

Questionnaire A

The role of antitrust authorities regarding the digital economy

1. The Bundeskartellamt prohibited Facebook Inc. from making the use of the Facebook social network by private users residing in Germany, who also use WhatsApp, Oculus, Masquerade and Instagram, conditional on **the collection of user and device-related data**, as well as combining all that information without the users' consent (decision based on Section 19 (1) of the German Competition Act). Data Protection intends to achieve an appropriate balance of interests between those responsible and those affected. The fundamental right to informational self-determination is also protected by the general clause in Section 19 of the German Competition Act. The Bundeskartellamt complained about an infringement of Art. 6 GDPR. (Decision from 6 February 2019, B6-22/16)

- *Are there similar efforts in other jurisdictions to combat the behaviour of social network operators in order to comply with European data protection requirements, especially the GDPR?*
- *Do the antitrust authorities in other jurisdictions agree that providers of large social networks (or similar platforms) such as Facebook gain advantages over competitors by collecting and merging data from several applications?*
- *Are the antitrust authorities responsible for monitoring the conditions of the use of social networks (or similar platforms) and data gathered or is this the exclusive responsibility of the data protection authorities? A specific provision does not exist in the GDPR, which is why this question is very controversial in German jurisprudence.*

2. The Bundeskartellamt has developed **guidelines to determine the market power** of networks and platforms. To assess market power, the relevance of network effects, economies of scale, access to data and innovation potential in digital markets has to be taken into account. *Do similar guidelines exist in other countries? What is considered important in other countries?*

3. Due to the diversity of platforms, it is difficult to differentiate within a platform that has several offerings. In case of Amazon online sales platform, on which a comprehensive range of goods is sold both by Amazon itself and by third-party dealers via the so-called Marketplace, it is necessary to distinguish the platform offering from the dealer's activity. Amazon presents both segments as a uniformly integrated shop in which there is no separation between Amazon's own business and the Marketplace business. *How is the term "platform" defined and how do other countries deal with such linked concepts?*

4. *Can there be an antitrust 'market' for free services? The European Commission is now accepting a market for free services, e.g. among users of search engines.*

5. The Bundeskartellamt has launched a **sector inquiry into online advertising**, because the online advertising market has grown tremendously throughout the last 20 years. To this end, advertising companies were asked where the focus of this investigation should be in view of the fact that Facebook and Google are powerful companies in the market. The UK Competition and Markets Authority is also undertaking a market study into online platforms and digital advertising. *What could be the focus of an online advertising survey by antitrust authorities?*

6. Data protection is generally not the responsibility of the competition authorities. However, the handling of data can be a parameter of competition. This parameter gains in importance when the handling of sensitive data is important to users. Excessive data collection (e.g. due to abuse of conditions) can constitute anticompetitive behaviour. Data are relevant under antitrust law in three respects: First, data can be a factor that can contribute to market power. In addition, data can increase market transparency among suppliers and facilitate collusion. Finally, data may give rise to anti-competitive behaviour. The Bundesgerichtshof has classified the use of inadmissible general terms and conditions as anti-competitive conduct. *How do other antitrust authorities rate the use of general terms and conditions with regard to **data collection**?*

7. In recent years, the Bundeskartellamt has conducted proceedings concerning most-favoured nation clauses and cooperation between content providers. The public discussion, however was primarily marked by allegations of abuse of market power. *How can special features of these markets be taken into account and how far should the special **responsibility of dominant companies** go?*

8. The Bundeskartellamt is responsible and active in the field of **telecommunications**. The Bundeskartellamt pays particular attention to the price and discount structure of the providers and thus protects competitors from adverse effects. As part of the broadband expansion in Germany, the Bundeskartellamt is investigating whether the cooperation between network operators restricts efficient infrastructure competition. In other countries:

- *What are the requirements to be met by companies?*
- *What is the situation with regard to infrastructure competition?*
- *How is effective consumer protection ensured?*

9. In the case of **comparison portals**, there is a clear need for action with regard to **consumer protection**. Central factors of the comparison are not transparent. As a result, consumers make decisions that they would not have made, if they had full knowledge of the market (infringement of sec. 5a (2) of the German Act against unfair competition). A sector inquiry (based on sec. 32e (5) and sec. 90 (6) of the German Competition Act) by the Bundeskartellamt has shown the following:

- horizontal cooperation exists between comparison portals,
- market coverage is very low,
- rankings are often based on commissions,
- other influencing factors (e.g. scarcity of supply) induce consumers to buy quickly,
- user reviews are often only made if explicitly requested.

The Bundeskartellamt has no authority to prosecute or sanction comparison portals. However, the Bundeskartellamt may carry out **sector inquiries**. In Germany, such studies are carried out on comparison portals, smart TVs and user ratings.

- *What competences do other antitrust authorities have in this regard?*
- *What other sanctioning options are available in other countries (civil or criminal law)?*
- *Are the antitrust authorities even authorized here?*

- *Are there similar investigations by other antitrust authorities?*
- *Is an international exchange between the antitrust authorities worthwhile?*
- *Which other sectors are investigated by the antitrust authorities?*

10. An investigation by the Bundeskartellamt requires a company exploiting its **market-dominating position**. Dominance has to be ascertained first. For some time now, however, the Bundeskartellamt has been aware of the need to initiate abuse proceedings even in the case of non-market-dominating companies, e.g. when using general terms and conditions. *Are abuse proceedings in other countries only possible for dominant companies or also for other companies? Are there other authorities responsible for those proceedings?*

11. The Bundeskartellamt has been dealing with **best price clauses** and price parity clauses in particular since 2013 (proceedings against Amazon, Booking, HRS). These were ultimately prohibited. The subsequent investigations require the analysis of numerous aspects and the consultation of various market participants.

- *What legal regulations exist in other countries, especially with regard to consumer protection?*
- *Who is responsible?*
- *To what extent may antitrust (or other) authorities intervene?*
- *Do national solutions for comparison portals make sense at all, or should harmonised solutions and standards be worked on across countries?*