Session 4: Market Power: Natural Monopoly and Standards Businesses

In our last session, we discussed the antitrust/competition policy approach to market power. In this session, we will look at situations where antitrust proper may not work very well given that the underlying production technology may give rise to just a few producers or even one. This is the case of natural monopoly and is historically the domain of regulated industries laws, such as those operating in railroads, telecommunications, electricity and natural gas. We continue to have statutes and regulations in those areas, but over the last twenty years, standard setting and platforms have become an important part of the regulatory conversation. Our reading will start with DVD patent pools and then we will look at the issue of network neutrality. The third reading is the press release issued on July 17, 2019 by the European Commission in which it announced a new investigation of Amazon. Finally, the fourth reading is the English summary issued by the German Cartel Office in February 2019 on its investigation into Facebook.

DVD Joint Licensing of Patents Request Letter

July 29, 1998

Honorable Joel I. Klein, Esq.,
Assistant Attorney General,
Antitrust Division,
United States Department of Justice,
10th Street and Constitution Avenue, N.W.,
Washington, D.C. 20530.

Re: Request for Business Review Letter Regarding the Licensing of Patents Essential to DVD-Video and DVD-ROM

Dear Mr. Klein:

On behalf of Koninklijke Philips Electronics, N.V. (“Philips”), Sony Corporation of Japan (“Sony”), and Pioneer Electronic Corporation of Japan (“Pioneer”) (and their affiliates which are involved in the patent licensing program described below) we submit this request for a Business Review pursuant to 28 C.F.R. § 50.6 regarding the proposed arrangement under which certain patents essential to the manufacture and use of DVD-Video and DVD-ROM will be licensed on reasonable and non-discriminating terms (the “Proposed Licensing Program”).

DVD (or Digital Versatile Discs) refers to a high density CD-sized optical disc in which signals are encoded and stored in digital form and are then read and reproduced by players using an optical read out beam. Relying on basic CD technology, the DVD discs and players allow for an increase of approximately sixty times the storage capacity of a typical CD or CD-ROM. DVD-Video and DVD-ROM are two formats relating to high density optical discs which have been described by Philips, Sony, Pioneer and several other companies in the DVD-Specification for Read Only Disc version 1.0 dated August 1996 and in several updates thereto (a copy of the specification is set forth in Exhibit A hereto).
A single DVD format for video and ROM was defined in an open process by participating companies over the course of several years at the request of various industries—particularly the computer industry—which asserted that multiple DVD formats would delay introduction of this new and beneficial product, increase costs, and much like the incompatible BETA and VHS formats, result in losses to consumers who purchased products based on a format which quickly became obsolete. In defining the DVD-Video and DVD-ROM formats, input was solicited and received from a variety of industries and an even wider variety of companies throughout the world.

As the format was developed and refined, it became clear that numerous independent companies had been granted patents which were relevant to DVD-Video and DVD-ROM. The three companies submitting this request actively sought to join the licensing of their patents with the patents of other companies which also claimed to have patents which are essential to DVD-Video and DVD-ROM. To date, those efforts have not resulted in any other companies joining the Proposed Licensing Program. Philips, Sony and Pioneer, however, remain willing to include others having essential patents in the licensing program described below.

The companies submitting this request firmly believe that, in the near future, DVD products will be widely marketed by a wide variety of companies. We are also convinced that, once these products are manufactured and distributed in volume, there will be great consumer demand for them. We anticipate that the producers and sellers of DVD discs and players will largely be the companies that currently manufacture and sell CDs and the equipment that plays CDs and CD ROMs. Thus, prospective licensees include manufacturers of consumer audio equipment and computer disc drives. Typically, licensees to manufacture DVD discs will be replicators, as is the case with CDs. In sum, the DVD licenses will be offered to the same classes of sophisticated licensees as are CD licenses, and there is every reason to expect that the transfer of this valuable DVD technology will have the same beneficial effects upon the relevant industries that CD licenses had upon the recorded music industry 15 years ago.

In one respect, licensors of DVD technology face risks and uncertainties that were not faced 15 years ago by the creators of CD technology. During the past year, several different formats have been announced that will compete with various applications of DVD for the favor of consumers. For example, Circuit City and others have developed Digital Video Express (DIVX), a pay-per-play system that allows consumers who have purchased a DIVX-compliant player to purchase a disc at a lower price and to play that disc for a limited period of time without having to return the disc when finished. The disc may later be “re-activated” for additional plays upon payment of additional fees. Various companies have announced that they will offer DIVX discs, including Twentieth Century Fox, the Walt Disney Company, Paramount Pictures, Universal Studios and Dream Works. It is our understanding that DIVX discs will not play on non-DIVX DVD players. In addition, NEC, one of Japan’s largest electronics manufacturers, has announced its intention to introduce Multimedia Video File (MMDF), an optical disc format which is expected to compete directly with certain applications of DVD technology. Other new announced products include TeraStor’s Near Field Recording (NFR) technology and Advanced Storage Magneto-Optical (ASMO). In short, this is an area in which several well-financed suppliers
are prepared to compete aggressively with DVD products. Obviously, there also will be competition among those selling DVD products.

Offering a patent license for all essential patents of the three companies under the Proposed Licensing Program will provide several pro-competitive benefits, including (1) reducing the uncertainty of the availability of patent licenses so that those who require a license to manufacture or use a DVD-Video or DVD-ROM product are aware that a license from the three companies easily can be obtained; (2) reducing the royalties that likely would be payable if the three companies licensed their essential patents on their own; (3) reducing the cost for each prospective licensee of determining on its own the identities of owners of essential patents and the entities from which licenses which must be obtained; (4) reducing other transaction costs of licensees having to negotiate and execute separate licenses; (5) reducing the transaction costs of essential patent holders offering separate licenses thereby allowing for a reduction in the price of the license; and (6) offering the same royalty rate and other conditions to all interested licensees so that no entity manufacturing or selling a DVD-Video or DVD-ROM product will have a price advantage over any other such entity as a result of entering into a license for the essential patents of Philips, Sony and Pioneer.

The Proposed Licensing Program will be structured to avoid any countervailing aspects that may be deemed anticompetitive. For example, each patent holder will retain the right to license its patents outside the Proposed Licensing Program under whatever terms and conditions it reaches with any prospective licensee, and each prospective licensee will be informed in writing of its option to negotiate such an individual license under reasonable terms and conditions. The Philips personnel who are responsible for the Proposed Licensing Program will play no role in the marketing of DVD products. An independent expert in the art has been retained to insure that the portfolio of patents that will be licensed under the Program includes only those patents which are essential to DVD-Video and DVD-ROM products. Although Philips, Sony and Pioneer have not been successful in having other companies join their licensing program, they remain willing to include any others having essential patents who wish to join. There will be no royalty payable by the licensee unless a licensed patent would be infringed but for the license, information which the licensee may be required to disclose to monitor infringement and royalty payments will not be disclosed to any of the licensors, but only to a third party expert retained by the licensors, patents included in the licenses will be specifically identified in appendices to the license, and Philips, Sony and Pioneer will commit to licensing to any licensee any essential patent rights they may acquire subsequent to the date specified in the license. Set forth below is a fuller description of the proposed licensing terms and the agreements among the licensors.

The Proposed Patent License
Two licenses (Appended hereto as Exhibits B and C) will be offered, both in substantially the same form. One is for DVD players, the other for DVD discs. A three page “Agreement” sets forth a few basic terms of the license and also specifically incorporates the “Conditions” of the license which are appended to the Agreement.
On the first page of the Agreement, it is specifically noted that Philips, Sony and Pioneer are each willing to license their respective patent rights for optical disc or player manufacturing whether within or outside the standard DVD specifications on reasonable terms and conditions. Thus, any prospective licensee who is dissatisfied with the terms of the Proposed Licensing Program is assured of this alternative.

Article 2 of the Conditions sets forth the terms of the license grant, and provides for a license under Licensed Patents which are defined in Article 1.07 as all patent rights pertinent to DVD discs or players which Philips has acquired the right to license, which have or are entitled to a priority date prior to January 1, 1997, and which are essential to DVD discs or players. Article 1.07 goes on to define as “essential” those patents which are necessary as a practical matter for compliance with the DVD-Video or DVD-ROM specifications. The license, therefore, includes not only all patents technically necessary to manufacture a product to the standard specifications, but also those which a typical licensee is likely to require. For example, it may be theoretically possible to design around a particular patent at significant additional cost (and without additional benefit), but few, if any, licensees who pay the standard royalty rate for other essential patents would want such patent excluded from the license. Indeed, it is fair to say that most, if not all, licensees would want such patents included.

Article 2.07 describes the method by which patents are selected for the portfolio license. The prospective licensee is specifically informed that Philips has appointed an independent patent expert to evaluate the patents of the three licensors for “essentiality” and that the portfolio included in the license may be amended from time to time based on the results of that evaluation.1

In Article 2.03, each licensor agrees to grant a license to each licensee under any essential patent which Philips, Sony or Pioneer acquire the right to license in the future. Thus, to the extent any of the licensors are issued essential patents in the future or other companies join the proposed licensing program, all licensees are guaranteed a license under any such essential patent.

Articles 2.05 and 2.06 set forth the terms of the licensees’ grant of patent rights. For the identical term of the license granted by Philips, Sony and Pioneer, the licensee agrees to grant to the licensors and other licensees (who also agree to the terms of the grant back) a royalty bearing license on essential patents. Thus, the scope of the grant back is virtually identical to the scope of the license itself. The grant back would not create any disincentive to innovate as it specifically allows the licensee to charge a royalty for its grant of a license and would only prevent a particular patent holder from deciding to use its after-acquired patent position to completely block others from competing in a business in which they already have invested substantial resources.

Article 4 sets forth the royalty payments to be made by licensees. The license provides for a $10,000 payment upon execution of the license ($5,000 of which may be credited to

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1 Philips has appointed Kenneth Rubenstein, a member of Proskauer Rose LLP of New York, to determine which patents are essential and should be included in the license. Dr. Rubenstein received his Ph.D in plasma physics from the Massachusetts Institute of Technology in 1975 and his J.D. cum laude from New York Law School in 1982. Dr. Rubenstein previously performed a similar function for the licensing of patents essential to MPEG-2 technology and he continues this work.
royalty payments) and a running royalty of $.05 per disc or 3.5% of the net selling price of a player, with a minimum player payment of $7.00 until January 1, 2000 and a minimum of $5.00 thereafter.2

Article 4 makes plain that no royalties are due unless “a Licensed Patent is utilized” and, therefore, there are no royalty paying obligations regardless of whether the 10-year license is in effect if the licensee has adopted new or different technology that does not utilize any of the patents in the portfolio.

Articles 4.09 and 4.10 provide that licensees must maintain and furnish certain information relevant to issues of infringement and appropriate royalty payments, but specify that such information shall be provided to independent experts rather than to any licensor itself.

The licenses provide for “most favorable nations” terms under which each licensee is assured of receiving the most favorable royalty rate granted any other portfolio licensee under the conditions specified in Article 5. Thus, no similarly situated licensee is given a competitive advantage by the license over any other such licensee.

Article 10.05 gives each licensor the right to withdraw its own patents from the portfolio license with respect to any licensee which both (1) brings a lawsuit against the licensor for infringement of an essential DVD patent and (2) refuses to license such patents to the licensor on fair and reasonable terms. This provision is necessary to prevent portfolio licensees from taking unreasonable and unfair advantage of the fact that each portfolio licensor already has agreed to license its patent on the open, fair and non-discriminatory terms provided in the portfolio license at royalty rates that are likely considerably lower than what would be payable if patents were licensed individually outside the portfolio license.

Without the provisions of Article 10.05, a portfolio licensee could, while enjoying the considerable benefits of the portfolio license, attempt to extract unreasonable terms for licensing its patents as a result of already being licensed under the portfolio license. Article 10.05 merely “evens the playing field,” returns the parties to the bargaining position each would have been in but for the portfolio license, and creates no competitive issues. This is particularly so in light of each portfolio licensors’ undertaking to license its patent outside the portfolio license. Thus, a licensee who subjects itself to the provision of Article 10.05 by filing suit and refusing to grant a license on fair and reasonable terms is not denied the right to a license for essential patents, just to a license for essential patents on the favorable terms of the portfolio license.

Finally, Article 11.04 provides that any disputes involving the license shall be submitted to arbitration in New York and resolved under New York law. This provides for a certain and cost effective method to resolve disputes.

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2 Widespread public reports have suggested that the typical disc will retail for approximately $20-25. The per disc royalty thus amounts to approximately .22% of the retail price of discs, although the royalty typically will be payable by the disc replicator.
Agreement Among Licensors

The agreements among Philips, Sony and Pioneer relating to the Proposed Licensing Program are set forth in two bilateral Agreements and Amendment No. 1 thereto, one between Sony and Philips and one identical agreement between Pioneer and Philips. The Agreements and Amendments are appended hereto as Exhibit D.

The Agreements basically set forth the terms under which Philips shall license the three companies’ essential patents and set out many of the same terms which are incorporated in the licenses itself and are discussed above. The Agreements make plain that the Proposed Licensing Program does not in any way impede the companies’ ability to license their patents on their own under any conditions they may negotiate.

Article 2.01 of the Agreement provides that Philips shall offer the portfolio license to “all interested third parties.” Article 5 of Amendment No. 1 further specifies that Philips shall grant licenses “to all interested parties and shall not discriminate against or among potential licensees” although Philips is entitled to seek financial guarantees on royalty payments when required. The Agreements also set out various terms for the collection and distribution of royalties. Although Article 4.03 provides that each party may consult with the others in the event of a good faith belief that an act of infringement has occurred, Article 4.04 provides that each party retains the right to enforce its patents as it sees fit.

Article 7 of Amendment No. 1 sets forth the details of the procedure by which Philips shall retain an independent expert to assure that all patents in the portfolio are essential, and provides the procedure under which patents may be added to the Proposed Licensing Program.

Conclusion

It is anticipated that DVD-Video and DVD-ROM applications will gain widespread acceptance among consumers in the United States and throughout the world. Intellectual property rights granted by the United States and other sovereign nations to numerous unrelated entities could seriously delay if not block the introduction of this new and significant technology. The Proposed Licensing Program described above eliminates one potential impediment to the implementation of DVD-Video and DVD-ROM by allowing all essential patents of Philips, Sony and Pioneer to be offered in a single, non-discriminatory, fair and cost effective licensing program. The Proposed Licensing Program has been carefully crafted in an effort to avoid any competition concerns which may arise from the combining of patents belonging to independent entities within a single license. We respectfully submit that the Proposed Licensing Program has successfully addressed any competition concerns, and that the pro-competitive aspects of the program far outweigh any potential competition issues which may remain.

We will be available at your convenience to provide any further information you may require. We very much appreciate the Division’s attention to this matter.

Respectfully,

Garrard R. Beeney

for Koninklijke Philips Electronics, N.V.; Sony Corporation of Japan and Pioneer Electronic Corporation of Japan
DVD Business Review Letter Response
December 16, 1998

VIA FAX
Garrard R. Beeney, Esq.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004-2498

Dear Mr. Beeney:
This letter is in response to your request on behalf of Koninklijke Philips Electronics, N.V. (“Philips”), Sony Corporation of Japan (“Sony”) and Pioneer Electronic Corporation of Japan (“Pioneer”) for the issuance of a business review letter pursuant to the Department of Justice’s Business Review Procedure, 28 C.F.R. ¶ 50.6. You have requested a statement of the Department of Justice’s antitrust enforcement intentions with respect to a proposed arrangement pursuant to which Philips will assemble and offer a package license under the patents of Philips, Sony and Pioneer (collectively, the “Licensors”) that are “essential,” as defined below, to manufacturing Digital Versatile Discs (DVDs) and players in compliance with the DVD-ROM and DVD-Video formats, and will distribute royalty income among the Licensors.

I. The DVD-ROM and DVD-Video Formats
The Standard Specifications for the DVD-ROM and DVD-Video formats describe the physical and technical parameters for DVDs for read-only-memory and video applications, respectively, and “rules, conditions and mechanisms” for player units for the two formats. In either format, the DVD offers storage capacity more than seven times that of a compact disc; a single-layer, single-sided DVD, for example, can store 4.7 billion bytes (4.38 GB) of information including audio, video, text, and data. Employing compression technology, a DVD-Video disc can hold a 135-minute feature film on a single side.

The Licensors, along with a number of other producers of consumer electronics hardware, software, or both, established the Standard Specifications. These Standard Specifications appear to implicate the intellectual property rights of numerous firms.

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1 DVD Specifications for Read-Only Disc (the “Standard Specifications”), Part 3: Video Specifications, Version 1.1 (December 1997), § 3.3.1. You have attached the Standard Specifications as Exhibit A to your letter. DVD-Video, which is described in Part 3 of the Standard Specifications, appears to be a subunit of the DVD-ROM format. The DVD-Video specifications indicate that DVD-Video discs shall comply with Parts 1 and 2 of the Standard Specifications, which describe the disc’s physical and file-system characteristics, respectively. Id., § 1.1.

2 In addition to the Licensors, the publishers of the DVD-ROM Specifications are: Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd.; Mitsubishi Electric Corporation; Thomson Multimedia; Time Warner Inc.; Toshiba Corp.; and Victor Company of Japan, Ltd. While your letter includes information concerning the process by which these formats were established, you have not requested, and this letter does not offer, an opinion on any competitive issues presented by the development of these formats or any other DVD-related format.
II. The Proposed Arrangement
The proposed arrangement is embodied in two pairs of licenses: two separate but substan-
tially identical licenses to Philips from Sony and Pioneer (the “DVD-Video and DVD-
ROM Agreement”); and a pair of standard licenses from Philips to DVD makers (the
“Disc License”) and player manufacturers (the “Player License”). Through these two sets
of licenses, Philips aggregates the Licensors’ patents and will disseminate them to users of
the DVD-ROM and DVD-Video formats.

A. The patents to be licensed
Under the proposed arrangement, Philips is licensing from the other Licensors those pa-
tents that: (i) they owned or controlled as of specific dates in 1997; (ii) are entitled to a
priority date before December 31, 1996; and (iii) are “essential,” which is defined as “nec-
essary (as a practical matter) for compliance with the DVD Video or DVD-ROM Standard
Specifications.” In turn, Philips will sublicense those patents, along with its own patents
that meet the same criteria, in the Portfolio Licenses for use in making discs or players,
respectively, that comply with either of those formats.

Initially, each Licensor has designated its “essential” patents for inclusion in the Portfolio
Licenses; there are 115 patents in all for the manufacture of DVD players, and 95 for the
manufacture of the discs themselves. However, the Licensors have retained a patent expert
to review the designated United States patents and make an independent determination as
to their “essentiality.” His determination, reflecting his “best independent judgment,” is to
be based on information he obtains from the Licensors, others in the industry, and the
advice of technical experts he may retain. The review, which is already underway, will not
entail an examination of validity. Should the expert determine that a patent initially desig-
nated as “essential” is not, Philips will exclude it from the Portfolio Licenses. However,
licensees that have already taken the Disc or Player License shall have the option to retain
their licenses to the newly excluded patent.

While one of the license documents indicates that the patent expert is to be “appointed”
by Philips, the letters that the Licensors will send to the expert state that all of them are
retaining him. Further, the letters state that the expert’s conclusions will have no bearing
on either his compensation or any Licensor’s future retention of him or his law firm.

As noted above, the DVD-Video and DVD-ROM Agreements ensure only that the Li-
censors’ “essential” patents with filing dates before December 31, 1996, and which were
owned or controlled by the Licensors as of November 24, 1997 (or, in Pioneer’s case,
October 1, 1997) will be part of the Portfolio Licenses. You have stated to us that, as of

\[5\] You have attached the Player License as Exhibit B to your letter, and the Disc License as Exhibit C. I will refer to the Disc and Player Licenses collectively as the “Portfolio Licenses.”

\[7\] DVD-Video and DVD-ROM Agreement, Arts. 1.06-1.07. You have confirmed that the term “priority date” means, for any given patent in the Portfolio License, the first date on which the application for that patent, or for a patent on the same invention in another country, was filed. See 35 U.S.C. § 119.

\[8\] We understand this definition to encompass patents which are technically essential—i.e., inevitably infringed by compliance with the specifications—and those for which existing alternatives are economically unfeasible. As discussed below, a less concrete definition of the term “as a practical matter” could give rise to difficult competitive issues. Neither Sony’s and Pioneer’s licenses to Philips nor the Portfolio Licenses convey rights to patents that are “essential” by virtue of the DVD formats’ incorporation of MPEG-2 video compression technology.
December 1, 1998, no Licensor has indicated that it owns or controls an “essential” patent that falls outside these bounds. Should such a patent emerge, however, the DVD-Vide o and DVD-ROM Agreements commit the Licensors to licensing it, “at fair and reasonable conditions,” to any licensee under the Portfolio Licenses, either through Philips or individually.

B. The joint licensing arrangement

1. The licenses from Sony and Pioneer to Philips

Sony and Pioneer have granted Philips nonexclusive, sublicensable licenses on their “essential” patents to enable Philips to grant licenses “to all interested parties . . . to manufacture, have made, have manufactured components of, use and sell or otherwise dispose of” discs and players that conform to the Standard Specifications. The licenses obligate Philips to grant licenses on the “essential” patents for use in conformity with the specifications nondiscriminatorially to all interested third-parties. All three Licensors, however, remain free to license their “essential” patents independently of the Portfolio Licenses, including for uses outside the DVD-ROM and DVD-Video formats.

The licenses from Sony and Pioneer also establish the Portfolio Licenses’ royalty rates. The Player License per-unit royalty is to be 3.5% of the net selling price for each player sold, subject to a minimum fee of $7 per unit, which drops to $5 as of January 1, 2000. The Disc License royalty is to be $.042 per disc sold. In addition, each Portfolio License requires a $10,000 initial payment, half of which is creditable against the per-unit royalties. Philips’ licenses from Sony and Pioneer separately set the latter two firms’ share of these royalties, again on a per-unit basis. The allocation of royalties among the Licensors is not a function of the number of patents contributed to the pool. To ensure the receipt of their agreed royalties, Sony’s and Pioneer’s independent auditors may audit Philips’ books and records up to once a year.

While each of the Licensors retains sole discretion to pursue infringers, the licenses from Sony and Pioneer require each Licensor to notify the others before initiating any enforcement action and provide for sharing of joint infringement litigation expenses.

2. The Portfolio Licenses

As authorized by its licenses from Sony and Pioneer, Philips’ licenses to disc and player manufacturers will be for use in conformity with the Standard Specifications. However, the Portfolio Licenses will notify potential licensees that all the Licensors are “willing to license their respective patent rights for optical disc manufacturing, whether within or outside of the DVD-Video and DVD-ROM Standard Specifications . . . on reasonable terms and conditions.” They will warn potential licensees that licenses from other intellectual property owners may be necessary for compliance with the formats. A “Most Favourable Conditions” clause will entitle the licensee to the benefit of any lower royalty rate Philips grants to another licensee under “otherwise similar and substantially the same conditions.”

Each Portfolio License will have a term of ten years from the license’s effective date, subject to termination for a limited number of reasons. To verify royalties owed and paid,

37 Philips or its licensee may terminate the license on 30 days’ notice for the other party’s default. Philips also
Philips may appoint an independent accountant to audit its licensees’ books and records up to once a year and may require licensees to provide the accountant with additional information for that purpose. The Portfolio Licenses also require licensees to provide, on request, information for review by a patent expert to determine whether a particular product infringes any of the licensed patents and, thus, triggers royalty obligations. The licensees’ obligation to provide information to the independent accountant and patent expert extends only to the information necessary to determine the amount of royalties owed or whether they are owed at all.

One of the grounds on which Philips may terminate a license relates to the licensees’ grantback obligation: Portfolio licensees must grant the Licensors and fellow licensees a license, “on reasonable, non-discriminatory conditions comparable to those set forth herein,” on any patents they own or control that are “essential” to either disc or player manufacture in conformity with the Standard Specifications. As noted above, this obligation is reinforced by Philips’ right to terminate without notice the license of any licensee that, after having refused to grant a Licensor a license on an “essential” patent it owns, sues that Licensor for infringement of that patent.

III. Analysis
As with any aggregation of patent rights for the purpose of joint package licensing, commonly known as a patent pool, an antitrust analysis of this proposed licensing program must examine both the pool’s expected competitive benefits and its potential competitive hazards. In particular, one expects that a patent pool “may provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation.” At the same time, “some patent pools can restrict competition, whether among intellectual property rights within the pool or downstream products incorporating the pooled patents or in innovation among parties to the pool.” Accordingly, the following analysis addresses (i) whether the proposed licensing program is likely to integrate complementary patent rights and (ii), if so, whether the resulting competitive benefits are likely to be outweighed by competitive harm posed by other aspects of the program.

A fundamental premise of the following analysis is that the patents to be licensed are valid. This is a legitimate presumption with any patent. On the other hand, persuasive evidence to the contrary would undermine virtually any licensing arrangement: “A licensing scheme premised on invalid or expired intellectual property rights will not withstand antitrust scrutiny.” Unaccompanied by legitimate intellectual property rights, restrictions on licensors or licensees are highly likely to be anticompetitive. None of the information

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that you have provided us warrants abandonment of the presumption of validity as to any of the patents to be licensed. Should the Department subsequently receive information that undercuts this presumption, its enforcement intentions as to the proposed arrangement might be very different.

A. Integration of Complementary Patent Rights

If the Licensors owned patent rights that could be licensed and used in competition with each other, they might have an economic incentive to utilize a patent pool to eliminate competition among them. A pool that served that purpose “would raise serious competitive concerns.”49 In combining such substitute patents, the pool could serve as a price-fixing mechanism, ultimately raising the price of products and services that utilize the pooled patents. If, on the other hand, the pool were to bring together complementary patent rights, it could be “an efficient and procompetitive method of disseminating those rights to would-be users.”50 By reducing what would otherwise be three licensing transactions to one, the pool would reduce transactions costs for Licensors and licensees alike. By ensuring that each Licensor’s patents will not be blocked by those of the other two, the pool would enhance the value of all three Licensors’ patents.

One way to ensure that the proposed pool will integrate only complementary patent rights is to limit the pool to patents that are essential to compliance with the Standard Specifications. Essential patents by definition have no substitutes; one needs licenses to each of them in order to comply with the standard. At the same time, they are complementary to each other; a license to one essential patent is more valuable if the licensee also has licenses to use other essential patents.

A broader inclusion criterion than essentiality carries with it two anticompetitive risks, both arising from the possibility that there may be substitutes for patents included in the pool. Consider, for example, a situation where there are several patented methods for placing DVD-ROMs into packaging—each a useful complement to DVD-ROM manufacturing technology, but not essential to the standard. A DVD-ROM maker needs to license only one of them; they are substitutes for each other. Inclusion in the pool of two or more of those patents would risk turning the pool into a price-fixing mechanism. Inclusion in the pool of one of the patents, which the pool would convey along with the essential patents, could in certain cases unreasonably foreclose the competing patents from use by manufacturers; because the manufacturers would obtain a license to the one patent with the pool, they might choose not to license any of the competing patents, even if they otherwise would regard the competitive patents as superior. Limiting a pool to essential patents ensures that neither of these concerns will arise; rivalry is foreclosed neither among patents within the pool nor between patents in the pool and patents outside it.

If our understanding of the criterion “necessary (as a practical matter)” is correct, then it appears that the Licensors intend to license through the pool only complementary patents for which there are no substitutes for the purposes of compliance with the Standard Specifications. Some uncertainty arises from this definition’s imprecision: Unlike the

50 Id.
MPEG-2 pool, which required actual technical essentiality for eligibility, this pool introduces the concept of necessity “as a practical matter.” On its face, this latter standard is inherently more susceptible to subjective interpretation. An excessively liberal interpretation of it could lead to the inclusion of patent rights for which there were viable substitutes. In that event, the pool could injure competition by foreclosing such substitutes.

Based on what you have told us, however, the definition of “necessary (as a practical matter)” that the expert will be employing is sufficiently clear and demanding that the portfolio is unlikely to contain patents for which there are economically viable substitutes. Thus, so long as the patent expert applies this criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine complementary patent rights while not limiting competition between them and other patent rights for purposes of the licensed applications.

The structure of this pool, however, creates some concern about the expert’s ability to apply this criterion entirely independent of the Licensors. While you have stated that the patent expert will be “independent” and demonstrated that his independence is a term of the licenses from Sony and Pioneer to Philips, the expert is being retained directly by the Licensors, who have an incentive to combine in the pool any of their competing DVD-related patents and to foreclose others’ competing patents. Without more, there would be justifiable skepticism that this structure would ensure a disinterested review of the “essentiality” of the patent rights put forward.

However, in furtherance of the provision for independence in the licenses from Sony and Pioneer to Philips, each Licensor has assured the U.S. expert in writing that the expert’s compensation and future retention will not be affected by his determinations as to essentiality; the same assurance will go to the Japanese patent expert as well. These assurances, of course, are no guarantee. Their continuing fulfillment is necessary to the expert’s independence and, consequently, to the likelihood that the portfolio will contain only complementary patents without foreclosing competition. Whether they will be sufficient as well as necessary remains to be seen.

Although the patent-expert mechanism is flawed, the Department is willing to base its present enforcement intentions on your representation that the combination of the Licensors’ contractual commitment to independence and their written assurances to the expert will insulate him from their interests sufficiently to ensure that the Portfolio Licenses will contain only those patent rights of the Licensors that all DVD-Video and DVD-ROM licensees will need. In that case, the proposed arrangement would serve the procompetitive purpose of combining complementary technologies into a package that will be likely to lower costs to makers of DVD-Video and DVD-ROM discs and players. If, nevertheless, these assurances prove insufficient either to ensure the expert’s ability to function independently and objectively or to ensure that the pool will contain only essential patents, the

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56 Because the royalty allocation is unaffected by each Licensor’s share of the patents in the Portfolio License, the Licensors have no financial incentive to exclude each other’s non-essential patents. In the MPEG-2 pool, in contrast, the joint licensor, which retained the expert, was an entity separate from the patent owners with no intellectual property of its own at stake. Moreover, the pool members themselves had a strong incentive to exclude non-essential patents, since their share of the royalties was a direct function of the number of essential patents they held.
Department’s enforcement intentions as to the proposed arrangement might be very different.

B. Foreclosure of Competition in Related Markets
As mentioned above, the Licensors are competitors in markets vertically related to the licensed technology—not only in “downstream” markets such as the manufacture of DVD discs and players, but also in the creation of content, such as feature-length films, that is incorporated in DVD discs. Consequently, the question arises whether this pool is likely to impede competition in any of those markets, not only between any given Licensor and licensees, but also among the Licensors themselves.

Based upon what you have told us, the proposed licensing program does not appear to have any such anticompetitive potential in the markets in which the licensed technology will be used. First, the agreed royalty is sufficiently small relative to the total costs of manufacture that it is unlikely to enable collusion among sellers of DVD players or discs. Second, the proposed program should enhance rather than limit access to the Licensors’ “essential” patents. Because Philips must license on a non-discriminatory basis to all interested parties, it cannot impose disadvantageous terms on competitors, let alone refuse to license them altogether. Should the agreed pool royalty prove economically unrealistic, each Licensor’s ability to grant licenses on its own to users of the Standard Specifications provides a backstop. Third, the extent of Philips’ ability to audit licensees, through independent accountants, is unlikely to afford it anticompetitive access to competitively sensitive proprietary information, such as cost data. Sony’s and Pioneer’s similarly limited right to an annual audit of Philips’ conduct as joint licensor should not create any greater likelihood of collusion. Nor does there seem to be any facet of the proposed program that would facilitate collusion or dampen competition among the Licensors in the creation of content for software.

C. Effect on Innovation
Because only already-filed “essential” patents and patent applications are required for inclusion in the Portfolio, the program does not discourage the Licensors from continuing research and development that may relate to the standard. Further, the Licensors are free to license their “essential” patents for purposes that compete with the DVD-Video and DVD-ROM standards.

Ordinarily, patent license grantback provisions might be expected to raise the question whether, by reducing licensees’ incentives to innovate, they threaten competitive harm that outweighs their procompetitive effects. Here, however, the proposed grantback provisions are so narrow that they are unlikely to raise significant issues. Their scope is commensurate with that of the Licenses: They cover only “essential” patents. A licensee’s non-“essential” improvements remain its own and may be licensed or not, as the licensee wishes. Thus, the grantback obligation seems unlikely to apply to further innovation within the DVD-ROM and DVD-Video formats. Instead, it is far more likely to force cross-licenses, on “reasonable, non-discriminatory conditions comparable to those” of the Portfolio Licenses, from owners of already extant “essential” patents. In requiring licensees to offer the Licensors and fellow licensees access, on reasonable terms, to whatever “essential”
patents they own or control, the Portfolio Licenses ensure that no licensee may take advantage of the benefits of the pool while exploiting its own market power over users of the Standard Specifications. The grantback provision is likely simply to bring other “essential” patents into the Portfolio, thereby limiting holdouts’ ability to exact a supracompetitive toll from Portfolio licensees and further lowering licensees’ costs in assembling the patent rights essential to their compliance with the Standard Specifications. While easing, though not altogether eliminating, the holdout problem, the grantback should not create any disincentive among licensees to innovate.

In the current circumstances, the proposed ten-year term of the license does not pose significant concerns. The Portfolio Licenses authorize only a limited field of use for the licensed technology—the manufacture and sale of products that comply with the Standard Specifications; they do not limit licensees’ other options. Licensees may seek presently unknown methods of complying with these standards, or they may support altogether different product standards. The absence of any renewal clause puts potential licensees on notice that they will be facing a new market-based negotiation for access to the technology on the expiration of the Portfolio Licenses ten years hence. The uncertainty of market conditions at that time makes it impossible to speculate on the degree of power, if any, the Licensors will hold over any future technology licensing market.

IV. Conclusion
Based on the information and assurances that you have provided us, it appears that the proposed arrangement is likely to combine complementary patent rights, thereby lowering the costs of manufacturers that need access to them in order to produce discs and players in conformity with the DVD-Video and DVD-ROM formats. Your assurances and information indicate that the proposed arrangement is not likely to impede competition, either in the licensing or development of technology for use in making DVDs, players, or products that conform to alternative formats, or in the markets in which DVDs and players compete.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the conduct you have described. This letter, however, expresses the Department’s current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department’s Business Review Procedure, 28 C.F.R. ¶ 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/ s / Joel I. Klein
For Immediate Release

FCC ACTS TO RESTORE INTERNET FREEDOM

Reverses Title II Framework, Increases Transparency to Protect Consumers, Spur Investment, Innovation, and Competition

WASHINGTON, December 14, 2017—The Federal Communications Commission today voted to restore the longstanding, bipartisan light-touch regulatory framework that has fostered rapid Internet growth, openness, and freedom for nearly 20 years.

Following detailed legal and economic analysis, as well as extensive examination of comments from consumers and stakeholders, the Commission reversed the FCC’s 2015 heavy-handed utility-style regulation of broadband Internet access service, which imposed substantial costs on the entire Internet ecosystem.

In place of that heavy-handed framework, the FCC is returning to the traditional light-touch framework that was in place until 2015. Moreover, the FCC today also adopted robust transparency requirements that will empower consumers as well as facilitate effective government oversight of broadband providers’ conduct. In particular, the FCC’s action today has restored the jurisdiction of the Federal Trade Commission to act when broadband providers engage in anticompetitive, unfair, or deceptive acts or practices.

The framework adopted by the Commission today will protect consumers at far less cost to investment than the prior rigid and wide-ranging utility rules. And restoring a favorable climate for network investment is key to closing the digital divide, spurring competition and innovation that benefits consumers. The Declaratory Ruling, Report and Order, and Order adopted by the Commission takes the following steps to achieve these goals:

Declaratory Ruling

- Restores the classification of broadband Internet access service as an “information service” under Title I of the Communications Act—the classification affirmed by the Supreme Court in the 2005 Brand X case.
- Reinstates the classification of mobile broadband Internet access service as a private mobile service.
- Finds that the regulatory uncertainty created by utility-style Title II regulation has reduced Internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers.
- Finds that public policy, in addition to legal analysis, supports the information service classification, because it is more likely to encourage broadband investment and innovation, thereby furthering the goal of closing the digital divide and benefitting the entire Internet ecosystem.
• Restores broadband consumer protection authority to the Federal Trade Commission (FTC), enabling it to apply its extensive expertise to provide uniform online protections against unfair, deceptive, and anticompetitive practices.

**Report and Order**

• Requires that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission, including any blocking, throttling, paid prioritization, or affiliated prioritization.
• Finds that transparency, combined with market forces as well as antitrust and consumer protection laws, achieve benefits comparable to those of the 2015 “bright line” rules at lower cost.
• Eliminates the vague and expansive Internet Conduct Standard, under which the FCC could micromanage innovative business models.

**Order**

• Finds that the public interest is not served by adding to the already-voluminous record in this proceeding additional materials, including confidential materials submitted in other proceedings.

The item takes effect upon approval by the Office of Management and Budget of the new transparency rule that requires the collection of additional information from industry.


WC Docket No. 17-108

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).
STATEMENT OF
CHAIRMAN AJIT PAI

Re:  Restoring Internet Freedom, WC Docket No. 17-108.

The Internet is the greatest free-market innovation in history. It has changed the way we live, play, work, learn, and speak. During my time at the FCC, I’ve met with entrepreneurs who have started businesses, doctors who have helped care for patients, teachers who have educated their students, and farmers who increased their crop yields, all because of the Internet. And the Internet has enriched my life immeasurably. In the past few days alone, I’ve downloaded interesting podcasts about blockchain technology, ordered a burrito, managed my playoff-bound fantasy football team, and—as you may have seen—tweeted.

What is responsible for the phenomenal development of the Internet? It certainly wasn’t heavy-handed government regulation. Quite to the contrary: At the dawn of the commercial Internet, President Clinton and a Republican Congress agreed that it would be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”

This bipartisan policy worked. Encouraged by light-touch regulation, the private sector invested over $1.5 trillion to build out fixed and mobile networks throughout the United States. 28.8k modems gave way to gigabit fiber connections. Innovators and entrepreneurs grew startups into global giants. America’s Internet economy became the envy of the world.

And this light-touch approach was good for consumers, too. In a free market full of permissionless innovation, online services blossomed. Within a generation, we’ve gone from email as the killer app to high-definition video streaming. Entrepreneurs and innovators guided the Internet far better than the clumsy hand of government ever could have.

But then, in early 2015, the FCC jettisoned this successful, bipartisan approach to the Internet. On express orders from the previous White House, the FCC scrapped the tried-and-true, light touch regulation of the Internet and replaced it with heavy-handed micromanagement. It decided to subject the Internet to utility-style regulation designed in the 1930s to govern Ma Bell.

This decision was a mistake. For one thing, there was no problem to solve. The Internet wasn’t broken in 2015. We weren’t living in a digital dystopia. To the contrary, the Internet is perhaps the one thing in American society we can all agree has been a stunning success.

Not only was there no problem, this “solution” hasn’t worked. The main complaint consumers have about the Internet is not and has never been that their Internet service provider is blocking access to content. It’s that they don’t have access at all or enough competition. These regulations have taken us in the opposite direction from these consumer preferences. Under Title II, investment in high-speed networks has declined by billions of dollars. Notably, this is the first time that such investment has declined outside of a recession in the Internet era. When there’s less investment, that means fewer next-generation networks are built. That means less competition. That means fewer jobs for Americans building those networks. And that means more Americans are left on the wrong side of the digital divide.

The impact has been particularly serious for smaller Internet service providers. They don’t have the time, money, or lawyers to navigate a thicket of complex rules. I have personally visited some of them, from Spencer Municipal Utilities in Spencer, Iowa to Wave Wireless in Parsons, Kansas. I have personally spoken with many more, from Amplex Internet in Ohio to AirLink Services in Oklahoma. So it’s no surprise that the Wireless Internet Service Providers Association, which represents small fixed wireless companies that typically operate in rural America, surveyed its members and found that over 80% “incurred additional expense in complying with the Title II rules, had delayed or reduced network expansion, had delayed or reduced services and had allocated budget to comply with the rules.” Other
small companies, too, have told the FCC that these regulations have forced them to cancel, delay, or curtail fiber network upgrades. And nearly two dozen small providers submitted a letter saying the FCC’s heavy-handed rules “affect our ability to find financing.” Remember, these are the kinds of companies that are critical to providing a more competitive marketplace.

These rules have also impeded innovation. One major company, for instance, reported that it put on hold a project to build out its out-of-home Wi-Fi network due to uncertainty about the FCC’s regulatory stance. And a coalition of 19 municipal Internet service providers—that is, city-owned nonprofits—have told the FCC that they “often delay or hold off from rolling out a new feature or service because [they] cannot afford to deal with a potential complaint and enforcement action.”

None of this is good for consumers. We need to empower all Americans with digital opportunity, not deny them the benefits of greater access and competition.

And consider too that these are just the effects these rules have had on the Internet of today. Think about how they’ll affect the Internet we need ten, twenty years from now. The digital world bears no resemblance to a water pipe or electric line or sewer. Use of those pipes will be roughly constant over time, and very few would say that there’s dramatic innovation in these areas. By contrast, online traffic is exploding, and we consume exponentially more data over time. With the dawn of the Internet of Things, with the development of high bit-rate applications like virtual reality, with new activities like high-volume bitcoin mining that we can’t yet fully grasp, we are imposing ever more demands on the network. Over time, that means our networks themselves will need to scale, too.

But they don’t have to. If our rules deter the massive infrastructure investment that we need, eventually we’ll pay the price in terms of less innovation. Consider these words from Ben Thompson, a highly-respected technology analyst, from a post on his blog Stratechery supporting my proposal:

The question that must be grappled with . . . is whether or not the Internet is ‘done.’ By that I mean that today’s bandwidth is all we [will] need, which means we can risk chilling investment through prophylactic regulation and the elimination of price signals that may spur infrastructure build-out . . .

If we are “done”, then the potential harm of a Title II reclassification is much lower; sure, ISPs will have to do more paperwork, but honestly, they’re just a bunch of mean monopolists anyways, right? Best to get laws in place to preserve what we have.

But what if we aren’t done? What if virtual reality with dual 8k displays actually becomes something meaningful? What if those imagined remote medicine applications are actually developed? What if the Internet of Things moves beyond this messy experimentation phase and into real-time value generation, not just in the home but in all kinds of unimagined commercial applications? I certainly hope we will have the bandwidth to support all of that!1

I do too. And as Thompson put it in another Stratechery post: “The fact of the matter is there is no evidence that harm exists in the sort of systematic way that justifies heavily regulating ISPs; the evidence that does exist suggests that current regulatory structures handle bad actors perfectly well. The only future to fear is the one we never discover because we gave up on the approach that has already brought us so far.”2

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Remember: networks don’t have to be built. Risks don’t have to be taken. Capital doesn’t have to be raised. The costs of Title II today may appear, at least to some, to be hidden. But the consumers and innovators of tomorrow will pay a severe price.

* * *

So what is the FCC doing today? Quite simply, we are restoring the light-touch framework that has governed the Internet for most of its existence. We’re moving from Title II to Title I. Wonkier it cannot be.

It’s difficult to match that mundane reality to the apocalyptic rhetoric that we’ve heard from Title II supporters. And as the debate has gone on, their claims have gotten more and more outlandish. So let’s be clear. Returning to the legal framework that governed the Internet from President Clinton’s pronouncement in 1996 until 2015 is not going to destroy the Internet. It is not going to end the Internet as we know it. It is not going to kill democracy. It is not going to stifle free expression online. If stating these propositions alone doesn’t demonstrate their absurdity, our Internet experience before 2015, and our experience tomorrow, once this order passes, will prove them so.

Simply put, by returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers. It also means more ways that startups and tech giants alike can deliver applications and content to more users. In short, it’s a freer and more open Internet.

We also promote much more robust transparency among ISPs than existed three years ago. We require ISPs to disclose a variety of business practices, and the failure to do so subjects them to enforcement action. This transparency rule will ensure that consumers know what they’re buying and startups get information they need as they develop new products and services.

Moreover, we empower the Federal Trade Commission to ensure that consumers and competition are protected. Two years ago, the Title II Order stripped the FTC of its jurisdiction over broadband providers. But today, we are putting our nation’s premier consumer protection cop back on the beat. The FTC will once again have the authority to take action against Internet service providers that engage in anticompetitive, unfair, or deceptive acts. As FTC Chairman Maureen Ohlhausen recently said, “The FTC’s ability to protect consumers and promote competition in the broadband industry isn’t something new and far-fetched. We have a long-established role in preserving the values that consumers care about online.” Or as President Obama’s first FTC Chairman put it just yesterday, “the plan to restore FTC jurisdiction is good for consumers. . . . [T]he sky isn’t falling. Consumers will remain protected, and the Internet will continue to thrive.”

So let’s be absolutely clear. Following today’s vote, Americans will still be able to access the websites they want to visit. They will still be able to enjoy the services they want to enjoy. There will still be cops on the beat guarding a free and open Internet. This is the way things were prior to 2015, and this is the way they will be once again.

Our decision today will also return regulatory parity to the Internet economy. Some giant Silicon Valley platforms favor imposing heavy-handed regulations on other parts of the Internet ecosystem. But all too often, they don’t practice what they preach. Edge providers regularly block content that they don’t like. They regularly decide what news, search results, and products you see—and perhaps more importantly, what you don’t. And many thrive on the business model of charging to place content in front of eyeballs. What else is “Accelerated Mobile Pages” or promoted tweets but prioritization?

What is worse, there is no transparency into how decisions that appear inconsistent with an open Internet are made. How does a company decide to restrict a Senate candidate’s campaign announcement video because her views on a public policy issue are too “inflammatory”? How does a company decide to
demonetize videos from political advocates without notice? How does a company expressly block access to websites on rival devices or prevent dissidents’ content from appearing on its platform? How does a company decide to block from its app store a cigar aficionado app, apparently because the company perceives that the app promotes tobacco use? You don’t have any insight into any of these decisions, and neither do I. Yet these are very real, actual threats to an open Internet—coming from the very entities that claim to support it.

Look—perhaps certain companies support saddling broadband providers with heavy-handed regulations because those rules work to their economic advantage. I don’t blame them for taking that position. And I’m not saying that these same rules should be slapped on them too. What I am saying is that the government shouldn’t be in the business of picking winners and losers in the Internet economy. We should have a level playing field and let consumers decide who prevails.

* * *

Many words have been spoken during this debate but the time has come for action. It is time for the Internet once again to be driven by engineers and entrepreneurs and consumers, rather than lawyers and accountants and bureaucrats. It is time for us to act to bring faster, better, and cheaper Internet access to all Americans. It is time for us to return to the bipartisan regulatory framework under which the Internet flourished prior to 2015. It is time for us to restore Internet freedom.

I want to extend my deepest gratitude to the staff who have worked so many long hours on this item. From the Wireline Competition Bureau: Annick Banoun, Joseph Calascione, Megan Capasso, Paula Cech, Ben Childers, Nathan Eagan, Madeleine Findley, Doug Galbi, Dan Kahn, Melissa Kirkel, Gail Krutov, Susan Lee, Ken Lynch, Pam Megna, Kris Monteith, Ramesh Nagarajan, Eric Ralph, Deborah Salons, Shane Taylor. From the Office of General Counsel: Ashley Boizelle, Jim Carr, Kristine Fargotstein, Tom Johnson, Doug Klein, Marcus Maher, Scott Noveck, Linda Oliver, and Bill Richardson. From the Wireless Telecommunications Bureau: Stacy Ferraro, Nese Guendelsberger, Garnet Hanly, Betsy McIntyre, Jennifer Salhus, Paroma Sanyal, Jamiang “Jimmy” Shang, Don Stockdale, and Peter Trachtenberg. From the Office of Strategic Planning and Policy Analysis: Eric Burger, Mark Bykowsky, and Jerry Ellig. From the Consumer and Governmental Affairs Bureau: Jerusha Burnett. From the Public Safety and Homeland Security Bureau: Ken Carlberg. And from the Media Bureau: Tracy Waldon.
Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Brussels, 17 July 2019

The European Commission has opened a formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.

Commissioner Margrethe Vestager, in charge of competition policy, said: "European consumers are increasingly shopping online. E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don't eliminate these benefits through anti-competitive behaviour. I have therefore decided to take a very close look at Amazon's business practices and its dual role as marketplace and retailer, to assess its compliance with EU competition rules."

Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers.

When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.

As part of its in-depth investigation the Commission will look into:

- the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition.

- the role of data in the selection of the winners of the “Buy Box” and the impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. The “Buy Box” is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. Winning the “Buy Box” seems key for marketplace sellers as a vast majority of transactions are done through it.

If proven, the practices under investigation may breach EU competition rules on anticompetitive agreements between companies (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and/or on the abuse of a dominant position (Articles 102 TFEU).

The Commission will now carry out its in-depth investigation as a matter of priority. The opening of a formal investigation does not prejudge its outcome.

Background

Article 101 of the TFEU prohibits anticompetitive agreements and decisions of associations of undertakings that prevent, restrict or distort competition within the EU's Single Market. Article 102 of the TFEU prohibits the abuse of a dominant position. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 11(6) of the Antitrust Regulation provides that the opening of proceedings by the Commission relieves the competition authorities of the Member States of their competence to apply EU competition rules to the practices concerned. Article 16(1) further provides that national courts must avoid adopting decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated.

The Commission has informed Amazon and the competition authorities of the Member States that it has opened proceedings in this case.

There is no legal deadline for bringing an antitrust investigation to an end. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which
the undertakings concerned cooperate with the Commission and the exercise of the rights of defence. More information on the investigation will be available on the Commission's competition website, in the public case register under case number AT.40462.

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In its decision of 6 February 2019 the Bundeskartellamt prohibited Facebook Inc., Menlo Park, USA, Facebook Ireland Ltd., Dublin, Ireland, and Facebook Germany GmbH, Hamburg, Germany (hereinafter: “Facebook”) from making the use of the Facebook social network (hereinafter: “Facebook.com”) by private users residing in Germany, who also use its corporate services WhatsApp, Oculus, Masquerade and Instagram, conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without the users’ consent. The prohibition is based on Section 19(1) of the German Competition Act (GWB). The same applies to terms making the private use of Facebook.com conditional on Facebook being able to combine information saved on the “Facebook account” without the users’ consent with information collected on websites visited or third-party mobile apps used via programming interfaces (“Facebook Business Tools”) and use this data. There is no effective consent to the users’ information being collected if their consent is a prerequisite for using the Facebook.com service in the first place.

The proceeding was initiated in March 2016 and aimed at user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The proceeding did not deal with the issue of information processed on the use of the social network that is generated after users have registered. The Bundeskartellamt saw no reason to intervene on the grounds of the prohibition of abusive practices under competition law. It is taken into account that an advertising-funded social network generally needs to process a large amount of personal data. However, the Bundeskartellamt holds that the efficiencies in a business model based on personalised advertising do not outweigh the interests of the users when it comes to processing data from sources outside of the social network. This applies in particular where users have insufficient control over the processing of their data and its allocation to their Facebook accounts. As far as this part of data processing is concerned, it was necessary to intervene from a competition law
perspective because the data protection boundaries set forth in the GDPR were clearly overstepped, also in view of Facebook’s dominant position.

1. Statement of facts

Facebook develops and operates various digital products, online services and applications for smartphones (apps). Facebook’s core product is the social network Facebook.com, which has been offered in Germany since 2008. Its user base has been increasing continuously worldwide. In 2018 the number of daily active users in Germany was 23 million, while 32 million users were classified as monthly active users.

Private users can access Facebook.com via the websites www.facebook.com, www.facebook.de or via a mobile app. Facebook offers private users a range of functions to connect with their friends and acquaintances and share contents with them. Private Facebook.com use is conditional upon registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. Based on this information, a personalised site is created for each user, which is subdivided into three subsites: the “profile”, “home” and the “find friends” pages. Users can see the latest news (“posts”) of other private and commercial users in the “Newsfeed” on their start pages. The order of appearance is based on an algorithm to match the user’s interests. Facebook Messenger is integrated into the social network and serves for real-time bilateral or group communication. In the social network, Facebook.com offers a variety of further functionalities, e.g. a job board, an app center or event organisation.

Not only private users but also businesses, associations or business individuals can use Facebook.com to publish content in the social network to increase their reach. Publishers can create their own pages to publish content and connect with private users, e.g. via subscriptions or likes. Facebook funds its social network through online advertising offered to publishers and other businesses. The ads match a social network user’s individual profile. The aim is to present users with ads that are potentially interesting to them based on their personal commercial behaviour, their interests, purchasing power and living conditions (“targeting” or “targeted advertising”).

In addition, the Facebook group offers “Facebook Business Tools”, a selection of free tools and products for website operators, developers, advertisers and other businesses to integrate into their own websites, apps and online offers via programming interfaces (Application Programming Interfaces, API) pre-defined by Facebook. The selection includes social plugins (“Like” or “Share”
buttons), Facebook login and other analytics services (Facebook Analytics) implemented through “Facebook Pixel” or mobile “software development kits” (SDKs).

Besides Facebook.com, Facebook also offers Instagram, a service for sharing photos and short video clips which is often referred to as a “photo network” or “photo blogging” service. The service has been growing considerably over the last few years and is also funded through advertising. Private users have to register via the mobile app. To register, they have to enter an email address, a user name and, as an optional piece of information, a phone number. They can also upload a profile picture. They can use the Instagram camera to take pictures or record videos and edit them using filters, texts, drawings or special effects before sharing them with other users.

WhatsApp Inc. is also part of the Facebook group. In Europe it offers the mobile app WhatsApp via its Irish subsidiary WhatsApp Ltd. WhatsApp is a free service which was originally developed as a free internet-based alternative to short message services (SMS). Using the service, users can send and receive a multitude of media like text messages, photos, videos, documents, locations, voice messages and voice calls. While WhatsApp has not been monetised through advertising so far, the company announced that it was going to launch advertising in the “status” function in 2019.

Masquerade is another product used for editing and sharing pictures with filters and masks. Facebook also offers virtual reality headsets and software via its Oculus business.

Using the social network Facebook.com is conditional on the user’s agreement to Facebook’s terms of service upon registration, i.e. they have to agree to the terms of service to conclude the contract. The terms of service stipulate that Facebook processes personal data as specified in particular in the data and cookie policies. Pursuant to these policies, Facebook also collects data on users and their devices outside of Facebook-related activities via Facebook Business Tools integrated by advertisers, app developers and publishers. Facebook also processes user data across other Facebook companies and products and collects user and device-related data from its corporate services. As a legal basis for data processing, Facebook claims that the data are required to provide the service and to fulfil Facebook’s legitimate interests.

2. Legal assessment

1. Market definition

Based on the concept of demand-side substitutability, the Bundeskartellamt defines the product market as a private social network market with private users as the relevant opposite market side. The relevant geographic market is Germany.
In defining the market and considering the new provisions of Section 18(2a) and (3a) of the German Competition Act (GWB), the Bundeskartellamt first of all examined Facebook’s business model and its special characteristics as a multi-sided network market with free services. With its service Facebook.com Facebook offers an intermediary product, which, according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18(3a) GWB. Essentially the product is a network financed through targeted advertising, which forms a multi-sided market precisely because of this form of financing. Key user groups are private users using Facebook.com without monetary compensation on the one hand, and advertisers running targeted advertisements on the other. Indirect network effects exist between the two user groups. Facebook added further market sides to its core product. One of these market sides is publishers using Facebook.com to promote their businesses with their own Facebook pages on which they publish editorial content and connect with users. Developers represent another side of the market. They can integrate Facebook into their own websites or apps by using “Application Programming Interfaces” (APIs) to integrate Facebook Products like social plugins (e.g. “Like” button), Facebook Login or the Facebook Analytics analysis service. Indirect network effects also exist between private users and the latter two sides:

As none of the above groups of Facebook users have demands similar to the group of private users, they have to be attributed to other markets. The network has to be considered a market service pursuant to Section 18(2a) GWB despite the fact that its use is not subject to fees for private users.
The product market definition also requires an analysis of the various online services commonly referred to as “social media” and their competitive relationships. Key criteria for defining the market are the high degree of product differentiation of social media and the various overlaps of their functionalities. When defining the market, strong direct network effects are also important. The Bundeskartellamt’s investigations, which included an examination of a large number of social media as well as a survey among users and competitors, and decisions by the European Commission in the Facebook/WhatsApp and Microsoft/LinkedIn cases have shown that a national market exists for social networks which essentially meet specific requirements that differ from other social media. With Google+ having disappeared from the market, this market now includes, besides Facebook, some smaller German providers of social networks. Networks like LinkedIn and Xing are designed to meet professional requirements and thus constitute a separate product market. Like the Commission in the Facebook/WhatsApp case, the Bundeskartellamt considers messaging services like WhatsApp as a separate market due to their technical characteristics and applications. The investigations have shown that although YouTube’s business model has some overlaps with those of social networks, the service is not sufficiently comparable to a social network. Snapchat, whose central function is a camera that opens automatically for taking “snaps” that are deleted after a short while, is not part of the product market either. The same applies to Twitter, Pinterest and Instagram. The latter is part of the Facebook group. When defining the market the Bundeskartellamt also looks at the extent to which internet companies shaped by network effects can show flexibility in adapting the products they offer. At least as far as the services affected in this case are concerned, it is not sufficient to have a “critical mass” of users or technical, financial and personal expertise in order to be able to enter neighbouring markets and be as successful as on the original market. As the example of Google+ has shown, a service cannot expect to have the same reach when providing a different type of service, due to strong direct network effects.

The geographic market was defined as Germany-wide as a result of the investigations, based on the fact that the service was found to be used predominantly to connect with people in the users’ own country, special national user habits and the lack of opportunities for supply-side substitution.

2. Market dominance

Facebook is the dominant company in the national market for social networks for private users pursuant to Section 18(1) in conjunction with (3) and (3a) GWB as, based on an overall assessment of all factors of market power, the company has a scope of action in this market that is not sufficiently controlled by competition.
First the Bundeskartellamt examined the user-based market share of Facebook on the relevant market. Facebook's user-based market share is very high, especially among daily active users, where Facebook has a market share exceeding 95%. Facebook's market share among monthly active users is above 80% and above 50% among registered users. The Bundeskartellamt considers the number of daily active users as the key indicator and relevant measurand for assessing the network's competitive significance and market success as a social network's success is measured by the intensity of use. Users use social networks as a virtual social space. When assessing the market share, the amount of time spent intensively using the network is an important indicator of the competitors' actual market position. The services of the Facebook group would have a combined market share far beyond the market dominance threshold pursuant to Section 18(4) GWB, even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market.

A key element of the market dominance test are the strong direct network effects of Facebook's business model and the difficulties associated with switching to another social network. Facebook users connect with selected people in the social network, and it is difficult to motivate them to switch to another service as well. Competitors in the area of social networks have been experiencing a continuous decrease in user-based market shares in recent years; some of them have already left the market. Examples include StudiVZ and SchülerVZ, services which were temporarily operated by the Holtzbrinck publishing group and which were market leaders before Facebook entered the German market. Their operating company went into insolvency in 2017. The Lokalisten network, which was operated by ProSiebenSat.1, was discontinued in the autumn of 2016. Google+, the social network operated by the Google group, announced in the spring of 2018 that it would discontinue its service for private users and offer a payable service for internal business communications. In contrast to its competitors, Facebook's user figures keep rising or at least stagnate at a high level. The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist. This assessment is supported by the fact that the strong identity-based network effects lead to a lock-in effect which makes it difficult for users or prevents them from switching to another social network. Existing functionalities and interfaces do not alleviate the consequences of Facebook's incompatibility with other social networks.

Another important aspect of the examination are the indirect network effects encountered with Facebook as an advertising-funded service, which increase the barriers to market entry. Other advertising-financed platforms will find it difficult to enter the market and be successful in the long-
term as all competitors would have to enter both the user market for social networks and the online advertising market.

Facebook also has excellent access to competitively relevant data. Facebook’s comprehensive data sources are highly relevant for competition as a social network is driven by such personal data. In addition, these specific data facilitate highly personalised advertising. Combined with the direct and indirect network effects, this access to data constitutes another barrier to market entry for a competitor’s product that can be monetised.

In its overall assessment, the Bundeskartellamt took a close look at the internet’s innovative power and its significance for assessing market power. The internet’s innovative power cannot be taken as a general argument against an internet company’s market power. Instead, specific indications of a dynamic or disruptive process are required in each individual case. This applies in particular to the control of abuse of dominant positions which focuses on the current market situation. Against this background the Bundeskartellamt examined the recent innovations which Facebook referred to. The authority’s opinion is that these developments do not go beyond responses to competition from substitutes in the case of some individual functionalities. In particular in the context of pronounced direct network effects, its responses have rather shown that Facebook has been capable of successfully fighting off competitors’ innovations. As a result, there is no trend towards users withdrawing from Facebook or Facebook losing market shares to a relevant extent despite the internet’s high innovative power.

3. Abusive data policy

Using and actually implementing Facebook’s data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB. Taking into account the assessments under data protection law pursuant to the General Data Protection Regulation (GDPR), these are inappropriate terms to the detriment of both private users and competitors.

a) Data protection and competition law

The Bundeskartellamt holds that, being a manifestation of market power, the terms violate the stipulations of the GDPR and are abusive within the meaning of Section 19(1) GWB.

The authority bases its assessment on the case-law of the German Federal Court of Justice, which established an abuse of business terms in the VBL-Gegenwert and Pechstein cases based
on the general clause of Section 19(1) GWB. In its decisions taken in the VBL-Gegenwert cases the Federal Court of Justice considers the agreement of contract terms abusive if terms and conditions violating Sections 307ff. of the German Civil Code are applied, in particular if the fact that such terms and conditions are applied is a manifestation of market power or superior power of the party using these terms. The Federal Court of Justice held that it was necessary to balance all interests including constitutional rights in the Pechstein case. Accordingly, to protect constitutional rights, Section 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished. If, the Court held, in such a case a dominant company handles constitutional rights of its contractual partners, the law had to intervene to uphold the protection of such rights. Relevant legal provisions in this regard were, according to the Court, the general clauses under civil law, one of which is Section 19 GWB. The Court held that these clauses should be applied with a view to balancing the conflicting positions of the contractual parties in such a way that the constitutional rights of all parties were, as far as possible, maintained.

The Bundeskartellamt holds that as far as the appropriateness of conditions agreed in an unbalanced negotiation is concerned, these decisions of the highest court apply to all other areas of the law as well. The same applies to data protection law, the purpose of which is to counter asymmetries of power between organisations and individuals and ensure an appropriate balancing of interests between data controllers and data subjects. In order to protect the fundamental right to informational self-determination, data protection law provides the individual with the right to decide freely and without coercion on the processing of his or her personal data.

The Bundeskartellamt closely examined the relation between the competition law provisions under Section 19(1) GWB and the harmonised European data protection principles of the GDPR which are mainly enforced by data protection authorities. The authority holds that it appears to be indispensable to examine the conduct of dominant companies under competition law also in terms of their data processing procedures, as especially the conduct of online businesses is highly relevant from a competition law perspective. It is the authority’s view that the European data protection regulations, which are based on constitutional rights, can or, considering the case-law of the highest German court specified above, must be considered when assessing whether data processing terms are appropriate under competition law.

The responsibility and consistency regulations in the GDPR do not rule out that the Bundeskartellamt can assess whether data processing terms infringe the GDPR. The GDPR has been in force in the Member States since May 2018. It governs the responsibility of data protection authorities and is set out to ensure a uniform level of protection and application by the national
data protection authorities. For this purpose a data protection board has been set up by the Member States to decide on data protection matters in the event of disputes. The board can also instruct the national authorities accordingly. These regulations, however, do not rule out that substantive data protection law can also be applied by authorities other than the national data protection authorities. The GDPR explicitly states that data protection law can also be enforced under civil law, i.e. full consistency is not aspired to. This applies in particular to consumer protection organisations and competitors and their associations. These entities can enforce data protection based on stipulations of the Act Against Unfair Competition (UWG) or regulations on business terms linked to data protection and also based on Section 19 GWB. A large part of the ECJ’s case law which data protection authorities and the data protection board have to consider has been obtained from civil law proceedings. Civil law proceedings promote rather than threaten the consistent implementation of data protection law, especially as the ECJ can be involved at an early stage as part of the preliminary ruling procedure. It is not evident that the consistency mechanism would rule out that the competition authority considers and interprets data protection law under Section 19 GWB and, at the same time, would allow a civil law enforcement of Section 19 GWB with regard to data protection law.

Also, data protection regulations do not suspend abuse control which is more specific. These regulations do not include final provisions regarding dominant companies, i.e. they only allow data processing by dominant companies to be examined by data protection authorities based on the direct data protection regulations, or the existing enforcement options under civil law (UWG or legislation on business terms). However, they do not include the prohibition of abusive practices which applies in particular to dominant companies. The GDPR does not explicitly state that its provisions are final, so it cannot be assumed that it leaves no further scope for examination by other authorities and under other aspects.

In the course of the proceeding the Bundeskartellamt maintained regular contact with data protection authorities none of which considered they had exclusive competence. The Conference of independent data protection authorities of the German Federal Government and the Länder (Konferenz der unabhängigen Datenschutzbehörden des Bundes und der Länder) expressly stated that the enforcement of data protection law must not be the sole response to violations of data protection requirements. Competition and antitrust law can, according to the conference, also be enforced. Even divestiture is mentioned as an option to punish the systematic circumvention of data protection. The Data Protection Officer for the city state of Hamburg explicitly supports the Bundeskartellamt’s proceeding. The Bundeskartellamt also briefed the Irish data protection authority IDPC about the proceedings.
b) Consideration of data protection aspects

In a first step, the Bundeskartellamt examined whether the data policy is appropriate based on the data protection assessments of the GDPR. It came to the conclusion that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools, which enable, among other things, profiling and “device fingerprinting”, violates European data protection requirements pursuant to the GDPR and is subject to the affected users’ consent pursuant to data protection requirements. Facebook, which is responsible for the processing of these data, presented or substantiated hardly any justifications in the course of the proceeding. The determined facts of the case do not indicate a sufficient legal justification for the extent of data collected and merged.

There is no effective consent pursuant to Art. 6(1a) of the GDPR. The reasons for this include the fact that, in view of Facebook’s dominant position in the market, users consent to Facebook’s terms and conditions for the sole purpose of concluding the contract, which cannot be assessed as their free consent within the meaning of the GDPR.

Facebook does not have to process data to fulfil its contract pursuant to Art. 6(1b) GDPR. This reason for justification has to be narrowly interpreted, i.e. it has to be considered whether the unilateral determination of the contract details has to be taken into account. Particularly, it cannot be substantiated that the service has to process data to the extent that has been determined in the course of the examination for reasons of efficiency and advantages of a personalised service. If this view is taken, the company would be entitled to unlimited data processing solely on the grounds of its business model and product properties as well as the company’s concept of product quality. Any kind of data processing would then have to be deemed necessary for fulfilling the contract as all data carry some information on the individual user. Processing data from third-party sources to the extent determined by Facebook in its terms and conditions is neither required for offering the social network as such nor for monetising the network through personalised advertising, as a personalised network could also be based to a large extent on the user data processed in the context of operating the social network. The latter is not a subject of the proceeding at hand. None of the stipulations of Art. 6(1c-e) GDPR apply to justify data processing for special purposes.

Even a comprehensive assessment of interests did ultimately not lead to the conclusion that Facebook’s interest in processing data according to the terms and conditions it set outweighs other interests (Art. 6(1f) GDPR). This assessment is based on an evaluation of the legitimate interests Facebook brought forward, third-party interests and user interests. Criteria considered were the consequences for the affected users, taking into account the data type and the way in
which it is processed, reasonable expectations of users and the respective positions of Facebook and its users. What also had to be considered pursuant to the guidelines of the data protection board was that Facebook as a dominant company has bargaining power over its users and is in a position to impose far-reaching data processing conditions, which users cannot prevent as they have no additional control mechanisms. Data processing to the extent at hand cannot be justified without the users’ voluntary consent. Voluntary consent to their information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place.

c) Manifestation of market power

The violation of data protection requirements found is a manifestation of Facebook’s market power. According to the case-law it is not necessary to determine that the conduct, i.e. the violation, was only possible in the first place because of market dominance and that other market participants did not have a chance to behave in a similar way. Instead, it is sufficient to determine that the two aspects are linked by a causality which is either based on normative aspects or the outcome. Both aspects can be assumed to be fulfilled in this case.

Normative causality with regard to the violation of data protection rules exists as the restriction of the private users’ right to self-determination is clearly linked to Facebook's dominant position. Data protection law considers corporate circumstances like market dominance, the concrete purpose and the amount of data processed in its justifications, i.e. Facebook’s market position is significant when assessing the violation.

In addition to that there is a causality in terms of the outcome as Facebook’s conduct linked to its market dominance, which was the subject of the proceedings at hand, impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts. It has thus gained a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook’s market power towards end customers.

Both data protection law and competition law consider the aspect of an unbalanced negotiation position, i.e. a weighing up of interests under competition law which could be required in addition to the examination under data protection law, and reach the same conclusions due to the largely identical considerations including market dominance. In addition, pursuant to the Pechstein case-law, assessments with regard to constitutional rights have to be included in assessments of interests under competition law. Again, these assessments are largely identical with the assessments under data protection law.
As Facebook is a dominant company users cannot protect their data from being processed from a large number of sources, i.e. they cannot decide autonomously on the disclosure of their data. However, it must be ensured that the interests of the opposite market side are sufficiently considered if a provider is a dominant company which is not subject to sufficient competitive control. The terms and conditions under review have a considerable reach as Facebook’s market power extends beyond its social network and consumers’ data are collected whenever they use the internet. While the efficiencies of a data-driven business model for consumers are generally acknowledged, the outlined extent of data processing is to be deemed inappropriate and hence abusive.

4. Decision

Based on the above and in exercising due discretion, the Bundeskartellamt has prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Sections 19(1), 32 GWB and ordered the termination of this conduct. The prohibition refers to the terms of processing personal data as expressly stated in the terms of service and detailed in the data and cookie policies as far as they involve the collection of user and device-related data from other corporate services and Facebook Business Tools without the users’ consent and their combination with Facebook data for purposes related to the social network. The Bundeskartellamt also prohibited the implementation of these terms and conditions in actual data processing procedures which Facebook performs based on its data and cookie policies. In the order to terminate the infringement Facebook is ordered to implement the necessary changes and to adapt its data and cookie policies accordingly within a period of twelve months. In addition to that Facebook has been given a deadline of four months to present an implementation road map for the adjustments. The time limits can be suspended by an emergency appeal to the Düsseldorf Higher Regional Court. Facebook has already appealed against this decision to the Düsseldorf Higher Regional Court and requested that the suspensive effect of the appeal be restored.