Questionnaire A

The role of antitrust authorities regarding the digital economy

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1. The collection of user and device-related data

In February 2019 the Bundeskartellamt qualified the data processing policy of facebook as an abuse of dominance according to German competition law, § 19 I GWB (Gesetz gegen Wettbewerbsbeschränkungen, German Law against Restraints of Competition)).[1] Facebook appealed this decision with the OLG Düsseldorf (Oberlandesgericht, Higher Regional Court). A court decision on the merits in the main proceedings has – as of August 2020 – not yet been taken. However, there have been several preliminary rulings regarding the immediate enforceability of the Bundeskartellamt's decision. If the court has serious doubts regarding the legality of the Bundeskartellamt's decision the court may order that the appeal has a suspensive effect (§ 67 III No. 2. GWB). In a preliminary ruling, the OLG Düsseldorf[2] had initially suspended the decision of the Bundeskartellamt. This interim decision by the OLG Düsseldorf was in turn reversed by the Bundesgerichtshof (BGH, Supreme Court) in June 2020.[3] The BGH spelled out that it does not have serious doubts as to the existence of an abuse of market power by facebook[4] and confirmed the immediate enforceability of the Bundeskartellamt's decision. As a next step, the facebook case is to be decided in the main proceedings by the OLG Düsseldorf. This decision may then again be appealed to the BGH. Also, the courts could make a referral to the CJEU.

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1 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16.

2 Higher Regional Court Düsseldorf, Judgement of 26 August 2019 – VI-Kart 1/19 (V), Beck-RS 2019, 188837 – facebook (interim decision).

3 BGH, Judgment of 23 June 2020 – KVR 69/19 – *facebook* (interim decision). For a more detailed analysis see M.-O. Mackenrodt and Klaus Wiedemann, Zur kartellrechtlichen Bewertung der Datenverarbeitung durch Facebook und ihrer normativen Kohärenz mit dem Datenschutzrecht und dem Datenschuldrecht, ZUM 2021, pp. 89-103.

4 BGH, Judgment of 23 June 2020 – KVR 69/19 – *facebook* (interim decision).

As to the substance, the Bundeskartellamt has prohibited facebook from combining user data and device-related data collected on the facebook website on the one hand with – on the other hand – so-called "off facebook data" if there is no sufficient consent in the sense of the GDPR. "Off facebook data" are data collected by other facebook owned services like Instagram and WhatsApp or data which have been collected from third party websites and made available to facebook. The Bundeskartellamt argued that facebook's general terms and conditions which provided for such a data policy were in contravention of the GDPR[5] and that imposing these terms and conditions upon facebook users constituted an abuse of dominance in the alternative of an exploitative abuse.[6]

The OLG Düsseldorf[7] had serious doubts that this constituted an abuse by exploitation. But the BGH, by contrast, held that there were no serious doubts that facebook's data policy constitutes an abuse of dominance.[8] In its unusually long decision, the BGH establishes its own line of argument which – as compared to the reasoning of the Bundeskartellamt – is more competition oriented and does not derive the exploitative abuse from a mere violation of the GDPR. At the same time, the BGH points out that still, the Bundeskartellamt's decision and findings are at their core in accordance with the BGH's more specific line of argument and that the BGH's reasoning does neither change the nature of the Bundeskartellamt's decision nor restrict facebook in its legal defense.[9]

The BGH notes that for users using facebook is made dependent on the fact that facebook is left free to combine off-facebook data with personal data that are generated by using facebook and to process these combined data.[10] This data policy allows an extended highly personalized user experience. However, the BGH holds that this extension of the service is imposed upon users by facebook and that they are forced to use the social network with this extended highly personalized experience which is based on the additional processing of off-facebook data.[11] Users may not

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5 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 573 ff.

6 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 525 ff.

7 The OLG's main concerns are summarized at BGH, Judgment of 23 June 2020 – KVR 69/19, para. 9 – *facebook* (interim decision).

8 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 53 – *facebook* (interim decision).

9 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 131 – *facebook* (interim decision).

10 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 53 – *facebook* (interim decision).

11 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 58 – *facebook* (interim decision).

have wanted that these off-facebook data are made available to facebook or made use of by facebook. The BGH argues, that users are deprived of their free choice to use the social network in a way that is limited to the personalized experience which is based on the personal data which are generated only by their use of the social network itself.[12]

In its competitive assessment the BGH finds that the imposition of the unwanted extended services results in negative competitive effects in two respects:[13] In the vertical relationship customers are exploited[14] and, in addition, in the horizontal dimension[15] competition is impeded on the market for social networks and potential competitors are excluded. It is important to note, that, by contrast, the Bundeskartellamt's theory of harm was centered around the question of whether an abuse by exploitation could be inferred from an imposition of invalid terms and conditions and from a violation of the GDPR.[16] The BGH, instead, refers to the freedom of choice of the users and, in addition, to the creation of an impediment[17] to competition by exclusionary conduct.[18] Thereby, the BGH's reasoning is more competition oriented and minimizes any interference with the data protection regime. As a general feature of the business model of social networks, data are used for placing targeted advertisements with internet users in order to finance the social network. Therefore, a dominant social network which – possibly without the consent required by the GDPR – collects and processes more and more data gains an even higher advantage over potential competitors. The BGH notes that a huge collection of data by a dominant social network raises entry barriers for potential competitors[19] who on their part due to facebook's extensive data processing practice become less likely to acquire advertising contracts which are required for the amortization of a competing social network. Furthermore, the BGH found that a restraint of competition on the market for

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12 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 58 – *facebook* (interim decision).

13 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 64 – *facebook* (interim decision).

14 A discussion of the abuse by exploitation and in particular of the contested causality requirement can be found at BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 66 ff. – *facebook* (interim decision). See also M.-O. Mackenrodt and K. Wiedemann, Zur kartellrechtlichen Bewertung der Datenverarbeitung durch Facebook und ihrer normativen Kohärenz mit dem Datenschutzrecht und dem Datenschuldrecht, ZUM 2021, pp. 89, 92 ff.

15 A more detailed discussion of an impediment to competition can be found at BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 92 ff. – *facebook* (interim decision).

16 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 522 ff.

17 BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 92 ff. – *facebook* (interim decision).

18 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 64 – *facebook* (interim decision).

19 BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 93, 94 – *facebook* (interim decision).

online advertising could not be excluded.[20] A detailed analysis of the online advertising market was not required because the potential restraints of competition do not necessarily need to occur on the same market where market power has been established.

In addition to identifying a potential restraint of competition, finding an abuse according to § 19 GWB requires a balancing of the interests involved.[21] In the particular case, the interests to be weighed include freedom of competition as the main objective of competition law, the fundamental right of informational self-determination which forms the constitutional basis of the data protection regime and also interests like economic freedom and the fact that for many users access to a social network is a way of participation in social life.[22] It is in this balancing process that data protection law comes in as one factor among others. The BGH states that the consent requirement of the GDPR represents one aspect of the constitutional right of self-determination.[23] And in a quite detailed discussion of the GDPR the BGH finds that facebook actually does not meet the requirements of Art. 6 GDPR.[24] The BGH maintains that within the balancing process the fact that a behavior is illegal can be one and possibly a decisive and sufficient factor to attribute less weight to the respective interest of the party who is in contravention of the law.[25] This is because competition law does not intend to support the enforcement of a behavior which is disapproved of by the legal order. At the same time, the BGH points out, that the illegality of a contractual condition or of a behavior like the data collection is not a requirement which is a necessary condition for assuming an abuse.[26]

This holding illustrates the relationship between competition law and the data protection law in the BGH's line of reasoning: The BGH refers to privacy considerations as one factor within the balancing of interests and finding a GDPR violation is not a necessary requirement for a competition law infringement. By contrast, in the Bundeskartellamt's line of argument assuming an abuse is more strongly related to the finding of a violation of the GDPR. Consequently, the BGH expressly emphasizes that

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20 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 96 – *facebook* (interim decision).

21 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 98 – *facebook* (interim decision).

22 BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 97 ff. – *facebook* (interim decision).

23 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 106 – *facebook* (interim decision).

24 BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 97 ff. – *facebook* (interim decision).

25 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 99 – *facebook* (interim decision).

26 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 99 – *facebook* (interim decision).

there is no doubt concerning the competence of the Bundeskartellamt in this case and that the competencies of the Bundeskartellamt are not excluded only because the application of competition law in this case takes data protection issues into account just like competition law in other cases takes into account other fields of European or national law.[27]

2. Determination of market power in digital markets

§ 18 I GWB contains a legal definition of market power. It spells out that a supplier or purchaser has market power if he has no competitors, is not exposed to significant competition or if he has a paramount market position in relation to his competitors. § 18 III GWB enumerates factors which are in particular to be taken into account when assessing market power. These criteria are also of value when it comes to determining market power in digital markets. However, digital markets exhibit economic features which are distinct from traditional markets and which are of high relevance for the determination of market power. The Bundeskartellamt has in 2016 published a working paper on the determination of market power in digital platform markets and networks.[28] In addition, drawing from the Bundeskartellamt's case practice the 9th amendment to the GWB in 2017 has introduced an explicit list of factors in § 18 IIIa GWB which are particularly relevant to the determination of market power especially with regard to digital and multi-sided platform markets or networks. The Bundeskartellamt has already applied the new provision in merger cases and in abuse proceedings, for example for assessing the market position of a ticketing platform.[29] The criteria in § 18 IIIa GWB are of equal rank to those in § 18 III GWB and both catalogues are not exhaustive.[30] These catalogues do not extend the definition of market power in § 18 I GWB.[31] Rather, when determining the market position, the overall picture of the competitive forces has to be assessed.[32]

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27 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 126 – *facebook* (interim decision).

28 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016.

29 Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, paras. 163 ff.; Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, paras. 154 ff.

30 M.-O. Mackenrodt, Germany, In: Mandrescu (ed.), EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution, Dongress Publications 2020, pp. 251, 260.

31 C. Grave, Marktbeherrschung bei mehrseitigen Märkten und Netzwerken, In: Kersting, Podszun (eds.), Die 9. GWB-Novelle, C.H. Beck 2017, pp. 17-44, para. 7.

32 Legislative reasons, Official Gazette 18/10207, p. 49.

2.1 Market shares as starting point

Market shares form the starting point for the assessment of the market position of an undertaking in traditional markets but also in digital markets.[33] In digital markets however, market shares as such are of lower significance as an indicator of market power. For example, in a merger of two digital dating platforms the Bundeskartellamt has not raised objections even though the (turnover-based) joint market share of the merging parties rose to 45-50% and the nearest competitor held only 30-35% of the market.[34] In the merger of two real estate platforms the Bundeskartellamt considered a joint market share of the merger partners of over 75% not to be objectionable as such.[35]

The methodology of determining market shares in digital markets often requires a modification as opposed to traditional markets. For example, in the case of services provided free of charge the turnover cannot be used to determine market shares. As alternatives to turnover figures the Bundeskartellamt has, for example, used the number of search queries with regard to search engines[36] and with regard to dating platforms[37] it referred to the number of registered members and individual visitors.

2.2 Competitive pressure through innovation, § 18 IIIa no. 5 GWB

If digital markets are very dynamic, market shares may change in a short time and are therefore only a weak indicator of market power. Therefore, a high degree of innovation in a particular market can indicate that a market position is contestable and be an argument against assuming market power irrespective of high market shares. Accordingly, § 18 IIIa no. 5 GWB lists innovation-driven competitive pressure as a factor for determining market power. However, the legislative reasons expressly note that it is not a sufficient argument against assuming market power if a contestability by innovations has only been put forward in an abstract and vague way.[38] Quite similarly,

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33 See for example Bundeskartellamt, Decision of 8 September 2015 – B6-126/14, para. 154.

34 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 138.

35 Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 3.

36 Bundeskartellamt, Decision of 8 September 2015 – B6-126/14, para. 154.

37 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 132.

38 Legislative reasons, Official Gazette 18/10207, p. 51.

the Bundeskartellamt rejects a general "internet defense" and spells out that an assumption of market power cannot be ruled out simply by generally pointing to the dynamic character of the internet.[39] Rather – as the Bundeskartellamt continues – an individual case examination is required and concrete indications of sufficiently probable, innovation-driven or disruptive changes within the respective forecast period have to be ascertained.

In merger case between two online dating platforms the Bundeskartellamt[40] has - even before the introduction of § 18a IIIa no. 5 GWB – investigated the dynamic character of the market: It found that there was a concrete dynamic competitive pressure in the market which would counteract a possible market power of the merged online dating platforms. Mobile dating apps such as the smartphone app Tinder had only been launched about three years prior to the merger, had experienced a strong growth in user numbers and offered novel functionalities such as localization of persons and accessibility at any time. Therefore, the concern regarding market power was lower and the merger was approved.

2.3 Network effects, § 18 IIIa no. 1 GWB

In digital markets network effects are – as spelled out in § 18 IIIa no. 1 GWB – a significant factor for assessing the market position of an undertaking. Even before the introduction of this provision, the Bundeskartellamt has argued that network effects constitute an entry barrier to multi-sided markets and reinforce market power.[41] This results from the fact that successful entry into a multi-sided market requires building up a critical mass of users simultaneously on both sides of the market in order to match the network effects of the incumbents. In a case with ticketing platforms, the Bundeskartellamt has held that indirect network effects create a considerable barrier to market entry.[42] On the other hand, in a merger case between dating platforms, the Bundeskartellamt assumed that in this particular case entry barriers did not give rise to market power despite the existence of network effects:[43] The Bundeskartellamt

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39 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 176.

40 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, paras. 177 ff.

41 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 142.

42 Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, paras. 165 f.; Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 162.

43 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, paras. 184 ff.

argued that in the specific case - as the example of the Tinder app had shown - market entry and the development of a critical mass and the achievement of a certain level of awareness are possible even with lower investment costs.

2.4 Parallel use of networks, § 18 IIIa no. 2 GWB

According to § 18 IIIa no. 2 GWB, parallel use of several platforms (multi-homing) and the cost of switching between platforms represent factors for determining market power.

A widespread parallel use and low costs for switching between platforms reduce the impact of network effects and the associated barriers to market entry. As a consequence, the tendency towards concentration and towards a tipping of the market are also reduced.[44] Therefore, it argues against an assumption of market power if multi-homing on both sides of a platform is common and if switching cost are low.

In the case of a merger between two real estate platforms the Bundeskartellamt determined that there was a high degree of multi-homing on both sides of the platform and considered this sufficient to counteract a tipping of the platform market.[45] Reviewing a merger of dating platforms, the Bundeskartellamt also found that multi-homing sufficiently restricted the emergence of market power, as 72% of the users were using multiple dating platforms at a time.[46] By contrast, in the case of ticketing platforms the Bundeskartellamt found that on both sides of the platform multi-homing was only possible to a limited extent.[47] Event organizers on the one side of the platform and advance booking outlets on the other side rarely used competing platforms. In this case the low degree of multi-homing resulted from the fact that the ticketing platform had concluded exclusivity agreements with event organizers and ticket quotas which were allotted to competing ticketing systems were not comparable in size.[48] Overall, advance booking outlets had used competing platforms only in a complementary or

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44 Legislative reasons, Official Gazette 18/10207, pp. 50 f.; Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 151.

45 Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 4.

46 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, paras. 153 f.

47 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, paras. 177 ff.; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, paras. 170, 180.

48 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, paras. 178 ff.; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, paras. 187, 191.

sequential manner.[49] This was not considered to be a sufficient restriction of market power.

2.5 Economies of scale, § 18 Abs. IIIa no. 3 GWB

A further factor to be taken into account when assessing market power are according to § 18 Abs. IIIa no. 3 GWB economies of scale. When assessing the market power of ticketing platforms the Bundeskartellamt noted that economies of scale existed due to the high fixed costs of establishing a database and due to the low variable costs.[50] As a consequence, this barrier to market entry was found to strengthen the market power of the leading platform and further reduce the ability of potential competitors to catch up.

2.6 Access to data, § 18 IIIa no. 4 GWB

Pursuant to § 18 IIIa no. 4 GWB for determining market power in digital markets a factor to be taken into account is access to data. According to the legislative reasoning not only the quantity of data is important, but also the qualitative ability to analyze and process huge amounts of data.[51]

In its case practice the Bundeskartellamt has with regard to ticketing platforms considered the collection and use of customer data as a factor of market power.[52] The Bundeskartellamt noted that third-party event organizers did not receive the data of their own customers which had in the past made bookings with them through the dominant ticketing platform.[53] Therefore event organizers could not build up their own customer database and they could not receive data about their customers when they wanted to switch to a competing ticket distribution system.[54] By contrast, the ticketing platform had passed on data to other companies like facebook.

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49 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 186.

50 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, paras. 188 f.; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, para. 194.

51 Legislative reasons, Official Gazette 18/10207, p. 51.

52 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, paras. 190 ff.; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, paras. 195 ff.

53 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 195; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, para. 200.

54 Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 195; Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, para. 200.

2.7 Relative market power and superior market power

In German competition law an intervention against abusive unilateral conduct is already possible below the threshold of market power if there is relative market power or superior market power. These concepts are discussed in question 10.

2.8 Intermediation power

In January 2020 the the 10th amendment to the GWB (which is also named "Digitalisierungsgesetz")has been enacted.[55] § 18 IIIb GWB introduces the concept of intermediation power into German competition law. This new paragraph spells out that when determining the market position of a company which acts as an intermediary on a multi-sided platform the importance of the intermediary service for access to supply and sales markets should be a relevant factor. Intermediation power constitutes a third form of market power in addition to demand side market power and to supply side market power.

2.9 Undertakings with paramount significance for competition across markets

In addition, in the course of the 10th amendment to the GWB § 19a I of the GWB has introduced the concept of undertakings with paramount significance for competition across markets. This concept applies to undertakings who are to a significant extent active in platform or network markets. When assessing their market position the following factors are in particular to be taken into account: the dominant position in one or more markets, financial strength and access to resources, vertical integration and activities in related markets, access to data and their importance for third parties' access to supply and sales markets. The new provision provides for a two-step procedure: In the first step the Bundeskartellamt may declare by order that a particular company holds such a market position. In the second stage the Bundeskartellamt could then prohibit certain strategies of such a company. This includes – under certain circumstances – self-preferencing, impeding competitors, certain abuses by using data, making data portability more difficult, certain deficiencies

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[55] The 10th amendment to the GWB ("GWB-Digitalisierungsgesetz") has entered into force on 19 January 2021. The final changes are reprinted at GWB-Digitalisierungsgesetz, BGBl. 2021, Part I, No. 1, 18 January 2021, 2. .

in the information policy towards other companies and demanding certain advantages. The addressee of the norm carries the burden of proof to show that its conduct is objectively justified.

3. Platform markets

As a general starting point, the term “platform” refers to two-sided or multi-sided markets which act as intermediaries between different groups of users.[56] The German competition law rules which were introduced into the GWB in 2017 in order to better address digital markets use the terms “multi-sided markets” and “networks” in § 18 IIa and IIIa GWB and not the term “platform”. However, according to the legislative reasons the terms “platform” and “multi-sided markets” are used as synonyms.[57]

The legislative reasons also point out that the term “platform markets” is not used in a uniform sense in the economic literature.[58] The Bundeskartellamt discusses different economic concepts of “platforms” in a working paper.[59] The Bundeskartellamt when defining the notion of a “platform” takes as a starting point that such a definition serves the objective to delineate certain constellations which pose similar analytical problems in competition law, in particular with regard to determining market power, delineating markets and devising theories of harm.[60] Therefore, the Bundeskartellamt combines several elements of different economic approaches in its definitions of platforms.[61] In its decision Google VG Media the Bundeskartellamt defines a platform for competition law purposes:[62] It considers it a defining element that a platform acts as an intermediary and enables a direct interaction between different user groups between which indirect network effects exist. Further, it is regarded as a characteristic that the platform is no longer involved in the interaction between these groups.

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56 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 8.

57 Legislative reasons, Official Gazette 18/10207, p. 47.

58 Legislative reasons, Official Gazette 18/10207, p. 47.

59 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 8 ff.

60 Bundeskartellamt, Decision of 8 September – B6-126/14, para. 121, footnote 137; Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 14.

61 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 8 ff.

62 Bundeskartellamt, Decision of 8 September – B6-126/14, para. 121. See also Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 14.

Indirect network effects occur if the utility of one user group is affected by the number of users in a different group who are also using the platform.[63] In the Bundeskartellamt's approach the term "indirect network effects" is used in a broad sense.[64] It encompasses unilateral network effects and also negative networks effects. For example, reading an additional advertisement can be of little or even of negative additional utility for the reader[65], for example in terms of nuisance or time loss. As an example, where indirect network effects might be negative for one group the Bundeskartellamt has considered the google search engine as a platform with advertisers on one side of the market and internet users on a different side.[66]

It should be noted that the "interaction" which is enabled between different user groups by a platform does not necessarily need to be a transaction in the sense of a purchase[67] but it rather refers to bringing together the user groups. Whether – as a result of the interaction – there is an additional transaction in the sense of a purchase depends on the type of the platform. For example, a selling platform like amazon brings together potential purchasers and traders which might result into a purchase or not. And a search engine platform enables an interaction of advertisers with internet users who perceive the advertisements. But an actual purchase of the advertised product – in most cases from a third party – is not required for assuming a platform market.

In its case practice the Bundeskartellamt distinguishes between different categories of platforms depending on the purpose of the interaction which the platform enables between different user groups.[68]

One category is formed by matching platforms and transaction platforms. A matching platform seeks to achieve a best possible matchmaking between users who are from different heterogeneous groups. It is not required that this interaction results in an actual transaction like for example a purchase. For instance, the

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63 M. Armstrong, Competition in Two-Sided Markets, 37 RAND Journal of Economics, p. 668.

64 A discussion of different concepts of network effects can be found at Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 9 f.

65 J.-C. Rochet, J. Tirole, Two-sided Markets: a progress report, 37 RAND Journal of Economics, 2006, p. 645, 652.

66 Bundeskartellamt, Decision of 8 September – B6-126/14.

67 J.-C. Rochet, J. Tirole, Two-sided Markets: a progress report, 37 RAND Journal of Economics, 2006, p. 645, 652.

68 An overview of platform categories can be found with Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 19 ff.

Bundeskartellamt has qualified dating platforms as matchmaking platforms.[69] Transaction platforms are a subgroup of matching platforms where the interaction of the users is geared towards completing a purchase transaction. For example, the Bundeskartellamt has qualified real estate portals[70] and comparison portals[71] where contracts could be concluded as transaction platforms. Matching and transaction platforms usually exhibit bidirectional indirect network effects between the different user groups[72] and the existence of the second market side is a requirement for the platform to function.[73]

The second category of platforms in the Bundeskartellamt's case practice is called "attention platforms" or "advertising platforms". On such platforms, offering a service to one group of users does not necessarily require the existence of another market side.[74] For example, offering the service of a search engine or offering the consumption of music or of a video clip would not necessarily require that there exists a second market side in relation to advertising providers whose advertisings are presented to the internet users. Rather, adding the second market side of advertising for financing the other market side is a strategic decision within the business model.[75] On attention platforms the indirect network effects are often only unilateral in character.[76] For example, indirect network effects operate in favor of advertisers who have a higher a willingness to pay if their advertisements are communicated to a higher number of internet users. By contrast, internet users do often not derive a higher utility from a platform because it shows them more advertising. The Bundeskartellamt has qualified a search engine as an attention platform.[77]

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69 BKartA, 22.10.2015, B6-57/15 – *OCPE/EliteMedianet*.

70 BKartA, 25.06.2015, B6-39/15 – *Immonet/Immowelt*.

71 BKartA, 05.08.2015, B8-76/15 – *ProSiebenSat.1/Verivox*.

72 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 20.

73 Bundeskartellamt, Case Report of 5 August 2015 – B8-76/15, p. 2; Bundeskartellamt, Case Report of 25 June 2015, B6-39/15, p. 2.

74 Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 2.

75 Bundeskartellamt, Decision of 8 September 2015 – B6-126/14, paras. 124 ff.; Bundeskartellamt, Case Report of 5 August 2015 – B8-76/15, p. 2; Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 2; Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 80.

76 Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 25.

77 Bundeskartellamt, Decision of 8 September 2015 – B6-126/1.

For the purpose of market definition the Bundeskartellamt has as a rule considered the two market sides of a matching or transaction platform to form a single market[78] while it qualified the sides of an attention platform as two separate relevant markets.[79] However, the market definition and the question whether the two sides of a platform form a single market will be decided on a case by case basis.

4. "Markets" for free services

It is a common feature of digital business models that consumers do not have to make direct monetary payments in return for receiving digital goods or services. In particular in multi-sided platform markets such services are financed by payments of users or businesses on the other market side. Such a pricing scheme can be motivated by the need to build up a large user base on one side of the market in order to generate high network effects. Network effects can be of a different intensity on different market sides. In such a case, to be successful the platform may have to apply a different strategy on the market sides.

For example, search services are seemingly offered for free to consumers. However, search engines like Google collect the data of consumers and garner high profits in the advertising markets.[80] Also, users do not have to pay a direct fee for using a hotel booking platform but hotels have to pay 15% of their revenues from bookings which have been made through the platform.[81] However, economically such fees very often have to be indirectly borne by the consumers. Quite similarly, for consumers using appstore platforms like the Apple App Store or google's playstore is free and also most apps are for free. However, app businesses who want to offer their app on the appstore have to pay a fixed fee and, in addition, a 30% fee for certain revenues which they make with their app.[82]

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78 Bundeskartellamt, Case Report of 5 August 2015 – B8-76/15, p. 3; Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 3.

79 Bundeskartellamt, Decision of 8 September 2015 – B6-126/14, paras. 124 ff.

80 For example, google enjoys a share of 90% of the 7.3 billion pound search advertising market in the UK. See Competition and Market Authority UK, Online platforms and digital advertising, market study final report, 2020, para. 18.

81 Booking.com applies a standard rate of 15%. See for example the Swedish case against booking.com: Svea Hovratt, 9 May 2019, PMT 7779-18 – booking. An English translation of the decision is reprinted at IIC 2019, p. 1167, 1172. See also M.-O. Mackenrodt, Price and condition parity clauses in contracts between hotel booking platforms and hotels, IIC 2019, pp. 1131, 1132.

82 The 30% fee is at issue in the investigations of the European Commission against Apple, see European Commission, Press Release IP/20/1073 of 16 June 2020, p. 1.

The fact that services are seemingly offered for free to consumers is no obstacle to defining a relevant market with regard to these services when applying competition law. In Germany, this is explicitly spelled out in § 18 IIa GWB. This provision which was introduced into the law in 2017 does not only apply to multi-sided digital markets but also to traditional markets.[83] However, this does not mean that every non-paid relationship constitutes a market. The absence of a payment according to the wording of the provision simply does not form an impediment to a competition law analysis. Assuming the existence of a market requires that the free service is offered for economic reasons or is part of a strategy that is at least indirectly profit-oriented.[84] For example, the provision of a private scholarship may not qualify as a market relationship.[85]

Prior to the introduction of § 18 IIa GWB the courts had occasionally refused to recognize the market character of a relationship which is free of charge.[86] The clarification in § 18 IIa GWB simplifies the application of the law, especially in the digital economy. For example, the assumption of a market does not depend on the discussion as to whether, in the absence of a monetary consideration, another form of consideration exists, for example in the form of the provision of data or the provision of attention to advertising.

The Bundeskartellamt had – even before the introduction of the legal provision – already assumed that a relationship which is free of charge could qualify as a market relationship, for example in the case of a merger between two dating platforms[87] and in a case of a merger between two real estate platforms.[88] In the dating platform case, the Bundeskartellamt has even expressly included the use of a dating platform which was financed by advertising and which was therefore free of charge for users into the same relevant product market as the use of a dating agency service for which users had to pay a fee.[89]

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83 Legislative reasons, Official Gazette 18/10207, p. 48. See also R. Podszun, Unentgeltliche Leistungen, In: Kersting, Podszun (eds), Die 9. GWB--Novelle, C.H. Beck 2017, pp. 1-16, paras. 29 ff.

84 Legislative reasons, Official Gazette 18/10207, p. 48.

85 Legislative reasons, Official Gazette 18/10207, p. 48.

86 Higher Regional Court Düsseldorf, Judgement of 9 January 2015 – VI-Kart 1/14 (V), para. 43.

87 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, para. 79.

88 Bundeskartellamt, Case Report of 25 June 2015 – B6-39/15, p. 3.

89 Bundeskartellamt, Decision of 22 October 2015 – B6-57/15, paras. 71, 81 ff.

The Bundeskartellamt has applied the new § 18 IIa GWB to a platform which provided services with regard to event tickets. The relationship between the ticketing platform and advance booking agencies was qualified as a market even though the service was free of charge.[90] Also in the facebook case the social network services were considered to be a market even though there was no monetary payment by private users.[91] The Bundeskartellamt pointed to the close connection of the services provided to private users with the activities of the platform on the market side of advertising and noted that the overarching business purpose of the platform activities is the same irrespective of the market side towards which a service is directed.[92] In any case the Bundeskartellamt argued, that a relationship of exchange with private users could be found because facebook's general terms and conditions constitute a contract with private users and private users are giving away their data.[93]

5. Online advertising

In 2018 the Bundeskartellamt[94] opened a sector inquiry on online advertising which is not yet completed.[95] Online advertising is regarded as a complex, highly technology driven sector with substantial economic significance. Some market actors claim that a few powerful online advertisers have established "walled gardens" which restrain competition. The sector inquiry in particular seeks to create a better understanding of the role of the different technical services like data collection and processing, audience targeting, benchmarking and auctioning of advertising spots.[96]

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90 Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, para. 144; Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 123.

91 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 239 ff; BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 27 ff. – *facebook* (interim decision).

92 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, para. 241.

93 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, para. 244.

94 Bundeskartellamt, Press Release of 1 February 2018.

95 The CMA of the UK has meanwhile completed a similar sector inquiry, see Competition and Market Authority UK, Online platforms and digital advertising, market study final report, 2020.

96 Current issues in online advertising were sketched out by the Bundeskartellamt in a short working paper, see Bundeskartellamt, online advertising, paper series, 2018, p. 7 f.

6. General terms and conditions with regard to data collection

In its original decision dealing with the data processing policy of facebook the Bundeskartellamt's[97] main line of reasoning was focused on an abuse by exploitation through an imposition of invalid general terms and conditions on private users.[98] This line of argument was largely rooted in a finding that facebook used invalid general terms and conditions and violated the GDPR.

The German facebook decision was based on the German prohibition of abuse in § 19 I GWB. For an abuse by exclusion it is quite uncontested that under German law a quite lenient causation requirement applies.[99] By contrast, for the alternative of an exploitative abuse through the imposition of unfair or invalid terms and conditions the causation requirement is contested under German[100] law.[101] The Bundeskartellamt held that only a quite lenient, so called normative causation is required.[102] This means that the dominant position has contributed to an amplification of the negative competitive effects of the conduct.[103] By contrast, the OLG Düsseldorf in the interim proceedings demanded that there needs to be a strict causation between the dominant position and the conduct.[104] This means that the imposition of the terms and conditions was possible only because of the dominance.[105] The OLG Düsseldorf argued that there was no such strict causation because users would accept general terms and conditions without reading anyway. Therefore the unilateral imposition of general terms and conditions would not be an expression of the market power.[106]

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97 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 169 ff.

98 See already above 1.

99 BGH, Judgment of 23 June 2020 – KVR 69/19, para. 78 – *facebook* (interim decision).

100 For a discussion of the causation requirement in Art. 102 TFEU see A. Fuchs, In: U. Immenga and E.-J. Mestmäcker (ed), EU Wettbewerbsrecht, C.H.Beck 2019, Art. 102 TFEU, paras. 135 ff.

101 See for example M.-O. Mackenrodt and Klaus Wiedemann, Zur kartellrechtlichen Bewertung der Datenverarbeitung durch Facebook und ihrer normativen Kohärenz mit dem Datenschutzrecht und dem Datenschuldrecht, ZUM 2021, pp. 89, 94.

102 Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, para. 873.

103 A. Fuchs, In: U. Immenga and E.-J. Mestmäcker (ed), GWB, C.H.Beck 2019, § 19 GWB, para. 215.

104 Higher Regional Court Düsseldorf, Judgement of 26 August 2019 – VI-Kart 1/19 (V), Beck-RS 2019, 188837, paras. 64 ff. – facebook (interim decision).

105 A. Fuchs, In: U. Immenga and E.-J. Mestmäcker (ed), GWB, C.H.Beck 2019, § 19 GWB, para. 215.

106 Higher Regional Court Düsseldorf, Judgement of 26 August 2019 – VI-Kart 1/19 (V), Beck-RS 2019, 188837, para. 77 – facebook (interim decision).

The OLG Düsseldorf[107] criticized several other dogmatic aspects of the Bundeskartellamt's reasoning but the BGH[108] held that there are no serious doubts as to the validity of the Bundeskartellamt's decision. However, as discussed in question 1 the BGH has chosen a line of reasoning in which a possible illegality of the general terms and conditions or an actual violation of the GDPR are no more a necessary condition for finding an abuse.[109] Rather, the BGH has additionally focused on an abuse by exclusion and on treating data as a parameter of competition. In any case, the BGH rejected the OLG Düsseldorf's quite strict view regarding the causation requirement in this case because the BGH found that there is a combination of an abuse by exploitation and an abuse of exclusion.[110]

In addition, the new wording of § 19 GWB after the 10th amendment to the GWB also suggests that quite a low degree of causation is sufficient for finding an abuse.[111] The role of data as a factor in determining market power is explicitly mentioned in § 18 IIIa no. 4 GWB (see question 2) and this argument has also been used in competition law decisions.[112]

7. Most favored nation clauses and cooperation between content providers

Most favored nation clauses are also referred to as best price clauses or parity clauses. They can take many different shapes depending on their drafting. In digital markets, competition authorities have scrutinized most favored nation clauses which state that the seller is not allowed to sell its goods in competing distribution channels at a lower retail price or at better conditions.[113] Different forms of such parity clauses have been dealt with more widely on a member state level and are discussed in question 11.

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[107] Higher Regional Court Düsseldorf, Judgement of 26 August 2019 – VI-Kart 1/19 (V), Beck-RS 2019, 188837 – facebook (interim decision).

[108] BGH, Judgment of 23 June 2020 – KVR 69/19 – *facebook* (interim decision).

[109] BGH, Judgment of 23 June 2020 – KVR 69/19, para. 99 – *facebook* (interim decision).

[110] BGH, Judgment of 23 June 2020 – KVR 69/19, para. 77 – *facebook* (interim decision).

[111] Federal Government, legislative reasons, GWB-Digitalisierungsgesetz, Official Gazette 19/23492, 19 October 2020, p. 11.

[112] See for example BGH, Judgment of 23 June 2020 – KVR 69/19, para. 43 – *facebook* (interim decision).

[113] See for example T. Hoeren, Germany, In: Kilpatrick et al. (eds), Antitrust analysis of online sales platforms & copyright limitations and exceptions, Springer C.H. Beck 2017, p. 157-185; M.-O. Mackenrodt, Price and conditions parity clauses in contract between Hotel booking platforms and hotels, IIC 50 (2019), p. 1131; F. Bostoen, Most favoured nation clauses, CoRe 2017, p. 223, 224.

As one of the few decisions on the European level a commitment decision of the European Commission deals with parity clauses of amazon with regard to e-books.[114] These parity clauses related not only to price but also to other aspects through which competing distributors could differentiate themselves from amazon, for example by developing innovative alternative distribution models. The Commission pointed to the special responsibility of a dominant undertaking[115] and uttered concerns that these parity clauses would impede the incentives for innovations or incentives to support innovations with regard to e-book distribution models which might be more appealing to consumers, like for instance variations of different book formats, bundles with print books, establishing book clubs etc.[116] Amazon's commitments[117] included not to enforce parity clauses which required publishers to offer amazon similar non-price and price conditions as those offered to amazon's competitors. Also, amazon would not be allowed to use clauses which require publishers to inform amazon about certain terms and conditions of amazon's competitors, in particular regarding new business models, promotions, prices etc.

8. Cooperation between network operators

Telekom Deutschland and EWE are the two leading internet network companies in certain regions in northern Germany where they wanted to cooperate regarding the rollout of the fast fiber optic internet network. They concluded a cooperation agreement which was reviewed by the Bundeskartellamt and they established a joint venture which required a parallel merger review by the Bundeskartellamt. After negotiations with the parties the Bundeskartellamt issued a consent decree[118] which contains binding obligations for the parties of the cooperation agreement and the Bundeskartellamt subsequently also approved the merger.[119]

The Bundeskartellamt had several concerns about possible negative effects on competition through the cooperation between the network operators.[120] The

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114 European Commission, Decision of 4 May 2017 – AT.40153.

115 European Commission, Decision of 4 May 2017 – AT.40153, para 70.

116 European Commission, Decision of 4 May 2017 – AT.40153, para 79.

117 European Commission, Press Release IP/17/1223 of 4 May 2017.

118 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18.

119 Bundeskartellamt, Decision of 30 December 2019 – B7-21/18.

120 See Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, paras. 32 ff.

commitments which were declared binding in December 2019 were meant to mitigate or eliminate these concerns. At the same time, the commitments aim at accelerating the cost intensive roll-out of high speed internet.

The commitments concerning the rollout contain an obligation to connect 300.000 households or company locations to the fast internet until the end of 2023.[121] As a safeguard, a non-compliance with this obligation would lead to the termination of the joint venture.[122] Also, a certain percentage of the rollout has to be accomplished respectively in rural areas and in areas with a low coverage of cable infrastructure.[123] This commitment addressed the concern that the cooperation agreement would create an incentive to shift the rollout efforts away from rural areas to urban areas which already have a high level of infrastructure.[124] Because of the cooperation agreement the two leading companies would not need to fear competition by the each other anymore within the area covered by the cooperation. Therefore, they might be incentivized to direct their rollout efforts away from rural areas and towards more lucrative urban areas where they have to fear that other companies could become market leaders. Therefore, the cooperation agreement would dampen the rollout efforts of the cooperating parties within the area which is affected by the cooperation.[125] By establishing certain roll-out objectives the commitment seeks to mitigate such negative side-effects of the cooperation agreement.

Further, the parties to the cooperation agreement committed to participate in future public tenders independently and that their joint venture would not participate in these public tenders.[126] This commitment however was criticized because the cooperating enterprises might still pursue a less aggressive bidding strategy even if they are not bidding jointly.[127]

Another category of commitments relates to providing access:[128] The cooperating parties are obliged to grant non-discriminatory access to competitors. This includes that third party telecommunication enterprises can buy services from the joint venture

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121 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, paras. 110 ff.

122 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, paras. 121 f.

123 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, para. 131.

124 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, para. 132.

125 Monopolies Commission, Twenty-third Biennial Report, 2020, para. 460.

126 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, para. 132.

127 Monopolies Commission, Twenty-third Biennial Report, 2020, para. 464.

128 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, paras. 136 ff.

on the same conditions like the cooperating parties.[129] Accordingly, this access regime seeks to achieve an “equivalence of inputs” which is stricter than the “equivalence of outputs” principle.[130] Together with certain marketing objectives the access commitment aims at promoting competition for end customers as third parties would be enabled to offer the same service to end consumers like the cooperating parties.

In sum, cooperation agreements regarding the rollout of an advanced technology infrastructure can accelerate the dissemination of a new technology. However, there is a danger of negative effects on competition in particular when dominant companies are involved. Therefore, such cooperation agreements should be limited to regions where absent a cooperation a rollout would be impossible[131] and carefully drafted commitments with effective sanctioning mechanisms should serve as a safeguard.

9. Comparison portals and consumer protection

Comparison portals can provide guidance to users and help to inform the decisions of consumers. If users are put in a better position to take well informed decisions competition and consumer protection are strengthened. However, users of comparison portals rely on the neutrality of the results on which they base their decision. In 2019 the BKartA has published a sector inquiry on comparison portals[132] which are active in the sectors of energy, telecommunications, loans, insurances, hotels and flights. The inquiry analyzes how consumer interests are accounted for by the comparison portals, in particular with regard to the issues of cooperation between comparison portals, market coverage of the portals, preselection of offers, ranking of results and consumer reviews.

In all sectors the inquiry found a frequent cooperation between different comparison portals, for example by using the same databases, while this was often not made transparent to consumers.[133] As a consequence, users of multiple comparison portals could erroneously interpret similar results by different portals as an independent

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129 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, para. 137.

130 Monopolies Commission, Twenty-third Biennial Report, 2020, para. 463.

131 Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18, para. 5.

132 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019.

133 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 55.

confirmation of the results which they have received from a seemingly competing comparison portal.

Regarding market coverage of the comparison the inquiry showed that in some sectors the comparison portals reflected only a small part of the markets as low as 25% and that some large suppliers were not included into the comparison. The reasons for a low market coverage include in particular that some portals excluded suppliers from the comparison which were not willing to pay a provision fee to the portals or because some portals required exclusivity agreements from suppliers to be included.[134] In many cases the consumers were not sufficiently informed about the market coverage of the comparison.

With respect to the preselection of what offers would be displayed in the list of results the criteria were often not made sufficiently transparent to consumers.[135] Many portals listed offers in a “position 0” which is displayed prior to the ranking and from this position 0 about 25% of users selected an offer.[136] In some sectors like energy and telecommunication the inclusion in this section was only based on a minimum qualitative assessment and depended on whether the company had paid a fee to the portal.[137] Consumers would in many cases not be informed if a contractual arrangement was the reason for including an offer into the position 0.[138]

Regarding the ranking, in particular in the hotel sector the ranking was influenced by the provision which hotels had paid to the comparison portal.[139] In some instances the ranking could be perceived as recommendations to users and the criteria for the ranking were not sufficiently made transparent.[140] User ratings in the respective branches were – with some exceptions in the hotel sector – only allowed by users who had actually made a transaction through the portal.[141]

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134 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 65.

135 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 3, 70.

136 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 78.

137 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 75.

138 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 78.

139 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 87 ff, 97.

140 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 98.

141 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019, p. 116. User ratings were the subject of a separate sector inquiry, see Bundeskartellamt, Sektoruntersuchung Nutzerbewertungen, vorläufige Ergebnisse, 2020.

The German Bundeskartellamt traditionally did not dispose of competences in the field of consumer protection. In the course of the ninth amendment of the GWB in 2017 the preexisting competence of the Bundeskartellamt to conduct sector inquiries was extended to the field of consumer protection[142] Applying the new provision the Bundeskartellamt has carried out or is carrying out several sector inquiries, in particular with regard to user ratings,[143] Smart TV,[144] comparison portals[145] and messenger servies. But the introduction of further enforcement competences in the field of consumer protection for the Bundeskartellamt was rejected by the lawmaker. Several consumer protection issues addressed in the sector inquiry on comparison portals are covered by German unfair competition law (UWG).[146] However, the German UWG relies on private enforcement which might not be sufficiently effective in some fields and might need to be cautiously complemented by public enforcement by the Bundeskartellamt.[147]

10. Abuse proceedings below the threshold of dominance

The Bundeskartellamt and the German courts can according to § 20 GWB apply the German provisions on the prohibition of unilateral conduct (§ 19 GWB) already below the threshold of market power, namely in cases of relative market power in a vertical relationship (§ 20 I, II GWB) or in cases of superior market power in a horizontal relationship (§ 20 III GWB). This national regulation is stricter than Art. 102 TFEU because the threshold for intervention is lower. But according to Art. 3 1. sentence 2 of regulation 1/2003[148] Member States are free to adopt and apply stricter national laws in their territory with regard to unilateral conduct.

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142 See § 32e V GWB.

143 Bundeskartellamt, Sektoruntersuchung Nutzerbewertungen, Press Release of 23 May 2019; Bundeskartellamt, Sektoruntersuchung Nutzerbewertungen, vorläufige Ergebnisse, Press Release of 18 May 2020.

144 Bundeskartellamt, Sektoruntersuchung Smart TVs, 2020.

145 Bundeskartellamt, Sektoruntersuchung Vergleichsportale, 2019.

146 See for exampla C. Alexander, Aktuelle lauterkeitsrechtliche Problemfelder von Online-Vergleichsportalen, WuW 2018, p. 765; F. Henning-Bodewig, Vergleichsportale, UWG und Befugnisse des Bundeskartellamts, WRP 2019, p. 537.

147 For a general discussion of a possible public enforcement regime with competences for the Bundeskartellamt see Podszun/Busche/Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts?

148 Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1 p. 1.

§ 20 I GWB in its current wording only applies in favor of small and medium enterprises. They need to be suppliers or purchasers of a certain type of goods or services. Relative market power requires that these companies depend on another undertaking in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist.[149] In such a scenario the company with relative market power is prohibited from unfairly impeding another undertaking or treating it differently without objective justification.

In many German cases related to the digital sector § 20 I GWB has been applied with regard to the relationship between platforms and independent companies who offer their products or services on the platform. For example, wide parity clauses on the hotel booking platform HRS have been found to be illegal according to Art. 101 TFEU but also according to § 20 I GWB.[150]

§ 20 III GWB deals with superior market power of an undertaking in relation to small and medium-sized enterprises who are its competitors. Superior market power refers to the relation between an undertaking and a competing small and medium enterprise and requires an imbalance of power which provides the undertaking with a leeway for unilateral actions which is not sufficiently controlled by competition.[151] The threshold for assuming superior market power is lower than for establishing market power in the sense of Art. 102 TFEU.[152] An undertaking with superior market power is prohibited from unfairly impeding such competitors.

The 10th amendment of the GWBhas adapted § 20 GWB to the requirements of the digital economy and introduced several changes to § 20 GWB which are of particular importance for digital markets. The amendment of § 20 I has removed the previous limitation of this provision to small and medium-sized enterprises (SMEs) and extends its applicability to all undertakings and associations irrespective of their size. In addition, the provision is according to § 20 I sentence 2 GWB explicitly applicable to multi-sided platforms on whose intermediation services companies are dependent as

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[149] Examples for such a dependency can for example be found with: U. Loewenheim, In: U. Loewenheim, C. Kersting, H. J. Meyer-Lindemann (ed), Kartellrecht, C.H.Beck 2020, § 20, paras. 20 ff.

[150] Higher Regional Court Düsseldorf, Judgement of 9 January 2015 – VI-Kart 1/14 (V), para. 193; Bundeskartellamt, Decision of 20 December 2013 – B9-66/10, paras. 235 ff.

[151] U. Loewenheim, In: U. Loewenheim, C. Kersting, H. J. Meyer-Lindemann (ed), Kartellrecht, C.H.Beck 2020, § 20, para. 57.

[152] U. Loewenheim, In: U. Loewenheim, C. Kersting, H. J. Meyer-Lindemann (ed), Kartellrecht, C.H.Beck 2020, § 20, para. 57.

regards their access to sales and procurement markets. This dependency has to be of such a character that sufficient and reasonable alternative possibilities do not exist. Further, the new § 20 Ia GWB clarifies that relative market power can also be based on the fact that one company is dependent on access to data controlled by another company. § 20 Ia GWB also spells out that a refusal of access to data for an adequate fee may constitute an unfair impediment even if there has not yet been a trade for such data. These amendments to § 20 GWB reflect the concept of intermediation power and could apply even in favor of a bigger company which is selling its goods on a superdominant trading platform.

For horizontal relationships with superior market power the new § 20 IIIa GWB remains – just like the prior version of § 20 III GWB – applicable only in favor of small and medium competitors. However, it defines a special scenario of abusive conduct on multi-sided platform markets or networks. On such markets an undertaking with superior market power is prohibited from impeding the independent attainment of distinctive positive network effects by competitors if this creates a serious risk that competition on the merits is restricted to a not inconsiderable extent. In sum, the amendments of § 20 GWB is intended to gain high significance for securing competition in digital markets.

11. Parity clauses

Best price clauses or parity clauses which are often used by digital platforms in different sectors forbid sellers to offer their goods or services at lower prices or at better conditions in other distribution channels than the platform.[153] These distribution channels can for example be the seller's own website, competing platforms or even off-line distribution or advertising channels. Depending on the drafting of the contract best price clauses can take different forms which may influence their legal assessment.

While only few cases have addressed parity clauses on the EU level (see question 7) quite many cases have been opened on the Member States level and parity clauses

[153] See for example T. Hoeren, Germany, In: Kilpatrick et al. (eds), Antitrust analysis of online sales platforms & copyright limitations and exceptions, Springer C.H. Beck 2017, p. 157-185; M.-O. Mackenrodt, Price and conditions parity clauses in contract between Hotel booking platforms and hotels, IIC 50 (2019), p. 1131.

have partly received a divergent treatment in different Member States.[154] In the digital sector the Bundeskartellamt and the courts in Germany have repeatedly classified agreements containing various forms of parity clauses as restrictions of competition by effect and a justification has in most cases been denied.

In 2013 the Bundeskartellamt had opened proceedings against the amazon sales platform. The parity clauses used by amazon essentially prohibited independent third-party traders from offering the goods which they offered via the amazon platform at lower prices on other internet platforms or in their own online shops. The Bundeskartellamt considered these price parity clauses to be restrictions of competition by object in a horizontal trade cooperation which could not be justified by efficiencies.[155] After amazon had committed to abstain from using such parity clauses, the Bundeskartellamt issued a commitment decision and discontinued the proceedings.

The Bundeskartellamt had also objected to the use of parity clauses on a comparison portal for electricity and gas supply contracts (verivox) where consumers could also conclude contracts with suppliers. The Bundeskartellamt pointed to positive effects of comparison portals on competition but also uttered concerns that parity clauses would restrict the freedom of suppliers to set prices and hinder competition between platforms.[156] After verivox had abandoned the use of these best price clauses the Bundeskartellamt discontinued the proceedings.

In 2018 the German Bundeskartellamt[157] and the Austrian Bundeswettbewerbsbehörde[158] initiated abuse proceedings with regard to the general terms and conditions which amazon used in its contracts with third party traders. The competition authorities had concerns that amazon was a gatekeeper who controlled the access of third party traders to their customers and that amazon was abusing its position by forcing disadvantageous contract clauses upon third party traders. After negotiations with regard to a wide range of clauses which may have constituted an

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154 For a comparison of the Swedish and the German hotel booking case see M.-O. Mackenrodt, Price and conditions parity clauses in contract between Hotel booking platforms and hotels, IIC 50 (2019), p. 1131.

155 Bundeskartellamt, Case Report of 9 December 2013 – B6-46/12.

156 Bundeskartellamt, Press Release of 3 June 2015.

157 Bundeskartellamt, Case Report of 17 July 2019 – B2-88/18; Bundeskartellamt, Press Release of 29 November 2018 – B2-88/18; Bundeskartellamt, Press Release of 17 July 2019 – B2-88/18.

158 Bundeswettbewerbsbehörde, Case Report amazon.de Marktplatz, 2019.

abuse of market power amazon changed its clauses and the competition authorities ended the investigation. In particular, amazon dropped a quality parity clause which required traders to use presentation material for their products which is of the highest quality which the particular trader is using in any other of its distribution channels.

Formal decisions on best price clauses with an extensive discussion of the relevant substantive issues have been taken by the Bundeskartellamt and the courts with regard to hotel booking platforms. In the German cases regarding hotel booking platforms, clauses have been referred to as “narrow” best price[159] clauses if they prohibited the hotel owner from offering his rooms at lower prices on his own website but allowed him to offer lower prices on competing digital platforms. By contrast, the “wide” best price clauses, which were for example at issue in the HRS-case in addition prohibited offering hotel rooms at lower prices on competing platforms. It should however be noted that – depending on the drafting of the contract – there are not only two categories but a wide range of best price or parity clauses. For example, in the Czech case against the hotel booking platform booking.com the “wide” best price clauses at issue were even wider than the “wide” best price clauses which were prohibited by the authorities and the courts in Germany. In the Czech case hotel owners were prohibited from offering better prices and conditions not only on their website and in other online distribution channels but also in offline distribution channels.[160] Such an extremely “wide” best price clause which also refers to offline scenarios contains an even stronger limitation of the economic freedom of hotel owners.

Wide parity clauses of the hotel booking platform HRS were found to be in contradiction to Art. 101 TFEU by the Bundeskartellamt in 2013.[161] This decision was upheld by the OLG Düsseldorf [162] and is final. It was found that wide parity restrict the economic freedom of action of hotel owners and have the effect of restraining competition on the market for booking platforms and on the market for hotel rooms. The vertical block exemption regulation 330/2010[163] was not applicable because in this

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[159] The cases also dealt with parity clauses referring to other attributes of the offer than price like quality and contractual conditions.

[160] UOHS (Czech competition authority), Press release of 11 November 2019.

[161] Bundeskartellamt, Decision of 20 December 2013 – B9-66/10.

[162] Higher Regional Court Düsseldorf, Judgement of 9 January 2015 – VI-Kart 1/14 (V).

[163] Vertical Block Exemption Regulation 330/2010 of 20 April 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 2010 L 102 p. 1.

case the 30% market share threshold was exceeded. However, the Bundeskartellamt and the OLG Düsseldorf pointed to several contentious issues with regard to the application of the vertical block exemption regulation to parity clauses.[164] An individual exemption according to Art. 101 (3) TFEU on the grounds of alleged efficiencies was denied.[165]

Wide parity clauses have also been at issue in a private competition law case which was decided by the OLG Düsseldorf (expedia).[166] In this case the defendant, the hotel booking platform expedia, held a market share of below 30%. The OLG Düsseldorf upheld the wide parity clauses because due to the low market share of expedia at any rate the vertical block exemption regulation would apply.[167] It was therefore left open in this case whether there was a restriction of competition or an individual justification.

Narrow best price clauses of the hotel booking platform booking.com were declared to be invalid by the Bundeskartellamt in 2015.[168] The Bundeskartellamt argued that narrow best price clauses have the effect of restraining competition in the sense of Art. 101 (1) TFEU and are not justified by efficiencies according to article 101 (3) TFEU. On appeal the OLG Düsseldorf initially upheld this decision in an interim decision.[169] However, in the main proceedings in June 2019 the OLG Düsseldorf reversed the decision of the Bundeskartellamt and held that the narrow best price clauses were valid.[170] In this decision the OLG Düsseldorf - quite as a surprise – departed from the dogmatic approach which it had taken in its interim decision and which had been applied by the Bundeskartellamt. The OLG Düsseldorf argued that an unwritten exemption to Art. 101 (1) TFEU would apply because narrow best price clauses would constitute a new area of application for the ancillary restraints doctrine.[171] The narrow best price clauses would – according to the OLG Düsseldorf – be necessary to avoid

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164 Bundeskartellamt, Decision of 20 December 2013 – B9-66/10, paras. 181 ff.; Higher Regional Court Düsseldorf, Judgement of 9 January 2015 – VI-Kart 1/14 (V), paras. 164 ff.

165 Regional Court Düsseldorf, Judgement of 9 January 2015 – VI-Kart 1/14 (V), para. 172; Bundeskartellamt, Decision of 20 December 2013 – B9-66/10, para. 195.

166 Higher Regional Court Düsseldorf, Judgement of 4 December 2017 – VI-U (Kart) 5/17. This decision upheld the first instance decision of the District Court Köln, Judgement of 16 February – 88 O (Kart) 17/16.

167 Higher Regional Court Düsseldorf, Judgement of 4 December 2017 – VI-U (Kart) 5/17, para. 54.

168 Bundeskartellamt, Decision of 22 December 2015 – B9-121/13.

169 Higher Regional Court Düsseldorf, Judgement of 4 May 2016 – VI-Kart 1/16 (V).

170 Higher Regional Court Düsseldorf, Judgement of 4 June 2019, VI-Kart 2/16 (V).

171 Higher Regional Court Düsseldorf, Judgement of 4 June 2019, VI-Kart 2/16 (V), p. 9.

free riding and to guarantee a fair and balanced exchange of services between the hotel platform and the hotel.[172] This decision is currently on appeal with the BGH.

Unlike Germany, several Member States have introduced special legislation which deals with best price clauses.[173] On the European level, Art. 10 (1) of the platform to business regulation (P2B) 2019/1150[174] addresses best prices clauses. It requires that an intermediation platform which uses best price clauses in its terms and conditions spells out the main economic, commercial or legal considerations for these restrictions. The reasons need to be easily available to the public. The P2B regulation applies since 12 July 2020 in the Member States. However, a mere transparency approach may not be sufficient to address the potential harm from best price clauses. In any case Art. 10 (2) P2B regulation explicitly states that it does not exclude other legal limitations on the use of best price clauses which may derive from other legal acts of the European Union or from laws of the Member States.

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[172] Higher Regional Court Düsseldorf, Judgement of 4 June 2019, VI-Kart 2/16 (V), pp. 25 ff.

[173] For example, Austria has included a prohibition of best price clauses in the hotel sector into the black list of illegal clauses of its unfair competition law, see No 32 in the blacklist of öUWG.

[174] Regulation 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186 p. 57.