Monopolkommission

Competition policy: The challenge of digital markets

Special Report by the Monopolies Commission pursuant to Section 44(1)(4) of the Act Against Restraints on Competition

Summary

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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 occurance in dynamic environments, the relevant public institutions, notably the competition authorities, must act quickly if required in specific cases (paras 51‑53, 54‑61).

Data and their relevancy for competition

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).

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 defense 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 defense. 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 differrent 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 were 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 on-going 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 appears 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 restrict 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 Wettbewerbs-beschränkungen – 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 (exploitative 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 centered 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).