

Germany

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1 Introduction

The development of the new economy sector raises new questions in all legal fields – antitrust law is no exception. Online sales are an omnipresent alternative for purchasing at brick and mortar shops. The advantages of these purchase methods for competition are obvious: Online sales make it possible for the end client to gather information on products and sellers without great effort. Above all, the possibility to compare prices strengthens the buyers' position. Online sales thus strengthen both inter- and intra-brand competition. These effects are even bigger on third-party platforms because the user is informed about alternative products and other sellers' offers. That of course motivates manufacturers and trade mark proprietors to restrict the possibility of online sales in order to decrease inter- and intra-brand competition and thus strengthen their products' position on the market. Antitrust law has to give an answer to the question in how far these interests can justify a restriction on online sales.

A high percentage of online sales are conducted with the involvement of very few third-party platforms (e.g. Amazon or eBay). Consequently, the platform operators can influence the competition on the online sales market to a great extent. Antitrust law provides the legal framework for examining their actions.

This article aims at giving an overview on the national written and case law concerning the application of antitrust law to online sales platforms.

Firstly, this article presents the legal bases of German and European antitrust law. That includes providing information about how the law is enforced in both administrative procedures and civil law suits. Secondly, possibilities of prohibiting or restricting online sales of goods by vertical agreements are examined. Emphasis is laid on the question whether bans on online sales via third-party platforms in selective distribution systems can be in line with antitrust law. Furthermore, latest case law concerning the possibility of most favoured nation conditions for online platforms will be discussed.

Less regard is given to merger control cases as these are not of high practical relevance in regard to online sales platforms.

2 German and European Antitrust Law

2.1 Governing Law

Two antitrust laws are applicable within the Federal Republic of Germany. The German national antitrust law is codified in the Act against Restraints of Competition (hereinafter: GWB).¹ Besides, Artt. 101 ff. of the Treaty of the Functioning of the European Union and Council Regulation (EC) 139/2004 of 20 January 2004 on the

¹ An official English translation can be found here: http://www.gesetze-im-internet.de/englisch_gwb/. Accessed 6 June 2017.

control of concentrations between undertakings (hereinafter: EC Merger Regulation) govern the European antitrust law. The application of the TFEU provisions is limited to cases that have an impact on the European Single Market.² If that is the case, the two legal regimes are generally of parallel application.³

Problems arise whenever the two antitrust regimes produce different legal results for the same case. As a general principle, European law prevails if it is stricter.⁴ If the national law is stricter, § 22 GWB and Art. 3 of the Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter: Implementation Regulation) solve the conflict. In regard to *restriction of competition*, the lawmaker pointed out in § 22 (2) GWB that national law may not prohibit behaviour that is allowed under European antitrust law. In cases dealing with an *abuse of dominant market power*, § 22 (3) GWB states that the application of stricter provisions of the GWB remains unaffected. If European law is applicable in *merger control cases*, the national law's application is prohibited according to § 22 (4) GWB.

2.1.1 Restriction of Competition

§ 1 GWB states that “agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited”. On the European level, Art. 101 (1) TFEU codifies the same. The criterion of restriction of competition is not legally defined. It is however generally acknowledged that the prohibition aims at protecting the economic freedom of action of all market players.⁵ Consequently, the question if and in how far this freedom is limited, is the starting point in order to examine if the criterion is fulfilled. Furthermore, the restriction has to be appreciable,⁶ meaning that it has to be suitable to have effects on the relevant market.⁷ Often, the question whether a behaviour meets these criteria has to be solved by referring to case law.⁸ There are also certain cases in which a restriction of competition is not given although the afore-mentioned criteria are fulfilled. These cases have been developed by antitrust case law,⁹ e.g. in regard to vertical restraints in selective distribution systems (see Section 3.3.1.1 below).

If the criteria are indeed met, the behaviour can, however, fall under an exception. § 2 GWB is applicable to solely national cases. In its first subparagraph, the provision allows agreements between undertakings, decisions by associations of undertakings or concerted practices on condition that they contribute to improving the

² H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 55.

³ H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 58.

⁴ H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 59.

⁵ CJEU, case 52/69, *Geigy AG v Commission*, ECR 1972, 787; W. Berg/M. Mudrony. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 1 GWB para. 46 and Art. 101 AEUV para. 72; K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 121; D. Hengst. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 2*, 12th ed, Luchterhand 2014, Art. 101 AEUV para. 147.

⁶ CJEU, case 22/71, *Béguelin Import/G.L. Import Export*, ECR 1971, 949; Federal Court of Justice, Decision of 14 October 1976, Case No. KZR 36/75 – *Fertigbeton I*, NJW 1977, pp. 804–805; W. Berg/M. Mudrony. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, Art. 101 AEUV para. 90 ff; K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 163.

⁷ Federal Court of Justice, Decision of 9 March 1999, Case No. KVR 20/97 – *Lottospielgemeinschaft*, GRUR 199, pp. 771–775; K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 167.

⁸ D. Hengst. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 2*, 12th ed, Luchterhand 2014, Art. 101 AEUV para. 148.

⁹ K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 123.

production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. An undertaking cannot rely on the exception if the afore-mentioned behaviour imposes concerned restrictions on undertakings which are not indispensable to attainment of these objectives or if it affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is obvious that this exception is drawn very narrowly so that it is usually hard for a defendant to prove that the requirements are met in the case at hand. On the European level, Art. 101 (3) TFEU is applicable.

§ 2 (2) GWB stipulates that exceptions to § 1 GWB can also derive from the so-called “block exemption regulations” of the European Council and the parliament of the European Union. These regulations specify the blanket clause of § 2 (1) GWB¹⁰ and thus bring legal certainty. The various regulations apply to different groups of agreements (e.g. vertical¹¹ and horizontal agreements) or to different industrial sectors (e.g. the insurance sector).¹² In European law, no conjunction to the block exemption regulation is needed as they are directly applicable.¹³

With the Seventh Amendment to the Act Against Restraints of Competition, the German lawmaker aligned § 1 GWB to Art. 101 (1) AEUV so that eventually the criteria became the same.¹⁴ The same can be said of the exceptions to the prohibition of § 1 GWB which are codified in § 2 GWB and are in line with Art. 101 (3) TFEU.¹⁵ This allows to make references to decisions of the European Commission, Guidelines of the European Commission and judgments dealing with a violation of Art. 101 (1) TFEU. To put it in a nutshell, there are no conflicts between national and European antitrust law with regard to the prohibition of restrictions of competition.

2.1.2 Abuse of dominant market power

§ 19 (1) GWB and Art. 102 (1) TFEU prohibit the abuse of dominant market power by one or several undertakings. As distinct from § 19 GWB, Art. 102 (1) TFEU can only be violated if the undertaking(s) has/have a dominant market power on the European Single Market or a substantial part of it. The two provisions are not congruent so that a legal gap between the systems exists. However, the European law – if applicable – regularly comes to the same result as the national law because the underlying value judgements correspond.¹⁶

An undertaking has a *dominant position* within the meaning of Art. 102 (1) TFEU on the market if it has “a

¹⁰ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 28.

¹¹ See Section 3.1 for more details.

¹² J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 32 ff.

¹³ Cf. J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 14.

¹⁴ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 1 GWB para. 10; H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 257 f.

¹⁵ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 7; H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 258.

¹⁶ J. Nothdurft. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 19 GWB para. 23; U. Loewenheim. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 para. 4. See as an example: Federal Court of Justice, Decision of 29 June 2010, Case No. KZR 31/08 – *GSM-Wandler*, MMR 2010, pp. 786–790; Federal Court of Justice, Decision of 4 March 2008, Case No. KVR 21/07 – *Soda-Club II*, WM 2008, pp. 893–900.

position of economic strength [...] which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.¹⁷ Several undertakings can have a dominant market position if they operate as a collective entity on the relevant market.¹⁸

§ 18 GWB defines the criterion of dominant market power for the application of national law. To strengthen legal certainty, the national law provides for rebuttable presumptions¹⁹ of a dominant market power in § 18 (4) – (6) GWB. For example, a single undertaking is presumed to have dominant market power if it has a market share of at least 40%; three or less undertakings are presumed to have dominant market power if their combined market share reaches 50%. According to § 18 (1) GWB, an undertaking has dominant market power as a supplier or purchaser of a certain type of goods or services on the relevant market when it either has no competitors or is not exposed to any substantial competition or has a paramount market position in relation to its competitors. § 18 (3) GWB then enumerates factors that have to be taken into account when assessing the market position of an undertaking.

Although these factors were developed for the traditional economic sectors, they are of relevance for the *new economy sector*, too. Besides, the list of factors is non-exclusive²⁰ so that the characteristics of the new economy sector can be taken into account adequately.²¹ However, with the development of the new economy sector hitherto unknown questions in regard to the assessment of an undertaking’s position in the market arise.

Within this sector, so-called *two-sided markets* are ubiquitous. Two-sided markets are networks in which one undertaking offers services in two directions.²² Within these markets, so-called *indirect network effects* arise if the attractiveness to use the service for the one demander (e.g. advertiser on google) depends on the size of the other demander (e.g. search engine user).²³ These effects arise in regard to online sales platforms like Amazon or eBay, too:²⁴ The more distributors make use of the platform, the more buyers will use the service and vice versa. The service provider regularly subsidises the group of customers which causes more indirect networks effects at the other group’s charge.²⁵ Consequently, the financial strength on one market is not a reliable factor for the assessment of the undertakings market position.²⁶ The national lawmaker has recognized that problem and is willing to introduce a new subparagraph (3a) to § 18 GWB that is in particular applicable to two- or more-sided markets.²⁷ According to that provision inter alia direct and indirect network effects (No. 1) have to be taken into account when accessing the undertakings position on the market. Besides, the lawmaker plans to introduce

¹⁷ CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977, 1875.

¹⁸ CJEU, case C-395/96, *Compagnie maritime belge transports et al. v European Commission*, ECR 2000 I-1365.

¹⁹ A. Bardong. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 18 GWB paras. 204, 207.

²⁰ A. Fuchs/W. Möschel. In: Immenga/Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 18 GWB para. 124.

²¹ T. Körber, *Analoges Kartellrecht für digitale Märkte?*, WuW 2015, pp. 120–133.

²² H. Bergmann/L. Fiedler In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 44; C. Ewald. In : Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 7 para. 71; T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168.

²³ C. Ewald. In : Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 7 para. 71.

²⁴ T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168.

²⁵ C. Ewald. In : Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 7 para. 72.

²⁶ C. Ewald. In : Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 7 para. 72.

²⁷ BT-Drs. 18/10207, p. 14.

further factors to face the challenges which result from the growth of the new economy sector, e.g. the parallel use of services and the effort the user has to make to switch to another system (No. 2) and the undertaking's access to data being relevant to competition (No. 4).

It is furthermore questionable if the presumptions of § 18 (4) – (6) GWB fit to the new economy sector as this sector is characterised by a high pressure for innovation. In the new economy sector, today's market shares may be vanished tomorrow and thus cannot be a reliable factor in order to assess an undertaking's market position.²⁸ In the course of the Ninth Amendment to the GWB, the lawmaker will implement “innovation-driven competitive pressure” as a relevant factor for the assessment of market power (§ 18 (3a) No. 5 GWB).²⁹ This will, however, leave the legal presumptions of market dominance untouched.

According to the case law of the Court of Justice of the European Union, an *abuse of dominant market power* is given if the undertaking's behaviour “influence(s) the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition [...] on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.³⁰ The adoption of that definition for the application of § 19 (1) GWB is largely acknowledged.³¹ The question whether or not a behaviour fulfils these requirements has to be answered on a case-by-case basis taking into account the opposing interests of the affected undertakings and the lawmaker's intention to guarantee free competition and free market access.³² That includes examining whether the behaviour results in efficiency advantages.³³ The burden of proof for these advantages rests with the dominant undertaking.³⁴ It is only met if the undertaking shows that the behaviour (a) is indispensable to reach the efficiency advantage, (b) that likely negative effects on competition and on consumer welfare are compensated by the efficiency advantage and (c) the conduct does not eliminate effective competition.³⁵ As courts tend to interpret national law in the light of European law,³⁶ the defence should be accepted in the context of § 19 (1) GWB as well.

In order to strengthen legal certainty, both legislators provided for non-exhaustive examples for the abuse of

²⁸ R. Podszun/U. Schwalbe, *Digitale Plattformen und GWB-Novelle, Überzeugende Regelungen für die Internetökonomie?*, NZKart 2017, pp. 98–106; T. Körber, *Analoges Kartellrecht für digitale Märkte?*, WuW 2015, pp. 120–133.

²⁹ BT-Drs. 18/10207, p. 14.

³⁰ CJEU, case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECR 1979, 461.

³¹ A. Fuchs. In: Immenga/Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 19 GWB para. 82a; U. Loewenheim. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 13; M. Wolf. In: Bornkamm/Montag/Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 29.

³² J. Busche. In: Busche/Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB paras. 15 f.; M. Wolf. In: Bornkamm/Montag/Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 34.

³³ CJEU, case C-95/04 P, *British Airways v European Commission*, ECR 2007 I-2331; EGC, case T-288/97, *Irish Sugar v Commission of the European Communities*, ECR 1999 II-2969.

³⁴ F. Bulst. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 2*, 12th ed, Luchterhand 2014, Art. 102 AEUV para. 143.

³⁵ European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02, para. 30.

³⁶ Federal Court of Justice, *Decision of 4 November 2003, Case No. KZR 2/02 – Depotkosmetik im Internet*, GRUR 2004, pp. 351–352.

dominant market power in § 19 (2) GWB and Art. 102 (2) TFEU.³⁷ For example, § 19 (2) No. 1 GWB states that an abuse exists if a dominant undertaking directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification. These criteria can be met if a dominant player refuses to deal or to supply.

§ 20 (1) GWB widens the scope of application of § 19 (2) No. 1 GWB in regard to undertakings with relative market power. The provision applies to undertakings “if small or medium-sized enterprises as suppliers or purchasers [...] depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist”. The examination of whether an undertaking is small or medium-sized is generally governed by a horizontal comparison (size compared to other competitors).³⁸ The provision e.g. covers cases in which the small or medium-sized enterprise is dependant from a manufacturer of brand products because customers have the reasonable expectation that these products are part of a complete range of products.³⁹ European antitrust law does not provide for a similar provision so that there is a distinct gap between the legal systems.⁴⁰ According to § 22 (3) GWB, stricter national law is even applicable in cases in which the behaviour is not covered by Art. 102 (1) TFEU.

The afore-mentioned provisions are also applicable in the *new economy sector*. However, the specialities of that sector, in particular the specialities of *two-sided markets*, have to be taken into account adequately.⁴¹ Whereas one can for example assume that a dominant undertaking misuses its position in traditional market sectors if it permanently offers its products or service for free, this is not the case in the new economy sector.⁴² In this sector the offer can in fact lead back to the economic decision to increase the financial burden for the one side in favour of the other side of the market that causes more indirect network effects. Consequently, the question whether market power on the one market is indeed abused cannot be answered without considering the other market.⁴³ The lawmaker did not take the chance to implement new legal provisions in the course of the Ninth Amendment to the GWB and thus left it to the legal practice to solve problems arising from the new economy sector.

2.1.3 Mergers

The §§ 35 ff. GWB govern the national merger control. According to § 35 (1) GWB, the merger control provisions are applicable if the merging undertakings had a combined worldwide turnover of more than EUR 500,000,000 in the last business year or if the domestic turnover of one concerned undertaking was more than EUR 25,000,000 and that of another concerned undertaking was more than EUR 5,000,000. As a general rule, § 36 (1) GWB states that a merger has to be prohibited if it would significantly impede effective competition, in

³⁷ The provisions relevant to online sales platforms will be discussed later on; see Sections 3 and 4.

³⁸ Federal Court of Justice, Decision of 24 September 2002, Case No. KVR 8/01 – *Konditionen Anpassung*, NJW 2003, pp. 205–208; J. Nothdurft. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 20 GWB para. 74.

³⁹ Federal Court of Justice, Decision of 9 May 2000, Case No. KZR 28/98 – *Designer Polstermöbel*, GRUR 2000, pp. 1108–1111; M. Lorenz. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 20 GWB para. 13.

⁴⁰ J.-M. Schultze/S. Pautke/S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen – Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 94.

⁴¹ T. Körber, *Konzeptionelle Erfassung digitaler Plattformen und adäquate Regulierungsstrategien*, ZUM 2017, pp. 93–101.

⁴² T. Körber, *Konzeptionelle Erfassung digitaler Plattformen und adäquate Regulierungsstrategien*, ZUM 2017, pp. 93–101.

⁴³ T. Körber, *Analoges Kartellrecht für digitale Märkte?*, WuW 2015, pp. 120–133.

particular if a dominant position would be created or strengthened. The legal definition of § 18 (1) GWB (see Section 2.1.2 above) can be used in order to examine whether the merger creates or strengthens a dominant position.⁴⁴ The legal presumptions of § 18 (4), (6) GWB are only applicable in cases of an alleged creation of a dominant position.⁴⁵ There are however exceptions to the prohibition according to § 36 (1) s. 2 GWB (improvements that outweigh the impediment; markets with an annual turnover of less than EUR 15,000,000; special terms for newspaper and magazine publishers).

On the European level the EC Merger Regulation is the most important source of law. The application of the national law is not possible if the merger falls under the EC Merger Regulation; § 35 (3) GWB. According to Art. 1 (1), (2) EC Merger Regulation that is the case if the combined aggregate worldwide turnover of all concerned undertakings is more than EUR 5,000,000,000 and the aggregate Community-wide turnover of one of them is more than EUR 250,000,000 unless each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover within one and the same Member State. Art. 1 (3) EC Merger Regulation extends the scope of application. In these cases, the European Commission is exclusively competent to conduct merger control.

Art. 2 (3) EC Merger Regulation states that a concentration that would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. The definition of a dominant market position is the same as in Art. 102 (1) TFEU (see Section 2.1.2 above).

The rise of *new economy sector* raises the question whether the turnover-parameter can still be the relevant factor to make a concentration subject to national or European merger control. In the new economy sector, services are often offered free of charge for the user so that the undertaking's turnover remains low. However, undertakings often have high market shares and the transactions volumes are remarkable. A prime example for that problem is Facebook's takeover of WhatsApp (600,000,000 users) having a transaction volume of USD 19,000,000,000.⁴⁶ The German lawmaker recognized that problem and will react to it by implementing a new subparagraph (1a) to § 35 GWB.⁴⁷ According to that provision, merger control shall be conducted in cases in which (a) the concerned undertakings had a combined worldwide turnover of more than EUR 500,000,000 in the last business year, (b) one of the concerned undertakings had a turnover of more than EUR 25,000,000 but no other undertaking concerned had a turnover of more than EUR 5,000,000 in the last business year, (c) the consideration is worth more than EUR 400,000,000 and (d) the acquired undertaking does considerable business on the national market.

2.2 Definition of the relevant Market

The assessment of the relevant market is crucial when examining whether a behaviour restricts competition on the market or whether an involved undertaking has dominant market power. A broad definition of the market

⁴⁴ H. Kahlenberg. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 36 GWB paras. 13 ff.; M. v. Merveldt. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 36 GWB para. 25.

⁴⁵ M. v. Merveldt. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 36 GWB para. 30.

⁴⁶ T. Körber, *Analoges Kartellrecht für digitale Märkte?*, WuW 2015, pp. 120–133.

⁴⁷ BT-Drs. 18/10207, p. 22 f.

will make antitrust violations less likely and vice versa.⁴⁸ One has to consider that the timely basis of analysis in merger control cases is different from the other cases of antitrust violation as the core question with merger control is whether there *will be* a dominant position after the undertakings concentration.⁴⁹

In both the national and the European system, the relevant market is defined by the overlap of the product market and the geographic market. Furthermore, a temporal parameter may also be relevant in some cases, e.g. where there is a temporary scarcity of the good.⁵⁰

The examination of the relevant *product market* is demand-side oriented. Products are offered on the same market if the demander sees one product as an alternative to the other (substitutability).⁵¹ Parameters like the good's or service's quality, their prices and purpose are included in the examination.⁵² Courts conduct the so-called SSNIP-test (small but significant non-transitory increase in price):⁵³ Two products belong to one market if customers would change to the other product in case of a small but significant increase (5 – 10%) of the price. The SSNIP-test is however not suited for defining the product market in each and every case as customers are not always price-conscious.⁵⁴

The question whether online offers can be an alternative to offline offers and vice versa can only be answered on a (demand-side oriented) case-by-case basis. For example, online offers cannot be seen as an alternative if personal advice or physical examination of the product is necessary in order to reach a purchase decision.⁵⁵

The *new economy sector* partially calls these principles into question. The SSNIP-test often fails as services are offered free of charge.⁵⁶ The vast majority of legal scholars are however of the opinion that a market can exist even in that case.⁵⁷ One has to agree with this since the user at least “pays” for the service by transmitting his personal data to the service provider.⁵⁸ Nonetheless, some courts took the opposite position.⁵⁹ The national

⁴⁸ Cf. H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 173.

⁴⁹ A. Bardong. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 18 GWB para. 54.

⁵⁰ CJEU, case 77/77, *Benzine en Petroleum Handelsmaatschappij BV BV et. al. v Commission of the European Communities*, ECR 1978, 1513; Federal Court of Justice, Decision of 26 May 1987, Case No. KVR 4/86 – *Gekoppelter Kartenverkauf, UEFA-Cup*, NJW 1987, pp. 3007–3009; Cf. H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 176.

⁵¹ CJEU, case 31/80, *NV L'Oréal and SA L'Oréal v PVBA “De Nieuwe AMCK”*, ECR 1980, 3775; Federal Court of Justice, Decision of 24 October 1997, Case No. KVR 17/94 – *Backofenmarkt*, GRUR Int 1997, pp. 637–640; J. Busche. In: Busche/Röhling (eds), *Kölnener Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 19.

⁵² H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 173 f.

⁵³ CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977, 1875.

⁵⁴ H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 174.

⁵⁵ K. Beckmann/U. Müller. In: Hoeren/Sieber/Holznapel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 45.

⁵⁶ H.-J. Bunte/F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 174; T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168.

⁵⁷ Regional Court Berlin, Decision of 19 February 2016, Case No. 92 O 5/14 Kart – *Google Presseauschnitt*, ZUM 2016, pp. 879–884; H. Bergmann/L. Fiedler. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 47; T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168; B. Paal, *Internet-Suchmaschinen im Kartellrecht*, GRUR Int 2015, pp. 997–1005; R. Podszun/B. Franz, *Was ist ein Markt? – Unentgeltliche Leistungsbeziehungen im Kartellrecht*, NZKart 2015, pp. 121–127.

⁵⁸ T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168; B. Paal, *Internet-Suchmaschinen im Kartellrecht*, GRUR Int 2015, pp. 997–1005.

legislator has recognized that problem and will clarify the legal situation by implementing a new subparagraph (2a) in § 18 GWB in line with the majority opinion.⁶⁰

The definition of the relevant market causes particular difficulties in regard to *two-sided markets* (see Section 2.1.2 above). Although the vast majority of legal scholars are of the opinion that each side is to be treated as one market,⁶¹ practitioners were faced with legal uncertainty up to now. With the planned implementation of § 18 (2a) GWB however, the lawmaker makes clear that he prefers the majority opinion because both sides of the market are never free of charge.⁶² In order to define the relevant market in two-sided markets, the assessment must however include the other side of the market as indirect network effects have to be taken into account.⁶³ The specialties of the new economy sector have to be taken into account when examining if the behaviour constitutes an antitrust violation (see Section 2.1.2 and 2.1.3 above).

The definition of the *geographic market* is demand-side oriented as well.⁶⁴ The geographically relevant market can be described as the area in which the conditions of competition in regard to the product market are sufficiently homogeneous.⁶⁵ It must be possible to distinguish the market from neighbouring areas.⁶⁶ For the national law, § 18 (2) GWB states that the relevant geographic market may be broader than the scope of the GWB. If the purchaser of the good or service is not willing to overcome physical distances to purchase the alternative good or enjoy the alternative service, they are not offered on the same geographic market.⁶⁷ It is thus possible that more than one geographic market exists within the territory of the European Union⁶⁸ or within the Federal Republic of Germany.⁶⁹

Although offers on the internet are accessible around the world, this does not lead to the conclusion that the

⁵⁹ Higher Regional Court Düsseldorf, Decision of 9 January 2015, Case No. VI-Kart 1/14 (V) – *HRS-Bestpreisklauseln*, NZKart 2015, pp. 147–152.

⁶⁰ BT-Drs. 18/10207, p. 14.

⁶¹ T. Höppner/J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168; T. Körber, *Analoges Kartellrecht für digitale Märkte?*, WuW 2015, pp. 120–133.

⁶² C. Kersting/S. Dworschak, *Win-Win-Situation of mehrseitigen Märkten: Google muss nicht zahlen*, ZUM 2016, pp. 840–846.

⁶³ H. Bergmann/L. Fiedler. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 48; R. Dewenter/J. Rösch/A. Terschüren, *Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen*, NZKart 2014, pp. 387–394.

⁶⁴ H. Bergmann/L. Fiedler. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 106.

⁶⁵ CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977, 1875; J. Busche. In: Busche/Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 33.

⁶⁶ CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977, 1875; J. Busche. In: Busche/Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 33.

⁶⁷ Federal Court of Justice, Decision of 6 December 2011, Case No. KVR 95/10 – *Total/OMV*, WM 2012, pp. 2111–2119; J. Busche. In: Busche/Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 36.

⁶⁸ J. Busche. In: Busche/Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 32.

⁶⁹ E.g. Federal Court of Justice, Decision of 6 December 2011, Case No. KVR 95/10 – *Total/OMV*, WM 2012, pp. 2111–2119.

whole world is the geographically relevant market.⁷⁰ As in every other market, factors like the webpage's language, legal and cultural barriers as well as the transportability of goods have to be considered.⁷¹

2.3 Enforcement of the Law

There are several possibilities for the enforcement of German and European antitrust law:

2.3.1 Administrative Procedure

First of all, there is the possibility of an *administrative procedure* that is regularly conducted by the German Federal Cartel Office in Bonn. Besides, every federal state maintains an own cartel office. These authorities are only responsible for handling cartel cases if effects of an agreement between companies are limited to the territory of the federal state (§ 48 (2) GWB). According to § 54 (1) GWB, the competition authority institutes proceedings ex officio or upon application by outsiders. The administrative procedure and the authorities' far-reaching enforcement powers are laid down in §§ 54 – 62 GWB. The competition authorities are inter alia allowed to issue prohibition orders (§ 32 GWB) and to impose fines on companies and responsible natural persons for violating antitrust law (§ 81 GWB). As a legal remedy against the authorities' decisions, an appeal is possible according to § 63 (1) GWB for which the Higher Regional Courts are competent (§ 63 (4) GWB). §§ 63 ff. GWB set out special rules for the court procedure. Although the courts conduct an administrative procedure, § 73 GWB declares several important provisions of the German Courts Constitution Act and the German Code of Civil Procedure (hereinafter: ZPO)⁷² applicable in these cases. Decisions of Higher Regional Courts are generally subject to judicial review by the Federal Court of Justice; § 74 (1) GWB.

According to § 50 (1) GWB and Art. 5 of the Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter: Implementation Regulation), the German authorities are generally also competent to enforce Artt. 101, 102 TFEU. Art. 5 Implementation Regulation enumerates the sanctions that can be chosen by the competent authority in order to enforce Artt. 101, 102 TFEU (prohibition orders, interim measures, imposing fines). The national authorities' competence however leaves the European Commission's authority to enforce European antitrust law unaffected (Artt. 4, 5 Implementation Regulation). The Commission may inter alia issue prohibition orders (Art. 7 Implementation Regulation) and may impose fines on undertakings (Art. 23 Implementation Regulation).

The administrative procedure regularly ends with the termination of the proceedings or an administrative deed purporting one of the afore-mentioned sanctions. However, proceedings can be settled during the administrative procedure in cases before the German cartel offices as well as before the European Commission.⁷³

The Federal Cartel Office has published a fact sheet on this possibility for proceedings involving the imposition

⁷⁰ K. Beckmann/U. Müller. In: Hoeren/Sieber/Holznapel, Handbuch Multimedia-Recht, 38. EL, C.H. Beck 2014, part 10 para. 59.

⁷¹ K. Beckmann/U. Müller. In: Hoeren/Sieber/Holznapel, Handbuch Multimedia-Recht, 38. EL, C.H. Beck 2014, part 10 para. 59.

⁷² An official English translation can be found here: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. Accessed 6 June 2017.

⁷³ H.-J. Bunte/F. Stancke, Kartellrecht, 3rd ed, C.H. Beck 2016, pp. 244, 427.

of fines.⁷⁴ According to these guidelines, a settlement can be entered into if the affected party formally accepts the alleged facts of the case and the suggested fine. The settlement agreement may not include a waiver in regard to legal remedies against the fine.⁷⁵ After a settlement agreement has been made, the administrative procedure is still closed by the imposition of a fine.⁷⁶ The cartel office grants the affected party a reduction in the amount of up to 10%.⁷⁷ The German authorities are however bound to the Basic Law of the Federal Republic of Germany (hereinafter GG). Art. 3 (1) GG codifies the general principle of equal treatment by the state that is violated if different decisions are made in cases with equal facts. In the administrative antitrust practice, the cases will however regularly differ from each other substantially.⁷⁸

In European antitrust law, Art. 10a of the Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter: Conduct of Proceedings Regulation) governs the settlement procedure. According to Art. 10a Conduct of Proceedings Regulation, the proceeding still ends with an administrative decision in line with Art. 7 or Art. 23 Implementation Regulation.

The possibility of settlements leads to the problem that courts are hindered to rule upon cases that might have precedent value. It is nevertheless an effective means to stop antitrust violations and makes economic sense for both the undertakings and the cartel offices.

2.3.2 Civil Lawsuits

Antitrust law can also be enforced via *private lawsuits* before the Regional Courts. § 33 (1) GWB provides affected persons with the claim to demand rectification of infringements and to desist from further infringements in case of a violation of a provision of the GWB or Artt. 101, 102 TFEU. The group of affected persons is legally defined as “competitors or other market participants impaired by the infringement”. Competitors are undertakings that are active on the same relevant market in both product-related and geographical dimensions, whereas other participants can be consumers or undertakings that are active on the relevant market as suppliers or demanders of goods or services.⁷⁹ There is also the possibility to sue for certain associations; § 33 (2) GWB. § 33 (3) GWB provides for the right to demand compensation on condition that the violation was made intentionally or negligently. Compensation can even be demanded if the plaintiff did not incur losses because he resold goods or services that were sold at an excessive price. As distinct from other legal systems, German antitrust law does not allow to claim punitive damages.⁸⁰ This can be ascribed to the general principle in German

⁷⁴ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?__blob=publicationFile&v=2. Accessed 6 June 2017.

⁷⁵ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 2.

⁷⁶ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 3.

⁷⁷ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 3.

⁷⁸ H.-H. Schneider. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, preface to §§ 54 ff. para. 20.

⁷⁹ V. Emmerich. In: Immenga/Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 33 GWB paras. 11 ff; G. Mäsch. In: Berg/Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 33 GWB paras. 21 f.

⁸⁰ J. Topel. In : Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 50 para. 90.

tort law that compensation shall not lead to an enrichment of the wronged party.⁸¹

An antitrust violation can also be used as a *defence against allegations of breach of contract*.⁸² According to § 1 GWB in conjunction with § 134 of the German Civil Code (hereinafter: BGB), contractual agreements that unduly restrict competition are void.⁸³ A violation of Art. 101 (1) TFEU has the same legal consequence according to Art. 101 (2) TFEU. If an agreement is the result of a prohibited conduct of a dominant undertaking (§ 19 GWB), of a prohibited conduct of an undertaking with relative or superior market power (§ 20 GWB) or violates Art. 102 TFEU, the contractual provision is void according to § 134 BGB.⁸⁴

The burden of proof rests with the defendant in all these cases.

Before filing a lawsuit cease-and-desist orders with penalty clauses are also common in legal practice. If the addressee signs the declaration, the other party gets a contractual claim for payment of the penalty.⁸⁵ The standard of proof for that claim is lower than for the tort claim of § 33 GWB. The plaintiff only has to prove that the contracting party's behaviour contradicts the agreement.

After a lawsuit has been filed, it is possible that cases are not closed by a judgment but by court or out-of-court settlements as in every other civil case. This derives from the principle of party disposition that dominates the civil procedure.⁸⁶ These possibilities are not explicitly laid down in the ZPO but accepted by customary law.⁸⁷ Settlements are civil contracts.⁸⁸ Consequently, every behaviour that contradicts the settlement entitles the other party to demand compensation according to § 280 (1) BGB. This contractual claim is independent from the tort claim codified in § 33 (3) GWB. It is of high relevance that the law presumes the responsibility of the defendant in regard to the breach of contract. The burden of proof thus shifts to the defendant,⁸⁹ whereas in tort claims it is upon the plaintiff to prove fault.

§ 307 ZPO codifies that where a party acknowledges a claim the court has to rule in accordance with this acknowledgment (consent decree). In that case, no decision on the merits is made.⁹⁰

Although there are no statistics on the application of the afore-mentioned means in antitrust cases concerning e-commerce platforms, one has to assume that they are broadly used. This of course leads to the well-known problem that courts are hindered from ruling on potential precedent cases which would help to clarify the legal situation.

⁸¹ J. Flume. In: Bamberger/Roth (eds), Beck'scher Online-Kommentar BGB, § 249 para. 48; J. Topel. In: Wiedemann (ed), Handbuch des Kartellrechts, 3rd ed, § 50 para. 90.

⁸² See for example Regional Court Frankfurt a. M., Decision of 31 July 2014, Case No. 2-3 O 128/13 – *Logo-Klauseln*, NZKart 2015, pp. 243–244 in the case of a ban of sales on third-party platforms.

⁸³ W. Berg/M. Mudrony. In: Berg/Mäscher (eds), Deutsches und Europäisches Kartellrecht, 2nd ed, Luchterhand 2015, § 1 GWB para. 96; H.-J. Bunte/F. Stancke, Kartellrecht, 3rd ed, C.H. Beck 2016, p. 283.

⁸⁴ H.-J. Bunte/F. Stancke, Kartellrecht, 3rd ed, C.H. Beck 2016, pp. 195, 327, 342.

⁸⁵ Federal Court of Justice, Decision of 12 July 1995, Case No. I ZR 176/93, GRUR 1995, pp. 678–681; R. Schmidt. In: Heussen/Hamm (eds), Beck'sches Rechtsanwalts-Handbuch, 11th ed, C.H. Beck 2016, § 36 para. 34; A. Ottofülling, Die Unterlassungserklärung und ihre Folgen, DS 2015, pp. 13–15.

⁸⁶ H.-J. Musielak. In: Musielak/Voit (eds), Zivilprozessrecht, 14th ed, Vahlen 2017, introduction para. 35.

⁸⁷ Cf. H. Wolfsteiner. In: Rauscher/Krüger (eds), Münchener Kommentar zur Zivilprozessordnung Band 2, C.H. Beck 2013, § 794 para. 8.

⁸⁸ M. Habersack. In: Säcker/Rixecker/Oetker/Limberg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 6, § 779 para. 33; cf. A. Staudinger. In: Schulze (ed), Bürgerliches Gesetzbuch, 9th ed, Nomos 2017, § 779 para. 7.

⁸⁹ R. Schulze. In: Schulze (ed), Bürgerliches Gesetzbuch, 9th ed, Nomos 2017, § 280 para. 15.

⁹⁰ Federal Court of Justice, Decision of 17 March 1993, Case No. XII ZR 256/91, NJW 1993, pp. 1717–1719; H.-J. Musielak. In: Musielak/Voit (eds), Zivilprozessrecht, 14th ed, Vahlen 2017, § 307 para. 15.

3 Vertical Restraints for the Online Sales Market

Attention has to be paid to vertical restraints of competition. Art. 1 (1) a) of the Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty of the European Union to categories of vertical agreements and concerted practices (hereinafter: Block Exemption Regulation) defines vertical agreements as “an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services”. This definition can also be used for solely national cases.

3.1 Governing Law

Vertical agreements can violate § 1 GWB (prohibition of agreements restricting competition) or, in inter-state cases, Art. 101 (1) TFEU. If the provision is indeed violated (see Section 2.3 above), the violation can still fall under an exception to the applicable provision. In inter-state cases, the Block Exemption Regulation provides for a number of exceptions. In conjunction with § 2 (2) GWB, the Block Exemption Regulation is also applicable to solely national cases.⁹¹

Art. 2 (1) Block Exemption Regulation points out that, as a general rule, Art. 101 (1) TFEU does not apply to vertical agreements. Art. 2 (2) – (4) Block Exemption Regulation sets more specific rules for special cases (vertical agreements between an association of undertakings and its members or between such an association and its suppliers; transfer of intellectual property rights; vertical agreements between competitors). If Art. 2 Block Exemption Regulation is applicable, it is then necessary to examine whether Artt. 3, 4 or 5 Block Exemption Regulation contain an exception to the general rule that vertical agreements are not covered by Art. 101 (1) TFEU. According to Art. 3 (1) Block Exemption Regulation, an agreement can only be excluded from the legal prohibition if neither the supplier’s nor the buyer’s market share exceeds 30% of the relevant market. Art. 4 Block Exemption Regulation covers hard-core restrictions of competition. If a vertical agreement contains hard-core restrictions, the whole agreement does not fall under the block exemption as codified in Art. 2 Block Exemption Regulation (“all-or-nothing-principle”).⁹² Art. 5 Block Exemption Regulation contains exceptions for no-competition clauses. In contrast to Art. 4 Block Exemption Regulation, the provision of Art. 5 Block Exemption Regulation has the legal effect that only the single contractual clause is not covered by Art. 2 Block Exemption Regulation.⁹³

The Block Exemption Regulation is further specified by the European Commission’s Guidelines on Vertical Restraints SEC(2010) 411 (hereinafter: Guidelines on Vertical Restraints).⁹⁴ Although these guidelines are only binding for the European Commission itself, they are of high practical importance.⁹⁵ German courts tend to refer

⁹¹ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 21.

⁹² J.-M. Schultze/S. Pautke/S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 516.

⁹³ K. Beckmann/U. Müller. In: Hoeren/Sieber/Holzengel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 142; J.-M. Schultze/S. Pautke/S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 840.

⁹⁴ An English version can be found here: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf. Accessed 22 May 2017.

⁹⁵ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 19; J.-M. Schultze/S. Pautke/S. Wagener, *Die*

to the guidelines without discussing their legal significance in solely national as well as in inter-state cases.⁹⁶

If no exception of the Block Exemption Regulation applies to the case at hand, there still is the possibility that the agreement falls under § 2 (1) GWB or under Art. 101 (3) TFEU that provide for individual exceptions. However, as the exceptions are narrowly formulated, it is usually hard for the defendant to prove that the requirements are met in the case at hand.

It is always upon the defendant to substantiate and prove that the criteria of the exemptions are met.⁹⁷ However, the burden of proof rests upon the plaintiff in regard to the question whether or not a hard-core restriction of competition (Art. 4 Block Exemption Regulation) is given.

Vertical restraints can also be prohibited by § 19 (1), (2) No. 1 GWB in conjunction with § 20 (1) GWB. § 2 (1) and (2) GWB are not applicable to such a violation.⁹⁸ Nonetheless, the exceptions of the Block Exemption Regulation are relevant, since agreements covered by the regulation cannot be “unfair” within the meaning of § 19 (2) No. 1 GWB.⁹⁹

3.2 Restriction of Online Sales via Webshops

The internet provides potential consumers with the possibility to gain more and more information about products and distributors and to compare them. This helps consumers to reach a well-considered purchase decision. The possibilities of the “new economy” thus enormously strengthen inter and intra-brand competition. Another crucial point for manufacturers is the so-called free rider problem that, above all, arises with the sale of high-quality branded goods:¹⁰⁰ Distributors may concentrate exclusively on online sales and are thus able to offer goods for a relatively low price, whereas other distributors engage in stationary trade and are faced with higher costs (e.g. for specialised consulting services or rents) which hinder them from offering the goods at similar conditions. In that situation, consumers often tend to make use of the stationary trader’s service and eventually buy online.

Consequently, the manufacturer’s interest in banning online sales is obvious.

Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 29; J. Dreyer/N. Lemberg, Möglichkeiten und Grenzen der Beschränkung des Internetvertriebs, BB 2012, pp. 2004–2010.

⁹⁶ E.g. Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352; Higher Regional Court Frankfurt a.M., Decision of 22 December 2015, Case No. 11 U 84/14 (Kart) – *Funktionsrucksäcke*, MMR 2016, pp. 634–639.

⁹⁷ Cf. Art. 2 Implementation Regulation; J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 209; M. Schweda/J.-C. Rudowicz, Verkaufsverbote über Online-Handelsplattformen und Kartellrecht, WRP 2013, pp. 590–600.

⁹⁸ J. Nordemann. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, § 2 GWB para. 62.

⁹⁹ J.-M. Schultze/S. Pautke/S. Wagener, Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 94.

¹⁰⁰ K. Beckmann/U. Müller. In: Hoeren/Sieber/Holznapel, Handbuch Multimedia-Recht, 38. EL, C.H. Beck 2014, part 10 para. 140.

Agreements containing a *total ban of online sales* always constitute a restriction of competition and thus fall under the provisions of Art. 101 (1) TFEU and § 1 GWB.¹⁰¹ A manufacturer does not profit from the exception of Art. 2 (1) Block Exemption Regulation when totally banning online sales because Art. 4 lit. b) Block Exemption Regulation excludes inter alia restrictions of the customers to whom a buyer may sell the contract goods. The total contractual ban of online sales would hinder the buyer to reach the group of online shoppers and is thus a hard-core restriction within the meaning of Art. 4 lit. b) Block Exemption Regulation.¹⁰²

The criteria of the “re-exception” to this hard-core restriction as codified in Art. 4 lit. b) i) Block Exemption Regulation could only be met if online sales via one’s own websites would be considered as a means of “active sales”. An “active sale” requires that a distributor takes advertising actions to win single consumers to purchase the advertised goods.¹⁰³ Normally, the consumer will, however, search for online offers of the needed goods himself so that webshops generally have to be characterised as a means of “passive sales”.¹⁰⁴

In selective distribution systems (see Section 3.3.1 below) Art. 4 lit. c) Block Exemption Regulation is applicable. The total ban of online sales constitutes a restriction of passive sales to end users and is thus prohibited.¹⁰⁵

It is however possible for the seller to allow the buyer the online sale of the contract goods only on condition that the buyer operates a stationary business at the same time.¹⁰⁶ In that case, the criteria of Art. 4 lit. b) Block Exemption Regulation are not fulfilled as the internet turnover of the buyer is not affected by this agreement.

Dual pricing-models (different prices for online and offline distributors) in general are also considered as a hard-core restriction of competition within the meaning of Art. 4 lit. b) Block Exemption Regulation.¹⁰⁷ This also applies to cases in which dual-pricing-models are realised by cash backflows.¹⁰⁸ The European Commission is of the opinion that such an agreement can be covered by the exception of Art. 101 (3) TFEU in cases in which online sales lead to “substantially higher costs for the manufacturer”.¹⁰⁹ The Commission exemplary refers to cases in which the manufacturer will be faced with more customer complaints or warranty claims. It further points out that agreements offering the distributor a fixed fee in order to support its online or offline activities

¹⁰¹ CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence*, ECR 2011 I-09419; Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352

¹⁰² Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352; M. Baron. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 4 Vert-GVO para. 259.

¹⁰³ Para. 51 of the Guidelines on Vertical Restraints; Johannsen/Wegner. In: Busche/Röhling (eds), *Köln Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 4 Vertikal-GVO para. 82; I. Innerhofer, *E-Commerce im Fokus des Wettbewerbsrechts*, ZVertriebsR 2013, pp. 266–272.

¹⁰⁴ Para. 52 of the Guidelines on Vertical Restraints; Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352.

¹⁰⁵ Para. 56 of the Guidelines on Vertical Restraints; CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence*, ECR 2011 I-09419.

¹⁰⁶ Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352; M. Baron. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 4 Vert-GVO para. 259; S. Simon, *Die neue Kartellrechtsverordnung (EU) Nr. 330/2010 für Vertriebs- und Lieferverträge*, EWS 2010, pp. 497–503.

¹⁰⁷ M. Baron. In: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 4 Vert-GVO paras. 255 ff.

¹⁰⁸ Federal Cartel Office, Decision of 18 June 2010, Case No. B 5 – 100/09; K. Beckmann/U. Müller. In: Hoeren/Sieber/Holzner, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 152.

¹⁰⁹ Para. 64 of the Guidelines on Vertical Restraints.

withstands antitrust law. This statement is only in line with the foregoing observations if one furthermore requires that the fixed fee covers extra efforts and expenses.¹¹⁰

Manufacturers could furthermore have the idea to operate a *Retail Price Maintenance System* to protect stationary businesses. Art. 4 lit. a) Block Exemption Regulation expressly prohibits such behaviour. There only is the possibility to recommend a sale price as long as that recommendation does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

Another possibility to restrict online sales is to contractually agree upon *limits on quantity* of online sales. An agreement that obligates the distributor to sell a percentage of the contract goods offline is covered by Art. 4 lit. b) Block Exemption Regulation and consequently not in line with the national and European antitrust law as long as the criteria of § 2 (1) GWB or Art. 101 (3) TFEU are not met.¹¹¹ According to para. 52 lit. c) of the Guidelines on Vertical Restraints, it is yet possible to demand that the distributor sells a certain absolute amount offline. The European Commission further states that this absolute amount can be the same for all contractors or individually determined for each contractor by objective criteria (e.g. buyer's size or geographic location). The law thus acknowledges the manufacturer's interest in maintaining an effective stationary trade of the contract goods.¹¹²

3.3 Ban on Distribution via Third-party Platforms in Selective Distribution Systems

As a consequence, some manufacturers try to at least prohibit sales via third-party platforms like eBay or Amazon that enormously strengthen intra-brand competition.¹¹³

3.3.1 Definition and legal Specialities

According to Art. 1 (1) lit. e) Block Exemption Regulation, a selective distribution system is “a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system”. This definition is also acknowledged by German courts for purely national situations.¹¹⁴ Whereas selective distributions systems restrict intra-brand competition, inter-brand competition is strengthened.¹¹⁵

This justifies that not every agreement in selective distribution systems constitutes a restriction of competition

¹¹⁰ J.-M. Schultze/S. Pautke/S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 762.

¹¹¹ Para. 52 lit. c) of the Guidelines on Vertical Restraints; J.-M. Schultze/S. Pautke/S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 757.

¹¹² S. Simon, *Die neue Kartellrechtsverordnung (EU) Nr. 330/2010 für Vertriebs- und Lieferverträge*, EWS 2010, pp. 497–503.

¹¹³ M. Schweda/J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹¹⁴ K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 276.

¹¹⁵ Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, MMR 2013, pp. 774–779.

within the meaning of § 1 GWB, respectively Art. 101 (1) TFEU. According to the CJEU's case law¹¹⁶ a restriction of competition is not given in selective distribution systems if (a) resellers are chosen on the basis of objective criteria of a qualitative nature, (b) the conditions are not applied in a discriminatory fashion, (c) the characteristics of the product in question necessitate the conditions in order to preserve its quality and ensure its proper use and (d) the condition's criteria do not go beyond what is necessary. Even though these criteria have been developed for Art. 101 (1) TFEU, the same standard applies to solely national cases that are governed by § 1 GWB.¹¹⁷

3.3.2 Restriction of Competition

Several German courts have dealt with these criteria in cases in which *sales via third-party platforms* were prohibited by contract and came to different results.

The Higher Regional Court Frankfurt ruled that an agreement that prohibits resellers to offer the contract goods (functional backpacks) on Amazon is in line with antitrust law.¹¹⁸ In the opinion of the court, consumers need sound advice for the purchase decision so that the third requirement of the CJEU's test was met. Furthermore, the court acknowledged that a luxury product image can justify a ban of online sales on third-party platforms. The latter argument is highly questionable as the CJEU decided that the purpose of protecting a product's prestigious image cannot justify a restraint of competition.¹¹⁹ The Frankfurt court argued in this regard that the CJEU's judgement concerned a total ban of internet sales and that, consequently, the judgment cannot serve as precedent for a ban of sales via third-party platforms. It further held that the contractual requirements do not go beyond the necessary scope as the court doubts that sound advice can be assured on third-party platforms as opposed to a resellers own website. Besides, in the court's opinion, it is not possible to signalise high product quality on these platforms as every product is presented in the same manner.

It is obvious that the court did not sufficiently consider the afore-mentioned CJEU's judgment that does not differentiate between total bans and restricted bans of online sales.¹²⁰ Furthermore, the judges failed to take the possibilities which Amazon provides to present products (e.g. Amazon shop systems¹²¹) into account. These do not substantially differ from the possibilities in a distributor's own online shop.¹²²

Ironically, the Higher Regional Court Frankfurt later moved forward to clarify the legal situation by referring the

¹¹⁶ Settled case law since CJEU, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, ECR 1977, 1875; CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, ECR 2011 I-9419.

¹¹⁷ Higher Regional Court Frankfurt a. M., Decision of 22 December 2015, Case No. 11 U 84/14 (Kart) – *Funktionsrucksäcke*, NZKart 2016, pp. 84–88; Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, NZKart 2014, pp. 72–75; K. Krauß. In: Langen/Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 277; D. Zimmer. In: Immenga/Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 1 GWB para. 327.

¹¹⁸ Higher Regional Court Frankfurt a. M., Decision of 22 December 2015, Case No. 11 U 84/14 (Kart) – *Funktionsrucksäcke*, NZKart 2016, pp. 84–88.

¹¹⁹ CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, ECR 2011 I-09419.

¹²⁰ Cf. the judgment of the previous instance: Regional Court Frankfurt a. M., Decision of 18 June 2014, Case No. 2-03 O 158/13 – *Funktionsrucksäcke*, MMR 2017, pp. 777–778; cf. M. Schweda/J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹²¹ See these Amazon stores as an example: <https://www.amazon.de/Marc-O-Polo/b?ie=UTF8&node=1695518031>. Accessed 6 June 2017; <https://www.amazon.de/b?node=8537844031> Accessed 6 June 2017.

¹²² Cf. M. Schweda/J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

matter to the CJEU for preliminary ruling in another case raising similar questions.¹²³ The CJEU will have to *inter alia* rule on the question whether the aim of maintaining a luxury product image is acknowledged by European antitrust law. Furthermore, the court will have to decide whether the general ban of sales via third-party platforms irrespective of a manufacturer's legitimate quality standard can withstand the CJEU's four prong test so that no restriction of competition is given. The CJEU's judgment in this case is awaited for the end of this year.¹²⁴

The *eBay* platform has a special status among third-party platforms: The Higher Regional Court Karlsruhe decided that a provision banning the sale on eBay can withstand antitrust law.¹²⁵ In the decided case, the contracting parties agreed upon general requirements concerning the online presentation of the contract goods (school bags). It was explicitly agreed that an offer on eBay is not fulfilling these requirements at the moment. According to the court, the agreement was in line with the CJEU's criteria and thus did not constitute a restraint of competition. As the contract puts demands on the good's presentation, the chosen criteria were objective and of qualitative nature. The court stated that the requirements that aimed at leading the customer to the distributor's stationary business were necessary to ensure the goods' proper use as orthopaedic considerations were of importance for the purchase decision. Eventually, the requirements' scope was not objectionable. However, the court pointed out that its decision does not apply to cases in which an offer is made by using the eBay shop system, because the contractual presentation requirements can be fulfilled in that case. The court furthermore denied a violation of §§ 19 (2) No. 1, 20 (1) GWB for the same reasons. Although the court acknowledged the resellers interest in using eBay (low investment and maintenance costs compared to an own website), it held that the manufacturer's, respectively the trademark proprietor's interests in adequately presenting its goods prevailed in case of the prohibition of single offers on eBay.

As opposed to this, the Higher Regional Court Berlin ruled that even offers in eBay shops are likely to impair the product's image as consumers associate eBay with a "flea market" that contradicts the manufacturer's interest in signalling the high quality of the contract good.¹²⁶ The court explicitly stated that this is not the case with every third-party platform.

Eventually, a ban on sales via third-party platforms will at least fail the fourth prong of the CJEU's test.¹²⁷ Even if one would still accept the manufacturer's interest in protecting the product image after the CJEU's *Pierre Fabre* judgment, manufacturers could also design their contracts in a way that certain requirements are imposed on the online presentation of goods instead of banning sales via third-party platforms. One has to acknowledge that sales via third-party platforms enormously strengthen intra-brand competition. Whereas a reseller's own homepage is likely to be lost in the world wide web, the offer is easily detectible on these platforms¹²⁸ and the user is able to compare different offers without leaving the platform's website. For small and medium-sized

¹²³ Higher Regional Court Frankfurt a. M., Decision of 19 April 2016, Case No. 11 U 96/14 Kart – *Depotkosmetik II*, NZKart 2016, pp. 236–239.

¹²⁴ CJEU, case C-230/16.

¹²⁵ Higher Regional Court Karlsruhe, Decision of 25 November 2009, Case No. 6 U 47/08, CR 2010, pp. 116–121.

¹²⁶ Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, MMR 2013, pp. 774–779.

¹²⁷ M. Schweda/J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹²⁸ M. Schweda/J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

enterprises, the possibility to offer their goods via such platforms often is the only way to launch the online market without being faced with high costs for the development and the maintenance of the website.¹²⁹ As manufacturers should be aware of the possibilities some platforms offer for the presentation of goods, one could conclude that the paramount aim of general bans is to impede intra-brand competition. The manufacturer's or trademark proprietor's interest in an appropriate presentation of its goods is adequately acknowledged if resellers have to regard special rules in regard to the presentation. If the manufacturer is of the opinion that certain third-party-platforms cannot meet these requirements, a contractual provision repeating that opinion and taking into account that the presentation possibilities may change in the future can help to clarify the contract. In that case, the CJEU's criteria are met so that no restriction of competition is given.

3.3.3 Exemptions

If one regards bans of sales via third-party platforms as restrictions of competition, it has to be examined whether manufacturers can rely on exceptions to the prohibition (see Section 2.1.1 above).

General bans on sales via third-party platforms could constitute a hard-core restriction of competition within the meaning of Art. 4 lit. c) Block Exemption Regulation. The provision requires that active or passive sales to the end user are restricted by the agreement.

The core question in that regard is whether the provision still is a quality requirement or already has the nature of a restriction. Bans on sales via third-party platforms prohibit the resellers to make use of an important distribution channel. As the foregoing examination has shown, a total ban on sales via third-party platforms cannot be regarded necessary to ensure the high quality of a good's presentation. Thus, as the manufacturer has no legitimate interest in banning these sales, the ban has to be characterized as a restriction of competition.¹³⁰

Furthermore, according to para. 56 of the Guidelines on Vertical Restraints, agreements restraining online sales may only impose requirements that are equivalent to requirements in the stationary business. A similar restriction for brick and mortar shops is not imaginable.¹³¹

However, para. 54 of the Guidelines on Vertical Restraints states that Art. 4 Block Exemption Regulation does not hinder the manufacturer from requiring "*that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform*". The provision's purpose is to prevent consumers from thinking that they contract with the third-party platform.¹³² This concern is baseless in regard to the most third-party platforms. Users of eBay are well aware that not eBay itself offers products online but registered sellers. On the Amazon marketplace the offer contains the notice that amazon is not a contracting party. This gets even more obvious if the offer is made by using the eBay shop system¹³³ or a shop on Amazon. As the Commission points out the importance of online distribution as a distribution channel in other parts of the Guidelines on Vertical Restraints, one can conclude that para. 54 is formulated too broadly. The provision is at least outdated as

¹²⁹ M. Schweda/J.-C. Rudowicz, Verkaufsverbote über Online-Handelsplattformen und Kartellrecht, WRP 2013, pp. 590–600.

¹³⁰ M. Schweda/J.-C. Rudowicz, Verkaufsverbote über Online-Handelsplattformen und Kartellrecht, WRP 2013, pp. 590–600.

¹³¹ M. Schweda/J.-C. Rudowicz, Verkaufsverbote über Online-Handelsplattformen und Kartellrecht, WRP 2013, pp. 590–600.

¹³² Regional Court Frankfurt a. M., Decision of 18 June 2014, Case No. 2-03 O 158/13 – *Funktionsrucksäcke*, MMR 2017, pp. 777–778; Regional Court Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 Kart – *Digitalkameras*, MMR 2014, pp. 183–184.

¹³³ Regional Court Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 Kart – *Digitalkameras*, MMR 2014, pp. 183–184.

the new possibilities third-party platforms provide for presenting products could not be taken into account. Furthermore, the provision is not binding for courts (see Section 3.1 above). The Higher Regional Court Frankfurt seems to have similar problems with that provision. In the above-mentioned request for preliminary ruling, it asked the CJEU whether it constitutes a hard-core restriction to competition within the meaning of Art. 4 lit. c) Block Exemption Regulation if a manufacturer prohibits members of a selective distribution system from handling internet sales by engaging third-party undertakings discernible to the public.¹³⁴ The court made clear that it doubts that a general ban on sales via third-party platforms can be justified by a legitimate interest of the manufacturer. The Federal Cartel Office indicated that a general ban on using third-party platforms constitutes a hard-core restriction, too.¹³⁵

3.3.4 Conclusion

The afore-mentioned cases show that it is highly controversial whether bans on sales via third-party platforms are in accordance with antitrust law. Practitioners are confronted with legal uncertainty.¹³⁶ However, the awaited judgment of the CJEU is likely to clear the legal situation. In conclusion, the total ban of sales via third-party platforms is seen very critical by German courts. Bans of sales via specific third-party platforms have to be examined carefully taking into account the platform's presentation possibilities and the manufacturer's interest in the ban.

3.4 Most favoured nation conditions

Most favoured nation conditions (MFNC) occur in the new economy sector as in every other economic sector. In regard to online sales platforms, the most relevant case of application of MFNC are contractual provisions that impose a contractual duty on sellers to guarantee that the product is not offered on another platform for a lower price. The specialty in these cases is that the party using the MFNC is not part of the supply chain but a third party.¹³⁷

The Regional Court Munich had to decide on the accordance of such an agreement between Amazon and its sellers with antitrust law in an action for a preliminary injunction.¹³⁸ The MFNC used by Amazon included online sales via the seller's own website as well as other third-party platforms. The court decided that such an agreement violates § 1 GWB. As the MFNC eventually dictates the price the seller demands on Amazon, his economic freedom of action is enormously restricted so that Amazon's behaviour constituted a restriction of competition within the meaning of Art. 101 (1) TFEU and § 1 GWB.¹³⁹

As Amazon most probably has a market share of more than 30%, the undertaking could not rely on Art. 2 Block Exemption Regulation according to Art. 3 (1) Block Exemption Regulation. But even if that had not been the case, the MFNC would constitute a hard-core restriction of competition according to Art. 4 lit. a) Block

¹³⁴ Higher Regional Court Frankfurt a. M., Decision of 19 April 2016, Case No. 11 U 96/14 Kart – *Depotkosmetik II*, NZKart 2016, pp. 236–239.

¹³⁵ Federal Cartel Office, Decision of 19 August 2014, Case No. B 3 – 137/12.

¹³⁶ Cf. K. Beckmann/U. Müller. In: Hoeren/Sieber/Holzsnagel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 160.

¹³⁷ I. Bodenstern, „Marketplace“-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹³⁸ Regional Court Munich I, Decision of 22 April 2010, Case No. 37 O 7636/10 (not published).

¹³⁹ I. Bodenstern, „Marketplace“-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

Exemption Regulation.¹⁴⁰ This provision covers agreements that have “as their object the restriction of the buyer’s ability to determine its sale price without prejudice to the possibility of the supplier to suppose a maximum sale price [...]”. MFNC like the one used by Amazon are only covered by the provision’s re-exception (maximum sale price) on the first view. If one considers the effects the agreement has on other platforms, one recognizes that indeed Amazon dictates a minimum price for these offers (higher than the price on Amazon).¹⁴¹ In case of a dominant market share (see Section 2.1.2) of Amazon, § 19 GWB is violated as well.

In a case decided by the Higher Regional Court Düsseldorf, MFNC were used by a hotel booking portal (HRS).¹⁴² The court ruled that the MFNC that prohibited the hotelier to make offers on other platforms for a lower price violated Art. 101 (1) TFEU and § 1 GWB. The judges held that the agreement leads to a market foreclosure on the market for hotel portals. It would be impossible for new portals to enter into the market if their potential contracting parties (hoteliers) were hindered to offer their rooms for a lower price than on other platforms. In regard to the market for hotel rooms, the court pointed out that competition is enormously restricted as the hoteliers cannot react to a decreasing demand on one platform by reducing the price only on that platform. Consequently, the hotelier will most likely not reduce the price so that end clients cannot profit from a lower price that would otherwise be possible. The court did not take a stand on whether the agreement constitutes a vertical restraint. As the portals market share was above 30%, the violation could not be justified by the Block Exemption Regulation according to its Art. 3 (1). It furthermore denied the exception of Art. 101 (3) TFEU, respectively of § 2 (1) GWB.

4 Conclusion

In an overall assessment, German and European antitrust law is ready to handle problems arising in the context of online sales platforms.

The legal provisions prohibiting behaviour that restricts competition are drafted broad enough to take the characteristics of the new economy sector into account adequately on a case-by-case basis. As German and European antitrust law relies on both administrations and private entities to enforce antitrust law, violations can be eliminated effectively. The definition of the relevant market, however, is a difficult point as the criteria that were developed for traditional economic sectors do not always fit to the new economy sector. The German lawmaker recognised that problem and will introduce new legal provisions regarding the specialties of the new economic sector.

The restriction of online sales is a matter of high relevance in European and national law. A total ban of online sales as well as the introduction of a price maintenance system is never possible. Even restrictions of online sales by dual-pricing systems or limits on the quantity of the goods sold online are only possible in special cases as German and European antitrust law and the courts applying that law acknowledge the high importance of online sales and its positive effects on competition. Practitioners are however still faced with legal uncertainty in regard to the ban of online sales via third-party platforms as the relevant case law is inconsistent. Total bans of sales via third-party platforms are not in line with antitrust law based on the arguments put forward in this article.

¹⁴⁰ I. Bodenstern, „Marketplace“-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹⁴¹ I. Bodenstern, „Marketplace“-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹⁴² E.g. Higher Regional Court Düsseldorf, Decision of 9 January 2015, Case No. VI-Kart 1/14 (V) – *Enge Bestpreisklauseln*, NZKart 2015, pp. 148–152.

Qualitative requirements for the online presentation of goods have to be examined on a case-by-case basis.

Most favoured nation conditions used by third-party platforms such as Amazon or hotel booking platforms violate antitrust law in the opinion of German courts.