

Competition 2016

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(*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)

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Chapter V

Digital markets: The Sharing Economy and FinTechs*

1 Introduction

1174. The digital markets continue to be a focal area of competition policy. Within the framework of the Europe 2020 Strategy adopted by the European Council, the European Commission has put forward a Digital Agenda which among other things is intended to promote the development of a digital single market.¹ The German Federal Ministry for Economic Affairs and Energy has presented a Digital Strategy 2025 as a basis for advancing digitalisation in Germany.²

1175. The Monopolies Commission has for its part repeatedly addressed the issue of competition in the field of digital services.³ Its Special Report 68, which received particular attention, examined, in particular, questions of competition arising in the context of platform services.⁴ The recommendations of this Special Report were incorporated into parliamentary work and into the Digital Strategy 2025 of the Federal Ministry for Economic Affairs. The recommendations on competition rules are to be implemented in the course of the upcoming Ninth Amendment to the Act Against Restraints on Competition (ARC).⁵ In following up Special Report 68, Germany's competition agency, the Bundeskartellamt (BKartA), subjected certain of the aspects studied by the Monopolies Commission to further study for purposes of official case practice.⁶ Also in the wake of the Report, in proceedings against Facebook the BKartA is investigating a possible abuse of market dominance by breaches of data-protection law.⁷ And finally, the British House of Lords produced a report on online platforms and the Digital Single Market, in the preparation of which the Monopolies Commission was formally heard.⁸

1176. In the present Biennial Report the Monopolies Commission expands its competition-policy treatment of digital markets by investigating questions of the collaborative use of economic goods ("sharing economy") (Part 2). In complement to the special chapter, Competition in the Financial Markets, of the Twentieth Biennial Report, it also comments on the phenomenon of digitalisation in the financial markets (Part 3). In this context as well, it examines business models found in the sharing economy (so-called crowd finance).

2 The Sharing Economy

1177. The increase of digitalisation is influencing more and more areas of economic life. An important trend in this context is the development of the so-called sharing economy, which is known alternatively and depending on one's focus as

* The Monopolies Commission would like to thank Ms. Allison Felmy for translating the original German text into English.

¹ On this see European Commission, <https://ec.europa.eu/digital-single-market/>, accessed on 4 July 2016.

² BMWi, Digitale Strategie 2025, <https://www.bmw.de/BMWi/Redaktion/PDF/Publikationen/digitale-strategie-2025,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>, accessed on 4 July 2016.

³ See especially Monopolies Commission, Biennial Report XX, A competitive order for the financial markets, Baden-Baden 2014, paras. 1 et seq. (on platform services and the use of data); Biennial Report XVI, More competition in the services sector as well, Baden-Baden 2006, paras. 838 et seq. (on digital broadcasting); Biennial Report XIV, Network competition through regulation, Baden-Baden 2002, 331 (Internet as a competition-policy challenge); Biennial Report XIII, Competition policy in network structures, Baden-Baden 2000, paras. 71 et seq. (competition-policy problems of the Internet), and the Special Reports on telecommunications.

⁴ Monopolies Commission, Special Report 68, Competition policy: The challenge of digital markets, Baden-Baden 2015.

⁵ On the Amendment to the Act Against Restraints of Competition see Chapter I, paras. 1 et seq. in this Report.

⁶ See BKartA, Arbeitspapier – Marktmacht von Plattformen und Netzwerken, 9 June 2016; Autorité de la concurrence/Bundeskartellamt, Competition Law and Data, Joint Paper of 10 May 2016.

⁷ BKartA, Press release of 1 March 2016; on the previous topic see Monopolies Commission, Special Report 68, supra (note 4), paras. 514 et seq.

⁸ House of Lords, Select Committee on European Union, Online Platforms and the Digital Single Market, 10th Report of Session 2015–16, <http://www.parliament.uk/online-platforms>, accessed on 4 July 2016.

the collaborative economy, peer-to-peer economy or demand economy, among other things.⁹ There is as yet no uniform definition of the sharing economy, though its root concept is often summarised by the slogan “sharing, not owning”. Accordingly, it is not ownership of, but access to goods that is in the foreground.

1178. Different authors attribute very different business models to the sharing economy, and these can be differentiated among other things by the types of users involved, whether the offer is for pay or for free or the form of pricing. The focus of the public discussion lies predominantly on commercial peer-to-peer (P2P) services. These services are digital intermediary platforms on which private persons can offer or obtain private goods and services for short-term temporary use for a fee. From an economic perspective, in these cases no goods or services are actually shared in the literal meaning of the word, but temporary rights of use for the often sequential use are traded and granted.¹⁰ Many of the business models assignable to the sharing economy thus only differ slightly from the traditional renting and letting of goods, or from the classic situation of friends helping friends. What is new is that through digital sourcing platforms the interaction between private parties who are interested in a joint use of goods or services is greatly simplified. This makes such transactions possible that previously would have failed due to high transaction costs, especially high search costs.

1179. The development of the sharing economy is not uncontroversial; its advantages and disadvantages are discussed, sometimes heatedly, in public. Its proponents tend to point out aspects like more flexible and self-chosen working hours, additional sources of income and not least an increased sustainability due to a more intensive use of resources.¹¹ Critics on the other hand point out possible risks to regular labour arrangements and dread the establishment of a new day-labourer class or “precariat”.¹² They also see the danger of a total commercialisation of everyday life, for instance when services that used to be performed by friends for friends, for free, are now only offered for a fee.

1180. Such criticism notwithstanding, business models based on the concept of “sharing”, or common use of goods and services, are considered to have a high market potential. Thus the prognosis of a study performed by PwC is that the worldwide revenues of sharing-economy services in the areas of accommodations, car sharing, finances, streaming of music and videos and staffing alone will increase from approximately USD 15 billion in the year 2015 to about USD 335 billion in 2025.¹³ As regards the European Union, a study commissioned by the European Commission calculates that in the year 2015 collaborative platforms¹⁴ in the five key areas of accommodation (short-term rentals), passenger transportation, services for private households, freelance and technical services and crowdfunding brought in revenues of approximately EUR 3.6 billion, compared to about EUR 1.8 billion in 2014 and EUR 1 billion in 2013.¹⁵ The transaction value facilitated by these platforms is estimated at about EUR 28.1 billion in 2015, in comparison to approximately EUR

⁹ Cf. e.g. Belk, R., You are what you can access: Sharing and collaborative consumption online, *Journal of Business Research* 67, 2014, p. 1595–1600; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 June 2016, A European agenda for the collaborative economy, COM(2016) 356 final.

¹⁰ In contrast to public goods, club goods or commons, with the private goods offered here there exists a rivalry in consumption, as well as the potential for exclusivity. Cf. Peitz, M./Schwalbe, U., *Zwischen Sozialromantik und Neoliberalismus – zur Ökonomie der Sharing-Economy*, ZEW Discussion Paper No. 16-033, p. 9.

¹¹ Cf. Florian, D., *Gegen Bevormundung. Caring Economy statt Sharing Economy?*, <http://www.gruenderszene.de/allgemein/sharing-economy-gesetz-debatte>, accessed on 5 April 2016.

¹² Cf. e.g. Slee, T., *Deins ist meins. Die unbequemen Wahrheiten der Sharing Economy*, 2016.

¹³ Cf. PwC, *The Sharing Economy*, Consumer Intelligence Series, 2015, p. 14.

¹⁴ The terms “sharing economy” and “collaborative economy” are often used synonymously. The European Commission uses the term “collaborative economy” for “business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals”. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 June 2016, A European agenda for the collaborative economy, *supra* (note 9), p. 3.

¹⁵ Cf. PwC, *Assessing the size and presence of the collaborative economy in Europe*, study commissioned by DG Growth, April 2016, p. 7. See on this also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 June 2016, A European agenda for the collaborative economy, *supra* (note 9), p. 2.

15.9 billion in 2014 and roughly EUR 10.2 billion in 2013. According to estimates, through a better utilisation of resources that have until now not been used intensively the EU economy could grow by up to EUR 18 billion in the short term, or EUR 134 billion in the middle to long term.¹⁶ For Germany a survey from the year 2015 shows that 46 per cent of those surveyed have already made use of at least one sharing-economy service from the areas of hotel and gastronomy, automobile and transportation, commerce and consumables, services, finances or media, and that 64 per cent plan to do so in the next two years. In some of these areas demand will nearly double in this time period. At the same time, the willingness to offer goods or services through sharing-economy services has been growing. Accordingly, 33 per cent of those surveyed have already offered services in the mentioned areas of the sharing economy, while 50 per cent plan to do so in the next two years.¹⁷

1181. In what follows the Monopolies Commission looks at the competition-policy challenges that go hand in hand with the development of sharing-economy services. First, it depicts the predominant varieties of sharing-economy services and describes the most important reasons for their inception and growth. It also explains the efficiency gains connected with the use of digital intermediary platforms. From this starting point competition-relevant aspects are then discussed. First, the question is examined to what extent distortions of competition can arise between traditional companies and sharing-economy services. In this framework it will be investigated to what extent there is a need for legislative or regulatory action from an economic perspective. Also, competition-relevant aspects of labour and tax law will be addressed. Second, the issue will be discussed to what extent competition problems can arise due to the two-sided or multi-sided nature of sharing-economy platforms. Following these general observations, the chapter will look in more detail at two sharing-economy services that are receiving particular public attention: first, intermediation services for private drivers, and second, intermediation services for short-term letting of private accommodations.

2.1 Definition and varieties

1182. As mentioned above, there is as yet no uniform definition of the term “sharing economy”. In principle, such firms can be allocated to the sharing economy whose business models are based on arranging for temporary rights of use for the common, often sequential use of goods or services. The firms as a rule operate a digital intermediation platform for this purpose on which they bring together supply of and demand for certain goods and services. Apart from this, however, a great many different forms of sharing-economy services can be differentiated.

1183. First, it is possible to categorise sharing-economy services according to the users involved. So-called P2P services allow “sharing”, or the common use of goods and services between firms (business to business, B2B) or private parties (consumer to consumer, C2C). The platform operators in this case function merely as intermediaries between the users, in some cases offering besides their mediation additional services such as payment processing, but are not themselves in possession of the goods offered or involved in performing the services required. The form most focused on by the public is P2P services, where private parties are found on both the supply and the demand side. Examples of this type are platform services through which private rides or accommodations are sourced. These must be differentiated from services in which the platform operators themselves provide the goods or services required for joint or shared use. Such platforms can also be directed to firms (B2B) as well as to private persons (B2C, business-to-consumer) on the demand side.¹⁸ An example of B2C services is car sharing, where the platform operators themselves provide the automobiles for

¹⁶ Cf. European Parliamentary Research Service, *The Cost of Non-Europe in the Sharing Economy*, January 2016.

¹⁷ Cf. PwC, *Share Economy. Representative survey*, 2015.

¹⁸ Cf. Demary, V., *Competition in the Sharing Economy*, Cologne Institute for Economic Research, IW policy paper 19/2015, 15 July 2015.

short-term hire.¹⁹ Depending on one's perspective, the sharing economy encompasses either only P2P services or the entire scope of these varieties.²⁰

1184. Differences in sharing-economy services can also be seen in terms of whether compensation is asked for the offer and the pricing method. The sourced goods or services can be offered both for compensation and for free, depending on the business model. Private parties for example offer their rooms on some platforms for payment (e.g. Airbnb) and on other platforms (e.g. CouchSurfing) for free or for a minimal fee to diffuse costs. If the goods are offered for compensation, a further central difference between many sharing platforms is whether the prices are set centrally by the platform service itself or by the individual users. The main reason for the pricing model is likely the type of good or service on offer. It is conceivable that the prices of homogeneous goods in particular are set centrally by the platform provider, whereas with differentiated goods pricing is left to the users themselves.

1185. Finally, there are also differences between sharing-economy services with regard to the funding of the platform itself. Depending on the business model's orientation, the use of the platform can be for pay or for free for the different user groups. As a rule, one or more groups of users pay a commission per transaction or a flat monthly fee for the use of the platform, while the pricing in each case is most likely calculated based on the elasticity of demand among the user groups. If the use is free for all groups of users, the platform is as a rule funded through advertising or donations.

1186. For the purposes of this Report, no conclusive definition of the sharing economy is necessary. Thus it will suffice to remark that the Monopolies Commission will concentrate in what follows on P2P services for private persons. These platform services are currently in the spotlight of public discussion and they constitute a central economic development in that they facilitate transactions between private parties to a degree not previously seen. This development gives rise to a number of legal and economic questions, such as on the necessity for regulation and on the delineation between private and commercial offers, which will be treated below.

2.2 Reasons for the emergence and growth of the Sharing Economy

1187. The growth of sharing-economy services, as has been observed particularly in the United States in recent years, is traced back to different factors. Of prominent significance is the technological progress in the field of information technology. The increased prevalence of (mobile) Internet and the development of smartphones has led to a drastic reduction in transaction costs, especially search and information costs.²¹ Thus digital intermediary platforms, through the simple and efficient matching of supply with demand, facilitate transactions that in the past would not have taken place on grounds of excessive transaction costs. Chief among these are transactions between private persons. Moreover, the dissemination of technologies like smartphones with GPS navigation has made many of today's sharing-economy services possible in the first place.

1188. A further important reason for the development of sharing-economy services is advancements in the solution of trust problems.²² Specifically in P2P markets, in which users often let out their personal property, trust is of central significance. Problems of trust can exist in this context especially due to a lack of information on the behaviour of the potential transaction partner regarding parameters not unambiguously contractually definable or verifiable, such as treatment of rented objects or payment ethics. As information problems and the trust problems they entail can stand in the way of worthwhile transactions, the firms involved are using various measures to try to overcome the anonymity of the

¹⁹ Car-sharing services are essentially short-term and especially flexible car-hire arrangements whose cars, depending on the type of service, can be picked up and parked at either fixed points or anywhere within the city (free floating).

²⁰ On this see for instance Demary, V., Competition in the Sharing Economy, Cologne Institute for Economic Research, supra (note 18); Dervojeda, K. et al., The Sharing Economy. Accessibility Based Business Models for Peer-to-Peer Markets, European Commission Business Innovation Observatory, Case study 12 September 2013.

²¹ Cf. Demary, V., Competition in the Sharing Economy, Cologne Institute for Economic Research, supra (note 18), p. 7.

²² Cf. Hortin, J. J./Zeckhauser, R. J., Owning, Using and Renting: Some Simple Economy of the "Sharing Economy", Working Paper, 10 February 2016, p. 7 et seq.

market and establish transparency. For this they rely particularly on rating and reputation mechanisms.²³ In this respect sharing-economy services have been able to take advantage of the many years of experience that Internet pioneers like eBay have with rating systems. To prevent manipulation and further improve the informative value of ratings these systems undergo continuous further development to adapt them to the specific needs of the services. Even if such evaluation systems are not flawless – problems can arise, for instance, through distortions caused by strategic use of exaggeratedly positive or negative ratings – they are a crucial factor in building trust. Further trust-instilling measures consist in for instance linking user accounts of some sharing-economy services with the profiles in social networks, or the verification by the platform operators of the users' identity based on identity documents. On the whole, these various measures help to reduce information asymmetries and to build trust between users who are strangers to each other. Through them, transactions between private parties that in the past would have been prevented by a lack of trust have now become possible.

1189. As a final factor for the increasing dissemination of sharing-economy services, an at least partial shift in values or attitudes in the population can be named. One thing often mentioned is that in younger strata of the population in particular, the significance of private property is waning, while the willingness to share or enter into a joint use of goods is on the increase. Also, the increased significance of sustainable consumption may have reinforced the willingness of many consumers to use sharing-economy services, although the use of these services does not in every case lead to greater sustainability.²⁴ A further-reaching, all-encompassing shift in the paradigm of values or attitudes, however, which some authors see as leading to a rejection of the capitalist societal order, seems questionable.²⁵ While there are some free-of-charge sharing-economy services, the majority of these services aim at a remunerated marketing of rights to use private property.²⁶

2.3 Efficiency gains through digital intermediary platforms

1190. The business model of sharing-economy services is based essentially on the digital intermediation of goods and services. The operators of those P2P services focused on here are neither in possession of the demanded goods, nor do they themselves perform the services demanded. Instead, they focus on a certain part of the value-creation chain, that is, providing a digital intermediation platform to match supply with demand, as well as additional services this may entail. This digital sourcing through platforms makes it possible to realise many efficiency gains.²⁷ Because this technology is in principle available to all market participants, as long as they are not precluded by existing regulations, the following statements refer not only to sharing-economy, or P2P services, but also to digital intermediary platforms in general.

1191. First, digital intermediary platforms facilitate the realisation of efficiency gains by the above-mentioned reduction of transaction costs. On the one hand, the direct and uncomplicated communication between individual users makes it much easier to find a transaction partner. This leads to a reduction of search and information costs. On the other hand, many platforms offer further functions to ease the execution of transactions, such as central pricing and direct payment processing through the platform.

²³ Cf. Edelman, B. G./Geradin, D., *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, Harvard Business School Working Paper 16-026, 10 September 2015, p. 5-7.

²⁴ On the question of the ecological sustainability of sharing-economy services, two effects must be distinguished: on the one hand, the more intensive utilisation of goods translates to greater sustainability. On the other hand, the joint use of goods creates new possibilities of consumption, which can have negative ecological effects (the so-called rebound effect). In assessing the sustainability of sharing-economy services, both effects must be taken into account.

²⁵ Thus e.g. Rifkin, J., *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Collapse of Capitalism*, 2014.

²⁶ Cf. Vogelpohl, T./Simons, A., *Kontroversen ums Teilen. Ein Überblick über das online gestützte Peer-to-Peer Sharing als gesellschaftliche Innovation und eingehende allgemeine und spezifische Kontroversen*, PeerSharing Arbeitsbericht 2, December 2015, p. 11.

²⁷ Cf. on the following statements in particular Edelman, B. G./Geradin, D., *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, supra (note 23), p. 3-8.

1192. Furthermore, intermediary platforms contribute to a more efficient allocation of scarce resources. Efficiency gains can arise from the common use of goods or the use of goods for different purposes. The latter is the case, for example, when a passenger car is used both privately and to transport third parties. Both aspects have in common that they increase the use or operating grade of goods. Specifically real-time matching can contribute to a more efficient allocation by for instance reducing transport services' empty running times or by forming ad hoc carpools with more efficient routes. In addition, the possibility of using matching platforms can under certain circumstances also lead to an increase in investments, since the possibility of a short-term lease may convince users to buy higher-value products that they ordinarily would not be able to afford.

1193. Efficiency gains also arise from the better accessibility to information. On one hand, the operation of a platform gives the operators an easy way to collect and process data, which can for instance be used to better coordinate supply and demand. On the other hand, information asymmetries between groups of users are reduced by for instance rating systems, thereby creating incentives to offer higher quality and reducing incentives to offer lower quality or to act opportunistically. Such rating systems as a rule work both ways, so that poorly rated providers as well as poorly rated demanders or consumers can be excluded from using the platform. This sanctioning mechanism helps to reduce incentives for bad behaviour.

1194. Last but not least, intermediary platforms can achieve efficiency gains by means of a more flexible pricing scheme that is based on supply and demand. Platform services can use information about current market conditions, especially, to balance out fluctuations in supply and demand with short-term price adjustments. Due to the direct communication between the intermediary service and its users, such price adjustments are presented directly to the users. This price transparency makes it impossible to consciously mislead or fleece consumers. This notwithstanding, a flexible pricing scheme is met with controversy in some areas of society, especially when it concerns services for which uniform prices or tariffs traditionally apply, such as the taxi trade. However, this does not change the basic efficiency of flexible price adjustments and the welfare gains associated with them.

2.4 Specific controversies of the Sharing Economy

1195. The above statements show that there is no "one" concept of the sharing economy, but that many different business models can be subsumed under this term. These business models are essentially based on a digital intermediary platform through which considerable efficiency and welfare gains can be realised. The central goal should be to enhance these efficiencies. To this end, regulations that restrict the use of these services should be tested for their necessity and their suitability and – if they do not pursue justifiable goals – should be revised.

1196. From a competition perspective it must be borne in mind that sharing-economy services often compete with traditional firms. This is particularly the case with the P2P services in the focus of this Report which allow private persons to offer products or services commercially. This form of commercial provision of services by private parties is new to many areas and may conflict with the existing legal framework. This can, on the one hand, negatively impact the growth of P2P services. On the other hand, distortions of competition between traditional firms and sharing-economy or P2P services can arise in consequence of asymmetrical regulation. In what follows, therefore, different competition-policy-related aspects of the sharing economy will be looked at in detail. The first question to be examined is which circumstances can make it fundamentally necessary to regulate sharing-economy services from an economic point of view. Subsequently, the discussion turns to the possibilities of appropriately delineating private and commercial providers, and to labour and tax-policy aspects of P2P services. Finally, possible concentration tendencies and the attendant potential competition problems of sharing-economy services are dealt with.

2.4.1 Need for regulation?

1197. Critics of sharing-economy services commonly bemoan the fact that many of these services either do not fall under the specific regulatory provisions for traditional providers in the relevant sectors, especially the consumer-protection provisions (e.g. safety regulations), or the services do not comply with them. This, it is argued, allows sharing platforms to offer their services at lower costs and represents an unjustified competitive advantage. In the name of

preventing such distortions of competition between traditional and digital providers, a common reaction is to demand the extension of traditional regulations to sharing-economy services. This demand fails to recognise, however, that the emergence of new technologies can render many of the rationales for traditional regulations obsolete. This is all the more true of regulations that aim to remedy potential information asymmetries, because the latter are reduced by the Internet in general and by digital intermediary platforms in particular. Against this background the Monopolies Commission in its Special Report 68 advised against a blanket extension of traditional rules to digital firms, recommending instead a continual evaluation of the regulation of traditional firms, and where appropriate a reduction of such regulation.²⁸

1198. With regard to digital intermediary platforms, the central goal, as the Monopolies Commission sees it, should be to boost the above-mentioned efficiencies while minimising the risks that these business models also involve by means of appropriate regulation. Due to the heterogeneity of the sharing economy the need for action on the part of the legislature can vary greatly depending on the service. Accordingly, it is not possible to lay a uniform or blanket regulation over the sharing economy. Instead, it must be examined in each individual case whether a state regulation is called for to remedy a market failure or for other reasons, not least politically motivated ones.²⁹ In the process it should be taken into consideration whether the platform services themselves have sufficient means, and sufficient incentives, at their disposal to remedy a potential market failure. Regulation of traditional firms should only be applied to digital intermediary services if the original market failure continues to exist and is not otherwise resolved by the new services.

1199. A regulation of P2P services to remedy a market failure most often comes into consideration due to externalities and information asymmetries between users. Externalities arise because P2P services can have a direct impact on non-users of the service. With transportation services, for instance, negative externalities can arise in the form of accidents caused by drivers' lack of sufficient training or unsafe vehicles; with short-term rental of private accommodations, they can take the form of guests being too loud. In principle, such externalities caused by P2P services, as with traditional suppliers, should be internalised by appropriate regulatory measures. Thus it would be conceivable to have – in analogy to traditional suppliers – special minimum requirements for persons intending to offer certain services on P2P platforms, use restrictions and insurance requirements. The measures taken should take the concrete business model as well as the specific circumstances, like regional differences, into account, and should be capable of resolving the ascertained market failure as well as necessary.

1200. Aside from externalities, information asymmetries can also cause market failure among P2P services that would require regulation. Information asymmetries are especially common with experience and credence goods, and they make it hard for the consumer to evaluate the quality and value of a product.³⁰ Overcoming such information asymmetries can entail considerable costs for a consumer. The possible consequences could be an adverse selection or moral hazard. In extreme cases of adverse selection, the lack of knowledge about quality and the consumers' diminishing willingness to pay could lead to a situation in which the price and quality of a good falls over so long a period that in the end only poor quality is left on the market, and the market for good quality collapses (the lemon problem).³¹ Moral hazard denotes a hidden deterioration of quality while the service is being provided. Traditionally minimum quality standards are used to try to ensure certain quality standards, which, due to information asymmetries, cannot be evaluated by the consumer.

1201. In the case of P2P services, information asymmetries between suppliers and consumers can exist due to the anonymity of users and the uncertainty about the quality of the goods or services on offer. In their role as intermediaries between user groups, however, P2P services have a vested interest in reducing these information asymmetries, as they

²⁸ Monopolies Commission, Special Report 68, *supra* (note 4), paras. 543, 549.

²⁹ From an economic perspective state regulation can be called for when market failures arise. Such a market failure can be attributed to different factors; the economics literature focuses mainly on indivisibilities, public goods, asymmetric information and externalities. On this see e.g. Fritsch, M., *Marktversagen und Wirtschaftspolitik* 9th ed., Munich 2014.

³⁰ Cf. Nelson, P., *Information and Consumer Behavior*, *Journal of Political Economy* 78 (2), 1970, p. 311–329.

³¹ Cf. Akerlof, G. A., *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, *The Quarterly Journal of Economics* 84(3), 1970, p. 488–500.

can prevent transactions from coming about between the users and thus negatively impact the revenues of the platform service itself. To reduce information asymmetries and to ensure a sufficient quality of the offer, P2P services make use of reputation and rating mechanisms. This on the one hand makes it easier to identify good and bad transaction partners, and on the other hand sets incentives to provide high-quality services, not least because the platform is able to exclude users with poor ratings. Reputation and rating systems thus make a fundamental contribution to overcoming the anonymity of the market and building trust between the users, and they reduce incentives for misbehaviour like providing poor quality or taking advantage of users. As further trust-generating measures, some P2P services – as described above – link user accounts with the profiles in social networks or verify the user’s identity by means of identity documents.³²

1202. Whether it is necessary, beyond these measures, to regulate quality aspects of P2P services depends largely on the effectiveness of the reputation and rating mechanisms employed. In principle a self-regulation or decentralised regulation of platforms is expedient when the established mechanisms sufficiently reduce the relevant information asymmetries.³³ This is likely to be the case when the relevant quality aspects are clearly observable, and thus assessable, by the users at least while consuming the good or service (so-called experience goods). This category includes the demeanour of suppliers operating on the platform (friendliness, helpfulness etc.) or even outward quality traits. Rating systems reach their limits, however, when relevant regulatory aspects are not observed, and cannot be objectively evaluated, by most users (so-called pure credence goods). In this case, a qualitative regulation will as a rule be necessary.³⁴

1203. Aside from this basic limitation, the representativeness of rating systems is also sometimes called into question. Thus it is noted, for instance, that users tend to hesitate to give poor ratings because they fear subsequently being rated poorly themselves, or that they are intimidated by the fear of “punishment” by their opposite number (e.g. exclusion from the platform). It is also purported that users with good experience have a greater tendency to rate their transaction partners than do users with negative experience.³⁵ It is also stated that the representativeness and thus the effectiveness of rating systems could be influenced by phoney ratings. It is conceivable that single suppliers might improve their own rating profile by buying positive evaluations or might write poor ratings for their competitors. And finally, there is the problem of users basing the writing of good reviews on the provision of “services in return”. Even if this criticism is essentially justified, it must be taken into consideration that the platform services attempt in their own interest to make their ratings systems as representative and manipulation-proof as possible. The possibility of submitting falsified ratings is furthermore limited if a rating – as is the case with most P2P services – is only possible following a transaction. The purchase of large numbers of positive ratings is probably of only secondary significance, then, where P2P services are concerned, especially considering that private persons do not have the same means at their disposal as large firms to do so.

1204. Despite the limitations mentioned here, reputation and rating systems should in principle contribute to reducing information asymmetries. While they may not always be able to completely substitute for qualitative regulations, this should not blind us to the fact that evaluation systems can be superior to state regulation in some matters. They are especially known to increase market transparency and they thereby discipline suppliers as well as consumers in terms of their behaviour. They also allow a constant control of objectively observable quality aspects as compared to possibly only random reviews under traditional regulations. Irregularities or recurrent problems are more quickly uncovered in this way, so that countermeasures can quickly be taken.

1205. Besides such reputation and rating systems, such P2P services can achieve a further reduction of information asymmetries by using modern technologies. These technologies can in certain cases substitute qualitative regulations that aim to remedy specific information asymmetries. Take for example the spread of smartphones that allows for using

³² On this see also para. 1188 of this Report.

³³ Cf. Gata, J. E., *The Sharing Economy, Competition and Regulation*, CPI’s Europe Column, November 2015.

³⁴ An example of this is the area of passenger transport. Here, rating systems can present a helpful assessment of the driver’s driving style or the car’s cleanliness. It is doubtful, however, that the majority of users can sufficiently assess the roadworthiness of the cars.

³⁵ Cf. Edelman, B. G./Geradin, D., *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, supra (note 23), p. 21.

GPS navigation and recording one's routes. These make the qualitative requirement of local knowledge tests in the taxi and car-hire trades obsolete, on the one hand. On the other hand, they give those consumers who are unfamiliar with a place an overview of the route taken and with it an additional means of monitoring. This reduces the drivers' incentive for taking roundabout routes, a classic form of moral hazard.

1206. In addition to qualitative regulation, there exist price regulations for several traditional services. The most prominent example in this context is no doubt the taxi trade, whose tariffs in Germany are set by the relevant authorities and may not be over- or undercut. Such a price regulation is not as a rule necessary in the case of commercial P2P services, where there is a high market transparency and price comparisons are readily obtained, especially in comparison to traditional offers. This is true independent of whether the platforms set prices themselves centrally or leave pricing to the users. Trust problems that may arise between the users in payment procedures are also reduced by electronic payment, which is used as a rule. On the whole, then, there is very little call for price regulation in digital intermediary platforms, at least as long as these do not have market power.

1207. Nevertheless, some authors raise the concern that the prices on some intermediary platforms fluctuate depending on supply and demand. One aspect that has come under particular criticism is "surge pricing", employed by the firm Uber, which leads to an increase in prices for a ride when demand rises sharply against supply.³⁶ From an economic perspective it must be noted that such a dynamic pricing method based on supply and demand is intrinsically efficient. Though in individual cases considerable price increases can arise, resulting in "hardship cases", on balance the system leads to welfare gains. In order to avoid especially strong price spikes in emergencies like severe storms, the legislature could consider setting upper limits for price increases. Such dynamic pricing with price ceilings would be preferable, from an economic point of view, to inflexible fixed prices.

1208. Finally, looking beyond externalities and information asymmetries, it can also be appropriate to regulate market participants in order to secure offers that are legislatively desirable but that the market itself does not provide.³⁷ One example of this could be the goal of sufficient barrier-free offers for physically impaired persons. If such policy goals are defined, competition rationale should dictate that all market participants within the relevant sector, thus also P2P services, must be appropriately involved in reaching these goals. One possibility would be to give the individual market participants concrete objectives, for instance with regard to providing a certain number of wheelchair-accessible vehicles, but to leave the measures to achieve these objectives up to the market players. If this is not possible an alternative would be to select certain suppliers – perhaps through a call for tender – to provide those offers that are not offered by the market. This offer could be financed by an additional tax to be paid by all market participants of a sector, or from general tax revenues. From a competition perspective, the decisive factor is that individual suppliers are not unilaterally burdened by regulations that serve to achieve certain political goals.

1209. In sum it can be stated that with regard to P2P services regulation can be called for reasons of information asymmetries, externalities or other policy goals. This does not, however, mean that to avoid distortions of competition exactly the same rules must apply to traditional suppliers and to those in P2P services. The goal of regulation should not be to protect single market participants from potentially more efficient competitors, but to remedy each market failure as it arises. Precisely in P2P services, due to the use of innovative technologies it can be advisable to use a less intensive regulation than with traditional suppliers. In addition, it should be ensured that the level of regulation takes account of the specific extent of the offer. In particular, a disproportionate restriction of merely occasional activities on P2P services by excessive regulations should be avoided.³⁸

1210. As a final note, it must be said that the technologies employed by sharing-economy services often can also be used by traditional suppliers. To avoid distortions of competition, therefore, the existent regulatory framework should

³⁶ This dynamic price adjustment is algorithmically controlled, and it takes place when passengers' waiting times rise sharply. Through the higher prices, the supply of available drivers increases, while the demand temporarily decreases. This is intended to balance supply and demand.

³⁷ Cf. Edelman, B. G./Geradin, D., *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, supra (note 23), p. 23 et seq.

³⁸ On this see also section 2.4.2 in this chapter.

be reviewed to determine whether it is still up to date concerning these providers, or whether an adjustment or reduction of the regulation is appropriate. Provisions that are unjustified or have been made obsolete by new technologies should be consistently abolished. An extension of such rules to cover P2P services, on the contrary, is inadvisable, because this would mean foregoing the increased efficiency gains mentioned above, to the detriment of the consumers and the concerned firms.

2.4.2 Delimitation of commercial and private suppliers

1211. P2P services allow private persons to offer goods or services commercially to an extent never before known. Besides the necessity of regulating P2P services, then, a further question arises here: under which circumstances should private parties be allowed to commercially supply goods or services. One main reason this is relevant is that many specific regulatory provisions, and in particular those for the protection of consumers, are often only applied to commercial actors. Moreover, different tax requirements exist for commercial agents than for private suppliers.

1212. There is no legal definition in the Trade, Commerce, and Industry Regulation Act (*Gewerbeordnung* – GewO) determining when commercial activity is present. In the case law and in the literature a trade is generally assumed when an allowed activity is carried out permanently in self-employment with the aim of earning a profit. Excepted from this rule are areas of primary production (especially agriculture and forestry), free professions and the management of one's own assets.³⁹ The criterion of permanence stipulates that the activity is not performed only occasionally but repeatedly and on a regular basis. Self-employment is given when the “tradesperson” is not subject to directives from third parties. The tradesperson should be internally objectively independent and solely responsible, and should act outwardly on his or her own account, at his or her own risk and in his or her own name. The criterion of aiming to earn a profit is, finally, of particular importance. This is given when the activity is aimed at obtaining an indirect or direct economic advantage in the form of a non-negligible surplus over the tradesperson's own expenditures. A concretely defined minimum or value threshold does not exist.

1213. In somewhat simplified form, in the current legal situation, commercial offers that are permanently performed for compensation and with the aim of profit must be distinguished from private offers that are performed only occasionally and without compensation or at least without aim of profit. It is not always possible to clearly categorise activities offered occasionally by private persons for compensation on P2P services within this framework. The border of commerciality is likely crossed, however, when private persons permanently and for profit motives offer goods or services on P2P services and thus de facto act as commercial suppliers.

1214. From a competition perspective the legal categorising of activities performed occasionally by private persons for compensation is particularly relevant with regard to the provisions applying to either commercial or private suppliers. In this respect, some commercial suppliers bemoan the much stricter rules applying to them in contrast to private suppliers, which they claim lead to higher costs and thereby to a distortion of their competition with private persons or P2P services. From a competition perspective it must however be noted that a complete alignment of the provisions for commercial and private suppliers is not constructive, at least when the latter only occasionally offer goods or services through P2P services. This would create a de facto barrier to market entry, because most private parties, in view of applicable law and the extent of their activity, would likely decline to make such an offer. The consequence would be a smaller range of offerings and less intense competition on the whole. It would also mean doing without the above-mentioned efficiency gains through P2P services, such as a better capacity utilisation of resources. The specific provisions for commercial and for private suppliers should therefore stand in relation to the extent of the activity.

1215. In order to avoid legal uncertainty and the accompanying distortions of competition, it is fundamentally necessary to have an unambiguous and comprehensible method for distinguishing between commercial and private suppliers. In this sense it seems that a distinction drawn only along the lines of the factor of remuneration would not be appropriate to every case considering the development of P2P services. To allow private persons to place an occasional offer for pay on P2P services, in individual cases thresholds or de-minimis exceptions could be set up, for instance in the form of

³⁹ Schulte, M./Kloos, J., *Handbuch Öffentliches Wirtschaftsrecht*, Munich 2016, § 6, Nos. 1–11.

revenue or value limits, below which private offers could all be classed as non-commercial.⁴⁰ Specific provisions and tax requirements linked to the commercial category would then only be applied when the thresholds were crossed. In this way potentially complicated and labour-intensive examinations of individual cases could be dispensed with, and the costs they entail could be saved. A proposal for the introduction of thresholds has for example been made by the European Commission in its Communication on the collaborative economy.⁴¹ Here it is not clear, however, how high the relevant thresholds are to be.⁴²

1216. The farther-reaching question of which provisions should apply to private suppliers independent of whether their activity is considered commercial can in the end only be answered in the individual case for the relevant business model. To secure a minimum of consumer protection even with the offers supplied by private persons via P2P services, safety provisions most importantly could be necessary. Users' compliance with these provisions could be monitored by the P2P service involved. A comprehensive check of the suppliers is advisable, especially when users register with the platform, followed up by regular inspections, ideally by the electronic provision of corresponding documentation.⁴³ Furthermore, depending on the nature of the offer, insurance requirements for the protection of consumers could also be necessary. It is also important that the consumers should always be able to recognise whether they are making use of a commercial or a private offer. Consumers should be informed clearly about their respective rights when using the platform service. A comprehensive harmonisation of the provisions for commercial and for private suppliers would, in contrast, not be constructive, because this would render the occasional use of the platform unattractive for many private parties.

2.4.3 Taxation of the offers

1217. A further controversial aspect is the taxation of P2P services. This topic is relevant from a competition perspective mainly because the suppliers who are active on these platforms are often in competition with traditional suppliers subject to taxation.⁴⁴ An unequal tax treatment of the two groups of suppliers could thus lead to distortions of competition.

1218. Essentially, the tax obligations that apply to the suppliers in P2P services depend on the type of activity and the amount of income or revenues. Of central relevance are income tax, value added tax and trade income tax.⁴⁵ Income from work for P2P services is generally always subject to income tax, regardless of whether the work is a commercial or merely occasional activity. However, depending on the type of income, there exist different tax allowances or exemptions. Thus for revenues from the rental or lease of an owner-occupied house or flat no tax is due up to an amount of EUR 520 per calendar year pursuant to Rule 21.2(1) of the administrative instructions on income tax of 2012 (*Einkommensteuer-Richtlinien* – EStR 2012). For certain other types of income there is an allowance pursuant to Sec. 22, No. 3, of the Income Tax Act (*Einkommensteuergesetz* – EStG) of EUR 256 per calendar year after deduction of income-related expenses.

⁴⁰ See on this e.g. Eichhorst, W./Spermann, A., Sharing Economy: Mehr Chancen als Risiken?, *Wirtschaftsdienst* 96 (6), 2016, p. 439; Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband* – vzbv), *Teilen, Haben, Teilhaben. Verbraucher in der Sharing Economy*, discussion paper of 29 June 2015, p. 28.

⁴¹ Cf. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 June 2016, A European agenda for the collaborative economy, *supra* (note 9), p. 5 et seq.

⁴² Some sharing-economy firms for instance recommended in a petition from 2014 the introduction of a value threshold for non-commercial earnings of EUR 5,000. The homepage of the initiators of the petition (<http://www.werteilthatmehr.de>) is now offline. On the content of the petition see e.g. Weigert, M., Onlinepetition zur Ökonomie des Teilens: Elf Startups fordern nutzerfreundliche Gesetze, <http://www.foerderland.de/digitale-wirtschaft/netzwertig/news/artikel/onlinepetition-zur-oekonomie-des-teilens-elf-startups-fordern-nutzerfreundliche-gesetze>, accessed on 5 April 2016.

⁴³ Such checks are already performed by some P2P services. One example is a number of transport services that check both drivers and vehicles upon registration and require regular proof of adherence to the specific safety regulations.

⁴⁴ A further argument is that the state or municipality would otherwise have to face a loss of tax revenues.

⁴⁵ Cf. on the following statements Vogelpohl, T./ Simons, A., *Kontroversen ums Teilen – Ein Überblick über das online gestützte Peer-to-Peer Sharing als gesellschaftliche Innovation und eingehende allgemeine und spezifische Kontroversen*, *supra* (note 26), p. 18–20.

1219. Besides the duty to pay income taxes, suppliers on P2P services can in principle also be subject to value added tax. Those with relatively low turnover, however, may avail themselves of the “small business rule” under Section 19 of the Value Added Tax Act (*Umsatzsteuergesetz* – UStG). Under this rule the value added tax need not be paid or listed if the gross revenues are below EUR 17,500 for the previous calendar year and expected to be under EUR 50,000 for the current calendar year. The total earnings for the year must be included in this calculation, meaning also those not earned via the respective P2P service. Use of the small-business rule precludes the option of deducting prepaid tax. Trade income tax, finally, must only be paid if the suppliers operate commercially. According to Section 11 of the Trade Income Tax Act (*Gewerbesteuer*gesetz – GewStG), it does not apply to natural persons, however, below an annual allowance of EUR 24,500 in profits. In this case, there is only a duty to report commercial activity.

1220. In addition to the tax duties named above, other, mainly regional or municipal taxes, can be applied. One example is the bed levy, or tourist tax, in the tourism sector. In order to avoid distortions of competition, such taxes should also be paid by traditional suppliers as well as suppliers on P2P services, regardless of whether they are occasional or commercial users. To avoid transaction costs, an obvious solution is to involve the platforms themselves in the collection and payment of such taxes and rates.⁴⁶ Besides this, the municipalities and cities are of course free to define low-level exemptions or allowances, where applicable, up to which the respective taxes for administrative reasons need not be collected or paid.

1221. Some proposals suggest introducing a tax-free amount for income from P2P sharing that would be in the same amount as the value limit, if one should be set to delineate commercial from private providers.⁴⁷ The aim of this proposal is to generally exempt those offers classified as private on P2P services from the duty to pay taxes. The reason given is that for other income, such as capital gains, substantially higher tax allowances exist. In principle, the introduction of such a blanket tax-free amount might indeed contribute to the growth of the sharing economy, since more private persons would as a consequence offer more goods or services. It could in certain circumstances imply an economically and ecologically sensible and more efficient use of private resources. From a competition perspective, however, it must be kept in mind that a tax-free amount for private income earned through P2P sharing would lead to competitive disadvantages for commercial providers, especially when no comparable allowance exists for the latter. Therefore, from a competition perspective, a special regulation for income from (digital) P2P sharing should be rejected.

1222. A further aspect of taxation of the P2P-service offerings has to do with tax fraud, which is alleged to be especially simple in this sector. In this respect, the blanket accusation is often made that many providers on P2P services do not observe their duty to pay taxes. Tax evasion can in principle lead to distortions of competition, especially when the providers on P2P services are as a result willing to offer goods or services cheaper than they would if they paid their taxes. However, this issue is not primarily a competition problem, but rather a clear breach of law, possibly in connection with insufficient means of enforcement by the finance authorities. This aside, tax evasion is not a specific feature of providers on P2P services; among other places, it can be found precisely in those economic sectors that are affected by these services.⁴⁸ Finally, the prosecution of tax fraud among P2P-service providers will often be even easier than among traditional providers, because all transactions are digitally collected and thus verifiable.

1223. One could consider involving the operators of P2P services more actively in the collection and payment of taxes and rates. This could ensure, for one thing, that the users fulfil their tax obligations. Secondly, it could avoid transaction costs arising from tax levying and payment. Greater involvement of platform services is a particular possibility for regional or municipal taxes and rates, and is already practiced today in some places. An example of this is intermediary platforms for private accommodations that have agreements with several cities outside Germany for collecting and paying the municipal tourism taxes. Such agreements could also be envisioned by German cities or municipalities.

⁴⁶ See on this also para. 1223.

⁴⁷ Cf. on this Weigert, M., Onlinepetition zur Ökonomie des Teilens: Elf Startups fordern nutzerfreundliche Gesetze, supra (note 42).

⁴⁸ Thus, according to the Office of Financial Control of Undeclared Employment, the taxi trade is a classic field for undeclared employment. Cf. on this Mayer, S., In der Taxibranche grassiert die Schwarzarbeit, Die Welt Online of 19 January 2011, <http://www.welt.de/wirtschaft/article12245714/In-der-Taxibranche-grassiert-die-Schwarzarbeit.html>, accessed on 5 April 2016.

2.4.4 Employment-policy aspects

1224. A controversial topic with regard to the sharing economy is, finally, the contractual or labour relationship existing between the platform services and the providers who are active on the platforms. This chiefly concerns those P2P services where the users themselves provide services. These include platform services through which users offer passenger transportation with their own automobile, for instance, or household-related services.

1225. Most P2P services see themselves as pure sourcing platforms on which the users can offer their services as independent contractual partners in a “solo self-employed” model.⁴⁹ Accordingly, the users themselves are responsible for paying the costs resulting from the service, on the one hand (such as petrol costs), and their social insurance, on the other hand. The P2P services, therefore, are not required to pay employer contributions to social insurance, and the labour and social-law provisions that apply to an employment arrangement with mandatory social insurance contributions, such as minimum wage, do not apply. This can mean a considerable cost advantage, and thus ultimately a competitive advantage as well, for P2P services as compared to traditional providers with employees for whom they pay mandatory social insurance contributions.

1226. Critics of this form of solo self-employment argue that the platform services pass on the main costs and risks to their users and would hardly be competitive against traditional providers without the cost savings brought by the users’ ostensible self-employment. A fear held especially by the unions is that of an erosion of employee rights by the reduction of mandatory social-insurance employment and the increase of what they claim is often a precarious solo self-employment. In this context, some demand that regulations of dismissal protection, minimum wages, work safety and work hours must also apply to the new digital offers.⁵⁰

1227. As far as this criticism is concerned, first, the use of P2P services should certainly not lead to the evasion of meaningful labour and social-policy provisions. The true advantage of these services lies in the efficiency gains explained at the beginning of this chapter, particularly in the efficient use of resources. Aside from this, it must be noted that in the end, the choice of business model is left up to each company, and the choice of activity, to each citizen. The concerns expressed with regard to solo self-employment of users is not a problem specific to P2P services. Studies show that solo self-employment in Germany greatly increased between 2002 and 2012, but has since been in decline.⁵¹ In the year 2014 only six per cent of gainfully employed persons between the ages of 15 and 64 were solo self-employed. Of these, around 25 per cent earned less than the minimum wage of EUR 8.50, but this share has decreased since 2011. In the same period, the share of solo self-employed people who earn EUR 25 or more per hour rose to over 20 per cent.

1228. An evaluation of solo self-employment should also consider, besides the monetary aspects, the advantages of working for oneself, however. Chief among these is the greater flexibility in work structuring, which many people consciously choose. With regard to P2P, it should also be noted that these services are often only used to generate additional income or to bridge a short-term gap between two regular jobs.⁵² Thus it should not be concluded from an increase of activity in P2P services that an across-the-board increase of precarious labour is taking place. This notwithstanding, policymakers are of course free to improve social security for those in solo self-employment with low income by means of suitable labour and social policy measures. One possibility could be to accept self-employed persons in the

⁴⁹ Solo-independent refers to persons who perform an independent work activity alone and therefore have no employees.

⁵⁰ Thus e.g. the head of the union DGB Reiner Hoffmann in an interview with the magazine *Der Spiegel*, 34/2014, p. 65.

⁵¹ Cf. Eichhorst, W./Spermann, A., *Sharing Economy: Mehr Chancen als Risiken?*, supra (note 40), p. 437 et seq.; Brenke, K., *Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen*, DIW Wochenbericht Nr. 7/2013, p. 3–16; Brenke, K., *Selbständige Beschäftigung geht zurück*, DIW Wochenbericht Nr. 36/2015, p. 790–796.

⁵² One indication of this is a study of the labour market for Uber drivers in the USA, according to which 55 per cent of the private drivers work less than 15 hours per week for the platform and weekly working times of many drivers can vary sharply from week to week. See on this Hall, J.V./Krueger, A.B., *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States*, Working Paper, 22 January 2015, p. 18.

statutory social insurance as a general rule, or to oblige clients or platform operators, in analogy to employers, to pay contributions for the service providers.⁵³ This could also reduce potential distortions between the forms of employment.

1229. Aside from this general criticism, some raise the allegation that the users on P2P services are very close to the borderline of sham self-employment.⁵⁴ This criticism is fuelled chiefly by the fact that offers on P2P services are not always clearly identifiable as independent or dependent activities. Relevant criteria for assuming an activity is independent include the entrepreneur's own risk, own place of business and possibility of disposing over one's own labour and relative freedom to choose the activity and work hours, that is, activity largely free of third-party directives.⁵⁵ Indicators of an independent activity of users of a P2P service include that these as a rule receive no direct instructions from the platform operators and are flexible with regard to their provision of service. Unlike dependent employees, they are not in a classic employment situation which stipulates, for instance, how many hours to work and when to work. A dependent employment could, on the other hand, be present if the users offer their service through only one P2P service and the latter makes very concrete stipulations regarding the criteria of service provision, and possibly even sets the price centrally. A category to be distinguished from sham self-employment, however, is "employee-like self-employment". This category encompasses cases in which a self-employed person is active over the long term, without employees with mandatory social insurance and essentially for only one client.⁵⁶

1230. These comments show that the classification of activity on P2P services, particularly of service providers, is often ambiguous. But this problem as well is not limited to P2P services. In fact, the line between self-employment and a dependent employment is blurred in many sectors, and the classification accordingly difficult. With regard to P2P services the potentially ambiguous classification of the activity is relevant, not least because it entails uncertainties with respect to the applicable provisions of labour and social law. A particular risk is present for the operators of the platform services, because in the case of users' sham self-employment, the former can face considerable additional demands in unpaid social insurance contributions. Ultimately, however, due to the high numbers of P2P platforms, no generally valid statement can be made on the classification of users' activities. Thus a case-by-case analysis will as a rule be necessary.

2.4.5 Market concentration and potential competition problems

1231. From an economic perspective, P2P services are so-called two-sided or multi-sided platforms. The platform service itself acts as an intermediary between suppliers and demanders of certain products or services. As with other two- or multi-sided platform markets there exists with P2P services a tendency towards market concentration. The determining factors for such a concentration have been studied exhaustively in the economics literature.⁵⁷ Accordingly, concentration is fostered in particular by positive indirect network effects, or the positive feedback existing between the individual groups of users of a platform. This means that the users on one side of the platform, for instance lessors, profit from a greater number of users on the other side of the platform, in this case, potential guests, and vice versa. Aside from strong indirect network effects, increasing returns to scale also act to foster concentration; these exist in platform services due to the comparably high fixed costs and low variable costs found here.⁵⁸

1232. Indirect network effects and economies of scale may foster a higher level of market concentration. And yet this does not mean that they inevitably lead to a monopolisation of the market and to corresponding competition problems, as other factors exist that work against a concentration. These factors are, first, capacity or usage restrictions (conges-

⁵³ Cf. Eichhorst, W./Spermann, A., *Sharing Economy: Mehr Chancen als Risiken?*, supra (note 40), p. 438 et seq.

⁵⁴ In California, in fact, a class-action suit against Uber on the question of whether the contractual partners must be classified as employees is currently pending.

⁵⁵ See e.g. Federal Social Court (BSG), judgment of 28 September 2011, B 12 R 17/09 R.

⁵⁶ The statutory pension insurance is mandatory for employee-like self-employed persons.

⁵⁷ Cf. Evans, D. S./Schmalensee, R., *The Industrial Organization of Markets with Two-Sided Platforms*, *Competition Policy International* 3 (1), 2007, p. 151–179. See also Monopolies Commission, *Special Report 68*, supra (note 4), paras. 45-53.

⁵⁸ A large share of the cost goes into establishing and maintaining a databank and developing an algorithm. In comparison, an additional transaction or additional platform user hardly generates any additional costs.

tion) and the differentiation potential of the platforms, and second, a practice called multihoming, that is, the possibility of the different user groups to use more than one platform service at a time. Capacity restrictions can exist for platforms when heterogeneous user groups raise the search costs on the platform or make it difficult to “match” the different platform sides. In this case the platform operator could attempt to improve the matching of platform sides by limiting the use of the platform to certain users.⁵⁹ A closely related practice is the possibility for platform services to differentiate, for instance by specialising in certain products or in a certain circle of users or customers.

1233. Of special significance in terms of concentration and competition between P2P services, finally, is the possibility of individual user groups to engage in multihoming. Here landlords, for instance, can offer their flats on not just one intermediary platform, but can use several services to acquire guests. The multihoming possibility is crucially dependent on the level of possible switching costs. Switching costs can arise with P2P services when the ratings received or the user’s own reputation cannot – as is the rule – be transferred to a different service, so that at each new service the reputation would have to be reacquired. This can prevent the suppliers of the services or products from changing platforms and lead to a lock-in of suppliers.

1234. The extent of concentration among P2P services depends on the specific characteristics of the factors named. This can vary from platform to platform, making a differentiated evaluation necessary. If, however, a P2P service has a market-dominant position, it can of course abuse its market power, just like other firms, attempting for instance to obstruct competing platforms or to force them out of the market.⁶⁰ It is conceivable that a platform owner might try to prohibit its users from using other platform services via exclusivity clauses, so as to prevent the latter from growing, and possibly – due among other things to the existing indirect network effects – to force them out of the market. The enforceability of such exclusivity clauses is questionable, however. Another possibility might be to set predatory prices in the form of especially low fees for the individual user groups. As the users will subsequently probably use the market-dominant platform service most, competing platforms that cannot cut their prices as drastically might have to leave the market. After these exit the market, the market-dominant firm could raise its fees and set monopoly prices. Since the technical effort of market entry of potential new platform suppliers is rather low, the success of such a strategy would mostly depend on the strength of the existing network effects. As long as these are not very strong, new suppliers could enter the market with low fees to attract users. A recoupment of losses suffered as a result of the predatory prices would then be improbable.

1235. In sum it must be noted that one should not generally assume competition problems based on a possible tendency towards concentration in P2P services. Quite the contrary, this concentration is, from an economic viewpoint, first and foremost an expression of an efficient market structure, which essentially arises from the existence of positive indirect network effects. In this connection it must also be pointed out that even presumably unusual conduct, such as price setting below marginal costs or subsidising a user group, can be efficient and unproblematic in terms of competition law.⁶¹ Aside from this, a potential market-dominating position of P2P services can certainly lead to competition problems. However, it must be assumed that any abuse of dominant position on the part of P2P services can be captured by applicable competition law. On the whole, then, for the time being there is no specific need for regulation of P2P services on grounds of competition problems.

1236. The only question that might arise is whether a regulation should be created to give users the possibility to transfer the ratings they have received on one platform service to another platform service. From a competition-policy perspective, such a rating-portability option would be desirable on principle, as it could reduce potential switching costs and make it easier to switch platforms, especially for the suppliers in P2P services. This is all the more true considering that for many customers the rating is, alongside other criteria like the price, an important criterion for making a decision. One critical comment is in order, though: first, a transfer of the received ratings could be problematic in terms of

⁵⁹ An example of this is dating portals that match only people with a university degree, for instance, to facilitate their search for a suitable partner.

⁶⁰ Cf. Peitz, M./Schwalbe, U., *Zwischen Sozialromantik und Neoliberalismus – zur Ökonomie der Sharing-Economy*, supra (note 10), p. 30.

⁶¹ See already Monopolies Commission, *Special Report 68*, supra (note 4), paras. 34–44.

data protection law if the users who have given the ratings have not granted their permission for such a transfer. In this respect the further question arises who even owns the ratings. Second, the rating systems of the individual P2P services can vary appreciably, asking for instance about different criteria. Thus the comparability of the individual P2P services' ratings must be checked to determine whether an appropriate transfer between different rating systems is possible. In the view of the Monopolies Commission this still needs to be clarified.

2.5 Interim conclusions

1237. The sharing economy has grown a great deal in significance in recent years. Chief among the causes of this development are the increased spread of the (mobile) Internet, the reduction of transaction costs (search and information costs) allowed by smartphones and the remedying of trust problems, in particular through the establishment of rating and reputation mechanisms. The digital sourcing via platforms that underlies the sharing economy allows the realisation of efficiency gains as a result of lower transaction costs, as well as a more efficient coordination of supply and demand, including flexible price-setting that is oriented on supply and demand. Further efficiency gains can arise from a more intensive utilisation of resources stemming from an increase in utilisation or capacity degree. The rating systems commonly found on the platforms, furthermore, reduce incentives for misconduct while increasing market transparency.

1238. At the centre of the focus of public discussion are platform services which allow private persons to offer goods or services commercially to an extent never before achieved. These P2P services act primarily as intermediaries between private persons who act as suppliers and demanders. The services operate a digital matching platform through which the transaction is executed, but are not themselves in possession of the goods or involved in the performance of the services offered. The market entry of P2P services leads to an increase of competitive intensity in the sectors of the economy concerned. This can entail price reductions, increases in quality and an overall greater selection of goods and services. The flexible use of P2P services allows the private persons acting as suppliers to earn a supplementary income.

1239. Classifying the commercial activities performed by private persons in P2P services within the valid framework of laws can in individual cases be difficult, because the unambiguous delineation of private and commercial activities is not always possible. From a competition perspective, this is most relevant with respect to specific existing provisions and tax obligations applying to commercial suppliers. To avoid legal insecurity and costly individual assessments, in some cases de-minimis exceptions could be introduced which would allow a clear differentiation based on appropriate criteria between commercial and private suppliers. Most constructive in this respect would be thresholds based on the extent and the type of activity. Specific provisions based on the commercial nature of the activity would only be applied where these thresholds were exceeded. Here profit limits could be considered, or ceilings limiting the private activity to a certain number of days a year.

1240. In order to prevent distortions of competition between traditional suppliers and P2P services, or the suppliers acting through them, due to an asymmetric regulation, an appropriate regulatory framework for P2P services should on the one hand be created, and on the other hand a revision and, where necessary, a modification of the regulation of traditional suppliers should be performed. A blanket transfer of the existing rules for traditional suppliers to P2P services and the suppliers acting there, on the contrary, is not recommended. A regulation of P2P services and activities offered through them can be advisable, especially due to information asymmetries and externalities. To ensure a minimum of consumer protection, measures like safety provisions or mandatory insurance, depending on the activity, may be necessary. The regulations should take account of the type and extent of the activity, so as not to create unnecessary barriers to market entry, which would in particular make it unattractive to occasionally offer a good or service through P2P services. With respect to the regulation of traditional suppliers, an adjustment, especially of those provisions that have evolved historically, may be necessary to adapt them to the new economic realities digitalisation has created.

1241. In principle, with P2P services, as with other multi-sided markets, a certain tendency towards market concentration is to be expected as a result of indirect network effects and economies of scale. From this no sweeping conclusion of competition problems should be drawn, however. If a service achieves a market-dominating position, any abuse of this market position would be captured by valid competition law. A specific need for regulation of P2P services based on competition problems is, at least for the time being, not discernible. This aside, the possibility could be examined to

create a regulation on the portability of user ratings. The possibility to transfer ratings received on one platform service to another could help to reduce potential switching costs and prevent lock-in, especially of suppliers on P2P services, from occurring.

2.6 Intermediation services for private drivers

1242. A much-discussed area of the sharing economy concerns digital procurement services for driving services which operate a platform on which the driver is matched with potential passengers. Especially controversial among them are procurement services for so-called private drivers (e.g. UberPop), in which the driving – as opposed to digital procurement services for licensed taxis (e.g. myTaxi, UberTaxi, Taxi Deutschland) or hired cars (e.g. UberBlack, Blacklane) – is done by private individuals in their own private vehicles. Because they do not comply with the Passenger Transportation Act (*Personenbeförderungsgesetz* – PBefG) such intermediation services for private drivers have since been prohibited throughout Germany.

1243. In the following the development in the sector for procurement services for driving services with a focus on intermediation services for private drivers will be described in more detail. First, the market development and the effects on competition emanating from the new services will be sketched. Then the focus will turn to differentiating between commercial and private passenger transportation. Following this, strategies will be discussed of adapting the existing Passenger Transport Act to allow for new forms of offers and more competition in the sector of individual passenger transportation. This part will describe how an appropriate regulatory framework for new service providers might look and which regulatory adjustments are necessary to avoid distortions of competition in the traditional taxi and private hiring vehicle (PHV) industry.

2.6.1 Market development and effects on competition

1244. The market for individual passenger transportation (point-to-point transportation), in Germany as in most countries, traditionally consists of taxis (Sec. 47 PBefG) and so-called private hiring vehicles with drivers (Sec. 49 PBefG). Both the taxi and the PHV trade require a licence pursuant to Sec. 2(1) PBefG. Becoming licensed for the taxi trade depends upon the fulfilment of subjective (qualitative) and objective (quantitative) licensing criteria. In most German cities and municipalities entry to the market is limited in terms of quantity. For the taxi trade, there is a tariff obligation (Sec. 51 in conjunction with Sec. 39(3) PBefG), an obligation to carry (Sec. 22 in conjunction with Sec. 47(4) PBefG) and an obligation to operate (Sec. 21 in conjunction with Sec. 47(3) PBefG). The tariffs are set by the local authorities and may not be exceeded or undercut within the mandatory driving area. Taxis in Germany serve the dispatch or pre-booked market (= rides ordered previously), the hail market (= cabs hailed on the street) and the taxi rank market (= general availability at designated places, e. g. taxi stands).

1245. In contrast to the taxi trade, the licence for the PHV trade is based merely on the fulfilment of qualitative requirements; there is no quantitative limit. For the PHV trade there is no operation, transportation or tariff requirement, and the prices can be freely set by the companies or negotiated with the passenger. PHV may only perform transportation assignments that have been received at the company seat or the operator's place of residence pursuant to Sec. 49(4) PBefG, and must return there immediately after every assignment if no new transportation assignment is present (the so-called obligation to return). For-hire vehicles, in contrast to taxis, are therefore only active in the pre-booked market; picking up passengers off the sidewalk, for instance, is not permitted without an advance order.

1246. In the past several years, technological development has led to the formation of a number of digital matching services that allow passengers to book a ride over a smartphone app. These digital services often offer different forms or quality levels of individual passenger transportation. Thus among other things, traditional taxis and PHV, but also luxury class sedans and limousines with professional drivers can be booked. Besides these services, which procure licensed vehicles with professional drivers, other procurement services have entered the market that provide so-called private drivers, who provide passenger transportation with their own private vehicles. In addition to intermediation, the firms, often called *Transportation Network Companies* (TNC), as a rule offer supplementary services such as payment processing. The prerequisite for using these platform services, for the drivers as well as for the potential passengers, is

registration, which is as a rule free of charge. The only intermediation services for private drivers, to the knowledge of the Monopolies Commission, that were temporarily active in Germany, are UberPop and Wundercar.

1247. Intermediation services for private drivers are often described by the term ridesharing. Conceptually, however, one must distinguish between a “ride”, where the driver determines the destination and gives people going in the same direction a lift, possibly for a small recompense (e.g. Blablacar, flinc), and paid transportation, where the passenger determines the destination (e.g. UberPop). The first case is ultimately a traditional “lift”, which due to the uncomplicated and short-term advance organisation through digital intermediation services can now also be offered for short rides. Only in this case is there an actual sharing or common use (ridesharing). The latter case, on the contrary, is a taxi or PHV-type transportation by private persons that is at least in part in competition with the traditional taxi and PHV trade. For this, terms like “ridesourcing”⁶² or “rideselling”⁶³ are more appropriate.

1248. In the focus of the public discussion, in Germany and many other states, is mainly the paid transportation of passengers by private people with private vehicles, where the passenger determines the destination. After local authorities had obtained judicial confirmation of their injunctive orders against the services UberPop and Wundercar in individual instances, the Frankfurt District Court in August of 2014 issued an interim injunction prohibiting UberPop from offering its services Germany-wide.⁶⁴ When this order was set aside a short time later due to lack of urgency,⁶⁵ the Frankfurt District Court again issued a Germany-wide injunction in the main proceedings between Taxi Deutschland and Uber in March 2015.⁶⁶ The Frankfurt Court of Appeal confirmed this prohibition on appeal in June 2016.⁶⁷ An essential reason for the injunction was that the dispatched private drivers had no licence to transport persons under the PBefG. In Germany, therefore, intermediation services for private drivers are currently prohibited, as in most other European countries.⁶⁸ Whether platform services that dispatch licensed PHVs instead of private drivers are compatible with the PBefG, is debated and has not yet been determined in a final court decision.⁶⁹

1249. Due to the existing regulation, intermediation services for private drivers have not yet been able to enter the market in Germany. In contrast to the media attention, in the short time they were in business, those services that operated in isolated big cities in this country played only a small role in comparison to traditional suppliers.⁷⁰ Which effects could emanate from a market entry of these services can mainly be observed based on relevant foreign markets. Of particular relevance in this respect are studies on some US metropolises that show that on the one hand a partial substitution of taxi rides by intermediation services for private drivers took place, but the new services on the other hand also contributed to what in some cases was a substantial expansion of the market for individual passenger transportation.

1250. Substitution effects can be seen especially clearly in San Francisco, where the number of rides per taxi from January 2012 to July 2014 decreased as a result of the market entry of intermediation services for private drivers by about

⁶² Cf. Rayle, L. et al., App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco, University of California Transportation Center (UCTC), Working Paper, November 2014.

⁶³ Cf. Randelhoff, M., [Definition] UberPop, WunderCar, Lyft & Co. – Ridesharing oder vielmehr Rideselling?, 24 July 2014, <http://www.zukunft-mobilitaet.net/74151/analyse/definition-ridesharing-rideselling-unterschiede-taxi-carpooling>, accessed on 20 June 2016.

⁶⁴ Frankfurt District Court, order of 25 August 2014, 2-03 O 329/14.

⁶⁵ Frankfurt District Court, judgment of 16 September 2014, 2-03 O 329/14.

⁶⁶ Frankfurt District Court, judgment of 18 March 2015, 3-08 O 136/14.

⁶⁷ Frankfurt Court of Appeal, judgment of 9 June 2016, 6 U 73/15. Since the judgment can still be appealed before the Federal Supreme Court (BGH), it is not yet final.

⁶⁸ UberPop is no longer available in Germany as of April 2015. The company Wunder, formerly Wundercar, has also withdrawn from the German market.

⁶⁹ Particularly relevant is Sec. 49(4) PBefG, under which for-hire cars may only process transportation orders that are received by the service operator in its place of business or residence. See on this e.g. Berlin Court of Appeal, judgment of 11 December 2015, Case No. 5 U 31/15. The appeal on the law is now pending before the Federal Supreme Court.

⁷⁰ UberPop was according to available information only available in Berlin, Düsseldorf, Frankfurt, Hamburg und Munich.

65 per cent, from approximately 1,400 to approximately 500 per month.⁷¹ In New York as well, taxi companies faced a decrease in rides per taxi and a loss of profits, though to a smaller degree than those in San Francisco.⁷² An expansion of the market for individual passenger transportation can be observed in Los Angeles, for instance. Here the number of taxi rides also decreased, from about 8.4 million in 2013 to about 6 million in 2015.⁷³ Also, studies show that the total revenue of the taxi trade sank from about USD 46 million in the first quarter of 2012 by roughly 13 per cent to approximately USD 40 million in the fourth quarter of 2014. However, this loss of revenue of about USD 6 million is compared to an “additional” revenue earned by UberX drivers in the amount of approximately USD 60 million.⁷⁴ In total, the revenue in the sector of individual passenger transportation in Los Angeles more than doubled between the first quarter of 2012 and the fourth quarter of 2014.

1251. The cause of the strong growth of the intermediation services for private drivers could be, on the one hand, that the prices of these services are normally lower than regular taxi tariffs, and the taxi companies were not able to respond with price adjustments of their own due to the existing tariff commitments in the markets concerned. Thus studies show that the prices of the intermediation services for private drivers, depending on the region and the selected quality, can be considerably lower than the local taxi tariffs.⁷⁵ On the other hand, passengers in the cities concerned reportedly often complained about the quality of taxis or taxi rides before the market entry of the new services, so that it stands to reason that many dissatisfied passengers switched to the new services. The concerned taxi companies in some markets evidently reacted to this development with an increase in the quality of their service. Thus, for instance, in New York there were fewer complaints on average per taxi ride, and in Chicago there were on balance fewer complaints about defective air conditioning and credit card readers, or unfriendly taxi drivers.⁷⁶ Thereby not only the users of the intermediation services for private drivers profited from the market entry of these platforms and the more intensive competition, but also the consumers of taxi rides. A further reason for the growth of the intermediation services could be that private drivers, according to individual studies, evidently are more often active in city areas that before were hardly served.⁷⁷

1252. In sum it can be said that the new intermediation services in the US cities concerned have led to an intensification of competition in the area of individual passenger transportation. Consumers in particular have profited, in the form of greater variety, better quality in some areas, and often lower prices. For many passengers, the services of traditional

⁷¹ Cf. Bond, A. T., *An App for That: Local Governments and the Rise of the Sharing Economy*, *Notre Dame Law Review Online* 90(2), 2015, p. 87.

⁷² In New York prices for taxi permits fell from USD 1.32 million in 2013 to USD 0.65 million in August 2015. This is partially attributed to growing competition from the new intermediation services. Cf. Van Zuylen-Wood, S., *The Struggles of New York City’s Taxi King*, 27 August 2015, <http://www.bloomberg.com/features/2015-taxi-medallion-king>, accessed on 20 May 2016.

⁷³ LA Times, *Uber and Lyft have devastated L.A.’s taxi industry, city records show*, 14 April 2016, <http://www.latimes.com/local/lanow/la-me-ln-uber-lyft-taxis-la-20160413-story.html>, accessed on 20 May 2016.

⁷⁴ Cf. Deloitte Access Economics, *Economy effects of ridesharing in Australia*, study commissioned by Uber, 2016, p. 58, <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-economic-effects-of-ridesharing-australia-150216.pdf>, accessed on 6 June 2016. UberX is an intermediation service in the USA with which private drivers – similar to the UberPop service in Germany – use their private cars to carry passengers for remuneration. The numbers are based on data from Uber and from the Los Angeles Department of Transportation. The income of private drivers sourced by other platforms such as Lyft are not reported.

⁷⁵ The prices depend among other factors on whether private persons (e.g. UberPop in Europe or UberX in the USA) or professional drivers (e.g. UberBlack) do the driving. Furthermore, some services offer different vehicle classes, like compact and higher-classed sedans. A study of 21 American cities shows that a five-mile ride at 30 miles per hour is cheaper with private drivers or UberX in almost every city studied, with the exception of New York and Philadelphia, than with taxis. Tips excluded, the price ratio of taxis to UberX lay between 0.9 in New York and 1.7 in Los Angeles; including a 20-per cent tip for taxi rides, it lay between 1.0 in New York and 2.1 in Los Angeles. Cf. Silverstein, S., *These Animated Charts Tell You Everything About Uber Prices In 21 Cities*, 16 October 2014, <http://www.businessinsider.com/uber-vs-taxi-pricing-by-city-2014-10?IR=T>, accessed on 30 May 2016.

⁷⁶ Cf. Wallsten, S., *The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?*, Technology Policy Institute, Working Paper, June 2015.

⁷⁷ See on this e.g. Smart, R. et al., *Faster and Cheaper: How Ride-Sourcing Fills a Gap in Low-Income Los Angeles Neighborhoods*, study commissioned by Uber, July 2015, <http://botecanalysis.com/wp-content/uploads/2015/07/LATS-Final-Report.pdf>, accessed on 6 June 2016.

suppliers and those of intermediation services for private drivers appear to be substitutable to a great extent. In evaluating the trend, it must however be considered that these TNCs are not fully unregulated in the USA, but usually are subject to a specific regulatory framework with minimum requirements concerning the selection of drivers and vehicles, as well as specific insurance requirements. This framework varies by state or by city, however.⁷⁸ The platforms themselves as a rule need a licence and must where applicable provide sufficient insurance to protect the passengers (and the drivers). In addition, they must examine whether the drivers and the vehicles meet the statutory minimum requirements. As a rule, this is done by looking at the relevant documents. The drivers must be submitted to a background check for any crimes or motoring offences. Further, requirements are often in place regarding driving experience and the age of the driver, and sometimes health check-ups are also prescribed. In some states or cities the drivers must be in the possession of not only a simple driver's licence, but also an official "for-hire licence". In some areas a trade must also be registered. The private cars used must be roadworthy. In this respect an annual inspection is most often required, and some authorities stipulate a maximum age for the vehicles. In some regions the vehicles must bear the company logo of the intermediation platform(s) while passengers are being transmitted; as a rule, this is placed on the windscreen.

1253. Although the US experiences cannot per se be transferred to Germany due to the difference in market structures, they can at least be seen as an indication of a potential market development here in Germany. A study commissioned by Uber, for example, arrives at the conclusion that in Berlin alone the market entry of such intermediation services for private drivers such as UberPop could lead to monetary advantages for consumers in the range of up to EUR 48 million, and this analysis does not yet consider certain factors including the expansion of the market that is to be expected in the case of lower prices, increased quality and advantages of product differentiation.⁷⁹ This notwithstanding, the actual market development is likely to depend, for one thing, on the structures present in the local taxi and PHV trade. Thus the immediate competitive pressure of the relevant intermediation services would probably be felt strongest where the pre-booked market is particularly strong in comparison to the hail and taxi rank market.⁸⁰ On the other hand, the regulatory framework would likely be of central significance, both that applying to the new intermediation services and that applying to the traditional taxi and PHV trade, as it is instrumental in defining which possibilities the traditional suppliers have to react.

2.6.2 Delimitation of private and commercial offers

1254. The PBefG distinguishes between for-payment, or commercial, passenger transportation and not-for-payment passenger transportation. Pursuant to its Sec. 1(1) the PBefG is only applicable to commercial transportation. Such transportation is given, in particular, when the total payment exceeds the operational costs of the trip, so that the trip is undertaken with the intention of earning a profit. In this case, there is, on the one hand, an obligation to obtain a permit, according to Sec. 2 PBefG. On the other hand, there are specific requirements regarding the qualification of the drivers and the service operators and regarding the vehicles used.

1255. In the case of remunerated, or commercial, passenger transportation the drivers, according to Sec. 48 of the Driver's Licence Regulation (*Fahrerlaubnisverordnung – FeV*), must possess a licence to transport passengers. To receive this licence, a driver must possess at least one class B driver's licence and be 21 years old. Furthermore, a driver must be fit to carry passengers, in terms of both character and health. This is proven by submitting an official certificate of good conduct, an excerpt from the register of driver fitness, a doctor's attestation of particular physical fitness and a

⁷⁸ For the existing rules in California see California Public Utilities Commission, Basic information for transportation network companies and applicants, http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Transportation_Network_Companies/BasicInformationforTNCs_7615.pdf, accessed on 06 June 2016.

⁷⁹ The amount of the monetary advantage would depend decisively on what market share the cheaper private suppliers were able to secure and whether the taxi industry responded to the additional competition by lowering its own prices. The latter presupposes a revocation of the tariff obligation. Cf. Haucap, J. et al., Chancen der Digitalisierung auf Märkten für urbane Mobilität: Verbraucherwünsche und neue Anbieter. Eine ökonomische Untersuchung, Joint study by DIW Econ and DICE Consult commissioned by Uber, February 2015.

⁸⁰ Nevertheless, one can assume that the pre-booked market will in future expand due to the spread of smartphones and the ease of use of the respective apps, at the expense of the other market segments.

special vision test. In towns with a population of 50,000 or more, taxi and PHV drivers must also take a test proving their familiarity with the area.

1256. In addition to these requirements for the drivers, there exist further requirements for the operators who wish to offer remunerated passenger transportation, i.e. taxi or PHV services. They must own a licence which according to Sec. 13 PBefG is only granted if the applicant is personally reliable and technically qualified.⁸¹ Financial standing must also be ensured. Personal reliability is proven, as with the drivers, by submitting various registry excerpts, including a certificate of good conduct. Technical qualification is as a rule evidenced by the successful completion of a technical qualification exam for taxi and PHV operators administered by the chamber of commerce. This exam procedure imparts, among other things, knowledge of the passenger-transportation, motoring, commerce, labour and tax laws, information on the business and financial management of a company and technical aspects.⁸²

1257. Legal provisions also exist for the vehicles used for the remunerated transportation of passengers. The Ordinance on the Operation of Motor Carriers in the Transportation of Passengers (*Verordnung über den Betrieb von Kraftfahrunternehmen im Personenverkehr* – BOKraft) stipulates, among other things, that the vehicles must have at least two doors on the right side and be equipped with an alarm system (Sec. 25 BOKraft). In the taxi trade there is additionally a prescribed colour for the vehicles (Sec. 26(1) BOKraft), though this has been abolished in some Länder. Vehicles in taxi transport must further be equipped with a taximeter (Sec. 28 BOKraft), those in PHV transport, with an odometer (Sec. 30 BOKraft). Also, pursuant to Annex VIII to Sec. 29 of the Road Traffic Licensing Regulation (*Straßenverkehrs-Zulassungs-Ordnung* – StVZO), a general inspection is required every 12 months on cars used for passenger transport, instead of every 24 months.

1258. The above-named requirements for drivers, operators and vehicles do not apply if the total remuneration does not exceed the operational costs of the trip, because in this case no passenger transportation with mandatory licence is present (Sec. 1(2) No. 1 PBefG). This is most likely to be the case with lifts, where the driver herself determines the destination and only takes passengers along for part of the trip as a favour or in order to reduce her costs. The operational costs encompass only consumption-related costs, however, especially of fuel, oil and tyre wear, and are not identical with net cost, which also includes the costs of owning the car, such as taxes, insurance and depreciation.⁸³ If in contrast private individuals offer individual passenger transportation with their own private vehicles for payment and with the intention of earning a profit, as is normally the case with the intermediation services under discussion, under applicable law this represents a commercial activity. Accordingly, the minimum requirements named above regarding drivers, operators and vehicles used must be met. De facto, therefore, the PBefG does not provide for remunerated passenger transportation by private persons.

1259. These observations show that the existence of a commercial activity, and the minimum requirements this entails for remunerated passenger transportation, ultimately depends on whether earnings exceed the operational costs or lie below them. This would seem to be a clear criterion for distinguishing commercial from private transportation. And yet operational costs vary according to the type of vehicle, which often makes them difficult to determine. Also, the threshold for assuming a commercial transportation is relatively low, so that even private persons who only occasionally use their own car to transport people for payment may fall within the scope of application of the PBefG and be required to comply with the applicable provisions. Against this background the criticism is sometimes expressed that the existing requirements are too comprehensive for the occasional offering of remunerated rides and that they are a hindrance to innovative services. In this context it is also pointed out that many of the private drivers using the platforms in the USA do not do so on a full-time basis, but use the service primarily to generate supplementary income or to bridge a period of temporary unemployment. For such purposes the possibility of arranging one's own work hours with the platform

⁸¹ Taxi permits in Germany also – in contrast to the PHV industry – often have quantitative limits.

⁸² Cf. on this e.g. German Chamber of Commerce (DIHK), Orientierungsrahmen der Industrie- und Handelskammern für die Vorbereitung auf die Fachkundeprüfung für den Taxen- und Mietwagenverkehr, September 2013, <https://www.muenchen.ihk.de/de/bildung/Anhaenge/sach-und-fachkunde/verkehr/orientierungsrahmen-taxen-und-mietwagenverkehr.pdf>, accessed on 2 May 2016.

⁸³ See on this for instance Hamm Court of Appeal, order of 13 January 2009, 3 Ss OWi 885/08.

flexibly and autonomously is a central advantage. A study on the subject shows that 55 per cent of private drivers working for Uber in the USA work fewer than 15 hours per week, and 85 per cent fewer than 35 hours per week for the platform.⁸⁴

1260. To allow private persons to offer remunerated passenger transportation on a small scale without too high requirements, one proposal being discussed is the introduction of thresholds or de-minimis exceptions. Accordingly, earnings limits could be set below which individual requirements that do not directly serve to protect consumers could be dropped. Finland, for instance, is planning to exempt suppliers from the existing licensing requirements up to an annual turnover of EUR 10,000.⁸⁵ Some market participants in Germany cite the elaborate technical qualification exam for taxi and PHV operators as one measure that could be dropped, or at least adapted, because it is not as necessary for independent private drivers, especially if they offer their services only occasionally, as for suppliers who are permanently engaged in passenger transportation as a means to earn a living.

1261. From the perspective of the Monopolies Commission, a differentiated examination is required with respect to the potential introduction of de-minimis exceptions or thresholds. What is not necessary is a de-minimis exception to differentiate between private ridesharing offered without intention of profit and commercial offers aimed at making a profit. The existing distinction on the basis of operational costs and the foregoing of stricter regulatory requirements for ridesharing, as exist for commercial passenger transportation, seem appropriate. To avoid legal insecurities arising from ignorance of the precise amount of operational costs, it could be sensible to revise the criterion of operational costs, for instance setting a blanket cost schedule for the consumption-related costs.⁸⁶

1262. An activity that must be distinguished from this is the commercial transportation of passengers by private persons with their own automobile, which is not provided for in the current legal situation. If this were to be legalised, a de-minimis exception, for instance in the form of a turnover threshold or a maximum number of work hours per week or per month could serve to define lower requirements for those who offer their services only occasionally than for companies that engage in this activity on a larger scale. The primary goal would thus be to lower the market-entry barriers for only occasional suppliers. If regulatory alleviations for occasional drivers are to be introduced, in the view of the Monopolies Commission there are in principle two possibilities. First, private, or occasional, drivers could all be assigned to the private sector up to a certain extent of activity. The de-minimis exception would in this case allow, besides regulatory alleviations, a clear delineation between commercial suppliers and private, commercially active suppliers. Second, within the commercial sector (according to the current definition) of passenger transportation, that is, in cases where the remuneration exceeds the operational costs, a threshold value could be set. The private drivers in this case would all be classified as commercial suppliers, but below the threshold they would be subject to lower regulatory requirements. The critical difference between the two variants would thus be that in the latter case, a commercial activity would be present regardless of the extent of the activity.⁸⁷

1263. If such de-minimis exceptions or threshold values were to be introduced, regardless of whether a private or a commercial activity were assumed, it would have to be considered which requirements could be dropped for the smaller scale of activity. Minimum requirements of the drivers and of the vehicles used would have to be retained in any case in order to safeguard passenger safety. Further, a sufficient insurance protection would have to be guaranteed, because a private automobile liability insurance may not cover all aspects of commercial transportation of passengers, even if

⁸⁴ Cf. Hall, J. V./Krueger, A. B., *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, supra (note 52), p. 18.

⁸⁵ Finnish Ministry of Transport and Communications, *Transport Code enables better transport services and flexible business operations*, Press release of 18 April 2016, <http://www.lvm.fi/en/-/transport-code-enables-better-transport-services-and-flexible-business-operations>, accessed on 6 June 2016.

⁸⁶ See also Odenwaldkreis, *Bedarfsgesteuerte Mobilitätsangebote. Flexible und alternative Bedienungsformen*, 15 January 2016, p. 23 et seq.

⁸⁷ Accordingly, in this case a business registration would be required. The trade income tax would not apply owing to the presumably small scope of the activity and the existing profit allowance of EUR 24,500. The income would, however, be subject to taxation in both cases.

this is only occasional.⁸⁸ What is conceivable, in contrast, is that below the defined threshold value the technical qualification exam for taxi and PHV operators could be dropped, or at least its content adapted.

1264. Whether the introduction of threshold values to reduce the catalogue of regulatory requirements for occasional drivers is in fact constructive would have to be examined in detail, in the view of the Monopolies Commission. Thus for example the requirement of a comprehensive technical qualification exam could be rejected, particularly with respect to private drivers sourced through P2P services independent of any de-minimis exception, since these are solo self-employed drivers and as such have no employees and essentially work as drivers. According to available information, in the USA, where so far the most experience has been gathered with the regulation of this kind of intermediation services, there exist no de-minimis exceptions, so that the regulations enacted specifically for these services apply without regard to the extent of the activity. Whether or not threshold values are introduced, in the view of the Monopolies Commission specific rules for private drivers sourced through platform services should also be enacted here in Germany.⁸⁹

1265. Finally, from a competition perspective, potential “de-minimis exceptions” in the sense of extensive tax allowances for private or occasional suppliers should be rejected. These would represent an unjustified cost, and thus competitive, advantage over traditional taxi and PHV companies. Aside from this, the small-scale business rule in the Value Added Tax Act (UStG) already represents relief for operations with low turnover.

2.6.3 Regulatory framework for intermediation services for private drivers

1266. As just explained, remunerated transportation by private persons in Germany is not provided for under the current legal framework of the PBefG. In contrast to Germany and most other European countries, in some states or cities of the USA a regulatory framework for intermediation services for private drivers has been created. As mentioned above, this was done in most cases by creating a separate category for these services, the TNCs, and legally defining minimum requirements regarding the qualification of the private drivers, the condition of the vehicles and insurance protection.⁹⁰ The concrete minimum requirements vary between the individual states or cities.

1267. If the legislature should decide to allow private or occasional drivers to offer rides in Germany in addition to the existing taxi and PHV trade, a similar regulatory framework as in the USA could be created for these services here. By doing so, the selection of offers and with it the competition in the area of individual passenger transportation could be enhanced, and interested persons could be given the possibility to earn a flexible supplementary income.⁹¹ To avoid distortions of competition between the different forms of offers the creation of such a regulatory framework should ideally go hand in hand with a comprehensive reform of the PBefG or with a liberalisation of the traditional taxi and PHV trade that takes into account the particularities of the individual market segments (pre-booked, taxi rank and hail market). The following sections first show which minimum requirements for the drivers and vehicles used should apply in order to ensure safe transportation of passengers. Then they examine which specific requirements are needed for the intermediation services.

⁸⁸ The passengers are still insured when the driver has not informed his insurance carrier that he transports passengers commercially. But in the case of a claim, there can be a considerable liability risk for the driver, of whom redress can be demanded by the insurance carrier. See on this e.g. Zeit Online, Die Risiken für Uber-Fahrer, 10 September 2014, <http://www.zeit.de/mobilitaet/2014-09/uber-nutzer-versicherungen>, accessed on 2 May 2016.

⁸⁹ On the creation of an appropriate regulatory framework for private drivers, see the following section 2.6.3.

⁹⁰ On this see para. 1252 in this Report.

⁹¹ A study for several US cities finds that 31 per cent of Uber drivers also have a full-time job, and 30 per cent a part-time job. Thirty-eight per cent of the drivers have no other job besides driving for Uber. Not surprisingly, this group work more hours than the average per week as Uber drivers. Of these, about one-third work more than 35 hours per week on the platform. Cf. Hall, J. V./Krueger, A.B., An Analysis of the Labor Market for Uber’s Driver-Partners in the United States, *supra* (note 52), p. 10.

2.6.3.1 Minimum requirements for drivers and vehicles

1268. From an economic perspective, a regulation of markets can be advisable primarily in order to avoid a market failure. In the field of passenger transportation such a market failure can arise chiefly through information asymmetries. The information asymmetries in this sector have declined sharply as a result of the technological advances of the last several years. But this is true primarily of objectively observable aspects, such as vehicle cleanliness or driver friendliness, that can be evaluated by the passengers in the framework of a rating system, for example. It is different with quality aspects that cannot be objectively evaluated, such as the technical aptitude of the drivers to transport passengers, or the road safety of the vehicles. To guarantee the quality of the service, there exist qualitative minimum requirements – as described above – for the driver and the cars used to carry passengers in the traditional taxi and PHV trade. As the special risk situation in road traffic warrants appropriate minimum standards that are valid regardless of whether the transportation of passengers is performed professionally and on a permanent basis or only occasionally, corresponding rules are also necessary for intermediation services for private drivers.

1269. Qualitative minimum requirements are necessary, first, with regard to the drivers dispatched by the platform services. To guarantee a safe transportation of passengers, these – like taxi and PHV drivers – should have a licence to transport passengers. This means, as explained above, that the drivers possess at least one class B driver's licence and are at least 21 years old and suitable both in character and healthwise for transporting passengers, which must be documented accordingly. Not necessary, on the other hand, as navigation technologies are by now ubiquitous, is a test of sufficient knowledge of the area, especially considering that navigation by smartphone and GPS is inherent to the intermediation services' business model. For precisely these potential occasional drivers, the time invested in such a test, even if the monetary investment is relatively low, represents a high barrier to market entry. Apart from that, the test of familiarity with the area should be done away with for taxi and PHV drivers as well.⁹²

1270. It would also be expedient if the authorities assigned the drivers an individual identification number that should be used to register or log in on a platform service and should be monitored by the platform service. This could help to ensure that the drivers do not circumvent any future rules on driving time and break times by using different platforms sequentially, for instance. In this way, many safety risks to passengers resulting from driver exhaustion could be ruled out.

1271. Moreover, it must be taken into consideration that the private drivers are usually treated by the platform services as independent contractual partners.⁹³ If this classification is correct, the drivers, as independent business operators, must have a permit for the passenger transportation trade under the current legal framework. One requirement in this respect is proof of their personal reliability and their technical qualification as a businessperson.⁹⁴ The latter is established – as described above – by means of a comprehensive technical qualification exam for taxi and PHV operators. It is doubtful whether such an exam is also necessary for independent drivers who only take on driving assignments through digital platform services and do not have their own employees. At least for private drivers only working occasionally or on a small scale, it seems reasonable to do without an extensive technical exam. Another option could be to introduce a specific, less extensive qualification exam for independent drivers who only take driving assignments through intermediation platforms and have no employees.⁹⁵

1272. With regard to the vehicles used to transport passengers, road safety must above all be guaranteed. Because the consumers, and sometimes the drivers as well, are often only able to evaluate the outer condition of the cars, but not their actual roadworthiness, here, in addition to statutory requirements, there need to be regular inspections by certi-

⁹² See already Monopolies Commission, Biennial Report XX, supra (note 3), para. 235. Familiarity with the area should be required, if at all, then of drivers not using a navigation system. This case will hardly be relevant in practice anymore.

⁹³ Whether this classification is correct is debated, and has even been the subject of legal disputes. Thus in the USA a class-action suit was only recently settled by payment of USD 100 million. Legal clarification of the existing contractual or labour relationship would be prudent to create legal security.

⁹⁴ Economic capacity must also be guaranteed.

⁹⁵ In contrast to the current exam through the chamber of commerce, contents regarding e.g. labour law could be dropped.

fied institutions like the German TÜV.⁹⁶ While there are legal regulations that apply to private vehicles, these are less strict than those applying to vehicles used for the commercial transportation of passengers. A main difference is the general inspection, which is required for private automobiles every 24 months, as opposed to the 12-month interval for commercially used cars.⁹⁷ Thus it warrants considering whether an annual general inspection is also necessary for private vehicles used for transporting passengers. Since such an obligation would not entail a very high barrier to market entry, it is generally justifiable in terms of guaranteeing passenger safety. As an alternative, the prescribed interval between inspections could be set according to mileage. This could help to take into account that the vehicles used by private and/or occasional drivers probably amass much less mileage per year than those used by taxi and PHV companies, especially when the latter are used by several drivers. In this case, the next general inspection would be required either after 24 months or when the mileage limit is reached.

1273. Not necessary, on the contrary, is the equipping of private vehicles with a separate taximeter (as in the taxi trade) or odometer (as in the PHV trade). Because the route is recorded via smartphone app by means of GPS, and the price is communicated directly by this app to the driver and the passenger, any manipulation of the route taken or of the tariff is almost completely ruled out. Furthermore, any attempt to take advantage of the passengers by driving roundabout routes can be ascertained after the fact. Likewise not necessary are legal provisions on the features that passengers can clearly observe themselves, such as the number of seats and doors or the colour of the cars. Thus, for example, there is no reason not to approve compact cars for transportation of passengers in addition to higher-classed and mid-size cars. It is merely important that the automobiles are roadworthy and the customers can find information about the type of car before they book a ride. It can be left up to the intermediation services to make the respective stipulations, and these can where appropriate offer different levels of quality at different prices.

2.6.3.2 Requirements for intermediation services

1274. Besides regulatory provisions on driver qualification and vehicle safety, in the view of the Monopolies Commission it is necessary to lay down specific requirements for the intermediation services for private drivers in the law. This seems appropriate not least because these services, compared to traditional services like taxi dispatchers, interfere more with market activity, often taking on additional tasks besides their intermediation activity, such as setting prices. Moreover, an unambiguous legal framework could help to create legal security for the new service providers.

1275. In principle, it seems the logical step to the Monopolies Commission to introduce a new transportation category for the relevant intermediation services within the PBefG in analogy to the procedure in some US cities and states. The intermediation services should be required to have a permit to carry out their business, which should not be limited in quantitative terms and could be revoked if necessary. They would – similar to the classic PHV trade – serve only the pre-booked market, that is, the dispatched drivers would only be allowed to carry out transportation assignments they have received through the platform provider's app. Service of the taxi rank and hail markets, that is, picking up passengers from taxi stands or the roadside, would be reserved for licensed taxis, as it is now. The drivers would, however, of course be allowed to collect passengers from the roadside who had placed an order via app.

1276. One main task of the platform operators would be to check that the drivers and the vehicles used to transport passengers met the minimum qualitative requirements defined by law. The role of the intermediation services could essentially be limited to continually monitoring the validity of the documents issued by the authorities or certifying institutions. This should ideally be done in real time, wherever possible, by the use of digital information and communication technologies (e-government). Drivers or cars not fulfilling the minimum legal requirements should be barred from the platform. This could help to ensure a permanent safety and quality control.

1277. A further task of the platform services would be to make sure of sufficient insurance coverage. The platform services should at base be responsible for the driver's, and ultimately the passengers', coverage during the ride. This could

⁹⁶ Cf. Peitz, M./Schwalbe, U., *Zwischen Sozialromantik und Neoliberalismus – zur Ökonomie der Sharing-Economy*, supra (note 10), p. 25.

⁹⁷ Pursuant to the trade associations' accident prevention provisions, an annual inspection is also required for company cars.

be managed either by means of an insurance obligation on the part of the platform services themselves or within the framework of an obligation to monitor the drivers' existing insurance coverage. One could argue in favour of an insurance obligation on the part of the platform operators that this would better address any gaps in coverage. Such a stipulation exists, for example, in many states in the USA, where insurance companies have developed relevant products. If it is the drivers who are required to have sufficient insurance, the intermediation services must ensure that this in fact covers (occasional) remunerated transportation of passengers. Normally, this is, at least as far as a regular automobile liability policy is concerned, not the case.

1278. As the intermediation services would only be active in the pre-booked market, which is characterised by a high degree of market transparency, a regulation of prices to protect consumers would not be necessary from an economic point of view. This is at least the case provided no market dominance is given. It is important, however, that the passengers are informed about the relevant prices before ordering a ride. Even if this is, as far as the Monopolies Commission knows, current practice with the well-known providers, a corresponding legal obligation to do so should be created. Under such market conditions, there is little reason, from an economic perspective, to deny flexible prices that fluctuate based on supply and demand. If on grounds other than economic ones it is decided to avoid excessive price fluctuation, setting an upper limit for possible price increases could be an option. This might be appropriate, for instance, in the case of catastrophes like heavy storms. Agreements to put a cap on the "surge pricing" multipliers have been made by Uber in the USA, for example.⁹⁸ An alternative here in Germany could be a legal obligation to limit price fluctuation in certain situations.

1279. One last comment on pricing is in order: that, from a competition-law perspective, it may be of relevance how the prices on the platform services are set. In general there are two possibilities. Either the intermediation services themselves set the prices for the drivers centrally, based for example on the vehicle category, or they leave the pricing to the individual drivers. Competition-law problems can arise primarily in the case of central pricing by the intermediation service. Of relevance for assessing the situation is above all the contractual or labour arrangement between the platform service and the drivers. If drivers are employed by the platform service, central price setting is no problem. If, however, the drivers have the status of independent contractual partners, which is the rule, this could indicate that the platform service is coordinating illegal price-fixing among the self-employed drivers. In economic terms, this does not however raise concerns of a potential cartelisation of the market, at least as long as the market share of the respective platforms is low. Where necessary, the competition agencies and courts will have to test the admissibility of such arrangements.

2.6.4 Liberalising the taxi and PHV industry

1280. Besides a regulatory framework for intermediation services for private drivers, the Monopolies Commission also considers a fundamental revision of the regulatory framework for the taxi and PHV industry as necessary to avoid distortions of competition. Otherwise the risk is great that traditional companies will be forced off the market due to their limited potential to react, especially where price setting is concerned.⁹⁹ The Monopolies Commission refers in what follows to key statements from its Twentieth Biennial Report, in which it recommended a liberalisation of the taxi and PHV trade while retaining qualitative minimum requirements.¹⁰⁰ All superfluous or obsolete provisions should be revoked.

1281. In the taxi trade, to begin with, the limit on the number of permits in many regions that restricts the market entry of taxi operators should be lifted. Such quantitative limits may have been necessary in the past, to provide incentives for

⁹⁸ Such an agreement was initially made for New York and subsequently extended to the entire United States. See on this New York City Press Office, A.G. Schneiderman Announces Agreement With Uber To Cap Pricing During Emergencies And Natural Disasters, Press release of 8 July 2014, <http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural>, accessed on 20 May 2016.

⁹⁹ This is probably one reason for the drop in taxi rides in the USA mentioned above.

¹⁰⁰ Cf. on the following statements Monopolies Commission, Biennial Report XX, *supra* (note 3), paras. 230–265.

investing and to allow a taxi market to develop in the first place.¹⁰¹ Today, however, such a restriction on market entry is no longer needed. First of all, no risk of the functioning of the taxi trade is to be expected as a result of overcapacity, because there exist both low barriers to exit the market and a functioning used-car market. This is evidenced, not least, by the experience of cities like Berlin and Hamburg, which have no such limit. The objective licensing criteria of Sec. 13(4) PBefG for taxi permits should therefore be abolished.

1282. Furthermore, the tariff requirement in the taxi trade (Sec. 51 in conjunction with Sec. 39(3) PBefG) should be abolished or at least relaxed. While price limits could if necessary be set for the rank and hail markets, free price setting should be the norm in the pre-booked market, which is of particular relevance for the competitive relationship between taxis and intermediation services for private drivers. Particularly in the orders market, a tariff requirement to protect passengers from fleecing is not necessary, because here practically no information asymmetries exist with respect to price and the high market transparency allows passengers to compare prices fairly easily. Regulating prices in the form of ceilings would at most be necessary in this market if the suppliers were very scarce. Repealing or easing the tariff requirement could give taxis the potential to compete with the new intermediation services not only on quality but also on price. Particularly in low-demand periods price reductions could be used to generate additional demand. It could moreover allow for a diversification of different price-quality combinations in the taxi trade as well.

1283. In addition to these changes in the taxi trade, regulatory adjustments should likewise be made in the PHV trade in order to enhance competition. Provisions that should be amended or repealed are, above all, those stipulating that orders for transportation must reach the PHV operator's seat of business directly and by telephone, and that the for-hire cars must return immediately to the seat of business after each ride if no new order has been received (Sec. 49(4) second and third sentence PBefG). While the former provision is technologically obsolete and restricts the possibility of dispatching for-hire vehicles via digital intermediation platforms, the latter "obligation to return" leads to empty trips that are dubious in economic and ecological terms.

1284. What should continue to exist in the taxi and PHV trade due to existing information asymmetries, in contrast, are qualitative minimum requirements on quality aspects that cannot be seen by passengers. This concerns above all safety requirements for the vehicles and the technical and personal aptitude of the drivers. A test of familiarity with the area, on the other hand, is no longer necessary today, with the widespread availability of navigation devices.

1285. By implementing the above-named recommendations, a modern and competitive regulatory framework could be created for individual passenger transportation that takes better account of the particularities of the individual market segments, that is, the pre-booked, taxi rank and hail markets. This could on the one hand bolster competition in the taxi and PHV trade, while on the other hand avoiding distortions of competition between traditional suppliers and the new intermediation services for private drivers, if the latter become allowed in Germany. This would allow the taxi trade in particular to compete not only on quality but also on price with the new intermediation services. Consumers would profit most from the greater selection of offers, as they could themselves decide which forms of transportation best meet their needs. Maintaining the current regulation in combination with a ban on the new intermediation services, on the contrary, would lead to a partitioning of the taxi and PHV market to the detriment of consumers.

1286. An argument sometimes put forward against such a competitive regulatory framework is that a largely liberalised taxi trade without a tariff requirement could not serve the public interest in the provision of transportation with blanket coverage and high availability for affordable prices.¹⁰² A main concern is a reduction of supply and a marked price increase in rural regions. In the view of the Monopolies Commission this argument is not comprehensible. First, it is far from clear that the current regulatory framework actually supplies the minimum coverage in rural areas that policy intended, if one considers the current demographic trend. Thus the German Taxi and Hire Car Association (Deutscher Taxi- und Mietwagenverband – BZP) itself points out that in ever more regions of Germany the taxi trade is no longer economically viable and that many former taxi business operators now only offer PHV services, as these do not entail a

¹⁰¹ Cf. Peitz, M./Schwalbe, U., *Zwischen Sozialromantik und Neoliberalismus – zur Ökonomie der Sharing-Economy*, supra (note 10), p. 25.

¹⁰² On this see e.g. the Comments of the Federal Government on Biennial Report XX of the Monopolies Commission, BT-Drs. 18/4721, 22 April 2015, paras. 27–34, <http://dip21.bundestag.de/dip21/btd/18/047/1804721.pdf>, accessed on 30 May 2016.

requirement of operation and transportation.¹⁰³ In ten per cent of Germany's area, according to the BZP, there are no longer any taxi operators. In the view of the Monopolies Commission this indicates that the existing regulation does not achieve the goal of providing the population with basic individual mobility, at least not in every case.

1287. Aside from this, the situation in rural areas must be looked at in a differentiated way. The effect of a liberalisation of the taxi trade, specifically in rural areas, will likely depend very much on the specific market conditions. Any regulatory framework that is enacted must take these into account. If an economically viable market entry is possible, a market-entry restriction based on only qualitative criteria should in any case lead to an increase of supply, in the sense of a higher number of suppliers, even in rural areas. A lower number of suppliers than the status quo, on the contrary, is not to be expected, since it is already possible today for established suppliers to exit the market at any time if economic viability is lost. If due to the regional market conditions only few suppliers are active on the market and it should happen that no competitive prices develop after the tariff requirement is removed, then considerable price hikes could be prevented by a price regulation in the form of price ceilings. This would protect consumers from excessive prices, on the one hand, and on the other, the suppliers could raise their rate of utilisation by lowering prices, especially in low-demand periods. A lower supply at times of the day when demand is especially low and service cannot be made economical despite price adjustments can if necessary be addressed by retaining the obligation to operate. As an alternative, the competent authorities could call for tenders for individual companies to serve during these off-peak hours, thus ensuring minimum coverage for a certain price.¹⁰⁴

1288. Regardless of the specific effects in rural areas of liberalising the taxi and PHV trade, in the view of the Monopolies Commission, such concerns should not be regarded as an obstacle to establishing a new competition-law regulatory framework, for metropolitan areas in particular. The Federal Government itself refers in its comments on the Twentieth Biennial Report that a liberalisation of the taxi trade in economically attractive regions is likely to lead to greater supply and accordingly greater pressure on prices.¹⁰⁵ The different market conditions in rural and urban areas can therefore justify different regulations for the taxi and PHV trade.

2.6.5 Summary

1289. The trend of digitalisation has led to the creation of digital intermediation services in the sector of passenger transportation that source so-called private drivers who (occasionally) use their own private vehicles to transport passengers. Particularly in the USA, these services have led to an intensification of competition in the sector of passenger transportation. There, a partial substitution of rides, on the one hand, and an expansion of the market for individual passenger transportation, on the other hand, can be observed. The increased competition profits consumers, first and foremost, as the new services often offer lower prices, the selection of services is on the whole greater, and the quality of individual transportation has increased. The latter is also true of the services offered by traditional taxi companies, some of whom have responded to the increasing competitive pressure within the bounds set by regulation by raising their quality.

1290. In Germany the sourcing of private drivers conflicts with the Passenger Transportation Act (PBefG). Such services have been prohibited by the courts and competent authorities. The main reason for this is that the private drivers have no permit in the sense of the PBefG to transport passengers. In order for such intermediation services to operate with legal security in Germany, the PBefG needs to be amended.

1291. The Monopolies Commission in principle advocates a reform of the PBefG and the creation of a regulatory framework for intermediation services for private drivers so as to enhance competition in the sector of individual passenger transportation. This regulatory framework should guarantee safe transportation to protect passengers, and it

¹⁰³ Cf. Böhm, R., Großer ÖPNV und Taxi wachsen zusammen, Auszug aus BZP-Report 2/2014, http://www.bzp.org/Content/MELDUNGEN/2014/_Kommentar_von_BZP-Vorstand_Roland_Boehm_OePNV__Taxi_wachsen_zusammen.php, accessed on 20 June 2016.

¹⁰⁴ For such a proposal see e.g. cnetz, cnetz fordert Reform des PBefG, Beschluss des cnetz e. V. zur Reform des Personenbeförderungsgesetzes vom 18. April 2016, <http://c-netz.de/2016/04/18/cnetz-fordert-reform-des-pbefg>, accessed on 20 May 2016.

¹⁰⁵ Cf. Comments of the Federal Government on Biennial Report XX of the Monopolies Commission, *supra* (note 102), para. 31.

could take the measures instated in the USA as its basic model. Accordingly, a specific transportation category could be created for intermediation services for private drivers, and minimum requirements on driver qualification and vehicle safety could be laid down in the law. For private drivers who only occasionally transport passengers, less strict requirements regarding criteria not related to safety could apply where necessary. In this regard the possibility to introduce a de-minimis exception should be examined. Moreover, sufficient insurance protection should be ensured: either the intermediation services should provide the necessary coverage themselves, or they should require the private drivers to submit proof of insurance that covers commercial transportation of passengers.

1292. A regulation of the intermediation services' prices to protect consumers is, from an economic perspective, not necessary due to the high degree of market transparency. This is true at least where the platform services do not hold a market-dominant position with the attendant scope of actions. The suppliers should however be obliged to inform the passengers of the current prices before these place an order. If non-economic reasons dictate the avoidance of excessive price fluctuations, a ceiling could be set to limit price increases. This could be necessary for instance in emergency situations, such as severe storms.

1293. In order to avoid distortions of competition, in addition to creating a regulatory framework for intermediation services for private drivers, the regulation of the taxi and PHV trade should be revised. As already argued in the Monopolies Commission's Twentieth Biennial Report, it is advisable to revoke the quantitative limitations that commonly exist in the taxi trade and to modify the tariff requirement. In the taxi rank and hail markets, initially, price ceilings could apply, whereas in the pre-booked market, which competes directly with intermediation services for private drivers, price setting should be largely free of restraints. This could enable taxi companies to respond to the new competition by adjusting their own prices and offers. In the PHV trade, the return requirement should be revoked, and it should be made clear that an incoming order for a ride may also be placed via digital intermediation services.

2.7 Intermediation services for private accommodations

1294. Next to intermediation services for private drivers, the most-discussed sector of the sharing economy is currently intermediation platforms for private accommodations. These platform services make it possible for private persons to offer their own living space, be it a flat or a single room, to potential guests quickly and easily over the Internet, for instance during a temporary absence. This short-term letting can generally be for a fee or not, though for-fee offers are the rule. The platform services themselves usually charge a fee for their intermediation activity, payable by the lessors, the potential guests or both groups of users. They also offer supplementary services such as payment processing. In some cities outside Germany they also collect the local tourist tax, passing it on to the authorities.

1295. The short-term letting of private accommodations has always been an important component of the German accommodations sector. Through the possibility of letting via digital intermediation platforms this area has gained in significance in recent years. The increase of short-term letting of private lodgings is not uncontroversial, however. While some profit from the development, especially private lessors, who are able to earn a small supplement to their income while they are away from home, and travellers, who have more offers to choose from and usually pay lower prices compared to many commercial accommodations, others, like representatives of the hotel trade, complain of distorted competition arising from an asymmetrical regulation that places a burden on consumers, local residents and taxpayers. This often results in the demand that the stricter legal provisions applying in the hotel trade be extended to the private lodgings offered on sharing-economy platforms.

1296. From a competition-law perspective, the more intensive competition in the accommodations sector must be seen as positive. It must nevertheless be ensured that fair competitive conditions prevail between the individual suppliers and distortions of competition are ruled out. With this in mind, the following sections will discuss various competition-policy issues. Following a brief description of the market development, focus will be placed, first, on the delineation of private and commercial offers. Then the key economic rationales will be explained that can make a regulation of the market for short-term accommodations necessary. Finally, the analysis will turn to whether a regulation of the platform services themselves is necessary.

2.7.1 Market development and effects on competition

1297. The German accommodations sector is traditionally characterised by a differentiated selection of offers. For the year 2015 the official accommodations statistics list roughly 436.2 million overnight stays in tourist accommodations. This represents an increase of approximately 2.9 per cent from the year 2014.¹⁰⁶ The majority of these stays were in hotels, inns and boarding houses, about 62 per cent in 2015, or around 272 million overnight stays.¹⁰⁷ The number of nights spent in vacation homes and flats, according to these statistics, was approximately 32,7 million in 2015, or around 7.5 per cent. These numbers refer only to nights spent in commercial holiday residences with at least 10 beds. Besides these offers listed in the official statistics, an additional 71.4 million nights were spent, according to a current study for the year 2014, in private, non-commercial holiday homes.¹⁰⁸ This means the numbers of overnight stays in holiday homes and flats run to over 100 million per year, or over 20 per cent. Looking at only German-speaking tourists, a further study shows that in Germany 36 per cent of these stay in holiday homes, and only 28 per cent in hotels and inns.¹⁰⁹

1298. The letting of private lodgings for touristic purposes, and the competition it generates between commercial and private offers, do not as such represent a new development. However, the supply of short-term private accommodations for let has increased through the rise of digital intermediation platforms such as Airbnb, Wimdu and 9flats, particularly in large cities. A current study puts the number of overnight stays in private flats arranged through online portals in Germany at at least 14.5 million in the year 2015.¹¹⁰ Of these, around two-thirds were recorded for the cities Berlin (c. 6.1 million), Hamburg (c. 2 million) and Munich (c. 1.9 million). According to this, one in eleven city tourists spends the night in accommodations offered through one of the major intermediation platforms.

1299. Chief among the reasons for the increase in short-term private flat rentals – as in other areas of the sharing economy – is most likely the sharp reduction of barriers to market entry arising from the lower search and information costs involved in the digital intermediation of accommodations. Digital platforms have created an additional supplementary option for distribution or marketing regarding private accommodations and by doing so raised awareness for this type of offer. This has made it easier for potential guests to find the offers of private accommodations that have always existed, for one thing. For another, the lower barriers to market entry may have been the initial impulse for many private persons to let their flats or rooms on a short-term basis; thus the numbers and the range of private accommodations on offer have increased.

1300. In general, the emergence of digital intermediation platforms and the greater supply of private lodgings brought about by them probably contributed to an increased intensity of competition in the accommodations sector. The positive effects on competition can be seen, first of all, in the general increase in variety of offers resulting from higher availability of various different types of private accommodations. The platform services themselves like to highlight the opportunity this brings to experience a city through the eyes of the people who live there (“live like a local”). Also, the additional supply of comparatively cheap private accommodations may at least partly have created a new demand.

¹⁰⁶ Cf. Statistisches Bundesamt, Inlandstourismus 2015: Neuer Rekord mit 436,4 million Gästeübernachtungen, Press release of 11 February 2016, 041/16. The figures refer to overnight stays in establishments with ten or more beds, or camping sites with ten or more pitches.

¹⁰⁷ Cf. Statistisches Bundesamt, Übernachtungen in Beherbergungsbetrieben nach Betriebsarten, <https://www.destatis.de/DE/ZahlenFakten/Wirtschaftsbereiche/BinnenhandelGastgewerbeTourismus/Tourismus/Tabellen/uebernachtungenBetriebsarten.html>, accessed on 10 June 2016.

¹⁰⁸ Cf. dwif – Consulting GmbH, Der Ferienhausmarkt in Deutschland – Volumen und ökonomische Bedeutung, Study commissioned by FeWo-direkt, June 2015.

¹⁰⁹ Cf. FUR Forschungsgemeinschaft Urlaub und Reisen e. V., ReiseAnalyse 2016. Erste ausgewählte Ergebnisse der 46. Reiseanalyse zur ITB 2016, p. 4, http://www.fur.de/fileadmin/user_upload/RA_2016/RA2016_Erste_Ergebnisse_DE.pdf, accessed on 2 May 2016.

¹¹⁰ Cf. Gesellschaft für Beteiligungen und Immobilienentwicklungen (GBI), Etwa jeder elfte Städtereisende in Deutschland schläft bei Airbnb & Co., Press release of 16 April 2016. The data are based on a sample of the accommodations offered on the three sourcing portals Airbnb, Wimdu and 9Flats during one week in November. The sample included only lodgings permanently available for let and complete with bath and WC, not single beds or rooms. All 179 German cities with more than 50,000 residents were included in the study.

Especially for those who have a small travel budget, the new services may have given them the opportunity to travel in the first place. And finally, the intermediation platforms, or the additional supply of private accommodations, led to an intensification of price competition. A US study shows that the market entry of Airbnb in Austin, Texas, led to a decrease of hotels' profits of eight to ten per cent, hotels in the low-price segment having been affected most.¹¹¹ The additional supply of short-term private accommodations has also restricted the hotels' price-setting scope. Since the hotels responded to the additional competition by lowering prices, hotel guests have also profited from the more intense competition.

1301. On the whole it is clear that the new intermediation services for private accommodations, or the increased short-term letting of private flats, has intensified the competition in the accommodations sector. While this must be judged favourably in terms of competition in general, there has also been some criticism of the new services. Among the concerns is potential distortion of competition due to asymmetrical regulation. As private lessors are subject to less strict regulatory provisions on the whole, for instance with regard to safety regulations, according to some critics they have cost advantages and thus ultimately unjustified competition advantages. Some also cast doubt on whether the private lessors meet their tax obligations. Aside from these competition-policy aspects, another fear is negative effects on the local housing market. As short-term rental to tourists is as a rule more profitable for landlords than long-term rental of living space, especially in urban centres such as Berlin this purportedly leads to a shortage of living space and to rising rents. Some also point out that the increasing presence of tourists in residential areas often brings with it noise pollution and other disturbances of the neighbourhood. To what extent this critique is justified and whether there needs to be a stricter regulation of short-term letting of private accommodation will be examined in more detail in the following sections.

2.7.2 Delimitation of private and commercial offers

1302. One important question concerning the letting of private accommodations through sharing-economy platforms is under what conditions this activity must be categorised as commercial and which specific rules exist for commercial activity. When classifying the rental offers in question, one must first distinguish between, on the one hand, trade and industry law and, on the other hand, tax law. In terms of trade and industry law, a commercial activity is typically given when rental is not merely a matter of administration of assets. The greater the extent of the economic activity and the pursuit of profit, the more likely the rental is to be a commercial activity.¹¹² As however no clear differentiation exists between commercial activity and pure asset management, each case has to be assessed individually. Thus the Federal Administrative Court (Bundesverwaltungsgericht) has for instance found that the rental of ten flats with 55 beds in an apartment house for two to six weeks each to holiday guests falls outside the category of asset management.¹¹³ If a commercial activity is present, this must be registered as a business pursuant to Sec. 14 of the Trade, Commerce, and Industry Regulation Act (*Gewerbeordnung* – GewO). This is as such of purely declaratory character, serving to inform the office for commercial affairs, which sends the pertinent information to the competent tax office, which in turn determines the tax status.¹¹⁴

1303. The assessment under tax law is separate from this trade and industry law viewpoint. The concept of “commerce” under tax law is similar but not identical to that under trade and industry law. A commercial operation in the tax-law sense, where it is likewise distinguished from mere asset management, according to valid case law, is present when the letting is done in hotel-like manner or supplementary services are performed that require a business organisation.¹¹⁵

¹¹¹ Cf. Zervas, G./Proserpio, D./Byers, J. W., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 27 January 2016.

¹¹² Cf. Berlin Chamber of Commerce, *Vermietung von Ferienwohnungen*, 9 February 2015, p. 2.

¹¹³ Federal Administrative Court (BVerwG), judgment of 26 January 1993, 1 C 25/91.

¹¹⁴ Cf. German Tourism Association (DTV), *Ferienunterkünfte – so entscheidet sich die Frage nach einem Gewerbe*, DTV Series: Recht in der Praxis. No. 6, March 2008.

¹¹⁵ Federal Finance Court (BFH), judgment of 14 January 2004, X R 7/02. Accordingly, frequently changing guests is a determining feature of the hotel category. It is also pointed out that keeping rooms available at all times for potential immediate use by guests

Thus the amount and the quality of supplementary services are significant. Ultimately, however, a case-by-case assessment is necessary here as well. In the case of a commercial activity in the sense of the tax law the landlord is required to pay trade income tax if annual profits are at least EUR 24,500.

1304. The current legal situation tends to view the occasional letting of private accommodations by private persons, and particularly the short-term letting of their own living space, as not constituting commercial activity under either trade industry law or tax law. The obligation to register a business and to pay trade income tax will thus most likely not apply to most short-term letting. Nevertheless, short-term rentals, meaning those up to six months, are subject to value added tax. Landlords can however make use of the small-business rule and refrain from listing or charging value added tax if annual revenues do not exceed EUR 17,500 for the previous year or EUR 50,000 for the current year. Furthermore, even income earned through private letting is subject to taxation in the context of the income tax report if it exceeds the allowance of EUR 520 per year.

1305. Aside from its relevance in terms of trade and industry law or tax-law, the distinction between commercial and private, or occasional, short-term letting has no direct regulatory effects. Rather, most of the existing rules either apply to both private and commercial suppliers or are based on other criteria, such as the number of beds. Uniform rules exist with respect to the obligation to issue a special registration form, for instance. Also, both commercial and private suppliers are required to charge their guests potential tourism taxes and rates such as bed tax or visitor's tax, and to transfer these to the authorities. In contrast, the specific safety and fire regulations in the accommodations sector apply based on the establishments' number of beds. Of relevance in this respect are thus the state building codes and accommodation establishment regulations of the individual *Bundesländer*. In most *Bundesländer* establishments with 12 or more beds are categorised by the building code as special structures to which stricter safety and fire-prevention rules apply due to the greater safety risks entailed by the type of use, size and greater number of visitors. Specific requirements for such establishments are found in the relevant accommodation establishment regulations, which depending on the Bundesland apply for establishments with at least eight, 12 or 30 beds. Holiday flats are often expressly exempted from the scope of application of these ordinances, because they have more the character of a flat in the general sense.¹¹⁶ For holiday homes and for establishments with a low number of sleeping units – irrespective of whether the rental is of a commercial nature – the less far-reaching general provisions of building law apply.

1306. To sum up, the distinction between commercial and private or occasional activity in letting private accommodations is above all of relevance for the requirement to register a business and to pay trade income tax. This distinction is largely dependent on the individual case, which ultimately results in a legal grey zone. While the occasional short-term letting of private lodgings will as a rule constitute a non-commercial activity, if the activity is larger in scale, it is no longer quite clear how it will be classified. This can create problems with respect to the growing supply of private accommodations offered on the Internet. To simplify the distinction between commercial and private activity, a de-minimis exception or threshold could be introduced, below which all activities are categorised across the board as non-commercial and that are thus not subject to approval. This could be an upper limit for the number of overnight stays or rentals per year, for example, as in Amsterdam (60 days) and London (90 days).¹¹⁷ Such a clear distinction could avoid costly case-by-case assessments and help the cities and municipalities to enforce the applicable conditions and rules. It would also provide legal security for those only occasionally offering short-term lets.

requires preparations of material and personnel not associated with the mere letting of flats. The BFH thus found that the letting of three holiday flats did not as such constitute a commercial operation (BFH, judgment of 28 June 1984, IV R 150/82). On the other hand, the Court confirmed commercial activity in the letting of only one holiday flat under the condition that it is fully furnished, located in a complex with other holiday flats and the advertising and administration for the purpose of short-term lets to constantly changing tenants is handled by a holiday-service organisation (BFH, judgment of 19 January 1990, III R 31/87).

¹¹⁶ On this see the explanatory memorandum of the model accommodation establishment regulations (*Muster-Beherbergungsstättenverordnung – MBeVO*), version of December 2000.

¹¹⁷ In San Francisco there is likewise a cap on the admissible number of overnight stays per year (90 days), if the flat is entirely at the guests' disposal and the landlord is not present. Sharing one's own flat where one is present, on the contrary, is allowed without restriction. In any case the landlord must generally register a business, however.

1307. To ensure the enforcement or monitoring of respective de-minimis exceptions, a registration of private landlords with the responsible authorities could be considered. This could prevent private persons from exceeding an existing limit without this being noticed, for example by multihoming on multiple platforms. Such an obligatory registration exists in San Francisco, where those letting private accommodations are required to register with the city. To keep bureaucratic costs to a minimum for all parties, this should be done via online registration if possible. As an alternative, the platforms could convey the necessary data to the cities and municipalities on behalf of the landlords.

1308. In contrast to the delineation of commercial and private activities, the tax-law consequences of this kind of scheme are clear enough. Adjustments, at least from a competition-policy perspective, are not necessary here. It is however important that the existing rules apply regardless of the concrete distribution channel; there should be no special rules for income from letting private accommodations through digital intermediation platforms.

2.7.3 Grounds for the regulation of short-term rentals

1309. As mentioned above, many of the provisions currently applicable to accommodations are not contingent on the presence of a commercial activity, but on the number of available beds. Accordingly, there already exist legal rules for the occasional short-term letting of private flats or rooms. A farther-reaching regulation, perhaps extending the provisions for large hotel establishments to small private suppliers, would only be justified from an economic perspective if a systematic market failure arose in the short-term private rental market despite the existing provisions.

1310. In the market for private rentals a market failure is mainly possible for reasons of information asymmetries or negative externalities. Information asymmetries can exist between the landlords and the potential guests with respect to safety and hygiene aspects. To protect consumers state minimum standards could thus be necessary to ensure a sufficient level of safety and hygiene. Negative externalities of the short-term letting of private lodgings can above all impact the local housing market in the form of increasingly scarce living space and rising rents. Also, the increasing presence of tourists in residential neighbourhoods can have negative effects on the quality of life in those areas, for instance through noise pollution or a scarcity of parking spaces.

2.7.3.1 Information asymmetries and consumer protection

1311. A state regulation of accommodations establishments could be called for, first, due to information asymmetries and as a result in order to protect consumers, that is, the guests of the establishments. This concerns mainly safety and hygiene aspects, as these – in contrast to the cleanliness of a flat or a room – is not something that guests can normally fully assess. To ensure a sufficient level of safety and hygiene, therefore, state-enforced minimum requirements usually exist for guest accommodations.

1312. In Germany the valid safety regulations, as explained above, are largely dependent on the size of the establishment, or the number of beds. For smaller suppliers the general safety provisions of building law apply, regardless of whether they are categorised as commercial. For professional suppliers with a great many beds, on the contrary, stricter safety and fire-protection rules apply, due to the greater risk potential, relating for instance to escape routes.¹¹⁸ The frequency of offers, such as the number of overnight stays rented per year, is not relevant for the applicable provisions.

1313. The different safety provisions have been criticised, especially by large commercial suppliers like the hotel industry. These refer, for one thing, to possible safety risks for guests and neighbouring residents because private flats rented out for short-term stays as a rule do not fulfil the safety standards that apply to large establishments. Furthermore, they complain of distortions of competition due to an asymmetric regulation, because the suppliers of private accommodations enjoy a cost advantage due to the less extensive provisions and can supply at a lower cost. In order to ensure uniform safety standards for all guests and to avoid distortions of competition, critics often demand that the stricter safety provisions for the hotel industry be extended to short-term rentals of private accommodations.

¹¹⁸ The specific provisions can as a rule be found in the respective accommodation establishment regulations.

1314. From a competition-policy view it must be pointed out that an adequate regulatory framework should always take account of the specific safety risks that are involved in the type and scope of the respective economic activity. In this sense the different regulatory treatment of a large hotel establishment from an (occasional) supplier of private overnight accommodations can certainly be appropriate. A possible cost advantage, and thus competitive advantage, of smaller suppliers on the basis of less extensive legal provisions is thus in and of itself not a reason to subject all suppliers to a blanket application of safety provisions. On the contrary, this could serve to create a barrier to market entry that could restrict competition in the accommodations sector.

1315. The further-reaching question of whether the currently existing safety regulations for private accommodations are sufficient or should be tightened cannot be sufficiently assessed here. On the one hand, it seems doubtful that safety provisions that in the past were evidently adequate for rented private accommodations should now be insufficient, especially considering that the flats in question are still suitable for long-term rental. On the other hand, it could be argued that higher safety risks arise precisely through the frequent short-term rental of these accommodations, and these could justify stricter safety regulations. In this case one could consider stipulating specific conditions for accommodations with only few beds that are less extensive than those for large establishments and yet extend beyond the level required for private flats. For example, stricter safety provisions could be based upon criteria like the rental frequency or the number of rental nights per year. The appropriateness of such a rule would have to be examined in detail.

1316. Besides safety rules, hygiene rules also serve to protect the consumers. Particularly important among these are provisions on food hygiene, which are only relevant if food and drink is provided in addition to lodgings. As this is probably only seldom the case with private accommodations, the details of the relevant provisions will not be given here. On the whole, statutory minimum standards of food hygiene should provide an adequate means to reduce information asymmetries, because most guests are not likely to be able to judge the hygienic conditions in an establishment. The respective provisions could thus help to ensure a sufficient level of protection.

1317. In contrast to the safety and hygiene aspects just named, there is no need for a regulation concerning the letting of private accommodations through digital intermediation platforms with regard to quality aspects that can clearly be observed, such as the cleanliness of a flat. This is especially true in cases where the platforms offer detailed rating systems that give customers the opportunity to find detailed information about the flat on offer and its landlord. Because highly rated accommodations as a rule receive more booking inquiries than those with poor ratings, rating systems allow for a self-regulation of the online portals regarding such observable aspects of quality, especially since the ratings on portals for private accommodations – in contrast to hotel-booking portals – normally refer to a specific room or flat. This mechanism helps to ensure the quality of offers.

2.7.3.2 Negative externalities

1318. Besides the information asymmetries named above, a regulation of short-term rental of private accommodations can also be advisable because of negative externalities. Two aspects warrant mention in this context.¹¹⁹ First, the increase in the short-term letting of private accommodations in large cities can have negative effects on the housing market, specifically, scarce rental housing and rising rents. Second, a common complaint is the undesirable presence of holiday guests in residential areas and the disturbance this entails for the neighbourhood, in the form of noise or lack of parking, which negatively impacts the acceptance of city tourism. Both aspects are not primarily problems specific to the new service platforms, and yet the growth of these platforms and the concurrent increase in supply of short-term rental accommodations may have exacerbated these problems.

1319. Whether the increase in rental of private accommodations via digital intermediation platforms has negative effects on the local housing market depends first and foremost on the local market conditions. Some studies show that precisely in large cities comparatively many private accommodations are permanently rented to tourists through inter-

¹¹⁹ Cf. Edelman, B. G./Geradin, D., *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, supra (note 23), p. 18 et seq.

mediation platforms.¹²⁰ In order to guarantee that the local population is provided with living space even in strained housing markets, some cities have enacted so-called bans on misappropriation (*Zweckentfremdungsverbote*). To name an example, the much-discussed ban on misappropriation in Berlin was enacted in 2014, so as to prevent, among other things, the transformation of regular living space into holiday rentals, and to reintroduce flats previously rented out as holiday rentals to the regular housing market.¹²¹ After a two-year transitional phase, as of 1 May 2016, in Berlin private flats may only be rented out as holiday rentals by a special permit, which is granted only in exceptional cases.

1320. To what extent bans on misappropriation actually bring a long-term easing of tense housing markets is a topic of debate.¹²² Also, some fundamental legal concerns have been voiced as this constitutes an extreme interference with property rights.¹²³ Aside from such concerns, the decisive factor in assessing the effectiveness of bans on misappropriation is which specific activities they cover. Here one must distinguish between a permanent letting of private flats as holiday accommodations and a merely occasional (sub-)letting of regularly lived-in flats or rooms, such as when the regular tenants are absent. Because in the latter case there is no permanent transformation of regular living space to holiday accommodations, the housing market is not being deprived of living space. In conceptual terms, accordingly, in this case there is no misappropriation in the true sense of the word. Targeted bans on misappropriation should therefore at most prohibit the permanent, but not the occasional, letting of private accommodation. The laws on this topic should contain rules that are as clear as possible.

1321. To distinguish permanent from only occasional letting, the threshold values or de-minimis exceptions mentioned above in the context of distinguishing commercial from private suppliers could be used as a basis. Specifically, a limit on the number of days in a year in which a property can be let appears appropriate. Such rules already exist in Amsterdam (60 days), London (90 days) and San Francisco (90 days), as well as in some German cities which have enacted bans on misappropriation.¹²⁴ By setting an upper limit it could be largely guaranteed that no regular living space is permanently removed from the housing market, without completely prohibiting landlords from occasional letting.¹²⁵ This could also prevent landlords from using online-portals to bypass possible statutory ceilings on the rental rate by constantly offering their flats to tourists on a short-term basis or to a single tenant for a longer period, such as a year, for a higher price than allowed by the statute. A factor that has no relevance is whether the short-term letting is for remuneration or not, since no flats are being withheld from the housing market either way. To make such a distinction would at most deprive the private parties involved of the possibility of a (low) supplementary income, but would not introduce new flats to the rental market.

1322. The above-mentioned potential negative effects of the increase in short-term rental of private accommodations on the immediate neighbourhood can ultimately be addressed by different measures. With respect to possible noise pollution, one initial, not overly restrictive approach could be for the landlord to establish house rules. This approach, of

¹²⁰ Cf. e.g. Gesellschaft für Beteiligungen und Immobilienentwicklungen (GBI), *Etwa jeder elfte Städtereisende in Deutschland schläft bei Airbnb & Co.*, supra (note 110).

¹²¹ On this see Act on the Prohibition of Misappropriation of Living Space (ZwVbG) of 29 November 2013 and Ordinance on the Prohibition of Misappropriation of Living Space (ZwVbVO) of 4 March 2014.

¹²² Thus it has been pointed out that holiday housing makes up only 0.5 per cent of all households in Berlin and as a result of the Misappropriation Act only 4,000 holiday flats would be converted to long-term living space. The same source points out the shortage of currently about 140,000 flats resulting from a misguided housing policy. Cf. Wimdu, *Zweckentfremdungsverbotsgesetz: Vermieter-Vereinigung von privaten Ferienwohnungen und Onlineportal Wimdu leiten Verfassungsklage gegen Stadt Berlin ein*, Press release of 2 October 2015.

¹²³ This is particularly true of the Berlin ban on misappropriation, against which the online portal Wimdu in cooperation with ApartmentAllianz in April 2016 filed a lawsuit. This action has meanwhile been dismissed by the Berlin Administrative Court; the appeal to the Berlin-Brandenburg Administrative Court of Appeal has been admitted. See Berlin Administrative Court, judgment of 8 June 2016, VG 6 K 103.16.

¹²⁴ Thus someone who owns a flat in Munich is allowed to let that flat while absent, for instance, for a total of six weeks per year without this constituting misappropriation.

¹²⁵ In designing such limits it must be kept in mind that even a flat not lived in constantly can due to market conditions be rented out only a few days or weeks in a year and thus be removed from the regular housing market. To prevent this, an operator registration may be called for.

which many private landlords make use, could in many cases be sufficient to discipline the guests' behaviour. This is especially true when booking is effected through digital intermediation platforms where the overnight stay is followed by a rating. These ratings allow landlords to select their guests, on the one hand, and they also give the guests incentives to behave appropriately, since a poor rating profile could otherwise make it hard for them to find lodgings on the platform in future. In cases where private landlords are required to register, they could further be given a warning when guests are too loud, and if the problem recurs they could be prohibited from letting the lodgings.¹²⁶ The problem of scarce parking in residential zones caused by increased short-term letting could be addressed by creating more free parking spaces for residents and visitor parking spaces requiring payment. In both cases the above-mentioned capping of the number of overnight stays per year should moreover help to reduce these negative externalities. A comprehensive ban on occasional short-term letting of private accommodations, as might be occasioned by planning and building law requirements, should at most be imposed in exceptional cases.¹²⁷

2.7.4 Regulating the intermediation services

1323. Besides the above-mentioned reasons that could justify a regulation of suppliers of private accommodations, it must also be determined to what extent a regulation of the intermediation platforms themselves is necessary. To this end, the following section focuses on the issue of potential insurance obligations and on the possibility that these platforms could be involved in levying taxes. It will also demonstrate that for now there is no need for a specific regulation for reasons of concentration tendencies or competition problems that these might entail.

2.7.4.1 Statutory insurance obligations

1324. An important question is whether intermediation platforms for private accommodations should be required by law to provide insurance for damages incurred during the use of the accommodations as a measure to protect consumers. The Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband – vzbv*), for example, demands that the platforms offer insurance to cover severe damage, such as fire-damage insurance or liability insurance for landlords.¹²⁸ In this respect it is also pointed out that an insurance requirement could give the platforms an economic incentive to monitor the offers more thoroughly with respect to safety aspects.

1325. In principle it is a good idea for landlords as well as guests to have sufficient insurance coverage. However, it is doubtful that a specific statutory obligation precisely for platform services is needed. For one thing, it should be noted that it is often a matter of self-interest for platform services to maintain sufficient insurance coverage, since this can prevent liability problems that could hamper the use and the growth of the platform. Thus it is not surprising that such policies are already being offered voluntarily by certain platform services.¹²⁹ Furthermore, requiring this of the platform services alone would lead to distortions of competition. Today, when customers rent a flat for tourism purposes they are strongly recommended to take out liability or landlord's liability insurance, but a legal requirement to do so does not exist. A legal requirement for platform services would thus be tantamount to a unilateral burden of a certain distribution channel, namely, rental through platform services. This cannot be justified from a competition perspective. The Monopolies Commission thus considers it more appropriate, if at all, to require the intermediation services to examine the insurance coverage of the landlords or the accommodations offered and to list it in understandable language on their

¹²⁶ Such a regulation exists, for example, in Amsterdam; see e.g. DutchAmsterdam, Airbnb collects tourist tax in Amsterdam, <http://www.dutchamsterdam.nl/3326-no-amsterdam-airbnb-ban#airbnbfriendly>, accessed on 2 May 2016.

¹²⁷ On this see also the Draft Bill of the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB) for a Law to Implement Directive 2014/52/EU in Urban Development Law and to Strengthen the New Urban Co-existence, 16 June 2016, http://www.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Staedtebaurecht/umweltvertraeglichkeitspruefung_staedtebaurecht_entwurf_bf.pdf, accessed on 30 June 2016.

¹²⁸ Cf. Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband – vzbv*), *Teilen, Haben, Teilhaben. Verbraucher in der Sharing Economy*, supra (note 40), p. 26 et seq.

¹²⁹ Airbnb, for instance, offers a liability plan for landlords that covers guest injuries in the flat, as well as a so-called host guarantee, which covers damages to the landlord's flat caused by guests. In both cases the sum insured is EUR 800,000.

booking portals. The consumers could then make their own decisions on the desired level of insurance. This kind of requirement to inform could also be used with regard to certain safety measures such as fire extinguishers.

1326. Another competition-based argument against introducing a statutory insurance obligation for intermediation platforms is that the costs this obligation would entail could constitute a barrier to market entry to potential new intermediation services. It could result in the enhancement of existing tendencies towards concentration arising from the multisided nature of the platforms; the increased difficulty to challenge certain intermediation services' market positions; and the general restriction of competition between the platform services. Therefore, if increased insurance coverage is deemed necessary for the guests' protection, to avoid distortions of competition a general insurance obligation for all privately rented lodgings should be introduced. It could be left up to the platform services whether to offer this coverage themselves, as a service for their users, or to demand proof of sufficient coverage from the landlords. Indeed, the advantage of closing gaps in coverage would in this case argue in favour of an insurance obligation for platform services.

2.7.4.2 Participation of platforms in tax levying

1327. A further point that should be deliberated is whether the intermediation services should be obliged to participate in the procedure of collecting and paying taxes and rates. Such involvement would be most relevant for the levying and paying of tourism taxes and rates. The intermediation platforms could, depending on the region, collect the applicable taxes and rates from the guests and transfer them on behalf of the landlords to the responsible authorities. International examples of this are Amsterdam, Paris and San Francisco, where the platforms have made voluntary arrangements with the local authorities to collect the tourist tax. An automatic procedure for collection and transfer of local taxes in the course of the platforms' booking process would greatly simplify the transactions for the private lessor. Moreover, it could ensure that all market players comply with their tax obligations and contribute their share to funding regional tourism.

1328. The Monopolies Commission considers the general idea of a cooperation between platform suppliers and German cities and municipalities in collecting and paying local tourist taxes and rates to be sound. Such cooperation should primarily be on a voluntary basis, however. The companies could then offer their users the supplementary service of automatic payment of taxes and rates. To this end agreements should be made between the platform services and the responsible local authorities. In contrast, a regulatory obligation to exchange data and collaborate on taxation would be problematic on data-protection grounds.

1329. Besides such direct cooperation in collecting and transferring municipal taxes and rates to finance tourism, another proposal sometimes made is to impose further informational duties on the platforms with regard to taxes for which users can be liable. It is debatable, however, whether such a legal obligation is actually needed. Most intermediation services already provide such information to their users as a voluntary service. Some suppliers also remind their users in a yearly e-mail of their duty to pay income taxes, or send annual statements of the income they have earned through the platform. Thus a regulatory obligation to inform users does not seem necessary, especially since the responsibility to fulfil one's own taxation duties lies with each user.

2.7.4.3 No regulation on grounds of concentration tendencies

1330. Finally, an important aspect is whether a regulation of intermediation services for private accommodations might be needed due to potential tendencies towards concentration or monopolisation, and any competition problems that might arise with these tendencies. Intermediation services for private accommodations are two-sided platforms that match lessors of private lodgings on the supply side with lessees for these lodgings on the demand side. Between the platform sides or user groups there is positive feedback, or positive indirect network effects, so that the attractiveness of the platform increases with the number of users on the opposite side of the platform. The potential lessees therefore profit from a greater presence of lessors and the lessors profit from a greater presence of potential lessees. This operat-

ing mechanism leads one to expect a certain market concentration in the sector of intermediation services for private accommodations.¹³⁰

1331. Despite this concentration tendency, from an economic perspective there is no necessity for a special regulation of intermediation platforms for private accommodations. It is conceivable that a platform could achieve a market-dominating position and attempt to force its competitors off the market by abusive conduct, in order to raise the prices or fees charged to both groups of users, for example. Exclusivity clauses are also possible, by which lessors in particular could be prevented from using several platform services at the same time (multihoming), as is predatory pricing. Such abusive conduct is, however, as explained above in section 2.4.5, first of all, already covered by valid competition law. Second, it is doubtful whether it would even be successful on the market. Thus it is of significance that there tend to be only low barriers to market entry for platform services, on the one hand. On the other hand, the switching costs for the users are often low because they have no exclusive bond with one platform, for instance in the form of high membership fees. It is less than clear, however, to what extent the users' willingness to switch is hampered by the lack of a possibility to transfer the ratings they receive, or the reputation they have established.

1332. As a rule, to avoid competition problems a lock-in of users should be avoided, so from a competition perspective, contractual restrictions that prevent platform switching, such as the above-mentioned exclusivity clauses, must be assessed critically. It is therefore positive that according to available information none of the relevant platform services for private accommodations currently employs such contractual restrictions. Furthermore, the possibility should be examined of allowing users to move the ratings they have accumulated or the reputation they have gained to competing platforms. As explained in section 2.4.5 above, potential data-protection problems and the possible lack of comparability among the ratings systems must be taken into consideration.

2.7.5 Summary

1333. The trend of digitalisation has led to the rise of intermediation platforms on which private persons can offer their living space for tourism purposes for short-term rental. The letting of private accommodations is not a new development, but these intermediation services have increased the supply of relevant flats and made them easier to find. Studies show that the market entry of relevant platform services increases competitive pressure primarily on hotels and other establishments in the low-price segment. The consumers profit from the new services in the form of a greater selection of offers in general and potentially lower prices, while the supplying private persons profit from the possibility of earning supplementary income.

1334. The delineation of commercial and private letting activities is not always clear. To create legal security and to avoid costly and laborious case-by-case assessments, a de-minimis exception could be introduced to separate commercial from private offers, such that short-term rentals that stay under the limit are automatically categorised as non-commercial. The most suitable option appears to be the establishment of a maximum limit for the number of overnight stays or rentals per year. Specific requirements triggered by the activity's being commercial in nature, such as registering a business and paying trade income tax, would not be necessary below this limit.

1335. A regulation of short-term letting of private accommodation can be necessary due to information asymmetries and externalities, regardless of whether an activity is commercial or not. Information asymmetries can exist in particular with respect to potential, not objectively observable safety risks. The valid safety and fire-prevention minimum standards for accommodations establishments are normally based on the number of beds they provide. As a rule, the state building codes of the *Bundesländer* apply to private or vacation flats. These are exempted from the farther-reaching provisions of the accommodation establishment regulations that apply to larger establishments, because they have the character of a flat in the general sense. Whether the provisions applying to the private or holiday housing, especially the existing safety regulations, are appropriate, cannot be sufficiently evaluated in the context of this Report. Regulatory adjustments based purely on the increase in supply of short-term private lodgings are not necessary, however. If the rules for private or holiday rentals should be modified, it should be without regard to the distribution channel. The uni-

¹³⁰ See also section 2.4.5 in this chapter.

lateral burdening of one distribution channel, such as intermediation through online platforms, is not justifiable from the perspective of competition law.

1336. Externalities of the short-term rental of private lodgings on the housing market can take the form of scarcity of living space and rising rents. Certain large cities are attempting to counter such developments by enacting bans on misappropriation that prohibit, among other things, the use of regular living space as holiday rentals. The important factor in evaluating bans on misappropriation is which concrete activities they cover. Here one must distinguish between a permanent short-term letting of holiday homes and an occasional letting or subletting of regularly lived-in private flats or rooms such as when the regular tenants are away. Targeted bans on misappropriation should at most prohibit the permanent but not the occasional letting of private accommodations, because only in the former case are negative effects on the housing market to be expected. In analogy to the delineation of private and commercial activities, here it would seem prudent to set a threshold in the form of a maximum number of overnight stays or rentals per year below which private persons are as a rule allowed to rent out their flat for a short term. Such thresholds already exist in some German cities that have bans on misappropriation in place.

1337. A comprehensive regulation of the actual activity of intermediation services is not necessary. From a competition-law point of view, one argument against a statutory insurance obligation for intermediation platforms is that this would place a unilateral burden on the distribution of private or holiday homes through intermediation platforms; another argument is that the costs such an obligation would entail could constitute a barrier to market entry for potential new intermediation services. It would be more appropriate to introduce specific duties to provide information to customers, which could include details not only about current insurance coverage but also on the existing safety measures. This increase in transparency alone could strengthen the position of the consumers.

1338. In order to ensure that the lessors on intermediation platforms comply with their potential obligation to collect and pay municipal tourism taxes or rates, voluntary agreements should be sought between the platform services and the responsible authorities. These agreements should allow the platform services to collect the applicable taxes and rates on behalf of the landlords and to transfer them to the authorities.

2.8 Recommendations

In the present Report, the Monopolies Commission has analysed the development of the sharing economy from a competition-policy perspective. At the focus of the analysis are P2P services, which allow private persons to offer goods or services on a commercial basis. Following general considerations on the sector, the Commission looked specifically at intermediation services for private drivers and intermediation services for short-term letting of private accommodations, two especially important areas of the sharing economy. Based on this analysis, the Monopolies Commission submits the following recommendations for action for the enhancement of competition and the creation of fair competitive conditions between sharing-economy services and traditional suppliers.

General recommendations

- To avoid legal insecurity and costly individual case assessments, there should exist clear-cut criteria to distinguish between commercial and private activities. In areas of the economy in which no clear criteria exist, the Monopolies Commission generally endorses the introduction of de-minimis exceptions or thresholds below which the activities of private persons are categorised across the board as non-commercial, and to which specific provisions contingent on the commercial nature of an activity do not apply. These thresholds should be sector-specific and based on the volume of the activity. These could be revenue limits or ceilings restricting the private activity to a certain number of days per year. Consumers should be able to clearly determine whether they are availing themselves of a private or a commercial offer.
- In order to avoid distortions of competition between traditional suppliers and new sharing-economy suppliers arising from an asymmetric regulation, first, an appropriate regulatory framework – if not already present – should be drafted for the new service providers; second, a review and, if necessary, a revision of the regulation of traditional

suppliers should be performed. A blanket transfer of the provisions applying to the traditional suppliers to the suppliers on P2P services should be avoided.

- To guarantee a minimum of consumer protection in the area of sharing-economy services, above all safety provisions and insurance obligations could be necessary. The regulations should take account of the type and extent of the activity so as not to create unnecessary barriers to market entry. A disproportionate restriction of merely occasional activity by excessive regulations should be avoided.
- A specific need for regulation of sharing-economy services due to competition problems is not in evidence at this time. If a service should achieve a market-dominating position, any abuse of this position could be caught by the current competition law. Aside from this, the possibility could be explored of creating a rule regarding the portability of user ratings, so as to avoid potential switching costs and a lock-in of users to certain sharing-economy services.

Recommendations on intermediation services for private drivers

- To strengthen competition in the sector of individual transportation of passengers, an appropriate regulatory framework should be created for intermediation services for private drivers. To this end, a category should be introduced in the Passenger Transportation Act (PBefG) for intermediation services for private drivers, and minimum standards for the drivers' qualifications and the vehicles' safety should be codified in the law. Proof of sufficient insurance coverage should be provided either by the intermediation services themselves or by the private drivers. The possibility of introducing a threshold should be examined, below which certain individual requirements not related to safety would not apply to private, occasional drivers.
- A regulation of the intermediation services' prices is not necessary, due to the existing market transparency, as long as no single services hold a market-dominating position. The suppliers should nevertheless be obligated to communicate the current prices clearly to the passengers before an order is placed.
- If for non-economic reasons it is considered necessary to avoid excessive price fluctuations, an upper limit could be set for potential price increases. This could be advisable in emergency situations such as heavy storms.
- To avoid distortions of competition the regulation of the taxi and PHV trade should be revised according to the recommendations of the Monopolies Commission in its Twentieth Biennial Report. In the taxi trade advisable steps include a revocation of the quantitative limits that often apply and a modification of the tariff requirement. In the taxi rank and hail markets, price ceilings could apply initially. In the pre-booked market, taxi operators should generally be free to set their prices, not least so that they can respond to the new competition from digital intermediation platforms for private drivers by adjusting their own prices and offers. In the PHV trade, the obligation to return should be revoked, and it should be clarified that a transportation order is allowed to reach the PHV operators through digital intermediation services.

Recommendations on intermediation services for the short-term letting of private accommodations

- With short-term letting of private accommodations through digital intermediation platforms there is no need for comprehensive legislative action from a competition perspective. The rules of the state building codes of each *Bundesland* applying to holiday homes should represent a sufficient basis for comprehensive protection of consumers. Any regulatory adjustments, for instance with respect to existing safety regulations, should be carried out independent of individual distribution channels, i.e. not applying exclusively to private or holiday housing sourced through digital platforms, in order to avoid distortions of competition.
- To simplify the delineation between commercial and private offers, a threshold could be introduced below which any rentals of private accommodations are automatically classified as non-commercial. In particular, a ceiling on the number of overnight stays or rentals per year would seem expedient. Up to this limit specific requirements applying to commercial transactions, such as the registration of a business or the payment of trade income tax, would not apply.

- Bans on misappropriation meant to prohibit the conversion of living space to holiday housing should be designed as precisely as possible to target – at most – the permanent, and not occasional, letting of private accommodations. To this end, a ceiling could be instated – analogous to the distinction between commercial and private offers – for the number of overnight stays or rentals per year. Up to this limit, all private persons could be allowed to let their flats for a short term.
- A comprehensive regulation of the activity of the intermediation services is not necessary. There is in particular no need for a specific statutory insurance obligation for the services. To enhance market transparency and to reinforce the consumers' position, specific information duties could be introduced where needed, for instance regarding the existing insurance coverage or safety measures.
- The intermediation platforms should be involved wherever possible in the levying of municipal tourism taxes or rates. To this end, voluntary agreements should be encouraged between the intermediation services and the responsible authorities. These agreements should allow the platform services to collect the applicable taxes and rates on behalf of the lessors and transfer them to the authorities.

3 Digitalisation in the financial markets

3.1 Introduction

1339. The Monopolies Commission commented in its Biennial Report XX on the competitive situation on the financial markets and in its Special Report 68 on business models in the digital economy.¹³¹ The significance of the digital economy for the financial sector has not yet been examined.¹³²

1340. The financial markets are currently characterised by three factors of influence:

- the increase of regulation in the wake of the financial crisis;
- the low-interest policy and the bond purchases of the central banks;
- digitalisation and the entry of new operators to the market.

In the present context, the third factor is relevant, and particularly the competitive aspects of digitalisation on the financial markets. In the period 2014–2015 the digitalisation of the financial sector became an important topic in the discussion on the financial markets.¹³³

1341. Traditional financial services are already being processed to a great extent through electronic channels. In this respect, the phenomenon of digitalisation is improving the technical capabilities. This is particularly evidenced by a shift of classic banking business to the Internet. Thus one study shows that in 2015 already about 84 per cent of Germans aged 18+ were conducting their banking activities online.¹³⁴ Approximately 89 per cent used a home PC or laptop, about 20 per cent used banking apps and about 16 per cent used the browser of their smartphone or tablet. According to a further study, 47 per cent of those surveyed in Germany who own a mobile device used mobile banking in the year 2015 and a further 17 per cent intended to do so within the next 12 months.¹³⁵ Moreover, many financial technology (FinTech) companies have been founded that commonly offer individual services, particularly in the areas of financing, investment and payment systems. In 2015 there were roughly 250 FinTech companies in Germany, amounting to an

¹³¹ Monopolies Commission, Biennial Report XX 2012/2013, A competitive order for the financial markets, Baden-Baden 2014, paras. 1329 et seq.; Special Report 68, Competition policy: The challenge of digital markets, Baden-Baden 2015.

¹³² See only Monopolies Commission, Biennial Report XX, supra (note 131), paras. 2070 et seq.

¹³³ Hatami, A., in: Chishti, S./Barberis, J. (eds.), *The FinTech Book*, Wiley 2016, p. 170 (170).

¹³⁴ comdirect bank AG, Press release of 1 September 2015, https://www.comdirect.de/cms/ueberuns/media/cori1088_1063.pdf, accessed on 1 July 2016.

¹³⁵ Ipsos, *Mobile Banking-Nutzung*, Study commissioned by ING-DiBa, 27 May 2015, <https://www.ing-diba.de/pdf/ueberuns/presse/publikationen/umfrageergebnisse-mobile-banking-2015.pdf>, accessed on 27 May 2016.

increase of approximately 70 per cent since 2013.¹³⁶ Overall digitalisation is likely to have a significant impact on the market development of the financial sector in the developed industrial nations but also beyond.

1342. Financial services generally speaking can be assigned to four purposes: (1) investment or savings objectives, (2) financing (offering loans), (3) insurance against risks and (4) exchange of cash and cash equivalents.¹³⁷ They have several particular features in contrast with the digital services examined in Special Report 68: “Competition policy: The challenge of digital markets”. In the present context only two of these particularities will be highlighted:

- Financial services are often bundled products. This can be illustrated by the example of a current account with a bank: here the account relationship encompasses a loan relationship between the bank and the customer, account maintenance and safekeeping of cash, the processing of transfers and debits, withdrawals and deposits, in some cases the processing of card payments and the granting of overdraft credit. Insurance policies, investment products etc. are similarly complex. Besides these services, banks, insurance companies and financial service providers traditionally offer related advice.
- Furthermore, financial service providers link financial transactions as intermediaries. Thus banks for example use the means received from savings customers (deposit business) and investors (capital market investing), among other things, to issue credit, to invest in their own interest or on behalf of clients, as a commitment in the framework of derivative trading (e.g. for risk protection) or in payment transactions.¹³⁸ Financial intermediation in this regard requires the trust of the customers.¹³⁹ For example, the depositors of the banks named in the above example do not just receive account maintenance from their bank, but they are providers of capital, whose resources are utilised by the bank in other transactions. If the trust between the bank and the depositors is damaged, this can result in capital flight in the form of bank runs. With other financial service providers as well, the business model depends greatly on the customers’ perception that the resources deposited there are secure. For this reason, in the relationship between providers of capital (depositors, investors) and financial service providers it is important that the latter establish a market reputation characterised by trustworthiness.

1343. As a result of the aforementioned particularities, the digitalisation of the financial sector and the resultant market development are in some aspects divergent from the developments in electronic commerce. The following sections will, first, present in detail the competition effects of digitalisation on the distribution of services through electronic channels (section 3.2). Next, the developments observed up until now and the further foreseeable competition developments will be described (section 3.3, 3.4). Finally the discussion will focus on what deductions can be drawn from these market changes in terms of regulation (section 3.5). The section concludes with competition-policy recommendations (section 3.6).

3.2 On the effects of digitalisation on the financial markets

1344. The market conditions for the sale of electronically processed financial products and services have for some time been subject to fundamental changes. The digitalisation trend is speeding up this process of transformation. This has especially been the case with regard to standardisable financial services in the private customer segment (section 3.2.1). In other segments (particularly private-customer products requiring much advice, and services for business customers) the effects of digitalisation have been less evident up until now (section 3.2.2). Where digitalisation has had no direct consequences is on services processed face to face through non-electronic channels – these services will be disregarded

¹³⁶ EY, German FinTech landscape: opportunity for Rhein-Main-Neckar, Study of 2 March 2016, 9. Finanzplatztag Frankfurt; [http://www.ey.com/Publication/vwLUAssets/EY-FinTech-study-Germany/\\$FILE/EY-FinTech-study-Germany.pdf](http://www.ey.com/Publication/vwLUAssets/EY-FinTech-study-Germany/$FILE/EY-FinTech-study-Germany.pdf), accessed on 1 July 2016.

¹³⁷ Kashyap, M. K./Weber, G., in: Chishti, S./Barberis, J., supra (note 133), p. 226 (226).

¹³⁸ See Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1333 et seq. on the so-called transformational functions that these fulfil.

¹³⁹ By contrast, it is not necessary – unlike with suppliers of digital platform services – for the customers of one side (e.g. depositors) to be able to directly contact the customers of the other side (e.g. borrowers) through the financial intermediary; on this cf. Monopolies Commission, Special Report 68, supra note 4 (note 131), paras. 36 et seq.

in what follows (e.g. cash withdrawals and currency exchange at banks; in some cases, damage assessment at insurance companies).

3.2.1 Standardisable financial services for private customers

1345. Standardisation and modularisation have long been increasing trends in the compilation and sale of financial services for private customers. This development began before the onset of digitalisation. It appears in many product areas (bank credits, investing, insurance sales etc.) and concerns both front-office products and the related back-office services. Standardisation and modularisation allow financial service providers to offer customers a full range of products, including those provided by cooperating partners (e.g. investment products like funds or building loan agreements). Also, external back-office services are often provided by third parties for the documentation and technical processing of financial transactions.¹⁴⁰

1346. Digitalisation has expanded the capabilities of standardisation and modularisation in the field of financial services, again with respect to services related directly to customers as well as in the back office. Digitalisation improves the suppliers' capabilities to compile products, and the customers' capabilities to obtain information on products and to conclude transactions over the Internet. At the same time, however, it has brought about a separation of the financial products from the respective advice, which will now be the focus of detailed analysis.¹⁴¹

1347. The background of the above-mentioned development is that the Internet generally increases market transparency to the advantage of the market participants and lowers the search and acquisition costs that transactions entail.¹⁴² This is relevant to financial services because customarily an information asymmetry exists with respect to many financial products between supplier and customer. Financial products are often difficult for customers to evaluate due to their consisting of bundles of partial services and being dependent on market trends. The advice provided for example by a bank or an insurance company customarily serves to inform the customer about the features and the suitability of the financial products it sells. At the same time, it gives the supplier the opportunity to get to know the customers' financial situation and possibly to sell them other products (cross-selling). Customarily, the pricing of the financial products does not make it readily apparent that the customer is paying for not only the product but also the advisory service bundled to it.¹⁴³

1348. The customary advice given by banks and insurance companies suffers from structural problems. The incentives to provide sound advice are reduced when the consultant's commission is contingent on the sale of certain products, this is not made sufficiently clear to the customer, and the customer cannot maintain an overview of market developments in the long run (not even ex post). This is all the more true of regular customers who do not obtain alternative offers for comparison before signing a contract. The advisory duties laid down in the law and developed by the case law may make the customers aware of this issue, but do not fully resolve it.¹⁴⁴ In addition, products with a complex risk structure can only (if at all) be sold at the customers' own risk. A further problem is that financial products can easily be

¹⁴⁰ On rationalising measures particularly in the associated groups, see Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1875 et seq.

¹⁴¹ Cf. Niehage, F., in: Everling, O./Lempka, R. (eds.), *Finanzdienstleister der nächsten Generation*, 1st edition, Frankfurt a. M. 2016, p. 33 (40).

¹⁴² Monopolies Commission, Special Report 68, supra note 4 (note 131), paras. 16 et seq., 64 et seq., 343 et seq.

¹⁴³ Rieck, C., in: Everling, O./Lempka, supra (note 141), p. 259 (262).

¹⁴⁴ The disclosure requirements for suppliers of financial investments have been tightened in the past few years; see on this Art. 23(2) Directive 2014/65/EU on Markets in financial instruments and on the amendment of Directives 2002/92/EC and 2011/61/EU, OJ EU L173 of 12 June 2014, p. 349; Secs. 6 et seq. Capital Investment Act (VermAnlG), Secs. 12a et seq. Investment Brokerage Ordinance (FinVermV); Federal Supreme Court, decision of 3 June 2014, XI ZR 147/12 (disclosure and information requirements of banks); and of 15 April 2010, III ZR 196/09 (disclosure and information requirements for brokers of insurance and capital investment products); divergent however for life insurance policies: see the Life Insurance Reform Act (LVRG) of 1 August 2014, Federal Law Gazette 2014 Part I No. 38, issued in Bonn on 6 August 2014.

remodelled or adapted and procured on the market, but financial consultants may not have the necessary knowledge of products that are new to them.¹⁴⁵ These problems can lead to incorrect advice.

1349. The Internet gives the customer easier means to counter this, as on the Internet alternative suppliers, financial brokers and information services make it easier for customers to compare products on their own. Thus the advisory services previously provided by the bank or insurance company are now supplemented or substituted by other companies or the customer's own research.¹⁴⁶ However, unlike the modularisation that until now was steered by the financial service providers themselves, the separation of product from advice now comes about by the customer's initiative.

1350. The customers' information through the Internet not only leads to informed decisions, but at the same time it seriously alters the relationship between the customer and the suppliers of financial products. On the Internet customer discover that Internet service providers offer answers to digital enquiries quickly, transparently and oriented towards customer preferences. These answers thus become seamlessly available to the customers in the course of their Internet activities and can be readily integrated into their digital lifestyle.¹⁴⁷ Furthermore, the improved channels of information over the Internet offer the customers alternatives of which advice provided by their bank or insurance may not have made the customers aware. This has two consequences:

- First, the previous trust-based bonds to certain product suppliers lessen in view of the supply of information on the Internet.¹⁴⁸
- Second, the customers' scope of action is broadened. The question is not so much which products a certain financial service provider can offer, but rather which products the customer (who now typically is better informed) has a demand for.¹⁴⁹

The growing customer independence can be exploited by the suppliers of digital services to offer customers their financial services and entice them away from their original bank.

1351. The appearance of digital suppliers therefore fundamentally calls the customer relations of traditional financial service providers into question. According to the above observations, in the digital economy the development of demand depends more than before on the information accessed by the customers as Internet users and on their interaction with other users (e.g. recommendations in social networks).¹⁵⁰ Thus it is no longer sufficient to offer customers services within the range of what the suppliers can provide in their existing organisation and to apply their existing thought patterns to new customer demands.¹⁵¹

1352. Conventional financial service providers like banks and insurance companies have until now enjoyed competitive advantages over alternative new suppliers, since they have an existing stock of customers, liquidity, a relatively full range

¹⁴⁵ Rieck, C., in: Everling, O./Lempka, supra (note 141), p. 259 (262 et seq.).

¹⁴⁶ Sonder, F., in: Chishti, S./Barberis, J., supra (note 133), p. 258 (258).

¹⁴⁷ Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., supra (note 133), p. 245 (245).

¹⁴⁸ Kinting, M./Wißmann, S., in: Everling, O./Lempka, supra (note 141), p. 3, (13 et seq., 17 et seq.). All things considered, trust remains an important factor in the banking sector; see Hoffmann, Retailbanking: Die Trümpfe in der Hand ausspielen, Die Bank 7/2015.

¹⁴⁹ Dombret, A., in Dombret (ed.), Bankenaufsicht im Dialog 2015, Frankfurt a. M. 2015, p. 6 et seq. and participants of the podium discussion id., p. 85 (90 et seq.); Niehage, F., in: Everling, O./Lempka, supra (note 141), p. 33 (38); Clarke-Walker, T., in: Chishti, S./Barberis, J., supra (note 133), p. 261 (261). Better access to information does not however rule out information overload; on this cf. infra para. 1395.

¹⁵⁰ Clarke-Walker, T., in: Chishti, S./Barberis, J., supra (note 133), p. 261 (261). This does not however mean that a so-called multi-channel distribution is necessary, because customers switch freely between online and offline channels. Studies show that customers only rarely switch information and transaction channels between the stages of gathering information and buying the product, and when they do it is normally from online to offline channels when it is not possible to complete the transaction online; see Niehage, F., in: Everling, O./Lempka, supra (note 141), p. 33 (43); Hoffmann, M., Die Trümpfe in der Hand ausspielen, Die Bank 07/2015, 56 et seq.

¹⁵¹ Cf. Niehage, F., in: Everling, O./Lempka, supra (note 141), p. 33 (39); Goranko, J., et al., id., p. 287 (300); Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., supra (note 133), p. 245 (245).

of products and the physical proximity to the customers (branch networks). In addition, they are protected by the bank and insurance regulations (e.g. supervisory authorities' provisional permits and admissions), and the banks have the additional protection of the systems of deposit and institutional guarantee.¹⁵² In the digital segment, however, many of these competitive advantages are only relevant to a dwindling degree:

- The existing stock of customers is not necessarily jeopardised by new suppliers, as long as customers shy away from a complete shift due to the cost and effort involved, instead making use of parallel services from several providers (known as multihoming).¹⁵³ However, this kind of behaviour is associated with a further loosening of the customer bonds, and can devalue them in economic terms. When customers in fact repeatedly use the financial services of alternative suppliers, this can in some cases reduce the liquidity of their home bank or insurance company.
- The offer of a full product range can represent a certain competitive advantage in the long run.¹⁵⁴ Yet this is relativised by the customers' perception that this range often consists of substitutable standardised services.¹⁵⁵ Digitally inclined customers tend more and more to compile their own products in the digital world, and their demand tends to be oriented ever more towards the offer that is best for them— regardless of supplier. In business with digitally inclined customers, therefore, it is increasingly necessary to arrange products in small units for special customer groups or to adapt them to the individual demand (so-called "mass individualisation").¹⁵⁶ Offers must increasingly be geared towards making recommendations to the customers based on their individual needs, even with services performed without consultation (so-called "digital assistance").¹⁵⁷ These developments generally argue in favour of financial service providers concentrating on services in their product range that correspond to the customers' preferences. This may mean that a greater amount of additional financial services must be bought than previously was the case.
- The advantage of the physical proximity to the customer loses more significance the more the customers request financial services over the Internet.¹⁵⁸ With respect to such services the advantage of physical proximity even becomes a disadvantage for conventional banks, because a network of local branches incurs high costs. According to the German Savings Banks Association (DSGV), customers now seek contact to their savings bank 200 times more often via smartphone apps than through a local branch.¹⁵⁹ For the time being, a local infrastructure will likely remain important for cash-related operations and for services requiring extensive counselling.¹⁶⁰ And yet the digitalisation wave is already causing banks and savings institutions to have to close many branches due to the high

¹⁵² And yet this protection is ambivalent in nature, as regulation in turn entails considerable burdens. On the competitive relevance of this aspect as well see Monopolies Commission, Biennial Report XX, *supra* (note 131), paras. 1745, 1752 et seq.

¹⁵³ European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 10 (supplier switching is rare); see also Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., *supra* (note 133), p. 245 (245) (switching accounts so far mostly when personal circumstances change, e.g. when moving house).

¹⁵⁴ Clarke-Walker, T., in: Chishti, S./Barberis, J., *supra* (note 133), p. 261 (263).

¹⁵⁵ A survey shows that more than half of the banking customers in the USA do not assume that their bank has different products on offer than other banks; Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., *supra* (note 133), p. 245 (245).

¹⁵⁶ Rieck, C., in: Everling, O./Lempka, *supra* (note 141), p. 259 (267).

¹⁵⁷ Goranko, J., et al., in: Everling, O./Lempka, *supra* (note 141), p. 287 (294); Dapp, T. F., *Fintech – Die digitale (R)evolution im Finanzsektor*, Study of 23 September 2014, db research, 17.

¹⁵⁸ European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 13; Kipker, I./Serges, S., in: Everling, O./Lempka, *supra* (note 141), p. 305 (320).

¹⁵⁹ Mussler, *Die Digitalisierung der Sparkassen hakt*, faz.net of 2 November 2015.

¹⁶⁰ Eurogroup Consulting, Study, *Banken: Bankkunden zieht es trotz Online-Banking in die Filiale*, AFP/unternehmen-heute.de of 8 October 2013; Steevens, C., *Die Filiale im digitalen Wandel*, Börsen-Zeitung of 31 December 2014, p. 34; and the participants of the podium discussion in Dombret, A. (ed.), *supra* (note 149), p. 85 (91 et seq.).

costs.¹⁶¹ It cannot be ruled out that not only the number of branches but also the overall number of banks will decrease as a result of digitalisation.

- Financial service providers have a certain protection from new competitors through the bank and insurance regulation.¹⁶² A number of financial services are subject to authorisation, and in the processing of financial transactions regulatory provisions must be observed, for example on risk management, money laundering and data protection.¹⁶³ While this regulation does prevent new suppliers from offering digital services over the full range of products, it does not rule out that the new suppliers will occupy the interface with the customer and banks and insurers will function merely as liquidators in the background.

1353. Aside from this, the IT infrastructure used with conventional financial services, and existing processes represent a considerable burden for business adjustments. Conventionally, the IT infrastructure and the relevant processes serve to process financial transactions in such a way as to allow optimal risk management while conforming with the regulatory provisions. To be competitive in the digital economy, however, financial service providers must increasingly analyse data with reference to customer preferences and where necessary adapt financial products to these preferences quickly.¹⁶⁴ This requires additional functions and process adjustments that entail considerable costs. Furthermore, different data formats often make it impossible to directly create data consistency throughout the whole system.¹⁶⁵ In addition, interfaces have to be optimised to better link internal and – where needed – external processes with each other.¹⁶⁶ Financial service providers invest increasing amounts of money in IT and process management, but most of it is still spent on maintenance, not to mention on a regulation-driven development of their existing systems.

1354. Digitalisation, finally, places considerable demands on personnel. The employees cannot focus exclusively on day-to-day operations with the problems this brings, but must remain open for quick changes and be willing to develop new customer-oriented solutions, independently if necessary.¹⁶⁷ Conventional banks and insurance companies in many cases must also cooperate with suppliers of digital services or take recourse to external consultants when adapting their business to the demands of the digital economy.

3.2.2 Financial services allowing for little or no standardisation

1355. The above-mentioned developments do not apply to all financial services within the private-customer segment, and outside this segment they can apply marginally or not at all. Thus large cash investments, some credit transactions and operations with risk pooling (= insurance transactions) are in some cases too case-specific and complex to be broken down into standardisable building blocks.

1356. In the private-customer segment, services that until now have been unsuitable for alternative offers include notably banking services for affluent private customers, extensive credit lines for insolvent debtors and debt rescheduling, as well as long-term insurance policies. This does not rule out that information and brokerage services are performed digitally, however, especially in the sale of insurance products.¹⁶⁸ Beside this, so-called peer-to-peer offers for credit lines

¹⁶¹ On this Deutsche Bundesbank, Bankstellenentwicklung im Jahr 2015, Press note of 13 April 2016, with annexes; McKinsey, Deutsche Banken vor grundlegendem Wandel, Press release of 7 April 2016.

¹⁶² Cf. Dapp, T. F., *supra* (note 157), p. 18.

¹⁶³ On this e.g. Sonder, F., in: Chishti, S./Barberis, J., *supra* (note 133), p. 258 (260); Freitag, R., in: Everling, O./Lempka, *supra* (note 141), p. 329 (333 et seq.).

¹⁶⁴ Cf. Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., *supra* (note 133), p. 245 (246). This makes existing processes even more complex; see Freitag, R., in: Everling, O./Lempka, *supra* (note 141), p. 329 (338).

¹⁶⁵ Duchamp, T., in: Chishti, S./Barberis, J., *supra* (note 133), p. 100 (101 et seq.).

¹⁶⁶ Kipker, I./Serges, S., in: Everling, O./Lempka, *supra* (note 141), p. 305 (325).

¹⁶⁷ Goranko, J., et al., in: Everling, O./Lempka, *supra* (note 141), p. 287 (301 et seq.).

¹⁶⁸ On this Schulz, A., Fintech für Versicherungen: Hinter den meisten Produkten steckt ein Makler, Finanztip of 11 November 2015.

and insurance policies are establishing themselves as one variant of the sharing economy.¹⁶⁹ Furthermore, there now exist alternative suppliers of pension schemes (through fund products) and further alternative providers of low-volume insurance plans (e.g. for electronic appliances).¹⁷⁰

1357. An important field of business that has until now been relatively unaffected by digitalisation consists in financial services for businesses (B2B segment). This segment is considerably larger than that of consumer services (B2C segment).¹⁷¹ And yet no fundamental change is to be expected here in the foreseeable future, despite the digitalisation of ever more parts of the economy.

1358. The main reason for this is that with regard to business customers, standardisation of products has only ever been possible to a limited extent. Companies steer their distribution chains by means of their own integrated procurement processes, and financial services must be coordinated with them. The transactions on average have a larger volume and within the distribution chain are very dependent on the relationship between the transaction partners and, for instance, one partner's relationship to a bank as a provider of credit. The prices in single transactions are influenced by taxes, discounts, cost of raw materials, supply and storage costs and can even change later, due for instance to renegotiations. The financial flows are more difficult to keep track of. For this reason there is less space for standardised financial services sold on a modular basis.¹⁷² Consequently, the cooperation between business customers and their financial service providers often continues to be close and trust-based.

Nevertheless, it is not inconceivable that digital solutions will with time become more significant, at least when the back office compiles products for business customers, or with regard to services performed in cooperation between a digital supplier and the business customer's house bank.¹⁷³

1359. A completely different situation exists, in contrast, when large corporate clients effect cross-border transactions or request consortium financing.¹⁷⁴ Admittedly, in these business segments there are developments vaguely comparable with the private customer segment; thus financial services are also compiled for corporate clients according to customer needs, and products and consulting services provided by division of labour (= in modules). In addition, the ties to individual financial service providers can in some cases be considerably looser. And yet this is a business, which is driven by the requirements associated with individual finance projects, and not by a customer request for an adjustment of large-scale services to customer preferences. The market forces described in this section do not have an impact on corporate clients.

3.3 Observations on the development of competition

1360. It seems as though the fact that the conventional financial service providers have until now always reacted with some delay to market developments has allowed new suppliers to enter the market with alternative offers.¹⁷⁵ This market development is illustrated by the example of bank services performed for private customers. Three phases can be determined in this development.

¹⁶⁹ On peer-to-peer loans see *infra* paras. 1388 et seq. in this Report. In the insurance sector see as an example: Friendsurance.

¹⁷⁰ Examples: Farr or Schutzklick.

¹⁷¹ Desharnais, D., in: Chishti, S./Barberis, J., *supra* (note 133), p. 88 (88), according to whom B2B in the USA is four times as large as the B2C segment.

¹⁷² Desharnais, D., in: Chishti, S./Barberis, J., *supra* (note 133), p. 88 (88 et seq.).

¹⁷³ On this Siegert, Interview in: Schneider, "Nur wenige Fintechs werden zu einer Marke", WiWo Online of 12 April 2016, estimating that even now roughly 40 per cent of FinTechs are already active in the B2B segment.

¹⁷⁴ Cf. European Commission, Decision of 3 October 2007, M.4844 – Fortis/ ABN AMRO Assets, paras. 13 et seq.; Decision of 28 June 1995, M.597 – Swiss Bank Corporation/S.G.Warburg, para. 12.

¹⁷⁵ Cf. Dapp, T. F., *supra* (note 157), p. 19.

3.3.1 Phase one: Online banking and direct banks

1361. In the first step, banks without their own branch network entered the market as alternative suppliers; here, customers can do their banking online or on the telephone and the banks possess an infrastructure for advisory services that is specifically aligned with these sales channels (direct banks).¹⁷⁶ The difference between direct banking and conventional branch banking is essentially that the customers take care of more of their own financial transactions and in exchange do not have to visit a branch. This “self-service” saves the bank costs, in that it partly shifts this burden onto the customer.¹⁷⁷

1362. Direct banks have become widely established in Germany since the late 1990s. Today they exist as independent private banks (e.g. Netbank, Umweltbank; the late DAB Bank¹⁷⁸), as subsidiaries of major foreign and domestic private banks (e.g. Comdirect, Consorsbank, ING-DiBa) and institutions of the Sparkassen Group (DKB, 1822direkt) and of non-bank enterprises (e.g. Volkswagen Bank). The lines dividing them from the branch banks are blurred, however. For example, the cooperative PSD Banks operate a regionally oriented direct-banking business and also have branches.¹⁷⁹ Aside from the direct banks serving the general banking needs of private customers, there are also special direct banks for stock-market transactions (e.g. S Broker, GENO Broker).

1363. The differences between direct banks and branch banks have further diminished in that most branch banks have begun to offer their customers additional online-banking functions. In this case, advice is still offered by the branch consultant, but the customers can independently perform transactions via online access to their account.

1364. In competing with the conventional branch banks, the direct banks have advantages due to their streamlined organisation and the fact that their systems are designed for digital process optimising.¹⁸⁰ They can also rely on employees specially trained in digital financial services and may – as compared with many conventional branch institutions – often have a more open corporate culture with respect to digital services. Competitive conflicts can however arise when direct banks, e.g. in payment processing, take recourse to the infrastructure of the branch banks. The practice addressed in the Twentieth Biennial Report of setting high fees at automated tellers for cash withdrawals from other banks and of automated tellers blocking credit cards issued by direct banks are examples of this.¹⁸¹

1365. From the customers’ perspective the supply of online-banking functions generally means a needs-based extension of the performance spectrum of the credit industry. And yet the online-offers of direct banks and other banks so far only give the customer relatively simple assistance in account maintenance (online cash transfers and similar services) and advisory services (chats, comparison calculators).¹⁸² They do not yet provide the customer with digital assistance and therefore leave room for an offer even better oriented towards customers’ needs.

¹⁷⁶ On direct banks see e.g. European Commission, Decisions of 11 March 1997, M.873 – Bank Austria/Creditanstalt, para. 23, and 22 February 2002, M.2709 – ING/DiBa; further BKartA, Decisions of 21 October 2010, B 4 – 45/10, para. 38, and 28 February 2012, para. 22.

¹⁷⁷ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (292 et seq.).

¹⁷⁸ The operating activities of the DAB Bank, as a formerly important independent supplier, were transferred at the end of 2014 to the German branch office of BNP Paribas S.A.

¹⁷⁹ Individual aspects of the business model of the PSD Bank Group are currently under the scrutiny of the German competition authority, Bundeskartellamt (BKartA); see Alzer, “Das Tischcloth ist zerschnitten”, Handelsblatt of 12 August 2015.

¹⁸⁰ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (301).

¹⁸¹ On this Monopolies Commission, Biennial Report XX, supra (note 131), paras. 2123 et seq.

¹⁸² Cf. Meusel, S., in: Everling, O./Lempka, supra (note 141), p. 271 (274 et seq.).

3.3.2 Phase two: Finance technology companies for single services

3.3.2.1 General features: Business models and offers

1366. In the second step, companies developed that offer digital services surrounding financial transactions and are thus referred to as finance technology companies (FinTechs). The central characteristics of FinTechs are that they have innovative business models using modern (digital) technologies, that they perform standardisable financial services (as a rule focussed on a certain area and not contingent on a banking licence) and that these services are highly tailored to the needs of the end consumer (i.e. simple, quick, transparent and as personalised as possible).¹⁸³

1367. Unlike banks, FinTechs often only perform individual services.¹⁸⁴ A crucial difference to conventional banks is that FinTechs develop their business model based on a desired customer experience and implement it technically.¹⁸⁵ The product is thus not first developed within the framework of the existing structure, and then separately presented to the customers and marketed.

1368. An overview of the market is difficult considering the variety of the business models. Generally speaking, the German FinTech segment, despite its considerable growth in the past few years, is probably still in its infancy. Figures on earnings and on the investments made in FinTechs vary from one study to the next, which is not least attributable to different definitions and conceptual delineations.¹⁸⁶

Thus Ernst & Young (EY), for one, estimates the size of the German “FinTech market” in a current study to be approximately EUR 2.4 billion based on revenues, making Germany the fourth-largest FinTech site in the world, after the United Kingdom (c. EUR 8.9 billion), New York (c. EUR 7.5 billion) and California (c. EUR 6.3 billion).¹⁸⁷ Investments in FinTechs according to this study grew in Germany in the year 2015 to about EUR 524 million, compared with roughly EUR 225 million in 2014 and approximately EUR 80 million in 2013.¹⁸⁸ For 2016 a further increase in investments is projected. Nevertheless, some of the investments in the leading FinTech regions, the United Kingdom (c. EUR 707 million), New York (c. EUR 1.9 billion) and California (c. EUR 4.8 billion), were much larger.

CB Insights and KPMG also show an increase in investments in FinTechs, estimating the venture capital invested in 2015 in such companies in Germany at about USD 193 million, compared with about USD 101 million in 2014 and about USD 44 million in 2013.¹⁸⁹ Despite this increase, investments in Germany are still low in an international comparison.

¹⁸³ Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (333); Horváth & Partners, FinTechs – Angriff auf die Geschäftsmodelle von Banken, Market analysis from July 2014, 4 et seq., 8.

¹⁸⁴ On this Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (320) (“cherry picking”).

¹⁸⁵ Niehage, F., in: Everling, O./Lempka, supra (note 141), p. 33 (38).

¹⁸⁶ See on this also Schneider, Wer seid ihr, und wenn ja, wie viele?, Handelsblatt of 3 March 2016. See in addition also supra para. 1341 in this Report.

¹⁸⁷ EY, German FinTech landscape: opportunity for Rhein-Main-Neckar, supra (note 136). The figures refer to FinTechs with strong growth that can be grouped in the so-called CLASSIC Framework; see on this EY, UK FinTech: On the cutting edge. An evaluation of the international FinTech sector, Study commissioned by HM Treasury, 24 February 2016. If traditional FinTechs are included, the turnover in the UK amounts to more than GBP 20 billion; see on this EY, Landscaping UK Fintech, Study commissioned by UK Trade & Investment, 6 August 2014.

¹⁸⁸ Taking into account the takeover of 360T by the Deutsche Börse for approximately EUR 725 million, investments in Germany amount to over EUR 1.2 billion for the year 2015. See on this EY, Rhein-Main-Neckar ist Deutschlands dynamischste FinTech-Region, Press release of 3 March 2016, <http://www.ey.com/DE/de/Newsroom/News-releases/EY-20160303-Rhein-Main-Neckar-ist-Deutschlands-dynamischste-FinTech-Region>, accessed on 1 July 2016.

¹⁸⁹ CB Insights/KPMG, The Pulse of Fintech, 2015 in Review, Study of 9 March 2016, <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/06/pulse-of-fintech-2015-review.pdf>, accessed on 1 July 2016. Deutsche Bank Research reports a similar figure for the year 2014, putting investments in FinTechs in Germany at approximately USD 85 million. See on this May, H./Kaya, O., German FinTechs and traditional banks: Friend or Foe?, Presentation of 1 October 2015, db research: https://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000366981/Presentation%3A_German_FinTechs_and_traditional_bank.pdf, accessed on 1 July 2016.

Thus the venture capital invested worldwide in FinTechs in 2015 amounted to roughly USD 13.8 billion.¹⁹⁰ Of this, USD 1.5 billion were invested in Europe – alone USD 962 million of this in the United Kingdom – USD 4.5 billion in Asia and USD 7.7 billion in North America.

1369. FinTechs present themselves as competitors of banks, that is, as independent Internet ecosystems (e.g. crowd-lending platforms) or as new competitors for individual services (e.g. account management), but they also collaborate with banks in a cooperation framework, that is, as product or process partners (including in the back office). There is a flowing transition zone between the two forms of activity. The financial services handled by FinTechs cover large areas of bank services for private customers and businesses, especially small businesses (front office) as well as the corresponding back-office services, including:¹⁹¹

- Account management services, either through FinTechs without a banking licence in the case of pure current accounts, or through FinTechs with a banking licence for online banking accounts with overdraft function, for either private customers or start-ups/SMEs;¹⁹² further, account administration for existing accounts (personal finance management);¹⁹³
- Credit services, for instance as platforms for crowd lending private to private or private to business, credit comparison and loan-brokering portals, platforms for combined products;¹⁹⁴ special supply for short-term credit lines (e.g. for deferment or instalment purchases);¹⁹⁵
- Investment services in the form of trading platforms for private investors, also within a social network service (social trading);¹⁹⁶ further, platforms for investments in the framework of crowd finance;¹⁹⁷
- Investment consulting services to bypass the commission-based advice provided by banks through online-based financial consulting; suppliers of consulting software (especially robo-advisors);¹⁹⁸
- Payment services (next-generation payment), that is, systems for mobile and Internet-based payment,¹⁹⁹ mobile points of sale (PoS) for traders;²⁰⁰

¹⁹⁰ Global investments in FinTechs in total, thus not only in the form of venture capital, according to the study, amount to approximately USD 19.1 billion.

¹⁹¹ Cf. Beck, R., *Wer braucht noch Banken*, Kulmbach 2015, Ch. 5; Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (316 et seq.). On the shares of the individual segments in the total business of FinTechs see e.g. Barkow Consulting, German FinTech Startup-Classification (n = 275), http://www.barkowconsulting.com/wp-content/uploads/2015/07/German_FinTech_Universe.png, accessed on 1 July 2016.

¹⁹² Examples: Number 26 (without a banking licence) or the Fidor Bank and Holvi (with banking licences). The former case requires a bank as a cooperating partner to process banking services that require a licence. The companies listed here as examples of course belong to a new FinTech generation which provides customers with an overall portfolio of services and does not just perform single services; on this in more detail section 3.3.3.

¹⁹³ Examples: Numbrs, finanzblick.

¹⁹⁴ Examples: Auxmoney, Lending Club (USA) and Lendico (D) (all private-to-private lending); Zencap (private-to-business lending); Check24 (credit comparison), Interhyp (real-estate loan brokerage), Smava (combination of credit comparison/crowd lending).

¹⁹⁵ Example: Vexcash, KreditUp. Wonga (UK).

¹⁹⁶ Examples: Tradegate Exchange (a trading platform), or Moneymeets, Ayondo, eToro (social trading). Social-trading platforms among other things allow small-scale investors to follow the strategies of experienced investors.

¹⁹⁷ Especially crowd investing (e.g. Deutsche Mikroinvest, Fundsters, Bergfürst, Seedmatch, Krautreporter) and crowd lending (on this see supra note 194).

¹⁹⁸ Examples: FinanzManager (formerly Quicken), Mint, StarMoney.

¹⁹⁹ Different types of systems can be counted among them, e.g. PayPal (guarantees payment of holders of a PayPal account); ClickandBuy, sofortueberweisung.de (both with access to an existing account), Skrill/Moneybookers (prepaid, i.e. no access to the account is necessary); Klarna (pay by invoice). As comparable systems of the conventional banks GiroPay or Paydirect (online payments) and Girogo (mobile payments) can be named.

²⁰⁰ Examples: iZettle, SumUp, Payleven (processing of card payments for business operators; mobile PoS).

- Currency services, such as peer-to-peer platforms that match up the holders of cash in different currencies so as to bypass fluctuating exchange rates or processing fees;²⁰¹ systems using associated prepaid credit cards²⁰² and other online transfer systems suitable for currency exchange;²⁰³
- Finally, supply of outsourcing software and white-label software solutions for banks (software as a service – SaaS), which facilitate FinTech-typical customer services or enhance process efficiency in the back office.²⁰⁴

In addition, FinTechs handle sourcing and brokerage services for insurance products for private customers.²⁰⁵ Further, in the corporate segment, beyond the core services in this area the following services are also offered:

- Investment advice through Internet platforms (Gasteen); establishment of technical platforms modelled on online ranking and booking portals and the like, intended among other things to make foreign exchange trading easier (e.g. Gator);²⁰⁶
- Services for the purchase of receivables.²⁰⁷

The development of these offers is on the whole quite dynamic. The current market in many of the above-mentioned cases typically involves different innovative approaches to solve the same problems.²⁰⁸

1370. In competition with conventional banks, FinTechs are advancing into areas in which the supply of specially customer-tailored digital banking services has so far been limited. Front-end suppliers edge the conventional banks out of digital contact with customers by occupying the customer interface for mobile and online-banking applications.²⁰⁹ Their goal is to grow quickly by offering customers attractive individual services and thus to achieve economies of scale.²¹⁰

1371. The conventional banks have long observed the competitive advances of FinTechs and are responding in certain cases by improving their own offers. In relation to FinTechs, banks can pursue the following four competitive strategies:²¹¹

- Banks evolve into technical platforms for FinTechs, that is, they provide the FinTechs with such a platform or create their own ecosystem, over which they retain control,²¹² for FinTechs (platform option);²¹³

²⁰¹ Examples: TransferWise, CurrencyFair.

²⁰² Example: Voxmoney.

²⁰³ Examples: Moneygram, PayPal, Western Union, WorldRemit.

²⁰⁴ One supplier of this is Wirecard AG. See also Knipker/Serges, in: Everling, O./Lempka, supra (note 141), 316 et seq., 320, 327.

²⁰⁵ R., T., Peer-to-peer insurance: Friends with benefits, *The Economist* of 15 June 2012; Schulz, A., supra (note 168).

²⁰⁶ Slodczyk, Wie ein trojanisches Pferd, *Handelsblatt* of 19 October 2015. The establishment of consultation platforms for private investment represents a parallel development; on this Anleger entdecken Beratungsplattformen im Netz, *dpa/faz.net* of 14 January 2015.

²⁰⁷ This refers to services for so-called quasi factoring, that is, for purchases of defaulted debts where the del credere risk remains with the supplier; on this Knipker/Serges, in: Everling, O./Lempka, supra (note 141), p. 311. These services complement the “true” factoring offered by banks.

²⁰⁸ Cf. European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 14 (on payment transactions); Desharnais, D., in: Chishti, S./Barberis, J., supra (note 133), p. 88 (88) (on electronic commerce in general).

²⁰⁹ Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (320).

²¹⁰ Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (320).

²¹¹ Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (335 et seq.); Freitag, Digitalisierung als Chance, *Die Bank* 7/2015, p. 30 et seq.

²¹² The term “ecosystem” is used here in the sense of a closed network of interrelated software – and in some cases hardware – components that is perceived as uniform by the users of the digital services; on this von Dapp, T. F., Fintech reloaded – Die Bank als digitales Ökosystem, Study of 28 April 2015, db research, p. 4 et seq.

- Banks invest in FinTechs (investor option);
- Banks develop their own FinTech offers (development option);
- Banks cooperate and integrate services into their own business model (integration option).

These options give the banks different degrees of potential for active participation, which nevertheless requires specific knowledge and a suitable infrastructure. Moreover, if the market presence of the FinTech remains separate from that of the bank, customers could be lost to the FinTechs.

1372. Banks' investments in the development of their own digital innovations have so far – both within and outside Germany – been relatively low. In Europe in the year 2014 retail banks had only digitalised 20–40 per cent of their processes and 90 per cent of European banks were using less than 0.5 per cent of their total expenditures for digital systems.²¹⁴ The bulk of these investments in the digital infrastructure still goes into maintaining the current systems.²¹⁵

1373. The difficulty for conventional banks consists in having to further develop their organisation and an existing infrastructure that is not necessarily tailored to the requirements of the digital economy, while on the other hand they risk cannibalising any existing business or losing customer contacts to new suppliers.²¹⁶ It is in fact estimated that in the long run a considerable share of the revenues from the standardised private customer segment could be jeopardised by FinTechs.²¹⁷ However, attempts to maintain and further develop the existing structures in many cases seem less than promising.²¹⁸

1374. Particularly on the part of the large universal banks, in recent years various cooperation models have nevertheless been developed, in which the banks support FinTechs through incubators, innovation labs, accelerators etc. and are thus able to use the new service providers as a source of innovation.²¹⁹ In the Sparkasse Group and the cooperative associated groups it has so far been mainly the larger institutions that have engaged with the approaches of the new digital suppliers.

1375. In many cases the business models of FinTechs are designed from the outset for cooperation with existing suppliers and integration in the systems of other financial service providers. Thus the FinTechs' IT is often equipped from the start with interfaces (APIs) allowing a direct embedding in other processes or a tethering of these.²²⁰ Furthermore, FinTechs often do without a banking licence in view of the cost and effort involved in obtaining one, which can present

²¹³ On this in particular Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (336), pointing out that this option lends itself particularly to B2B business because (or provided that) its structure is already modular.

²¹⁴ Olanrewaju, The rise of the digital bank, McKinsey, July 2014; <http://www.mckinsey.com/business-functions/business-technology/our-insights/the-rise-of-the-digital-bank>, accessed on 1 July 2016.

²¹⁵ See supra para. 1353 in this Report.

²¹⁶ Cf. Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (321, 326); Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (338). Critical with regard to risks of cannibalisation [...] (an alternative to self-cannibalisation is the devaluation of the business by competitors); with regard to attempts to further develop a not necessarily suitable IT infrastructure.

²¹⁷ BCG, Press release of 7 July 2015: "Achtel der Ertragsbasis geht in zehn Jahren verloren"; Roland Berger, Executive Retail Banking Survey: Digital Transformation, Summary Document, November 2015, slide 19: "The disintermediation/debundling threat is more present than ever with an estimated 20–30 percent of revenues at risk [by competition from FinTechs]"; McKinsey, The Fight for the Customer, McKinsey Global Banking Annual Review 2015, p. 3 and 22 et seq.: "We estimate that in five major retail banking businesses (consumer finance, mortgages, SME lending, retail payments and wealth management) from 10 to 40 percent of revenues (depending on the business) will be at risk by 2025, and between 20 and 60 percent of profits, with consumer finance the most vulnerable."

²¹⁸ See Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (338); see also Gelis, P., in: Chishti, S./Barberis, J., supra (note 133), p. 235 (236); Margaris, S., id., p. 238 (238) (on self-cannibalisation vs. losing customers to competitors); Clarke-Walker, T., in: Chishti, S./Barberis, J., supra (note 133), p. 261 (262) (on developing IT systems vs. purchasing new systems).

²¹⁹ Kanning, Silicon Frankfurt, FAZ.net of 19 February 2016; Habdank, DZ Bank: "Wir wollen von Fintechs vor allem lernen", www.finance-magazin.de.

²²⁰ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (294).

an obstacle when the product they offer is a part of a service for which a banking licence is required.²²¹ A further problem for FinTechs can arise when communication with the customers needing individual advice is made difficult by the lack of a consultation infrastructure, or when the trust engendered by an evolved customer relationship is lacking.²²² These factors play a role in the frequent decision of FinTechs to enter into cooperation with banks.²²³

1376. Aside from these considerations, a merging of FinTech and banking segments can simply be forced by market processes. This is especially the case when FinTechs fail to achieve market penetration with their products.²²⁴ Failure can result – besides when the offers are not yet fully developed or faulty business choices are made – especially when their financial power is not sufficient to win over a critical mass of customers.²²⁵ In such cases as well, FinTechs either enter a cooperation with banks or shift their focus to creating innovative white-label products²²⁶ for banks.

1377. Yet the cooperation of banks and other capital providers with FinTechs (or e.g. venture-capital companies) can not least contribute to the improvement of expertise in assessing and financing newly founded FinTechs and start-ups in general. Providers of capital are namely normally the more averse to risk, the larger and more complex the project to be financed is.²²⁷ The business models of start-ups (such as e.g. in the FinTech sector), in the founding phase, are characterised by high risks and low available collateral; then in the growth phase they have high financing needs, whereas it is difficult to estimate future cash inflows.²²⁸ In Germany this has in the past led to problems promoting start-ups, since this only occurred through development banks and venture capital companies, and no banking segment worthy of note was able to develop in this area.²²⁹ The cooperation of conventional financial service providers with FinTechs could now contribute to reducing problems of this type because the capital providers are better able to assess the business models of their partners. Over time, increasing funding options could lead to a decrease in FinTechs' dependency on banks, which until now has been the consequence of the fact that the development institutions' funding programmes used most frequently in Germany (especially KfW) are also processed by banks.²³⁰

3.3.2.2 Particularities of platform services (especially payment systems/crowd finance)

1378. For a number of FinTechs (in the broadest sense)²³¹ the most competition-relevant particularity is that they are organised as platforms. Platform services function as intermediaries between different user groups on the Internet and allow the users to come into direct contact with each other on the platform. Examples in the FinTech area are innovative trading platforms, portals for crowd finance and services that allow the partners to the transactions to effect payments.

1379. The Monopolies Commission examined the competitive mechanisms that exist on markets with platform suppliers in its Special Report 68. Platform services often require high investments in platform infrastructure and can trigger concentration tendencies on the markets concerned by bringing different user groups together in the course of their

²²¹ On this Freitag, R., in: Everling, O./Lempka, supra (note 141), p. 329 (333).

²²² Niehage, F., in: Everling, O./Lempka, supra (note 141), p. 33 (40); Freitag, R., id., p. 329 (337).

²²³ These banks tend to be specialised banks that are not competing for customers (e.g. Wirecard Bank).

²²⁴ According to market observers, so far only about half of German FinTechs have survived; see Maschmeyer, C., in: Rottwilm, C., "Wer 10 Investments macht, sieht bis zu 5 Insolvenzen", Interview in manager magazin on 8 September 2015 (on investing in FinTechs); Schleidt, D., Wirbelwind zwischen Bankentürmen, faz.net of 1 June 2016 ("strong competition [...], to which five to six out of ten start-ups [...] fell victim").

²²⁵ Critical e.g. Dohms, Fintechs verbrennen Millionen, Capital of 16 March 2016; Dohms, Fintechs - Revoluzzer ohne Geschäftsmodell, Capital of 17 May 2016.

²²⁶ White Label = brandless; see supra para. 1369 in this Report.

²²⁷ Disrupters disrupted, Economist of 16 May 2015, 61 (here on venture-capital funding of start-ups).

²²⁸ Dapp, T. F., supra (note 157), p. 23.

²²⁹ On this already Monopolies Commission, Biennial Report XX, supra (note 131), para. 2026.

²³⁰ Besides this FinTechs can also search for funding through other FinTech services, whether by crowd finance or social funding networks (e.g. AngelList); see also supra para. 1390 in this Report.

²³¹ I.e. including companies that have long been active on the market, such as PayPal.

operations – each independent of the extent of positive network effects, efficiencies of scale on the platform, the existence of negative network effects/use limits, the differentiation potential of the platform and the possibilities of multi-homing or switching providers.²³²

1380. As concerns the innovative financial services performed through platforms, currently such concentration tendencies seem less pronounced overall than in the services examined in Special Report 68. This will be illustrated with the examples of the new payment services and crowd finance. It must be noted that any tendencies toward concentration may become relevant not only from a competition-policy perspective, but also with respect to questions of financial market stability.

Payment services

1381. Payment services represent a significant field of business in the context of providing financial services.²³³ The relevant markets traditionally encompass the operation of card-payment systems and other systems of payment (e.g. electronic direct debit scheme, online transfer).

1382. Competition in the area of payment systems takes place on several market levels and depends as well on the distribution channels employed.²³⁴ On the highest level, the operators of payment systems compete for banks as sales agents. On a downstream level, the banks compete for instance within a single card system for traders as points of acceptance and for consumers as card users. With payment systems other than card systems the downstream market level can exhibit different characteristics. Some payment systems allow online payments among other things (e.g. credit card systems); others serve exclusively to process payments online (e.g. PayPal, sofortueberweisung.de). For mobile payments specifically, there are as yet only very few suppliers.

1383. A characteristic of many payment systems is, as mentioned, the platform-like structure, where traders and consumers are brought together on the same service platform. In these cases, concentration tendencies can arise due to strong indirect network effects, for the system is more attractive, to traders as well as consumers, the more it is used by those on either side of the platform. It is further conducive of concentration that many payment systems address an unlimited circle of users, despite the fact that at least some systems aim specifically at certain user groups (e.g. company credit card systems). Still, so far no single payment system has been able to fully establish itself as the leader.

1384. In the area of online payment services, nevertheless, several “revolutionary” changes have been announced in recent years, first among these the introduction of an alternative to the widespread system of PayPal. The PayPal payment system has been available in Germany as a non-TAN-based²³⁵ system since 2004. The savings bank and cooperative banks took the first step of introducing Giropay in 2006 as an alternative, in this case, a TAN-based online payment system. Since November of 2015 the German financial institutions (including private banks) also offer the Paydirekt system without TANs.²³⁶ Finally, in the year 2016, it was announced that the TAN will no longer be needed for Giropay payments for amounts under EUR 30.²³⁷ As an independent alternative system – which the banks are fighting²³⁸ – the PIN-²³⁹ and

²³² Monopolies Commission, Special Report 68, supra (note 131), paras. 45 et seq., 54 et seq. with reference to Evans, D. S./Schmalensee, R., *The Industrial Organization of Markets with Two-Sided Platforms*, Competition Policy International 3 (1), 2007, p. 151–179.

²³³ See already Monopolies Commission, Biennial Report XX, supra (note 131), paras. 2110 et seq.

²³⁴ See e.g. European Commission, Decision of 26 February 2014, 39.398 – VISA MIF, paras. 14 et seq.; Decision of 19 December 2007, 34.579 – MasterCard, paras. 257 et seq.; Decision of 14 August 2007, M.4844 – Fortis/ABN Amro Assets, paras. 42 et seq.; BKartA, Decision of 8 April 2014, B4 – 9/11, paras. 5 et seq., 30 et seq.; BKartA, Press release of 9 June 2006.

²³⁵ TAN = Transaction number, a single-use numerical pass code.

²³⁶ Frühauf, M., *Konkurrenz für Paypal*, FAZ.net of 19 August 2015; pli/AFP, *Mit diesem Bezahltdienst wollen deutsche Banken Paypal platt machen*, Focus of 15 November 2015.

²³⁷ De la Motte, L., *Wettlauf der Systeme*, Handelsblatt of 30 March 2016, p. 34; Mussler, H., *Die Digitalisierung der Sparkassen hakt*, FAZ.net of 2 November 2011.

²³⁸ On the pending proceedings of the Bundeskartellamt regarding online money transfers see BKartA, Annual Report 2014, p. 24; on this also already Monopolies Commission, Biennial Report XX, supra (note 131), para. 2110.

TAN-based online payment system from sofortueberweisung.de has been able to establish itself on the market. The revolution that was announced in online payment systems, judging from the development so far, is coming more slowly than expected. This might be attributable to the considerable technical difficulties involved with introducing such services, but also to factors like the EU regulation of transaction fees.²⁴⁰ Moreover, TAN-based systems are considered to be safer than non-TAN systems; they are also more complicated for customers to use.

1385. For quite some time, observers have also seen a considerable market potential for the introduction of contactless payment systems with which customers can pay in stores. The German credit industry has long had to deal with difficulties in this area. The savings banks (initially in cooperation with the cooperative banks) introduced the prepaid system Girogo starting in 2012. But this system is still evidently only supported by some traders.²⁴¹ The cooperative banks have now introduced a “contactless bank card”, which will in future be distributed by the private banks and savings banks as well.²⁴²

1386. As an alternative to the payment systems of the German credit industry, the large retail chain Aldi Nord has recently announced that it will introduce its own contactless payment functions.²⁴³ The major mobile phone providers (Deutsche Telekom, Telefónica, Vodafone) also offer so-called wallet apps, which users can download on their smartphones and use to pay.²⁴⁴ It is as yet not clear whether major technology and Internet companies are also planning their own competitive advances in Germany in the field of contactless payment. This especially concerns the service ApplePay, which was presented in September 2014 but so far is available only outside Germany.²⁴⁵ This service is considered to have a good chance of successfully establishing itself on the market, in part because of the cooperation between Apple and the three major US credit card companies.²⁴⁶

1387. The fact that the attempts to introduce new online and mobile payment systems in recent years have faced great difficulties shows that the establishment of such a system alongside the offers that exist already requires a high level of expertise in designing the details and potentially considerable investments in establishing the payment platform. Unlike other platform systems, which are implemented on the market using an asymmetric pricing policy (to the advantage of the consumer side), payment systems cannot use a similar strategy because consumers are frequently not charged discernible fees for using the system, in part due to (direct and indirect) non-discrimination requirements of the existing

²³⁹ PIN = personal identification number (also: secret number), i.e. a numerical pass code used for authentication for instance when accessing a bank account.

²⁴⁰ Bay, L., Warum Apple vor einem Flop stehen könnte, Handelsblatt of 20 November 2014. On the relevant EU regulation see especially Regulation 2015/751 on interchange fees for card-based payment transactions, OJ EU L 123 of 19 May 2015, p. 1; on this also already Monopolies Commission, Biennial Report XX, supra (note 131), para. 2121.

²⁴¹ See on the one hand Sharma, girogo mit bereits 10.000 Akzeptanzstellen in Deutschland, <http://www.nfc-ready.de/> of 10 October 2014; on the other hand, “girocard kontaktlos” ersetzt girogo: Volks- und Raiffeisenbanken starten Pilotprojekt im Raum Kassel, <http://www.it-finanzmagazin.de/> of 28 May 2015; Bender, H., Aldi akzeptiert, BargeldlosBlog of 12 June 2015 (“rare examples of girogo acceptance”).

²⁴² De la Motte, L./Slodczyk, K., Niederlage für die Sparkassen: Genossen setzen Standard fürs kontaktlose Bezahlen, Handelsblatt of 13 January 2016.

²⁴³ Woll, J., In 2400 Filialen: Aldi Nord startet kontaktloses Bezahlen per NFC, <http://winfuture.de/> of 9 June 2015. The term NFC (near field communication) denotes a technical standard for a contactless exchange of data.

²⁴⁴ So funktioniert Aldis Bezahl-Revolution, Stern of 10 June 2015.

²⁴⁵ Cf. Schwan, B., Apple Pay kommt in fünf neue Länder, Heise of 28 October 2015.

²⁴⁶ American Express, MasterCard and Visa.

card system operators.²⁴⁷ This has contributed to the common practice of consumers using different payment systems at the same time (multihoming).²⁴⁸

Crowd finance

1388. Services for crowd finance (also known as crowd funding) are platform services in which providers of capital (investors, lenders) take part on one side of the platform and capital acquirers (project owners, borrowers) on the other side. Of the crowd financing services that have been available until now, one can distinguish according to the purpose of the funding being sought between services for investing (crowd investing), project funding (crowd funding in the narrow sense), lending (crowd lending) and other purposes (e.g. non-material purposes, customer retention through bonus systems).²⁴⁹

1389. An alternative division of crowd financing services can be made according to how capital procurement is organised; accordingly, there are donation-based, reward-based, lending- or credit-based and equity-based services.²⁵⁰ Those most likely to compete with conventional financial service providers are the credit- and equity-based services.

1390. The credit- and equity-based services, whose funding purpose lies in investing and project funding, in Germany normally collect money in order to grant silent partnerships or from so-called equity loans.²⁵¹ On the side of capital providers there are often institutional investors, who invest money from a fund.²⁵² On the other hand, credit platform services serve to broker regular loans, with interest or interest-free, from private to private (peer-to-peer, C2C) or from private to business (C2B). Depending on whether the capital seekers are required to solicit a certain minimum funding through the platform before the funding project is even concluded, one can further distinguish fixed-funding or flexible-funding models. For the latter, the thresholds for capital providers operate as a quality signal with regard to the funding-worthiness of a project; on the other hand, a funding project does not come about below this threshold, to the detriment of the capital seeker.

1391. Crowd finance is in the focus of the public interest, as it represents an alternative to banks in their core activities and furthermore is also relevant for financing start-ups. Crowd financing platforms profit from indirect network effects, because they become more attractive to capital providers or capital seekers the more users participate on the other platform side. In order to attract capital providers in particular, the price structure for the use of the platform is often asymmetric, that is, fees are only charged of the capital seekers.

1392. Despite the presence of network effects, concentration tendencies of the platform segment have only been observable on a very limited scale so far. This is probably because, among other things, the platform operators orient their business towards certain target groups on one of the two platform sides and thus only accept the funding requests of

²⁴⁷ Non-Discrimination Rules, Honor-all-Cards/Products Rules; note last year's amendment to the law in Art. 10 et seq. Regulation 2015/751, supra (note 240), prohibiting many such rules; furthermore European Commission, Impact Assessment of 24 July 2013, SWD(2013) 288 final, Vol. 1/2, p. 24; Italian AGCM, decision of 3 November 2010, 21768 – Carte di credito, Boll. n. 43/2010; ECN Subgroup Banking and Payments, Information paper on competition enforcement in the payments sector, March 2012.

²⁴⁸ On multihoming in this context Dapp, T. F., supra (note 157), p. 20.

²⁴⁹ Cf. Beck, R., supra (note 191), p. 196 et seq.

²⁵⁰ See Viotto, J., Competition and Regulation of Crowdfunding Platforms: a Two-Sided Market Approach: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741883, accessed on 1 July 2016; further, Stellungnahmen zur Anhörung Ausschuss Digitale Agenda am 11. November 2015: <https://www.bundestag.de/bundestag/ausschuesse18/a23/anhoerungen/fachgespraech-digitalisierung-in-der-finanzwirtschaft/417416>, accessed on 1 July 2016 .

²⁵¹ Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (313); Beck, R., supra (note 191), p. 197, 199 et seq. (and the examples on the following pages). Silent partnerships are equity participations in which the provider of capital waives its rights as equity holder in exchange for a share of the profits; see Secs. 230 et seq. HGB. Profit-participating loans (also: shareholder loans) are a special form of loan (Secs. 488 et seq. Civil Code (BGB)), where the lender's compensated does not (or at least not primarily) take the form of interest on the loan, but essentially a share in the profits or sales.

²⁵² Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (309).

certain capital seekers (e.g. only C2C or C2B) or only address certain capital providers (e.g. lenders for certain projects).²⁵³ Furthermore, capital providers often multihome by using several crowd financing platforms in parallel to spread risk, as well as different financial investment forms.

1393. A central hindrance to growth seems until now to have been the fact that capital providers, especially on the consumer side, hardly see crowd financing platforms as an alternative to existing forms of investing cash. Thus a study in the United Kingdom showed for example that around 60 per cent of Internet users will in future probably not use alternative funding platforms.²⁵⁴ A report of the European Commission has showed that investors are still insufficiently informed about the real risks of crowd investments.²⁵⁵ This represents a problem, according to observers' impressions, in particular for such platforms whose business model is relatively strongly oriented towards the needs of commercial capital seekers.²⁵⁶ For the time being, crowd finance will likely remain limited to individual market niches.

3.3.2.3 Interim result: Better satisfaction of customer demand

1394. The market entry of FinTechs generally benefits customers, because it makes innovative services available. From the customers' perspective, FinTechs simplify the execution of individual financial services by tailoring such services to the customers' preferences (= digital assistance). Besides this, it can be highlighted as positive that the offers of FinTechs in part even open up access to financial services for such groups of customers that would not be reached by the standardised offers of conventional banks in view of higher risks and lower yields. An example of this consists of services that – from the bank's point of view – obtain access to crowd capital for non-creditworthy debtors (crowd lending).²⁵⁷

1395. Despite these advantages, the improvements to individual services still do not completely fulfil customer expectations. One problem that has arisen is the large and changing number of new services continuously entering the market; however, the information overload this entails for the customers should abate with the market penetration of individual solutions. A more serious problem is that the innovations presented so far have fundamentally not yet produced a portfolio of services that is optimally geared towards the customers' needs.

3.3.3 Phase three: Development of new full-service providers

1396. The third step, therefore, witnessed the market entry of members of a new generation of FinTechs who bundle various individual services on a (technical) platform²⁵⁸ and give the customer access to these services through a uniform portal or a mobile app.²⁵⁹ The portal encompasses a basic range of in-house services (account management, cards, eWallet), that are compiled independent of existent systems, equipped with an underlying level of API interfaces for third-party services and rounded out by a comprehensive compliance and customer-identification infrastructure.²⁶⁰ In addition, the portal operator can offer in-house consulting or directly commission its partners with the consulting services.

²⁵³ Viotto, J., *supra* (note 250).

²⁵⁴ Baeck, P./Collins, L./Zhang, B., *Understanding alternative finance: The UK Alternative Finance Industry Report 2014*, p. 14, <http://www.nesta.org.uk/sites/default/files/understanding-alternative-finance-2014.pdf>, accessed on 1 July 2016.

²⁵⁵ SpaceTec, *Crowdfunding innovative ventures in Europe: The financial ecosystem and regulatory landscape*, Study for the European Commission, 30-CE-0614273/00-88, SMART N° 2013/0074, p. 66 et seq.; Viotto, J., *supra* (note 250), p. 11 et seq.

²⁵⁶ Smith, C., in: Chishti, S./Barberis, J., *supra* (note 133), p. 149 (151); herein on the above-named studies as well, *supra* (note 255 et seq.).

²⁵⁷ On this Morgenthaler, P., in: Everling, O./Lempka, *supra* (note 141), p. 203 (206 et seq., 211); Beck, R., *supra* (note 191), p. 160 et seq., 222 et seq.

²⁵⁸ The term "platform" is used in the field of IT systems to denote a software level with interfaces on which applications can be run and developed. It is not to be confused with the platform concept in economics.

²⁵⁹ On this Schwab, F./Guibaud, S., in: Chishti, S./Barberis, J., *supra* (note 133), p. 245 (246); Gelis, P., *id.*, p. 235 (235); Margaris, S., *id.*, p. 238 (238); see also Kanning, *Jetzt kommen die Lego-Banken*, FAZ.net of 16 April 2016.

²⁶⁰ Gelis, P., in: Chishti, S./Barberis, J., *supra* (note 133), p. 235 (235, 237). So-called know-your-customer (KYC) systems serve as legitimisation tests with money-laundering risks in mind.

1397. The systems described here are also termed digital (financial) market places. Their structure allows not only banking services and innovative FinTech services (e.g. peer-to-peer services) to be integrated. Rather, they can even be set up so that the portal operator can provide customers who place an individual request with the best offer out of a pool of suppliers. Finally, it is in principle possible to give customers access to services of non-bank companies through the platform as well (e.g. to manage a mobile phone account).

1398. For the time being this is a niche offer which however is said to have considerable market potential. The FinTechs in question either actually dispose of a banking licence (e.g. Fidor Bank, Holvi) or can act as a technical service provider with a processing bank in the background (Number26). In 2016, several conventional banks and savings institutions have announced their intention to follow their lead and offer comparable services.²⁶¹

1399. The digital financial market places, due to their full in-house product range, constitute competitors of conventional direct and branch banks. Moreover, they do not concentrate – in contrast to previous FinTechs – on a technically optimised offer of individual financial services, but they optimise the interface through which customers are granted digital access to such services.²⁶² Their goal is to bundle individual financial services into one complete offer that matches each customer's individual preferences.

1400. Due to their business focus, the financial market places represent with their portfolio not only competitive alternatives, however, but are simultaneously open to cooperation with banks, insurance companies, FinTechs and other companies with digital offers.²⁶³ The potential competitive effects are at this point difficult to assess, and yet the following developments are at least conceivable:

- The openness of the new FinTechs for cooperation with banks could, with respect to banking services for Internet-oriented private customers, promote the development of hybrid business models and, with time, the amalgamation of conventional banks and FinTechs where services for digitally-oriented private customers are concerned.²⁶⁴ In this case the logical consequence would be that the business models differentiate yet again: Thus successful banks or FinTechs could each evolve into a financial market place operator selling banking services for third parties; otherwise they could stake out a niche and either become suppliers of customer services under their own label or white label (front office) or even take over processing tasks in the back office.²⁶⁵
- Through the further development of open market place systems it could become easier for even non-bank companies from the field of technology (e.g. Internet service suppliers, mobile phone operators) to become active in the area of digital financial services.²⁶⁶

To what extent these developments become reality the future will show.

1401. From the point of view of customers, market place systems make it possible – unlike the individual service offers of banks and FinTechs – for customers to go to a single source for financial services tailored to their individual preferences. At the same time, the flood of information to which customers have so far been subjected with regard to digital financial services can be reduced, because the individual services that are relevant to a customer can be automatically integrated by the operator of the market place system. Market place systems can even be set up so as to allow customers not only to view and compare the services of individual suppliers (information and comparison platform), but also to

²⁶¹ Deutsche Bank, Deutsche Bank startet neue Banking-App, Press release of 26 April 2016; Dohms/Schreiber, Sparkassen planen "Smartphone-Bank", Süddeutsche.de of 2 May 2016; on this also Yomo: Acht Sparkassen, Finanz Informatik, rheinlandmobil und Star-Finanz basteln am number26-Killer, IT Finanzmagazin of 3 May 2016.

²⁶² Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (327).

²⁶³ Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (238).

²⁶⁴ Such hybridisation is just as conceivable regarding individual financial products, for instance through the combination of human and algorithmic consulting (robo-advisors); on this Mellinghoff, M., in: Chishti, S./Barberis, J., supra (note 133), p. 147 (148).

²⁶⁵ Ferrari, R., in: Chishti, S./Barberis, J., supra (note 133), p. 248 (252); see also Schwab, F./Guibaud, S., id., p. 245 (246).

²⁶⁶ Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (240).

invite various suppliers to tender financial products (auction platform). This facilitates competition on an individual basis in the market for financial services, which will give the customer an added value over the previous offers.

1402. The orientation towards such added value in turn means that financial service providers who operate or cooperate with market place systems must consistently orient their offers towards certain groups of customers.²⁶⁷ This indicates a diversification according to customer groups.²⁶⁸

3.4 Prospects: Where is the market headed?

1403. One open question is whether in the course of digitalisation innovations will develop a “disruptive potential”, and thus a fundamental rearrangement of the financial system is to be expected in the foreseeable future. There have been different speculations on whether major technology companies or Internet service providers (Apple, Facebook, Google etc.) could revolutionise the entire market.²⁶⁹ A fundamental rearrangement of the financial system would not only be significant for competition, but could also entail stability risks.²⁷⁰

1404. In the view of the Monopolies Commission, it might not be possible to rule out future “disruptions” on the financial markets, but from today’s perspective their probability must be assessed as rather limited. The digitalisation phenomenon has not yet changed the very nature of financial services (of banks, insurance companies etc.), but has only altered the technical processes involved in providing these services.²⁷¹ The most significant change so far is probably the shift of banking services out of the local branches onto the Internet. This certainly reduces the need of the banks and savings institutions for branch networks in their current form. Thus a disruption of existing business models in the banking sector already seems to be taking place in today’s market.

1405. Even if further fundamental revolutions in the financial system are not foreseeable, at least at the moment, it is probable that competition will be strengthened in the coming years by the effects of digitalisation, that the standardisation and modularisation of banking services will continue and that the suppliers will have to further orient their business towards the preferences of customers.²⁷²

1406. The increasing competition might speed up the consolidation already observable today in different areas of the German financial system, because in the digital world financial services cannot be restricted to a certain business segment, for which reason all suppliers of such services essentially compete with each other. At least as regards individual digital services, in future even offers from suppliers (previously) outside the field can be expected.²⁷³ Furthermore, today companies like Apple, Facebook, Google etc. already exert a considerable pressure to innovate on the existing market players, even if these companies have until now refrained from offering their own financial services, at least in Germany.

²⁶⁷ Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (239).

²⁶⁸ Gelis, P., in: Chishti, S./Barberis, J., supra (note 133), p. 235 (235).

²⁶⁹ See e.g. Ertinger, S./Kerkmann, C., Willkommen bei der Google-Bank!, Handelsblatt of 20 June 2013; Berdak, O., Why Asking About Google Bank Is The Wrong Question, Oliwia Berdak’s Blog, entry of 29 July 2014; Hirt, O./Kröner, A., Internetfirmen drängen ins Banking – “Es wird furchtbar”, Reuters Insight of 23 June 2014/8 May 2015; Banken fürchten “Paypal” und Co., Handelsblatt of 12 February 2013; Seibel, K., Banken haben Angst vor Google & Co., Welt Online of 24 June 2013; see also Knop, C., Apple will das Bezahlen revolutionieren, FAZ of 11 September 2014, p. 17; Mobile payments: Unfriending cash, The Economist of 21 March 2015 (on new payment functions from Apple or Facebook).

²⁷⁰ On the relationship between competition policy and the protection of financial stability see already Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1382 et seq.

²⁷¹ See Gelis P., in: Chishti, S./Barberis, J., supra (note 133), p. 235 (235); Gyori, D., id., p. 264 (264).

²⁷² Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (318).

²⁷³ European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 12; see also Kanning, T./Heeg, T., Mobilfunkanbieter drängen ins Bankgeschäft, FAZ.net of 6 May 2016; earlier: MasterCard, Deutsche Telekom, Telefónica Deutschland, Vodafone und MasterCard vereinfachen gemeinsam mobile Zahlungen, Press release of 25 February 2014.

1407. Standardisation and modularisation will likely remain a gateway for FinTechs and other companies to develop market access for their own digital financial service offers. It is not out of the question that this may in individual cases lead to regulatory issues. This is because, to conventional financial service providers, their own reliability and the protection of money entrusted to them are of primary importance, due to regulation as well as from the customers' perspective. New projects thus mean considerable cost and effort, so that often failure is out of the question.²⁷⁴ In comparison, new market players in the digital world are often unregulated under supervisory law and reckon on being able to win customers for innovative solutions, although this approach likewise entails the risk of failure including a total loss of their investments.²⁷⁵

1408. The orientation towards customer preferences could lead to an increase in the significance of customer data and a more detailed analysis of these data.²⁷⁶ The analysis of large (customer) data bases facilitates the development of services that are suitable for mass markets and yet largely customer-oriented.²⁷⁷ The data in question, however, are increasingly not only available to individual financial service providers alone, because with modularisation and the arrival of digital service providers, third parties now also have access to such data. On the other hand, price loses its significance for the suppliers as a competitive differentiation factor when services are standardised and modularised.²⁷⁸ For this reason it might become more and more important for players to set themselves apart from the competition by means of an appreciable added value on the product side.²⁷⁹ In this respect social-media ratings could also become increasingly relevant.²⁸⁰

1409. Finally, the tendency will likely continue that financial service providers are increasingly replaced by other companies or forced off the market without substitute in the context of data-based payment schemes.²⁸¹ Data-based payment can take place in the framework of the existing financial system, e.g. when service providers use consumer data to offer online advertising space and thereby generate income for third parties.²⁸² Another possibility is purely data-based payment schemes that are independent of the existing financial system (e.g. use of cryptocurrencies).²⁸³ At any rate, and

²⁷⁴ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (298); see also Hatami, A., in: Chishti, S./Barberis, J., supra (note 133), p. 170 (170).

²⁷⁵ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (298); Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (239).

²⁷⁶ Cf. European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 12 (significance of "big data"). On the possible competition relevance of the data-protection issues this raises, see also Monopolies Commission, Special Report 68, supra (note 131), paras. 92 et seq., 514 et seq.

²⁷⁷ Horváth & Partners, FinTechs – Angriff auf die Geschäftsmodelle von Banken, Market analysis from July 2014, p. 5 ("individualised in just a few clicks and concludable online"); Monopolies Commission, Special Report 68, supra (note 131), paras. 15, 78 (on personalisation).

²⁷⁸ Zander, 352; on the significance of price from the customers' point of view Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (320 et seq.).

²⁷⁹ Kipker, I./Serges, S., in: Everling, O./Lempka, supra (note 141), p. 305 (326); Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (239); Lunn, B., id., p. 241 (242); see also Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (302); and Clarke-Walker, T., in: Chishti, S./Barberis, J., supra (note 133), p. 261 (262): Suppliers must always ask themselves what keeps the customer from using a certain product – the marketing, the customers' familiarity with the product or the product's features as such.

²⁸⁰ Thus experiences with FinTechs are commented on in Internet blogs, forums etc.; see e.g. <http://www.p2p-kredite.com/>; <http://www.finanztip.de/community/>, accessed on 1 July 2016.

²⁸¹ Cf. Sonder, F., in: Chishti, S./Barberis, J., supra (note 133), p. 258 (258).

²⁸² Cf. Sonder, F., in: Chishti, S./Barberis, J., supra (note 133), p. 258 (259).

²⁸³ The blockchain technology used in cryptocurrencies is said to hold great market potential; applications are expected in a few years at the earliest, however; on this Eagar, M., in: Chishti, S./Barberis, J., supra (note 133), p. 212; Hayes, A./Tasca, P., *ibid.*, 217; Wild, J./Arnold, M./Stafford, P., Das Rennen um die Blockchain, Capital of 12 November 2015; Janschitz, Die Technologie hinter Bitcoins: Wie Blockchain das Internet für immer verändern könnte, <http://t3n.de/news/blockchain-588923/>; Why Bitcoin may herald a new era in finance, The Economist insights of 12 September 2014; Seibel, Blockchain ist die Revolution des Geldverkehrs, Welt Online of 22 October 2015; Kanning/Siedenbiedel, Das Geld der Zukunft, FAZ.net of 12 February 2016.

the above-mentioned developments notwithstanding, the reliance of the financial services' business on technological progress and the business models of digital service providers is likely to continue to grow.²⁸⁴

3.5 Competition-friendly regulation

1410. From a competition-policy perspective, besides understanding the market development it is also relevant to ask how the legal and administrative regulation needs to be adjusted in order to create a level playing field for competitors. When applying a competition-policy standard it must be ensured that interventions in the market should only serve to improve competitive conditions, and not to protect individual market participants from market fluctuations when these have missed their chance to adjust to the changing market. In particular, the often criticised lack of a sufficient innovation culture in Germany is therefore more relevant to industrial policy than to competition policy.²⁸⁵

In the Monopolies Commission's conception, with this in mind the following questions arise:

- Is the regulatory framework for financial services adequate, in view of the current market conditions, to achieve regulatory goals while not inducing distortions of competition?
- To what extent and in what way should the regulation be redesigned in order to prevent the obstruction of market participants on newly emerging product markets (here: especially for FinTech services)?
- Must the regulatory framework be adapted to avoid a regulation-based geographical fragmentation of newly emerging markets?

These questions cannot be answered conclusively considering the sheer bulk of current financial market regulation and the extent of ongoing market changes. However, the Monopolies Commission deems it advisable to at least make note of certain principles that are listed below. Further, it will continue to observe the development and will comment on individual issues as needed.

3.5.1 Competition-neutral pursuit of regulatory goals

1411. The regulation of financial services is intended to maintain stability in the financial market and to shield the market participants from losses caused by the materialisation of certain risks. These goals are served by financial supervisory law, while general consumer protection law also serves the latter purpose. Other regulations include, in particular, provisions on data protection and technical data safety, as well as, in Germany, the rules of the *Bundesländer* as regards trade and industry (*Gewerbe*) and savings banks.

1412. From the Monopolies Commission's perspective, these goals should be pursued in as competition-neutral a manner as possible. In doing so it must be taken into consideration that the primary law of the EU protects the goal of a uniform single market characterised by undistorted competition, aside from the goals of prudential and financial markets regulation.²⁸⁶ This makes it necessary, particularly for service offers just entering the market, to examine whether a conflict of regulatory objectives exists between the protection of competition and the protection of other interests and how such a conflict may be resolved. In this context any preliminary legislative balancing must be respected by the competent authorities, though the authorities must in their turn also take balancing decisions, particularly within their own margin for appreciation or discretion.

1413. In the present context conflicts of regulatory objectives can arise with regard to the protection of competition, particularly concerning the supervisory-law goal of protecting financial market stability.²⁸⁷ The other objectives of prudential and financial markets regulation (e.g. protecting investors and creditors, financial market integrity with regard to

²⁸⁴ Goranko, J., et al., in: Everling, O./Lempka, supra (note 141), p. 287 (289 et seq., 295).

²⁸⁵ See for many: Kanning, T., Silicon Frankfurt, FAZ.net of 19 February 2016; Hirt, O./Kröner, A., Internetfirmen drängen ins Banking – "Es wird furchtbar", Reuters Insight of 23 June 2014/8 May 2015.

²⁸⁶ Art. 3(3), first sentence and Art. 4(3) TEU in conjunction with Protocol 27 to the Treaties, OJ EU C 83 of 30 March 2010, p. 309.

²⁸⁷ On this see fundamentally already: Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1382 et seq.

manipulative/criminal acts etc.) protect less far-reaching or less unequivocal legal interests.²⁸⁸ In these cases, it may be possible to rule out a conflict of regulatory objectives already because the protection of competition can, at least in certain cases, also encompass a protection of the legal interests in question (e.g. in protecting investors/consumers). If a conflict of aims should still arise, it must be borne in mind that the protection of undistorted competition is, because it is expressly laid down in primary EU law, of particularly high importance in the context of the protection of the European single market.²⁸⁹ Therefore in balancing it with the legal interests of financial market supervision, the protection of competition may have to be given more weight.²⁹⁰ This is significant precisely where the regulation of new types of financial service providers is concerned.

1414. In the view of the Monopolies Commission it should at any rate be ensured that the regulation does not set its requirements so high that they pose an insurmountable barrier to market entry. This is particularly important for licensing rules. In many cases, though, FinTechs, whose emphasis is on technical improvements, acting e.g. as a credit institution, can do without regulatory approval entirely or need only a limited licence. The limited licence corresponds to a catalogue of duties with certain limitations. Incidentally, in matters of licensing, the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) uses its statutorily granted margin for appreciation when it makes its requirements dependent on the risk and complexity of the business activities in all those cases for which the legislature has merely provided for a general framework.²⁹¹

1415. Furthermore, BaFin will likely also have the discretion to take up a case with regard to the question of whether e.g. in borderline cases, in which the activity of FinTechs cannot clearly be classified under the supervisory rules, it chooses to forego an intervention on grounds of a lack of licence.²⁹² One situation where this choice suggests itself might be when the company in question is new on the market and, if it should be forced off the market by more successful competitors, the only parties who would have to fear losses are individual investors or consumers. In this case a jeopardising of financial market stability is improbable. Regarding the other goals of protection under supervisory law, it is clear that these would in such a case have to recede before the protection of competition as an institution.

1416. Conflicts of regulatory objectives between competition and consumer protection, on the contrary, are not very probable to begin with as far as the setting or enforcement of informational duties to the consumer is concerned. The enforcement of legally required consumer information on the risks of new offers will as a rule be not only possible and reasonable, but it also serves to create fair competition on the merits (reduction of information asymmetries).²⁹³

1417. Regarding other aspects like data protection and technical data security, the regulation affects all market participants equally. Thus two things must be taken into account: first, the principle of proportionality, and second, the fact that enforcement of data protection and data security standards promotes competition on the merits by countering activities through which market players achieve competitive advantages by illegally accessing third-party data.

²⁸⁸ On these goals of protection see e.g. Fischer in: Boos/Fischer/Schulte-Mattler, Kreditwesengesetz, 4th edition, Munich 2012, KWG Introduction, marginal notes 122 et seq.; Scherer in: DepotG, Munich 2012, above Sec. 1 marginal note 2; Assmann in: Assmann/Schneider, WpHG, 6th edition 2012, Introduction, marginal notes 11, 15; Schwark in Schwark/Zimmer, Kapitalmarktrechtskommentar, 4th edition, Munich 2010, Einl BörsG marginal note 18; Beck, *ibid.*, Sec. 1 BörsG marginal note 1; Heidelberg, *ibid.*, Einl WpPG marginal notes 1, 23; Heidelberg, *ibid.*, above Sec. 8f VerkProspG marginal note 1; Hennrichs, *ibid.*, Sec. 8f VerkProspG marginal notes 4 et seq.; Noack/Zetzsche, *ibid.*, Einl WpÜG, marginal note 9; on the Capital Investment Code (KAGB): Government Draft, BT-Drs. 17/12294, p. 187 et seq.; on the VermAnlG: Government Draft, BT-Drs. 17/6051 of 6 June 2011, p. 1; further Sec. 4(1a) Financial Services Supervision Act (FinDAG).

²⁸⁹ See on the codification in primary law Art. 51 TEU in conjunction with the provisions cited in note 286.

²⁹⁰ Cf. Monopolies Commission, Biennial Report XX, *supra* (note 131), paras. 1386 (primacy of competition).

²⁹¹ On this President Hufeld in: BaFin, Annual Report 2015, p. 40 et seq.

²⁹² Cf. Sec. 4, first sentence of the Banking Act (KWG) (“In cases of doubt, BaFin will decide whether an undertaking is subject to the provisions of this Act.”); further Sec. 37(1) KWG (“If banking business is carried out or financial services are provided without the authorisation required under section 32, [...] BaFin can order the undertaking [...] to cease business operations immediately”; emphasis added).

²⁹³ See e.g. Secs. 1 et seq. UWG; Federal Supreme Court, Decision of 31 March 2016, I ZR 160/14, para. 56 with references.

1418. A competition-neutral regulation, however, must not only be pursued by each competent authority when applying the provisions it is called upon to enforce, but it also requires authorities to coordinate their activities. Regarding the market development for digital services, close cooperation seems particularly essential between the following authorities and other offices:

- ECB, BaFin, Bundesbank (protection of finance-supervisory goals);²⁹⁴
- Competition authorities (protection from distortions of competition);
- Federal and state data protection supervisors and the Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik – BSI; for ensuring data protection and technical data security);
- Consumer organisations in the execution of tasks mandated by the state (consumer protection).

Section 50c of the ARC already provides for a cooperation between the German competition authorities, the Bundesbank and BaFin. The provision, in the estimation of the Monopolies Commission, is in its scope of application already a sufficient statutory basis for the purposes of information exchange between authorities.²⁹⁵ In other areas a cooperation between authorities initially developed informally (e.g. between BaFin/Bundesbank and BSI), and it is at the moment not clear to what extent a legal regulation is needed here.²⁹⁶ In some cases, according to those involved, the cooperation still leaves room for improvement. The Monopolies Commission suggests that the Federal government request a report from the competent authorities summarising their collaboration and possible deficits, in order to recognise where cooperation should be improved with respect to the appropriate regulation of new financial services.

1419. A certain problem area is represented in the digital world by areas of supervision for which regional authorities are competent. This supervision (supervision over financial investment brokers and similar, savings bank supervision)²⁹⁷ generally runs idle where digital services are concerned. The Monopolies Commission suggests reviewing the supervision provided for in the Trade, Commerce, and Industry Regulation Act (*Gewerbeordnung*) over the financial services industry with regional competence and where needed to transfer it uniformly to federal authorities with respect to digitally performed services.²⁹⁸ The savings bank supervision is an area of municipal supervision, so that in this respect a transfer of competence may not be an option on grounds of constitutional-law distribution of competences.

3.5.2 Avoidance of regulatory stifling of innovation

1420. The regulatory protection of the innovative potential of the market raises the following two issues with respect to digitally performed financial services. First, the question arises of how to use regulation to deal with market changes caused by digitalisation. Second, it must be contemplated whether regulation itself can and should make a supportive contribution to the development of the market (so-called enabling regulation).²⁹⁹

1421. With regard to the first question, the Monopolies Commission has already pointed out in its Special Report 68 that in the markets affected by digitalisation the legislature as well as the respective competent authority should where

²⁹⁴ ECB: if it performs bank supervision tasks with respect to German banks; see Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ EU L 287 of 29 October 2013, p. 63; on this also Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1679 et seq.

²⁹⁵ See on Sec. 50c of the ARC already Monopolies Commission, Biennial Report XX, supra (note 131), paras. 2103, 2108.

²⁹⁶ On data security see, quite informative from the banking supervision perspective: President of BaFin, Hufeld, F., in: Dombret, A. (ed.), *Bankenaufsicht im Dialog 2015*, Frankfurt a. M. 2015, p. 78 et seq.; further, the reproduction of the podium discussion id., p. 85 et seq.

²⁹⁷ On supervision of investment brokers etc. see Secs. 34d et seq. GewO; on supervision of the savings institutions see the *Spar-kassen Acts of the Bundesländer*.

²⁹⁸ Such an examination, as far as can be seen, last took place on the occasion of the enactment of the Capital Investment Act; see Federal Government, Draft law, BT-Drs. 17/6051 of 6 June 2011, p. 64.

²⁹⁹ On this e.g. Malady, L./Buckley, R. P./Tsang, C.-Y., *Regulatory Handbook: The Enabling Regulation of Digital Financial Services*, UNSW Law Research Paper No. 2016-05, especially p. 17 et seq..

possible continually examine whether the regulation needs to be adapted to altered market conditions.³⁰⁰ In the present context, this concerns less the question of whether a regulation is even necessary to safeguard financial market stability and other protected interests, but rather the question of how to appropriately design this regulation.

1422. Therefore, with regard to the requirements of prudential and financial market regulation, it must be taken into consideration that the cost and effort of applying for authorisation is seen by the market participants as very high, as is the follow-up investment by regulated institutions in terms of notifications, continual compliance, infrastructure and personnel. FinTechs complain that the investment required of companies as a consequence of regulation disadvantages them in comparison to existing financial services providers, because they cannot offer certain services. In view of this fact it is debated whether to defer at least temporarily the registration or notification requirements for small, new market entrants offering digital financial services (so-called regulatory sandbox).³⁰¹ The question must be decided by the legislature in view of the existing rules. The Monopolies Commission recommends examining whether a temporary suspension of registration or notification requirements can be introduced for new services requiring authorisation, as long as these services are provided on a scale that lies below thresholds to be set by law, and if systemic risks can be ruled out (e.g. because they are primarily technically optimised standard services). To protect investors and consumers, it could be sufficient in cases like these to impose special disclosure requirements on the new market entrants and possibly to require securities.³⁰² Demands of farther-reaching easing of requirements (e.g. lower equity requirements for banking transactions), on the other hand, are viewed sceptically by the Monopolies Commission, because the approach pursued up to now, “equal risk – equal regulation” in this respect contributes to uniform competition conditions.

1423. Particularities exist with platform-based provision of financial services. This is the case because platform operators themselves do not perform an intermediation service typical of banks or insurance companies, but merely provide market participants with the possibility for a direct exchange. Therefore e.g. capital requirements may be necessary with respect to such service providers to the extent that they receive customer money to pass on, but not in regard of a loan relationship with their investors.

1424. To protect investors and consumers from loss by default on the part of the capital seekers in crowd finance organised as a platform, the German legislature introduced a variant of legal investment limits in the form of the Retail Investors Protection Act (Sec. 2a of the *Vermögensanlagengesetz* – VermAnlG). According to this provision, the regulatory treatment of crowd financing platforms depends on whether the total amount of the financial assets of the same issuer that can be obtained by an investor not organised as a capital company exceeds certain limits.³⁰³ The background of the new provision, according to the Explanatory Memorandum of the Act, was financial losses that investors had sustained due to the fallacious belief that high yields could be achieved without risk.³⁰⁴ The Monopolies Commission opines that the new legal rule for new offerors constitutes a barrier to market entry whose necessity may be challenged from a competition perspective. Indeed the Retail Investors Protection Act simultaneously expanded the set of instruments for an intervention on the part of the authorities.³⁰⁵ It is possible that the losses incurred by the investors in question could have been prevented if the investors had had better information or greater risk awareness, for which purpose regulations in part already existed before the Retail Investors Protection Act was enacted, and in part were newly introduced

³⁰⁰ See already Monopolies Commission, Special Report 68, supra (note 131), paras. 545, 549.

³⁰¹ See President Hufeld in: BaFin, Annual Report 2015, 41; Schlenck, *Wie Fintech-freundlich muss die Finanzaufsicht sein?*, gruenerszene.net of 15 January 2016.

³⁰² On crowd finance see e.g. SEC, Press release No. 2015-249 of 30 October 2015 (including Fact Sheets); UK FCA, *A review of the regulatory regime for crowdfunding and the promotion of non-readily realisable securities by other media*, February 2015; on considerations of the US OCC see also Curry, *Speech at the Federal Home Loan Bank of Chicago*, 7 August 2015: <http://www.occ.gov/news-issuances/speeches/2015/pub-speech-2015-111.pdf>.

³⁰³ The thresholds are (1) EUR 1,000, (2) EUR 10,000 in the case of freely disposable assets of at least EUR 100,000 or (3) twice the amount of average monthly net earnings, but no higher than EUR 10,000.

³⁰⁴ German Federal Government, *Draft Act on the Protection of Retail Investors*, BT-Drs 18/3994, p. 1 et seq., Section A.

³⁰⁵ On this Sec. 4(1a) FinDAG, Sec. 4b WpHG, introduced by the Retail Investor Protection Act, *Federal Law Gazette 2015 Part 1 No. 28 of 9 July 2015*, p. 1114.

by it. It is likely of central significance with respect to crowd finance to ensure that the necessary information is actually imparted to consumers.³⁰⁶

1425. With respect to the above-mentioned second question on a regulation to support market development, such rules in particular are to be considered that encourage the development of marketable standards and compatible solutions, in view of the continued increase of standardisation and modularisation in financial transactions. A positive example of this is the current Payment Services Directive, according to which banks must give third parties access to APIs that facilitate the display of income and account information and the initiation of payment.³⁰⁷ On the basis of the Directive on Markets in Financial Instruments (MiFID 2) customers are also intended to have better capabilities to find out whether they can obtain individual products contained in a package of financial services separately.³⁰⁸

3.5.3 Avoiding a regulatory fragmentation of markets

1426. The development of new digital financial services is likely to have EU single-market relevance in many cases, as such services can be offered across Europe and in many cases can be adapted to locally varying markets or to the preference of customers in these markets.

1427. The fact that financial services can fundamentally be provided across borders through digital channels is only partially taken into account by the existing regulation with respect to novel services. While the general financial market regulation in the entire EU is by now largely harmonised, a special regulation of FinTechs only exists so far on a national level and here only rudimentarily.³⁰⁹ Especially for crowd finance, new regulations have already been introduced nationally (e.g. in Germany, France and the United Kingdom).³¹⁰ The national legislations show considerable variety, which is intended to take account of the local market conditions and the particularities of the respective legal regime.³¹¹ Varied rules also continue to exist in areas relevant to financial service providers outside the actual regulation of financial markets (e.g. in data protection provisions and to some extent also provisions combating money laundering).

1428. The national provisions deal specially with cross-border financial services only in very few cases – at least on the level of private customers. This is at any rate true if one ignores the protection provisions for cases in which consumers make use of financial services of suppliers without a seat of business in the respective Member State. As regards digitally performed and new services, however, the lack of rules on cross-border services can contribute to a cross-border

³⁰⁶ On this SpaceTec, supra (note 255), p. 66 et seq.; see also vzbv, Comments of January 2015 on the Draft Act on the Protection of Retail Investors, Sections 2 and 3 emphasising the necessity of a better provision of information for consumers.

³⁰⁷ Art. 66 et seq. and Recital 28 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC, OJ EU L 337, 23 December 2015, p. 35; on this Sonder, F., in: Chishti, S./Barberis, J., supra (note 133), p. 258 (260).

³⁰⁸ See European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 11 on Directive 2014/65/EU on Markets in Financial Instruments [...] (MiFID 2), OJ EU L 173 of 12 June 2014, p. 349.

³⁰⁹ This of course does not mean that the services concerned are unregulated; the applicable regulations are – depending on the concrete business model – e.g. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ EU L 119 of 4 May 2016, p. 1, and Directives 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [...], OJ EU L 149 of 11 June 2005, p. 22; 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ EU L 95 of 21 April 1993, p. 29; 2014/65/EU on Markets in Financial Instruments [...] (MiFID 2), OJ EU L 173 of 12 June 2014, p. 349; 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading [...], OJ EU L 345 of 31 December 2003, p. 64; and the national implementation provisions.

³¹⁰ See in detail European Commission, Staff Working Document, Crowdfunding in the EU Capital Markets Union, 3 May 2016, SWD(2016) 154 final.

³¹¹ European Commission, Staff Working Document, Crowdfunding in the EU Capital Markets Union, 3 May 2016, SWD(2016) 154 final, p. 17 et seq. and Annex 2. On Germany see also the above-mentioned Sec. 2a VermAnlG; on France/UK also Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (239); further UK FCA, A review of the regulatory regime for crowdfunding and the promotion of non-readily realisable securities by other media, February 2015.

offer being obstructed from the beginning, and that consumers either never get to know offers from other Member States at all or they do not develop sufficient trust to make use of such offers. Consumers in fact only use financial services from other Member States to a very small extent (that is, in less than five per cent of cases for banking services like credit cards, current accounts and mortgages or for insurance services).³¹²

1429. The regulation approaches employed so far in the Member States are thus capable of impeding the creation of a uniform single market for new financial services. Against this background the Monopolies Commission would welcome it if the Member States, as a rule, adopted a soft approach to regulating FinTechs, if they reappraised current rules and coordinated their efforts with each other with respect to amendments and new rules to a greater extent than has been usual up to now. This is also to be taken into consideration when the national legislature implements the Payment Services Directive, which for the first time involves technical service providers like FinTechs to a limited extent in the supervisory regulation. As an alternative one could consider transferring the new regulation of FinTech services to a greater degree to the EU level from the start.³¹³

1430. Appreciable impediments to the development of a harmonised single market for innovative financial services can in certain cases be found in the different national approaches of the authorities, and this even beyond the enforcement of varying national provisions. Thus some complain that British investors expect farther-reaching advance information on licence applications from the authorities than they would receive for instance in Germany.³¹⁴ The Monopolies Commission has already made out a growing sensitivity on the part of the German supervisory authorities for the development of new services. The development of a coordinated regulatory framework indeed appears urgent at present.

1431. A question that is particularly relevant from an industrial policy perspective, though less from a competition-policy perspective, is, finally, to what extent the regulatory environment should be designed so as to be an attractive choice of location for new services. From a competition-policy viewpoint it can however be problematic when market participants move to other jurisdictions in order to achieve a competitive advantage on the home market due to the lower regulatory standards there (regulatory arbitrage).³¹⁵ This kind of evasion is relatively easy, particularly as regards the provision of financial services, by choosing the business seat of the service provider in the “most convenient” available jurisdiction.³¹⁶ If such practices should be observed among innovative financial services, this would be a further argument in favour of regulating the services in question on the EU level.

3.6 Competition-policy conclusions and recommendations

1432. Digitalisation, based on the above observations, is leading to fundamental changes, at least in certain segments of the financial services sector: Standardisation and modularisation are on the rise, and at the same time customer services are becoming more specific to the customer, especially in the private customer segment (key word: “mass individualisation”). The legislature and the competent authorities should keep a close watch on these developments, without succumbing to the temptation to impede them in order to protect market participants with outdated business models.

1433. The Monopolies Commission recommends that legislatures and supervisory agencies be guided by the following principles where rules are concerned that are relevant for the provision of services in the front- or back-office area of the financial sector:

³¹² European Commission, Green Paper of 10 December 2015 on Retail Financial Services in the Single Market, COM(2015) 630 final, p. 7.

³¹³ On this Terlau, M., FinTech – die Zukunft des Zahlungsverkehrs im Lichte der zweiten Zahlungsdienste-RL, DB 9/2016, M5; restrained European Commission, Staff Working Document, Crowdfunding in the EU Capital Markets Union, 3 May 2016, SWD(2016) 154 final, p. 31; EBA, Opinion on lending-based crowdfunding, 26 February 2016, EBA/Op/2015/03, paras. 8 et seq. (each specifically on crowd finance).

³¹⁴ Schreiber, M., Anschlag für die Revolution, Süddeutsche.de of 22 November 2015.

³¹⁵ Practices of this nature besides this are also problematic from a supervisory-law perspective; cf. e.g. EBA, Opinion on lending-based crowdfunding, 26 February 2016, EBA/Op/2015/03, para. 8.

³¹⁶ Margaris, S., in: Chishti, S./Barberis, J., supra (note 133), p. 238 (239).

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- A balanced policy should continue to be pursued, whereby it should be noted that competition interests can – and in some cases must – be attributed a higher weight in individual cases, especially when balancing them against legal interests of financial market supervision, in order to guarantee a dynamic development of the market.³¹⁷
 - Excessive regulatory demands on companies of the digital economy that are newly entering the market should be avoided under considerations of proportionality. It can be a sensible legislative strategy in competition-policy terms to temporarily suspend or reduce registration or information requirements to prevent the risk of precluding market entries by the investments these requirements entail. A different strategy could be to test in the context of measures to protect investors whether transparency-promoting rules could suffice as opposed to a farther-reaching supervisory-law intervention in the market.
 - With respect to an innovation-friendly regulation the focus should be placed on promoting the development of standards and mutually compatible solutions. Besides this, regulatory measures should always be tested for their potential effects on the development of cross-border offers of digital financial services. The Monopolies Commission would welcome the adoption by the Member States of a generally restrained approach in their regulation of FinTechs, their revision of existing regulations and their increased joint coordination in future with respect to amendments and new regulations.
 - Concerning national regulatory initiatives with regard to digitally performed financial services the risk must be kept track of that market participants might move to different jurisdictions in order to achieve a competitive advantage by the lower standard of regulation there (regulatory arbitrage). For this reason regulatory measures should always be tested for their equal enforceability vis-à-vis all market participants.
 - The supervisory authorities should continue to pursue and continuously develop their current approach of making regulatory interventions in the market processes regarding the digital provision of financial services dependent on the concrete business model. A close exchange between the competent authorities should contribute to their capability to adapt their respective expertise to any new market developments that may arise.

³¹⁷ Cf. in general Monopolies Commission, Biennial Report XX, supra (note 131), paras. 1382 et seq. and section 6, 1. Recommendation.