granting of discrimination-free access to all contents with effective control of abuse, and (iii) the introduction of the principle of "platform neutrality".<sup>142</sup>

### 5.1. On the modus operandi of general search engines

**179.** The fundamental purpose of a search engine is to make it easier for users to find information on the internet. Given the volume of information that is available on the internet, search engines assume a major role as an information intermediary. Accordingly, the Federal Court of Justice found in the Paperboy judgment that "without using search ser-

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<sup>137</sup> Statista and LSP Digital consider the search segment to be the highest-selling internet market in Germany in 2013, ahead of travel services and small ads.

<sup>138</sup> Cf. PwC, <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2014/internet-advertising.pdf>, retrieved on 26 March 2015.

<sup>139</sup> Cf. European Commission, press release IP/10/1624 of 30 November 2010.

<sup>140</sup> Cf. European Commission, press releases IP/13/371 of 25 April 2013 and IP/14/116 of 5 February 2014.

<sup>141</sup> Cf. European Parliament, item 15 of the European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)).

<sup>142</sup> Cf. Federal Ministry of Justice and Consumer Protection, [http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gemeinsames-Schreiben-Digitale-Agenda\\_DE.pdf?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gemeinsames-Schreiben-Digitale-Agenda_DE.pdf?__blob=publicationFile), p. 6, retrieved on 26 March 2015.



vices, [...] it [would be] practically impossible to make use of the incalculable mass of information available in the World Wide Web in a meaningful way.”<sup>143</sup> In some cases, this role of information intermediary is used to deduce a more far-reaching responsibility under media law given that search engines can influence access to information on the internet in a similar manner to classical media.<sup>144</sup>

**180.** Since search services are offered free of charge as a rule, they primarily compete on the basis of their quality. This is typically measured by the relevance of the search results for users. Further quality-related factors are the speed at which the search results are provided and the design of the user interface. Most general search engines use a simple interface allowing search terms to be entered in a search box. The search engine Yahoo!, by contrast, uses a portal model where users are already shown for instance news items or the weather in advance of any search query information.

**181.** Search services use programs such as “web crawlers” or “spiders” which automatically copy the data and contents of third-party websites and store them for later use. The information thus collected is used to draw up a web index in which a number of words are assigned to each copied internet address (URL) which are subsequently used when responding to search queries. Thus, the frequency with which the world wide web is crawled determines the topicality and hence also the quality of the search results. The search query entered by a user triggers a search algorithm searching the web index for relevant websites and the hits being presented in an appropriate sequence (ranking). A large number of factors (“signals”) are taken into account in this process, the details of which vary from one search engine to another. Common factors are: (i) the frequency and the place where a search term can be found on a website, (ii) the linking of a website with other sites, (iii) in general terms the content of a site and of neighbouring sites; furthermore, the search engine operator (iv) takes countermeasures intended to prevent website operators from exerting an unwelcome influence on the search display.

**182.** Google, Bing and Yahoo! are also referred to as general or horizontal search engines since they can provide search results for all types of search query. Relevant websites are shown to users on the results page as “organic” or “natural” search hits. Where search engines are advertising funded, search-based advertising is displayed alongside the organic search results.<sup>145</sup> Apart from horizontal search engines, search queries can also be answered on specific categories such as images, videos or news by specialist (vertical) search engines which typically access a relevant image, video or news index. There are also other websites which facilitate searching in specific categories. For instance, Amazon provides information on products, and Facebook provides information on individuals.

**183.** Depending on the search query, an increasing number of results from specialised search services are included in the results shown by general search services. Within this “universal” search, further relevant information is shown, such as map extracts or images. For instance, the search query “weather Bonn” leads not only to links to weather services' websites, but also takes users directly to information on the weather in Bonn, which is shown in a separate ad box above the organic search results. The integration of further services into the general search has an impact on the visibility of organic search results.<sup>146</sup>

## 5.2. The economic significance of search engines

**184.** Search engines play a central role in finding information on the internet by acting as an intermediary between searchers and search subjects. Given the vast number of websites on the world wide web, a search for information would be highly laborious without technical aids, and in many cases would be virtually unfeasible from the user point of view, if not actually impossible. This is suggested by the fact that there are simply too many websites on the internet and that the addresses of the websites (URLs) are assigned in so unsystematic a manner that an individual could not find them without technical aids. For the lion's share of internet users, hence, a typical online session starts with a search query being sent to a search engine. This frequently also applies if the user is specifically looking for sites which he/she

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<sup>143</sup> Federal Court of Justice (*Bundesgerichtshof*), Judgment of 17 July 2003, I ZR 259/00, p. 25.

<sup>144</sup> Cf. Paal, B.P., *Rechtsstudie zu Suchmaschinen, Marktmacht und Meinungsbildung*, 2012, pp. 8 f.

<sup>145</sup> Cf. section 4.1.1.

<sup>146</sup> Cf. section 5.4.2.2.

already knows. Search engines are therefore used more as a navigation tool in such cases, and less simply to find information. From a user's perspective, search queries can be sub-divided into three categories, individual search queries however not being attributable to one category only:

- navigation-orientated queries where a user looks for sites which they already know,
- information-orientated queries where a user gathers general information on a topic, frequently through several consecutive searches, and
- transaction-orientated queries taking place with the aim of carrying out a transaction.<sup>147</sup>

**185.** At the same time, search engines offer website operators a platform on which they can be found. Content-providers compete with an untold number of other providers for users' attention. A high ranking enables them to be less reliant on gaining attention for instance by other means such as advertising. Given this fact, a sub-category of online marketing has been established in the shape of Search Engine Optimization (SEO) which aims to design websites in such a way that they are shown as high as possible in the organic result listings.

**186.** In economic terms, therefore, the major added value of search services consists, first, in reducing transaction costs, such as user search costs and content-provider advertising costs (intermediation service). If one further presumes that the search results are shown in accordance with their relevance for the party searching, this also increases the general transparency of the market for users (selection service). What users consider to be the "best" hits are to be found at the beginning of the list, and there is no need to search through the entire results list for the most relevant result. The search engine service thus makes it possible to find information more efficiently and to implement any transactions faster.

**187.** Since these services are as a rule free of charge both for search engine users and for content-providers, search engines do not benefit directly from providing their intermediation service. Turnover is typically made through advertising. Since with transaction-related search queries users reveal what they would like to buy, search queries are particularly well suited to showing targeted advertising.

### **5.3. Concentration tendencies on markets for search platforms**

**188.** Advertising-financed search services operate on a three-sided platform market, bringing together (i) search engine users who are looking for content on the internet, (ii) content-providers whose websites the search engine includes in its web index, and (iii) advertisers who place search-based advertising. Depending on the respective research subject, it can be legitimate to regard search engines as two-sided platforms.<sup>148</sup>

#### **5.3.1. Market definition and market shares**

**189.** A competition-based analysis of a market is contingent as a rule on defining it so that market shares can be identified as indicators of market concentration. Given the multi-sided nature of search platforms, one can best examine the individual sides of the platforms. To this end, each side of the platform is to be defined separately by product related and geographical criteria, and the shares on the respective side of the platform are to be identified separately. When assessing the respective shares of the sides of the platform, finally, interdependences between the sides of the platform are to be taken into account.<sup>149</sup>

**190.** The geographical definition of digital markets is likely to be frequently worldwide, given that digital products entail virtually no transport costs. However, in the case of search platforms, it must be presumed that, because of linguistic and cultural differences, the market definition must be made along national borders in many cases, with regard to both the search side and the advertising side.

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<sup>147</sup> Cf. Lewandowski, D., *Wie lässt sich die Zufriedenheit der Suchmaschinennutzer mit ihren Suchergebnissen erklären?* in Krah, H./Müller-Terpitz, R., *Suchmaschinen* (Passauer Schrift zur interdisziplinären Medienforschung, Vol. 4). Münster: LIT, 2014, pp. 35-52.

<sup>148</sup> Cf. Dewenter, R./Rösch, J./Terschüren, A., *Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen*, NZKart 2014, pp. 387 ff.

<sup>149</sup> Cf. section 2.2.3 on the market definition of platforms.

**191.** When it comes to the subject-matter delimitation of the search side of search platforms, it seems reasonable to consult the spread of search queries.<sup>150</sup> A large number of horizontal search engines offer search services in Germany. However, at 91 percent of search queries in February 2015, Google answers the vast majority of search queries in Germany. This is followed by Microsoft's Bing, at just under four percent, and Yahoo! with slightly over two percent (cf. Table 5.1). All other general search engines such as T-Online, Ask.com or AOL Search account for shares of less than one percent. What is more, many of these smaller search engines do not provide their own search results, but work together with Google. Similarly, search results on Yahoo! are currently provided by Bing.<sup>151</sup>

**192.** The distribution of search queries is relatively stable over time. Google was still answering an average of roughly 97 percent of that year's search queries in 2010, and hence has faced a drop of six percent up to 2015 (cf. Figure 5.1). Several competing providers accordingly benefited from growth. Bing and Yahoo! benefited most, seeing their shares triple from roughly 1.1 percent in 2010 to 3.7 percent (Bing) and double to almost 2.2 percent (Yahoo!), respectively.

**193.** Also in other countries, individual search engines account for a large share when it comes to answering searches. Thus, similar spreads are reached in other European countries such as France and the United Kingdom as they are in Germany. Google is the largest search engine in the USA, with almost 75 percent of all search queries. Unlike in European countries, Bing and Yahoo! have been able to obtain a larger share, with more than ten percent each. Furthermore, in countries such as China and Russia, the search engines Baidu (72.9 percent) and Yandex (42.2 percent) have been able to demonstrate large shares of search queries. It would appear that these search engines have advantages vis-à-vis other search engines given their earlier market entry, but political factors may also play a role.<sup>152</sup>

**Table 1: Spread of search queries in selected countries (in %)**

Search engine	Germany	United Kingdom	France	USA	Japan	China	Russia
Google	91.0	88.0	92.7	74.9	64.4	2.6	47.0
Bing	3.8	7.2	3.6	12.6	4.5	2.8	2.4
Yahoo!	2.2	3.7	3.3	10.4	30.4	-	1.4
Baidu	-	-	-	-	0.3	72.9	-
Yandex	-	-	-	-	-	-	42.2
Others	3.0	1.1	0.4	2.1	0.4	21.7	7

N.B.: The figures are estimates made by Stat Counter Global Stats, based on a worldwide sample of 2.1 billion page visits. They record the frequency at which specific search engines refer to third-party sites. The figures in the table are rounded off and relate to desktop searches (not including mobile and other devices) in February 2015.

Source: gs.statcounter.com

**194.** Both general and specialised search engines can be substituted in part. While there are certainly specific search queries which typically are only made using general search engines, other information for instance on products, hotels

<sup>150</sup> The Monopolies Commission has no reliable data on the spread of search queries. The publicly known data contains different extrapolations based on different samples in many cases. However, as a rule these provide a similar picture of the spread of search queries. The differences that can be found here between different sources can be neglected at this point.

<sup>151</sup> Cf. SEO-united, *Suchmaschinenverteilung in Deutschland*, <http://www.seo-united.de/suchmaschinen.html>, retrieved on 26 March 2015.

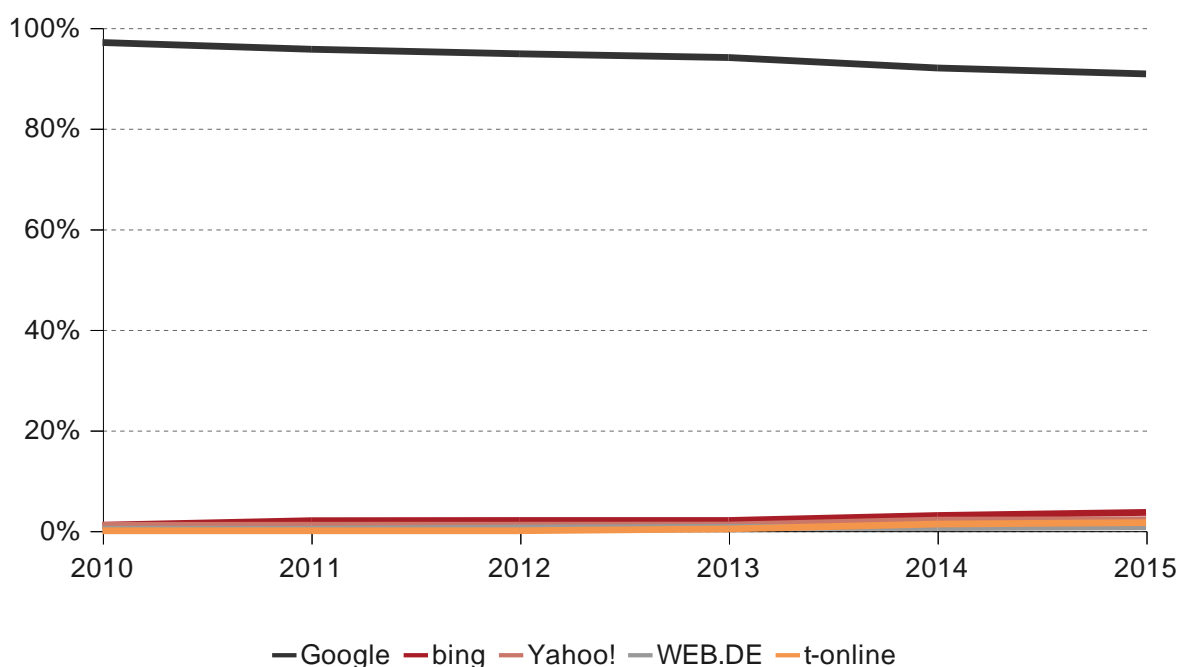
<sup>152</sup> Google has closed its search service because of State censorship in China. Search queries on Google.cn are currently being diverted to Hong Kong to Google.com.hk.

and restaurants is available via both general and specialised search engines. The share of a search service for instance in restaurant searches in Germany could be approximately ascertained via the share of the references made by a search service to restaurant websites. Hence, the market definition is a question of the individual case. It remains to be seen how the cartel authority's ruling practice will develop in the future.

**195.** However, it is hard to ascertain shares on the second side of the platform, indexing. First, not every website can be recorded by search engines, and the total number of websites on the internet is growing constantly. At the same time, a website can be indexed by a large number of search engines, so that search engines – unlike the way it is done de facto on the side of searchers and advertisers – cannot rule one another out.

**196.** The Monopolies Commission has no reliable data with regard to the third side of the platform, i.e. search-based advertising. It can be presumed that the market shares are at a similar level as on the user side, given the interdependence between the two sides of the market. However, it appears questionable whether a narrow definition of a market for search engine advertising is appropriate given the existing potential for substitution between search engine advertising and other forms of online advertising.<sup>153</sup>

**Figure 5.1: Shares of search queries of search engines in Germany (in %)**



N.B.: The figures are annual averages for desktop searches. For the data basis cf. notes on Table 5.1

Source: Own illustration based on data from gs.statcounter.com

**197.** It should be taken into account when evaluating a search platform's large market share that this need not be an expression of market failure necessitating State intervention. Large market shares may be the result of well-functioning competition, and are unproblematic as long as the latitude of a search engine which has large market shares is sufficiently restricted by other factors and market entry remains possible as a matter of principle. It is therefore to be discussed below what factors may influence market concentration on the search engine market, and the degree to which market power is favoured or limited.

<sup>153</sup> Cf. this to Chapter 4 (Online advertising).

### 5.3.2. Factors affecting market concentration and market dominance

**198.** Platform markets may tend towards considerable market concentration, which may lead in the long term to a situation in which only one provider remains on the market.<sup>154</sup> In general terms, the potential dangers ensuing from a monopoly include welfare losses as against the situation with competition resulting from prices that are too high and production volumes that are too low. In addition to such allocative inefficiencies, a lack of competitive pressure can also cause a monopolist to operate inefficiently due to inferior production technologies (“X inefficiencies”). A lack of competition may also have a negative impact on the innovativeness of a company in the long term (dynamic inefficiency).<sup>155</sup>

**199.** Regarding search platforms, a lack of competition might result in low search quality or excessively high prices for advertising customers. In the long term, a monopolist might have no incentive to create new innovative search services. Furthermore, market power can be used to obtain competitive advantages through abusive conduct. We explore below the factors favouring a market concentration on the search engine market and the degree to which the possibility for market entry is influenced by this.<sup>156</sup>

**200.** As with many other digital goods, one may also presume in the case of search services that economies of scale play a major role. Cost-related economies of scale apply in general if the average costs decrease as the output quantity increases because of high fixed costs. In the case of search engines, fixed costs run into the billions, for instance for creating the web index, developing the search algorithm and building computing centres, and are likely to be relatively high in comparison to the variable costs involved in a search.<sup>157</sup> At the same time, the high fixed costs constitute a considerable market entry barrier on the search engine market, even if certain costs become increasingly variable, for instance by virtue of the possibility to rent server services.

**201.** A further significant economy of scale results from the data collected on users' search conduct.<sup>158</sup> The more data a search platform has, the better it can adjust the display of search results and search-based advertising to match users' interests. This learning effect in turn causes more users to use the search service and enables ever higher advertising turnover to be achieved.

**202.** The scope of this effect is however limited. The more often a specific search enquiry is made, the lower is its additional value for improving the search results. While the added value of a frequently searched term can thus be very low, seldom-made search queries may make a major contribution towards improving search results. Such infrequent search queries are likely to particularly include those search queries concerning for instance current events with regard to which there is as yet no information on users' conduct, and search queries consisting of several terms, “long-tail queries”.

**203.** There is controversial discussion regarding the question of the extent to which a large search query history is also a prerequisite for a successful market entry.<sup>159</sup> While it is argued on the one hand that data on search engine use has now become central to market success, it is pointed out on the other hand that, particularly on the internet, data is available in large volumes and that the correct analysis of the data is the actual challenge. It is not possible to conclusively assess here to what degree data from other sources than the use of search engines constitutes suitable substitutes and market entry is also possible without access to historical web traffic data.

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<sup>154</sup> Cf. Chapter 2 on platforms.

<sup>155</sup> Cf. e.g. Schwalbe, U./Zimmer, D., *Kartellrecht und Ökonomie*, 2nd ed., Frankfurt/M. 2011, pp. 22 ff.

<sup>156</sup> Cf. Haucap, J./Kehder, C., *Suchmaschinen zwischen Wettbewerb und Monopol: Der Fall Google* in Dewenter, R./Hacaup, J./Kehder, C. (eds.), *Wettbewerb und Regulierung in Medien, Politik und Märkten: Festschrift für Jörn Kruse zum 65. Geburtstag*, Baden-Baden, 2013, pp. 115-154.

<sup>157</sup> Cf. Bracha O./Pasquale, F., *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, *Cornell Law Review* 93, 2008, 1149-1209, p. 1181 or Pollock, R. *Is Google the Next Microsoft? Competition, Regulation in Internet Search*, *Review of Network Economics* 9 (4), 2010, pp. 24 f.

<sup>158</sup> Cf. on this section 5.5.2 (Communitisation of web traffic data).

<sup>159</sup> Newman, N., *Search, Antitrust and the Economics of the Control of User Data*, *Yale Journal on Regulation*, Vol. 30, No. 3, 2014; critical on this Lerner, A.V., *The Role of “Big Data” in Online platform Competition*, 26 August 2014, doi: 10.2139/ssrn.2482780.

**204.** Network effects are also relevant in addition to economies of scale, albeit it is necessary to distinguish here between direct and indirect network effects. Direct network effects apply in general if the benefit ensuing from a service rises with the number of users in a group.<sup>160</sup>

**205.** Such network effects are not initially obvious from the point of view of searchers since, in contrast to for instance social networks, there is no direct interaction between search engine users. The users of a search engine do not directly benefit from the search engine being used by other searchers.

**206.** When it comes to advertising customers, one may also presume that there are no positive direct network effects. Rather, one may anticipate that advertising customers compete for advertising space and for users' attention. The more advertising customers a search engine has, the less attractive it becomes for other advertising customers since prices for advertising space go up.

**207.** Moreover, no positive network effects can be expected to occur for content-providers since they compete for users' attention in a similar way to the group of advertising customers. The more websites are crawled by a search engine, the more unlikely it becomes that a specific website will appear at the top of the results list and be called up by users.

**208.** Indirect network effects apply in general if a platform becomes more attractive for a group of users because another group of users increases in size.<sup>161</sup> Indirect network effects among advertising customers are most likely to arise with regard to search engines given that the more users a search engine has, the more attractive it becomes from the point of view of advertising customers. From their point of view, the quality of a search engine increases with its ability to show advertising to a relevant group of consumers as targetedly as possible. While the number of users is irrelevant in the sense that they pay per click or per display, the probability that there is an interested user to whom advertising can nonetheless be shown is higher with larger search engines. This is likely to be particularly relevant when targeting advertising at highly specific groups. Negative indirect network effects occurring between advertising customers and search engine users may cause user numbers to fall if there is too much advertising. This effect can be countered by showing targeted advertising if one presumes that personal advertising matches users' interests better than non-customised advertising.

**209.** A large number of users, and a correspondingly larger volume of clicks on search advertising, are likely to have a positive impact on the ability of the search engine to show advertising targetedly to groups of customers who have a relevant interest in buying. This benefits both the search engine through higher advertising revenue (economies of scale) and advertising customers, who enjoy higher turnover.

**210.** Positive indirect network effects are also conceivable to a certain degree among content-providers. The latter have an interest in appearing as far up on a search engine's results list as possible. However, websites can only be optimised in terms of the individual requirements of a search engine. Search engines with many users are therefore particularly interesting from the content-providers' point of view. However, at the same time, it might be possible for the attractiveness of the platform to fall from the users' point of view if the websites which corresponded to the users' interest were no longer listed at the top of the results list, but instead those were to be featured which were best customised to the criteria of the search engine. This at least applies where the search engine's criteria and users' interests are not a perfect match.

**211.** Possibilities to use various providers in parallel ("multi-homing") can counter market concentration on multi-sided platform markets in particular. It is relatively easy for search engine users to use several search engines simultaneously, and this does not entail any additional costs. Hence, one may presume that for instance if Google were to deliver lower-quality search results or otherwise act in an abusive fashion towards users, it would lose users, who would resort to competitors such as Bing or Yahoo.

**212.** Nonetheless, a number of factors can be mentioned which help ensure that users remain loyal to a search engine. In addition to a better-quality search engine, familiarisation effects and the personalisation of search results may also help ensure that users do not switch to another search engine. Where search engines have information on the searches

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<sup>160</sup> Cf. section 2.2.2.

<sup>161</sup> Cf. section 2.2.2.

made by a user in the past, search results may be customised to individual user conduct, for instance by virtue of search results that were selected in the past being shown higher up. However, it is not possible to make a conclusive statement on the degree to which search results are personalised in this way and how significant this form of personalisation is.

**213.** A major role is played in this context by the default settings of search engines in software and devices. Although users can easily switch between search engines at no cost, the default setting ensures a high degree of customer retention. This explains why some providers such as Google, Microsoft and Yandex have an interest in offering both a search engine as well as complementary operating systems, browsers and devices, since as a rule these complementary systems make it easier to use their own search engine, or at least this is pre-set as default.

**214.** What is more, search engines compete to conclude default contracts with independent providers of software and devices. For instance Yahoo! replaced Google as the standard search engine in Mozilla's Firefox browser in the USA at the end of 2014, via which more than 100 billion searches per year are made worldwide.<sup>162</sup> As a result, the share of Yahoo searches among Firefox users in the USA rose from its previous level of 9.9 percent in November 2014 to reach 28.3 percent in January 2015. Related to the total U.S. search market, this corresponded to growth by more than two percentage points from 8.6 percent to 10.9 percent in the same period.<sup>163</sup>

**215.** Similar to the user side, advertising customers should also be able as a matter of principle to use different search engines in parallel. The utilisation of other advertising space outside search engines could also be an option in many cases. In turn, it is also vital to be able to substitute search engine advertising for other forms of advertising, both on and off the internet. One aspect to be viewed critically in this context is constituted by attempts on the part of search engines to use exclusive contracts, or technical restrictions to limit the portability of ads and hence the possibilities for multi-homing.<sup>164</sup>

**216.** Multi-homing is possible for website operators in the sense that they can make their websites analysable ("crawlable") for several search engines, and hence do not need to opt for one search provider. Only in exceptional cases may frequently crawled sites become overloaded, such as news sites, and this may impair websites' functionality, thus reducing their willingness to be crawled by large numbers of search engines.<sup>165</sup> It may be presumed here that frequently used search engines are more rarely prevented from analysing a site than less well-known search engines. Hence, it cannot be ruled out that in particular little-used search engines may have a competitive disadvantage vis-à-vis established search engines.

**217.** Possibilities to differentiate between platforms on the basis of heterogeneous user preferences can counter market concentration and create possibilities for market entry. Since search engines offer their service on the user side free of charge as a rule, there is no possibility to gain shares on the search side through lower prices. Consequently, the search engine which provides the best quality from the user's point of view will be the most attractive one. As awareness of privacy issues in online search grows, a new distinguishing characteristic for competitors has emerged. The services of the search engine DuckDuckGo, which does not collect and process personal data, and hence is becoming increasingly popular among users, can be used as an example here.

**218.** At the same time, vertical search services compete with horizontal search engines. In today's perspective, rival platforms such as Facebook and Amazon are not real alternatives to general search engines such as Google or Bing since unlike these they do not possess an index of the world wide web, but use the information that is contained on their platform. They are nonetheless likely to create considerable competitive pressure, at least when it comes to specific search queries. In particular with regard to displaying search-related advertising, it is likely to be irrelevant whether a user is looking for a specific product or service on a general or specific search engine. What is decisive, rather, is the

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<sup>162</sup> Cf. Mozilla, press release of 19 November 2014, <https://blog.mozilla.org/blog/2014/11/19/promoting-choice-and-innovation-on-the-web/>, retrieved on 29 April 2015.

<sup>163</sup> Cf. StatCounter: <http://gs.statcounter.com/press/yahoo-gains-further#g2>, retrieved on 26 March 2015.

<sup>164</sup> Cf. on this also section 4.4.

<sup>165</sup> Websites are automatically crawled by search engines as a rule. Additionally, websites may be submitted, for instance to Google, for inclusion in the index or the (renewed) crawling of a website asked for from Google. Cf. e.g. Webmaster Guidelines on <https://support.google.com/webmasters/answer/35769?hl=en>.

purchasing intention of the user. Increasing competitive pressure from specialised services is also suggested by the fact that large providers such as Facebook, Amazon or Apple, which are expanding their existing service range to include search services, are becoming less and less dependent on established search engines by providing search services themselves.<sup>166</sup>

**219.** A further factor which may influence market concentration is the ability of a platform to expand capacities. In the case of search engines, it may be relatively unproblematic to expand capacities to answer search queries and to index websites by appropriately expanding server capacities through investing money in this. On the advertising customer side, it may actually be presumed to be most likely that the number of ads that can be shown is limited by the available space on the website or by user acceptance. However, the ability of a search engine to display advertising increases with the number of search enquiries. This means in concrete terms that capacity restrictions will not limit a search engine with regard to quickly acquiring large market shares. This can, first, help to ensure that a search engine is able to further expand large market shares quickly. On the other hand, search engines with a small market share would be able to answer an increasing number of search enquiries quickly.

**220.** To sum up, concentration in search platforms in particular is favoured by economies of scale and network effects. Furthermore, both factors ensure that market entry is made more difficult and that it entails correspondingly high investment costs. An important disciplining function is taken up by search engine users who could switch providers relatively easily because switching costs are low.

#### **5.4. Potential competition problems on the markets for search platforms**

**221.** Potential competition problems on the markets for search platforms are discussed below which emerge from the fact that search platforms can, on the one hand, influence access to websites as a kind of “gatekeeper” (5.4.1), while on the other hand continually refining their services by incorporating new functions and implementing search services on new software and device platforms (5.4.2).

##### **5.4.1. Search platforms as the “gatekeepers” of the internet**

**222.** Because of their role as intermediaries in the search for information, horizontal search engines in general, and the Google search engine in particular, are frequently referred to as the “gatekeepers” of the internet.<sup>167</sup> This is a term from communication and social sciences that is primarily used with regard to media use. Accordingly, gatekeeping is understood as a journalistic process of filtering and processing information which determines what content reaches readers and which does not, and hence influences public opinion-making.<sup>168</sup>

**223.** Search engines provide both an intermediary service as well as, similar to journalists, a selection service in the sense that search results are ranked. However, the selection process is likely to focus on the users' interest as anticipated by the search engine, and to constitute less of a journalistic selection process.

**224.** The term “gatekeeper” is frequently equated to the term “essential facility”. The competition law concept of the essential facility stipulates that a company which is dominant because it controls an essential facility may not exploit its position by refusing possible access to this facility at the upstream level, hence ruling out effective competition at the downstream level. The Monopolies Commission considers it doubtful whether search platforms meet the legal prerequisites of an essential facility. This applies regardless of what characteristics of such platforms are being analysed as essential facilities (user data, web index, search algorithm).

**225.** Regardless of its market share, a single search engine is unlikely to constitute an essential facility if there are alternative search engines making it possible to find websites. An essential facility is contingent on the service of the company not being amenable to being duplicated by another provider, regardless of any difficulties existing for the demand

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<sup>166</sup> Cf. Reuters, <http://www.reuters.com/article/2014/12/12/us-facebook-microsoft-idUSKBN0JQ2AY20141212>, retrieved on 26 March 2015.

<sup>167</sup> Cf. Almunia, J., Competition in the Online World, speech held on 13 November 2013, [http://europa.eu/rapid/press-release\\_SPEECH-13-905\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-905_en.htm), retrieved on 26 March 2015.

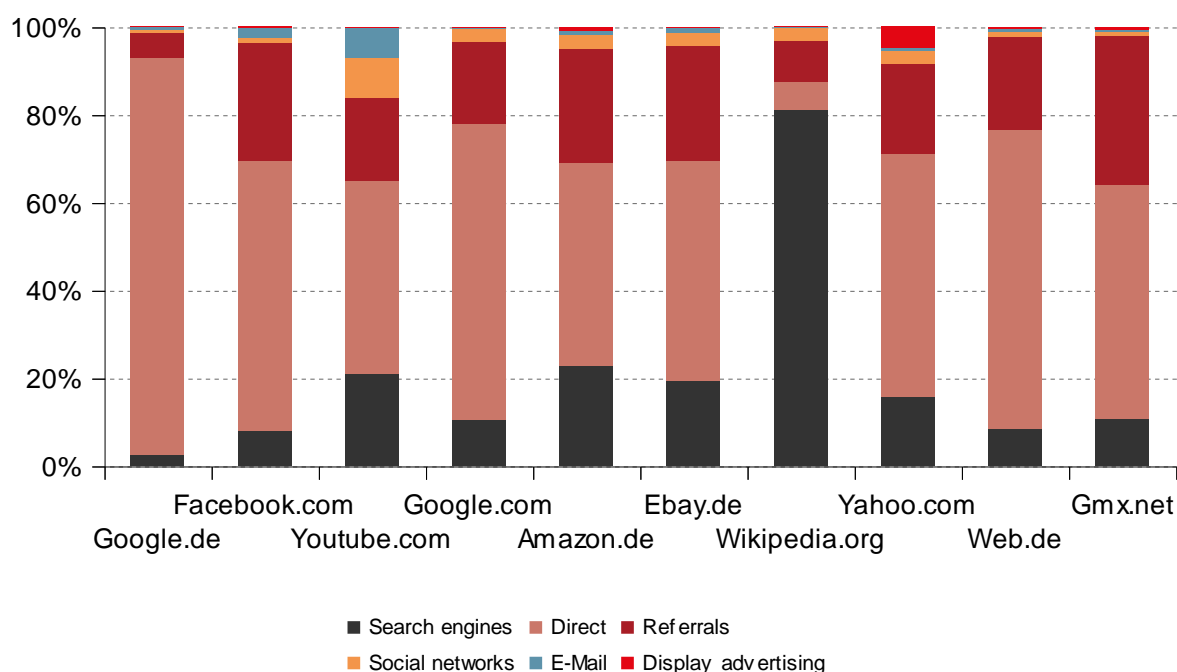
<sup>168</sup> Hess, T./Matt, C. *Gatekeeper in der digitalen Medienwelt*. In: MedienWirtschaft, Vol. 9 No. 3, 2012, pp. 48-51.



side.<sup>169</sup> It has not yet been clarified whether network effects of associated markets (multi-sided platforms) also need to be taken into consideration in this context. For instance, Google could be able to provide a service that cannot be duplicated by other horizontal search engines particularly because Google performs the largest number of general search queries, and is thus able to improve its services in such a way that it is able to offer the best services among all horizontal search engines. However, one may presume that other search engines (e.g. Bing/Yahoo!) would immediately exploit any shortcomings of Google in order to attract users and hence reduce the degree to which they lag behind Google. Google is subject to competitive pressure from other search engines in this regard.

**226.** Independently of the essential facility concept, user conduct also speaks against the assumption that the individual search engines act as gatekeepers from the user perspective. Figure 5.2 shows the traffic sources of the ten most visited websites in Germany, including websites of search engines such as Google.de or Yahoo.com themselves. In most cases, these websites are navigated to directly, that is by placing bookmarks on the web browser or by entering the URL in the browser's navigation bar. An exception appears to be the website of the online source of reference Wikipedia, which is navigated to via search engines roughly 80 percent of the time.

**Figure 5.2: Traffic sources of the most-visited websites in Germany (in %)**



N.B.: The information relates to February 2015.

Source: Own illustration based on data from similarweb.com

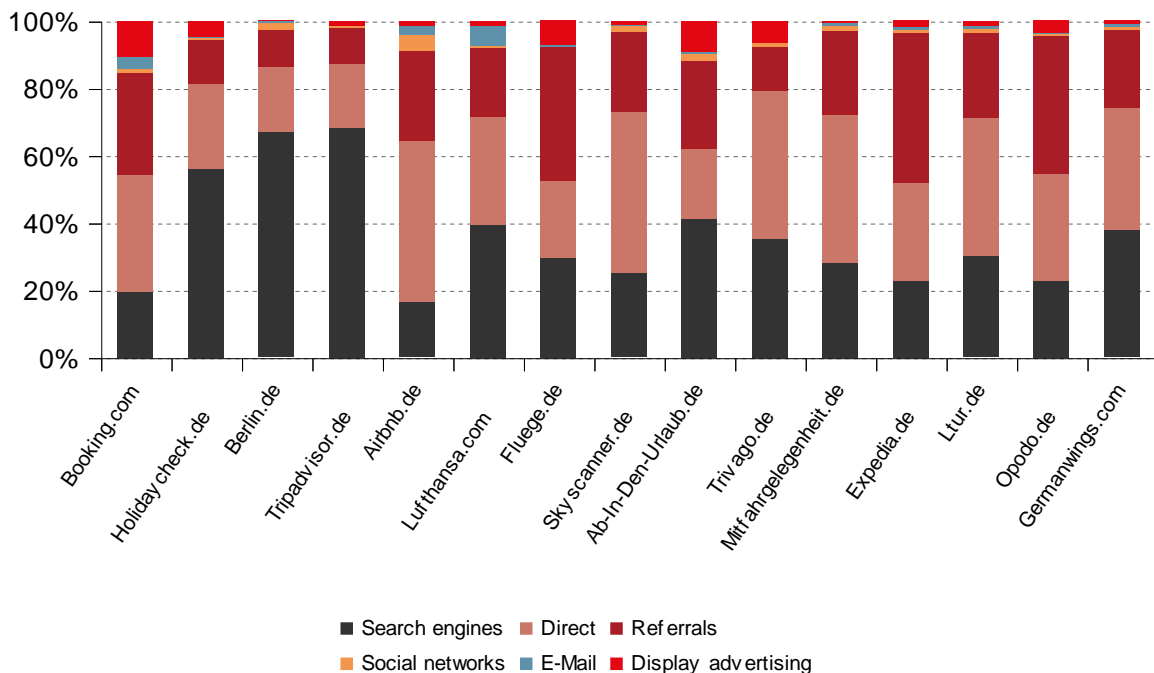
**227.** Hence, it is not very surprising that well-known websites which account for a large share of internet traffic do not rely on search engines. However, Wikipedia shows that a website primarily operating to collect information, despite being relatively well known, is largely navigated to via search engines. Users seem to start their search for information on a search engine and then seek more detailed information on Wikipedia. Hence, search queries which actually frequently target Wikipedia are initially made to a general search engine instead of directly entering the search term on Wikipedia.

<sup>169</sup> ECJ, Judgment of 26 November 1998, C-7/97 – *Bronner*, European Court Reports 1998, I-7791, para. 46: “For access [to the existing system] to be capable of being regarded as indispensable, it would be necessary at the very least to establish [...] that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.” (only underlined here)

**228.** However, it can be presumed that the significance of search engines as a source of traffic increases as a matter of principle the more irregularly a user visits a specific site and the less well known a website is. For instance, this can be made clear by travel sector websites. Figure 5.3 shows the traffic sources of the 15 most-visited websites from the travel sector, including for instance hotel reservation platforms or flight booking sites. It can be seen at first sight that the share of the traffic coming from search engines is larger than in the previous example, and furthermore that it varies considerably between the websites that were looked at. While for instance Tripadvisor.de or Berlin.de receives almost 70 percent of their visitors via search engines, these account for fewer than 20 percent of visitors to Booking.com or Airbnb.de. Direct visits to the site or re-directions from other websites play a larger role here than search engine traffic.

**229.** We can see that, in addition to search engines with direct site access and references from other websites, there are still at least two more frequently used ways of finding websites. Display advertising, e-mails or social networks (still) appear to play a relatively minor role when it comes to navigating to a website. There may be a number of different reasons why search engine traffic accounts for such a large share, such as the lack of brand awareness of a website or the regularity with which certain websites are used (it is not worthwhile for users to set a bookmark in their browsers until a high degree of regularity has been reached) or quite fundamentally, as in the case of Wikipedia, users' surfing habits.

**Figure 5.3: Traffic sources of travel websites in Germany (in %)**



N.B.: The information relates to February 2015.

Source: Own illustration based on data from similarweb.com

**230.** From the content-provider's point of view, it is argued at times that search engines have a gatekeeper function given that, de facto, only those websites are said to be findable on the internet which are listed among the upper search hits and that content-providers, given that they make up the other side of the market, allegedly have to rely on listing by search engines to communicate of their contents.

**231.** It is conceivable that inclusion in the index of a search engine is a precondition for being findable on the internet.<sup>170</sup> Having said that, it should be taken into account that no search engine has probably indexed all websites. Even

<sup>170</sup> Cf. Introna, L.D./Nissenbaum, H., Shaping the Web: Why the Politics of Search Engines Matters, 16 INFO. Society 169 (2000).

the largest search engines, which claim to have trillions of documents in their web index, do not cover the entire internet.<sup>171</sup> What is more, parts of what is understood to be the internet cannot be indexed by search engines using crawlers. Nonetheless, the Monopolies Commission considers that it cannot be ruled out that a search engine could make it more difficult for competing services to be found.

**232.** From the point of view of advertising customers, it appears to be unclear whether an individual search engine with a very large market share on the user side is a gatekeeper in order to be able to place advertising on the internet. A fact that speaks against such a suggestion is that there are a large number of other websites which offer advertising space on the internet and permit customers to be approached in a targeted fashion on the basis of new technical possibilities similar to search engines. The question arising as to whether these advertising spaces constitute a suitable alternative for advertising customers is closely linked with the discussion of the market definition in this area.<sup>172</sup>

**233.** A special role of a search engine with a large market share for advertising customers appears to be only conceivable in certain cases. This might be presumable for instance when it comes to displaying a specific advertisement to a small, precisely defined group of users. In such a case, it appears to be plausible that a search engine with a large share of users provides the only useful service since it is the only one which can offer with sufficient probability users from this group who are interesting in buying.

**234.** There are good reasons for not presuming that search engines such as Google or Bing satisfy the conditions for an essential facility. Also apart from this concept, search engines can only limitedly be seen as constituting gatekeepers for access to information and users on the internet. Unlike many other media, the internet is particularly typified by the fact that it provides unfettered access to information. As opposed to journalistic gatekeeping, content which does not appear at the top of the search results remains accessible for internet users as a matter of principle, for instance via other search engines.

**235.** The fact that a major share of internet traffic reaches a website not via search engines, but via other channels, suggests that content-providers are not generally dependent on a specific search engine. Search engines are most likely to play a major role for websites which are relatively unknown. However, the Monopolies Commission considers that this does not rule out that arbitrary non-inclusion in the web index, or the deletion of a website from it, could constitute abusive conduct on the part of a dominant search engine if inclusion in the index were to be technically possible and customary, and hence one company were to be treated differently than companies of the same kind.<sup>173</sup> However, it should be taken into consideration here that search engines must be given a margin of appreciation when creating the web index.

#### **5.4.2. Expansion tendencies of search platforms**

**236.** As already stated, horizontal search engines are multi-sided platforms whose business models aim to include all relevant sides of the platform. Search platforms compete for users via the quality of their search services. These are in turn a precondition for making the platform attractive for advertising customers and achieving turnover. The ability to find websites influences the attractiveness of the search service for users. At the same time, content-providers benefit from being found.

**237.** As the commitment of users and advertising customers to a specific search platform through network effects tends to be low compared to other platform services (e.g. social networks), the attractiveness of the search platform from a user's point of view is of decisive significance in competition, and this explains why even those search platforms which have a large market share have an interest in refining their services from the user's viewpoint in order to safeguard their market position.

**238.** At the same time, search platforms, as profit-orientated companies, face the challenge of opening up new profit opportunities. This permits various strategies to be identified: including the search service in other software and device

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<sup>171</sup> Cf. e.g. Google, Crawling & Indexing, <http://www.google.com/insidesearch/howsearchworks/crawling-indexing.html>, retrieved on 26 March 2015.

<sup>172</sup> Cf. section 4.2.

<sup>173</sup> Cf. section 19(2) No. 1 of the Act Against Unfair Competition [*Gesetz gegen den unlauteren Wettbewerb – UWG*].

platforms, such as browsers and mobile devices, in order to expand the user base (5.4.2.1), incorporating new services such as map and news services to increase platform attractiveness (5.4.2.2), and preferential treatment of the platform's own services in order to maximise profit (5.4.2.3).

#### **5.4.2.1. Incorporating search services in other software and device platforms**

**239.** In order to reach as many users as possible, and hence to be able to attract more advertising, search platforms have an incentive to also make their service usable outside their own website. Thus, widespread use is made of the incorporation of search services as a function in websites of other content-providers and browsers, and as an application on internet-capable devices such as smartphones and tablets.

**240.** The combination of the platform's own browsers and operating systems furthermore offers the possibility to place one's own search service prominently and to install it as the default search service. This provides synergies, which may help to explain why e.g. Google has an incentive to develop its own browser (Chrome) and its own operating system (Android) and to provide them free of charge. Combining a dominant search service with an operating system could be problematic in competition terms if it caused market foreclosures. For instance, the linking of mobile operating systems and applications (apps) with central services such as Google Search, Google Maps or YouTube could impair competition between different operating systems, sales portals for apps (app stores) or different app manufacturers.

**241.** In concrete terms, Google has been accused in this context of among other things impairing competition on the market for the development of apps within the Mobile Application Distribution Agreement (MADA).<sup>174</sup> For instance, for the manufacturers of mobile devices (OEMs) the pre-installation of specific Google apps is contingent on the acquisition of a free licence which provides for the installation of a bundle consisting of several Google apps, namely the "Google Mobile Application Suite (GMS)". What is more, among other things the Google Search Widget must be prominently placed on the welcome screen, and specific Google services must be set as default.

**242.** The European Commission is currently examining whether this leads to competition restrictions and proceedings need to be initiated. The question will also need to be clarified here as to whether the bundling of different apps leads to anti-competitive foreclosure of the market and is to be disapproved of, taking potential efficiencies into consideration.

**243.** In the view of the Monopolies Commission, the restrictive contents of the MADA will need to be considered here against the background of competition between different "mobile ecosystems" which impose different levels of restrictions on their users, and hence promise a different "user experience". In addition to the Google ecosystem, which includes the Android operating system, the Google Playstore and various Google apps, Amazon, Apple, Microsoft and other providers also offer their own, frequently closed ecosystems with accordingly different user experiences. Thus, on devices with a Microsoft or Apple operating system, applications can only be acquired via the dedicated, exclusive App Store. In contrast, the MADA does not rule out the use of various app stores on Android devices. Device manufacturers can continue to pre-install other app stores and apps and place them prominently, or can do without the GMS altogether and use other app packages supplied by competing providers. In the same way, users are free to install competing applications, despite any pre-installed Google apps, and can hence multi-home and switch applications.

#### **5.4.2.2. Incorporating new services and contents to increase platform attractiveness**

**244.** Search platforms are increasingly incorporating the results and contents of specialised services in the results of the horizontal search in order to answer search queries. These include map extracts, news, images and videos, but also increasingly hotel, restaurant or product reviews. Such inclusion of specialised services constitutes a refining of the search platform, and hence a product innovation, also because many search queries cannot be sensibly answered until other services are incorporated in this way. However, these incorporated services do not need to be the platform's own content-providers (on this 5.4.2.3).

**245.** The search platform's additional functions make it more attractive to users. What is more, it can offer users an added value if relevant content is shown directly, thus making an inconvenient search on other websites unnecessary.

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<sup>174</sup> Cf. FairSearch, [www.fairsearch.org/fairsearch-announces-complaint-in-eu-on-googles-anti-competitive-mobile-strategy/](http://www.fairsearch.org/fairsearch-announces-complaint-in-eu-on-googles-anti-competitive-mobile-strategy/) retrieved on 23 March 2015. Critical as to the allegations Körber, T., NZKart 2014, 378 ff.

The inclusion of complementary services can hence offer advantages for users, particularly since the content remains findable via the organic results list. If, additionally, complementary services are competing to be incorporated in the general search, it is possible for high-quality services to assert themselves, something which would be positive for users in turn.

**246.** The incorporation and hence the preferred portrayal of an individual service in the search results leads to disadvantages for all the services which are not included and which, unlike the service which is presented preferentially, need to expect a fall in their own visitor figures. Depending on the nature and duration of cooperation between search engines and service-providers, this may have a negative impact on willingness to invest. Problems may arise if the search-provider incorporates its own (suboptimal) services.<sup>175</sup>

**247.** However, it is to be seen as being more problematic if other providers' contents are used notwithstanding commercialisation rights ("scraping"). This is all the more so if a dependency exists between search engines and content-providers. Examples of such conduct on the search engine market are the use of user-generated contents of competing services such as images, product and hotel reviews, as well as possibly the use of protected text excerpts ("snippets") when displaying the specialised search results. Such unauthorised commercialisation of third-party contents does not constitute abuse under competition law where competition is effective, but may breach the principles of fair competition (section 4 Nos. 10-11 of the Act Against Unfair Competition [*Gesetz gegen den unlauteren Wettbewerb – UWG*]). What is more, such conduct on the part of a search platform which has market power would also be relevant under competition law (Art. 102 TFEU and section 19 of the Act Against Unfair Competition).<sup>176</sup> In particular, it would be considered problematic if competing providers were only able to defend themselves against their contents being used in the specialised search results by foregoing inclusion in the search engine's web index altogether, and hence also not being named in the organic search hits.

#### **5.4.2.3. Preferential treatment of the platform's own services**

**248.** Search platforms which offer both searching and other services and contents (images, videos, review and comparison portals, etc.) have an incentive to afford preferential treatment to them when showing search results ("search bias") in order to motivate users to visit the platform's own services ("traffic diversion"), and hence to achieve higher turnover for instance via advertising or acting as an intermediary for products. In-house contents can be afforded preferential treatment in a variety of ways, such as by falsifying the search algorithm or by affording preferential treatment to the presentation of the platform's own services in the search results.<sup>177</sup> This kind of interference is regarded in the public debate as problematic since search results can be distorted away from satisfying user interests, and towards those of the platform operator ("search neutrality").

#### **Incentives to falsify the search algorithm**

**249.** Independently of preferential displaying of own services in the search results (see below), the search algorithm could be falsified in order to increase the ranking of own contents or those of cooperation partners among the organic search hits ("promotion"), or to deliberately decrease the ranking of specific services provided by competing providers ("demotion"). Hence, users would be steered more towards the platform's own services. Such conduct would be harmful both for competing services and for users since competitors would have to expect falling numbers of visitors, and users would not reach the websites best matching their interests. That being said, a search engine would have to expect a considerable loss of reputation and a loss of search queries if this kind of interference were to be made public.

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<sup>175</sup> Cf. section 5.4.2.3. below for more detail.

<sup>176</sup> See section 8 below for more detail.

<sup>177</sup> Cf. previous section.

## Preferential inclusion of own services

**250.** In addition to the distortion of search results, users can also be re-directed to in-house services if preferential treatment is afforded to the platform's own services when prominently including specialised services.<sup>178</sup>

**251.** While highlighting the content of specialised services in general may certainly constitute an innovation in the users' interest (cf. section XX), in particular preferential treatment of the platform's own services may entail further advantages and disadvantages, thus making it necessary to take a more differentiated look. In many cases the inclusion of other providers' services is likely to also not cause any technical problems. This is suggested for instance by the fact that Google has included third-party contents in the past and that Microsoft's Bing cooperates with other providers in some cases.

**252.** From the search platform perspective, incentives exist to use their own services in order to attract more users to them, and thus to achieve additional turnover. What is more, advantages may result from not incurring the concomitant transaction costs between the search platform and content-providers. However, at the same time, there is a danger that the quality of the search results may worsen, and ultimately that it may lose users if the incorporated service were to be relatively poor. An in-house platform service such as a comparison or review portal could be poorer because, at least at the beginning, it does not have a sufficient quantity of feedback in order to be relevant from the user point of view.

**253.** Incentives to redirect users to its own services exist regardless of the market position of a search platform. That being said, one should presume that a search platform which has a competitive advantage, for instance because of better technologies or more web traffic data, has greater latitude for including lower-quality services of its own than other search platforms have. Unlike these, it does not have to presume that customers will switch to another provider as long as the overall quality of the search platform remains sufficiently high. What is more, it can be presumed that possible reductions in quality caused by the incorporation of lower-quality services would decrease in the long term since the preferential portrayal in the search results encourages more users to use the service.

**254.** It is questionable whether such competition restrictions are compensated for by efficiencies that are achieved in the context of the incorporation of services. This applies at least if one considers the potential long-term impact on the service portfolio of search services. As a result of the incorporation of in-house services, users initially forgo the utilisation of potentially better competing services in many cases, but depending on their preferences save (short-term) search costs which need to be expended to identify suitable services in the general search results. That being said, the inclusion of in-house services may enable the search platform operator to consolidate its market power (in the long term) and to effectively shore itself up against competition.

## The legal assessment of the potential for abuse

**255.** In legal terms, the fact of dominant operators of a search platform affording preferential treatment to their own services may entail abusive leveraging of market power. Competition problems of this kind are and have already been the subject-matter of proceedings of the U.S. and European competition authorities against Google. However, the suspicion of falsifying the search algorithm was not confirmed, and was dropped.<sup>179</sup> Furthermore, the U.S. Federal Trade Commission (FTC) reached the conclusion back in 2013 that the showing of complementary services together with the organic search results was unobjectionable in competition terms since the advantages for users outweighed the disadvantages for competitors.<sup>180</sup> In derogation from this, the European Commission continues to investigate combined presentations in a set of proceedings that are still pending in the context of the allegation of re-directing data traffic

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<sup>178</sup> With regard to potential falsifications of the search algorithm of the Google search platform in favour of incorporated services, cf. FTC Staff Report, as quoted in: Mullins/Winkler/Kendall, Inside the U.S. Antitrust Probe of Google; Winkler/Mullins, How Google Skewed Search Results; Kendall/Winkler, Excerpts from FTC Staff Report on Google's Search Practices, in each case in: Wall Street Journal of 19 March 2015.

<sup>179</sup> FTC, press release of 3 January 2013, *In the Matter of Google Inc.* On examination in the EU, cf. European Commission, 39.740 – *Google*, press release IP/10/1624 of 30 November 2010. On this already Monopolies Commission, XXth Biennial Report, loc. cit., para. 42.

<sup>180</sup> Cf. FTC, press release of 3 January 2013.

(“traffic diversion”). Furthermore, the Commission is investigating various practices carried out by Google related to the Android mobile operating system.

**256.** When it comes to displaying complementary services, in order to eliminate possible abuses, Google has offered commitments to the European Commission according to which, should its own specialised search services be displayed, the services of three rivals are also to be displayed. The allegations with regard to the Android operating system have not yet been the subject-matter of an offer of commitments.

**257.** The European Commission has now forwarded objections to Google, and for this reason has also detailed its allegations in generally accessible press publications.<sup>181</sup> The objections relate to one of the accusations raised in the original proceedings, namely the systematic preferential treatment of Google's own price comparison service in the general search results. The European Commission considers the unequal treatment of Google's own price comparison service in comparison to other services to constitute abusive conduct which is connected to the prominent placing of its own price comparison service and the application of a system of sanctions to other price comparison services. Google is said to thus be leveraging its position of market power in the general search on related markets.<sup>182</sup> Furthermore, the European Commission considers an abuse to lie in the fact that Google uses the Android mobile operating system in order to enforce the pre-installation of Google's own applications and services, to prevent the development and sale of Android versions from other providers (“Android forks”), and to link and bundle Google applications and services with other applications/services and with interfaces.<sup>183</sup>

## **5.5. On the need for regulatory action**

**258.** The above discussion of the search engine market has revealed that the scope for the conduct of large search engines is at least partly restricted at present by a number of market-related factors. Regardless of this, there is a political discussion on adding supplementary regulation to the existing set of antitrust tools in order to keep competition functioning on search platforms and to protect other market players (including consumers) against abuses of market power.<sup>184</sup>

**259.** The Monopolies Commission holds the view that a purely preventive regulation, regardless of any abuse, in particular by a regulation of the search algorithm or regulatory divestiture tools, cannot be approved of at present (on this, cf. 5.5.1). When it comes to regulatory activities aiming to enable search platforms to have equal access to user data or to make this dispensable by establishing a State-funded web index, the risks outweigh the potential advantages in its view (on this 5.5.2). At best, activities should be considered which promote the development of standards for the networking of platforms and increase interoperability (on this 5.5.3).

### **5.5.1. No need for purely preventive regulation**

**260.** A regulation applying to internet platforms aiming to prevent abuses is at best to be approved of with the greatest reservation in the view of the Monopolies Commission, and certainly does not appear to be necessary at present.

#### **5.5.1.1. No need for a divestiture instrument regardless of abuse**

**261.** In order to counter the potential dangers of affording preferential treatment to in-house services when showing search results, it is proposed to divest general searches and specialised services in order to prevent the preferential treatment of in-house services when displaying search results.

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<sup>181</sup> European Commission, press releases IP/15/4780, IP/15/4781, IP/15/4782 and declaration of Commissioner Vestager, STATEMENT/15/4785, both of 15 April 2015.

<sup>182</sup> European Commission, press release IP/15/4781 and declaration of Commissioner Vestager, STATEMENT/15/4785, both of 15 April 2015.

<sup>183</sup> European Commission, press release IP/15/4782 and declaration of Commissioner Vestager, STATEMENT/15/4785, both of 15 April 2015.

<sup>184</sup> Cf. most recently European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, communication of 6 May 2015, pp. 10 and 12 ff., and Federal Government, statement on the XXth Biennial Report of the Monopolies Commission 2012/2013, Bundestag printed paper 18/4721, para. 17.

**262.** Such divestiture could take place in different ways. For instance, the German Energy Industry Act (*Energiwirtschaftsgesetz – EnWG*) provides for measures aimed at divestiture in accounting, computing and organisation, as well as in terms of company law.<sup>185</sup> Going even further, it would be possible to consider complete divestiture under property law. The right of disposal of the various services would then have to lie with different owners, for instance once specific parts of the company had been separated. Accordingly, various forms of divestiture of search platforms would be conceivable. Such divestiture could be restricted to dominant search engines or envisaged for all search engines.

**263.** However, divestiture always constitutes a grievous encroachment on the company's structure. A regulatory divestiture instrument would hence always have to be structured and applied in a reasonable fashion, measured against the economic goal that was pursued by it.

**264.** However, when it comes to the risk of search platforms affording preferential treatment to their own services in a manner that is not sanctioned by competition, it is doubtful whether such activities would actually be suited to effectively reduce any market distortions. This applies in particular if the activities were carried out solely because of the market power of specific search engines or for all search engines in the field of organic searches.

**265.** True, if a search engine is prevented by structural activities or regulatory stipulations from expanding its organic search results to include contents from proprietary specialised services, several providers could compete for space for such services. This might have a positive impact on competition on these markets, which in turn would be in the interest of users. That being said, regulatory activities linked to the existence pure and simple of market power would from the outset run counter to the approach of competition law, which consciously accepts (internal) growth through market success in order to thus create an incentive to innovate. This is all the more so in the event of a regulation based solely on the operation of a search engine in organic searches.

**266.** On the side of the search engines affected, divestiture could moreover eliminate any rationalisation advantages and deprive them of existing economies of scale and scope. Because of the severity of the encroachment on the business model, the Monopolies Commission considers that divesting a dominant search platform could at best be considered if the relevant search platform had market power within an established market environment that was not permanently typified by competitive structures.<sup>186</sup> As long as, by contrast, there appears to be a chance to stimulate competition powers, a grievous, irreversible encroachment on existing company structures is ill-advised. Quite apart from that, it is questionable whether any divestiture measures vis-à-vis platform operators domiciled outside Germany could be monitored and enforced.

#### **5.5.1.2. No need for regulation of the search algorithm**

**267.** Furthermore, it is being considered to engage in regulatory activities to prevent the falsification of search results and guarantee search neutrality. The term “search neutrality” is based on the idea that search engines may not afford preferential treatment to their own contents.<sup>187</sup> By contrast, difficulties would arise from an attempt to positively formulate demands for a (completely) “neutral” search platform. The compiling of a list of search results is always based on criteria which are determined by the search engine operator, and hence are subjective to a certain degree.

**268.** As per the proposals that have been made to date, a regulation of the search algorithm to ensure search neutrality would entail that a State authority would have to undertake to supervise any changes to the algorithm.<sup>188</sup> Given the frequency with which changes are made, this would entail considerable effort. What is more, due to the complexity of the search algorithms, it would remain unclear whether it would be possible to objectively ascertain a distortion. Moreover, search engines are better equipped in cases of doubt to give their own services an advantage when showing the

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<sup>185</sup> Cf. Monopolies Commission, Special Report 59, Energy 2011: Advantages and disadvantages in competition development (*Energie 2011: Wettbewerbsentwicklung mit Licht und Schatten*), Baden-Baden 2012, paras. 391 ff.

<sup>186</sup> Cf. already Monopolies Commission, XXth Biennial Report, loc. cit., para. 58; *ibid.*, Special Report 58, Options and capacity limits of company divestiture under competition law (*Gestaltungsoptionen und Leistungsgrenzen einer kartellrechtlichen Unternehmensentflechtung*), Baden Baden 2010, para. 135.

<sup>187</sup> Cf. Crane, D.A., Search Neutrality as an Antitrust Principle, University of Michigan Public Law Working Paper No. 256, 2011.

<sup>188</sup> Cf. e.g. Bracha, O., and Pasquale, F., Federal Search Commission? Fairness, Access, and Accountability in the Law of Search, 93 *Cornell Law Review* 1149 (2008).



search results. Given their knowledge of the search algorithm, the websites of in-house services could be adapted to the search criteria used by the search engine to ensure a good placing on the results list without necessitating a change to the search algorithm.<sup>189</sup>

### 5.5.1.3. No need to communitise the search engine infrastructure

**269.** A possible regulatory approach towards intensifying competition on the search platform market could entail (1) the disclosure of the search algorithm or of the web index of a dominant search engine to competitors, (2) the development of a generally accessible web index, or (3) the communitisation of exclusive user data.<sup>190</sup> There are hence some calls to disclose the information in question or to add to it by means of an infrastructure developed and provided by the State.

**270.** Regulatory action is also considered in these cases regardless of whether the search platform operator acts abusively within competition law if it refuses to grant access to information to which it has exclusive access. Only a competition policy-related legal assessment of these activities is to be carried out in this context, and not one related to intangible assets and privacy.

**271.** The Monopolies Commission considers that the State-enforced disclosure of the search algorithm or of the web index by a dominant search platform vis-à-vis its competitors is to be rejected. Such an action would entail a major risk of eliminating the incentives to invest in the development of the search algorithm and the web index. At the same time, such an activity would mean a major encroachment on company interests that need protecting.<sup>191</sup>

**272.** As an alternative to revealing the search algorithm or the web index of a dominant search platform, there has also been discussion of the creation of for instance a State-funded, open web index. This would make it possible to take account of the fact that, apart from Google and Microsoft's Bing, currently only smaller providers such as DuckDuckGo and Blekko have any web index of their own with which to respond to searches. Such an activity would also require a greater financial and technical effort than the development of a European search engine, which has also already been mooted.

**273.** The Monopolies Commission considers that the disadvantages of a State-funded, open web index would clearly outweigh any potential advantages. True, one can presume that such an index would make it easier for new providers to enter the search engine market since the costs incurred by the establishment and operation of an index would be saved. That being said, the success of the project would be highly uncertain since it ultimately depends on it being accepted by search engine users. On the other hand, it is not obvious why search engines based on a public index should be more successful than the existing competitors. A considerable amount of public funding would have to be expended for the establishment and management of any public web index. Since privately funded web indices are currently being drawn up, the existence of a State mandate in this domain cannot be easily justified. What is more, the distortion of the search engine market associated with the State commitment speaks against using public money to fund a web index. This would devalue investment that private providers have already made.

**274.** Over and above this, there are already publicly accessible web indices such as that of the Common Crawl Foundation.<sup>192</sup> Even if the leading search engines such as Google or Bing have more resources and a much larger web index, publicly accessible web indices with several billions of listed websites are evidently sufficient to serve as a foundation for a search engine and to make it easier to enter the market. Other existing search engines are also based on web indices of a similar size.<sup>193</sup>

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<sup>189</sup> Cf. on this also Grimmelmann, J., Some Skepticism About Search Neutrality, in: *The Next Digital Decade: Essays on the Future of the Internet*, p. 435, Szoka, B./Marcus, A. (eds.), *The Next Digital Decade: Essays on the Future of the Internet*, TechFreedom, pp. 435 ff.

<sup>190</sup> Cf. Argenton, C./Prüfer, J., Search Engine Competition with Network Externalities, *Journal of Competition Law and Economics* 8 (1), 2012, pp. 73-105.

<sup>191</sup> Cf. also German Federal Court of Justice, judgment of 28 January 2014, VI ZR 156/13, BGHZ 200, 38 (The scoring algorithm of the Schufa as its "major commercial secret").

<sup>192</sup> Cf. <http://commoncrawl.org/>, retrieved on 26 March 2015.

<sup>193</sup> Information provided to the Monopolies Commission by the Common Crawl Foundation.

**275.** There is also discussion of regulating the usage data. Unlike the search algorithm or the web index, the usage data is not an in-house achievement of the search platform, but is created by user input when they use the search engine.

**276.** Such usage data creates a learning effect on the search platform. Concentration tendencies on the market can be amplified in the long term if learning effects appear predominantly on a specific search platform. The reason for this is that a search platform can use the user interaction on the search site to improve the search results that are shown and the search-based advertising in line with users' interests. This means that, once a search platform has obtained a competitive advantage, it can expand it and hence "tip" the market (on all sides) in its favour, and the operators of competing search platforms can only improve their own service while facing ever-increasing difficulties.

**277.** A possibility to counter such concentration tendencies would be to provide the usage data for other search engines. A variety of paths are again thinkable for this, either a bilateral exchange via interfaces that would have to be established, or an exchange via a central infrastructure to which all search engines would be granted access.

**278.** The advantages of such an approach would include it constituting a less intensive encroachment on the business model than would be the case if general search and specialised services were to be divested. Search platforms would continue to be able to compete via a number of other quality-related factors, such as the level of detail of the web index, the speed of the search engine or their user friendliness.

**279.** A disadvantage of such regulatory intervention would be the considerable amount of effort which would be needed in technical terms from the search platform operators in question, as well as within a control of data exchange by a State agency. Furthermore, problems would relate to the fact that the exchange of web traffic data would permit other search engine operators to draw conclusions as to quality factors such as the web index or the search algorithm used. It would have to be ensured by means of appropriate technical procedures that no personal data would be shared in order to allay privacy concerns. What is more, standards for the data exchange and the calculation of access prices would have to be developed and enforced. This effort would appear disproportionate, in particular if the regulatory encroachment could only be enforced for the German-speaking area.

**280.** The Monopolies Commission considers that the disadvantages outweigh the potential advantages here too, so that such regulatory activity can not be recommended, at least at present.

### **5.5.2. Promoting the development of standards as a sensible activity**

**281.** By contrast, the assessment of the European Commission and of the Federal Government that a regulatory framework for the future should be created among other things by promoting norms and standards appears to also be correct for search platforms and services depending on them.<sup>194</sup>

**282.** The European Commission pointed out in its digital agenda that the technical interoperability and the open architecture of the internet which this creates is a precondition for being able to use information and communication technologies without restriction. This is contingent on norms and standards which reduce the risk of binding users to a specific technology.<sup>195</sup> In this regard, significance particularly attaches to interfaces for software development.<sup>196</sup> Moreover, norms and standards make sense when they counter market players' dependence on individual platform services.

**283.** The Monopolies Commission suggests considering activities minimising the disadvantages for other internet services due to the modus operandi and refinement of search platforms. Thus, State stipulations appear to make sense obliging providers of internet services, including search engines, to effect technical presets to protect other market players against violations of their rights when using their contents and data (e.g. copyright or privacy rights), e.g. by

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<sup>194</sup> Cf. European Commission, A Digital Agenda for Europe, Communication of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 245 final, pp. 17 ff.; Federal Government, Digital Agenda 2014-2017, Brochure of August 2014, p. 13.

<sup>195</sup> European Commission, A Digital Agenda for Europe, Communication of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 245 final, pp. 17 f.

<sup>196</sup> Federal Government, Digital Agenda 2014 – 2017, Brochure of August 2014, p. 13 (in particular with regard to the interlinking of classical industry with information and communication technologies).

making situation-dependent, automatic enquiries to obtain the explicit consent of the right holder.<sup>197</sup> Furthermore, when it comes to setting up devices and systems, technical norms or standards appear to make sense which provide for the active selection of search engines and specific search services by users using applications for mobile devices or in the browser.<sup>198</sup>

### 5.5.3. Refining the copyright pertaining to indexed contents

**284.** The Monopolies Commission considers that copyright should be further developed in order to, first, do justice to the needs of dynamic markets in the digital economy and, second, to appropriately satisfy the legitimate protection interests of holders of intellectual property rights. This applies with regard to the utilisation of intellectual property in the display of online search results, but also over and above this.

**285.** In particular the introduction of copyright rules at EU level may make sense in order to provide authors of intellectual works (e.g. books and images) with better protection than previously against the commercialisation of such creations by third parties. This applies given the fact that the enforcement of such rights within the EU's fragmented legal framework is made more difficult. Furthermore, regulations at EU level could make it clear – beyond the competition risks already applying to search engines – what preconditions need to be taken into account when deploying technical means in order to enforce territorial restrictions of national copyrights (“geoblocking”). In practice, the boundaries drawn by the case-law for such technical means are obviously frequently disregarded, which may constitute a violation of competition rules.<sup>199</sup> Furthermore, the introduction of copyright regulations at EU level could contribute to the development of European digital enterprises which operate across borders in the audiovisual sector.

**286.** Moreover, the rules on the attribution of intellectual property should also be reconsidered, and possibly simplified. There is for instance considerable uncertainty in practice as to who the holders of rights are to a user review that has been submitted online.

**287.** An ancillary copyright has been introduced in Germany which supplements the rights of the authors of press articles. This enables publishers to assert their own rights in this display when extracts are shown that are generated by a search engine, and hence at the same time in the services of the search engine (traffic generation). Hence, the underlying dispute which involves search engines and publishers relates exclusively to the intermediaries between the author and the reader, albeit it is essentially not a matter of the copyrighted work (e.g. a specific press article), but of the power to commercialise the user attention attracted by reproducing current affairs. However, unlike press articles produced on them, current news items cannot be protected. The dispute should be decided on by developing business models which are in line with the market challenges on the part of the intermediaries, and not by legislative intervention.

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<sup>197</sup> Cf. already paras. 103 f. above (on privacy).

<sup>198</sup> Cf. on this above paras. 192 f. On possible regulatory action cf. in this regard European Commission, Decision of 16 December 2009, 39.530 – *Microsoft (Tying)*, Annex.

<sup>199</sup> ECJ, Judgment of 4 October 2011, C-403 & 429/08 – *Football Association Premier League*, European Court Reports 2011, I-9083; on this Monopolies Commission, XXth Biennial Report, loc. cit., paras. 1034 ff.

## 6 Social networks

**288.** Social networks such as Facebook, Xing or Twitter offer their users a platform on which they can communicate with other users and can create a wide variety of content which they can share with them. According to a representative survey carried out by the industry association Bitkom, more than three-quarters of internet users in Germany (78 per cent) were registered with at least one social network in 2013, and two-thirds (67 per cent) were active users, the vast majority of whom used social networks every day.<sup>200</sup> Thus social networks are a central component of the modern internet that allows users to interact (Web 2.0) and to establish new contacts, thereby offering an added value in comparison with pure communication services such as WhatsApp or Skype, which largely serve to enable consumer communication between existing contacts. The popularity of social networks is reflected in the user figures. The largest social network in the world is Facebook, with some 2 billion registered and 1.4 billion active users. Other services with large numbers of users are Tencent Qzone, which is largely established in the Asian region (629 million active users), Google+ (540 million), Instagram (300 million) and Twitter (284 million).

**289.** Social networks provide a wide variety of services.<sup>201</sup> Most of these networks typically offer a number of basic functions, including a user profile, a list of contacts and a messaging feature. Social networks may however differ widely in terms of their target groups, functions and purposes. Some networks such as Facebook, Google+ or Tencent Qzone address a large group of users, including both private individuals as well as public agencies and companies which use social media as a part of their public relations work and of their corporate communication. A wide range of possibilities are available for user interaction. Communication can take place bilaterally between users, in groups or publicly, enabling users both to send text messages and links to other websites, as well as to share images or videos. On the other hand, there are a large number of other providers specialising in specific user groups and purposes. Networks such as LinkedIn or Xing for instance function as platforms for professional networking. Other networks such as Instagram or Flickr are particularly suited for sharing images and videos, while Twitter is used to publish short messages.

**290.** There are several distinct methods of funding social networks. Many providers capitalise on the access which they have to users by increasingly offering space for online advertising. For instance, the social network Facebook made the lion's share of its worldwide turnover of USD 12.5 billion which it achieved in the fiscal year 2014 through advertising, high growth rates being recorded in mobile internet use in particular.<sup>202</sup> Alternative forms of funding include subscription fees or "Freemium" models where basic functions are free of charge and certain premium functions are offered for a fee.

**291.** Public criticism of social networks particularly addresses the way in which the services handle personal data. A group of Facebook users recently took the company to the Vienna Regional Court, accusing it of violating its users' privacy, illegally collecting and forwarding data and spying on users via Like buttons and Apps.<sup>203</sup> The changes that Facebook made to its terms and conditions at the beginning of 2015 drew similar criticism.<sup>204</sup> Facebook was particularly criticised for having acquired extensive possibilities to collect and evaluate user data, as well as to exchange user data

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<sup>200</sup> Bitkom, *Soziale Netzwerke 2013, Eine repräsentative Untersuchung zur Nutzung sozialer Netzwerke im Internet*. Third, expanded study, Berlin, 31 December 2013.

<sup>201</sup> The following Wikipedia article contains an overview of a number of known social networks:  
[http://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](http://en.wikipedia.org/wiki/List_of_social_networking_websites), retrieved on 14 April 2015.

<sup>202</sup> Facebook, [http://files.shareholder.com/downloads/AMDA-NJ5DZ/107683291x0x822961/FD718A09-C312-4605-9A17-1D6EF07BDD5A/FB\\_Q115EarningsSlides.pdf](http://files.shareholder.com/downloads/AMDA-NJ5DZ/107683291x0x822961/FD718A09-C312-4605-9A17-1D6EF07BDD5A/FB_Q115EarningsSlides.pdf), p. 8, retrieved on 29 April 2015.

<sup>203</sup> Cf. inter alia tagesschau.de, tagesschau.de, <http://www.tagesschau.de/ausland/facebook-153.html>;  
<http://www.zeit.de/digital/datenschutz/2015-04/facebook-datenschutz-klage-schadenersatz-oesterreich>, retrieved on 14 April 2014.

<sup>204</sup> Cf. Zeit Online, <http://www.zeit.de/digital/datenschutz/2015-01/facebook-agb-aenderung-datenschutz-fragen>, retrieved on 13 April 2015.

with other services which belong to Facebook, such as WhatsApp, Instagram and the advertising service Atlas.<sup>205</sup> However, other providers such as Twitter are being increasingly criticised for their extensive access to user data too.<sup>206</sup>

**292.** Even if this primarily focuses on topics related to privacy and consumer protection, competition-policy interests are touched upon if potentially dominant providers of social networking services use their position vis-à-vis users in order to obtain a competitive advantage by acquiring comprehensive access to user data. The potential need for legislative action on the basis of concentration tendencies in connection with access to user data in social networks is therefore discussed below.

## **6.1. Concentration tendencies**

**293.** In economic terms, social networks are first and foremost (one-sided) networks which have a user group with the network members. Opening up for advertising purposes makes social networks two-sided platforms, bringing together, first, the users of a social networking service and, second, their advertising customers. Furthermore, if social networks offer programming interfaces for software developers, for instance for games, they can also be seen as three-sided platforms which additionally bring together users and content-providers.

### **6.1.1. Market definition/market shares**

**294.** Similar to advertising-funded search platforms (cf. section 5), when it comes to a competition-related assessment of the conduct of social networking services, a market definition can be only approximately arrived at by taking an initially separate view of the individual sides of the platform, and thereby taking possible interdependences between the sides of the platform into account.

**295.** With regard to the geographical market definition, it can be ascertained, first, that social networks offer their services worldwide as a matter of principle, so that communication can take place globally. On the other hand, the lion's share of user interaction and of the advertising that is displayed is likely to be attributed to a single linguistic and cultural area. For instance, German Facebook or Twitter users will prefer to use the service with the German-language setting; they will largely communicate with other German users, and advertising will be shown to them that is adapted to their location and is in German.

**296.** The number of registered users will be of only limited assistance when it comes to calculating shares on the user side of social networking services. For instance, only just under one quarter (540 million) of the estimated 2.4 billion registered users of Google+ are actually active in the network at least once per month.<sup>207</sup> The lion's share of registered members can thus not be reached by other users and by potential advertising customers. Hence, the network is estimated to be less significant to users and advertising customers. It should also be taken into account when considering membership figures that users may be active on more than one social network, and hence membership figures only say so much regarding the actual spread of users.

**297.** Hence, it is likely to be helpful, in addition to the number of users, to consider the frequency of user interaction on the platform. This can for instance be roughly achieved by considering the numbers of page views. Figure 6.1 shows the number of such page views on the ten most popular social networks in Germany in December 2014. This does not include page views via mobile devices. This reveals that, with roughly 636 million views (corresponding to 77 percent), Facebook's website was visited much more frequently than all the other services under consideration here together (roughly 190 million). Google+ and Twitter lag far behind, with roughly 40 million page views each (corresponding to almost 5 percent).

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<sup>205</sup> On this HmbBfDI, *Facebooks neue Datenschutzrichtlinie tritt heute in Kraft*, press release of 30 January 2015.

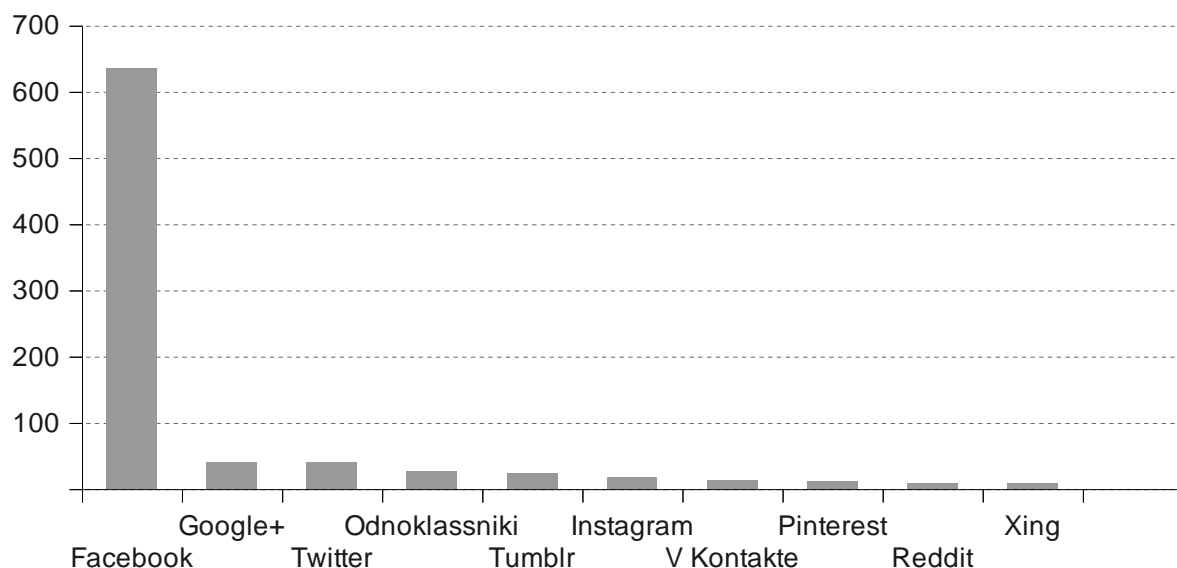
<sup>206</sup> Cf., inter alia, Heise.de, <http://www.heise.de/newsticker/meldung/Datenschutz-Twitter-Nutzer-leicht-zu-verfolgen-2156201.html>, retrieved on 13 April 2015, or also FAZ.net, <http://www.faz.net/aktuell/feuilleton/medien/datenschutz-twitter-erstellt-app-diagramm-13289768.html>, retrieved on 13 April 2015.

<sup>207</sup> On the estimated number of Google+ profiles cf. Miernicki, G. <http://plus.miernicki.com/>, retrieved on 29 April 2015. On the number of active users cf. Google Official Blog, <http://googleblog.blogspot.de/2013/10/google-hangouts-and-photos-save-some.html>, retrieved on 29 April 2015.

**298.** The user shares of individual social networks should also be estimated to be higher if one presumes that the services looked at here can constitute different products from a user’s point of view. All social networks typically offer a number of basic functions such as user profiles, contact lists and communication functions.<sup>208</sup> However, many services are distinguished by different functionalities and user interfaces, the consequence of which is that these services are used in different ways and users access several services at the same time. While, for instance, Twitter largely serves to publish short messages, Instagram in particular specialises in publishing photographs. Facebook, by contrast, offers more extensive ways of drawing other users' attention to various contents such as messages, images and videos. Accordingly, depending on the specific perspective selected, services such as Facebook, Twitter or Instagram cannot be attributed to the same market, or only to a restricted degree.

**299.** It becomes apparent that a highly precise definition on the user side is not possible because of different substitution relationships and of the possibility to use different services in parallel (“multi-homing”). Even in the case of a potentially too wide definition of social networking services, Facebook is extremely relevant among users. The reasons for the high level of concentration are illustrated below.

**Figure 6.1: Most-visited social networks in Germany (page views in millions)**



N.B.: The figures relate to December 2014. Mobile visitors are not included.

Source: Own illustration based on Statista/SimilarWeb

### 6.1.2. Factors determining market concentration and market domination

**300.** Marked direct network effects on the user side favour a strong concentration of users on a small number of providers. The more members a social network has, the greater is the benefit of the network for the individual. The argumentation that is brought forward in some of the literature, namely that limits are imposed on the concentration tendencies as marginal costs are caused to rise as a result of increasing complexity, does not appear to be compelling.<sup>209</sup> This is countered, first, by the fact that there are a large number of social networks which permanently have very high user numbers and are continuing to grow. Second, measures are taken not to overwhelm users, for instance by filtering news pages on which reports from other users are brought together (news feeds) using algorithms in accordance with individual users' interests.

<sup>208</sup> European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, para. 51.

<sup>209</sup> Cf. Yoo, C. S., *When Antitrust met Facebook*, University of Pennsylvania Law School, Institute of Law and Economics, Research Paper Nos. 12-31, 2012, pp. 1148 ff.

**301.** Concentration tendencies are further favoured by a lack of interoperability between different social networks. Where users of various networks cannot communicate across platforms, they have an increased incentive to join the largest network in order to at least potentially interact with as many other users as possible. Operators of smaller networks in particular are therefore likely to have an interest in enabling their users to communicate with users of other, possibly larger, networks in order to compensate for disadvantages that might ensue from their networks being too small. Conversely, operators of relatively large networks have no incentive to enable interoperability with other networks since they are interested in retaining users within their network.

**302.** Without such interoperability, a large user base of an established service constitutes a barrier to market entry for other similar services. Unlike for instance with search engines, the switching costs for users tend to be high because of strong direct network effects and coordination costs. From a user perspective, high switching costs result, first, from the fact that, in particular, the contacts cannot be transferred when switching to a less popular network. Second, when switching providers, information that has been shared is lost because, for instance, messages, comments and photographs cannot be easily transferred to another network. A lack of data portability may thus increase users' switching costs and heighten any lock-in effect. A social network with a large user base hence has more leeway for abusive conduct. Unlike on platform markets with low user retention, it is hence insufficient in social networks for a competitor to merely offer slightly higher quality to entice a sufficiently large number of users to switch providers. An alternative social network would, rather, have to compensate for users' higher switching costs by offering much higher quality. This would "tip" the market in favour of another provider, but its strong position would in turn remain disputable, so that the latitude for competition-restricting conduct would be limited.<sup>210</sup>

**303.** Platform differentiation can contribute towards weakening concentration tendencies if some users switch to a new provider because of heterogeneous preferences. However, in many cases, one may presume that they are specialised services which serve a specific market niche by virtue of concentrating on a specific user group such as professionals (LinkedIn and Xing) or stressing a specific functionality such as sharing images (Instagram), and are hence regarded by users more as complementary services. This means that users will tend to use the services of for instance Twitter and Facebook alongside each other instead of switching from one service to the other. Because of their specialisation, it must therefore be doubted that these services are able to endanger the market position of a broader-based service with a larger number of users in the long term.

**304.** Similar to the case of advertising-funded search engines, indirect network effects between users and advertising customers may exist in the case of social networks in that a large network with a large number of users is more attractive for advertising customers than a smaller network is. Since advertising customers pay per display and/or per click, the advantage of a larger network is likely to be that it has more information on user interests, thus enabling it to show advertising in a more targeted fashion. On the other hand, users are unlikely to prefer a network which has a larger number of advertising customers.

**305.** High investment costs, for instance for establishing large server systems, are likely to play a somewhat marginal role when it comes to market entry. While the operators of large social networks have large server systems, computer capacities can also be rented at short notice, so that smaller networks do not necessarily incur the disadvantages brought about by high fixed costs.

## **6.2. Potential competition problems**

### **6.2.1. Incentives towards collecting excessive amounts of user data**

**306.** There are several ways in which user data plays a central role in the business model of advertising-funded social networks. First, network operators have an interest in users revealing their personal data to other users to increase the attractiveness of the network since it is only by passing on personal data to other users in order to in personal information that social interaction is enabled. Since users' willingness to reveal personal information also depends on how well this information is protected against unwelcome third-party access, social networks as a matter of principle are also interested in guaranteeing a high standard of data security.

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<sup>210</sup> Cf. para. 16 (competition according to Schumpeter).

**307.** Conflicts of interest between operators and users of social networks can arise with regard to the use of personal data if user data is evaluated for advertising purposes. Thus, the standard terms and conditions of many services frequently provide for far-reaching user consent to the processing, and not infrequently also to the commercial exploitation of the data which users make available to the respective providers when utilising the service.<sup>211</sup>

**308.** Such conduct is encouraged if the minimum statutory requirements as to transparency on the market are inadequately implemented. These are the following minimum requirements in particular:

- the principle of transparency under civil law (section 307(1)(2) of the German Civil Code [*Bürgerliches Gesetzbuch – BGB*]): Standard terms and conditions must be worded in such a way that the rights and obligations of the user's contracting partner (average addressee) are presented as clearly, simply and precisely as possible.<sup>212</sup> The economic disadvantages of a regulation must also be made so clear for the opposing side as can be expected given the respective circumstances.<sup>213</sup>
- the stipulation relating to the use of utilisation data for advertising (section 15 (3) of the German Telemedia Act and sections 4 and 14(2) No. 2 of the German Federal Data Protection Act): If there is no statutory basis, the utilisation and commercialisation of personal data are only permissible as a matter of principle if the data subject has consented. The drawing up of utilisation profiles for the purposes of advertising, market research or forming according to the need is only permissible if the user has been informed of his/her right to object and has not objected.
- the prohibition of unfair competition by misleading acts (sections 5(1) and 5a(2) of the German Act Against Unfair Competition [*Gesetz gegen den unlauteren Wettbewerb – UWG*]): Accordingly, providers of internet services may not carry out any commercial acts containing misleading information on major components of the service or of the price or withhold important information from consumers.<sup>214</sup>

**309.** The law itself is likely to contribute towards a worsening of the transparency situation for users. This is caused by the fact that a large amount of information must be provided regardless of whether the consumer currently needs and can process it, or at least is provided to minimise individual liability risks. This makes it particularly difficult for consumers to estimate what consent they have given by consenting to the standard terms and conditions and what the scope of this consent is. Thus, according to a recent study, almost 75 percent of users stated that such terms were frequently too long and complicated to be understood at all.<sup>215</sup> Accordingly, a large proportion of users also do not read these standard terms and conditions, or at most only skim through them. Moreover, almost two thirds of respondents stated that, in their opinion, it was impossible to verify whether the standard terms and conditions were complied with.

**310.** The lack of compliance with minimum legal requirements as to the design of the collection and use of user data can lead to situations in which operators of social networks (1) force through decisions with regard to users without their knowingly consenting (e.g. forced acceptance of particularly far-reaching data access), (2) restrict users' scope for decision-making by shaping the conditions of use, or by technical means (e.g. by making it difficult to delete profiles,

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<sup>211</sup> On this HmbBfDI, *Widerspruchsbescheid erlassen - Mehr Kontrollrechte für Google-Nutzer gefordert*, press release of 8 April 2015; *Wesentliche Änderungen bei der Datenverarbeitung von Google notwendig - Datenschutzaufsicht erlässt Anordnung*, press release of 30 September 2014; vzbv, *Facebook führt Nutzer in die Irre*, press release of 26 February 2015. It is unclear in some cases to what degree they are contractual conditions at all. This is open for instance when it comes to the data protection and utilisation conditions applicable to search entries; cf. for instance Google, Privacy Policy in the version of 25 February 2015, retrievable via [www.google.com](http://www.google.com): "We use the information we collect from all of our services [...] also [...] to offer you tailored content – like giving you more relevant search results and ads."

<sup>212</sup> Federal Court of Justice, Judgment of 21 July 2010, XII ZR 189/08, para. 29; Judgment of 7 October 2010, XI ZR 3/10 – *Schwäbisch Hall*, para. 20; Judgment of 12 March 2014, IV ZR 295/13, para. 23 (cited acc. to Juris in each case).

<sup>213</sup> Federal Court of Justice, Judgment of 7 October 2010, XI ZR 3/10 – *Schwäbisch Hall*, paras. 20, 24.

<sup>214</sup> Cf. section 2(1) No. 1 of the Act Against Unfair Competition on the term "commercial practice". Because of prior activities constituting a risk, liability for the conduct of third parties may also be considered here, e.g. where services are provided that violate third-party rights; cf. Federal Court of Justice, Judgment of 28 June 2007, I ZR 153/04 – *Telefonaktion*, para. 21; Köhler in: Köhler/Bornkamm, *Gesetz gegen den unlauteren Wettbewerb – UWG*, 33<sup>rd</sup> ed. 2015, section 8 of the Act Against Unfair Competition para. 2.16.

<sup>215</sup> German Institute for Trust and Security on the Internet, DIVSI study titled: *Daten – Waren und Währung*, November 2014.



ruling out data portability), or (3) collect more commercialisable user data than would be economically justified given the quality of the service (= the service provided in return). In this regard, a comparison suggests itself with cases in which purchasers must accept an excessive price or overly long contractual term.

**311.** The conduct that has been mentioned may be problematic in terms of privacy and consumer protection. However, when it comes to well-functioning competition, it should be presumed that the risks involved in such conduct are limited given that consumers can select alternative services from competitors. Strong network effects that are favoured by a lack of interoperability, as well as by high switching costs, may lead to a lock-in situation for users, and this may lead to market concentration. A social network can then use the resulting latitude vis-à-vis users to exact farther-reaching acceptance of the collection and exploitation of personal data than what could be expected in situations of effective competition. A competition problem would then arise in the case of social networks, in addition to the consumer protection problem.

### **6.2.2. Expanding supply**

**312.** In general, it can be observed on the market for social networking services that providers attempt to make platforms more attractive by incorporating new services and functions. These can be the network operator's own services or those of third parties. Facebook has for instance expanded its social network to include a number of services of its own such as a newly designed search function, a chat service, a message service, a video application and a marketplace for classifieds. Users in the USA have also been able to use the "Social Jobs Partnership" jobs exchange since 2012.

**313.** Facebook also offers an interface to software developers for programs which are integrated into the user profile and which, if the user consents, can access personal data. These are primarily games and other communication applications. Users can also make content such as texts, images and videos of the websites of other content-providers available to other users of the social network.

**314.** In this context, there have been media reports of cooperation plans between the social network Facebook and various content-providers such as the New York Times and National Geographic.<sup>216</sup> In accordance with this plan, news items would no longer only be published on the content-providers' websites, but also directly in the social network. There would therefore be fewer of today's links to contents outside the network. The objective is to save users the inconvenience of opening of articles in another application, in particular on mobile devices, in order thus to make it possible to seamlessly read contents in another app.

**315.** Participants could benefit from this kind of cooperation in a variety of ways. The social network would become more attractive for users and advertising customers since content could be shown to users directly in the network, and additional advertising could be shown directly next to the contents. This kind of cooperation could be attractive for content-providers since content would receive greater attention through being prominently placed in the network and by making access simpler. What is more, content-providers might receive a part of the additional advertising proceeds. Direct disadvantages would arise for content-providers from the fact that there would be no more possibilities to display advertising and collect user data on their own website. What is more, content-providers who do not cooperate with Facebook might be disadvantaged vis-à-vis providers who do cooperate if their content is not shown on Facebook in a similar fashion and they consider themselves forced to also cooperate with Facebook. It remains to be seen what long-term impact this would have on the media market. However, content-providers might become more dependent on Facebook since content would no longer be exclusively available for users on the content-providers' websites, and incentives to access these sites would be reduced.

### **6.2.3. Refining the product portfolio**

**316.** Facebook's current plans to expand the Facebook Messenger cannot be easily assessed in terms of competition. This Messenger was originally developed as a communication service (similar to Microsoft Messenger and WhatsApp). According to press information, Facebook is now planning to transform the service into a platform for mobile applica-

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<sup>216</sup> Cf. nytimes.com of 23 March 2015, [http://www.nytimes.com/2015/03/24/business/media/facebook-may-host-news-sites-content.html?\\_r=3](http://www.nytimes.com/2015/03/24/business/media/facebook-may-host-news-sites-content.html?_r=3), retrieved on 28 April 2015.

tions (apps).<sup>217</sup> According to these plans, providers of apps are to be enabled to develop apps which can be integrated into the Facebook Messenger and freely selected and used by Messenger users.

**317.** This expansion of the Facebook Messenger follows a development that can currently be particularly observed in the Asian region (cf. the Line and WeChat services), and is accountable to the fact that user behaviour is obviously changing in a manner that is relevant for Facebook. The product which Facebook has mainly offered so far is a social networking service. This service was originally developed for desktop use. As the network succeeded against market rivals (MySpace, in Germany: e.g. StudiVZ), the service was further developed. The final product which is available today is a service which can be used on different devices and aims to offer users a wide range of possibilities to present and introduce themselves and communicate with as many contacts as possible, and for entertainment in general.

**318.** However, a development is noticeable such that the services that are relevant for Facebook are being used increasingly, or even exclusively, on mobile devices. Users can individually combine the services that they would like to use on these devices. In doing so, they can also select alternatives to the services offered by Facebook. One example was, prior to the takeover of WhatsApp, the utilisation of WhatsApp as an alternative to the Facebook Messenger.

**319.** Facebook has reacted to this development by taking over several providers of complementary or competing services (e.g. Instagram, WhatsApp).<sup>218</sup> In doing so, Facebook proceeded in the same way as other operators of large internet platforms which also took over smaller services that are frequently used on mobile devices and integrated them into their companies, e.g. Google the YouTube platform or Twitter the Posterous blog platform, the Vine video service and the We Are Hunted music service.

**320.** Contrary to what one might presume, and also in contrast for instance with the investigations undertaken in preparation for the European Commission's decision on the takeover of WhatsApp, Facebook has not integrated all the services into its social network which it has taken over.<sup>219</sup> Particularly the Instagram and WhatsApp services, which are highly popular among users, continue to be marketed to users separately. Facebook is doing this in order to take account of the fact that users whose personal preferences dictate that they only use Instagram or WhatsApp, but not Facebook's social network, are only interested in these very services.

**321.** By amending its standard terms and conditions for users, Facebook has created the possibility to use user data that have been collected on one service for other services.<sup>220</sup> This permits the combination and evaluation of the data so that the services can be developed in a standard form and a uniform service can be offered to cooperating providers (e.g. app providers on the Facebook Messenger).<sup>221</sup> This at the same time enables Facebook to retain its own links to users even if the latter use the services of other providers which are integrated into the Facebook Messenger. In the same way, subsequent to the amendment to the standard terms and conditions, the user data may be evaluated and commercialised uniformly for advertising purposes.

**322.** Facebook is using these changes to reduce its commercial dependence on the success of its social network. The refinements that have been made to the Facebook Messenger, rather, set the stage to develop the business model of the operation of a social network, for which it is vital for user data to be collected in a manner which enables Facebook to continuously maintain its links to users and to continue to use the user data collected so far, even if users only use the social network sporadically, or indeed cease using it altogether.

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<sup>217</sup> On this e.g. Lindner, *Facebook wertet Messenger auf*, FAZ of 26 March 2015: Eichenseher, *Facebook streut, um zu wachsen*, Gizmodo Buzz of 7 April 2015.

<sup>218</sup> Cf. FTC, File No. 121-0121, press release of 22 August 2012; File No. unknown, press release of 10 April 2014; European Commission, decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*.

<sup>219</sup> Cf. European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 136 ff., 159 ff, 184 ff. on the examination conducted by the European Commission.

<sup>220</sup> Facebook Data Policy, section titled "How is this information shared", <https://de-de.facebook.com/about/privacy>, retrieved on 23 April 2015.

<sup>221</sup> Cf. the presentations at the F8 Conference 2015, in particular the contributions "F8 2015 Opening Keynote", "Conversation With WhatsApp, Instagram and Messenger", as well as "Implementing and Understanding Facebook Analytics for Apps".

**323.** It is striking that this development was evidently not part of the subject-matter of the merger control proceedings on the takeover of WhatsApp. The European Commission had to adopt a predictive decision in the proceedings on the market development expected in the foreseeable period (at least two years).<sup>222</sup> According to Facebook's statement outside the proceedings, the refining of the Facebook Messenger and the integration of WhatsApp and Instagram into Facebook's product portfolio appear to be central elements of this company's business strategy.<sup>223</sup> The decision of the European Commission does not reveal how this strategy is adjudged in a competition perspective.

**324.** The development on which Facebook has embarked reveals parallels to the development of the portfolio of Google's services with regard to mobile utilisations. Google has also taken over a popular platform in the shape of YouTube which is suitable for mobile utilisations, the service provided by which can be used by users separately from Google's general searching. At the same time, Google has developed additional services in the shape of the Android operating system and the Google PlayStore which can be used on mobile devices, hence also permitting Google to maintain its links to users even if they use services (e.g. apps) from other providers.

**325.** The expansion of the services to include platforms and services that can be used on mobile devices can be seen as a result of changing user preferences. However, it can entail competition risks if services are bundled by a dominant company, or if they are placed by such a company on the market by other means that hinder competition by other service-providers or facilitating the exploitation of user retention by the services in question. Such competition risks are already part of the subject-matter of proceedings of the European Commission against Google. The Monopolies Commission considers it necessary also to monitor developments at Facebook.

#### **6.2.4. The legal assessment of the potential for abuse**

**326.** A potential for abuse that is relevant under competition law is only to be presumed in the case of dominant services. An abuse of market power is conceivable in two ways with regard to dominant social networks. First, the operators of social networks could hinder competitors, for instance by preventing other services from providing their own services to users, or by expanding their services in an anti-competitive manner ("exclusionary abuse"). On the other hand, when such companies collect data excessively and curb the ability of users to limit such data collection, this could potentially constitute an abuse as well ("exploitative abuse").

**327.** The anti-competitive expansion of services by bundling services has so far not been the subject-matter of regulatory proceedings with regard to social networks. In contrast, the question of hindering competitors by refusing to incorporate third-party contents in their own websites (e.g. videos from third-party services) has already been the subject-matter of court proceedings in the US. A reason for the operator of a social network to refuse to incorporate third-party contents may ensue from the fact that such incorporation might enable the providers of the contents to benefit from the success of the network without contributing to the advance investment associated with its establishment. However, in the only case that has been ruled on to date, the incorporation was carried out by users, and was hence relevant neither in accordance with the U.S. competition law that has been examined, nor under European abuse law.<sup>224</sup>

**328.** In general terms, when it comes to activities which make it more difficult for users to switch to a rival service (e.g. restrictions with regard to data portability and interoperability), it is necessary to take account of the fact that dominant companies are as a matter of principle also not obliged to make it easier for competitors to enter the market or to help them in other ways.<sup>225</sup> Another assessment may be necessary if there is not only such a refusal, but additionally anti-competitive conduct is exercised on its part.

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<sup>222</sup> Cf. Regulation 802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ C 133 of 30 April 2004, p. 1 (consol. version 2004R0802 – EN – 1 January 2014 – 003.001), Annex I, Form CO, Nos. 3.2 and 8.7; DG Competition Best Practices on the conduct of EC merger control proceedings, 20 January 2004, paras. 16 ff. as well as 20.

<sup>223</sup> Cf. once more the presentations at the F8 Conference 2015, in particular the contributions "F8 2015 Opening Keynote", "Conversation With WhatsApp, Instagram and Messenger".

<sup>224</sup> *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (Rzx), 2007 WL 6865852 (C.D. Cal. 4 June 2007), confirmed: 304 F. App'x 554 (9th Cir. 2008).

<sup>225</sup> European Commission, Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ EU C 45 of 24 February 2009, p. 7, para. 75; as to the under-

**329.** The potential for abuse to be caused by excessive data collection is not necessarily based on a provable breach of the law, but on the unbalanced nature of the service provided by the internet provider (in this case, for instance facilitating social interaction opportunities) and the service provided by the users in turn (facilitating access to personal data) (“exploitative abuse”).<sup>226</sup> Abuse in the relationship between the service-provider and the users can also be considered if – as with a number of social networks – the service is provided within a multi-sided relationship (e.g. because data are commercialised without any specific factual relationship with the service provided to users). However, it is very difficult to prove such abuse. This is, first, because the criterion of the legal examination is only vague (What does “excessive”<sup>227</sup> mean, and when does no factual relationship exist?). Second, the services of the service-provider in question can also be so complex or user-specific that they cause insurmountable actual obstacles when it comes to proving the abuse, for instance because they require a situation- or user-dependent evaluation of the relevance of the service in question.

### **6.3. On the need for regulatory action**

**330.** In a similar way to search engines, the question of a need for legislation is discussed with regard to social networks. The Monopolies Commission considers there to be no apparent need to amend competition law. However, it does appear necessary to enhance legal protection for internet users in various fields.

#### **6.3.1. No need to amend competition law**

**331.** The Monopolies Commission holds the view that there is no need for additional regulation under competition law on the basis of the available information.

**332.** It therefore appears in particular that there is no need to expand the specific press and broadcasting merger control in Germany (section 38(3) of the German Act Against Restraints on Competition – ARC [*Gesetz gegen Wettbewerbsbeschränkungen – GWB*]) to cover social networks. This applies regardless of the fact that social networks – just as the services provided by news aggregators and other internet services – supplement traditional media and are increasingly replacing them for some user groups.<sup>228</sup> The special provisions on press and broadcasting merger control are to take the fact into account that traditional media that are available only locally and regionally require more detailed control to ensure local and regional diversity. Social networks' markets on the internet are as a matter of principle to be defined in broader geographical terms (as a rule on a national basis or wider, for instance related to a linguistic region). Furthermore, such services as a matter of principle lack the editorial and journalistic activity that is constitutive for the press and for broadcasting.

**333.** Specifically with regard to social networks, according to the information currently available there is just as little need for regulation regarding the identification of abusive or unfair conduct. The expansion of the supply of social networks by incorporating complementary services can be examined under the existing principles (bundling). The existing problems related to providing proof of any exploitative abuse through excessive access to user data are not specific to the internet.<sup>229</sup>

#### **6.3.2. The need to enhance data protection**

**334.** Where there is a risk that operators of social networks will act excessively in order to retain their users, it is likely to be possible to limit this risk, above all by enhancing users' rights. Therefore, activities have already been initiated, or at

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lying European case-law, see in detail e.g. Monopolies Commission, Post 2009: Setting course for competition (*Auf Wettbewerbskurs gehen*), Special Report 57, para. 121; also *United States v. Microsoft Corp.*, 253 F.3d 34, 75 (D.C. Cir. 2001) (en banc) (per curiam); finally also: *Facebook, Inc. v. Power Ventures, Inc.*, [2012] WL 542586 (N.D. Cal. 16 February 2012).

<sup>226</sup> Cf. Gebicka/Heinemann, [2014] World Comp. 37(2), 149 and 162 ff.

<sup>227</sup> Cf. ECJ, Judgment of 14 February 1978, 27/76 – *United Brands*, European Court Reports 1978, 207, paras. 235 ff. (“unfair prices”).

<sup>228</sup> Cf. section 9.2 below for more details on this.

<sup>229</sup> Cf. on this para. 329 above and para. 498 below.

least proposed, among which above all the “right to be forgotten” which has been established in EU case-law and detailed in the planned General Data Protection Regulation is to be highlighted in the present context.<sup>230</sup>

**335.** Within the legislative procedure on the General Data Protection Regulation, it is furthermore planned to make data portability easier.<sup>231</sup> This is likely to be an effective means of limiting the market power of individual social networks. First, potential switching costs would be considerably reduced and the simultaneous administration of several user accounts in different social networks would be made easier. Second, incentives could be created to establish social networks with stricter data protection standards.

### **6.3.3. The need to refine consumer protection**

**336.** Apart from this, the consumer protection problems occurring in social networking services provide reasons in the view of the Monopolies Commission to refine the set of instruments of consumer protection on the internet.

**337.** In particular, measures appear to make sense which oblige internet providers to improve the information which they provide to users on the effect of such consent once it has been given, and to enhance users' opportunities to enforce their data protection interests themselves.<sup>232</sup> This is helped by measures on the part of platform operators to make data guidelines more transparent.

**338.** What is more, the provision of for-a-fee services where there is no advertising and evaluation of data for such advertising purposes may help satisfy users' data protection interests. For instance, the YouTube video platform, which belongs to Google, has announced that it intends to offer a subscription service with no advertising.<sup>233</sup> On the basis of such market solutions, users could be granted a specific statutory right of choice vis-à-vis internet services entitling them to either preclude any use of their data for advertising purposes and to use the relevant service anyway, with advertisements not adapted to the user, or to accept the use of their data for advertising purposes and to receive advertisements adapted to user preferences. It would then have to be established in detail to what degree users, should they so desire, are to be informed of how their data is used before being able to give effective consent. Such a statutory right could help to effectively strengthen data protection over and above the stipulations of the General Data Protection Regulation, while at the same time reducing the competitive advantages obtained through past breaches of privacy. This solution should at least be considered in the event of the payment models for the advertising-free utilisation of services with which individual providers are currently experimenting not becoming permanently established as a marketable alternative.

**339.** Regardless of this, the approach of traditional consumer protection, orientated as it is towards information pure and simple, needs to be reviewed and most likely replaced by a more nuanced approach. In particular, measures should be taken to ensure that standard terms and conditions are worded in a more transparent fashion.

**340.** Borrowing from the law on paid orders in electronic commerce (section 312j of the Civil Code), consumers should be provided with contract-related information on the internet in an event-orientated manner, including when taking up free services – when concluding the contract this therefore refers above all to information on the main elements of the contract (“Button solution”). Against this background, the Monopolies Commission welcomes the ongoing initiatives of the Federal Government to determine specific information together with the operators of app stores which is to be shown to consumers in a prominent place when they purchase an app.

**341.** Furthermore, it could be considered to legally restrict extensive and global consent to the utilisation of personal data in the standard terms and conditions. This appears to be particularly relevant if the terms are amended within an

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<sup>230</sup> ECJ, Judgment of 13 May 2014, C-131/12 – *Google Spain*, ECLI:EU:C:2014:317, No. 92 ff.; Art. 17 of the European Commission's Proposal of 25 January 2012 for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final; furthermore see para. 37 above.

<sup>231</sup> Art. 18 of the European Commission's Proposal of 25 January 2012 for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

<sup>232</sup> Cf. paras. 103 ff above.

<sup>233</sup> Cf. no author provided, *Youtube denkt über Abo-Modell nach*, dpa/FAZ.net of 28 October 2014, retrieved on 14 April 2015.

existing utilisation relationship and the possibilities to use data are expanded, but users of this expanded utilisation cannot object without withdrawing from the service in question. A welcome regulation in this context is provided by the planned General Data Protection Regulation, in accordance with which the party responsible for data processing is to bear the burden of proof for the person in question having given their consent to the processing of their personal data for clearly defined purposes.<sup>234</sup> In competition policy terms, this appears to be particularly relevant because registration portals can currently collect much more relevant data for placing advertising than non-registration online services, which may only process data in an anonymised fashion.<sup>235</sup>

**342.** The introduction of the market watchdog to monitor the digital world (*Digitale Welt*) is welcomed by the Monopolies Commission. This is an initiative of the consumer protection authorities within which the markets for digital goods and services are to be observed in order to be able to inform consumers and governmental supervisory bodies such as the Federal Network Agency, the Federal Cartel Office and the data protection supervision authorities of any undesirable developments in good time.<sup>236</sup> This will help ensure that contracting parity between providers of internet services and users is improved.

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<sup>234</sup> Art. 7 of the European Commission's Proposal of 25 January 2012 for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

<sup>235</sup> Cf. para. 103 f.

<sup>236</sup> Federal Ministry of Justice and Consumer Protection, press release of 17 October 2014.

## 7 Electronic trade (e-commerce)

**343.** Online trade in goods and services (also referred to below as e-commerce) can be divided into three basic fields. A distinction needs to be made in terms of trade between companies (business-to-business – B2B), that between companies and consumers (business-to-consumer – B2C), and between consumers (consumer-to-consumer – C2C). The information provided in this chapter largely focuses on online trade between companies and consumers, a subject which has taken on particular pre-eminence within the public debate. A special focus is placed on “online trading platforms” or “online market places”.

**344.** Online trade in goods and services on the internet has now become a matter of course for many companies and consumers. This is shown not least in the growing popularity of “mobile shopping”, that is shopping via mobile devices such as smartphones and tablets. The increasing digitalisation of trade poses challenges for classical brick-and-mortar trade in particular, which faces falling visitor numbers. In some cases this has given rise to the fear that city centres may die out.<sup>237</sup>

**345.** E-commerce affects commercial competition in a number of ways.<sup>238</sup> Falling search costs and increased market transparency through price comparisons cause price competition to intensify; the geographical market for transactions is expanded, and distribution costs fall as a result of the possibility of direct trade between manufacturers and consumers, as well as the larger range of products offered by online dealers. However, new information asymmetries may occur because of the lack of a facility for consumers to test products before buying, albeit this can be remedied by review and recommendation systems on the internet or return arrangements. The possibility to enter the market varies from one market segment to the next. While trading platforms in particular make it easier for online dealers to enter the market, they themselves can achieve significant market positions due to strong indirect network effects. Ultimately, therefore, the development of e-commerce may not only increase competition in trade, but can in fact trigger new competition problems.

**346.** The following discussion begins by presenting the major market players in e-commerce and the development of turnover in recent years. The focus here is on the development of the market in Germany. The discussion then explores concentration tendencies in German e-commerce. The chapter closes by examining some potential competition problems in e-commerce.

### 7.1. Market players

**347.** A large number of players are active in online trade. As one might expect, these include both dealers and consumers – the latter encompassing both business customers and private customers – as well as and in particular trading platforms or online market places which operate as intermediaries. Furthermore, there are price comparison portals covering a wide range of product categories.

**348.** When it comes to online dealers, a distinction by product range can be applied that is similar to that in stationary trade. Accordingly, there are dealers who limit themselves to specific product categories, such as clothing or electronic articles, and those which offer a more comprehensive assortment selected from a wider range of product categories. Furthermore, an increasing number of manufacturers are opening their own online shops, hence competing with dealers and with their own distribution partners.

**349.** Trading platforms or online market places are two-sided or multi-sided platforms where online dealers (sellers) and consumers (customers) connect, thus making it possible to match supply and demand.<sup>239</sup> They offer a large number of advantages for consumers, such as greater market transparency, a broader selection of products, overcoming confidence problems when shopping on the internet, a reduction of switching costs, as well as the ability to engage in cross-border transactions. On the dealers' side, small dealers in particular benefit from lowered barriers to market entry, as

<sup>237</sup> Cf. e.g. Reimann, E., *Online-Handel bedroht die Innenstädte*, Deutsche Welle, 17 February 2014, <http://www.dw.de/online-handel-bedroht-die-innenst%C3%A4dte/a-17437252>, retrieved on 28 April 2015.

<sup>238</sup> Cf. Buccirossi, P., Background Note, in: OECD, *Vertical Restraints for On-line Sales*, Policy Roundtables series (2013), DAF/COMP(2013)13, 12 September 2013, pp. 17 ff.

<sup>239</sup> Advertisers may also constitute a third side of the platform where appropriate.

well as from the ability to reach large groups of customers.<sup>240</sup> Besides functioning as intermediaries, some trading platforms take over payment processing for online dealers and offer other services such as shipping. Most charge a fee or commission for providing their services, and this is typically charged to the dealers. These advantages of trading platforms are accompanied by the risks posed by a high level of market concentration (as a result of network effects) and the concomitant market power.

**350.** Trading platforms exist in particular to facilitate trade between consumers (C2C), between companies and consumers (B2C), as well as between companies (B2B). Moreover, they can specialise in specific product categories or offer a more extensive product range. A further distinction needs to be made between providers that merely operate a trading platform without acting as dealers themselves (e.g. eBay), and vertically integrated companies which are both the owners of a platform and dealers on this platform, and hence compete with other dealers on their own platform (e.g. Amazon on Amazon Marketplace).

**351.** By virtue of the fact that they enable price comparisons to be carried out for a wide range of product categories, price comparison portals make a major contribution towards price transparency on the internet. In a similar way as with online dealers and trading platforms, a distinction needs to be made with regard to whether they are specialised in one or a small number of product categories, or cover multiple categories. Specialised price comparison portals exist for instance for flight or travel bookings. In a more recent development, some price comparison portals are enabling consumers to purchase products directly without re-directing them to the website operated by the respective dealer. They are thus coming closer to the traditional field of trading platforms.

## 7.2. Developments in e-commerce

**352.** E-commerce between companies and consumers has grown considerably in recent years.<sup>241</sup> However, publicly available data on market volume in e-commerce is inconsistent, and varies depending on its source due to the different survey methods and products considered.<sup>242</sup> Accordingly, the information provided below is to be understood as an orientation only. Information provided by the market research institute eMarketer suggests that worldwide B2C e-commerce turnover increased from approx. USD 1,058 billion in 2012 to around USD 1,316 billion in 2014. A further increase to USD 2,489 billion is forecast to take place by 2018.<sup>243</sup> Turnover in B2C online trade in Europe was approx. USD 277 billion in 2012 and around USD 325 billion in 2013. It is expected to increase to around USD 535 billion in 2018.<sup>244</sup>

**353.** eMarketer shows online trade turnover of approx. USD 52 billion and growth by 21.7 percent for Germany in 2013.<sup>245</sup> Germany hence accounts for the fifth-highest B2C e-commerce turnover behind China, the USA, the United Kingdom and Japan. Turnover is expected to rise to approx. USD 99 billion by 2018, albeit growth rates are set to fall each year. Information from the German Retail Federation (Handelsverband Deutschland – HDE) points in a similar direction. Online trade turnover for 2014 was hence approx. EUR 39 billion (not including value-added tax). This corresponds to year-on-year growth of 17 percent. Growth of 12 percent and turnover of EUR 43.6 billion is being forecast

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<sup>240</sup> Cf. Centre for European Policy, *Vertikale Beschränkungen und offene Online-Marktplätze. Eine ökonomische und juristische Analyse für Markenartikel*, Study commissioned by the Markenverband e.V., Freiburg, 31 March 2014, pp. 16 ff.

<sup>241</sup> The figures on e-commerce turnover vary depending on the source because of different collection methods and products analysed. The figures below are hence only to be taken as an orientation.

<sup>242</sup> Different figures on market volume can emerge from the manner in which the attribution of returned goods is treated.

<sup>243</sup> Cf. eMarketer, Retail Sales Worldwide Will Top \$22 Trillion This Year, 23 December 2014, <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>, retrieved on 27 March 2015. The figures refer to products and services purchased via the internet, incl. travel bookings.

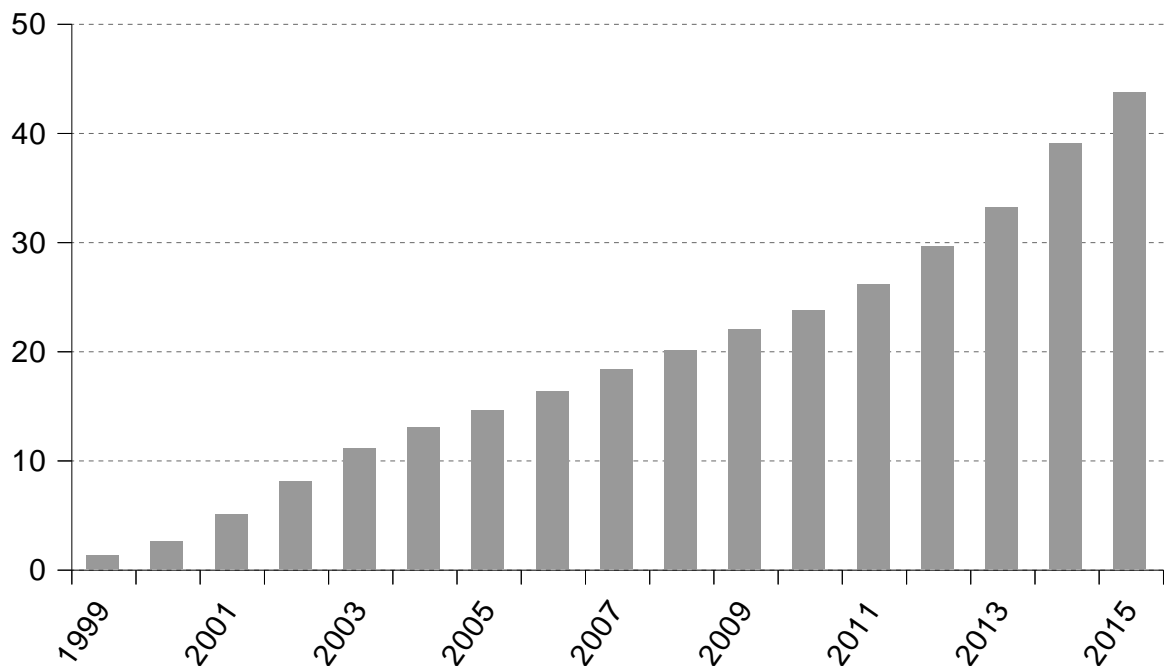
<sup>244</sup> Cf. eMarketer, New Delivery Options Let Western Europe's Shoppers Have It Their Way, 25 July 2014, <http://www.emarketer.com/Article/New-Delivery-Options-Let-Western-Europes-Shoppers-Have-Their-Way/1011042>, retrieved on 27 March 2015. The figures refer to products and services purchased via the internet, not incl. travel bookings and event tickets.

<sup>245</sup> Cf. eMarketer (2014), Retail Sales Worldwide Will Top \$22 Trillion This Year, 23 December 2014, <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>, retrieved on 27 March 2015. The figures refer to products and services purchased via the internet, not incl. travel bookings and event tickets.



for 2015.<sup>246</sup> The German E-Commerce and Distance Selling Trade Association (Bundesverband E-Commerce und Versandhandel Deutschland e.V. – bevh) quotes e-commerce turnover net of tax at roughly EUR 43.6 billion in 2014. This corresponds to year-on-year growth of “only” approx. 4 percent.<sup>247</sup> Gross total volume is quoted at approx. EUR 51.2 billion, while, at approx. EUR 41.9 billion, the lion's share is accounted for by trade in physical goods. Digital goods and services<sup>248</sup> account for turnover of roughly EUR 9.4 billion. Figure 7.1 illustrates the turnover development in German B2C e-commerce between 1999 and 2015 on the basis of data provided by the HDE.

**Figure 7.1: B2C E-commerce turnover in Germany (in EUR billion)**



N.B.: The figures include turnover (not including value-added tax) from non-food, fast-moving consumer goods (FMCG), entertainment, tickets, downloads and travel (not including holiday trips). The figures for 2015 are estimated.

Source: Own illustration based on HDE, Online-Monitor 2014, Berlin, 2014

**354.** The strong growth in online trade is also reflected by the increasing share of e-commerce among total retail sales. The latter increased in Germany by approx. 1.9 percent to reach EUR 459.3 billion in 2014.<sup>249</sup> The shares accounted for by online trade among retail sales vary from one study to another. The bevh quotes an increase in the share of interactive trade, that is of e-commerce and classical distance selling, among total retail activities from 7.2 percent in 2009 to

<sup>246</sup> Cf. HDE, Online Monitor 2014, Berlin, 2014, [http://www.einzelhandel.de/images/141126\\_Handel\\_digital\\_Brochure\\_ds.pdf](http://www.einzelhandel.de/images/141126_Handel_digital_Brochure_ds.pdf), retrieved on 27 March 2015. The figures refer to turnover from non-food, fast-moving consumer goods (FMCG), entertainment, tickets, downloads and travel (not including holiday trips).

<sup>247</sup> Cf. bevh, Annual press conference. Interaktiver Handel in Deutschland 2014, presentation given on 3 March 2015, [https://www.bevh.org/uploads/media/150303\\_Pressepr%C3%A4sentation.pdf](https://www.bevh.org/uploads/media/150303_Pressepr%C3%A4sentation.pdf), retrieved on 27 March 2015. The study is based on a telephone and online survey on spending habits in online and distance selling, as well as on the consumption of digital services such as downloads and tickets. Roughly 40,000 private individuals in Germany aged above 14 were surveyed from January to December 2014.

<sup>248</sup> This category includes downloads and travel and ticket bookings.

<sup>249</sup> Cf. HDE, Annual press conference, Berlin, presentation of 30 January 2015, [http://www.einzelhandel.de/index.php/presse/pressekonferenzen/item/download/7731\\_c4194b90f6a955f833638ff581f928cb](http://www.einzelhandel.de/index.php/presse/pressekonferenzen/item/download/7731_c4194b90f6a955f833638ff581f928cb), retrieved on 27 March 2015.

11.1 percent in both 2013 and 2014.<sup>250</sup> If one takes a look solely at the share of retail sales accounted for by e-commerce, this corresponds to an increase from approx. 4.4 percent in 2009 to roughly 9.5 percent in 2014. A market study carried out by deals.com and the Centre for Retail Research quotes the share of online trade in trade turnover in Germany at 8.1 percent in 2013 and 10 percent in 2014. A share of 11.6 percent is anticipated for 2015.<sup>251</sup>

**355.** Regardless of the precise market data, a further increase in the shares of online trade in retail sales can be anticipated, albeit with falling growth rates in e-commerce. Accordingly, eMarketer, which quotes the 2013 share of online trade in Germany at a mere 6.1 percent, forecasts that this share will increase to 11.2 percent in 2018. However, at the same time, they expect annual online trade growth to fall from 21.7 percent in 2013 to just 8 percent in 2018.<sup>252</sup> The EHI Retail Institute forecast as early as in 2012 that online trade would reach a share of up to 27 percent of all retail sales by 2025.<sup>253</sup>

**356.** According to the European Commission, online trade in the EU focuses on trade within individual Member States. Cross-border trade is said to be much less common. Roughly one-half of the EU's population made an online purchase in 2014, but only 15 percent of these individuals purchased products from online dealers from another Member State. The European Commission is investigating the causes of this lower level of cross-border online trade as part of a sector inquiry on e-commerce.<sup>254</sup>

**357.** A topical development in online trade is the increased utilisation of several complementary distribution channels. For instance, 50.4 percent of the 1,000 largest online shops in Germany also run a stationary retail shop; 37.6 and 32.9 percent, respectively, sell their products on the online market places of Amazon and eBay. Furthermore, the mobile channel, that is purchasing and selling via mobile devices such as smartphones and tablets, is of increasing significance. For instance, 45.6 percent of the online shops looked at are now offering mobile websites and apps with a shop function.<sup>255</sup> The growth rates of mobile trade were several times higher than those of stationary online trade. According to estimates, mobile commerce turnover in Germany grew by approx. 103 percent in 2014, compared to approx. 7 percent via desktop computers. All in all, mobile devices accounted for approx. 16.8 percent of German online turnover.<sup>256</sup> The trend towards multichannel and omni-channel distribution is also reflected in the turnover figures of "multichannel mail-order companies", which managed to increase their turnover in Germany by 48 percent year-on-year in 2014 to about EUR 10.94 billion.<sup>257</sup> In comparison to this, estimates suggest that the turnover of online market places fell by

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<sup>250</sup> Cf. bevh, loc. cit.

<sup>251</sup> Cf. deals.com/Centre for Retail Research, Internationale E-Commerce-Studie 2015, <http://www.deals.com/umfragen/e-commerce-studie-2015>, retrieved on 27 March 2015. In this study, retail encompasses the sale of commercial goods to consumers via shop businesses and on the internet. The data does not include any turnover from gastronomy, motor vehicles, petrol and fuels, event tickets, travel, insurance or bank and loan products. Value-added tax is excluded as far as possible according to the information provided.

<sup>252</sup> Cf. eMarketer, Retail Sales Worldwide Will Top \$22 Trillion This Year, 23 December 2014, <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>, retrieved on 27 March 2015. The figures refer to products and services purchased via the internet, not incl. travel bookings and event tickets.

<sup>253</sup> Cf. EHI Retail Institute, press release of 14 June 2012, <http://www.ehi.org/presse/pressemitteilungen/detailanzeige/article/markanteil-onlinehandel-waechst-weiter.html>, retrieved on 27 March 2015.

<sup>254</sup> Cf. European Commission, fact sheet MEMO/15/4922 and press release IP/15/4921; previously already press release IP/15/4701 of 26 March 2015.

<sup>255</sup> Cf. EHI Retail Institute/Statista, E-Commerce-Markt Deutschland 2014, Cologne/Hamburg, October 2014. The information contained in the study is based on a questionnaire carried out among the 1,000 highest-sales online dealers and on extrapolations in the shape of a regression analysis, as well as company information from business reports, press releases and company websites. It only takes account of turnover with physical goods, not with digital goods. The figures state the net turnover of the online shops in question from business activities pure and simple, corrected for returns and not including value-added tax. The net turnover of these 1,000 online dealers was roughly EUR 30 billion.

<sup>256</sup> Cf. deals.com/Centre for Retail Research, loc. cit.

<sup>257</sup> Cf. bevh, loc. cit.

approx. 10 percent to roughly EUR 23.48 billion in 2014. Such market places nevertheless continue to represent the largest distribution channel in online trade by far.<sup>258</sup>

**358.** A further trend in online trade is, finally, an increasing verticalisation of manufacturers. More and more (brand) manufacturers are now running their own online shops through which they sell their products directly to consumers, thus circumventing their classical trading partners. This development appears to be particularly relevant given the possible distribution restrictions for trading partners such as prohibitions to use third-party platforms.

### **7.3. Concentration tendencies in German e-commerce**

**359.** It is shown below to what degree concentration tendencies exist in e-commerce in Germany. To this end, online dealers and trade platforms acting as intermediaries are discussed as examples. After first presenting the need for a suitable market definition, factors are illustrated that may promote or weaken a market concentration on trading platforms.

#### **7.3.1. Market definition and market shares of online dealers**

**360.** German online trade is frequently stated to have a high and still increasing market concentration. Reference is generally made here to the shares of individual dealers among the total turnover volume of online trade in Germany. Relevant data has been provided for instance by the EHI Retail Institute in a recent study.<sup>259</sup> However, this study defines the total market as the net turnover of the 1,000 largest online shops trading in physical goods, which was about EUR 30 billion. Among these 1,000 online shops, the ten largest online shops accounted for roughly 37.1 percent of the net turnover of physical goods in 2013, compared to 32.3 percent in the previous year. The 100 largest online shops generated roughly two thirds of total turnover, and the 500 largest made about 86 percent. The “all-rounders”, which offer a more comprehensive product range online, generated almost 40 percent of the total turnover of the 1,000 online shops considered. According to this study, the largest online dealer in Germany by far is Amazon with an estimated turnover of EUR 5.79 billion in 2013, followed by Otto with EUR 1.89 billion and Zalando with EUR 702 million<sup>260</sup>.

**361.** Such turnover figures frequently lead the general public to draw the unreflected assumption that competition problems exist or that individual companies have taken up dominant positions on the market. In fact, such information is hardly significant in terms of competition policy since a competitive perspective requires a definition of the respectively relevant market in terms of geography and product range. As to the geographical market definition, it appears to be questionable in this regard whether online markets are to be defined by national, European, global or language borders. This is likely to depend in particular on the products considered, and to vary between, for instance, physical and digital goods. When it comes to defining the market in terms of product range, it should be taken into account that only those products are attributed to a common market which are sufficiently substitutable. Moreover, the substitution relations between online trade and stationary trade need to be examined. A view of companies' total turnover can hence be misleading if it does not specialise in a product and/or a product category. Thus, it is not possible to generally conclude from the above turnover shares of online trade that for instance Amazon, which generates its turnover via a large number of product categories, has more market power than Zalando, which is specialised in clothing.

**362.** One might mention in this context the book trade, which has moved into the focus of public attention on account of the negotiations between Amazon and certain publishers. Several market players and commentators have pointed out in this regard that, with its market share of roughly 80 percent of the online book trade, Amazon had a dominant position. However, it is questionable whether the online book trade constitutes a market that can be distinguished from

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<sup>258</sup> Cf. *ibidem*. This constituted a fall by approx. 10 percent vis-à-vis 2013. However, trading platforms continue to be the largest mail-order group in e-commerce by far, followed by multichannel mail-order operators (approx. EUR 10.94 billion) and internet mail-order operators pure and simple (approx. EUR 5.65 billion).

<sup>259</sup> Cf. EHI Retail Institute/Statista, *loc. cit.*

<sup>260</sup> Amazon itself quotes its total turnover in Germany at approx. USD 11.9 billion in 2014. However, this figure includes both turnover from product sales and also other business activities, so that the turnover from its own trading business is likely to be lower. Amazon Marketplace dealer turnover is not included in this figure. Cf. <http://www.sec.gov/Archives/edgar/data/1018724/000101872415000006/amzn-20141231x10k.htm#s21F0250F132C18429D9452F1E3EE59F5>, retrieved on 27 March 2015.

the stationary book trade since the two distribution channels are likely to be substitutable for some consumers. Alternatively, if one takes a look at the German book trade as a whole, Amazon remains an important player, with a share of approx. 25 percent, but does not necessarily have a position on the market which necessitates antitrust intervention.<sup>261</sup> In the final analysis, the de facto substitution relationships can only be empirically determined.

**363.** The above discussion makes it clear that generalised statements on the market power of individual companies in online trade based solely on alleged market shares are not true to fact. Instead, there is a need to suitably define the relevant market. Accordingly, even very small dealers or manufacturers which operate in niches may have market power in their fields because their products are not substitutable. Such prominent market positions are likely to be limited to individual product markets as a rule. To what extent problems exist on individual markets can ultimately only be determined by competition authorities in specific proceedings. There is no need to take regulatory action solely because of the size of individual online dealers.

### **7.3.2. The market definition and market share of trading platforms**

**364.** As stated at the beginning, trading platforms are two-sided platforms on which sellers and dealers are brought together with buyers and consumers. The platform acts as an intermediary in the transaction between both sides of the platform, and reduces transaction costs. Trading platforms charge a fee for such matchmaking and other related intermediary services, and as a rule this is paid by the sellers. It has been estimated that turnover of roughly EUR 23.48 billion was generated via online market places in Germany in 2014.<sup>262</sup> Hence, they are the most important mail-order groups in e-commerce. As such, Germany has a large number of trading platforms which either have a one-for-all orientation or which specialise in specific product categories. However, most transactions are concentrated on the two large generalists Amazon Marketplace and eBay. There is no official information regarding sales turnover on these platforms alone for Germany since both Amazon<sup>263</sup> and eBay<sup>264</sup> only publish their aggregated total turnover from all their business divisions. If one looks at commission turnover, it is estimated that eBay is the market leader at approx. EUR 1.4 billion in 2013, followed by Amazon Marketplace at EUR 968 million. Other providers only generate commission turnover in the one- to two-digit million range.<sup>265</sup>

**365.** The above data makes it clear that trading platforms have an important role to play in online trade in Germany, and that there obviously is a certain concentration tendency in this field. However, since this data is likewise not based on a definition of a relevant market, it is also not possible to infer in general that there are competition problems in this regard. Because of the two-sided nature of the platforms, the market definition of trading platforms must take into account the substitution possibilities of the two demand sides, i.e. of buyers and sellers, and, where applicable, accommodate any interdependences between the two sides of the platforms.

**366.** The geographical market definition of trading platforms is likely to very much depend on the product that is being traded. A global market definition can thus be considered for digital products as such since the transport costs for this kind of goods are virtually zero. That being said, there may be factors such as language barriers or licence conditions which require a narrower market definition based on language areas or even national borders. The market definition for physical goods is likely to tend to be narrower than for digital goods since, in addition to potential language barriers, transport costs also play a major role here. The precise geographical market definition can ultimately only be determined in relation to products.

**367.** With regard to the product market definition of trading platforms, the potential for substitution on the buyers' and on the sellers' side must be determined. It should be first of all pointed out here that a trading platform as such is not a

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<sup>261</sup> Cf. Haucap, J./ Kehder, C., Marktdominanz von Google, Amazon und Co.: Diktieren die Internetfirmen die Regeln?, ifo Schnelldienst 67(12), 2014, pp. 3-6.

<sup>262</sup> Cf. bevh, loc. cit.

<sup>263</sup> Cf. this with footnote 260.

<sup>264</sup> eBay shows a trading volume of USD 83 billion for 2014's worldwide market place business, and net turnover of USD 8.8 billion. Net turnover in Germany over all business units was USD 2.1 billion cf. eBay Inc., Form 10-K 2014, <http://investor.ebayinc.com/secfiling.cfm?filingID=1065088-15-54&CIK=1065088>, retrieved on 27 March 2015.

<sup>265</sup> Cf. EHI Retail Institute/Statista, loc. cit.

market in its own right since it competes with other trading platforms from both the buyer's as well as the seller's perspective, and under certain circumstances with other providers which enable the sale and purchase of a product that is in demand.<sup>266</sup> Whether this is so depends on the individual service provided by the trading platform for which there is a demand from the individual side of the platform. So far, the decision practice permits virtually no generally valid conclusions to be drawn with regard to the market definition.

**368.** As to the buyer side, the question arises as to whether this side has a demand only for the intermediary service provided by the trading platforms, or indeed for the products which they offer.<sup>267</sup> In the first case, as a matter of principle all platforms and portals which offer intermediary services for purchasing a desired product would need to be included in the relevant market. Besides the different general and specialised trading platforms, this therefore includes in particular price comparison portals, which list the online shops of several dealers offering the product being sought and provide links to them. This applies all the more since some price comparison portals have now started to make it possible to purchase products directly via their own websites. Where, by contrast, the buyer side demands the possibility to purchase a specific product, from the buyers' perspective, trading platforms compete with other internet dealers, and possibly also with brick-and-mortar shops, but not with price comparison portals which re-direct users to other websites to make their purchases. On many trading platforms, the possibility to purchase is likely to be the decisive factor among the alternatives that present themselves from the buyers' perspective. For instance, eBay does not compete with Amazon Marketplace for potential used car buyers, but it does compete with AutoScout24.

**369.** From the seller's point of view, by contrast, there is an option to utilise a trading platform or to trade via a proprietary online shop. If, with regard to dealers who operate their own online shop, one considers once more only the intermediation service, all intermediation services that are suited for reaching the relevant group of customers in order to sell a specific product via their own shop are to be included as substitutes for a trading platform in the relevant market. As on the buyer side, these are both general and specialised trading platforms, as well as price comparison sites. If, by contrast, from the point of view of sellers the product in demand is the possibility to trade directly with consumers, all distribution channels which constitute alternatives to trading via trading platforms are to be included in the relevant market. These include both online shops, and where appropriate also brick-and-mortar shops.

**370.** In each case, an objectively relevant market must therefore be defined for both sides of the platform which includes those products and services which can be regarded as a substitute for the essential product and the main service of the trading platform. A product-related (and possibly a product group-related)<sup>268</sup> perspective needs to be adopted here so that for instance a market for intermediary services consisting of the sale of specific electronic articles may need to be defined distinctly from that for intermediary services for the sale of motor vehicles.

**371.** Finally, it needs to be taken into account in the market definition that different substitution possibilities may arise for buyers and sellers if it is not new goods that are being sold, but used goods. Furthermore, it may be that the respective sale format (auction or fixed price) also restricts the substitutability of different trading platforms. As a matter of principle, there are indications that it is possible to define a separate market for online auctions of used products, differentiated according to groups of goods. This emerges from the fact that, first, there are no adequate substitutes outside the internet, and that, second, the auction format may be more attractive for the sale of used goods than fixed prices, in particular for private individuals, because there frequently are no market prices. Insofar as such a market for online auctions of used products needs to be defined, eBay is likely to take up a strong position in this market in Germany even today.<sup>269</sup>

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<sup>266</sup> Also cf. section 2.2.3 on the market definition of platform services.

<sup>267</sup> Cf. this with e.g. Federal Cartel Office, Decision of 26 November 2013, B6-46/12 – *Amazon*, with Case summary of 9 December 2013, pp. 2 f.; European Commission, Decision of 21 August 2007, M.4523 – *Travelport/Worldspan*, paras. 9 ff., in particular paras. 39 ff.; cf. already earlier the same, Decision of 22 July 1992, M.190 – *Nestlé/Perrier*, 5 December 1992 OJ L 356/1, para. 20, generally on the market definition in partly-overlapping services (here: intermediation and sale, and sale only).

<sup>268</sup> A product group-related market definition is preferred for instance in the food retail trade; cf. on this Federal Cartel Office, Sector inquiry titled "*Nachfragemacht im Lebensmitteleinzelhandel*", B2-15/11, report of September 2014, pp. 119 ff.

<sup>269</sup> Cf. Haucap, J./Wenzel, T., *Ist eBay unbestreitbar ein nicht bestreitbares Monopol? Monopolisierungstendenzen und Regulierungsbedarf bei Online-Marktplätzen*: Kruse, J./Dewenter, R., (eds.), *Wettbewerbsprobleme im Internet*, Baden-Baden 2009, pp. 7-34.

**372.** To sum up, it can be stated that the turnover shares of trading platforms quoted at the beginning cannot be equated to market shares that are relevant under competition law since they are not based on a proper market definition. Relevant product markets are not used as a basis, nor is the two-sided nature of the platforms taken into account. Nonetheless, these turnover shares show that the “market” for trading platforms is highly concentrated. This is not necessarily problematic, even for dealers who rely on selling via trading platforms in order to achieve an appropriately broad customer reach, as long as the platforms' latitude is restricted by the two-sided nature of the platforms and by other factors. The major factors for market concentration among trading platforms are identified below.

### **7.3.3. Factors of market concentration and competition assessment**

**373.** The concentration tendency on trading platforms that has been pointed out above is typical of platform markets, and is similarly found in e-commerce, for instance also with hotel booking portals. Possible consequences of such market concentration may include a lower level of competition intensity between trading platforms, and as a consequence thereof higher fees for sellers or poorer quality on the part of the platforms.

**374.** This concentration tendency can be largely explained through the factors discussed in Chapter 2 above.<sup>270</sup> Accordingly, concentration is encouraged in particular by strong indirect network effects as well as by increasing scale effects. By contrast, the risk of a capacity overcharge or capacity constraints, differentiation opportunities open to the platforms, as well as the possibility available to the individual sides of the platform to engage in multi-homing and to switch providers, counteract concentration tendencies.

**375.** A defining trait of trading platforms is the existence of positive indirect network effects. Each seller thus benefits from a larger number of potential buyers in the form of a greater likelihood of selling their products, and each buyer benefits from a larger number of sellers as a result of the wider range of goods being offered on the platform (“feedback loop”). By contrast, direct network effects are of subordinate significance with regard to trading platforms since there is no direct interaction between the users on the platform side.<sup>271</sup> If anything, negative direct network effects could occur. This applies in particular to the seller side since each additional seller increases the competitive pressure on the respective trading platform. Negative direct network effects may arise on the buyer side, especially with auction platforms since the competition for a product increases with each additional potential buyer.

**376.** Besides indirect network effects, trading platforms have increasing scale effects, this applying in most fields of e-commerce, and hence advantages of scale. This occurs because operating a trading platform entails relatively high fixed costs, for instance because of managing databases, while the variable costs triggered by additional transactions are relatively low. Scale effects make it more difficult for potential providers to enter the market given that they first need to make considerable infrastructure investments.

**377.** Scale effects and indirect network effects are the main factors contributing to concentration on trading platforms. Having said that, there are more factors which counteract concentration. In this context, the risk of a capacity overcharge at the trading platforms should be relatively low, albeit for instance an excess of sellers and the price competition which this involves may deter some sellers. It is likely to be more relevant whether the individual demand sides can engage in multi-homing, in other words can use several platforms in parallel, and whether trading platforms are adequately distinguishable from one another.

**378.** Scope for differentiation can lead to a segmentation of the market for trading platforms, and hence enable several similar platforms to operate side by side. It is obvious that such possibilities exist for trading platforms. This differentiation becomes particularly clear when it comes to specialised trading platforms which only carry a limited product range. Besides for instance Amazon Marketplace and eBay, both of which carry a comprehensive range of products, there are thus also platforms specialising in selling motor vehicles, real estate, etc. Moreover, trading platforms can distinguish themselves from one another by way of website design, payment options or rating systems. One must consider that this very market segmentation, which promotes diversity, can lead to competition problems since it may reduce the competitive pressure between the individual trading platforms.

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<sup>270</sup> Cf. on this paras. 45 ff.

<sup>271</sup> One exception may be constituted by platforms which enable trading in used goods for private individuals since buyers can assume the function of sellers and sellers of buyers here.

**379.** The parallel use of multiple trading platforms by the individual demand sides can ultimately counteract concentration. In this context, the options as regards multi-homing may differ for buyers and sellers. If multi-homing can be used and is used by both buyers and sellers, the concentration tendency is reduced. However, if one of the two sides uses single-homing, the market can quickly “tip” to the benefit of a platform.

**380.** As a matter of principle, the possibility of multi-homing on trading platforms is likely to exist for both buyers and sellers. However, where appropriate, this may be restricted by imposing switching costs.<sup>272</sup> An example of this on the seller side is the frequent lack of a possibility to transfer the reputation that has been built up through good ratings on one trading platform to others. This reputation thus represents a platform-specific investment. What is more, sellers are likely to prefer large trading platforms since they enable them to reach a larger number of potential customers and do not run the risk of selling their products below their value. This especially applies to auctions, since as a rule achieving a high sales price is contingent on there being a sufficiently large number of bidders. Multi-homing is ruled out for sellers when auctioning off individual items.<sup>273</sup>

**381.** Multi-homing is simpler for buyers given the lower switching costs. For instance, a buyer's good reputation is relatively insignificant as a rule. Nonetheless, switching costs may arise for instance through utilisation fees that are charged for specific services provided by a trading platform, thus deterring buyers from using alternative platforms or dealers. Other factors which counteract the parallel use of multiple trading platforms include habit-forming effects, a certain loyalty towards the platform or a higher quality standard in the sense of a better range of products available on the platform. Moreover, a lack of willingness to provide personal data to several trading platforms and a certain inertia on the part of the buyers may deter them from switching platforms.

**382.** All in all, one can say that concentration on trading platforms is likely to be largely caused by indirect network effects and by scale effects. While these make it more difficult for new providers to enter the market, one can nonetheless observe that such a market entry is possible, especially through adequate differentiation. Furthermore, the trading platforms' liberty of competitive action is reduced by the possibility, albeit reduced on the seller side, for multi-homing on both sides of the platform. However, competition problems might arise if operational leeway presents itself to the respective platforms due to a lack of alternatives on the part of the respective platform sides.

**383.** In conclusion, it should also be pointed out that it cannot be generally concluded from a high level of concentration among multi-sided trading platforms that competition problems exist, but instead that, in economic terms, this can in fact be a reflection of an efficient market structure.<sup>274</sup> The high level of concentration largely emerges from the existence of the indirect network effects, which are internalised by multi-sided platforms and taken into account in pricing. In this sense, conduct on platforms that is supposedly unusual, such as below-marginal-cost pricing or subsidising one side of the platform, may also be efficient and unobjectionable in terms of competition law. Nonetheless, strong market positions of individual trading platforms resulting from indirect network effects can lead to competition problems. Such potential competition problems and other issues are explored in the next section.

#### **7.4. Potential competition problems in e-commerce**

**384.** The discussion above shows that online trade has grown strongly in recent years and has established itself as a major distribution channel. At the same time, one can observe a certain concentration tendency, in particular among trading platforms. As has been shown, this kind of concentration may well be efficient in economic terms, not least given the two-sided nature of these platform markets. However, this does not rule out potential competition problems which can result among other things from the operational leeway open to companies which have market power. Various aspects of this are considered below. First of all, the problems relating to potential buyer power in e-commerce are explored, after which potential competition problems are illustrated which may result from the vertical integration of trading platforms and online dealers, as well as from the bundling and preferential treatment of in-house services.

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<sup>272</sup> Cf. on the statements below Haucap, J./Heimeshoff, U., Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?, DICE Discussion Paper No. 83, January 2013.

<sup>273</sup> The limited possibility of multi-homing for sellers in online auctions is likely to have made a major contribution to the extraordinary market position enjoyed by eBay in online auctions.

<sup>274</sup> Cf. this also with section 2.2.1.

Moreover, market power risks which occur below the level of market dominance are touched upon and vertical distribution restrictions illuminated in more detail. Finally, potential cross-border trade restrictions are considered.

#### **7.4.1. Buyer power in e-commerce**

**385.** A topic with competition-policy relevance in e-commerce is the potential buyer power of individual online dealers, trading platforms or indeed booking portals. A prominent position is enjoyed in particular by Amazon, which – as stated at the beginning – is the largest online dealer in Germany by far, and which transacts a large share of all German online trade via its trading platform. As an example of Amazon's alleged buyer power, in particular the tough negotiations between Amazon and individual publishers with regard to conditions for e books, subsequent to which the delivery of printed books of these publishers by Amazon was delayed, has received particular attention both in and outside Germany. Agreement has now been reached between Amazon and the publishers in question, but a competition complaint on the part of the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels) remains pending with the European Commission. It will be up to the antitrust proceedings to show whether Amazon has actually breached antitrust law or these were only negotiations between contracting partners that are commonplace in a market economy. A breach of antitrust law is also possible under German law below the threshold of market dominance (section 20 of the Act Against Restraints on Competition – ARC [*Gesetz gegen Wettbewerbsbeschränkungen – GWB*]).<sup>275</sup>

**386.** Regardless of this specific case, the question needs to be raised as to the degree to which a prominent market position and the potential buyer power of individual players in e commerce can trigger a need to take action in terms of competition policy. As a matter of principle, it should be presumed that the internet has improved the position of dealers vis-à-vis manufacturers and suppliers. The main cause for this is likely to be the increased price transparency in e-commerce, which is promoted by the different (trading) platforms and comparison portals. This price transparency enables both wholesalers and retailers to exert pressure in negotiations on manufacturers' sales prices. However, to what degree buyer power exists in certain fields can only be assessed on a case-by-case basis.

**387.** The prominent position of intermediaries as well as the increased price transparency on the internet suggest that buyer power might be more common in e-commerce. However, this changes nothing with regard to the economic assessment of buyer power. In particular, it is not obvious that buyer power should be judged in any other way in e-commerce than in classical trade. According to economic negotiation theory, buyer power, or negotiating power, exists when a potential buyer is able to obtain better prices and conditions vis-à-vis manufacturers than would be available under competition conditions, or if they obtain better prices and conditions than similarly situated competitors without any apparent reason. The outcome of the negotiations between the players depends on different factors such as the size of the players concerned or the frequency with which they interact and the details of this interaction, which determine the alternatives available to the individual players.<sup>276</sup> In e commerce, in particular the considerable significance and size of certain online dealers, trading platforms or booking portals are likely to restrict the alternatives available to some manufacturers and service-providers such as hoteliers.

**388.** In competition-policy terms, the competition effects of buyer power need to be distinguished from those of market power which providers (on sales markets) exert towards consumers. While, as a rule, this kind of market power can lead to higher prices, lower consumer surplus and generally lower social welfare, buyer power can even have positive welfare effects as long as the improved conditions are passed on to consumers. The latter particularly depends on the competition intensity on the trading level.<sup>277</sup> By contrast, negative competition effects of buyer power are only rarely discernible in reality. The waterbed, foreclosure and spiral effects that have been discussed in the economic literature, or indeed de-stimulating investment, innovation and quality effects, by and large occur only under special conditions.<sup>278</sup>

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<sup>275</sup> Cf. this also with section 7.4.4.

<sup>276</sup> Cf. Monopolies Commission, XIXth Biennial Report, loc. cit., paras. 1072-1117.

<sup>277</sup> In the book trade, improved conditions resulting from the Fixed Book Price Agreement that is in effect in Germany may only be partly passed on to consumers. Here it is then primarily the trading companies themselves which benefit from improved conditions.

<sup>278</sup> Cf. Monopolies Commission, XIXth Biennial Report, loc. cit., paras. 1072-1117.



**389.** All in all, it can be said that neither certain knowledge of the buyer power in individual fields of e-commerce is currently available, nor that the impact of such buyer power on social welfare is unambiguous. In particular it is not possible to conclude that individual dealers or portals have considerable buyer power solely because of a potentially high concentration in certain fields of e-commerce. What is more, buyer power – unlike classical market power – may have a positive impact on welfare as a whole as long as competition itself is not impaired at trading level. Reference should be made here once more to the need pointed to at the beginning for a satisfactory market definition which encompasses all competition forces. Ultimately, there is always a need in this regard to take a case-specific view in order to ascertain the impact of buyer power.

**390.** Where buyer power exists in individual areas of e-commerce, the applicable competition law is likely to be sufficient to adequately address it. There is no need to change the law here, in particular not to protect individual industries. Rather, it should be pointed out that abusive buying practices are not permissible in accordance with the Act Against Restraints on Competition. It is a matter for the competition authorities to monitor market events and sanction any abusive conduct on the part of large demand-side players.

#### **7.4.2. Vertical integration of trading platforms**

**391.** Competition problems in e-commerce may result from the vertical integration of companies. A trading platform is deemed to be vertically integrated in particular if the operator of the platform is at the same time a seller, and hence a market player on the seller side. One example of this is Amazon, which operates as a dealer on its own Marketplace, and hence directly competes with other dealers. While vertical integration can be efficient in economic terms because it can for instance solve coordination problems, a competition relationship between platform operators and other online dealers may also lead to conflicts of interest and to potentially abusive modes of conduct.

**392.** First, it is possible for the operator of a platform to present its own products preferentially and to especially place these further up in the results of a product search. However, as a rule, this kind of preferential treatment of the in-house product range is only likely to be profitable for the platform operator if its own margin with regard to the product in question is greater than the sales commission which other dealers have to pay. This is likely to limit the incentives of a platform operator to present rival offers in a discriminatory manner. Moreover, the preferential display of the in-house product range will only be expedient if no adequate substitution possibilities exist for the dealers on the platform. As explained above, this needs to be adjudged on a case-by-case basis. However, in many instances, external dealers are likely to have substitution possibilities, such as other trading platforms or indeed price comparison sites that re-direct users to their proprietary online shop. Trading platforms' operational leeway is restricted in such cases.

**393.** A further potential competition problem may result from the fact that a trading platform operator can monitor other online dealers' transactions on its platform. This enables such operators to identify rival products for which demand is particularly strong so as to then include these in their own trading portfolio. Where platform operators are able to obtain better supply conditions vis-à-vis the manufacturers of these products, this may enable them to pool demand on the platform for themselves, displace other online dealers and improve their market position accordingly.

**394.** Finally, a vertically integrated trading platform operator can benefit from the accumulation of additional data which is aggregated by transactions between other dealers and consumers on his platform. These additional data may be used to draw up more precise user profiles and to provide customers for instance with better product recommendations and to encourage them to buy. All in all, additional data can thus improve the quality of the in-house platform and consequently its own competition position vis-à-vis its rivals. Hence, an accumulation of data may impact competition between platforms.

**395.** The above discussion shows that dealers may see good reasons to expand their own online shops to form a platform and to permit other dealers to use it. Trading platforms benefit not only from appropriate commission payments from dealers, but can improve their competition position by observing sales and accumulating additional data. The welfare effects of such conduct is not unambiguous since this increases competition between trading platforms at least in the short run, and where competition exists at dealer level, any lower purchase prices are passed on to consumers as a rule. Be this as it may, the conduct of vertically integrated companies in e-commerce should be observed by competition authorities in order to prevent any abuses. By contrast, there is no apparent need to regulate vertically integrated trading platforms.

### 7.4.3. Bundling and preferential treatment of services belonging to the platform

**396.** A characteristic that is typical of many internet companies is the considerable diversification and expansion into different business areas. This aspect is also relevant to e-commerce. A competition problem may arise if large companies use their prominent market position in order to bundle their own services and expand into further markets in a competition-distorting manner.

**397.** To what degree anti-competitive modes of conduct on the part of companies exist in e-commerce needs to be examined in individual cases. However, as a matter of principle, companies have incentives to grant preferential treatment to or bundle their own services or products. For instance, a trading platform can impose on its dealers the obligation to take up additional services provided by the platform, such as its payment system. This kind of integration of in-house services may cause problems in competition terms, but may also involve considerable consumer benefits. An example of this can be found with regard to eBay and its subsidiary PayPal, whose payment system eBay dealers may be obliged to offer as a method of payment, thus involving extra costs for them. The Federal Cartel Office refrained in 2010 from initiating proceedings against eBay in this regard because, as it said, it could be expected that the activity would lead to fewer complaints with regard to transactions, and hence customer satisfaction with the utilisation of the platform would rise.<sup>279</sup>

**398.** Another example of the alleged preferential treatment of in-house services and of the bundling of services that is relevant to e-commerce can be found with regard to search platforms. Specifically, Google in particular is accused of preferentially displaying its own services in the search results. When it comes to e-commerce, it is particularly relevant that this also affects a price search engine (Google Shopping) which competes with other price comparison portals and trading platforms and in some cases even online shops. Preferential treatment of Google Shopping could thus be prejudicial towards other price comparison portals, and could displace these. It is not possible to state at this juncture to what degree this kind of accusation is justified. In this context, reference is made to the discussion in Chapter 5, which addresses in general terms the potential preferential treatment of in-house services by search platforms.

### 7.4.4. Market power risks below the level of market dominance

**399.** Some aggressive growth strategies can be observed in e-commerce. Some companies try to increase their turnover quickly and accept losses to this end (“turnover at any cost”). Prominent examples of such conduct include Amazon, which invests massively in new services and products, as well as Zalando.

**400.** This kind of expansion strategy might be explained with the goal of becoming established as a standard provider or first port of call for specific products or services on the internet in order to thus build a loyal clientele. Expansion into other markets such as the bundling of services as described above can be used to bind customers to one's own company. It also appears to make economic sense with platform markets in particular to “tip” the market to one's advantage, even if this means accepting temporary losses because of existing network effects. This applies in particular to trading platforms if the possibility to switch platforms or to engage in multi-homing is limited for sellers on account of reputation effects.

**401.** It is questionable whether and to what degree these incentives to pursue rapid growth lead to competition risks which necessitate and justify the application of the antitrust rules already below the level of market dominance. It should be taken into account in this regard that the major abuse-related provisions contained in section 20(2) of the ARC are also applicable when small or medium-sized enterprises depend on the dealers or platform operators in question as suppliers or purchasers of certain kinds of goods or commercial services in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist (“relative market power”).

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<sup>279</sup> Cf. FAZ, Bundeskartellamt. *Ebay darf Verkäufer zur Paypal-Nutzung zwingen*, 23 April 2010, <http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/bundeskartellamt-ebay-darf-verkaeufer-zurpaypal-nutzung-zwingen-1970888.html>, retrieved on 27 March 2015.

**402.** It is presumed that in particular Amazon in the online book trade has at least relative market power in relation to small and medium-sized publishing houses.<sup>280</sup> Amazon has recently applied two discount-based strategies to establish its market position and to expand it generally in the bookselling trade:

- Where Amazon acts as a seller for the publishers, Amazon tried in the first strategy, acting on the demand side, to persuade the publishers to grant bigger discounts on the purchasing price when selling e-books. Several publishers have accused the company of using its market power in the printed book segment as leverage. However, it remains open with regard to this accusation as to whether the print and e-book markets are so closely linked that the enforcement of the discounts that were demanded actually constitutes taking advantage of a market power-related operational leeway on the part of Amazon, and can hence be regarded as leveraging market power (rather than simply representing tough conduct in negotiation).<sup>281</sup> It should also be considered that Amazon's demands for discounts might have been excessive (sapping).<sup>282</sup> However, it should be taken into account in this regard that it is Amazon who enables the publishers to reach certain groups of readers in the first place.<sup>283</sup>
- Amazon's approach can be viewed as a second, basically discount-based, strategy to undermine the fixed book price agreement to which all dealers in book retailing are subject by selling e-books to end-customers via a flat rate, and thus granting them discounts on the price of the printed work. This offer promotes customer acquisition. However, with regard to any circumvention of the fixed book price agreement, this is likely to be unobjectionable in competition terms. This applies regardless of the specific way in which e-books are sold.<sup>284</sup> The fixed book price agreement protects booksellers directly, and indirectly also protects publishers against price competition.<sup>285</sup> Such systems are to serve to preserve "cultural and linguistic diversity in Europe".<sup>286</sup> However, this very fixed book price agreement system comes under pressure to justify itself when internet providers open up new possibilities to sell e-books which are fundamentally independent of the distribution structures that are protected by the fixed book price agreement system.

**403.** Where they fall below the level of market dominance, the strategies discussed above can only be covered by national law (section 20 of the ARC). However, where the national antitrust rules are applicable, there are no reliable indications of anticompetitive conduct at present, at least on the basis of the applicable information.

#### **7.4.5. Vertical distribution restrictions**

**404.** Vertical sales agreements are counted as constituting potential competition problems within e-commerce. In comparison to horizontal agreements (agreements among competitors), vertical agreements are less problematic as a matter of principle, which is why they are also partly exempt under the EU's Vertical Restraints Block Exemption Regulation (BER).<sup>287</sup> Nonetheless, they may represent a source of considerable competition restrictions. In particular, they can act as obstacles to market entry and expansion, as well as facilitate collusive conduct, though the latter is likely to be less relevant given the already high level of price transparency on the internet. This can lead to a weakening of intrabrand competition, and hence to higher prices, in particular if competition between manufacturers (interbrand competition) is only weak. Potential consequences of such a weakening of intrabrand competition can be both total welfare losses

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<sup>280</sup> Cf. this with paras. 385 ff above.

<sup>281</sup> Cf. the case-law cited in: Grabitz/Hilf, Art. 102 para. 464.

<sup>282</sup> Cf. The Federal Cartel Office proceedings against Edeka (2013).

<sup>283</sup> Cf. ECJ, Judgment of 28 March 1985, 298/83 – *CICCE*, European Court Reports 1985, 1105, paras. 4 f., 22 and 24 f.

<sup>284</sup> For instance *Skoobe* (Bertelsmann/Holtzbrinck) and *Readfy* should be mentioned as providers of comparable flat-rates.

<sup>285</sup> European Commission, press release of 22 June 2000, IP/00/651, in March 2002 finally confirmed, cf. press release of 22 March 2002, IP/02/461.

<sup>286</sup> European Commission, press release of 22 March 2002, IP/02/461.

<sup>287</sup> European Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ EU L 102 of 23 April 2010, p. 1.

caused by a less allocative as well as dynamic efficiency and redistribution effects as some of the consumer surplus is transferred to the manufacturer.<sup>288</sup>

**405.** Potential efficiency gains need to be taken into account when it comes to the competition assessment of vertical restrictions. Efficiency gains can occur in particular if the corresponding agreement alleviates or remedies coordination problems in vertical market and added-value chains. Such problems include in particular vertical and horizontal external effects (e.g. double marginalisation, free-riding), the provision of adequate incentives for product- and contract-specific investments (hold-up problem), as well as the protection of an established brand image.<sup>289</sup> Depending on the form of vertical competition restriction which they take, these potential efficiency-related arguments are relevant to differing degrees.

**406.** Depending on the business model and products, different forms of vertical distribution agreements are used on the internet, some of which are liable to restrict competition. A distinction can be made between price-related and non-price-related vertical distribution restrictions.<sup>290</sup> The investigations that were recently carried out by the Federal Cartel Office focused particularly on price parity clauses (also known as best price clauses) and prohibitions to use third-party platforms.<sup>291</sup> The application of such vertical agreements was largely prohibited in order to prevent a potential reduction of (intra-brand) competition and thus higher consumer prices. These decisions were criticised both by the companies in question and by some scholars. Furthermore, stationary dealers allege that internet trade is receiving preferential treatment from the antitrust authority, which they claim could lead to city centres and the stationary specialist dealers dying out.

**407.** The Monopolies Commission already discussed the relevant decision practice of the Federal Cartel Office in its XXth Biennial Report.<sup>292</sup> Its focus there was on a legal analysis of the decisions of the Federal Cartel Office. This analysis is supplemented below to include economic aspects. In accordance with the decision practice, particular attention is given to price parity clauses as a major form of price-related vertical distribution restriction, and to prohibitions to use third-party platforms as a form of non-price-related distribution restriction.

#### **7.4.5.1. Price-related distribution restrictions (in particular price parity clauses)**

**408.** Price parity clauses and, in some cases, vertical resale price maintenance agreements are used in internet trade as major forms of price-related vertical competition restrictions. As a matter of principle, vertical resale price maintenance has the same impact on internet trade as on stationary trade. As a hardcore restriction, vertical fixed or minimum price maintenance is prohibited under Art. 101(1) TFEU and section 1 of the ARC, but may be exempted on a case-by-case base as long as it is accompanied by adequate efficiency gains. The manufacturers' recommended retail prices are relatively unproblematic.<sup>293</sup> While these may facilitate the coordination of prices, they are not sufficient as a rule to bring about a stable collusive equilibrium.

**409.** The price parity clauses (also known as best price clauses) on which the competition authorities are currently focusing are a comparatively new form of price-related vertical restriction.<sup>294</sup> They are used in particular by multi-sided platforms, for instance by hotel booking portals or online market places, and restrict dealers and sellers when it comes

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<sup>288</sup> Cf. Federal Cartel Office, *Vertikale Beschränkungen in der Internetökonomie*, background paper for the meeting of the Working Group on Competition Law, 10 October 2013, pp. 8 ff.

<sup>289</sup> Cf. *ibidem*, pp. 5 ff.; general cf. also European Commission, Guidelines on Vertical Restraints, OJ 19 May 2010 C 130/1, paras. 100 ff.

<sup>290</sup> Cf. Buccirosi, P., Background Note, *loc. cit.*, pp. 10 f.

<sup>291</sup> Cf. e.g. Federal Cartel Office, B6-46/12 – *Amazon*, Case summary of 9 December 2013; Federal Cartel Office, B9-66/10 – *HRS*, Case summary of 20 December 2013; Federal Cartel Office, B3-137/12 – *Adidas*, Case summary of 19 August 2014.

<sup>292</sup> Cf. Monopolies Commission, XXth Biennial Report, *loc. cit.*, paras. 884-920.

<sup>293</sup> On the economic impact of price maintenance and recommended prices cf. Schwalbe, WuW 2011, pp. 1197-1216.

<sup>294</sup> A particularity is constituted by the form of price parity clause on Amazon's Marketplace, which was prohibited by the Federal Cartel Office. This was largely regarded as constituting a horizontal competition restriction since Amazon competed with affected third-party dealers by operating as a dealer on its own platform. Cf. Federal Cartel Office, B6-46/12 – *Amazon*, Case summary of 9 December 2013.

to offering their products outside the platform at a lower price. What is more, they may relate to other non-monetary contract conditions, as is the case with hotel booking portals regarding the available number of rooms. Price parity clauses differ from other price-related distribution restrictions in that they are determined not by manufacturers, but by platform-providers who act in their role of intermediary as a kind of sales representative. Unlike the different forms of vertical price maintenance, dealers and sellers can set the price level freely. However, since they cannot offer lower prices via other distribution channels, their ability to price in the different costs of the distribution channels by price differentiation is limited. If dealers operate on several platforms with such clauses, they must offer products on these platforms at identical prices.

**410.** Price parity clauses are categorised as vertical agreements. However, since it is presumed that they are not intended to restrict competition, unlike price maintenance, they are customarily not regarded as constituting a hardcore competition restriction under Art. 101(1) TFEU and section 1 of the ARC. That being said, price parity clauses may lead to a competition restriction. In this case, the clauses may be exempted in accordance with the Vertical Restraints Block Exemption Regulation as long as the market share of the provider does not exceed 30 percent (Art. 101(3) TFEU in conjunction with Art. 3 and 7 of the Vertical Restraints Block Exemption Regulation). Should the market share be higher, an individual exemption is possible pursuant to Art. 101(3) TFEU and section 2 of the ARC, as a matter of principle. However, this is contingent on the agreement being accompanied by adequate efficiency-enhancing effects and adequate consumer benefit. Furthermore, the exception must be indispensable in order to achieve efficiency-enhancing effects, and may not rule out competition. Apart from this, price parity clauses may not breach the prohibition of the abuse of a dominant market position.

**411.** The impact of price parity clauses has been the subject of only little research in the economic literature so far. Three competition-restricting effects are identified.<sup>295</sup> They are said, first, to hinder the market entry of new platforms since these cannot distinguish themselves vis-à-vis the established platforms by reducing sales commissions and hence lowering final consumer prices and thereby gaining market shares. Second, parity clauses can reduce the competition intensity between platforms and hence increase sales commissions and final consumer prices. Hence, platforms have lower incentives to reduce commissions and even greater incentives to increase them because sellers cannot account for different commissions via price differentiation in the retail price. Third, price parity clauses may facilitate collusive conduct between platforms since they, first, reduce the advantages ensuing from deviating from such an agreement and, second, enable a better verification of whether the agreement is being adhered to.

**412.** More recent theoretical economic work on price parity clauses confirms some of the above potential competition restrictions.<sup>296</sup> It also confirms that the competition impact depends on the specific market conditions. In particular, it is confirmed that price parity clauses tend to lead to higher sales commissions and retail prices.<sup>297</sup> The effects on market entry are less clear, by contrast. While price parity clauses make it more difficult for platforms with differentiated, non-equivalent business models to enter the market – since sellers are unable to pass, for example, lower commissions on to end-customers – the market entry of platforms with similar and equivalent business models may indeed be facilitated if the price parity clause leads to a corresponding price rise. Price parity clauses can, thus, restrict competition between different business models in this regard which compete with one another on the same relevant market. Insofar as this affects the development of business models which, for instance, entail lower costs – and hence potentially lower retail prices because of lower “quality” – this may restrict the alternatives for consumers in favour of business models that are already established on the market.

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<sup>295</sup> Cf. Buccirosi, P., Background Note, loc. cit., p. 24.

<sup>296</sup> Cf. this with in particular Boik, A./Corts, K.S., *The Effects of Platform MFNs on Competition and Entry*, 3 June 2014; Johnson, J.P., *The Agency Model and MFN Clauses*, 10 January 2014; furthermore, Foros, Ø./Kind, H.J./Shaffer, G., *Turning the Page on Business Formats for Digital Platforms: Does Apple's Agency Model Soften Competition?*, CESifo Working Paper Series No. 4362, August 2013.

<sup>297</sup> The profit of the platforms by contrast depends on elasticity of demand. Where demand is sufficiently inelastic, price parity clauses accordingly cause the profits of the platforms to increase. However, in other cases, a price rise may cause the profit of the platforms to fall in overall terms.

**413.** Above all, the protection of contract-specific investments and the prevention of opportunistic pricing are noted as a justification for price parity clauses, claiming that they improve efficiency.<sup>298</sup> An essential goal of price parity clauses is, thus, to protect the investment that dealers have made in the quality of the platform, i.e., in particular in the information provided, and to put an end to the free-riding conduct of other dealers who do not engage in similar investments and are, thus, able to offer the products in question at a better price. Such free-riding is contingent on the public nature of the information that has been provided. Free-riding can have a negative impact on the willingness to invest, and thus on the quality of the platform. With regard to multi-sided platforms, this may be relevant in particular because the loss of customers on one side of the platform, in this case the buyers, can quickly entail the loss of customers on the other side of the platform, i.e., the sellers. This may cause the platform to become less attractive as a whole. Some scholars cite increased price transparency on the market and incentives for non-price competition as further efficiency-enhancing effects. However, it is not clear to what degree consumers benefit from the price guarantees which price parity clauses frequently include.<sup>299</sup>

**414.** Competition authorities, and the Federal Cartel Office in particular, are critical of price parity clauses. The cartel proceedings to date have particularly focused on the question of the degree to which price parity clauses are necessary in order to rein in potential free-riding on services. The Federal Cartel Office said that this was not the case, for instance, in its decision regarding the case of HRS, and regarded the efficiency-enhancing effects that were submitted as slight at best.<sup>300</sup> What is more, consumers were not given a fair share of the resulting benefit, and the competition restriction was not indispensable. However, it was left open whether substantial competition was eliminated. This, not undisputed, decision has now been confirmed by Düsseldorf Higher Regional Court.<sup>301</sup> The Monopolies Commission stated in its XXth Biennial Report that it considered the legal assessment of the Federal Cartel Office to be correct as a whole, but indicated that the economic assessment of price parity clauses remained unclear and that it was virtually impossible to provide the necessary proof of specific efficiencies.<sup>302</sup>

**415.** The above discussion shows that price parity clauses have not yet become sufficiently known in economic terms. However, the competition assessment appears to very much depend on the specific market conditions. Since price parity clauses can also increase efficiency, the Monopolies Commission believes that a ban on such clauses, at least, is ill advised at the present time. Instead, the conditions of the clauses and the market characteristics should be analysed in depth on a case-by-case basis. The latter include the aspects already mentioned above, such as the intensity of network effects or the possibility of multi-homing. On the other hand, it is not possible at present to make a general assessment of price parity clauses, albeit this might be welcome in the interest of legal certainty.

**416.** Furthermore, it is necessary to take account of the fact that, when assessing the damaging effect of price parity clauses on competition, the presumed market power of the companies, and hence the market definition, assume central significance. When it comes to the product market definition, in particular the multi-sided nature of internet platforms should be taken into account. As a result, the market definition must encompass all substitution possibilities of the individual sides of the platform. Also, there is a need to precisely examine the geographic market definition since national market definitions do not always adequately cover the competitive forces on the internet. An incorrect market definition may, for instance, cause companies to be wrongly regarded as dominant and to be wrongly prohibited from engaging in certain conduct such as using price parity clauses, although these may have an efficiency-enhancing effect under certain circumstances.<sup>303</sup>

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<sup>298</sup> Cf. Buccirosi, P., Background Note, loc. cit., p. 23.

<sup>299</sup> For a critique of price guarantees cf. e.g. Arnold, T./Baake, P./Schwalbe, U., *Preisgarantien im Einzelhandel: Nicht verbraucherfreundlich, sondern ein Instrument zur Durchsetzung hoher Preise*, DIW Wochenbericht No. 16/2012.

<sup>300</sup> Cf. Federal Cartel Office, Decision of 20 December 2013, B9-66/10 – HRS Best Price Clause.

<sup>301</sup> Cf. Düsseldorf Higher Regional Court, Order of 9 January 2015, VI – Kart. 1/14 (V).

<sup>302</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 895 and 900.

<sup>303</sup> Thus, with regard to the decision of the Federal Cartel Office in the case of HRS, the criticism has been made that, first, the two-sided nature of the platform had allegedly not been sufficiently considered and that, second, a national market definition did not correspond to market realities. A broader market definition, and thus a smaller market share of HRS, might have led to an exemption of the price parity clause within the Vertical Restraints Block Exemption Regulation.

**417.** With regard to future investigations and decisions on the part of the competition authorities, eventually a methodically consistent approach towards specific types of contract in individual industries should be pursued where possible, implying that corresponding cases are to be taken up alongside one another. A situation as in the field of hotel booking portals, where first only one company was banned from using price parity clauses while competitors were allowed to continue to use them at least temporarily, or indeed to continue to use them to the present day, may in turn lead to competition distortions, and should be avoided.<sup>304</sup> What is more, consistent action within the EU should be aimed at. For instance, unlike the Federal Cartel Office, the French, Italian and Swedish competition authorities recently accepted a less far-reaching commitment on the part of a hotel booking portal according to which price parity clauses may continue to be applied vis-à-vis hotels' own websites.<sup>305</sup> Where there are no objective reasons for this variant approach, such differing decisions on the part of authorities are questionable.

#### **7.4.5.2. Non-price-related distribution restrictions (in particular prohibitions to use third-party platforms)**

**418.** A practically relevant field of vertical agreements is constituted by activities on the part of manufacturers to restrict internet sales. These distribution restrictions are particularly used by brand manufacturers in order to acquire an influence on the distribution channels, frequently aiming to limit intrabrand price competition in favour of a brand and quality image. Such distribution restrictions appear in a wide variety of manifestations, albeit with regard to internet sales in particular, especially dual pricing systems and prohibitions to use third-party platforms are highly relevant.<sup>306</sup>

**419.** Dual pricing systems are used in order to support a specific distribution channel. Depending on the type and volume of sales, dealers are granted different discounts or subsidies. In practice, in particular stationary sales are supported to the detriment of internet sales. In accordance with the Guidelines on Vertical Restraints, the granting of a subsidy for stationary dealers is not objectionable.<sup>307</sup> By contrast, competition problems could be caused by discounts for a specific form of distribution since this creates incentives to sell more via the discounted distribution channel. The Federal Cartel Office typically adjudges dual pricing systems which grant discounts for a specific form of sale critically since they lead to a restriction of the group of customers to whom dealers can sell.<sup>308</sup> The Monopolies Commission adopted a wait-and-see position in its XXth Biennial Report when it comes to the practice of the Federal Cartel Office.<sup>309</sup> However, it does regard it as problematic that the pros and cons so far put forward with regard to dual pricing systems have frequently stood on a fragile footing in legal and empirical terms. In the XXth Biennial Report, it first of all presented the legal framework which it considers to be decisive. Accordingly, brand protection, which is frequently put forward as a justification, may also need to be taken into account. Apart from these legal considerations, the Monopolies Commission considers, as a matter of principle, a more precise empirical and case-specific assessment of the effects of dual pricing systems to be necessary. It is misguided, in practice, to use previous decisions to derive arguments for the weight of the effects of dual pricing systems, which can only be identified by empirical means.

**420.** Currently, “prohibitions to use third-party platforms”, which ban dealers from selling on trading platforms and open online market places such as eBay or Amazon Marketplace, have caused quite some controversy. Such prohibitions to use third-party platforms are issued by some manufacturers, both in non-selective distribution and in selective distribution networks, in order to restrict internet sales. The case-law on the permissibility of prohibitions to use third-party platforms has so far been inconsistent. This especially applies to non-selective distribution, and to a lesser degree also

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<sup>304</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., para. 896.

<sup>305</sup> Cf. AHGZ Online, Kartellbehörden akzeptieren Selbstverpflichtung von Booking.com, 21 April 2015, <http://www.ahgz.de/unternehmen/kartellbehoerden-akzeptieren-selbstverpflichtung-von-bookingcom,200012221253.html>, retrieved on 30 April 2015.

<sup>306</sup> In addition, there are further vertical restrictions of internet trade, such as the ban on search engine advertising or on listing on price comparison portals, which may also be problematic in terms of competition law.

<sup>307</sup> European Commission, Guidelines on Vertical Restraints, OJ EU C 130 of 19 May 2010, p. 1, para. 52 (d).

<sup>308</sup> Cf. e.g. Federal Cartel Office, Decision of 27 November 2013, B5-144/13 – *Gardena*; decision of 23 December 2013, B7-11/13 – *Bosch-Siemens Haushaltsgeräte*.

<sup>309</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 907 ff.

to selective distribution.<sup>310</sup> The Federal Cartel Office has so far largely addressed prohibitions to use third-party platforms in terms of selective distribution networks, and takes a critical view of them. For instance, Adidas adjusted its selective distribution network, which included a ban on selling on open online market places, in accordance with anti-trust law in response to pressure from the Federal Cartel Office, and withdrew the across-the-board ban on sales.<sup>311</sup> The outcome of the “pilot proceedings” against Asics remains open. The following discussion focuses on prohibitions to use third-party platforms within qualitative selective distribution networks.

**421.** In selective distribution networks, manufacturers only supply dealers meeting certain qualitative criteria for the sale of the products, such as certain advisory services or an attractive product presentation. The authorised dealer may only resell to consumers and to other dealers that are authorised by the manufacturer. In the context of such selective distribution networks, many manufacturers also restrict internet sales. An extreme example would be a ban on selling on the internet altogether, but one finds more frequently a ban on specific forms of internet sales such as the prohibitions to use third-party platforms which are relevant here.

**422.** Depending on their configuration, selective distribution networks can have various harmful effects on competition. First of all, as a matter of principle they restrict intrabrand competition, since dealers who fail to meet specific qualitative criteria are excluded from selling the products. This reduced intrabrand competition may lead to higher final consumer prices, in particular if brand competition between different manufacturers (interbrand competition) is weak, so that a manufacturer has a certain market power.<sup>312</sup> Since trading platforms constitute a particularly highly competitive distribution channel – because of their low search and transaction costs, their high degree of brand awareness, as well as the strong customer reach and market transparency – a qualitative requirement leading to a prohibition to use such platforms may restrict intrabrand competition to a considerable degree.<sup>313</sup> In particular, such platform bans may prevent smaller dealers from entering the market that cannot make the investment necessary for their own online shop and/or are virtually impossible for the majority of consumers to find.

**423.** In addition to weakening intrabrand competition, manufacturers can also use a selective distribution network to signal a credible commitment to forgo aggressive price competition. This may lead to less interbrand competition and render manufacturers less efficient. This particularly applies if several manufacturers introduce such selective distribution networks in parallel.

**424.** As a justification for selective distribution networks and for any, where applicable, concomitant prohibitions to use third-party platforms, reference is especially made to the protection of the brand and product image. This is significant in two ways.<sup>314</sup> On the one hand, a brand exerts an important signalling function, in particular when it comes to goods built on experience and trust. Through a high level of investment in the quality and marketing of their products, which only pays off in case of multiple purchases, manufacturers give a quality promise through which information asymmetries in internet sales are reduced. On the other hand, particularly when it comes to luxury goods, the brand and product image can be a core product feature which represents the decisive factor in a purchase alongside other functional product characteristics and the price. The establishment and maintenance of a product image should, in economic terms, therefore be regarded in the same manner as investments in the functional characteristics of a product. Both are said to ultimately enhance the consumer benefit.

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<sup>310</sup> Munich Higher Regional Court, Judgment of 2 September 2009, U (K) 4842/09, unlike Schleswig Higher Regional Court, Judgment of 5 June 2014, 16 U Kart 154/13, did not regard a prohibition to sell via internet platforms outside a selective distribution network as constituting a hardcore restriction. Berlin Appeal Court, Judgment of 19 September 2013, 2 U 8/09, and Karlsruhe Higher Regional Court, Judgment of 25 November 2009, 6 U 47/08 Kart, as a matter of principle did not regard a prohibition to sell via auction platforms within a selective distribution network as constituting an offence of competition restriction.

<sup>311</sup> Cf. Federal Cartel Office, Case summary of 19 August 2014, B3-137/12 – *Adidas*.

<sup>312</sup> If, by contrast, there is intensive interbrand competition, selective distribution networks and prohibitions to use third-party platforms are less problematic in antitrust terms since the market power and hence the operational leeway of the manufacturers is limited.

<sup>313</sup> Cf. e.g. Lohse, WuW 2014, p. 122.

<sup>314</sup> Cf. the following discussion with the Centre for European Policy, loc. cit.



**425.** According to this set of arguments, in order to protect the brand and product image, manufacturers rely on exerting an influence on how their products are sold. When it comes to branded articles, this is justified in particular by the need to avoid the potential problem of free-riding. Accordingly, dealers may make a major contribution to the product image, for instance by suitably presenting the manufacturer's products. However, since this contribution entails individual costs, it is rational for each dealer to refrain from making this contribution, in order to offer the products more cheaply at the expense of other dealers. Manufacturers can take action against such free-riding, and on the negative impact that this has on the product image and on the functions of the brand, by establishing a selective distribution network aimed at safeguarding the individual contribution of each dealer by way of qualitative requirements such as prohibitions to use third-party platforms. Thus, the manufacturers' primary goal is not to restrict intrabrand price competition in order to enforce higher final consumer prices, but to protect the brand image, which is said to be in the consumers' interest. This set of arguments can be largely transferred to luxury goods, albeit here it is not the protection of the function of a brand that is sought, but the preservation of a high price level in order to safeguard the luxury image as a product characteristic.

**426.** It should be borne in mind in this context that fierce intrabrand price competition at dealer level is in the manufacturers' interest since such price competition only has a negative effect on the dealers' margin, but not on that of the manufacturers. Manufacturers themselves benefit from the lower prices through higher sales. Thus, manufacturers only have an incentive to issue prohibitions to use third-party platforms and accept restrictions on intrabrand competition if this enables them to sell more products and generate higher profits. This is conceivable in particular if platform sales actually have a negative effect on the product image and the number of products sold falls despite lower prices. In this respect, some manufacturers may decide to ban certain forms of sales not because they promote intrabrand price competition, but rather despite the fact that they do so. Consumers are compensated for any higher final consumer prices through an improved product image.

**427.** In economic terms, prohibitions to use third-party platforms that are issued within selective distribution networks only represent a disadvantage for consumers under certain circumstances. This is particularly the case when manufacturers have market power because of scant interbrand competition, or when they weaken brand competition as a whole in case several manufacturers introduce them at the same time. It is also conceivable that manufacturers who wish to operate an online shop of their own will also wish to protect it through prohibitions to use platforms.

**428.** In legal terms, qualitative selective distribution networks are compatible with Art. 101(1) TFEU and section 1 of the ARC if they serve to protect legitimate quality requirements imposed by the manufacturers, all dealers can take part in the system as a matter of principle, and the proportionality of the criteria that have been established is maintained for as long as the restrictions of the selective distribution network serve to improve competition. In this case, exceptionally, the statutory conditions for a competition restriction are not fulfilled. Otherwise, a selective distribution network is in breach of competition law. However, it is possible to qualify for an exemption under the Vertical Restraints Block Exemption Regulation, or for an individual exception under Art. 101(3) TFEU and section 2(1) of the ARC based on potential efficiency-enhancing effects. The duty to substantiate and the burden of proof that the prerequisites of a block or individual exemption are satisfied lies with the companies.<sup>315</sup> Hardcore restrictions do not fall within the scope of the Vertical Restraints Block Exemption Regulation.

**429.** To what extent prohibitions to use third-party platforms in selective distribution networks comply with competition law, or to what extent they even constitute a competition restriction within the meaning of the law, depends decisively on whether – in line with the above – such prohibitions are characterised as a legitimate quality criterion in sales. This, in particular, is disputed both in the case-law and the literature. The existence of a qualitative criterion is largely negated for global prohibitions to use third-party platforms. The situation is different if the platform prohibition is derived from other qualitative requirements of online and offline sales as a kind of clarification and consequence. Hence, a manufacturer whose qualitative criteria rule out selling via trading platforms, for instance for reasons of legal security, may explicitly prohibit sales via trading platforms. This kind of clarification is regarded by some as a qualitative criterion,<sup>316</sup>

<sup>315</sup> Art. 2 sentence 2 of Regulation 1/2003; cf. also Communication from the European Commission, Guidelines on the application of Article 81(3) TEC, OJ 27 April 2004 C 101/97, para. 46; cf. also Schmidt in: Immenga/Mestmäcker, Wettbewerbsrecht,, Vol. 1 EU/Part 2, 5th ed. 2012, Art. 2 of Regulation 1/2003, Nos. 31 and 35 ff.

<sup>316</sup> Cf. Centre for European Policy, loc. cit., pp. 38f.

while others regard it as an unjustifiable partial ban on internet sales.<sup>317</sup> It is also a matter of debate whether platform prohibitions make a contribution towards image protection and towards the prestigious nature of a product, and hence can be categorised as permissible qualitative requirements.<sup>318</sup> Finally, it is argued that a prohibition to use third-party platforms might constitute a customer restriction since the internet is partly ruled out as a distribution channel.<sup>319</sup> While it therefore does not appear to be clear without ambiguity whether platform prohibitions constitute competitive restraints within the meaning of the law, this is doubtful specifically in economic terms given the positive impact on product image discussed above.

**430.** The range of legal opinions appears to be similarly mixed with regard to the possible exemption of platform prohibitions in the context of the Vertical Restraints Block Exemption Regulation. It matters in this regard whether these prohibitions are hardcore restrictions in terms of Art. 4(b) or (c) BER or legitimate quality requirements for online sales under paragraph 54 of the Guidelines on Vertical Restraints, which moreover have an equivalent in brick and mortar shops in accordance with paragraph 56. If the latter is the case, there is a need to weigh the interests of the manufacturer against those of consumers in intrabrand competition. A platform prohibition as a quality standard within a selective distribution network is likely to be justified in particular if it makes a major contribution towards protecting the product image. As already noted above, opinions vary with regard to the degree to which this is the case.<sup>320</sup> There is a need to take account of the fact that quality standards as to sales are also not permissible if they operate de facto as hardcore restrictions.<sup>321</sup> When it comes to platform prohibitions, a restriction of passive sales is conceivable inasmuch as the dealers' opportunities to achieve a high degree of customer reach are limited. Hence, uncertainties also remain with regard to the possibility of an exemption in the context of the Vertical Restraints Block Exemption Regulation.

**431.** If no exemption in accordance with the Vertical Restraints Block Exemption Regulation is possible, there is still the option of an individual exemption. In turn, especially a potential contribution to the protection of the product image or of the quality signal of a brand is to be taken into account as constituting possible efficiency gains via platform prohibitions.<sup>322</sup> This kind of contribution is likely to much depend on the nature of a product and, for instance, to be of increased relevance with regard to luxury articles.<sup>323</sup> However, it is often presumed that the efficiency-enhancing effect will tend to be slight in most cases since sales via platforms are said not to overly damage the product image and quality signal of a brand. What is more, considerable efficiency gains for consumers would overcompensate potential negative effects on the product image through platform sales.<sup>324</sup> Platform prohibitions are also said not to be justified by potential free-rider problems given that such prohibitions are considered to be unnecessary to solve these problems. Instead, qualitative stipulations and commitments on the part of manufacturers are likely to be sufficient in many cases as a less incisive means.<sup>325</sup> To what degree the necessary criteria of an individual exemption – efficiency-enhancing effects, a fair share for consumers of the resulting benefit, the indispensability of the agreement and not eliminating competition – are fulfilled can ultimately only be verified on a case-by-case basis.

**432.** As mentioned, the Federal Cartel Office views critically prohibitions to use third-party platforms as a quality standard in selective distribution networks, and – largely in harmony with the above set of arguments – presumes that such prohibitions are not eligible for exemptions. The Monopolies Commission adopted a wait-and-see approach in its XXth Biennial Report with regard to the position of the Federal Cartel Office.<sup>326</sup> Its analysis was largely focused on the legal

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<sup>317</sup> Cf. Lohse, WuW 2014, pp. 125 f.; Schweda/Rudowicz, WRP 2013, pp. 596 f.

<sup>318</sup> Thus, for example, the Berlin Court of Appeal in the case of *Sternjakob*. Critical on this: Rudowicz, NZKart 2014, p. 258.

<sup>319</sup> Cf. Lohse, WuW 2014, p. 125.

<sup>320</sup> Negative e.g. the Frankfurt Regional Court, judgment of 31 July 2014, 2-03 O 128/13 – Depotkosmetik; cf. also Centre for European Policy, loc. cit., pp. 49 ff.; Lohse, WuW 2014, pp. 126 ff.; Rudowicz, NZKart 2014, pp. 253-260.

<sup>321</sup> Cf. Rudowicz, NZKart 2014, p. 260.

<sup>322</sup> Cf. Centre for European Policy, loc. cit., p. 56; Lohse, A. (2014), loc. cit., pp. 126 ff.

<sup>323</sup> Cf. Rudowicz, NZKart 2014, p. 260.

<sup>324</sup> Cf. Schweda/Rudowicz, WRP 2013, pp. 593 ff.

<sup>325</sup> Cf. Lohse, WuW 2014, pp. 123 f.

<sup>326</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 901-920.

assessment. It was welcomed that the Office took into account that manufacturers did not acquire control of the distribution channels to a degree which noticeably prevented the free development of internet commerce. Moreover, distribution restrictions were ultimately said to be better adjudged on a case-by-case basis by weighing the negative impact on intrabrand competition and the long-term impact on interbrand competition. More vociferous criticism of the position taken by the Federal Cartel Office is, by contrast, expressed by brand manufacturers as well as by some economists. According to their arguments, the adjudging of vertical distribution agreements ought to give more consideration to efficiencies brought about by investing in the brand and product image.<sup>327</sup> What is more, reference is made to the significance of interbrand competition when it comes to assessing intrabrand competition restrictions.

**433.** The Federal Cartel Office's previous competition-law analysis only considered aspects of image protection within a limited scope. It has for instance been recognised that brand manufacturers may take measures to protect their brands which may serve to distort competition on condition that such action also benefits consumers. This includes measures to protect the prestige character where this prestige is based on high-quality characteristics of the product and damage would be done to the reputation of the brand if such measures were not to be taken.<sup>328</sup> However, the Federal Cartel Office considers the brand image so far only as justifying vertical distribution restrictions where it refers to higher product quality. Sales criteria which serve to protect the prestige character of the manufacturer's brand and which are, hence, derived from the brand or from the sheer charisma of a product are not recognised with reference to European case-law.<sup>329</sup>

**434.** What is particularly criticised about this position is that the judgment of the ECJ in the seminal *Pierre Fabre* case only referred to a specific situation, that is a prohibition on selling via the internet as a whole. The prestigious nature was hence said not to be a legitimate reason for prohibiting internet sales altogether, but the product image could continue to constitute a legitimate reason for the restriction of competition insofar as not all internet sales were affected by it.<sup>330</sup> Moreover, it should be taken into account that the *Pierre Fabre* case should be considered in the context of the Court's trademark case-law. According to this case law, competition-restricting measures as such could also be compatible with Art. 101(1) TFEU if they serve to protect the prestige character of a brand.<sup>331</sup> The ECJ may have ruled in the case of *Pierre Fabre* that an exemption under the Block Exemption Regulation is not available in such cases.<sup>332</sup> According to the ECJ, however, this does not rule out an individual exemption to protect the rights of the brand owner on the basis of an assessment.<sup>333</sup>

**435.** The assessment of platform prohibitions within selective distribution networks under the competition rules, hence, ultimately depends on whether the brand and/or product image is recognised as a potential justification in the sense of an efficiency objection. From an economic perspective, a case ought to be made for taking such a justification into consideration as a matter of principle, in the sense of both an indication of product characteristics as well as of a quality signal over and above this. To what degree sufficient efficiency-enhancing gains are actually improved by such a brand and product image should be examined on a case-by-case basis – ideally through empirical analyses – and cannot be answered generally. Certainly, it is likely correct that many platforms help reduce information asymmetries given the possibility to review products and to rate dealers, and that it is also possible to inspect products in platform sales given the right of revocation.<sup>334</sup> Furthermore, it is likely to be questionable in many cases whether platforms actually have a negative image which is transferred to established brands, particularly since many of these platforms now also offer dealers many ways of designing their product presentation.<sup>335</sup> Nonetheless, the economic arguments presented at the

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<sup>327</sup> Cf. e.g. Centre for European Policy, loc. cit.

<sup>328</sup> For a more precise legal analysis, cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 901 ff.

<sup>329</sup> Cf. ECJ, Judgment of 13 October 2011, C-439/09 – *Pierre Fabre*, European Court Reports 2011, I-9419.

<sup>330</sup> Cf. Centre for European Policy, loc. cit., pp. 30 f.

<sup>331</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., para. 906 and the case-law quoted therein.

<sup>332</sup> Cf. ECJ, Judgment of 13 October 2011, C-439/09 – *Pierre Fabre*, European Court Reports 2011, I-9419, No. 46.

<sup>333</sup> Cf. ECJ, Judgment of 13 October 2011, C-439/09 – *Pierre Fabre*, European Court Reports 2011, I-9419, Nos. 49 f. and 57.

<sup>334</sup> Cf. Rudowicz, NZKart 2014, p. 258.

<sup>335</sup> Cf. Lohse, WuW 2014, p. 126.

beginning make it appear doubtful that a manufacturer would prohibit platform sales if they did not have a negative impact on the product image.

**436.** All in all, the discussion above shows that it is not possible to make universally valid statements on the permissibility under competition law of platform prohibitions in the context of selective distribution networks. Instead, case-by-case assessments are needed which take into account the degree of brand competition between manufacturers and accommodate the above objections on the protection of the brand and product image. The assessment under competition law should thus determine whether the brand image is eligible for protection in the case at hand; whether platform sales entail a negative image; whether this is transferred to the brand image; and whether the allegedly positive effect of a platform prohibition on interbrand competition outweighs the negative impact on intrabrand competition.<sup>336</sup> The efficiencies of the platform sale that are mentioned at the beginning, for instance the reduction of transaction and search costs as well as of information asymmetries, trust barriers, and market entry barriers should also be taken into account in this assessment.<sup>337</sup> Platform prohibitions appear to be objectionable in particular if they are declared by vertically integrated manufacturers who sell their products via their own online shops, and hence compete directly with their own authorised dealers. In this case, platform prohibitions are likely to exert a direct impact on the horizontal competition relationship between manufacturers and retailers.

**437.** Finally, it should be pointed out that, in the opinion of the Monopolies Commission, too little attention is paid in particular to the trademark case-law of the European Courts when it comes to assessing prohibitions to use third-party platforms. It also seems problematic that decisions of national authorities regarding online sales may have a cross-border impact (e.g., because after a prohibition in Germany, providers readjust their range of products in other Member States on account of the risk of a prohibition). This may lead to aberrations in market developments if the competition authorities' decisions are based on a too narrow interpretation of the case-law of the European Courts.

#### **7.4.6. Trading restrictions within the EU**

**438.** The trade in goods and services via the internet has undergone strong growth in recent years. However, as mentioned at the beginning, according to information from the European Commission, this trade takes place to a large degree within national borders, while cross-border trade is much less common. For instance, roughly one half of the population of the EU bought products online in 2014, of whom only 15 percent purchased anything from online dealers in another Member State.<sup>338</sup>

**439.** The reasons for the only slight significance of cross-border online trade within the EU may be varied. Possible reasons which are unproblematic from a competition point of view may be, first, the frequently much higher costs for international shipping, in particular when returning goods, and, second, persisting language barriers or national consumer preferences. Moreover, it cannot be ruled out that the different developments in e-commerce are caused partly by different legal frameworks within the EU or indeed by contractual restrictions between companies to restrict cross-border trade. The European Commission will be addressing these questions in a sector inquiry on e-commerce in order to then take action on reducing trade restrictions and to implement a Digital European Single Market.<sup>339</sup>

**440.** The Monopolies Commission welcomes such a sector inquiry to identify trade restrictions. As to possible distribution restrictions which may impair cross-border trade, it has no such indications at present. However, given the distribution restrictions in national e-commerce mentioned above (platform prohibitions and price parity clauses), it does not appear to be unlikely that companies are also reaching agreements to restrict cross-border trade. It is in any case conspicuous that, even within the EU, some internationally operating companies do not offer shipping to other Member States, even though they themselves have branches there. Sales agreements which lead to a restriction of the clientele constitute hardcore restrictions under European law, which can only be exempted in individual cases.

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<sup>336</sup> Cf. Rudowicz, NZKart 2014, p. 258.

<sup>337</sup> Cf. *ibidem*, p. 259.

<sup>338</sup> European Commission, fact sheet MEMO/15/4922 and press release IP/15/4921; previously also press release IP/15/4701 of 26 March 2015.

<sup>339</sup> Cf. *ibidem*.

**441.** In addition to the aforementioned factors, in particular different national regulations as well as institutional obstacles could be responsible for the relatively low level of cross-border trade. First of all, it is necessary to point once more in this regard to different national data protection regulations which cause legal uncertainty, and which in particular may prevent smaller companies from offering their products across borders. The abovementioned different national regulations concerning the use of cookies are only one example in this regard.<sup>340</sup> Smaller dealers in particular might therefore find it difficult to keep track of the different national regulations and to implement them in compliance with the law. Taking the strictest regulation as an orientation, and considering the ensuing lower quantity of important data collected, may in turn entail competitive disadvantages since this restricts the possibilities of approaching users in a targeted fashion. Harmonising privacy regulations within the planned European General Data Protection Regulation could have a positive impact on e-commerce in this regard as well.

**442.** A further regulation which can impair cross-border trade in general, and online trade in particular, is the planned reform of the German Electrical and Electronic Equipment Act (*Elektro- und Elektronikgerätegesetz – ElektroG*).<sup>341</sup> This provides among others for old appliances to be taken back free of charge by dealers who have a sales-floor or storage space of more than 400 square metres. Implementation could entail considerable costs for online dealers in particular since they would also have to pay the return costs under certain circumstances, and these can be relatively high in cross-border shipping. This example shows that legal regulations which appear to make sense can have an unwanted impact on online trade, in particular on that between Member States. This kind of impact should be taken into account by the legislature.

**443.** An example of possible cross-border trade barriers with digital products is constituted, finally, by the value-added tax regulation for electronically provided services, which came into force on 1 January 2015. According to this regulation, for instance, a German online dealer who offers digital products has to charge to a buyer living in another Member State the value-added tax that is due in that country. This is likely to entail higher costs for dealers, in particular resulting from a greater programming effort for dynamic price information in online shops, which needs to vary depending on the user's country of origin. It is not clear here how it is at all possible to determine the respective user's country of origin. There are plans to pass regulations to make practical implementation easier, but it cannot be ruled out that practical obstacles to trade will emerge from the reform of the regulation for cross-border trade in digital goods which, on account of there being no transport costs, is relatively easy to implement.

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<sup>340</sup> Cf. this with para. 95 above.

<sup>341</sup> Draft Bill of the Federal Government reforming the Act Governing the Sale, Return and Environmentally Sound Disposal of Electrical and Electronic Equipment (*Elektro- und Elektronikgerätegesetz – ElektroG*), [http://www.bmub.bund.de/fileadmin/Daten\\_BMU/Download\\_PDF/Abfallwirtschaft/elektrog\\_novelle\\_gesetzentwurf\\_bf.pdf](http://www.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Abfallwirtschaft/elektrog_novelle_gesetzentwurf_bf.pdf), retrieved on 30 April 2015.

## 8 The legal perspective: Protection of undistorted competition in the digital economy

**444.** The digital economy in general develops dynamically. Nonetheless, the establishment of platforms with market power on the internet, and the utilisation of the internet by dominant companies for distribution purposes have made the competition authorities and other authorities (e.g., for privacy and consumer protection) open proceedings and have also led to litigation since roughly the middle of the first decade.

**445.** Notified company take-overs were approved by the authorities with the competence for merger control, albeit there were detailed investigations in some cases (e.g., in the case of *Google/DoubleClick*; in the USA obviously also for instance in the case of *Facebook/Instagram*).<sup>342</sup>

**446.** The U.S. authorities initiated proceedings against Google, Apple and Facebook on grounds of competition law, and there were objections under privacy and consumer protection law against certain corporate practices.<sup>343</sup> Additionally, there have already been various (other) sets of court proceedings in the USA against internet service providers because of accusations of anti-competitive conduct.<sup>344</sup> In the EU, the European Commission initiated – still pending – proceedings in 2010 against Google for the abuse of market power.<sup>345</sup> The ECJ case-law has at the same time generated competition-relevant ideas for refining the European privacy regime.<sup>346</sup> In the EU Member States, the competition authorities have implemented from around 2009 onwards proceedings on selective distribution systems that were not permissible under competition law; a pioneer role is performed in this regard by the Federal Cartel Office.<sup>347</sup> Proceedings on questions related to legal protection in the digital economy have become increasingly common in the case-law at national level in recent years.<sup>348</sup>

**447.** Competition law aims to eliminate distortions of competition, and in this sense is also mandated to protect the digital economy as a system of undistorted competition.<sup>349</sup> As explained in the above economic sections, particularly the most economically successful services on the internet are offered on the basis of platforms, and platform services tend

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<sup>342</sup> Cf. from U.S. practice FTC, *Google/DoubleClick*, File No. 071-0170; Early Termination Notice of 16 June 2011, *Microsoft Corporation/Skype Global S.a.r.l.*, 20110881; Notice of 29 November 2013, *Microsoft Corporation/Nokia Corporation*, 20140115; Notice of 17 February 2010, *Microsoft Corporation/Yahoo! Inc.*, 20090650; *Facebook/Instagram*, File No. 121-0121; *Facebook/WhatsApp*, press release of 10 April 2014 and on this Orescovic, Reuters of 10 April 2014, Facebook says WhatsApp deal cleared by FTC; DOJ, press release of 13 February 2012, *Google/Motorola Mobility*; from EU practice, European Commission, M.4731 – *Google/DoubleClick*; M.7217 – *Facebook/WhatsApp*; M.6281 – *Microsoft/Skype*; M.7047 – *Microsoft/Nokia*; M.5727 – *Microsoft/Yahoo! Search Business*; M.6381 – *Google/Motorola Mobility*; in Germany Federal Cartel Office, press release of 21 April 2015, *Immonet/Immowelt*; Federal Cartel Office, Decision of 17 March 2011, B6-94/10, confirmed by Düsseldorf Higher Regional Court, Order of 8 August 2012, VI – Kart 4/11 (V); Federal Cartel Office, press releases of 11 March and 16 September 2013 (*Video Portals*).

<sup>343</sup> FTC, *In the matter of Google Inc.*, File No. 111-0163, statement of 3 January 2013 regarding Google's search practices; *U.S. v. Apple, Inc., et al.*, 14-60 (2nd Cir. 2014); FTC, File No. 092-3184, *In the matter of Facebook, Inc.*, Consent Order and press release of 29 November 2011 (concerning data protection).

<sup>344</sup> *Facebook, Inc. v. Power Ventures, Inc.*, [2012] WL 542586 (N.D. Cal. 16 Feb. 2012); *LiveUniverse, Inc. of MySpace, Inc.*, No. CV 06-6994 AHM (Rzx), 2007 WL 6865852 (C.D. Cal. June 4, 2007), confirmed: 304 F. App'x 554 (9th Cir. 2008).

<sup>345</sup> European Commission, press release IP/10/1624 of 30 November 2010; Vice President Almunia, J. on the further course taken by the proceedings, statement of 18 December 2012 on the *Google* proceedings, SPEECH/12/967; European Commission, press release IP/13/371 of 25 April 2013 and MEMO/13/383, press release IP/14/116 & MEMO/14/87 of 5 February 2014.

<sup>346</sup> ECJ, Judgment of 13 May 2014, C-131/12 – *Google Spain*, ECLI:EU:C:2014:317; outside the context of this report also ECJ judgment of 8 April 2014, C-293/12 and C-594/12 – *Digital Rights Ireland*, ECLI:EU:C:2014:238.

<sup>347</sup> Cf. OECD, Vertical Restraints for On-line Sales, Policy Roundtables series (2013), DAF/COMP(2013)13 and Monopolies Commission, XXth Biennial Report, loc. cit., paras. 884 ff. as well as Chapter 7 above, for an overview. It was announced on 7 April 2015 that the U.S. DOJ had also filed a lawsuit against an online dealer (case of *Topkins*).

<sup>348</sup> Cf. e.g. Federal Court of Justice, judgment of 29 April 2010, I ZR 69/08 – *Vorschaubilder I*, BGHZ 185, 291 (on copyright consent); judgment of 17 July 2003, I ZR 259/00 – *Paperboy*, BGHZ 156, 1 (on copyright); judgment of 6 May 1999, I ZR 199/96 – *Tele-Info CD*, BGHZ 141, 329 (on copyright); Frankfurt/M. Higher Regional Court, judgment of 29 October 1996, 11 U (Kart) 44/95 (on data protection) on the case-law valid in the context of this report.

<sup>349</sup> Cf. Protocol No. 27 to the EU Treaties on undistorted competition as the subject of protection by good competition policy, OJ EU C 83 of 30 March 2010, p. 309.

towards concentration because of network effects. Where the result is a reduction of competition on the internet, this is only relevant under competition law if the dangers for competition outweigh the advantages ensuing from platforms' market power (i.e., the supply of innovative internet services). In legal terms, it is necessary to distinguish between external and internal growth.

**448.** “External growth” takes place if a company merges with another or acquires a decisive influence over another company – or, under German law, influence that is at least competitively significant. This is objectionable under competition law in case the transaction significantly impedes effective competition, in particular through the acquisition or the strengthening of a dominant position. External growth can lead to a market position which is not necessarily based on the market performance of the companies involved. From a competition law perspective, it must be presumed that, in the event of external growth, the competition risks outweigh the advantages that it entails, and all the more so as companies obtain market power as a result of the concentration.

**449.** “Internal growth” takes place if a company is operating successfully on the market, and hence is able to grow by its own strength. This is unobjectionable under competition law because here the prospect of reaching an advantageous market position through one's own success on the market constitutes an incentive to innovate in accordance with the conception of the law. The situation is only different if existing market power is exploited in an abusive manner, for instance in order to further consolidate the market position or market power. Where companies that operate on the internet violate other laws in the case of internal growth (e.g., privacy/copyright regulations), such violations are not relevant under competition law as a matter of principle. An exception may apply after market power has been achieved.<sup>350</sup>

**450.** The protection of undistorted competition is difficult in the digital economy. The question has been raised as to whether the extant set of legal tools is at all sufficient to protect competition and the rights of the market players. The Monopolies Commission does not see a need to question the existing legal framework as a matter of principle. Nonetheless, there is a need to refine the law, and in many cases to make it effective, in order to facilitate undistorted competition. On the basis of the investigation in the previous parts of this report, the Monopolies Commission states below which shortcomings it considers need to be remedied in merger control (cf. on this section 8.1), and which in the prosecution of abuses under competition law (cf. on this section 8.2).

## **8.1. Merger control on online markets not yet sufficiently effective**

**451.** Particularly on dynamic markets, merger control is a major tool to prevent the market structure becoming encrusted in a manner opposing innovation. It covers not only concentrations between competitors (horizontal concentrations), but also those along the added-value chain (vertical concentrations), as well as with companies on directly adjacent markets or on other markets (conglomerate concentrations).

**452.** However, the digital economy demonstrates specific characteristics with the high significance of multi-sided platforms. The Monopolies Commission considers the current legal framework for merger control not to be sufficiently effective in this regard.

### **8.1.1. The need to verify the notification requirements**

**453.** Merger control in the EU and in Germany is structured, in procedural terms, as ex-ante control. The duty to report a transaction is triggered by “notification requirements” (turnover thresholds, presence of a concentration). In cases which are not assigned to the European Commission, merger control may be carried out under national law subject to certain conditions. However, the current design of the notification requirements leads to gaps in control in the digital economy.

**454.** In accordance with both European and German law, a duty to notify only exists if the turnover of the companies involved in the concentration has exceeded certain thresholds (Art. 1 and 4 of Regulation 139/2004<sup>351</sup>; section 35 of the German Act Against Restraints on Competition - ARC [*Gesetz gegen Wettbewerbsbeschränkungen – GWB*]). This can entail gaps in protection if a platform service is taken over without the turnover thresholds of European and German

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<sup>350</sup> Cf. paras. 515 ff.

<sup>351</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“EC Merger Regulation”), OJ L 024 of 29 January 2004, p. 1.

law. The thresholds provided under German law for a duty to notify were further raised in 2009 by virtue of the introduction of a “second domestic turnover threshold” (section 35(1) No. 2 of the ARC).<sup>352</sup> The consequence of the regulatory technique used in both European and German law is that the acquisition of a company which previously had little or no turnover can also remain exempt from control if the purchaser is a world market leader with turnover in the billions. This is, first, relevant to business models which involve the formation of commercially valuable data inventories without the individual companies' data inventories already having impacted turnover to a considerable degree. Second, the current notification system is unable to cover cases where young companies are acquired, for instance in the technology sector, which have considerable market potential, but so far only have little turnover. Thus, market-leading companies can eliminate up-and-coming competitors from the market at an early stage of development by acquiring them before they grow into serious competitors. These considerations show the significance that attaches to effective merger control, particularly on dynamic technology markets, in the interest of protecting competition. The risk of protection gaps of the type described is limited by the fact that concentration projects may be captured by the variously defined notification requirements that may apply in other countries, and hence may be subject to their control. Thus, an examination within the network of EU competition authorities (European Competition Network – ECN) may be considered if a proposed concentration can be investigated in individual Member States.<sup>353</sup> In the same way, as a matter of principle the European Commission may initiate proceedings in accordance with Art. 22 of Regulation 139/2004 in response to a request by one or more Member States, and may investigate the project at EU level. However, the latter proceedings are unusual and only possible within tight deadlines. These regulations do not guarantee in practice that the market impact of the project in for instance Germany could be analysed.

**455.** Apart from this, the concentration criteria of German law (in particular acquisition of shares or assets, competitively significant influence) do not, according to the case-law, cover the acquisition of any intellectual property rights (e.g., patent portfolios) with which no current turnover is (yet) related.<sup>354</sup> Such acquisitions are also not subject to review under EU law.<sup>355</sup> Yet, where innovations in the digital economy build on the utilisation of protected technologies, companies can acquire a major influence over further market developments under certain circumstances by acquiring protection rights.

**456.** Merger control law, as a matter of principle, also does not provide for the ex-post prohibition of concentrations that significantly impede effective competition. It is possible to prohibit concentrations under EU law which constitute a structural abuse of market power because of old but presumably still applicable case-law.<sup>356</sup> This theoretically facilitates a subsequent examination, similar to that recently carried out by the U.S. Department of Justice with an internet concentration below the U.S. thresholds.<sup>357</sup> However, the European Commission has stated that, in application of the Merger Control Regulation, it would not carry out such abuse control in respect of concentrations in principle.<sup>358</sup> Such abuse control would also be subordinated and is not common.<sup>359</sup>

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<sup>352</sup> Cf. this with Monopolies Commission, XVIIIth Biennial Report, More Competition, Few Exceptions, Baden-Baden 2010, para. 474.

<sup>353</sup> European Commission, M.7217 – *Facebook/WhatsApp* (examined by the European Commission on application of the companies in accordance with Art. 4(5) of Regulation 139/2004).

<sup>354</sup> Federal Court of Justice, Judgment of 10 October 2006, KVR 32/05 – *National Geographic I*.

<sup>355</sup> Cf. European Commission, Consolidated Jurisdictional Notice, OJ EU C 43 of 21 February 2009, p. 10, para. 24. Besides this, latitude exists to particularly structure cases of the acquisition of protection rights for instance in such a way that an obligation to report can be circumvented.

<sup>356</sup> ECJ, Judgment of 21 February 1973, 6/72 – *Continental Can*, European Court Reports 1973, 215, para. 26; GC, Judgment of 10 July 1990, T-51/89 – *Tetra Pak*, European Court Reports 1990, II-309, para. 23 (“disacquisition” of an exclusive licence).

<sup>357</sup> Cf. *U.S. of Bazaarvoice, Inc.*, No. 13-CV-00133 WHO (N.D. Cal. Dec. 2, 2014).

<sup>358</sup> European Commission, statements on the interpretation of Art. 22 of Regulation 4064/89 [= Art. 21(1) of Regulation 139/2004] for the Council's Minutes of 19 December 1989, WuW 1990, 240 (243 f.).

<sup>359</sup> Cf. GC, Judgment of 20 March 2003, T-175/99 – *UPS Europe*, European Court Reports ECR 2002, II-1915) ECLI:EU:T:2002:78 Nos. 61 and 64.



**457.** Competition abuse control law is in any case generally not applied to concentrations in Germany. That being said, the definition of abuse in German law is to be interpreted within the meaning of the principles that were developed in EU law.<sup>360</sup>

**458.** In the view of the Monopolies Commission, a solution should be sought on the basis of refining German and European merger control law. The prior checking under merger control law should remain the standard procedure in the interest of legal certainty.

**459.** The Monopolies Commission recommends that the notification requirements be extended. When it comes to calculating the relevant turnovers, the statutory stipulations under the law as it stands already take account of the particularities of certain markets where the turnover thresholds for the assessment of the economic significance of transactions are not authoritative (Art. 5(3) of Regulation 139/2004 and section 38(2)-(4) of the ARC). By extending these provisions, additional notification requirements should be established based on the transaction volume. From the current point of view of the Monopolies Commission, such notification requirements would have general scope, and appear to be preferable as compared to notification requirements specifically established for digital markets (e.g., based on a certain number of users).

**460.** The requirement to notify based on the transaction volume is likely to be suited to close protection gaps in cases in which the competition potential of a company is not reliably reflected in the turnover achieved to date. For instance, the market potential of the WhatsApp Messenger service was hardly expressed in past turnovers, when the company was taken over by Facebook in 2014 for a record price of USD 19 billion. Accordingly, the acquisition was originally subject to neither European nor German merger control. The European Commission was only able to carry out proceedings in this regard because the transaction was notifiable in three Member States under the national notification thresholds and Facebook had requested for these proceedings to be remitted to the European Commission. It would be possible to take account of the transaction volume in the sense that, as an alternative to the company's past turnover figures, the value of the consideration agreed on in a transaction (e.g., the purchase price agreed on the acquisition of a company) is taken as a basis.<sup>361</sup>

**461.** It would be conceivable, for instance, to supplement the existing turnover thresholds in the wording of the norms to include appropriate purchase price thresholds. It would for instance be possible to add the following Paragraph 6 to Art. 1 of Regulation 139/2004:

*“The turnover thresholds of paragraph 2 shall also be deemed to have been exceeded if the value added by an undertaking concerned is more than EUR 5 billion and an aggregate Community-wide turnover of more than EUR 250 million is achieved by at least one of the undertakings concerned. The turnover thresholds of paragraph 3 shall also be deemed to have been exceeded if the value added by an undertaking concerned is more than EUR 2.5 billion, the aggregate turnover of all undertakings concerned exceeds EUR 100 million each in at least three Member States, the aggregate turnover of at least one of the undertakings concerned is more than EUR 25 million in each of at least three of these Member States, and the aggregate Community-wide turnover of at least one undertaking concerned exceeds EUR 100 million.”*

In German law, new sentences 2 and 3 could be added to section 35 subsection (1) sentence 1 of the ARC:

*“These turnover thresholds shall also be deemed to have been exceeded if the value added by an undertaking concerned is more than 500 million Euro and at least one undertaking concerned has achieved turnover of more than 25 million Euro in Germany. Section 35 subsection (2) sentence 1 shall not apply to cases falling under section 35 subsection (1) sentence 2.”*

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<sup>360</sup> Cf. section 8.2.1.2. below. This is likely to apply regardless of the fact that Art. 102 TFEU does not take precedence over prohibitions of commercial conduct which are based on national provisions to prohibit or sanction one-sided acts by companies (cf. Federal Court of Justice, judgment of 6 November 2013, KZR 58/11 – VBL-Gegenwert, para. 41).

<sup>361</sup> Divergent concept in: section 7a of the U.S. Clayton Act (15 U.S.C. section 18a).

The proposed section 35(1)(3) of the ARC, as amended, ensures that the stipulation that follows does not apply to the cases that are relevant here. Additionally, the applicability of the minor market clause contained in section 36 (1) No. 2 of the ARC should be excluded for the cases mentioned.

**462.** The acquisition of individual assets without a current market turnover would not be regarded as a concentration (Art. 3 of Regulation 139/2004 and section 37 (1) of the ARC) in the case of a transaction volume exceeding the newly introduced threshold. In order to close the remaining gap in the regulation, it could be considered to add a provision to Art. 3(2) of Regulation 139/2004 and section 37(1) of the ARC such that the acquisition of an asset also applies in cases covered by the new section 35(1)(2) of the ARC, as amended.

**463.** The proposals to adjust the notification requirements under the merger control law concern necessarily both Regulation No. 139/2004 and the national merger control rules. The modification of the national regulations is already favoured by the fact that the definition of “concentration” in Regulation No. 139/2004 covers fewer cases than the ARC. If a concentration project fails to satisfy the criteria of Art. 3 of Regulation 139/2004, it could still be examined on the basis of the criteria for a concentration contained in section 37(1) Nos. 1, 3 or 4 and subsection (2) of the ARC. What is more, it cannot be ruled out that all the turnover thresholds of Regulation No. 139/2004 are met in a relevant case, but European merger control law nonetheless does not apply because the two-thirds clause is satisfied. One may finally presume that the national legislature is probably able to carry out such legislative proceedings more rapidly than can be achieved at European level with 28 Member States.

### **8.1.2. The need to refine the substantive assessment criteria**

**464.** In substantive terms, merger control requires a prognosis as to whether the project that is to be examined leads one to anticipate a significant impediment to effective competition (the “SIEC test”).<sup>362</sup> The examination of the competition effects by this standard entails an overall view. The following characteristics of the services concerned, among others, should be taken into account in this context when it comes to projects in which the internet services which are the focus of this report are involved:

- The services examined are multi-sided platforms where the sides of the platform are interlinked, and hence may not be regarded in isolation (platform interdependences).
- The markets on which the platforms are operating may tend towards concentration, depending for instance on the links existing between the sides of the platform and the interactions between them that these trigger.
- Expanding the platforms by integrating further services makes it possible to combine data which the company offering the platform services may be able to strategically use for its own benefit.

The Monopolies Commission considers that, in some respects, these specific characteristics should be taken into account to a greater extent in merger control legal practice.

### **8.1.3. Taking account of the platform interdependences when identifying relevant markets**

**465.** The platform character of some internet services poses practical difficulties when it comes to defining the relevant market. The examination under merger control law is traditionally orientated above all towards markets on which products are directly traded for monetary consideration. Unlike the business models of other market players, the business model of internet platforms does not provide for any direct monetary compensation for certain services for platform users, but is rather based on displaying advertising, which is used to build up a range of products that are funded by third parties.

**466.** Operations on platform sides on which services are provided with no monetary consideration (e.g., answering online search queries) do not constitute a market activity from a traditional viewpoint. The older case-law only considered such activities if they were relevant to explain the mechanisms on the platform sides with monetary consideration (e.g., marketing of search advertising).<sup>363</sup> However, the precise definition of the markets on which the companies in

<sup>362</sup> SIEC = Significant Impediment to Effective Competition.

<sup>363</sup> Cf. e.g. Berlin Court of Appeal (*KG*), Order of 4 March 1986, Kart 1/84 – *Niederrheinische Anzeigenblätter*, WuW/E Higher Regional Court 3767 (3770); Federal Cartel Office, B6-98/09 – *Roth + Horsch Pressevertrieb/Presse-Vertrieb Pfalz*, para. 63; in EU practice,

question provide services without monetary consideration is likely not to have been material to the rulings in those older cases.

**467.** The difficulties in the case-law may have been aggravated by the fact that platform markets are also referred to as “multi-sided markets”. This definition obscures the fact that a platform is not in itself a relevant market within the meaning of merger control because the platform operator may certainly compete on the platform sides with other platform-based or non-platform-based providers. The lack of a distinction between the platform operations and the relevant markets may lead to misguided presumptions, such as that effective competition with a platform provider is contingent on market entry on both sides of the platform.<sup>364</sup>

**468.** It is correct that sides of the platform cannot be regarded separately from one another, in particular because of the indirect network effects. While this primarily concerns the question of market concentration and the question of a possible foreclosure of effective competition, the platform provider does have to design its business model such that it takes account of the market conditions of all sides of the platform at the same time. Equally, market power can only be identified if the interdependences between the sides of the platform are taken into account.<sup>365</sup> That being said, the connections which emerge as a result of the presence of platform-based providers in relation to other markets should also be taken into account in the market definition in order to do justice to the interactions between the sides of the platform.

**469.** The market definition with regard to markets on which multi-sided platforms operate without direct monetary consideration is not mentioned in the relevant Notice on the definition of the relevant market.<sup>366</sup> The Notice is also not conclusive when it comes to the “SSNIP Test”, which is used for the market definition.<sup>367</sup> This test produces no meaningful results where prices are not gathered, or because of the platform-related interdependence of several markets, the prices do not permit conclusions to be drawn as to a single market.<sup>368</sup>

**470.** The merger control practice regarding concentrations where software and internet platforms are involved remains inconsistent, but now takes the characteristics of platform-based business models into account to a greater degree than the guidelines do. Accordingly, current economic knowledge suggests that it also tends to include the sides of the platform on which services are provided without any direct monetary consideration.<sup>369</sup> However, it continues not to be customary to examine the platform-related links and the resultant interactions in a separate stage of the examination.<sup>370</sup>

**471.** The Monopolies Commission suggests that the communication on the definition of the relevant market be revised. Furthermore, the platform-related links and their impact on the market definition should be separately analysed in merger control practice. The Monopolies Commission further points out that, in the market definition in the case of internet platforms with data-based business models, a changed approach may also lead outside the internet to a market assessment that deviates from the previous practice when it comes to examining “multi-sided markets”, with one side of the

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European Commission, Decision of 7 July 2005, M.3817 – *Wegener/PCM/IV*, paras. 15, 19 and 29 f.; hence definition of a search market left open in European Commission, Decision of 18 February 2010, M.5727 – *Microsoft/Yahoo! Search Business*, paras. 85 f.; further Podszun/Franz, NZKart 2015, 121 ff. for a possible categorisation of the case-law.

<sup>364</sup> E.g. Federal Cartel Office, *Leitfaden zur Marktbeherrschung in der Fusionskontrolle*, 29 March 2012, para. 66.

<sup>365</sup> Cf. paras. 55 ff; cf. section 8.2.1.1 below on market power.

<sup>366</sup> European Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 of 9 December 1997, p. 5.

<sup>367</sup> Cf. in particular Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 of 9 December 1997, paras. 15 ff.

<sup>368</sup> Cf. para. 59 above.

<sup>369</sup> Cf. European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 13 ff. and 45 ff.; Decision of 7 October 2011, M.6281 – *Microsoft/Skype*, paras. 10 ff.; Decision of 4 December 2013, M.7047 – *Microsoft/Nokia*, paras. 28-30 and 31 ff.; Decision of 18 February 2010, M.5727 – *Microsoft/Yahoo! Search Business*, paras. 85 f. and 201 ff.; Decision of 13 February 2012, M.6381 – *Google/Motorola Mobility*, paras. 162-163. Cf. also Podszun/Franz, NZKart 2015, 121 ff. for a possible categorisation of the case-law (EU/Germany).

<sup>370</sup> Cf. recently for such an examination however Federal Cartel Office, Decision of 20 April 2015, B6-39/15 – *Axel Springer/Immowelt*.

market being (partly) free of charge (in particular media markets such as newspaper markets, markets for fee-/advertising-/audience-funded television).

#### 8.1.4. Taking platform-inherent concentration tendencies into account

**472.** The platform-inherent concentration tendencies on the part of those involved in the concentration need to be taken into account when examining the competitive impact of a concentration.<sup>371</sup> In this regard, in a concentration where a platform service is involved as the acquirer, the following examination is likely to be necessary as a matter of principle:

- With regard to markets on which the acquirer has been operating from the outset, it should be necessary to examine whether the concentration amplifies the platform-inherent concentration tendencies, and to what degree this can contribute towards hindering effective competition on the platform sides in question.
- With regard to markets on which the acquirer did not start to operate until after the concentration, it should be examined whether the concentration tendencies in question can contribute to anti-competitive concentration effects on those third markets.

**473.** However, to date, merger control practice has usually not yet generally separately analysed the platform-inherent concentration tendencies. Instead, those factors which contribute towards or which counter such a concentration tendency (e.g., positive and negative indirect network effects) are primarily addressed within an examination of the individual sides of the platform in competition with other providers.<sup>372</sup> So far, it has remained unclear in some of the decisions whether effects that relate to a platform as a whole and are not only restricted to individual sides of the platform (e.g., indirect network effects as opposed to direct network effects) have been examined at all and to what degree this has taken place.<sup>373</sup>

**474.** Independently of this development, the approach towards examination so far entails that, customarily, the focus is not on the incentives for (potential) platform users to change to the platform which directly contribute towards the concentration tendencies of the platform. Rather, the examination – as in cases where no platform is involved – starts from the impact that the concentration has on the competitors of the platform operator on the individual sides of the platform. This may cause problems if it leads to a situation in which the platform-inherent concentration tendencies caused or at least partly favoured by the concentration are underestimated and the possibilities open to competitors to assert themselves against the platform are overestimated.

**475.** The Monopolies Commission wishes to point out at this juncture that the consideration of the links between the sides of the platform which is necessary for economic reasons when evaluating efficiencies in EU law furthermore conflicts with the precondition that, as a matter of principle, only efficiencies on the relevant market may be taken into account.<sup>374</sup> German law is more flexible in this regard (balancing clause in section 36(1) of the ARC).<sup>375</sup>

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<sup>371</sup> Cf. paras. 36 ff. and 45 ff.

<sup>372</sup> European Commission, Decision of 7 October 2011, M.6281 – *Microsoft/Skype*, paras. 69 ff., in particular paras. 96 ff.; furthermore paras. 141 ff. (specifically on network effects: paras. 92 and 130); Decision of 4 December 2013, M.7047 – *Microsoft/Nokia*, paras. 86 ff. (on network effects: paras. 113 and 158 ff.); Decision of 13 February 2012, M.6381 – *Google/Motorola Mobility*, paras. 161 ff.; Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 159 ff. and 180 ff. (in particular paras. 187 f.). A comparatively detailed examination of elements of the platform structure, which are also relevant for platform-inherent concentration tendencies, can however be found in European Commission, Decision of 11 March 2008, M.4731 – *Google/DoubleClick*, paras. 134 and 137 ff.; Decision of 18 February 2010, M.5727 – *Microsoft/Yahoo! Search Business*, paras. 201 ff.

<sup>373</sup> Cf. however, on the basis of the platform, recently Federal Cartel Office, decision of 20 April 2015, B6-39/15 – *Axel Springer/Immowelt* (examination of the competition impact in a concentration of online real estate platforms).

<sup>374</sup> European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Guidelines), OJ C 31 of 5 February 2004, p. 5, para. 79.

<sup>375</sup> Cf. Federal Cartel Office, *Leitfaden zur Marktbeherrschung in der Fusionskontrolle*, 29 March 2012, para. 186.

**476.** The relevant official guidelines on the evaluation of concentrations, and on the question of market dominance, also only comment marginally<sup>376</sup> or very cursorily<sup>377</sup> on the question of the degree to which concentrations involving platforms may lead to a significant impediment to effective competition.<sup>378</sup> The guidelines make no separate statement on the significance to be attached to the platform-inherent concentration tendencies within the merger control examination. In particular, they do not explore the fact that market shares or price levels of a multi-sided platform on individual sides of the platform are not very informative from the outset.<sup>379</sup>

**477.** The Monopolies Commission recommends refining the legal framework on evaluating the impact of concentrations on competition so that it takes account of the characteristics of multi-sided platforms more comprehensively. Accordingly, the relevant guidelines should make it clearer that the assessment of competitive situations on multi-sided platforms requires an overall view to be taken in which greater significance is attached to other factors than market shares and the scope for pricing, for instance direct and indirect network effects, innovation pressure and – on the internet – user data. German law could also refer to this aspect in general terms in section 18 of the ARC.

### **8.1.5. Taking account of the combination of data stocks**

**478.** It is conceivable that the concentration-related combination of data stocks on the platform of an acquirer enables its operator to prevail over competitors in its further competition conduct solely by virtue of permanently having superior knowledge e.g., of the user preferences. This can be used by a platform operator in order to expand into directly adjacent digital markets, as well as into other markets not previously belonging to the company's core business. Developments indicating in this direction have been pointed out at various junctures in this report.<sup>380</sup>

**479.** The concentration-related combination of data could enable platform operators to (also) seal themselves off from competition in the long term, independently of their market power, and to already occupy new markets before their competitors have an actual chance to react. It remains unclear at present to what degree such risks exist. The Monopolies Commission recommends that the changes on the market be continually and precisely observed by the competent authorities in this regard.

## **8.2. Risks of abuse of market power due to shortcomings in the enforcement of the law**

**480.** Competition law protects the function of competition as a driver of product innovation on digital markets. It accepts that innovative companies grow as a result of their success on the market. However, where companies gain market power, this also entails the risk of abuse, just as in other sectors of the economy. It is the task of abuse control under competition law to prevent this. When it comes to abuse control in the digital economy, in particular the preservation of innovation competition is to be protected.

**481.** Potential abuses of digital market power are the subject of lively public discussion, focusing of course on individual companies which have already prosecuted for specific abuses. However, the public debate is nonetheless broader. This discussion is concerned about whether protection against abuse of market power on the internet is generally sufficient.

**482.** A major reason for this discussion is that access to data has become a key factor in product development and innovation.<sup>381</sup> This has triggered considerable competition for data and data access among companies operating as market players on digital markets. Internet users (consumers) have, by contrast, become concerned about excessive data collec-

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<sup>376</sup> European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18 October 2008, p. 7 (Non-horizontal Guidelines), paras. 62 and 101; Horizontal Guidelines, para. 72 (in each case on network effects).

<sup>377</sup> Federal Cartel Office, *Leitfaden zur Marktbeherrschung in der Fusionskontrolle* (Guideline on Market Dominance in Merger Control), 29 March 2012, paras. 36 and 66, as well as footnote 92.

<sup>378</sup> Federal Cartel Office, *Leitfaden zur Marktbeherrschung in der Fusionskontrolle*, 29 March 2012, paras. 36 and 66.

<sup>379</sup> Cf. paras. 35, 39 f. and 56 ff. above; by contrast, e.g. European Commission, Horizontal Guidelines, paras. 17 f.; Federal Cartel Office, *Leitfaden zur Marktbeherrschung in der Fusionskontrolle*, 29 March 2012, paras. 25 f. referring to section 19(6) of the ARC.

<sup>380</sup> Cf. paras. 22 ff., 244 ff. and 316 ff. above; further paras. 393 and 396 ff.

<sup>381</sup> Cf. paras. 69 and 78 f. above.

tion. Data collection and the use of data consequently give rise to questions regarding not only the protection of competition, but also copyright, privacy and consumer protection.

**483.** However, the law is ambiguous in many instances. The relevant aspects are mixed, and frequently appear to be inextricably interlinked in legal terms. This is one of the reasons why proceedings before the competition authorities are complex and laborious. What is more, the authorities, the directly affected companies and others involved in the proceedings may have different opinions over and above the proceedings as to what conduct is to be assessed as relevant in terms of abuse or how specific conduct on the market is to be assessed.

**484.** Some voices in the public debate have been calling to supplement the existing competition law to include a regulation akin to antitrust law in order to effectively protect markets in the digital economy against distortions. By contrast, the Monopolies Commission considers the existing substantive abuse rules to be adequate. That being said, it does consider shortcomings to exist in the enforcement of competition rules in cases of abuse (cf. on this section 8.2.1).

**485.** Legal uncertainties may make it more difficult at times for market players to enforce their rights vis-à-vis companies with market power. In the Monopolies Commission's view, this may encourage the abusive use of market power. The protection problems that have been mentioned should nonetheless not be solved primarily via competition law, but by improving the possibilities open to market players to enforce market-relevant individual rights (cf. section 8.2.2 on this).

### **8.2.1. The need to improve the framework of the law on abuse**

**486.** The Monopolies Commission considers it to be necessary to strengthen the legal framework for abuse. While it has no fundamental doubts as to the efficiency of the substantive provisions on abuse, it does opine that these should be refined in individual instances, taking account of the specific characteristics of the digital economy. Above all, the Monopolies Commission considers shortcomings to lie in the procedural enforcement of competition regulations in cases of abuse.

#### **8.2.1.1. Refining the principles on market dominance and relative market power**

**487.** An abuse of market power that is relevant in terms of competition law is contingent on market dominance in European and German law. The condition of the existence of market dominance also appears to be appropriate in the digital economy. However, the characteristics relating to events on the market should be taken into account when identifying market power.

**488.** In EU law, the traditional definition of market dominance is based on whether the company in question is able to prevent competition on a relevant market because it can behave independently of the market.<sup>382</sup> Market dominance is similarly defined in section 18 of the ARC.<sup>383</sup> The examination standard which this stipulates does not explicitly accommodate the characteristics of multi-sided platforms that have been repeatedly described in this report (i.e., the interdependence of markets).<sup>384</sup> However, it is likely to be open to interpretation in the sense that the criteria that are to be examined are only regarded as being authoritative if they indicate market dominance on the respective (sub-)market (e.g., search market) in an overall assessment of all interdependent sides of the platform.

**489.** It should be presumed here that the loyalty of the transaction partners on one side of the platform (e.g., in the case of Google: the users) can expand the scope of conduct available to the platform operator of a multi-sided platform on other sides of the platform (e.g., in the case of Google: indexing and advertising markets). Conversely, market dominance is likely to be contra indicated if the transaction partners on one side of the platform (e.g., in the case of Google: content-providers and advertising customers) can limit the reaction of the platform operator on an interdependent

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<sup>382</sup> ECJ, Judgment of 14 February 1978, 27/76 – *United Brands*, European Court Reports 1978, 207, paras. 63/66; ECJ, Judgment of 13 February 1979, 85/76 – *Hoffmann-La Roche*, European Court Reports 1979, 461, para. 38; ECJ, Judgment of 9 November 1983, 322/81 – *Michelin*, European Court Reports 1983, 3461, para. 30 (established case-law); European Commission, Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ EU C 45 of 24 February 2009, p. 7, para. 10.

<sup>383</sup> The legal definition here presumes individual markets (cf. section 18(1) of the ARC: “the [...] relevant market”), and attaches particular authoritative weight to the market share (cf. section 18(3) No. 1 and sections 4 as well as 6-7 of the ARC).

<sup>384</sup> Cf. paras. 45 ff. above on this, and paras. 465 ff. and 472 ff in relation to merger control.

further side of the platform (e.g., in the case of Google: the search markets). Independently of this, the dynamic nature of digital markets is unlikely to hinder market dominance where companies can recognise and react to changes in demand at such an early stage that they can prevent their market power becoming eroded. Please refer to the comments in the previous chapters of this report as to the details.<sup>385</sup>

**490.** Furthermore, German antitrust law relating to abuse is also applicable if only relative or superior market power exists (section 20 of the ARC). This may be relevant in particular with platform services which grow aggressively in order to obtain a dominant position on a platform market (e.g., Amazon, Zalando, Twitter, Uber). Where this report examines abuse potentials in the case of market dominance, the same applies as a matter of principle where there is relative and superior market power under German law.

### **8.2.1.2. Refining the principles on abuse**

**491.** The legal principles on the abuse of a dominant position should be refined by the competent competition authorities and courts in individual cases. However, the Monopolies Commission does not consider the dynamic nature of digital markets to require any examination standard that is different to the traditional principles.

**492.** The identification of abuses of a dominant position on the internet may encounter difficulties. This is because there is no legal definition of abuse, and the conduct of companies with market power does not necessarily fall within a group of cases that has already been recognised as abuse.

**493.** According to the European case-law, in order to identify an abuse, it must be generally examined whether a company that is in a dominant position has engaged in:

*“behaviour [...] which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”<sup>386</sup>*

This definition of abuse largely consists of two elements. First, the market structure must already have been weakened because of the presence of the undertaking in question (= consequence of market dominance). Second, the undertaking must engage in conduct which differs from normal competition and additionally restricts competition.<sup>387</sup>

**494.** Regarding these principles, legal uncertainties have arisen as a result of the attempts to establish a more economic approach in abuse control under the competition rules.<sup>388</sup> The above definition of abuse is largely concerned with the question of whether it is sufficient that the conduct of the undertaking in question can have a competition-restricting impact, or whether this in fact must be proven. The case-law has made it clear that it is sufficient for the conduct to potentially have a competition-restricting impact.<sup>389</sup>

**495.** The national legislature wishes the concept of abuse in German law to be interpreted in terms of the principles developed in EU law.<sup>390</sup> The Monopolies Commission presumes such an interpretation in this report.

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<sup>385</sup> Cf. 2.2 above and Chapters 5-7.

<sup>386</sup> ECJ, Judgment of 13 February 1979, 85/76 – *Hoffmann-La Roche*, European Court Reports 1979, 461, para. 91 (established case-law).

<sup>387</sup> ECJ, Judgment of 13 February 1979, 85/76 – *Hoffmann-La Roche*, European Court Reports 1979, 461, para. 123.

<sup>388</sup> Cf. European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005.

<sup>389</sup> GC, Judgment of 30 September 2003, T-203/01 – *Michelin*, European Court Reports 2003, II-4071, paras. 237-239; GC, Judgment of 17 September 2007, T-201/04 – *Microsoft*, European Court Reports 2004, II-2977, paras. 867-868.

<sup>390</sup> Bundesrat, statement on the Government Draft of the German Act Against Restraints on Competition, Bundestag printed paper 15/3640, pp. 47 and 75; the same, Bundesrat printed paper 201/1/05, pp. 2-3.

**496.** Abuse of a dominant position is possible in two manifestations on the basis of the above principles. First, competitors can be foreclosed (exclusionary abuse), and second, the value added by other market participants can be exploited (exploitative abuse). In addition, both types of abuse can be mixed, containing exclusionary and exploitative elements.

**497.** As far as can be ascertained, the potential for exclusionary abuse in the digital economy has so far been discussed from two points of view, namely:

- forms of access foreclosure on the internet<sup>391</sup>, and
- the leveraging of market power, for instance by favouring own services<sup>392</sup>, through the exploitation of third-party content and data to the detriment of competitors<sup>393</sup>, or by preventing customers from switching providers (advertising customers/users)<sup>394</sup>.

**498.** It is conceivable given such abuses of market power that they additionally show exploitative elements, such as in the case of the exploitation of third-party content and data (if this takes place to the disadvantage of content-providers and data owners) or in the case of specific prevention of customer switching (e.g., excessive binding of customers by restricting data portability).<sup>395</sup> Otherwise, a potential for exploitative abuse is considered to consist of artificially limiting capacities with regard to advertising space, or simply through excessive data access.<sup>396</sup>

**499.** On platform markets, the extent to which this potential for legal abuse exists is essentially influenced by the dynamic nature of the market development and by the characteristics of the platform (e.g., the extent of data access, the kind of network effects).

**500.** The dynamic nature of the market development is of central significance. Being in a dominant position enables providers on the internet to recognise and react to changes in demand so early that they can prevent their market power becoming eroded due to the dynamic market development. Hence, the market dynamic does not necessarily preclude the possibility to abuse market power.

**501.** The characteristics of platforms are relevant not only with regard to companies that are already dominant, but also if monopolisation strategies are analysed at levels below market dominance. The growth strategies of platform operators can build on violations of the law that are deliberately committed or at least accepted, which provide the platforms with a competitive advantage, but do not necessarily entail exclusion or exploitation.<sup>397</sup> However, it may be relevant with regard to the abuse of market power if discounts are enforced or deliberately used, allowing the platform operator to benefit from the loyalty-enhancing effect ensuing from passing on the advantages related to such discounts. Here, national law offers possibilities via section 20 of the ARC to counter attempts to monopolise at levels below a dominant position.

**502.** Finally, with regard to the question of whether competition restrictions can be justified on platform markets by consumer efficiencies, this is a matter not only of competition on the dominant platform or the platform that has market power within the meaning of section 20 of the ARC. Rather, it should also be examined whether (potential) competitors remain able in the long term to innovate in such a way as to be able to establish a competing platform.

### **8.2.1.3. Overcoming some serious shortcomings in procedural law**

**503.** In the view of the Monopolies Commission, the tools that are available to enforce competition law should be strengthened. The structure of the abuse proceedings, particularly at EU level, is questionable in terms of competition policy and rule of law.

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<sup>391</sup> Cf. section 5.4.1 above.

<sup>392</sup> Cf. section 4.3.2 above, section 5.4.2 (in particular section 5.4.2.3), sections 6.2.2-6.2.4, section 7.4.3.

<sup>393</sup> Cf. para. 247 above and section 8.2.2.1 below.

<sup>394</sup> Cf. section 4.3.1 above, 4.3.2, section 5.4.2.1, para. 246 and para. 254 ff., section 6.2.4, section 7.4.3.

<sup>395</sup> See para. 328 above on the latter.

<sup>396</sup> Cf. paras. 157 ff. and 329 above.

<sup>397</sup> Cf. e.g. Beeger, B./Lindner, R., *Uber macht?*, FAZ of 5 October 2014, on the growth strategy of the transportation service Uber.



**504.** Abuse proceedings take too long to counter damaging competition effects of abusive conduct on dynamic markets, such as on the digital markets. The *Google* proceedings, for instance, have been pending without a decision since 2010. It is unacceptable in terms of competition policy for proceedings under antitrust law not to be concluded until after dominant companies have long since eliminated any newly emerging competition. The experience in the media player and browser cases relating to Microsoft was sobering in this regard, despite the fact that competition has now become livelier.<sup>398</sup> On the other hand, shortening proceedings via consensus-based termination is detrimental to legal certainty (there is no appealable ruling)<sup>399</sup> and to the development of the law (a refining of the law by judicial review of authorities' decisions is avoided). The incentives for companies to weigh from the outset the costs and benefits of a breach in light of these procedural shortcomings can also undermine compliance with the law by other market players.

**505.** Moreover, there are questionable indications that the enforcement of antitrust law vis-à-vis internet providers at EU level is influenced by complaints submitted with high publicity, and by political pressure. However, some applicants in these instances have an inadequately innovative or otherwise disadvantageous business model, which therefore failed on the market. It is not the task of competition law to protect this kind of business model against the market.

**506.** The procedural law applying to abuse proceedings is also objectionable. There are for instance major incentives to avoid decisions to impose a fine because of the effort which they involve. The means used are consensual decisions based on commitments. Proceedings aiming in this direction do not obviate the obligation of the antitrust authority to investigate the facts that are relevant to the case, such that it can adopt a decision on the basis of a tenable damage theory. However, the consideration of aspects and arguments which might speak against a specific ruling is not necessary to the same degree as proceedings aiming to lead to a ruling to impose a fine. Commitment proceedings can also be implemented without any statement of objections. While the authority can take account of complaints in a resource-efficient manner by rapidly initiating the proceedings and implementing non-confrontative proceedings, the very concise decisions on the basis of undertakings cannot be effectively challenged. This leads to risks both for the companies affected by the examination (pressure to reach an agreement), and for other market players – in particular those who are not involved in the proceedings – (decision against third parties). At the same time, the lack of a judicial review tends to impair legal certainty. Finally, observers see a tendency to use commitment proceedings to achieve procedural outcomes the enforcement of which might not have been implementable in confrontational proceedings aiming for a penalty decision.<sup>400</sup> For these reasons, rulings based on commitments have widely been regarded as a problematic instrument.

**507.** It is also questionable whether proceedings on the merits of the case in the shape of commitment proceedings (Art. 9 of Regulation 1/2003) are at all suited to address the risks of abuse in the dynamic environment of the digital economy. Commitment proceedings are particularly available for cases in which the proof of an infringement that is to be terminated (within the meaning of Art. 7 of Regulation 1/2003) would be too laborious, that is in particularly complex cases.<sup>401</sup> That being said, fast-changing market situations are fundamentally contra-indicative to the implementation of proceedings on the merits of the case that close the case, and hence also of commitment proceedings since in such cases, on the one hand, only relatively little time remains to ascertain suitable commitments, while, on the other hand, it is only possible to resume the proceedings and amend the ruling subject to strict conditions.<sup>402</sup> Apart from that, it is not possible to test commitments on the market, for instance on the basis of an interim ruling, except by obtaining statements from the market players.<sup>403</sup> The difficulties involved in commitment proceedings on digital markets have also been shown in the on-going proceedings of the European Commission against Google, in which the European Commission has obtained market reactions over a period stretching from March 2013 to February 2014 on several commitment

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<sup>398</sup> European Commission, Cases 37.792 and 39.530 – *Microsoft*; also, *U.S. v. Microsoft Corporation* 253 F.3d 34 (D.C. Cir. 2001).

<sup>399</sup> At least as far as the agreement reaches.

<sup>400</sup> Cf. also Monopolies Commission, Special Report 54, *Electricity and Gas 2009: Energy markets at the crossroads between politics and competition (Strom und Gas 2009: Energiemärkte im Spannungsfeld von Politik und Wettbewerb)*, Baden-Baden 2009, paras. 495 ff.

<sup>401</sup> Jaeger in: *Frankfurter Kommentar zum Kartellrecht*, Supp. 67 (January 2009), Regulation 1/2003, Art. 9 para. 2.

<sup>402</sup> Cf. Art. 9(2) of Regulation 1/2003.

<sup>403</sup> Cf. Art. 27(4) of Regulation 1/2003.

offers that had been submitted by Google and which it provisionally regarded as suitable, without ultimately reaching a decision on commitments on this basis.<sup>404</sup>

**508.** Moreover, a tenable abuse allegation and a decision that is not only based on a bilateral deal between the authority and the company directly concerned, but which includes all relevant interests (including those of third parties), are also preconditions when implementing commitment proceedings. Against this background, the decision which has now been made to serve formal objections on Google in which the European Commission reasons its position in detail is to be welcomed.<sup>405</sup>

**509.** Instead of directly initiating proceedings on the merits of the case, it makes more sense to first of all order interim measures where there are rapid changes on dynamic markets (Art. 8 of Regulation 1/2003) since as a rule expedited measures are necessary (urgency as reason for the order), and material justification arises from the fact that the measures against a specific market party (regardless of developments which might take place later) are presently preferable in comparison to failure to carry out such measures (justifying an entitlement to the order). The decision on the order could potentially also be used within the current law to test remedies in practice before they are permanently declared binding in a later ruling on the merits of the case.<sup>406</sup>

**510.** Nonetheless, the Monopolies Commission considers a general shortcoming to lie in the fact that the existing rules of procedure do not unambiguously define the relationship between interim measures and proceedings on the merits of the case between themselves. The Monopolies Commission suggests making more use of the tool of interim measures in abuse cases on digital markets. As a test for the use of interim measures, it suggests using as a basis whether material changes in the market (cf. Art. 9(2)(a) of Regulation 1/2003) are to be expected within two years, a frequently chosen assessment horizon for foreseeable developments in competition. It may be possible under certain circumstances then to adopt a decision in such proceedings also on the basis of commitments.<sup>407</sup> However, it should always contain a sunset clause.

**511.** In the view of the Monopolies Commission, it is furthermore indispensable, in the main proceedings, to take more account of the risk that the termination of the commitment proceedings – even with supplementary urgent measures – might ultimately become excessively delayed, and that this might cause long-term damage to the market structures. Such damage is likely as a rule to have a particular impact on third parties who were not involved in the proceedings, and whose interests were not considered in the proceedings.

**512.** Delays to the proceedings are as a rule advantageous to the company against which the proceedings are being pursued. First, it is not prevented during the proceedings from continuing the conduct of which it is being accused. Second, the danger that third parties will demand compensation for the conduct is at least reduced for the duration of the proceedings since those third parties will await the outcome of the proceedings as a rule.

**513.** These are good reasons for conducting the proceedings in such a way that the relevant company is subject to increasing pressure over time in order to eliminate any complications and to help terminate the proceedings as quickly as possible. A suitable means to that effect might be to ensure that the commitment proceedings, where commitments are offered, are automatically transformed into termination and penalty proceedings in accordance with Art. 7 and 23 of Regulation 1/2003 one year after the commitments have been submitted, and before that at any time on reasoned third-party request, provided that the commitments are not declared binding by a ruling on the part of the Commission prior to expiry of a deadline. Apart from this, the proceedings should be automatically transformed into termination and penalty proceedings on expiry of an absolute deadline for a ruling (e.g., three years), on expiry of which an amicable

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<sup>404</sup> For details on the proceedings to investigate suitable commitments cf. European Commission, Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308 of 20 October 2011, p. 6, paras. 126 ff. and 129 ff.; Antitrust Manual of Procedures, March 2013, Ch. 6, paras 43 and 45 ff.

<sup>405</sup> European Commission, press release of 15 April 2015, IP/15/4780.

<sup>406</sup> A “market test” is already possible in accordance with Art. 27(4) of Regulation 1/2003, but this only includes the possibility to submit observations on commitments that have been submitted, and not their practical implementation for test purposes.

<sup>407</sup> Art. 8 of Regulation 1/2003 is unlikely to rule out the anticipation of the merits of the case; cf. Jaeger in: *Frankfurter Kommentar zum Kartellrecht*, Supp. 67 (January 2009), Regulation 1/2003, Art. 8 para. 9 (disputed).

solution based on commitments would finally become impossible. Finally, the option should be created for the competition authority to be able to order the time-limited implementation of commitments by means of an interim ruling.

## 8.2.2. Improving the protection of market-relevant individual rights

**514.** The Monopolies Commission considers it to be indispensable that the previously mentioned competition-related activities also be supplemented by additional measures to improve the enforceability of the individual rights of users and content-providers in the digital economy.<sup>408</sup> In the view of the Monopolies Commission, the unlawful exploitation of third-party data and content can also constitute an abuse of market power.<sup>409</sup> However, remedying shortcomings in legal protection with regard to data and content should not primarily take place via competition law, but by improving the options open to market players to enforce market-relevant individual rights.

### 8.2.2.1. The potential for abuse ensuing from the unlawful exploitation of third-party content and data

**515.** The exploitation of third-party content and data constitutes competition-relevant conduct. The utilisation of third-party content and data in one's own offer of internet services is in conformity with competition if it takes place with justification. By contrast, the unlawful utilisation of third-party content and data by a dominant company can cause problems under competition law (antitrust law) in the Monopolies Commission's view, at least if it entails the foreclosure of competitors or the exploitation of other market players.<sup>410</sup>

**516.** Existing copyrights, the rules of fair competition and the privacy rules can be violated by – among other things – commercial operations on the internet. Companies with market power can use this kind of conduct to entrench their market position. The following may serve as examples of this:

- displaying protected content of books/images in vertical search results or in social networks (breach of copyright or related rights);
- the collection of personal data by providers of internet services (search engines, social networks, trading platforms), but also for instance automatic price differentiation in internet offers<sup>411</sup> (breach of privacy regulations);
- emulation of competing services/deceptive display of search results by search engine operators to re-direct data traffic (breach of the Unfair Competition Act [*Gesetz gegen den unlauteren Wettbewerb – UWG*]).

Such violations of the law are presently relevant in practice as regards the allegation being examined by the European Commission that Google has been abusively taking the original content of competing internet services in the ad results of its own search services (“scraping”).<sup>412</sup>

**517.** Abuses of market power by violating non-antitrust law and in particular national provisions have so far only been rarely examined in the European case-law. However, it is recognised that EU law only protects performance-based competition and that a company may not abuse its dominant position by gaining an advantage through unlawful and deceptive acts which make it possible for it to exclude effective competition.<sup>413</sup> This is also the understanding in the litera-

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<sup>408</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., para. 65 (on data protection); consenting Federal Government, statement on the XXth Biennial Report of the Monopolies Commission 2012/2013, Bundestag printed paper 18/4721, para. 13 (specifically with regard to privacy).

<sup>409</sup> Cf. this with para. 247 above (on scraping).

<sup>410</sup> A breach of the law may otherwise constitute unfair competition conduct (section 4 No. 11 of the Unfair Competition Act).

<sup>411</sup> Cf. Ohrtmann/Schwiering, NJW 2014, 2984 (2988).

<sup>412</sup> Cf. this with para. 176 above.

<sup>413</sup> GC, Judgment of 1 July 2010, T-321/05 – *AstraZeneca*, European Court Reports 2010, II-2805, para. 355, confirmed by: ECJ, Judgment of 6 December 2012, C-457/10 – *AstraZeneca*, ECLI:EU:C:2012:770, cf. in particular para. 149 f.; cf. also: GC, Judgment of 12 June 2014, T-286/09 – *Intel*, No. 219; GC, Judgment of 17 September 2007, T-201/04 – *Microsoft*, para. 1070, on the protection of performance-based competition.

ture.<sup>414</sup> Such actions go beyond mere violations of the law which may also be asserted in damage actions before the civil courts vis-à-vis an arbitrary non-dominant company.

**518.** That the violation of legal provisions can (at the same time) constitute abuse of market power is in line with the established case-law of the German courts. This applies in particular to the breach of competition-related provisions.<sup>415</sup> The use of unlawful contractual provisions may also be abusive in other cases, at least if it is an expression of market power or of considerable market superiority on the part of the user.<sup>416</sup> Furthermore, abuse in the shape of unfair exclusion is to be found on the basis of a weighing of interests in which all interests are to be included which do not aim to achieve an unlawful purpose.<sup>417</sup> Here, legally recognised rights may also restrict the scope of conduct for a dominant company.<sup>418</sup> Hence, the violation of such rights may also be abusive within the meaning of antitrust law.

**519.** That being said, the abuse of market power by violation of the law is not a uniform group of cases since, in the cases that have been ruled on to date, special circumstances typically applied due to which the violation was relevant to competition. It is not settled yet whether an examination in the individual case is necessary concerning the degree to which the violation of the law in question satisfies the preconditions for an abuse of market power (structural weakening of the market/deviation from normal competition conduct/competition restriction). What is more, stricter preconditions may need to be presumed for a violation of the rules on fair trading practices than under antitrust law.

**520.** It has already been described that an abuse of market power in general has two preconditions. First, the market structure must be weakened because of the presence of the company in question. Second, the company must engage in conduct which deviates from normal competition and additionally restricts competition.<sup>419</sup>

**521.** It may be presumed for the purpose of the present discussion that the market in question is structurally weakened within the meaning of the general definition of abuse in the European case-law by the presence of the platform operator in question.

**522.** In the present context, conduct deviating from normal competition may consist of a violation of copyrights, of the law on fair trading practices and/or of privacy rules. That such conduct is widespread does not preclude a violation since companies' statutory scope of conduct is not expanded by other market players being unable to successfully enforce their rights against them.<sup>420</sup>

**523.** It could at most be questionable whether the violation of the law is adequately connected to competition. A particular link to competition might be necessary because, in the case of a breach of provisions that are competition-neutral, it may be questionable whether conduct indeed deviates from normal competitive conduct. In the view of the Monopolies Commission, this consideration is contra-indicated by the fact that, under competition law, it should be solely a matter of whether the dominant company can indeed use the breach of the law for exclusion or exploitation.

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<sup>414</sup> Cf. only: Fuchs/Möschel in: Immenga/Mestmäcker, *Wettbewerbsrecht*, 5th ed. 2012, Art. 102 TFEU, para. 291 (on coupling); Brand in FK, Art. 82 (abuse), para. 530; Eilmannsberger in: *Münchener Kommentar*, 1st ed. 2007 Art. 82 EG, paras. 553 ff. (which however demands causality between market dominance and abuse).

<sup>415</sup> Federal Court of Justice, Judgment of 17 December 2013, KZR 65/12, para. 76 (violation of section 46(1) of the Energy Industries Act [*Energiewirtschaftsgesetz – EnWG*]) (quoted acc. to Juris); Federal Court of Justice, Judgment of 7 February 2006, KZR 33/04 – *Probeabonnement*, WuW 2006, 1029, para. 17 (violation of the Unfair Competition Act); Federal Court of Justice, Judgment of 22 July 1999, KZR 13/97 – *Kartenlesegerät*, WuW 1999, 1106 (misrepresentation/violation of the Unfair Competition Act).

<sup>416</sup> Federal Court of Justice, Judgment of 6 November 2013, KZR – 58/11 – *VBL Gegenwert*, WuW 2014, 57, para. 65; similar in rem already Federal Court of Justice, Judgment of 16 December 1986, KZR 36/85 – *Taxizentrale Essen*, WuW/E BGH 2341 and 2342 f.

<sup>417</sup> Cf. only Düsseldorf Higher Regional Court, Order of 21 December 2012, VI – Kart 5/11 (V), No. 44 (quoted acc. to Juris).

<sup>418</sup> Federal Court of Justice, Judgment of 10 February 1987, KZR 43/85 – *Handtuchspender*, WuW/E BGH 2368, 2369 (on trademarks); Federal Court of Justice, Order of 25 October 1988, KVR 1/87 – *Lüsterbehangsteine*, WuW/E BGH 2535, 2541 (protection of related rights); similar Federal Court of Justice, Order of 21 February 1995, KVR 10/94 – *Importarzneimittel*, WuW/E BGH 2990, 2997 (encroachment on the demand decision to which end-users are entitled in accordance with section 129 of Book V of the German Social Code [*Sozialgesetzbuch V – SGB V*]).

<sup>419</sup> ECJ, Judgment of 13 February 1979, 85/76 – *Hoffmann-La Roche*, European Court Reports 1979, 461, No. 123; on this already para. 493 above.

<sup>420</sup> Cf. Federal Court of Justice, Order of 25 October 1988, KVR 1/87 – *Lüsterbehangsteine*, WuW/E BGH 2535, 2540.

However, this question may remain open because, in the Monopolies Commission's view, it is likely to be possible to affirm an adequate connection with competition in the cases that are relevant here.

- The inclusion of protected content in search results in breach of copyright and related rights, as well as of the ancillary protection of rights under the unfair trade rules, is likely in all cases to show an adequate connection with competition because the rights in question particularly relate to the economic utilisation and exploitation of the protected content.<sup>421</sup>
- The connection with competition can be questionable when it comes to the possible violations of privacy of the operators of internet platforms.<sup>422</sup> However, it is also possible to find a connection with competition in this case since data protection law ultimately assigns to the entitled party the right to decide on his/her data.

**524.** Hence, it is necessary to continue analysing the degree to which the breach of the law in question may indeed give rise to competition restrictions. Competition restrictions can only be considered in the case of an economic activity carried out on the basis of supply and demand. Such an economic activity cannot be considered in isolation in the sense that a company commits a violation of the law. By contrast, the economic exploitation of the data and content obtained by the violation of the law is certainly an economic activity.

**525.** On an internet platform that is typified by network effects, abuse could be constituted through the fact that the dominant company uses its conduct to obtain a possibility to "tip" the market in its favour and to further establish its position on such a market.<sup>423</sup> This is likely to be the case with regard to the exploitation of protected content and data, at least in individual cases. It is not least the respective content and data that could make a major contribution towards making the internet platform in question more attractive for users (e.g., inclusion of text scraps, images or video clips). It is also argued that at least individual dominant platforms additionally safeguard their exclusive possibility to use data and content by actively foreclosing competitors in acquiring data and content.

**526.** It might still be questioned for legal reasons whether abuse that is based on a breach of the law could fail to be relevant under antitrust law because this abuse could not necessarily also be causally traced to a dominant market position. Causality exists in the relevant cases not primarily between market power and abusive conduct, but may only exist between the breach of the law and the competition restriction associated with the exploitation of the content and data that were obtained. Consequently, it could be argued that the dominant company could also engage in the same business model on the markets for online advertising regardless of its dominant market position. As a consequence, the competition law allegation of the abuse of a dominant position could be said not to be justified. The wording of the German case-law probably has to be understood in this light, in the sense that the abuse had to be (in accordance with German law) the "expression" of the dominant position.<sup>424</sup>

**527.** However, the abuse of a dominant position – in addition to a deviation from normal competition conduct – is not conditional, according to the EU's case-law, on the abusive conduct particularly being based on the market position of the company in question. This reflects the "special responsibility" of dominant companies presumed in the case-law, something which goes beyond the responsibility of their competitors under competition law.<sup>425</sup> The derogating interpretation of German law is likely to at least be immaterial in the cases that are relevant here because there will usually be a connection with the Single Market as a rule, and hence EU law – which does not require the abuse to be causally linked

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<sup>421</sup> However, content as such are not protected against being exploited by competitors where no rights or technical protection precautions are circumvented in doing so; cf. Federal Court of Justice, Judgment of 30 April 2014, I ZR 224/12 – *Flugvermittlung im Internet*, NJW 2014, 3307.

<sup>422</sup> Opposing ruling: Frankfurt/M. Higher Regional Court, Judgment of 29 October 1996, 11 U (Kart) 44/95 – *Teleauskunft-CD-ROM*, WRP 1996, 1175, 1189 f.; left open in: Federal Court of Justice, Judgment of 6 May 1999, I ZR 199/96 – *Tele-Info-CD*.

<sup>423</sup> European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ EU C 45 of 24 February 2009, p. 7, para. 20.

<sup>424</sup> Cf. para. 518 above; on the need for causality under German law cf. in general also Federal Court of Justice, Judgment of 4 November 2003, KZR 16/02 – *Strom und Telefon I*, BGHZ 156, 379 = WuW/E DE-R 1206 f.; KG, Judgment of 26 January 1977, Kart 27/76 – *Kombinationstarif*, WuW/E OLG 1767 and 1771.

<sup>425</sup> ECJ, Judgment of 9 November 1983, 322/81 – *Michelin*, European Court Reports 1983, 3461, para. 57; also Federal Court of Justice, Order of 4 March 2008, KVR 21/07 – *Soda Club II*, para. 37.

to market dominance – is likely to be applicable. This could make the competition-restricting conduct of a dominant company abusive even if it is not based on the dominant position.

**528.** A justification by prevailing consumer advantages is questionable. Consumers may have the direct advantage of using internet services for free, and may well be able when doing so to also access protected content for free (= short-term advantage), but this is countered by the possibility that dominant platforms may use the expansion of the services that they offer to effectively shore themselves up against competition (= risk of long-term disadvantages).

### **8.2.2.2. Refining and enforcing market players' individual rights**

**529.** As discussed above, the possibility of an abuse of market power by violations of the law is contingent on other market players not being able to assert their rights against the abuse (enforcement problem). This problem should be tackled in general terms, and not only with a view to the conduct of companies that have market power.

**530.** A risk of inadequate protection of the individual rights of market players encouraging abuses of market power is likely to always exist in general if internet service providers obtain structural advantages from other market players being unable to effectively assert their rights (in particular copyright and rights of personality), and the service providers being able to actively use these advantages to stabilise their market position and to shore themselves up against newly emerging competition.<sup>426</sup>

**531.** It is necessary in such cases to strike a balance between the competitive interests of the service providers operating on digital markets (broad data access) and the contrary non-competition interests of copyright holders and consumers (to prevent broad data access). By contrast, calls which have been voiced at times to reduce the extent of the protection of central copyright and rights of personality on the internet appear to be problematic.<sup>427</sup> Apart from data protection, this relates in particular to the protection of copyright and general consumer rights.

**532.** The Monopolies Commission has made recommendations at various points in this report on how legal protection for right holders and consumers can be enhanced on the internet. These recommendations relate to the following in detail:

- data protection//privacy law;<sup>428</sup>
- copyright;<sup>429</sup>
- consumer protection and civil law<sup>430</sup>, and
- media regulation.<sup>431</sup>

In this context, the Monopolies Commission has also evaluated measures that have already been carried out or are being planned.

**533.** The Monopolies Commission has already pointed out that greater cooperation is needed between the competent authorities when it comes to enforcing the existing law.<sup>432</sup> Such an exchange appears also to be necessary between the German and European agencies when adjusting the legal framework, and is also already taking place.<sup>433</sup>

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<sup>426</sup> Cf. paras. 76, 101 ff. and 306 ff. above (on data protection), paras. 247 and 284 ff. (on copyright et al.).

<sup>427</sup> Cf. this with para. 94 above (on data protection).

<sup>428</sup> Cf. paras. 92 ff., 165 f., 282 f. and 441 above.

<sup>429</sup> Cf. paras. 282 f. and 284 ff above.

<sup>430</sup> Cf. 336 ff above.

<sup>431</sup> Cf. paras. 169 f. above; cf. this with paras. 565 ff below.

<sup>432</sup> Monopolies Commission, XXth Biennial Report, loc. cit., para. 66; agreeing Federal Government, statement on the XXth Biennial Report the Monopolies Commission 2012/2013, Bundestag printed paper 18/4721, para. 14.

<sup>433</sup> Cf. most recently European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, Communication of 6 May 2015, in particular pp. 20 ff.

## 9 The influence of digitalisation in other economic areas

**534.** The digitalisation of the economy encompasses not only the development of the platform services on which this report focuses, but in fact goes much further. Digitalisation triggers many forms of interdependencies between the digital economy and the rest of the economy, including:

- goods transactions and service-provision via trading platforms (e.g., Amazon Marketplace, eBay), booking portals (e.g., HRS, Kayak) and other digital channels;
- commercial use of services between consumers via the user-to-user platforms of the providers of “share economy” services, in particular where such services are provided in competition with those of traditional service-providers (e.g., Uber/taxis, Airbnb/hotels, FinTechs/banks);
- development of media and communication services which expand the available content (“new media”), and which in turn frequently compete with existing media and services (streaming services/classical broadcasting, E-books/books, WhatsApp/Skype/telephony);
- digitalisation of production processes (“Industry 4.0”);
- development and marketing of intelligent devices (the Internet of Things, e.g., “Smart Home” applications and the like).

**535.** However, it is not only markets for goods and customer services that are expanding in the digital economy. This development is also revealed on the labour markets, albeit to a lesser degree as yet. It is presumed that there will be an ever-increasing division of labour in many fields of work in the future, that qualifications will become more significant for occupational activities, and that for instance geographical or linguistic barriers will become less so, in particular where good training and a high level of motivation are crucial. Hence, educational policy is likely to assume a central role when it comes to making Germany attractive in the long term as an industrial location for international companies as potential employers.<sup>434</sup>

**536.** The Monopolies Commission focuses in this Report on the competition-policy implications of the market activities of internet platforms, and is not carrying out a more detailed analysis of issues beyond this. This is because the Monopolies Commission considers that the internet-specific competition problems related to platform services have already triggered antitrust proceedings, while the rest of the market development is very much in a state of flux, and for the time being should merely be further observed. In this chapter, the Monopolies Commission nonetheless draws up general principles which it considers should be taken into account when providing policy advice on the digitalisation of the economy.

**537.** These principles cover four areas:

- the need to adjust the regulatory framework where new types of providers enter regulated markets with innovative business models (e.g., in the sharing economy) or with innovative products (cf. with section 9.1);
- the question of whether additional regulation is needed for providers with innovative business models and products after these have entered the market (in this case specifically for the media field) (cf. with section 9.2);
- policy-makers' and administrative approaches to necessary changes made by existing providers to traditional business models and products to remain competitive in the digital economy in the long term (here specifically for “Industry 4.0”) (cf. with section 9.3); and finally,
- encouragement by the State of innovative business models where competition has failed (cf. with section 9.4).

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<sup>434</sup> Cf. this with e.g. BIBB, press release 14/2015 of 15 April 2015; Bos et al., International computer and information literacy study (IEA study), National report (2014), [http://www.waxmann.com/fileadmin/media/zusatztexte/ICILS\\_2013\\_Berichtsband.pdf](http://www.waxmann.com/fileadmin/media/zusatztexte/ICILS_2013_Berichtsband.pdf), retrieved on 14 May 2015.

The efforts of policy-makers in Germany in the first two areas have so far largely focused on the protection of existing market structures. By contrast, policy in the latter two areas focuses on actively supporting the further market development.

### **9.1. The need to adjust the regulatory framework**

**538.** The internet makes it possible to develop new business models and to differentiate existing ones. The concomitant reduction of transaction costs enables the economy to meet the demand for goods and services in an ever more individualised manner. In the same way, consumers themselves can become providers of goods and services on the internet, and via the internet also in other sectors of the economy.

**539.** This has enabled the development of an economy of sharing (the abovementioned “sharing economy”). As has been mentioned, examples particularly include the intermediation of accommodation/hotel and transport services between private individuals (Airbnb, Uber et al.), the development of in-house media content by internet users in blogs and on video channels such as YouTube, or user-generated financial services (peer-to-peer lending, crowd financing). These services are very largely offered via internet platforms. Almost anyone can take part as a provider in the exchange of goods and services.

**540.** Not lastly, the internet opens up further dimensions of competition. In the geographical context, the internet broadens markets by enabling buyers to basically take up any offer that is available on the web. This makes it possible to provide services in market niches where the buyer group that can be reached would be too small and widely dispersed for a non-internet-based service. Furthermore, there is ever-growing competition between internet-based and non-internet-based goods and services. The market development is however being hindered by regulatory barriers in many cases. The new business models come up against a regulatory framework which has not adapted to market developments in geographical, product-related or indeed temporal terms.

**541.** In geographical terms, the development of an internal digital market is being hindered by a range of factors. For instance, telecommunication and media regulation, and the practice followed when allocating frequencies, have not yet been sufficiently harmonised in the view of the European Commission in order to optimally facilitate the cross-border expansion of the network infrastructure and its cross-border utilisation. Cross-border electronic trading (e-commerce) is said not to have developed satisfactorily so far. The European Commission refers by way of example to the fact that, while 44 percent of EU consumers used online trade in 2014, only 15 percent of them bought goods from other EU countries.<sup>435</sup> In this regard, there is said to be a need to achieve greater harmonisation of contractual and consumer protection regulations and to deliver parcels in a more efficient and affordable way.<sup>436</sup> Furthermore, shortcomings are considered to exist in the development of Europe-wide minimum standards for data protection and for cross-border transactions in copyrighted works. Finally, the costs and the complexity of the existing regulations on value-added tax are also said to constitute a major problem for small and medium-sized enterprises (SMEs) in cross-border trade.<sup>437</sup>

**542.** In product-market terms, the existing regulations may be unjustifiably preventing providers with innovative business models from entering the market. By contrast, established business models may also not be competitive vis-à-vis new business models, or only to a restricted degree, because of the existing regulation. In the view of the Monopolies Commission, there is a need to analyse in each case, against the background of technological and economic development, whether the new business models may need to be subject to regulation in order to create a level playing field, and if so, then to what regulation.

**543.** Regulatory restrictions for market entry for new types of provider have recently come to light, in particular in the following fields:

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<sup>435</sup> European Commission, Factsheet: Why we need a Digital Single Market; [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet_en.pdf), retrieved on 30 March 2015; similar Commissioner Vestager, Competition policy for the Digital Single Market: Focus on e-commerce, speech of 26 March 2015, SPEECH/15/4704.

<sup>436</sup> Cf. on this also the recommendations of the Monopolies Commission in this Report, paras. 441 ff.

<sup>437</sup> European Commission, Digital Single Market Strategy: European Commission agrees areas for action, press release IP/15/4563 of 25 March 2015.



- “share economy” transport services (e.g., Uber, Wundercar): foreclosure of competition by non-uniform regulation of the taxi and hired car services and by restrictions hindering access to the taxi market (e.g., concession restrictions, obligations to return, unequal treatment in terms of value-added tax). At least as they stand, these restrictions are not needed given the regulatory policy goals of taxi regulation.<sup>438</sup> It should be considered that new technologies such as smartphone applications (apps) help reduce information asymmetries on taxi markets.<sup>439</sup> In addition to providing a taxi pure and simple, smartphone apps for instance make it possible to review taxi journeys and to calculate the approximate fare in advance. Navigation devices which one also finds in the vast majority of taxis today should make it unnecessary to give proof of having passed comprehensive local knowledge tests, and should protect passengers from being placed at a disadvantage because of a lack of such knowledge.
- share economy housing and accommodation services (e.g., Airbnb): foreclosure of competition through restrictive residential and building regulations (bans on using housing space for other purposes and the like), where these also rule out occasionally providing accommodation to third parties without considering the interests of competition. Such provisions are also likely to go beyond what is necessary. The measures taken to ensure the provision of housing for the population should be re-adjusted given the aforementioned new business fields.
- book price maintenance (self-publishing, e-books): foreclosure of competition where self-published products and e-books are subjected to the same requirements as the publishers' traditional print products. Book price maintenance protects booksellers and publishers by ruling out price competition for books within the scope of the law. Such price maintenance however leads to increased consumer prices, and is to be seen critically on principle in competition-policy terms if the price increase does not appropriately benefit consumers.<sup>440</sup> The Monopolies Commission hence already regarded the existing book price maintenance as misguided, and maintains its critical view regardless of the current legislative projects in this regard.<sup>441</sup>
- streaming services (e.g., Netflix): foreclosure of competition by broadcasting law restrictions and broadcasting subsidies. Media services are increasingly interchangeable from a user point of view. The market boundaries are becoming more and more diffuse. Media regulation may originally have been necessary because of the scarcity of frequencies and in order to ensure a diversity of opinions. The Monopolies Commission however criticised it in the XVth Biennial Report as excessive.<sup>442</sup> This regulation needs to be fundamentally revised.
- crowd funding and payment services (such as sofortüberweisung.de): Although restraints on such services which emerge via bank and financial market regulation may be justified given the need to guarantee the stability of providers and on the financial market, the regulation may go too far as a whole given the burdens that it entails.<sup>443</sup> A problem that exists regardless of regulation is that banks may also shore off payment services through antitrust agreements, on which the Federal Cartel Office is currently carrying out investigations.<sup>444</sup>

The restrictions mentioned in the cases above benefit in most cases local, established providers (e.g., taxis, hotels, local businesses and booksellers) and hinder meeting an increasingly supra-regional demand which has ultimately led to the development of new types of internet providers. In the long term, this also hinders the development of further innovative internet services from scratch.

<sup>438</sup> Monopolies Commission, XXth Biennial Report, loc. cit., paras. 218 ff.

<sup>439</sup> Monopolies Commission, XXth Biennial Report, loc. cit., para. 235.

<sup>440</sup> Cf. European Commission, Guidelines on Vertical Restraints, OJ L 130 of 19 May 2010, p. 1, paras. 48 and 223 (hard core restriction) and para. 225 (justification).

<sup>441</sup> Cf. Monopolies Commission, XIIIth Biennial Report, loc. cit., paras. 691 ff., XIVth Biennial Report, Network Competition through Regulation (*Netzettbewerb durch Regulierung*), Baden-Baden 2003, paras. 681-682. It is currently planned to also apply book price maintenance to e-books, which is however not likely to be easily compatible with EU law, given the relevance of the sale of e-books to the internal market; cf. European Commission, press release IP/02/461 of 22 March 2002, Annex.

<sup>442</sup> Most recently Monopolies Commission, XVth Biennial Report, More Competition in the Services Sector As Well, Baden-Baden 2006, paras. 104 ff. and 742 ff.

<sup>443</sup> Monopolies Commission, XXth Biennial Report, loc. cit., paras. 1744 ff.

<sup>444</sup> Cf. the on-going sets of proceedings Federal Cartel Office, B4-71/10 – Sofort AG and Banken AGB.

**544.** Problems may however also arise in terms of regulatory burdens to which – conversely – already established providers are subjected, which are regulated vis-à-vis new and unregulated providers on the internet, if those regulations make it difficult for the regulated providers to adjust their business models. This risk is considered to exist in telecommunications in particular, where “Over-The-Top” (OTT) providers offer services such as Skype and WhatsApp, which substitute existing telecommunication services such as classical telephony, SMS and MMS without being subject to comparable regulations. Such “incumbents”, and to a lesser degree also their competitors, are frequently still subject to sector-specific regulation in telecommunication. This consists of comprehensive access and fee regulation, requirements for the interoperability of the infrastructures, telecommunication-specific consumer protection (e.g., number portability), sector-specific data protection (e.g., locations may only be collected to a highly-restricted degree), as well as specific provisions on guaranteeing public security (data retention). In the Monopolies Commission's view, sector-specific regulation should give more attention than previously to competitive pressure by OTT providers. Such providers should be more frequently subject to comparable regulations than was previously the case if they offer telecommunication services.<sup>445</sup>

**545.** In terms of time, it should finally be pointed out that the norm-setting frequently fails to take into account the dynamic nature of the market development and the constant change to which this leads. The legislature can typically not take account of new business models when setting norms. However, market entry barriers, which this creates over time for innovative business models, are only acceptable where they can continue to be justified by the protection intended to be provided by the legal rules in question.

**546.** Policy-makers are aware of the problem that the regulatory framework must be adjusted to the market development. The European Commission and the German Federal Government have drawn up digital agendas which provide for the law to be adjusted to the economic and societal circumstances that have been created by the internet.<sup>446</sup>

**547.** At EU level, it is particularly important for activities to facilitate an internal digital market in this field. The aim in this regard is to achieve even greater harmonisation of the telecommunication regulations, of copyright and data protection, of the practice followed when allotting frequencies, as well as improving the enforcement of competition law.<sup>447</sup> Moreover, regulations on contracts and consumer protection in cross-border electronic trading and regulations in turnover tax law are to be harmonised.<sup>448</sup>

**548.** In Germany, the fields for harmonisation that are designated at EU level are regarded as a framework in which the national digital agenda is embedded. Elements of the Federal Government's Digital Agenda include activities favouring the industry existing in Germany, in particular activities to improve the digital infrastructure and to network production, for SMEs among others.<sup>449</sup> Adjustments to the regulatory policy framework in the above areas are recognised as being necessary, but no political consensus has yet been formed in this regard.

**549.** The Monopolies Commission considers an on-going review of the regulatory framework in the sectors of the economy that are typified by digital markets, and possibly an adjustment of this regulatory framework to new market conditions, to be necessary. The applicable regulations should, as a matter of principle, be uniform over and above the relevant product and geographic market in order to avoid an artificial fragmentation of markets. Such fragmentation may be justifiable because of differing regulatory and cultural-policy goals pursued within national legislation, but only to the

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<sup>445</sup> Cf. also Monopolies Commission, Telecommunication 2013: Preserve Diversity in the Markets, Special Report 66, paras. 10, 52 and 139 ff. with further recommendations.

<sup>446</sup> European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, Communication of 6 May 2015; as well as previously Digital Agenda for Europe, Communication of 19 May 2010, COM(2010) 245 final; Federal Government, digital Agenda 2014 – 2017, brochure of August 2014.

<sup>447</sup> Juncker, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission, Opening Statement of 15 July 2014, section 2.

<sup>448</sup> European Commission, Digital Single Market Strategy: European Commission agrees areas for action, press release IP/15/4563 of 25 March 2015.

<sup>449</sup> Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, Ch. I and II. Additionally, the Federal Government's Digital Agenda contains considerations over and above purely market-related questions, i.e., on innovation at state level (Ch. III), on digital participation in society (Ch. IV), with regard to education, culture and media (Ch. V) and security (Ch. VI).

extent that is necessary and suitable to achieve the individual goals (e.g., for objectives related to youth protection, data protection or other legal protection, services of general interest, maintenance of national cultural characteristics).

**550.** This notwithstanding, the Monopolies Commission would like to point out that the measures already being planned at EU level may lead to changes with an impact far beyond making cross-border trading easier. For market-related reasons, these measures will also be adopted in areas of competence which on principle have been reserved to the Member States to date (telecommunications and media regulation, civil law/consumer protection, data protection and IP rights, tax law). In that regard, a discussion on the precise regulative objectives seems necessary, which can justify continued national regulation instead of a harmonisation at European level.

**551.** In the same way, regulatory and cultural policy leeway remains for the legislature in the Federal State and in the *Länder* to define goals which also need to be met by all market players when adjusting national regulations in line with changing market conditions. This may mean that, besides the existing market players (e.g., taxis), new market players (e.g., share economy transport services) are also subject to normative restrictions which are necessary and suitable to achieve the respective goals. This however changes nothing as to the assessment of the Monopolies Commission that, in many fields, the current regulations most likely go beyond what is necessary and constitute unjustified entry barriers to the relevant product markets.<sup>450</sup>

## **9.2. A need for additional regulation (in particular in the media domain)?**

**552.** There is discussion at present with regard to additional regulation of providers in the digital economy, and in particular to internet services which provide information to the users of the internet, and hence play a central role in to reducing information-related search costs. When it comes to internet services which transmit and display the information digitally (“new” media), apart from the need for a regulation that is “similar to antitrust law”<sup>451</sup>, which has been discussed elsewhere, a need for regulation is considered to arise from the risk that users’ opinion formation can be distorted where the information provided by the services helps form opinions.<sup>452</sup>

**553.** Today, users rely on internet services in just the same way as on traditional media (press, radio) to obtain information. Media content is transmitted on the internet via a large number of providers and formats, from the websites of classical media companies, through the services of aggregators, to user-generated sources of information (e.g., blogs). An ever-growing role is played by news aggregators (e.g., Google News) and social networks (Facebook, YouTube, Twitter) since these services are being used more and more by users as a major source of news.<sup>453</sup>

**554.** The communication of news takes on special significance in Germany for the formation of opinions in the democratic state. Hence, it is considered to be a task of the State to protect citizens’ formation of opinions. This protection classically relates to broadcasting in particular, and secondly to the press, which provide the users of these media with edited, journalistic contents (services of general interest).<sup>454</sup> The State must therefore ensure in classical broadcasting in particular that opinion formation is not distorted by the contents that are transmitted being influenced by the economic interests of broadcasters or central political stipulations.<sup>455</sup> Hence, a special regulation counters the establishment of opinion-making power in broadcasting. At the same time, cultural diversity is also to be safeguarded. The responsibility of broadcasting regulation therefore lies not centrally with the Federal State, but with the *Länder*.<sup>456</sup>

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<sup>450</sup> Cf. paras. 541 ff. above.

<sup>451</sup> Cf. section 5.5 above (on search engines).

<sup>452</sup> Albig, T., *Google ist nicht zu durchschauen*, DIE ZEIT No. 10/2015 of 5 March 2015.

<sup>453</sup> Lobe, A., *Wie Twitter und Facebook die Wirklichkeit verzerren*, FAZ.net of 20 March 2015.

<sup>454</sup> Cf. Monopolies Commission, XXth Biennial Report, loc. cit., paras. 1046 ff.

<sup>455</sup> Federal Constitutional Court, Judgment of 4 November 1986, 1 BvF 1/84 – 4. *Rundfunkurteil*, BVerfGE 73, 118 (172 and 190 f.); Judgment of 25 March 2014, 1 BvF 1/11 et al. – *Fernsehrat*; further Federal Constitutional Court, Judgment of 16 June 1981, 1 BvL 89/87 – 3. *Rundfunkurteil*, BVerfGE 57, 295 (323); Order of 18 December 1996, 1 BvR 748/93 et al. – *DSF*, BVerfGE 95, 163 (172).

<sup>456</sup> Kluth/Schulz, *Konvergenz und regulatorische Folgen*, report on behalf of the Broadcasting Commission of the *Länder*, October 2014, pp. 57 ff.

**555.** This regulation has however not kept pace with developments in the media. The new media are expanding the sources of news for users to include all contents which correspond to user preferences, also for instance with entries in blogs or purely private news. They hence permit users to form an opinion without the influence of the editing and journalistic processing on the part of the providers, which are typical of traditional media.

**556.** Just as the traditional media, the new media work according to economic principles. The orientation to the user preferences is part and parcel of their business model, given that the services in question are mostly advertising funded. Orientating towards user preferences heightens the chances that users will take note of the contents offered to them, and that advertising can also be placed which is customised to their preferences.

**557.** For this reason, the risk of opinion distortion for political reasons is considered to be minor in most cases. There is also virtually no evidence of such distortions so far.<sup>457</sup> These services have therefore also not yet been subject to media regulation, for instance in order to ensure diversity.<sup>458</sup>

**558.** Having said that, distortions of opinion formation are conceivable in that users may be unaware of the connection between the contents that are displayed and advertising, and hence contents can be shown which are to lead users to purchases that are lucrative for providers, but that are not in the actual user interest. This risk is likely to be present in particular in social networks which display news and other contents to users regardless of a deliberate, targeted query on the part of users, solely on the basis of their preferences. For these reasons, the existing media regulation was expanded to include telemedia regulation, albeit there are enforcement problems here.<sup>459</sup>

**559.** The traditional media (TV and radio in particular) and the new, internet-based media are hence subject to regulations that differ in structure and range. This poses two problems in terms of competition:

- the risk of competition distortions between traditional media and new media;
- the questionable justification in competition terms of an additional regulation with regard to internet-based media.

**560.** Given the above, competition distortions posing a disadvantage to traditional media are most likely to follow from the special media regulation. Such competition distortions are brought about where new media are active on the same market as traditional media without being subject to the same legal conditions, e.g.:

- accreditation obligations and media concentration control with regard to private television broadcasters (Commission on Investigation of Concentration [Kommission zur Ermittlung der Konzentration im Medienbereich – KEK])<sup>460</sup>
- unofficial and official provisions for the shares of governmental and government-related representatives in the television council and the administrative council;<sup>461</sup>
- provisions to ensure diversity of opinion in broadcasting;<sup>462</sup>
- provisions on advertising in broadcasting.<sup>463</sup>

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<sup>457</sup> Kluth/Schulz, *Konvergenz und regulatorische Folgen*, report on behalf of the Broadcasting Commission of the *Länder*, October 2014, p. 39.

<sup>458</sup> Cf. also European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, Communication of 6 May 2015, p. 12.

<sup>459</sup> Cf. on this para. 76 above.

<sup>460</sup> Sections 20 ff. of the Interstate Broadcasting Agreement; critical on media concentration control Monopolies Commission, XVth Biennial Report, loc. cit., para. 793.

<sup>461</sup> Previous regulation unconstitutional: Federal Constitutional Court, Order of 25 March 2014, 1 BvF 1/11, 1 BvF 4/11.

<sup>462</sup> Sections 11 and 25 ff. of the Interstate Broadcasting Agreement.

<sup>463</sup> In particular sections 7 f., 15 f. and 44 ff. of the Interstate Broadcasting Agreement.

**561.** By contrast, a distortion of competition does not necessarily emerge from the specific press and broadcasting merger control in Germany (section 38 of the ARC), since, as has been stated, the fact is taken into account that only local and regional traditional media require more detailed control in order to safeguard local and regional diversity.<sup>464</sup>

**562.** There are distortions of competition working in the opposite direction in favour of traditional public broadcasting, which receives State subsidies for its funding. The Monopolies Commission has already criticised the specific media concentration control, but has also expressed competition reservations as to subsidies of public broadcasting.<sup>465</sup> The scientific advisory board at the Federal Ministry of Finance has now questioned the special status of public broadcasting in a report on the tasks and funding of public broadcasting corporations as a whole.<sup>466</sup>

**563.** Competition distortions in the relationship between the traditional media and the new media can be justified if and to the degree that they are necessary and suitable to protect the diversity of opinions. The mandate to safeguard the freedom of broadcasting contained in Art. 5 § 1 sentence 2 of the German Basic Law [*Grundgesetz – GG*] aims to bring about a system which ensures that diversity of the existing opinions finds as broad and complete expression in broadcasting as possible – and this constitutional mandate is said to also apply to media on the internet.<sup>467</sup>

**564.** Having said that, it is necessary to take account of the interaction between the national constitutional stipulations on freedom of broadcasting, and the freedom of competition as well as the EU's fundamental freedoms, which are individually protected by EU law with primacy of application. The precise relationship between the two regulatory fields has yet to become clear.

**565.** The need to also regulate new media is affirmed by some policy-makers.<sup>468</sup> Such a regulation does not appear to cause any problems if it is restricted to regulations to increase the transparency of the conditions under which services are offered. Thus, users should particularly be informed if the operators of social networks permit other criteria than user preferences to influence the display of contents, e.g., internal company guidelines on nudity, violence and criminal content. Additionally, a broader identification obligation should be justifiable so that users can recognise that the contents of blogs, social networks and similar internet services are not edited, and hence are less reliable than the contents of traditional media which comply with certain quality standards. Furthermore, the existing information obligations must be better implemented if an individual service is advertising funded (sections 6 and 15(3) of the Telemedia Act as well as section 4 No. 3 of the Unfair Competition Act [*Gesetz gegen den unlauteren Wettbewerb – UWG*]).

**566.** By contrast, regulation of content must be rejected in terms of competition policy. There are no indications so far that this kind of regulation is necessary to protect freedom of opinion, and that the encroachment on competition which this implies could hence be justified. Where new media display contents based on user preferences, this poses less of a risk that the intermediary will distort the display of the contents for political reasons than in the case of services which additionally edit the contents by journalistic means. On the contrary, the risk exists that media regulation which leads to a state agency determining the contents to be displayed independently of the preferences of the users (e.g., to maintain “communicative equal opportunities”) actually could trigger a distortion of political opinion making.<sup>469</sup> In view of difficulties encountered in establishing selection criteria, content-related regulations could furthermore be misused to protect classical providers against competition.

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<sup>464</sup> Cf. para. 332 above. In this regard cf. also already XIXth Biennial Report on the position of the Monopolies Commission, Strengthening Competition in Retailing and Services, Baden-Baden 2012, para. 169; Special Report 63, *Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht*, Baden-Baden 2012, paras. 70 ff.

<sup>465</sup> Monopolies Commission, XVth Biennial Report, loc. cit., paras. 788 and 792 f.; cf. furthermore paras. 801 ff.

<sup>466</sup> Scientific advisory board at the Federal Ministry of Finance, *Öffentlich-rechtliche Medien – Aufgabe und Finanzierung*, report 03/2014, December 2014; retrievable: [http://www.bundesfinanzministerium.de/Content/DE/Downloads/Broschueren\\_Bestellservice/2014-12-15-gutachten-medien.html](http://www.bundesfinanzministerium.de/Content/DE/Downloads/Broschueren_Bestellservice/2014-12-15-gutachten-medien.html).

<sup>467</sup> Bethge in: Sachs, *GG*, 6<sup>th</sup> ed. 2011, Art. 5 paras. 90a ff.

<sup>468</sup> Cf. footnote 452 above.

<sup>469</sup> This problem is however frequently not adequately discussed in the context of regulation proposals; Cf. only Kluth/Schulz, *Konvergenz und regulatorische Folgen*, report on behalf of the Broadcasting Commission of the *Länder*, October 2014, pp. 84 ff. and 92 ff. (on “services with added value for public communication”; cf. pp. 23-24 on this term).

**567.** Apart from this, it should be taken into account that any state regulation of services which are provided in the entire German-speaking area or even beyond in a homogeneous competition environment could lead to a territorial fragmentation of the market, and that cross-border regulation could come upon obstacles in terms of its enforcement.<sup>470</sup>

**568.** It should be stated as a general principle that an additional regulation of internet services can only be justified to bring about equal competition conditions if a comparable risk applies to these internet services and to the providers with which they compete. In particular with internet services the products of which are orientated towards user preferences, it is necessary to take a precise look at the extent to which this is the case.

### **9.3. Political support for adjustments of existing business models and products to the digital economy (“Industry 4.0”)**

**569.** The discussion at national level currently goes beyond the adjustment of the regulatory framework to the challenges posed by innovative internet services, and also relates to advancing the classical economy to meet the challenges of the digital age.

**570.** The Federal Government considers one key aspect of market development which needs to be supported by policy-makers to be, specifically, the digitalisation of production processes (“Industry 4.0”).<sup>471</sup> This is the digital interconnection between industrial processes, which aims to enable machines to interact directly and to exchange data in real time.<sup>472</sup> Machines are for instance being designed which can configure themselves and automatically offer their services in the production process. Machines and components are to be identifiable and localisable at all times by their own internet addresses. The interconnection of industrial processes makes the distinction between (expensive) made-to-specification production and (cheaper) mass production less significant. It becomes possible to use products in more resource-efficient ways, and hence to reduce costs in order to remain competitive in a globalised world. Regarding the workforce, skills which can be replaced with technology become less significant, while creativity and specialist knowledge become more so.

**571.** The interconnection of industrial processes requires standards which make it possible to exchange data between the products of different manufacturers, and hence to achieve the interconnection of industrial processes in the first place. At the same time, it calls for a framework enabling market players to secure their individual competitive advantages against free-riders (in particular data protection and security).

**572.** The digital interconnection of industrial processes marks a development that is driven by the innovations of the market players, which is accompanied and promoted by policy-makers, but which cannot be designed in the concrete sense of the word.<sup>473</sup> In the competition-policy view of the Monopolies Commission, the following aspects need to be particularly pointed to:

- The assessment of competition issues on markets that are affected by the digitalisation of production processes is made more complex by the digital integration of the processes and the concomitantly increasing interdependence of production factors. While standardisation simplifies processes, these pose new challenges to the organisation, given the need for detailed advance planning and exact coordination of production processes. This is associated with opportunities for the development of new business fields which, depending on the market structure, may however also entail new risks for competition.

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<sup>470</sup> Cf. European Commission, Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*, paras. 44 and 68, on the geographical market definition in social networks and communication services.

<sup>471</sup> <http://www.hightech-strategie.de/de/Industrie-4-0-59.php>, retrieved on 19 May 2015. Similar the European Commission, cf. European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, Communication of 6 May 2015, pp. 15 ff.

<sup>472</sup> This development is described with a variety of new terms by policy-makers and in the media (e.g., “Industry 4.0”, “Smart Factory” and “cyber-physical systems”). These terms however appear to frequently be unclear to market players so far, and are also only used isolatedly in the specialist literature. No more precise definition is needed for the purposes of this Report.

<sup>473</sup> However, going further in some respects Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, p. 13.

- The necessary standardisation may take place by agreement or be enforced by companies that have market power. It is particularly important in competition terms to ensure that, apart from the aspects that are directly linked with the standard and which are necessary for it, standardisation does not encourage any coordinated competitive conduct (collusion), and that it does not hinder technical development and innovations.<sup>474</sup> Companies with market power should furthermore be prevented from becoming able to permanently enforce poor standards.
- The digitalisation of the economy implies that, in order to distinguish themselves from competitors in competition, simple (replicable and standardisable) products and knowledge become less significant for providers in favour of special products and knowledge (which cannot be replicated and standardised). This competitive advantage can enable owners of special products and knowledge to amass relevant data and to further expand their informational head start. In fact, this is likely to be frequently necessary in order to be able to offer overall solutions to buyers, for which there is increasing demand. The information divide which is arising in the digital economy should however not be underestimated in terms of its significance for competition.
- On the buyer side, the dependence of providers on special products and with special knowledge may increase the barriers to switching (lock-in effects). This may aggravate exploitation risks.
- One can presume in many fields of industrial production that the market will become more dynamic. Thus, information advantages resulting from digitalisation will tend to benefit in particular large companies which already have interconnected structures from the outset. Such companies have advantages of scale and scope, and are already present on international markets in many cases. However, particularly innovative ideas frequently become established in small companies where only a small amount of consensus-reaching needs to be done within the company. Such companies can also displace established competitors if the success of innovations is not precluded by lock-in effects.

From the point of view of the Monopolies Commission, it is hence of high importance to prevent distortions of competition wherever possible in the context of the digitalisation of the economy, in order to protect newly-forming or changing relevant markets against permanent damage. The Monopolies Commission therefore welcomes the fact that the Federal Government regards it as a focus of its digital policy to guarantee undistorted competition, also where the digitalisation of the economy is encouraged and driven forward.<sup>475</sup>

**573.** It stands to reason that a potential risk in competition terms may lie in fields the development of which enjoys priority from an industrial policy point of view. This needs to be taken into account when designing political measures in order to keep the risk at bay that political measures will have competition-distorting side-effects.

#### **9.4. Promotion of innovative business models where competition fails**

**574.** The Federal Government has announced that it will support the young digital economy and promote innovative business models on digital markets.<sup>476</sup> This promotion is to encompass funding for the targeted support of young companies and their entrepreneurial counselling and advice.

**575.** Targetedly promoting companies through financial measures may be welcome in competition-policy terms, for instance because it boosts market dynamics in structures where competition is lacking, or can open up markets at all. The latter case applies where competition fails and this market failure cannot be remedied without state intervention. Such a market failure is considered to exist in the digital economy particularly when it comes to funding innovative start-up companies (start-up funding).<sup>477</sup>

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<sup>474</sup> Cf. European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11 of 14 January 2011, p. 1, paras. 64 ff. and 263 ff.; Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27 April 2004, p. 97, para. 29.

<sup>475</sup> Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, pp. 4 and 12 ff.

<sup>476</sup> Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, p. 14.

<sup>477</sup> Cf. already Monopolies Commission, XXth Biennial Report, loc. cit., para. 2026.

**576.** The Federal Government has provided for a variety of measures in the Digital Agenda aimed at improving the financing conditions for start-ups and their linking-up with industry and with start-up platforms.<sup>478</sup> Some of these measures supplement tools which had already been installed for venture capital funding of start-ups.<sup>479</sup> In response to an initiative of the Federal Government, the German stock exchange has announced its intention to open up a pre-market platform for young growth companies and investors.<sup>480</sup> Furthermore, the Federal Minister of Economics has announced to further expand accelerators which are meant to help start-ups, among other things, by providing support and advice on how to grow quickly.<sup>481</sup> Further programmes are provided by the business development banks and via various funds for start-up funding.<sup>482</sup> Given the thinning out of the private supply of venture capital funding, for instance the KfW is also planning to operate as an investor in venture capital funds.<sup>483</sup>

**577.** The Federal Government has set out in its Digital Agenda that its business development policy is also to be orientated towards reducing market entry barriers, while accommodating the principle of undistorted competition.<sup>484</sup> This means that young companies are to be enabled to enter the market but without the promotion having lasting additional market effects that would only benefit the promoted companies in question. The Monopolies Commission considers the above-mentioned measures to finance innovative start-ups as unobjectionable in terms of competition-policy given these pre-conditions.

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<sup>478</sup> Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, p. 14; on this also previously CDU, CSU and SPD, Coalition Agreement, 18<sup>th</sup> parliament, published on 27 November 2013, pp. 64 and 98.

<sup>479</sup> For instance the programme titled “INVEST – subsidies for venture capital”; on this: <http://www.bafa.de/bafa/de/wirtschaftsfoerderung/invest/>, retrieved on 21 May 2015.

<sup>480</sup> No author provided (apa/Reuters), *Deutsche Börse startet neue Plattform für Start-Ups und Investoren*, Deutsche Wirtschafts Nachrichten of 19 February 2015; <http://deutsche-wirtschafts-nachrichten.de/2015/02/19/deutsche-boerse-startet-plattform-fuer-start-ups-und-investoren/>, retrieved on 31 March 2015.

<sup>481</sup> Gabriel, S., speech of 25 February 2015 on the Digital Agenda at the session of the Bundestag's Committee on the Digital Agenda; previously already Federal Ministry of Economics, press releases of 24 October 2014 and 17 June 2014.

<sup>482</sup> Cf. on this the overview of the Federal Ministry of Economics at: <http://www.bmwi.de/DE/Themen/Technologie/Innovationsfoerderung-Mittelstand/wagniskapital-unternehmensgruendungen.html>, retrieved on 31 March 2015. The Federal Ministry of Economics and the KfW are planning for instance to establish a co-investment fund which is to take a direct holding in young technology companies together with private investors (e.g., business angels, family offices, but also venture capital funds).

<sup>483</sup> The product “ERP venture capital fund investments” developed by the KfW aims to promote technology-orientated start-ups and companies in their early growth phase. The KfW plans to invest up to EUR 400 million in VC funds in the next five years. The first potential VC funds have already been identified.

<sup>484</sup> Federal Government, Digital Agenda 2014 – 2017, brochure of August 2014, p. 4.



## 10 Summary of the policy recommendations

**578.** In this Special Report, the Monopolies Commission examines competition on selected digital markets, in particular on “platform markets”. Its policy recommendations for adjusting the existing regulatory framework are summarised below.

### Policy recommendations on antitrust law

**579.** The special characteristics of multi-sided platforms constitute a challenge for **competition policy**. The fundamental contexts and the complexity of multi-sided platforms need to be taken into consideration by competition authorities and courts when assessing specific cases under competition law. It is important to include all sides of a platform in the analysis, and to capture both direct and indirect network effects in terms of their economic significance. The assessment of the competitive situation on multi-sided platforms requires an overall view to be taken in which greater importance is to be attributed to other factors than market shares, such as network effects, the availability of user data and the dynamic nature of the market observed.

**580.** The Monopolies Commission recommends expanding the scope of **merger control**. In addition to the previous merger control thresholds which are based on specific company turnover levels, further merger control thresholds are to be established linking to the transaction volume. Such regulations are needed in order to close gaps in protection. Cases of the acquisition of companies which did not achieve a high turnover in the past may also appear questionable in terms of competition policy with regard to their considerable economic significance. In the digital economy, a company's economic potential is frequently better expressed in the purchase price offered or paid for it than in the previously generated turnover.

**581.** The Monopolies Commission recommends adding a new § 6 to Art. 1 of Regulation 139/2004:

*“The turnover thresholds of paragraph 2 shall also be deemed to have been exceeded if the value of the value added by an undertaking concerned is more than EUR 5 billion and an aggregate Community-wide turnover of more than EUR 250 million is achieved by at least one of the undertakings concerned. The turnover thresholds of paragraph 3 shall also be deemed to have been exceeded if the value of the value added by an undertaking concerned is more than EUR 2.5 billion, the aggregate turnover of all undertakings concerned exceeds EUR 100 million each in at least three Member States, the aggregate turnover of at least one of the undertakings concerned is more than EUR 25 million in each of at least three of these Member States, and the aggregate Community-wide turnover of at least one undertaking concerned exceeds EUR 100 million.”*

In German law, new sentences 2 and 3 should be added to section 35 subsection (1) sentence 1 of the German Act Against Restraints on Competition (ARC):

*“These turnover thresholds shall also be deemed to have been exceeded if the value added by an undertaking concerned is more than 500 million Euro and at least one undertaking concerned has achieved turnover of more than 25 million Euro in Germany. Section 35 subsection (2) sentence 1 shall not apply to cases falling under section 35 subsection (1) sentence 2.”*

Additionally, the applicability of the minor market clause contained in section 36(1) No. 2 of the ARC should be ruled out for the cases mentioned.

**582.** The acquisition of individual assets without a current market turnover would also not be regarded as a concentration (Art. 3 of Regulation 139/2004 and section 37(1) of the ARC) in the case of a transaction volume exceeding the newly introduced threshold. In order to close the regulatory gap which this leaves, it could be considered to add a provision to Art. 3(2) of Regulation 139/2004 and section 37(1) of the ARC such that the acquisition of an asset also applies subject to the provisos of Art. 1(6) of Regulation 139/2004, new version, and section 35 (1)(2), new version, of the ARC.

**583.** Operators of internet platforms such as search engines, social networks or trading platforms may have incentives to engage in abusive conduct, for instance for the preferential treatment of in-house services or for bundling. The legal principles on the **abuse of a dominant position** should be refined by the competent competition authorities and courts when ruling on individual cases.

**584.** The Monopolies Commission suggests amendments to the **law of procedure** for the abuse proceedings under competition law. Given the dynamic nature of digital markets, it recommends that the European Commission should make greater use of the tool of the ordering of interim measures in abuse cases on digital markets. For the ordering of interim measures, the Monopolies Commission proposes to test whether material changes in the market (cf. Art. 9(2)(a) of Regulation 1/2003) are to be expected within two years, a frequently chosen assessment horizon for foreseeable developments in competition. It also proposes a change in the procedural provisions such that the commitment proceedings under Art. 9(2)(a) of Regulation 1/2003 are automatically transformed into termination and penalty proceedings in accordance with Art. 7 of Regulation 1/2003 once a suitable period has expired or on reasoned third-party request.

**585.** With regard to the future practice of the competition authorities, the Monopolies Commission proposes examining the traditional results of the **definition of markets**. With regard to the market definition, greater attention should be paid to the characteristics of multi-sided platforms. There is also a need to query the sub-division of online advertising into search-based and non-search-based advertising since technical improvements have caused these two forms of advertising to become more similar. Furthermore, attention should be paid to possible substitution relationships between online and offline advertising.

**586.** Competition litigation should focus more on the **significance of data** for companies' economic success. This also applies to merger control since here newly founded internet services characterised by low turnover, but potentially highly valuable data inventories, are acquisition targets. In contrast, aspects entirely related to data protection should be addressed outside competition law proceedings.

**587.** The Monopolies Commission does not consider **separate regulation** for search engines to be appropriate, at least not at present. Any public control over search algorithms would, provided it was technically feasible, require considerable public funds. And even if technology allowed algorithms to be reviewed, it would still be difficult to prove such manipulation of the algorithm. In that context, it must be considered that the operator of a given search engine does not need to manipulate the search algorithm in order to take advantage of the preferential display of its own services: knowing the algorithm already enables the operator to design the websites for its own services so that they rank high in the generic list of results.

**588.** Similarly, an obligation to disclose the search algorithm cannot be recommended. If the search algorithm were publicly known, website operators would be able to optimise their sites in such a way that would considerably impair the display of search results according to their relevance. Finally, an obligation to disclose or share the web index with competing search engines cannot be recommended either because this would remove incentives to create and update the index on an on-going basis.

**589.** In the Monopolies Commission's view, the **separation** of general and specialised search services, as is occasionally proposed, would not be an adequate measure to effectively mitigate potential market distortions. It also appears to be currently disproportionate. A divestiture could at most be considered if a search platform has irreversibly robust market power. In contrast, as long as chances exist for the stimulation of competitive forces, one must advise against such a serious intrusion into existing company structures, also since rationalisation advantages would be foreclosed and existing advantages of scale and scope, though being to users' benefit, would disappear.

**590.** With regard to **vertical restraints on internet distribution systems**, the Monopolies Commission advises against per se prohibitions of "price parity clauses" and "prohibitions to use third-party platforms". The impact of price parity clauses in particular has so far not yet been the subject of sufficient research. The conditions which such clauses contain, as well as the market characteristics, should therefore be observed in individual cases, and cases of a similar nature should be taken up by the authorities in parallel. The assessment of prohibitions to use third-party platforms should be assessed on a case-by-case basis, taking account of the extent of existing interbrand competition between manufacturers, as well as of any issues with regard to efficiency related to the protection of the brand image.

**591.** The Monopolies Commission considers it to be necessary that the above-mentioned competition-related activities also be supplemented by additional measures to improve the **enforceability of the individual rights** of content-providers and users in the digital economy. In the view of the Monopolies Commission, the unlawful exploitation of third-party content and data can also constitute an abuse of market power. However, shortcomings in legal protection with regard to content and data should not be remedied primarily via competition law, but by improving the legal options open to

market players to enforce market-relevant individual rights. These problems should be tackled in general terms, and not only with a view to the conduct of companies that have market power. There is more on this below.

### **Policy recommendations on copyright**

**592.** The copyright rules concerning the protection of owners of internet IP should be developed further. The introduction of rules at EU level may make sense in order, first, to provide authors of intellectual works (e.g. books and images) with effective protection against the commercialisation of such creations by third parties and, second, to clarify what legal boundaries exist on the internal market for technical restrictions to trade (e.g. geoblocking). It should be considered to clarify the law where there are uncertainties when it comes to the **attribution of intellectual property** (for instance, with regard to users' reviews).

### **Policy recommendations on data and consumer protection law**

**593.** The planned European **General Data Protection Regulation** should make a major contribution towards reducing competition distortions previously resulting from differences between the national regulations on data protection. Given that the regulation will also be applicable to non-European companies, this will enable effective protection of individuals who are domiciled in the Union. The data portability rights provided for in the Proposal can help stimulate competition, as they mitigate existing barriers to users' switching (lock-in effects). The drastic sanctions provided for in the Proposal for a Regulation (fines of up to 5 percent of the offending company's annual turnover) provide suitable incentives to comply with the provisions.

**594.** However, reservations exist as to the regulation's effectiveness with regard to the competence of individual authorities: Unlike in competition law, where the European Commission is competent in cases of Community-wide significance, according to the present version of the drafts, the national authorities will remain competent for the enforcement of data protection law. With regard to enterprises, the authority of their state of residence and establishment will have leading responsibility. The Monopolies Commission acknowledges that a European data protection committee is to coordinate the work of the national authorities and resolve conflicts, where necessary by handing down a decision. Nonetheless, particularly companies from third countries might have incentives to choose to locate their European branch in a country in which they may expect a relatively mild practice with regard to administration and sanctions.

**595.** The Monopolies Commission advocates the timely enactment of the General Data Protection Regulation. Drafts should not be watered down with regard to their substance. When it comes to enforcement, a supervisory structure should be implemented that guarantees stringent enforcement of data protection law. The experience gained in the enforcement of competition law suggests a **dual structure**: the Member States' data protection authorities should have competence for cases that are of regional significance. In cases that are of significance beyond this – in particular in those cases which are of Union-wide significance –, by contrast, a central authority should have competence which has the expertise and resources that are needed to also enforce European data protection standards vis-à-vis digital-economy companies that operate globally.

**596.** The approach of traditional **consumer protection**, orientated as it is towards information pure and simple, needs to be reviewed in the digital economy and most likely replaced by a more nuanced approach. In particular, measures should be taken to ensure that standard terms and conditions are worded in a more transparent fashion. Borrowing from the law on paid orders in electronic commerce (section 312j of the Civil Code [BGB]), consumers should be provided with contract-related information on the internet in an event-orientated manner, including when taking up free services.

### **Policy recommendations for reducing asymmetric regulation**

**597.** The Report also addresses competition distortions resulting from the **meeting of new, initially unregulated services and old, regulated ones**. One example of this is new platforms in the share economy which compete with classical service-providers (for instance in the taxi business or in the intermediation of temporary accommodation). There are often reflex-based calls in such contexts to subject the new competitors to the existing regulation. The Monopolies Commission recommends considering the opposite solution, namely releasing the established companies from regulation. If

new technologies give rise to competition, there is a need to analyse whether the traditional regulation is still needed. Regulation has previously been created where competition as such was initially not regarded as being adequate to provide a high-quality service at competitive prices. The Monopolies Commission therefore wishes to propose a debate to examine whether there is a need to hold on to regulation for all concerned where there is a regulatory misalignment between old and new services.

**598.** Should it appear necessary to adjust the regulatory framework because of the appearance of new service-providers, the relevant rules should generally be homogeneous across product and geographical markets in order to obviate an artificial **fragmentation of markets**. Such fragmentation can be justified by divergent regulatory and cultural objectives of the respective national legislation, but only to the extent that is necessary and adequate to reach the relevant objectives.

**599.** This notwithstanding, the Monopolies Commission points out that the measures currently envisaged at EU level may lead to changes which will have an impact far beyond alleviating cross-border trading. For market-related reasons, these measures will also be adopted in areas of competence that have generally been reserved to the Member States to date (telecommunications and media regulation, civil law/consumer protection, data protection and IP rights, tax law). In that regard, a **discussion on the precise regulatory objectives** seems necessary which can justify national regulation continuing to take precedence over harmonisation at European level.

**600.** Competition distortions which are the result of differing **advertising rules** for different types of media should be reduced. To this end, in particular the advertising air time rules for traditional broadcasters should be reduced or even abolished. In contrast, extending the existing advertising air time regulation to internet media pure and simple is not warranted.

**601.** The digital **interconnection of industrial processes** ("Industry 4.0") is a development that is driven by the innovations of the market players which is accompanied and promoted by policy-makers, but which cannot be shaped in the concrete sense of the word. Nonetheless, the Monopolies Commission welcomes the fact that the Federal Government regards it as a focus of its digital policy to guarantee undistorted competition, also where the digitalisation of the economy is encouraged.

**602.** The Federal Government has set out in its Digital Agenda that its **business development policy** is also to be orientated towards financing innovative start-ups (start-up funding), while accommodating the principle of undistorted competition. The Monopolies Commission considers the measures provided for in the Digital Agenda to finance innovative start-ups to be unobjectionable in terms of competition policy.