

Thomas Hoeren

7.1 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 to purchasing at brick-and-mortar shops. The advantages of these purchasing 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 buyer's position. Online sales thus strengthen both inter- and intra-brand competition. The effects on inter-brand competition 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 trademark 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 of 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 statutory and case law concerning the application of antitrust law to online sales platforms.

Firstly, this report 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

T. Hoeren (✉)

Westfälische Wilhelms-Universität, Münster, Germany
e-mail: hoeren@uni-muenster.de

restricting online sales of goods by vertical agreements are examined. Emphasis is laid on the question as to 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.

7.2 German and European Antitrust Law

7.2.1 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, Article 101 TFEU and Regulation 139/2004 on the control of concentrations between undertakings 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

Issues arise whenever the two antitrust regimes produce different legal results for the same case. As a general principle, EU law prevails if it is stricter.⁴ If the national law is stricter, § 22 *GWB* and Article 3 of the Regulation 1/2003 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 EU law is applicable in *merger control cases*, the national law's application is prohibited according to § 22 (4) *GWB*.

7.2.1.1 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 EU level, Article 101 (1) TFEU codifies the same. The criterion of restriction of competition is not legally defined.

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

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

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

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

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For the national law, it is 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 for instance with regard to vertical restraints in selective distribution systems.

As there is neither a consistent definition of competition on the EU level nor a clear line drawn by EU case law, it is harder to determine a restriction of competition within the meaning of Article 101 (1) TFEU.¹⁰ However, the existing case law allows to conclude that a restriction of competition is given if the commercial freedom of action of the involved market players is limited.¹¹ Besides, the CJEU pointed out in some judgments that an agreement's impact on third parties¹² and its impact on the European Single Market¹³ are important factors in examining whether a

⁵W. Berg and M. Mudrony. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 1 GWB para. 46; K. Krauß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 121.

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

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

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

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

¹⁰V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, Art. 101 AEUV para. 107.

¹¹ECJ, case C-306/96, *Javico v Yves Saint Laurent Parfums*, ECR 1998 I 1983: 'an agreement intended to deprive a reseller of his commercial freedom'; CFI, case T-368/00, *General Motors Nederland and Opel Nederland v Commission*, ECR 2003 II 4491; V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, Art. 101 AEUV para. 109; D. Hengst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 12th ed, Luchterhand 2014, Art. 101 AEUV para. 147.

¹²E.g. CJEU, case C-279/06, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, ECR 2008 I 6681.

¹³E.g. CJEU, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, ECR 1977 1875.

behaviour is a restriction of competition. Again, case law plays an important role.¹⁴ And like in the national law, the restriction has to be appreciable.¹⁵

If the criteria are indeed met, the behaviour can, however, fall under an exception under both legal regimes. § 2 GWB is applicable to solely national cases. In its first sub-paragraph, the provision allows agreements between undertakings, decisions by associations of undertakings or concerted practices on the condition that they contribute to improving the 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 that are not indispensable to the 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 EU level, Article 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) GWB¹⁶ and thus bring legal certainty. The various regulations apply to different groups of agreements (e.g. vertical¹⁷ and horizontal agreements) or to different industrial sectors (e.g. the insurance sector).¹⁸ In EU law, no conjunction to the block exemption regulation is needed as they are directly applicable.¹⁹

With the Seventh Amendment to the Act Against Restraints of Competition, the German lawmaker aligned § 1 GWB to Article 101 (1) TFEU so that eventually the criteria became the same.²⁰ 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 Article 101 (3) TFEU.²¹ This allows to make references to decisions of the European Commission, Guidelines of the European Commission and judgments dealing with a violation of

¹⁴C. Grave and J. Nyberg. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 1 AEUV para. 257.

¹⁵CJEU, case 22/71, *Béguélin Import/G.L. Import Export*, ECR 1971 949; V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 1*, Art. 101 AEUV para. 116.

¹⁶J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 28.

¹⁷See Sect. 7.3.1 for more details.

¹⁸J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 32 ff.

¹⁹Cf. J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 14.

²⁰J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 1 GWB para. 10; H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 257 f.

²¹J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 7; H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 258.

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Article 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.

7.2.1.2 Abuse of Dominant Position

§ 19 (1) GWB and Article 102 (1) TFEU prohibit the abuse of dominant market power by one or several undertakings. As distinct from § 19 GWB, Article 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 EU law—if applicable—regularly comes to the same result as the national law because the underlying value judgments correspond.²²

An undertaking has a *dominant position* within the meaning of Article 102 (1) TFEU on the market if it has ‘a 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’.²³ Several undertakings can have a dominant market position if they operate as a collective entity on the relevant market.²⁴

§ 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 presumptions²⁵ 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

²²J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 19 GWB para. 23; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and 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.

²³CJEU, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977 1875.

²⁴CJEU, case C-395/96, *Compagnie maritime belge transports et al. v European Commission*, ECR 2000 I 1365.

²⁵A. Bardong. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 18 GWB paras. 204, 207.

non-exclusive²⁶ so that the characteristics of the new economy sector can be taken into account adequately.²⁷ 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.²⁸ Within these markets, so-called *indirect network effects* arise if the attractiveness to use the service for a customer on one side of the platform (e.g., advertiser on Google) depends on the size of the customer on the other side of the platform (e.g., search engine user).²⁹ These effects arise in regard to online sales platforms like Amazon or eBay, too³⁰: the more that 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 that causes more indirect network effects at the other group's charge.³¹ Consequently, the financial strength on one market is not a reliable factor for the assessment of the undertaking's market position.³² The national lawmaker has recognised that problem and is willing to introduce a new sub-paragraph, (3a), to § 18 GWB that is in particular applicable to two- or more-sided markets.³³ According to that provision, inter alia, direct and indirect network effects (No. 1) have to be taken into account when assessing the undertaking's position on the market. Besides, the lawmaker plans to introduce further factors to face the challenges that result from the growth of the new economy sector, for instance the parallel use of services and the effort that 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.³⁴

²⁶A. Fuchs and W. Möschel. In: Immenga and Mestmäcker (eds), Wettbewerbsrecht Band 2, § 18 GWB para. 124.

²⁷T. Körber, Analoges Kartellrecht für digitale Märkte?, WuW 2015, pp. 120–133.

²⁸H. Bergmann and L. Fiedler. In: Loewenheim, Meessen, Riesenkampff, Kersting and 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 and J. Grabenschröer, Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche, NZKart 2015, pp. 162–168.

²⁹C. Ewald. In: Wiedemann (ed), Handbuch des Kartellrechts, 3rd ed, § 7 para. 71.

³⁰T. Höppner and J. Grabenschröer, Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche, NZKart 2015, pp. 162–168.

³¹C. Ewald. In: Wiedemann (ed), Handbuch des Kartellrechts, 3rd ed, § 7 para. 72.

³²C. Ewald. In: Wiedemann (ed), Handbuch des Kartellrechts, 3rd ed, § 7 para. 72.

³³BT-Drs. 18/10207, p. 14.

³⁴R. Podszun and 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.

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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).³⁵ 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'.³⁶ The adoption of that definition for the application of § 19 (1) GWB is largely acknowledged.³⁷ 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.³⁸ That includes examining whether the behaviour results in efficiency advantages.³⁹ The burden of proof for these advantages rests with the dominant undertaking.⁴⁰ It is only met if the undertaking shows that (a) the behaviour is indispensable to reach the efficiency advantage, (b) likely negative effects on competition and on consumer welfare are compensated by the efficiency advantage and (c) the conduct does not eliminate effective competition.⁴¹ As courts tend to interpret national law in the light of European law,⁴² the defence should be accepted in the context of § 19 (1) GWB as well.

³⁵ BT-Drs. 18/10207, p. 14.

³⁶ ECJ, case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECR 1979 461.

³⁷ A. Fuchs. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 19 GWB para. 82a; U. Loewenheim. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 19 GWB para. 13; M. Wolf. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 29.

³⁸ J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 1*, 1st ed, Carl Heymanns Verlag 2017, § 19 GWB paras. 15 f.; M. Wolf. In: Bornkamm, Montag and Säcker (eds), *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht Band 2*, 2nd ed, C.H. Beck 2015, § 19 GWB para. 34.

³⁹ ECJ, case C-95/04 P, *British Airways v European Commission*, ECR 2007 I 2331; CFI, case T-288/97, *Irish Sugar v Commission of the European Communities*, ECR 1999 II 2969.

⁴⁰ F. Bulst. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 2*, 12th ed, Luchterhand 2014, Art. 102 AEUV para. 143.

⁴¹ European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009, C 45, p. 2, para. 30.

⁴² Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352.

In order to strengthen legal certainty, both legislators provided for non-exhaustive examples for the abuse of dominant market power in § 19 (2) GWB and Article 102 (2) TFEU.⁴³ 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).⁴⁴ The provision 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.⁴⁵

European antitrust law does not provide for a similar provision so that there is a distinct gap between the legal systems.⁴⁶ According to § 22 (3) GWB, stricter national law is even applicable in cases in which the behaviour is not covered by Article 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.⁴⁷ 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.⁴⁸ In this sector, the offer can in fact lead back to the economic decision to increase the financial burden for one side in favour of the other side of the market that causes more indirect network effects. Consequently, the question whether market power on one market is indeed abused cannot be answered without

⁴³The provisions relevant to online sales platforms will be discussed later on; see Sects. 7.3 and 7.4.

⁴⁴Federal Court of Justice, Decision of 24 September 2002, Case No. KVR 8/01 – *Konditionen Anpassung*, NJW 2003, pp. 205–208; J. Nothdurft. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 20 GWB para. 74.

⁴⁵Federal Court of Justice, Decision of 9 May 2000, Case No. KZR 28/98 – *Designer Polstermöbel*, GRUR 2000, pp. 1108–1111; M. Lorenz. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 20 GWB para. 13.

⁴⁶J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen – Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 94.

⁴⁷T. Körber, *Konzeptionelle Erfassung digitaler Plattformen und adäquate Regulierungsstrategien*, ZUM 2017, pp. 93–101.

⁴⁸T. Körber, *Konzeptionelle Erfassung digitaler Plattformen und adäquate Regulierungsstrategien*, ZUM 2017, pp. 93–101.

considering the other market.⁴⁹ 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.

7.2.1.3 Mergers

§§ 35 ff. GWB governs 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 particular if a dominant position would be created or strengthened. The legal definition of § 18 (1) GWB (see Sect. 7.2.1.2 above) can be used in order to examine whether the merger creates or strengthens a dominant position.⁵⁰ The legal presumptions of § 18 (4) and (6) GWB are only applicable in cases of an alleged creation of a dominant position.⁵¹ 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 EU level, Merger Regulation 139/2004 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 Article 1 (1) and (2) Regulation 139/2004, 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. Article 1 (3) EC Merger Regulation extends the scope of application. In these cases, the European Commission is exclusively competent to conduct merger control.

Article 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 Article 102 (1) TFEU (see Sect. 7.2.1.2 above).

The rise of the *new economy sector* raises the question whether the turnover parameter can still be the relevant factor to make a concentration subject to national

⁴⁹T. Körber, Analoges Kartellrecht für digitale Märkte?, WuW 2015, pp. 120–133.

⁵⁰H. Kahlenberg. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, § 36 GWB paras. 13 ff.; M. v. Merveldt. In: Berg and Mäsch (eds), Deutsches und Europäisches Kartellrecht, 2nd ed, Luchterhand 2015, § 36 GWB para. 25.

⁵¹M. v. Merveldt. In: Berg and Mäsch (eds), Deutsches und Europäisches Kartellrecht, 2nd ed, Luchterhand 2015, § 36 GWB para. 30.

or EU 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 transaction 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 19,000,000,000.⁵² The German lawmaker recognised that problem and will react to it by implementing a new subparagraph, (1a), to § 35 GWB.⁵³ 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.

7.2.2 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 will make antitrust violations less likely and vice versa.⁵⁴ 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.⁵⁵

In both the national and the European systems, 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, for instance where there is a temporary scarcity of the good.⁵⁶

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).⁵⁷ Parameters like the good's or service's

⁵²T. Körber, Analoges Kartellrecht für digitale Märkte?, WuW 2015, pp. 120–133.

⁵³BT-Drs. 18/10207, p. 22 f.

⁵⁴Cf. H.-J. Bunte and F. Stancke, Kartellrecht, 3rd ed, C.H. Beck 2016, p. 173.

⁵⁵A. Bardong. In: Langen and Bunte (eds), Kartellrecht Kommentar Band 1, 12th ed, Luchterhand 2014, § 18 GWB para. 54.

⁵⁶ECJ, 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 and F. Stancke, Kartellrecht, 3rd ed, C.H. Beck 2016, p. 176.

⁵⁷ECJ, 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), Kölner Kommentar zum Kartellrecht Band 3, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 19.

quality, their prices and purpose are included in the examination.⁵⁸ Courts conduct the so-called SSNIP test⁵⁹: 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-sensitive.⁶⁰

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.⁶¹

The *new economy sector* partially calls these principles into question. The SSNIP test often fails as services are offered free of charge.⁶² The vast majority of legal scholars are, however, of the opinion that a market can exist even in that case.⁶³ One has to agree with this since the user at least 'pays' for the service by transmitting his personal data to the service provider.⁶⁴ Nonetheless, some courts took the opposite position.⁶⁵ The national legislator has recognised that problem and will clarify the legal situation by implementing a new sub-paragraph, (2a), in § 18 GWB in line with the majority opinion.⁶⁶

The definition of the relevant market causes particular difficulties in regard to *two-sided markets* (see Sect. 7.2.1.2 above). Although the vast majority of legal scholars are of the opinion that each side is to be treated as one market,⁶⁷ practitioners were faced with legal uncertainty up to now. With the planned implementation

⁵⁸H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 173 f.

⁵⁹ECJ, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977 1875.

⁶⁰H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 174.

⁶¹K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznapel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 45.

⁶²H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 174; T. Höppner and J. Grabenschröer, *Marktabgrenzung bei mehrseitigen Märkten am Beispiel der Internetsuche*, NZKart 2015, pp. 162–168.

⁶³Regional Court Berlin, Decision of 19 February 2016, Case No. 92 O 5/14 Kart – *Google Presseauschnitt*, ZUM 2016, pp. 879–884; H. Bergmann and L. Fiedler. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 102 AUEV para. 47; T. Höppner and 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 and B. Franz, *Was ist ein Markt? – Unentgeltliche Leistungsbeziehungen im Kartellrecht*, NZKart 2015, pp. 121–127.

⁶⁴T. Höppner and 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.

⁶⁵Higher Regional Court Düsseldorf, Decision of 9 January 2015, Case No. VI-Kart 1/14 (V) – *HRS-Bestpreisklauseln*, NZKart 2015, pp. 147–152.

⁶⁶BT-Drs. 18/10207, p. 14.

⁶⁷T. Höppner and 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.

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.⁶⁸ 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.⁶⁹ The specialties of the new economy sector have to be taken into account when examining if the behaviour constitutes an antitrust violation (see Sects. 7.2.1.2 and 7.2.1.3 above).

The definition of the *geographic market* is demand-side oriented as well.⁷⁰ 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.⁷¹ It must be possible to distinguish the market from neighbouring areas.⁷² 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.⁷³ It is thus possible that more than one geographic market exists within the territory of the European Union⁷⁴ or within the Federal Republic of Germany.⁷⁵

Although offers on the Internet are accessible around the world, this does not lead to the conclusion that the whole world is the geographically relevant market.⁷⁶ As in every other market, factors like the web page's language, legal and cultural barriers, as well as the transportability of goods, have to be considered.⁷⁷

⁶⁸ C. Kersting and S. Dworschak, Win-Win-Situation of mehrseitigen Märkten: Google muss nicht zahlen, ZUM 2016, pp. 840–846.

⁶⁹ H. Bergmann and L. Fiedler. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 48; R. Dewenter, J. Rösch and A. Terschüren, Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen, NZKart 2014, pp. 387–394.

⁷⁰ H. Bergmann and L. Fiedler. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), Kartellrecht, 3rd ed, C.H. Beck 2016, Art. 102 AEUV para. 106.

⁷¹ ECJ, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977 1875; J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 33.

⁷² ECJ, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1977 1875; J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 33.

⁷³ 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 and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 36.

⁷⁴ J. Busche. In: Busche and Röhling (eds), *Kölner Kommentar zum Kartellrecht Band 3*, 1st ed, Carl Heymanns Verlag 2016, Art. 102 AEUV para. 32.

⁷⁵ E.g. Federal Court of Justice, Decision of 6 December 2011, Case No. KVR 95/10 – *Total/OMV*, WM 2012, pp. 2111–2119.

⁷⁶ K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznagel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 59.

⁷⁷ K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznagel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 59.

7.2.3 Enforcement of the Law

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

7.2.3.1 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 one 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')⁷⁸ 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 Article 5 of Regulation 1/2003, the German authorities are generally also competent to enforce Articles 101 and 102 TFEU. Article 5 Regulation 1/2003 enumerates the measures that can be chosen by the competent authority in order to enforce Articles 101 and 102 TFEU (prohibition orders, interim measures, imposition of fines). The national authorities' competence, however, leaves the European Commission's authority to enforce European antitrust law unaffected (Articles 4 and 5 Regulation 1/2003). The Commission may, *inter alia*, issue prohibition orders (Article 7 Regulation 1/2003) and may impose fines on undertakings (Article 23 Regulation 1/2003).

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.⁷⁹

The Federal Cartel Office has published a fact sheet on this possibility for proceedings involving the imposition of fines.⁸⁰ According to these guidelines,

⁷⁸An official English translation can be found here: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. Accessed 6 June 2017.

⁷⁹H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 244, 427.

⁸⁰Federal 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.

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.⁸¹ After a settlement agreement has been made, the administrative procedure is still closed by the imposition of a fine.⁸² The cartel office grants the affected party a reduction in the amount of up to 10%.⁸³ The German authorities are, however, bound to the Basic Law of the Federal Republic of Germany (hereinafter GG). Article 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.⁸⁴

In EU law, Article 10a of Regulation 773/2004 governs the settlement procedure. According to Article 10a of Regulation 773/2004, the proceeding still ends with an administrative decision in line with Article 7 or Article 23 Regulation 1/2003.

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.

7.2.3.2 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 Articles 101 and 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 customers of goods or services.⁸⁵ There is also the possibility to sue for certain associations, § 33 (2) GWB. § 33 (3) GWB provides for the right to demand compensation on the 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. Distinct from other legal systems, German antitrust law does not allow to claim punitive

⁸¹ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 2.

⁸² Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 3.

⁸³ Federal Cartel Office, Fact Sheet on Settlements in proceedings involving the imposition of fines, February 2016, p. 3.

⁸⁴ H.-H. Schneider. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, preface to §§ 54 ff. para. 20.

⁸⁵ V. Emmerich. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 33 GWB paras. 11 ff.; G. Mäsch. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 33 GWB paras. 21 f.

damages.⁸⁶ This can be ascribed to the general principle in German tort law that compensation shall not lead to an enrichment of the wronged party.⁸⁷

An antitrust violation can also be used as a *defence against allegations of breach of contract*.⁸⁸ According to § 1 GWB, in conjunction with § 134 of the German Civil Code (hereinafter 'BGB'), contractual agreements that unduly restrict competition are void.⁸⁹ A violation of Article 101 (1) TFEU has the same legal consequence according to Article 101 (2) TFEU. If an agreement is the result of a prohibited conduct of a dominant undertaking (§ 19 GWB) or of a prohibited conduct of an undertaking with relative or superior market power (§ 20 GWB) or violates Article 102 TFEU, the contractual provision is void according to § 134 BGB.⁹⁰

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.⁹¹ 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 closed not 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.⁹² These possibilities are not explicitly laid down in the ZPO but accepted by customary law.⁹³ Settlements are civil contracts.⁹⁴ 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

⁸⁶J. Topel. In: Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 50 para. 90.

⁸⁷J. Flume. In: Bamberger and Roth (eds), *Beck'scher Online-Kommentar BGB*; J. Topel, § 249 para. 48. In: Wiedemann (ed), *Handbuch des Kartellrechts*, 3rd ed, § 50 para. 90.

⁸⁸See, 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.

⁸⁹W. Berg and M. Mudrony. In: Berg and Mäsch (eds), *Deutsches und Europäisches Kartellrecht*, 2nd ed, Luchterhand 2015, § 1 GWB para. 96; H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, p. 283.

⁹⁰H.-J. Bunte and F. Stancke, *Kartellrecht*, 3rd ed, C.H. Beck 2016, pp. 195, 327, 342.

⁹¹Federal Court of Justice, Decision of 12 July 1995, Case No. I ZR 176/93, GRUR 1995, pp. 678–681; R. Schmidt. In: Heussen and 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.

⁹²H.-J. Musielak. In: Musielak and Voit (eds), *Zivilprozessrecht*, 14th ed, Vahlen 2017, Introduction para. 35.

⁹³Cf. H. Wolfsteiner. In: Rauscher and Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung Band 2*, C.H. Beck 2013, § 794 para. 8.

⁹⁴M. Habersack. In: Säcker, Rixecker, Oetker and Limperg (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.

defendant in regard to the breach of contract. The burden of proof thus shifts to the defendant,⁹⁵ 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.⁹⁶

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 that would help to clarify the legal situation.

7.3 Vertical Restraints for the Online Sales Market

Attention has to be paid to vertical restraints of competition. Article 1 (1) a) of Regulation 330/2010 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.

7.3.1 Governing Law

Vertical agreements can violate § 1 GWB (prohibition of agreements restricting competition) or, in interstate cases, Article 101 (1) TFEU. If the provision is indeed violated (see Sect. 7.2.3 above), the violation can still fall under an exception to the applicable provision. In interstate cases, Regulation 330/2010 provides for a number of exceptions. In conjunction with § 2 (2) GWB, Regulation 330/2010 is also applicable solely to national cases.⁹⁷

Article 2 (1) Regulation 330/2010 points out that, as a general rule, Article 101 (1) TFEU does not apply to vertical agreements. Article 2 (2)–(4) Regulation 330/2010 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 Article 2 Regulation 330/2010 is applicable, it is then necessary to examine whether Article 3, 4 or 5 Regulation 330/2010 contains an exception to the

⁹⁵R. Schulze. In: Schulze (ed), *Bürgerliches Gesetzbuch*, 9th ed, Nomos 2017, § 280 para. 15.

⁹⁶Federal Court of Justice, Decision of 17 March 1993, Case No. XII ZR 256/91, NJW 1993, pp. 1717–1719; H.-J. Musielak. In: Musielak and Voit (eds), *Zivilprozessrecht*, 14th ed, Vahlen 2017, § 307 para. 15.

⁹⁷J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 21.

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general rule that vertical agreements are not covered by Article 101 (1) TFEU. According to Article 3 (1) Regulation 330/2010, 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. Article 4 Regulation 330/2010 covers hardcore restrictions of competition. If a vertical agreement contains hardcore restrictions, the whole agreement does not fall under the block exemption, as codified in Article 2 Regulation 330/2010 (all-or-nothing principle).⁹⁸ Article 5 Regulation 330/2010 contains exceptions for non-compete clauses. In contrast to Article 4 Regulation 330/2010, only the single contractual clause falling under Article 5 Regulation 330/2010 is not covered by Article 2 of the said Regulation.⁹⁹

Regulation 330/2010 is further specified by the European Commission's Guidelines on Vertical Restraints (hereinafter 'Guidelines on Vertical Restraints').¹⁰⁰ Although these guidelines are only binding for the European Commission itself, they are of high practical importance.¹⁰¹ German courts tend to refer to the guidelines without discussing their legal significance in solely national, as well as in interstate, cases.¹⁰²

If no exception of Regulation 330/2010 applies to the case at hand, there still is the possibility that the agreement falls under § 2 (1) GWB or under Article 101 (3) TFEU, which provides 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.¹⁰³ However, the burden of proof rests upon the plaintiff in regard to the question whether or not a hardcore restriction of competition (Article 4 Regulation 330/2010) is given.

⁹⁸J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 516.

⁹⁹K. Beckmann and U. Müller. In: Hoeren, Sieber and Holzengel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 142; J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 840.

¹⁰⁰An English version can be found here: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf. Accessed 22 May 2017.

¹⁰¹J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 19; J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 29; J. Dreyer and N. Lemberg, *Möglichkeiten und Grenzen der Beschränkung des Internetvertriebs*, BB 2012, pp. 2004–2010.

¹⁰²E.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.

¹⁰³Cf. Art. 2 Implementation Regulation; J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 101 Abs. 3 AEUV para. 209; M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

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.¹⁰⁴ Nonetheless, the exceptions of Regulation 330/2010 are relevant since agreements covered by the regulation cannot be ‘unfair’ within the meaning of § 19 (2) No. 1 GWB.¹⁰⁵

7.3.2 Restriction of Online Sales via Web Shops

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 goods¹⁰⁶: 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.

Agreements containing a *total ban of online sales* always constitute a restriction of competition and thus fall under the provisions of Article 101 (1) TFEU and § 1 GWB.¹⁰⁷ A manufacturer does not profit from the exception of Article 2 (1) Regulation 330/2010 when totally banning online sales because Article 4 lit. b) Regulation 330/2010 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 hardcore restriction within the meaning of Article 4 lit. b) Regulation 330/2010.¹⁰⁸

The criteria of the ‘re-exception’ to this hardcore restriction, as codified in Article 4 lit. b) i) Regulation 330/2010, 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

¹⁰⁴J. Nordemann. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, § 2 GWB para. 62.

¹⁰⁵J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 94.

¹⁰⁶K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznapel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 140.

¹⁰⁷CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence*, ECR 2011 I 9419; Federal Court of Justice, Decision of 4 November 2003, Case No. KZR 2/02 – *Depotkosmetik im Internet*, GRUR 2004, pp. 351–352.

¹⁰⁸Federal 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 and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 4 Vert-GVO para. 259.

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that a distributor takes advertising actions to win single consumers to purchase the advertised goods.¹⁰⁹ Normally, the consumer will, however, search for online offers of the needed goods himself so that web shops generally have to be characterised as a means of 'passive sales'.¹¹⁰

In selective distribution systems (see Sect. 7.3.3.1 below), Article 4 lit. c) Regulation 330/2010 is applicable. The total ban of online sales constitutes a restriction of passive sales to end users and is thus prohibited.¹¹¹

It is, however, possible for the seller to allow the buyer the online sale of the contract goods only on the condition that the buyer operates a stationary business at the same time.¹¹² In that case, the criteria of Article 4 lit. b) Regulation 330/2010 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 hardcore restriction of competition within the meaning of Article 4 lit. b) Regulation 330/2010.¹¹³ This also applies to cases in which dual-pricing models are realised by cash backflows.¹¹⁴ The European Commission is of the opinion that such an agreement can be covered by the exception of Article 101 (3) TFEU in cases in which online sales lead to 'substantially higher costs for the manufacturer'.¹¹⁵ The Commission exemplarily 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 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.¹¹⁶

Manufacturers could furthermore have the idea to operate a *Retail Price Maintenance System* to protect stationary businesses. Article 4 lit. a) Regulation

¹⁰⁹ Para. 51 of the Guidelines on Vertical Restraints; E. Johannsen and A. Wegner. In: Busche and Röhling (eds), *Kölner 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.

¹¹⁰ 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.

¹¹¹ 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 9419.

¹¹² 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 and 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.

¹¹³ M. Baron. In: Loewenheim, Meessen, Riesenkampff, Kersting and Meyer-Lindemann (eds), *Kartellrecht*, 3rd ed, C.H. Beck 2016, Art. 4 Vert-GVO paras. 255 ff.

¹¹⁴ Federal Cartel Office, Decision of 18 June 2010, Case No. B 5 – 100/09; K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznapel, *Handbuch Multimedia-Recht*, 38. EL, C.H. Beck 2014, part 10 para. 152.

¹¹⁵ Para. 64 of the Guidelines on Vertical Restraints.

¹¹⁶ J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 762.

330/2010 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 Article 4 lit. b) Regulation 330/2010 and is consequently not in line with the national and European antitrust law as long as the criteria of § 2 (1) GWB or Article 101 (3) TFEU are not met.¹¹⁷ 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.¹¹⁸

7.3.3 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.¹¹⁹

7.3.3.1 Definition and Legal Specialities

According to Article 1 (1) lit. e) Regulation 330/2010, 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.¹²⁰ Whereas selective distributions systems restrict intra-brand competition, inter-brand competition is strengthened.¹²¹

This justifies that not every agreement in selective distribution systems constitutes a restriction of competition within the meaning of § 1 GWB, respectively

¹¹⁷ Para. 52 lit. c) of the Guidelines on Vertical Restraints; J.-M. Schultze, S. Pautke and S. Wagener, *Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen Praxiskommentar*, 3rd ed, Verlag Recht und Wirtschaft 2011, para. 757.

¹¹⁸ S. Simon, *Die neue Kartellrechtsverordnung (EU) Nr. 330/2010 für Vertriebs- und Lieferverträge*, EWS 2010, pp. 497–503.

¹¹⁹ M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹²⁰ K. Krauß. In: Langen and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 276.

¹²¹ Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, MMR 2013, pp. 774–779.

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Article 101 (1) TFEU. According to the CJEU's case law,¹²² 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 Article 101 (1) TFEU, the same standard applies solely to national cases that are governed by § 1 GWB.¹²³

7.3.3.2 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.¹²⁴ 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.¹²⁵ The Frankfurt court argued in this regard that the CJEU's judgment 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 reseller's own website. Besides, in the court's opinion, it is not possible to satisfy high product quality standards 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 judgment that does not differentiate between total bans and restricted bans of online sales.¹²⁶ Furthermore, the judges failed to take into account the possibilities

¹²² Settled case law since ECJ, 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.

¹²³ 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 and Bunte (eds), *Kartellrecht Kommentar Band 1*, 12th ed, Luchterhand 2014, § 1 GWB para. 277; D. Zimmer. In: Immenga and Mestmäcker (eds), *Wettbewerbsrecht Band 2*, § 1 GWB para. 327.

¹²⁴ Higher Regional Court Frankfurt a. M., Decision of 22 December 2015, Case No. 11 U 84/14 (Kart) – *Funktionsrucksäcke*, NZKart 2016, pp. 84–88.

¹²⁵ CJEU, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, ECR 2011 I 9419.

¹²⁶ 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

that Amazon provides to present products. In comparison to other third-party platforms (compare next passage dealing with eBay) Amazon's shop system¹²⁷ does not substantially differ from regular online shops run by the distributor.¹²⁸

Ironically, the Higher Regional Court Frankfurt later moved forward to clarify the legal situation by referring the matter to the CJEU for preliminary ruling in another case raising similar questions.¹²⁹ 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.¹³⁰

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.¹³¹ 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 a 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 scope of the requirement 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 reseller's 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.

and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹²⁷ 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.

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

¹²⁹ 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.

¹³⁰ CJEU, case C-230/16, *Coty*.

¹³¹ Higher Regional Court Karlsruhe, Decision of 25 November 2009, Case No. 6 U 47/08, CR 2010, pp. 116–121.

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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.¹³² The court explicitly stated that this is not the case with every third-party platform.

The *Federal Cartel Office* dealt with bans on third-party platforms as well.

In the *Adidas case*, the authority prohibited the use of a contractual ban to sell Adidas products via third-party platforms in a selective distribution system on the basis of both Article 101 (1) TFEU and § 1 GWB.¹³³ The contractual ban was limited to so-called open marketplaces, being defined as platforms that allow either C2C trading or trading of used and damaged products or sale of the same good by more than one distributor. The cartel office applied the CJEU's four-prong test and came to the result that the agreement constituted a restriction of competition. In the authority's opinion, a total ban of sales via third-party platforms does not constitute an objective criterion of a qualitative nature being necessary to ensure a high quality standard. Furthermore, it pointed out that, as a less severe means, there regularly is the possibility to contractually agree upon specific rules for the (online) presentation of the contract goods. The Federal Cartel Office also found the restriction to be appreciable. The authority argued that online distribution via third-party platforms is an essential distribution channel and emphasised that third-party platforms allow small and medium-sized enterprises to enter into the online distribution market.

The *Asics case* was solved similarly by the Federal Cartel Office. The authority found that (a) a contractual agreement hindering a distributor from selling the contract goods online by making use of price search engines, as well as (b) a provision prohibiting the use of Asics' trademarks on any third-party web page and (c) a provision prohibiting the distribution via third-party platforms, violated Article 101 (1) TFEU and § 1 GWB.¹³⁴ The cartel office laid emphasis on the fact that the provisions would hinder authorised dealers from improving the traceability of their offers. It pointed out that the online distribution via third-party platforms has to be considered as an essential distribution channel. In the authority's opinion, the contractual agreements failed the CJEU's test because they were not purely objective and went beyond the necessary scope.

The *European Commission* seems to take a different view on this matter in its staff working document accompanying the final report on the e-commerce sector inquiry.¹³⁵ The Commission indicates that an agreement only constitutes a restriction of competition within the meaning of Article 101 (1) TFEU if a ban of sales via third-party platforms 'de facto amounts to a total ban of the use of the internet'.¹³⁶ However, these observations are not binding.

¹³² Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und -rucksäcke*, MMR 2013, pp. 774–779.

¹³³ Federal Cartel Office, Decision of 27 June 2014, Case No. B 3 – 137/12.

¹³⁴ Federal Cartel Office, Decision of 26 January 2016, Case No. B 2 – 98/11.

¹³⁵ http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf. Accessed 26 July 2017.

¹³⁶ Para. 502 f. Staff Working Document Final Report E-Commerce Sector Inquiry.

The latest German case law and the Federal Cartel Office's decision practice tend to classify the ban of online sales via third-party platforms as a restriction of competition. This opinion deserves to be endorsed as bans on sales via third-party platforms will at least fail the fourth prong of the CJEU's test.¹³⁷ 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 home page is likely to be lost in the World Wide Web, the offer is easily detectable on these platforms¹³⁸ and the user is able to compare different offers without leaving the platform's website. For small and medium-sized 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.¹³⁹ Consequently, bans of sales via third-party platforms negatively affect intra-brand competition. As manufacturers should be aware of the possibilities that 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.

7.3.3.3 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 Sect. 7.2.1.1 above).

General bans on sales via third-party platforms could constitute a hardcore restriction of competition within the meaning of Article 4 lit. b) or Article 4 lit. c) Regulation 330/2010. The first provision, inter alia, covers restrictions of the customers to whom a buyer may sell the contract goods. The latter provision concerns restrictions of active or passive sales to the end user by the agreement. It is highly controversial whether total bans on sales via third-party platforms fall under these provisions.

¹³⁷ M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹³⁸ M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹³⁹ M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

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The vast majority of *German courts* ruled that a general ban of sales via Internet marketplaces constitutes a hardcore restriction within the meaning of Article 4 lit. b) Regulation 330/2010 and argued that the provision would already be fulfilled if the restriction makes it significantly more difficult to reach more or other consumers.¹⁴⁰ The judges stated that this was the case because consumers enjoyed the advantages of sales via Internet marketplaces (comparability, traceability). The Regional Court Kiel explicitly referred to paras. 52 and 50 of the Guidelines on Vertical Restraints.¹⁴¹ In a similar case, the Higher Regional Court Munich ruled differently, arguing that Article 4 lit. b) Regulation 330/2010 could only be fulfilled if the restriction aims at a definable group of customers.¹⁴² In the above-mentioned request for preliminary ruling,¹⁴³ the Higher Regional Court Frankfurt moved forward to clarify the legal situation by asking the CJEU whether Article 4 lit. b) Regulation 330/2010 is fulfilled in cases of total bans on sales via third-party platforms.¹⁴⁴

In regard to Article 4 lit. c) Regulation 330/2010, the *Federal Cartel Office* indicated in its *Adidas* case that a general ban on using third-party platforms constitutes a hardcore restriction within the meaning of this provision.¹⁴⁵ In the *Asics* case, the cartel office repeated its opinion but pointed out that the legal situation is unclear.¹⁴⁶ The authority, however, argued that the ban would substantially restrict the possibilities for distributors to sell the contract goods online to end clients. Especially, small and medium-sized enterprises would be dependent on the possibility to make use of third-party platforms to enter into the online market. Equivalent measures could not have been taken in the stationary business. Furthermore, the cartel office pointed out that sales via third-party platforms do not per se cause negative effects on a product's presentation. Emphasis was laid on the advantages of the use of third-party platforms for the end client (less search effort, better comparability) and on the seller's possibility to require a specific presentation of the contract goods. The *Regional Court Frankfurt* ruled in the same way.¹⁴⁷

¹⁴⁰ Higher Regional Court Berlin, Decision of 19 September 2013, Case No. 2 U 8/09 Kart – *Schulranzen und –rucksäcke*, MMR 2013, pp. 774–779; Higher Regional Court Schleswig, Decision of 5 June 2014, Case No. 16 U Kart 154/13 – *Partnervereinbarung*, NZKart 2014, pp. 364–366; Regional Court Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 Kart – *Digitalkameras*, MMR 2014, pp. 183–184.

¹⁴¹ Regional Court Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 Kart – *Digitalkameras*, MMR 2014, pp. 183–184.

¹⁴² Higher Regional Court Munich, Decision of 2 July 2009, Case No. U (K) 4842/08 – *Partnervereinbarung*, NZKart 2014, pp. 364–366.

¹⁴³ CJEU, case C-230/16, *Coty*.

¹⁴⁴ 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.

¹⁴⁵ Federal Cartel Office, Decision of 19 August 2014, Case No. B 3 – 137/12.

¹⁴⁶ Federal Cartel Office, Decision of 26 January 2016, Case No. B 2 – 98/11.

¹⁴⁷ Regional Court Frankfurt a. M., Decision of 31 July 2014, Case No. 2-3 O 128/13 – *Logo-Klauseln*, NZKart 2015, pp. 243–244.

The *European Commission* seems to take the opposite view. It argues that bans of sales via third-party platforms only regulate how but not to whom the contract goods can be sold and consequently cannot be considered a hardcore restriction within the meaning of Article 4 lit. c) Regulation 330/2010.¹⁴⁸ The Commission, however, points out that the CJEU might rule differently in the upcoming *Coty* judgment.¹⁴⁹

Proponents of this view often refer to para. 54 of the Guidelines on Vertical Restraints. According to that provision, Article 4 Regulation 330/2010 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*. However, this cannot serve as an argument for the opinion denying a hardcore restriction within the meaning of Article 4 lit. b) or c) Regulation 330/2010. The provision's purpose is to prevent consumers from thinking that they contract with the third-party platform.¹⁵⁰ This concern is baseless in regard to 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 system¹⁵¹ 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 the new possibilities that third-party platforms provide for presenting products could not be taken into account. Furthermore, the guidelines are not binding for courts (see Sect. 7.3.1 above).

According to para. 56 of the Guidelines on Vertical Restraints, agreements restraining online sales may only impose requirements that are equivalent to the requirements in the stationary business. A similar restriction for brick-and-mortar shops is not imaginable.¹⁵²

The *Higher Regional Court Frankfurt*, being aware of the legal uncertainty, asked the CJEU whether total bans on sales via third-party platforms constitute a hardcore restriction to competition within the meaning of Article 4 lit. c) Regulation 330/2010.¹⁵³ 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.

¹⁴⁸ Para. 509 Staff Working Document Final Report E-Commerce Sector Inquiry.

¹⁴⁹ CJEU, case C-230/16, *Coty*.

¹⁵⁰ 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.

¹⁵¹ Regional Court Kiel, Decision of 8 November 2013, Case No. 14 O 44/13 Kart – *Digitalkameras*, MMR 2014, pp. 183–184.

¹⁵² M. Schweda and J.-C. Rudowicz, *Verkaufsverbote über Online-Handelsplattformen und Kartellrecht*, WRP 2013, pp. 590–600.

¹⁵³ 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.

7.3.3.

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¹⁵⁴ Cf. K.
Recht, 38

¹⁵⁵ I. Bode
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¹⁵⁸ I. Bode
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7.3.3.4 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.¹⁵⁴ 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.

7.3.4 Most-Favoured-Nation Conditions

Most-favoured-nation conditions (hereinafter '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 involves 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.¹⁵⁵

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.¹⁵⁶ 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 Article 101 (1) TFEU and § 1 GWB.¹⁵⁷

As Amazon most probably has a market share of more than 30%, the undertaking could not rely on Article 2 Regulation 1/2003 according to Article 3 (1) Regulation 1/2003. But even if that had not been the case, the MFNC would constitute a hardcore restriction of competition according to Article 4 lit. a) Regulation 1/2003.¹⁵⁸ 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 that the agreement has on other platforms,

¹⁵⁴ Cf. K. Beckmann and U. Müller. In: Hoeren, Sieber and Holznel, Handbuch Multimedia-Recht, 38. EL, C.H. Beck 2014, part 10 para. 160.

¹⁵⁵ I. Bodenstein, "Marketplace"-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹⁵⁶ Regional Court Munich I, Decision of 22 April 2010, Case No. 37 O 7636/10 (not published).

¹⁵⁷ I. Bodenstein, "Marketplace"-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹⁵⁸ I. Bodenstein, "Marketplace"-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

one recognises that indeed Amazon dictates a minimum price for these offers (higher than the price on Amazon).¹⁵⁹ In case of a dominant market share (see Sect. 7.2.1.2) 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).¹⁶⁰ The court ruled that the MFNC that prohibited the hotelier to make offers on other platforms for a lower price violated Article 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 portal's market share was above 30%, the violation could not be justified by Regulation 330/2010 according to its Article 3 (1). It furthermore denied the exception of Article 101 (3) TFEU, respectively of § 2 (1) GWB.

7.4 Conclusion

In an overall assessment, German and EU 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 EU 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 into 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

¹⁵⁹ I. Bodenstern, "Marketplace"-Händler zur Preisparität verpflichtet? – Amazon-AGB auf dem kartellrechtlichen Prüfstand, GRUR-Prax 2010, pp. 260–263.

¹⁶⁰ 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.

of online sales via third-party platforms as the relevant case law is inconsistent. Following the new lines lately drawn by German courts and the Federal Cartel Office, total bans of sales via third-party platforms are not in line with antitrust law. Qualitative requirements for the online presentation of goods have to be examined on a case-by-case basis.

(1) 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.