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E-commerce induced competition law problems - potential impacts and solutions

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1. Introduction

For a long time a majority of scholars argued to exempt the internet from government regulation as its transnational "bottom-up" governance model would be superior to any traditional "top-down" model of state governance. This was reflected – and still is to a large extent – in an approach of government which might be characterised by "laissez faire" and the exercise of internet regulation – be it standards or domain name property rights – by private bodies. The internet, though, has changed dramatically in the meantime from a public, government sponsored communication infrastructure without economic interest to an increasingly private, commercially oriented medium. Deeper insights into the workings and consequences of the internet and imminent changes with the advent of broadband technology have raised critical concern about the continuation of a hands-off attitude of government which might cause problems in taxation, intellectual property protection and competition policy. The border-crossing transactions of e-commerce are confronted with different regulatory regimes and other legal uncertainties connected to the evaluation of new phenomena. A desirable stimulus for e-commerce would come from a reduction of these uncertainties.

We might categorise these uncertainties into two groups, the first depending on the evaluation of new phenomena, stemming from differing analyses of effects and the adoption possibilities of existing regulation. They might be characterised as "technical" uncertainties. The second type of legal uncertainties depends on the "systemic" differences in international law and legal practice. An important question in type two uncertainties is the still ongoing discussion on the designation of venue and the applicable law.

A proposition to create an internet specific legal framework in order to avoid these problems seems impracticable for several reasons. Online and off-line jurisdiction have to follow the same legal principles, this implies that the existing legal framework for the off-line world will remain the basis for e-commerce related modifications. Frequent and often important technological change – e.g. with the advent of mobile internet – would demand frequent and important adaptations of a special legal framework which would further add to the existing legal uncertainties.

This paper tries to fathom the related problems for competition policy: the new problems emerging with e-commerce, the discussion of recent decisions and existing uncertainties of the first type, a rough review of existing regulatory regimes and the uncertainties of the second type and potential solutions for a case based, co-ordinated international practice or a harmonisation of regimes and institutions.

In a first step this paper will illustrate the e-commerce specific changes and potential consequences for competition law. The innate tendency towards size and concentration in internet economics combined with the existence of dominant players and new possibilities to restrain competition via tying and bundling (or foreclosure) are at the core of our discussion. The problems surface in the segments of competition law: antitrust, fair trade and consumer protection law. These segments of German competition law will be used to structure the discussion of selected issues like

- Dominance, tying and bundling, collusion and denial of access (antitrust)
- Illegal or virtually illegal advertising, changes in privacy or unwanted advertising (fair trade)
- Illegal appropriation, use and proliferation of personal data and definition of venue (consumer protection).

In a second step selected recent papers and decisions will be discussed. Due to the early state of development this discussion will be limited to only a few aspects and can just roughly outline the underlying problems and the continuing uncertainties without going into detail. Some of the issues cited above have already been matter in dispute: potential collusion, exclusive tying to exchanges, bundling of demand, tying or bundling of software to a dominant operating system, virtually illegal advertising, changes in privacy policy, exchanges of personal data and questions of venue. Some cases are still discussed, e.g. access to broadband or limits on the proliferation of personal data in the US, some have been regulated by law, e.g. electronic communication and privacy in the EU.

The principles for the designation of the applicable jurisdiction and differences in competition law and legal practice will be the core question of the third chapter. Even though several US and Canadian courts decisions have already tried to establish principles for the designation of venue related to the internet a

number of uncertainties remain as the principles still show potential misdirections.

The amount of existing regulation indirectly also influencing the internet and significant regulatory differences between states increase the legal uncertainties of the second type. The chapter serves as an input to global governance discussion. It will allow for an assessment of the chances of global governance concepts and the limits of these concepts.

The discussion of global governance will have to imply several levels: an institutional, a legal and an operational against the background of various governance options. The institutional level will look at the organisation of the regulatory framework, the legal at the degrees of formalisation and the operational at questions of conflict settlement. This will have to take account of questions of transparency, duration and feasibility of conflict resolution as well as the possibility of enforcement of decisions. The options discussed will include guidelines, co-ordination bodies and harmonisation of legal systems.

Well aware of the difficulties in balancing the freedom needed for a further development of the internet against the arguments for regulatory action, the last chapter will try to propose potential basic guidelines for e-commerce induced competition problems by trying to distil some principles from the discussions. Recommendations for basic global governance will be based on the assessment of feasible co-ordination and desirable solutions.

The term regulation is used, if not indicated otherwise, in a wide sense: it implies all kinds of existing bodies – private or public – and related rules – from industry agreements to national law.

The paper is limited to a comparison of regulations in industrialised nations. The conclusions drawn mainly relate to this sample. The question of exemptions or modifications for developing nations, though neglected, may be very important for the development of e-commerce. Due to the early state of development this paper can, even for its limited scope, neither be exhaustive in the treatment of issues nor in the discussion of recommendations.

2. Which new competition issues may arise in e-commerce?

2.1. Antitrust

Important network externalities of the internet lead to equally important economies of scale quite often in combination with powerful economies of scope. The consequence is a quasi innate tendency towards concentration which probably has important effects on competitive advantages in the

- Collection of fees from users,
- Offering of services to users,
- Collection and exploitation of information – the strategic good of the internet economy – and
- Set-up of virtual, vertical co-operation using the economies of scope in information.

The existence of important players already partly dominating – at least regionally – market segments and influencing standards in the value-added chain increases the dangers of a distorted competition. As examples may serve big access providers (e.g. AOL Time Warner), infrastructure providers like incumbent telcos (e.g. Deutsche Telekom, France Télécom), software providers (e.g. Microsoft) or logistics providers (e.g. Deutsche Post or other incumbent POs with significant logistics and banking operations).

The development of the economic side of the internet – which introduces a new orientation towards *paid services* to the differently planned (free for use) network – seems still difficult: the vast majority of offered information services are without cost for the user, a free, public good type net will continue to co-exist, even copyrighted information, e.g. music or videos, are quite often exchanged at no cost over the net. Just a limited number of suppliers of internet related services can bill the user because they can tie[1] or bundle the network externalities they can offer with service fees: e.g. access providers, software developers, network operators or specialised information service providers which operate on a subscription basis.

[1] The use of the word tying in this context describes a compulsory bundling of clauses, products or services to a product or service.

Dominant players which are active in several segments of the market – e.g. access, transmission, value-added services – can increase their attractiveness to customers by *offering bundled services* . This increases the temptation for *tying* (compulsory bundling of services) by (regionally) dominant players which probably leads to a distortion of service competition and to competitive advantages in the collection of fees, coming from different sources (subscription, transaction fees, placement fees, service prices and commissions). Other competitors, especially start-ups, have significantly lower chances to profit from these possibilities: market entrance entails significant sunk costs, the position to demand fees for subscription or services is limited due to the low externalities offered and a lack of information on the market, which makes it difficult to tailor product/ service offers to specific customer groups, increases the risk of failure of the business model (amply demonstrated by dot.com failures). Thus regional dominance of a firm may be stifling competition. This leads to a number of questions regarding: the positive effects of concentration for the economy as a whole, the assessment of potential losses due to reduced entry and technological diversity, the threshold of dominance and antitrust action or the definition of relevant markets (region, country or world including or not including the offline segment).

Competitive advantages in the *collection and exploitation of information* are equally facilitated by tying strategies: demand for services or products is tied to information demand. The dynamics of this process are probably increased by the demand of advertising for high coverage, the growing advantage in customer knowledge with growing size of the information base in turn with better targeted advertising and a more precisely defined segmentation strategy with special offers for specific customers.

The internet makes it easier to set up *virtual vertical co-operations* by automatically tying or bundling services from other firms to an e-commerce process: e.g. a chargeable value-added transmission service, a billing service, a logistics service or installation and maintenance services. If practised by dominant firms, this may increase the reach of dominance and lead to a foreclosure of competitors on other markets.

These examples may have shown that the internet erodes the traditionally used definition of product markets as several products or services can be or are cre-

ated simultaneously by one firm – quite often an already dominant firm in one segment. In fact, the product or service distributed via the net may be – due to the low average diffusion rate of this kind of distribution – of only minor importance compared to the collection of fees or information. This makes it significantly harder to define relevant markets. In order to demonstrate this more clearly, I broke down the internet value-added chain roughly into three domains, separating services, information flows and generated fees (see graph 1). Until now the information dominance issue combined with a simultaneous impact on several, formerly separate markets and the resulting problem for market definition has not been addressed in depth. It is still unclear if specific combinations of information coupled with a dominant position in another segment may develop characteristics comparable to an "essential facility".

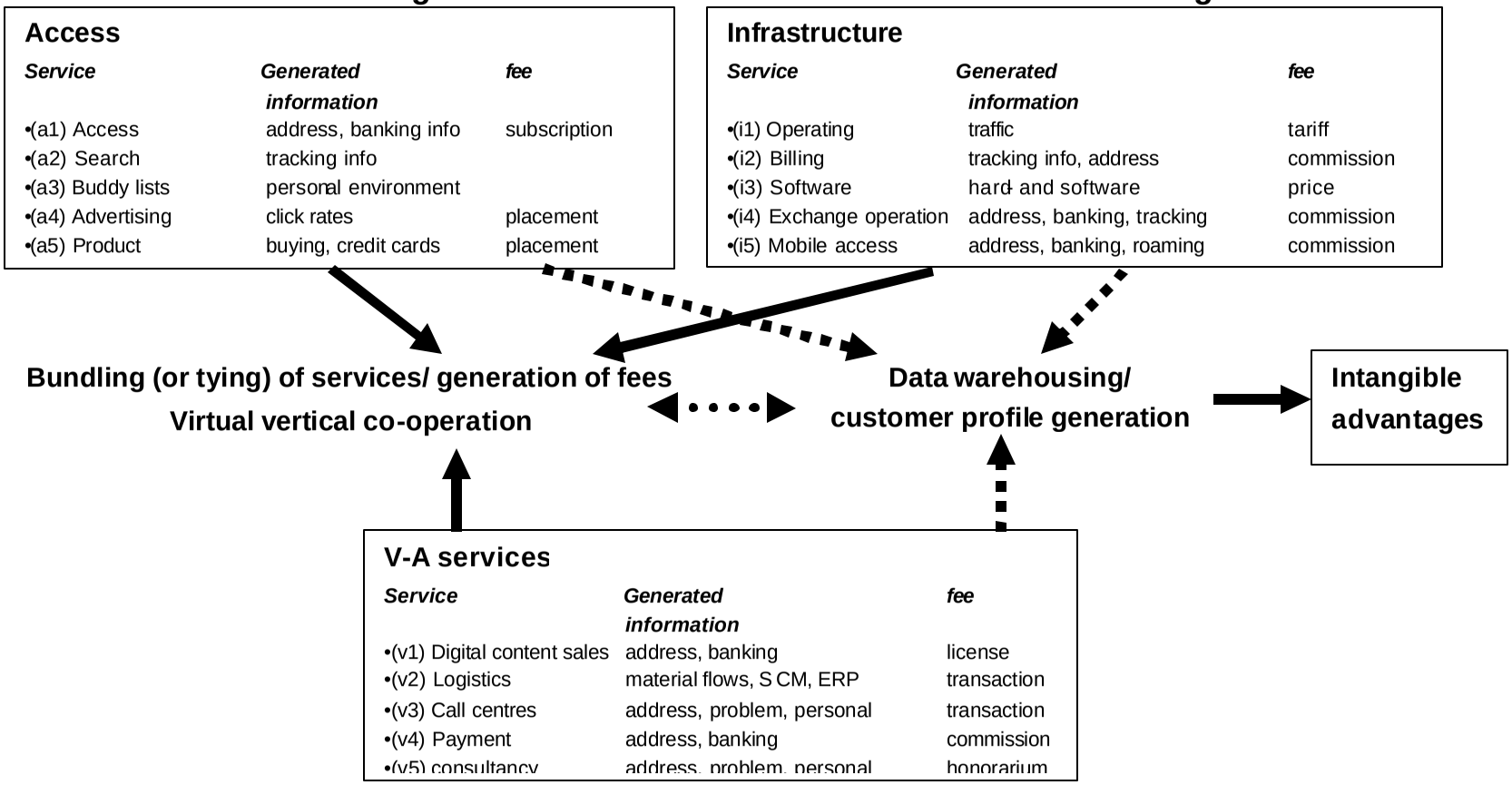
The other e-commerce specific feature is the potential transparency of processes by making information accessible to all market partners via *exchanges*. This may lead to the competition problems of

- Collusion,
- Exclusive agreements and
- Denial of access.

The potential *collusion* via systematic and transparent collection of information in exchanges or net-based, private sector statistics are classical prerequisites for cartels. *Denial of access* can imply that not all competitors in a market can participate in an electronic exchange, especially when founded by leading or dominating enterprises of a sector, or only a limited of ISPs are granted access to (CATV) broadband transmission. Both could happen indirectly, by either setting standards which can only be fulfilled by a limited number of firms or by tying additional services to access. This issue of "virtual" restriction has not yet been addressed to our knowing.

Tying of participants to private exchanges – e.g. the obligation to exclusively sell or buy via the exchange – poses principal problems. *Bundling* of demand via an exchange maybe accepted as long as the market share of the bundled demand remains small enough. The bundling of demand via exchanges in "strategic", industry-specific goods, though, may seem critical (see 2.2.).

Graph 1 **Factors re-enforcing tendencies towards dominance in e-commerce segments**



Type of potential dominance via segment	***Example***	***Services/ information/ fees***
Access provision	AOL Time Warner	a1,a2,a3,a4,a5 + v1,v4,v7
Infrastructure provision	Incumbent telco	i1,i2,i5,i6 + a1,a2,a4,a5,a6,v3,v7
Software provision	MS	i3 + a1,a2,a3,a4,a5,v1,v4,v7
Logistics provision	Incumbent PO	v2,v4 + a1,a2,a4,a5,a6,v7

Antitrust/ cartel legislation in several countries is bound to assess the potential positive effects of market dominance. The probably important economies of scale and scope of e-commerce use for the suppliers might thus overcompensate the estimated negative effects from a restriction of competition. Typically, though, this restriction also tends to imply a limitation of technology choice.

2.2. Fair trade

The discussed fair trade problems so far centre on advertising and privacy policy as the internet makes it possible

- To be globally present,
- Easily shift the lieu of origin,
- To use new forms of not directly recognisable advertisement,
- To reach an enormous amount of persons at practically no cost and
- Unnoticeable shifts in privacy policy.

The *global presence* of presented content can unintentionally or intentionally lead to collisions between regional (state) or national law. Thus products or services, whose sale is prohibited in offline distribution, may be available via e-commerce. I call this kind of advertising a nationally forbidden product from another national market where advertising is legal virtually illegal. The potential dissolution of *lieu* via server location may allow for an intentional use of legal differences. Both cases could already be observed.

Via new techniques of traffic guidance – e.g. search engines, smart tags or deep links – advertisements which are *not recognisable* as such could be used. The advertisements could also be hidden in chat forums of user communities.

The possibility to *reach* practically all users of the net with advertisements at practically no cost has led to “spam”: unsolicited publicity. In extreme cases spamming may even block e-mail access in denial of service attacks.

The use of the asset customer information may vary when start-ups are bought by other firms. Neither the change of possession nor the modified *privacy policy* may be easily detectable for the customer.

2.3. Consumer protection

Concerns about internet related consumer protection issues mainly arise from two domains

- The potentially non-existing privacy of the net and
- The information about the valid law in cases of complaints.

The internet makes it possible to collect and exchange/ sell vast amounts of personal information without being perceptible to the user. This can happen e.g. via cookies or clickstream analysis. Additionally demands of information or services and e-commerce transactions are coupled with personal questionnaires which quite often allow for a linking of the collected data with other sources, e.g. credit card data. Dominant firms which are active in several segments of e-commerce or virtual co-operations may come quite close to realise their dream about the transparent customer and the optimal product differentiation. The consumer quite often may feel nagged by targeted advertising and probably does not like the idea that for him confidential actions on the net become known to others. This idea may become oppressive if government can access and use the information.

Significant differences in legal systems can make international e-commerce hazardous for the acquirer. Though, for example, EU rules for mail-order contracts remain valid, their main flaw is that they were originally devised for national transactions, where national courts could enforce decisions against the contracting party. What can a customer do, when an international contracting party declines to reimburse? National courts in his country may not have the power to enforce their decision abroad. The suggested validity of the country of origin rule – as opposed to the off-line use of the country of destination rule – makes settlement of conflicts more difficult for the consumer: he probably does not know the legal system and incurs higher fees for conflict resolution.

The following table gives an overview of the discussed problems.

E-commerce related issues in selected domains of competition law

Domain	**Issue**	**Examples**
Antitrust	Potential dominance of value added chains by standard setting firms via tying of services	• E.g. via software, access portal, data storage, search and placement services (software provider constellation) • E.g. via billing, data storage, tracking and access portal services potentially including search and placement (incumbent telecom constellation) • E.g. via content, data storage, tracking, access portal services including search and placement (access and content provider constellation) • E.g. via logistics, data storage, tracking, payment and access portal services potentially including search and placement (incumbent PO constellation)
	Tying	• Exclusive tying of partners to one exchange • Exclusive tying of services to access or application programmes to operating systems • Exclusive tying of distribution partners to bundled products
	Bundling Potential collusion	• Of demand for strategic (sector-specific) goods • Of access and transmission services for competing service providers • Systematic gathering of statistical information by all firms in a sector • Transparent data on exchanges
	(Virtual) denial of access	• Limited access to private B2B exchanges • Limited access to broadband transmission
Fair trade	Virtually illegal advertising	Advertising legally prohibited goods or services in a national market from another national market where there are no legal restraints
	Illegal or potentially illegal advertising	• Advertisements which are not properly labelled as such, e.g. smart tags, deep links, chat forums • Not indicated search restrictions e.g. in portals or search engines / shop bots
	Changes in privacy policy	Changes in the use or proliferation of personal data without notice
	Unwanted advertising	e.g. Spam
Consumer protection	Illegal proliferation of personal data	Sales or exchanges of personal data to third parties not underlying comparable contractual clauses without consent
	Illegal use of personal data	Collection or use of protected data without notice or options to block use

3. Recent decisions, discussions – continuing "technical" uncertainties

There seems to be shared consent that existing off-line competition law and legal practice is applicable to the internet as well without major modification[1]; this view is supported by some decisions mostly referring to prior off-line practice. The number of leading decisions still is very small. This is due partly to new problems, partly to the necessity of deciding on a case to case basis. The following, selection tries to work out some of the issues in more detail – dominance, tying, bundling, advertising, venue and applicable law and privacy – by using, as above, the subdivisions of German competition law. Legal uncertainties in all antitrust cases arise from margins of evaluation of technical facts.

3.1 Antitrust

3.1.1. Dominance

The definition of dominance plays an important role in e-commerce and internet related competition policy as the network externalities of dominant products/ services can be combined via new possibilities of bundling and other advantages discussed above with other products/ services

The definition in use in the EU and Germany is based on the decision of the European court in the "United Brands" case: an economic position allowing the enterprise to impede competition by being able to behave independently from competitors and consumers in this market[2]. This equals the German definition of § 19 Abs. 2 Nr. 2 GWB. The threshold for action of Art. 82 EG is where an enterprise can behave independently from competitors or control the conditions

[1] E.g. U. Böge, Ist das deutsche Kartellrecht für elektronische Marktplätze noch zeitgemäß?, presentation at the 19th FIW-Symposium, 2.3.2001, www.Bundeskartellamt.de. (Böge stresses sufficient flexibility and aptitude of legal instruments but sees the already existing collaboration of national competition authorities as increasingly important) or J.I. Klein, The Importance of Antitrust Enforcement in the New Economy, p. 8, January 29, 1998, www.usdoj.gov/ atr/public/speeches/1338.htm

[2] EuGH 14.2.1979 „United Brands"

of competition[1]. German and EU law do not exclude the possibility of a dominant position even though significant competition[2] existed.

The actual measurement of dominance in most countries relies on a bundle of structural criteria where market share stands out. Other criteria are measurements of: financial resources, access to purchase and sales markets (including vertical integration and a full line of products or systems offers, brands, own distribution networks, logistics and secured provision of inputs), personal, legal or financial interrelations, barriers to entry (resources, market dynamics, transport cost, economies of scale and scope, technical or international barriers), incomplete substitution, high concentration of demand, development phase of the market[3].

Measurement criteria for dominance may be easily agreed upon. The critical point of all dominance analysis lies in the definition of relevant markets[4]. Here some new problems come up with e-commerce:

- Markets can no longer be characterised by one product or service but by a bundle of them: e-commerce transactions typically include access, transmission or value-added services (data-, financial-, logistical-) which can be provided by one firm.
- The net offers a strongly increased potential for product differentiation. Parting from a concept oriented at close substitutes ("Bedarfsmarkt-Konzept") this might lead to an "atomisation" of markets.
- The global reach of the net which enlarges potential competition,
- The important role of technological innovation for market dynamics and
- An increased potential for co-operation via the net.

The German and European law has so far used very strict criteria, limiting the market to only close substitutes of the product. There is a visible tendency to

[1] Bundeskartellamt, Grundsatzabteilung, Auslegungsgrundsätze vom 2.10.2000, www.Bundeskartellamt.de.

[2] U. Immenga, E.J. Mestmäcker, EG-Wettbewerbsrecht Kommentar, München 1997, Art. 86 EGV, note 66 f.

[3] Bundeskartellamt, Grundsatzabteilung, Auslegungsgrundsätze vom 2.10.2000, www.Bundeskartellamt.de .

[4] W. Möschel et al., Wettbewerbspolitik für den Cyberspace, Gutachten des wissenschaftlichen Beirats beim BmWiT, Juli 2001, p. 26 f, www.bmwi.de/publikationen .

continue the strict interpretation: the European commission has argued that digital distribution of music is a separate market[1]. Even a separation of "download" (HDD stored files) and "streaming" (simultaneously used files without storing) is reflected[2]. Other examples could be the emergence of a pan-European horizontal WAP portal[3] or a differentiation between narrow-band and broadband access[4].

The US antitrust concerns over selling music on the internet by the five major record companies[5] indicate a similar direction. The Department of Justice investigation is seen as a monitoring of ventures among companies which together control about 80 % of the US market.

Stated dominance – in a merger case – must not lead to unconditional antitrust action. Many regimes provide for a balancing of negative and positive consequences. In case of predominant advantages for customers and the economy exemptions can be granted. If the exemptions have to be decided by the same courts judging the dominance, this may lead to conflicting aims. The assessment of potential gains is extremely difficult and the decision is more of political than legal nature[6]. In Germany these procedures have been separated for this reason.

Quite often positive effects and the pre-competitive phase of research or development have led to a liberal handling of R&D collaboration. This attitude seems bound to change in Germany as technology is seen as an important driver in the network economy. (virtual) Co-operation in R&D in tendency reduces technological choice and is seen as especially negative when dominant players are included[1]. Exemptions may be granted if developments could not be financed without co-operation.

[1] COM COMP M. 1741, MCI WorldCom/ Sprint; COM COMP M. 1852, Time Warner/ EMI.

[2] COM COMP M. 1845, R26, AOL/ Time Warner.

[3] COM COMPJV.48, Vodafone/ Vivendi/ Canal+; COM COMP M.2050,R22, Vivendi/ Canal+/Seagram.

[4] COM COMP M. 1845, R33-35, AOL/ Time Warner; US v. AT&T Corp. & Media One Group Inc., No. 1:00CV01176.

[5] M. Richtel, Plans to sell Music on the Internet Raise Antitrust Concerns, in NY Times, August 7, 2001.

[6] W. Möschel et al., Wettbewerbspolitik für den Cyberspace, Gutachten des wissenschaftlichen Beirats beim BmWiT, Juli 2001, p. 30 f, www.bmwi.de/publikationen .

A definition of dominance can vary according to the evaluation of criteria and differences in court interpretation. Inside the EU this has led to problems which can be highlighted by the "Masterfoods v. HB Ice Cream" case[1] (the GE/ Honeywell merger case could serve as an illustration for EU – US problems). Though national courts in Europe can make legally binding decisions on antitrust issues, they (and the national competition authorities) are bound to cooperate with the European Commission and Court if no decisions have been taken at these levels. Kamann and Horstkotte[2] point out that in parallel decision cases there is a fundamental obligation for national courts to follow European decisions. Other European acts like the institution of legal proceedings, "comfort letters" or negative attestations according to Art. 2 VO Nr. 17 have no formal binding consequences and tend to increase legal insecurity in cases of dispute.

Another important source of uncertainty lies in the assessment of potentially positive effects of restricted competition (welfare approach). The changing perceptions of development potential during the phases of dot.com boom and bust can serve as a good illustration of the difficulty and the enormous interpretation margins of this task. The demanded proof by Shelanski and Sidak[3] that any measure taken against a dominating firm would increase allocative, productive and dynamic efficiencies is practically impossible and would reverse the burden of proof. In order to avoid conflicting aims in investigations, the assessment procedure of positive effects should be separated from the assessment of dominance.

These uncertainties are increased by the EU white paper and the regulation draft regarding articles 81 and 82 of the EU treaty. Hereby the commission proposes to supplant the existing procedure of ex-ante control via registration by a system of "legal exception" which would lead to an ex-post control and a reversal of the burden of proof[4]. This revives an old French concept which was turned down already in the fifties and sixties negotiations. Germany is strictly

[1] EuGH decision, Rs. C-344/98, in: Wirtschaft und Wettbewerb (WuW) /E EU-R389.

[2] H-G. Kamann, Ch. Horstkotte, Kommission versus nationale Gerichte – Kooperation oder Konfrontation im Kartellverfahren, in: WuW 5/2001, p. 458 ff..

[3] H.A. Shelanski, J.G. Sidak, Antitrust Divestiture in Network Industries, The University of Chikago Law Review 68:93, 95-197, p. 196.

[4] W. Fikentscher, Das Unrecht einer Wettbewerbsbeschränkung: Kritik an Weißbuch und VO-Entwurf zu Art. 81, 82 EG-Vertrag, in: Wirtschaft und Wettbewerb 5/2001, p. 446 ff.

opposed to this concept as several statements by the government[1], the delegation of the Ministry of Economics and Technology[2] and the monopolies commission[3] demonstrate.

3.1.2. Tying

The terms tying and bundling are often used indiscriminately. For a better understanding we propose to use the term "tying" for compulsory bundles: the customer has no choice of an unbundled product at a different price. Tying used with a dominant position forces the buyer of a dominant – and network efficient – product to buy another product which could also be separately sold but probably has lower selling chances as it does not offer the same network externalities. It is thus an anti-competitive measure if competing products are on the market. The bundling of access in telecommunications would qualify in our view as a tying measure. Exclusive contracts, e.g. limiting a firm to the use of only the one exchange as a condition for access or giving selected ISPs conditional broadband access to CATV networks would, too, qualify as tying.

Of course tying is a strategic option of all firms in order to ameliorate their position in competition. Antitrust problems in the internet start if dominance in another segment is used to create competitive advantages for a product via the dominant product. This could be seen as a kind of cross subsidisation of one product which has to compete with others from a product where the firm gains dominance rents. There is an argument, though, that dominance rents will be used for the technological development of a fledgling market with important investment needs[4] – as lately used by AT&T related to broadband CATV. Lemley

[1] Stellungnahme der Regierung der Bundesrepublik Deutschland zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EGV, www.bmwi.de /Homepage/Politikfelder/Wirtschaftspolitik/Wettbewerbspolitik/

[2] Erste Stellungnahme der deutschen Delegation zur Reform der EU-Wettbewerbsregeln für horizontale Vereinbarungen, BmWi, Berlin, 9.3. 2000, www.bmwi.de /Homepage/ Politikfelder/Wirtschaftspolitik/Wettbewerbspolitik/

[3] W. Möschel, H. Greiffenberger, W. Haastert, M. Hellwig, E. Weber-Braun, Kartellpolitische Wende in der Europäischen Union? Köln, Oktober 1999 , www.monopolkommission.de .

[4] See J.B. Speta, Handicapping the Race for the Last Mile? A Critique of Open Access Rules for Broadband Platforms, 17 Yale Journal on Regulation 39, 76 (2000) and D. A. Lathen, Broadband Today, FCC Cable Services Bureau, www.fcc.gov/bureaus/cable/reports/

and Lessig[1] show based on a publication by Shelanski it is competition, not monopoly, that spurs innovation.

The most publicised recent tying case combined with an attested dominant position related to the internet is the Microsoft case of tying a browser to an operating system. The development indicates that the foreclosure doctrine, out of fashion for a certain time, may be valid in network industries. The court of first instance decided that Microsoft had tried to monopolise the browser market by tying the browser to its monopoly product in operating systems for PCs. Trying to maintain the monopoly in operating systems and to obtain one in the browser market were judged as a violation of Sec. 2 of the Sherman act, the tying arrangement as a violation of Sec. 1.

The case is a precedent for the tying of network services – e.g. passport registration, msn net –, a modified version of Java – which tries to dilute an open industry standard – and new, non standard products for picture processing – until now provided by Kodak – or media players – by RealNetworks via AOL Time Warner – into Windows XP. The first version's complication of an installation of majority products combined with the impossibility to de-install Microsoft products indicates antitrust intent. Detailed discussions of remedies exist in this case. They range from divestiture – in the meantime abandoned by the Department of Justice – an acquittal on tying charges[2] combined with a mandatory versioning of XP – which would have to be sold unbundled only and at different prices for at least two years – to an acquittal in practice on the grounds of public welfare as the demanded proof cannot be submitted[3].

The European antitrust probe in the Microsoft case goes farther. Among the abuse issues are: the disclosure of interoperability information and the tying of a proprietary media player. The disclosure issue is seen as harming consumers, competition and innovation. Several preceding Commission and European Court cases requiring the disclosure of technical information to competitors exist

[1] M.A. Lemley, L. Lessig, The End of End to End: Preserving the Architecture of the Internet in the Broadband Era, 48 UCLA Law Review 1 (2001), p.37.

[2] R. C. Picker, Pursuing a Remedy in Microsoft: The Declining Need for Centralized Coordination in a Networked World, John M. Olin Law & Economics Working Paper No. 130, p.25 on mandatory software coordination; a reasoning I would strictly object on the grounds of my text.

[3] H.A. Shelanski, J.G. Sidak, Antitrust Divestiture in Network Industries, The University of Chikago Law Review 68:93, 95-197, p. 197.

– the Commission cases 1984 against IBM, 1988 against Racal Decca, 1991 against Tetra Pak, 2001 against IMS Health Inc. and the 1987 case Volvo v. Erik Veng U.K. Ltd. or the 1995 case Magill TV Guide Ltd. v. Irish Television – indicate that Microsoft might not be able to withhold information it sees as proprietary.

Another applicable though not directly internet related decision on tying was taken by the European Court in the Masterfoods v. HB Ice Cream case. Masterfoods and HB compete on the Irish market and both hold significant market shares. HB provided its Irish retailers with freezers to store its ice cream by binding them to use it exclusively for their products. Many retailers, though, used it also for Masterfoods products. When HB reminded the retailers of their exclusive agreement, Masterfoods demanded declaratory action regarding exclusivity. The EU Court decided in favour of Masterfoods. If we interpret the freezers in retail as a network with a tying arrangement, the EU Court has decided against tying arrangements by dominant players as even tying by players with significant market power was excluded.

3.1.3. Bundling

In order to differentiate bundling from tying, bundling is defined as the conditional combination of goods or services, which may be available separately at different prices. Bundling may describe the bundling of demand or transactions via exchanges or combined offers of access and value-added services which are available separately. The bundling of access and transmission services for ISPs which are not available separately qualify for a tying arrangement according to our definition.

Several bundling judgements from Germany are chosen to illustrate the critical points. CC-markets [1] an open, neutral platform owned jointly by BASF, Degussa-Hüls, Henkel and SAP bundling Europe wide transactions with technical goods and services – negotiations and completion of the contracts take place outside the platform – was cleared by the German Cartel Office. RubberNet-

[1] U. Böge, Ist das deutsche Kartellrecht für elektronische Marktplätze noch zeitgemäß?, presentation at the 19th FIW-Symposium, 2.3.2001,p. 9, www.Bundeskartellamt.de.

work[1] was registered as an exchange for MRO products where tyre and rubber companies can bundle their demand. The registered joint venture was also cleared. Böge[2] notes that a joint venture based on "strategic goods" where the sector is the main or only customer would not have been cleared. Thus bundling of demand by dominant buyers would not be accepted.

Since 1999 all bundling of demand in co-operative purchasing groups has to be registered with the cartel office in Germany (§ 9 Abs. 4 GWB).

Power- or community shopping by consumers – the bundling of demand in order to reach a better price – had been blocked in Germany by "Rabattgesetz" (rebate law) and "Zugabeverordnung" (decree on giveaways) until mid 2001. Even though these regulations were dropped in the course of harmonisation with EU law, new decisions indicate persisting problems for power shopping (and equally for reverse auctions[3]): The OLG Köln (a third instance court) decided that "aleatoric attraction" of this technique may substantiate a violation of §1 of the law against unfair competition[4] (UWG). The resulting legal insecurity from this interpretation – which perpetuates the model of a dependent consumer – applies, as Lange[5] points out, only to German firms. Firms from EU member states are excluded via the EU e-commerce directive.

3.1.4 Access

Two quite different access issues are discussed so far: the access to privately founded exchanges and the access of service providers to unregulated access networks – potential "denial" cases.

The open access for all interested firms to privately owned exchanges has been the reason for admission of the Covisint exchange by the German and US cartel

[1] Wirtschaft und Wettbewerb 6/2001, VII Entscheidungssammlung: Nachfragebündelung durch B2B-Plattform, p. 611 – 614.

[2] U. Böge, Ist das deutsche Kartellrecht für elektronische Marktplätze noch zeitgemäß?, presentation at the 19th FIW-Symposium, 2.3.2001,p. 10, www.Bundeskartellamt.de.

[3] OLG Hamburg, Urteil vom 7.12.2000 – 3U116/00, Versteigerungen im Internet in umgekehrter Richtung, GRUR-RR 2001, 113.

[4] OLG Köln, Urteil vom 1.6.2001– 6U204/00.

[5] K. W. Lange, Steht das Powershopping in Deutschland vor dem Aus?, Wettbewerb in Recht und Praxis 8/2001, p.888 ff.

offices. It should be kept in mind, though, that these exchanges start only with limited numbers of firms complying to the set standards. Further development of the exchange and the experience and trust gained by co-operating firms in the process may at a later stage lead to a virtual exclusion of non-participating firms.

If network operators can refuse the access of ISPs to non-regulated access networks – e.g. CATV broadband in the US – is still under inquiry by the FCC. A grant of monopoly rights would, according to Lemley and Lessig[1] result in a change of the until now open architecture of the internet. They clearly object the wait and see argument brought forward by Litan[2]. For some regions CATV seems to be the sole access opportunity to broadband internet as DSL technology depends on the distance from the next hub and satellite links are not yet available. These regions would be excluded from access competition.

3.1.5. Collusion

B2B exchanges can offer important advantages via increased cost savings through the transparency of processes and increased competition in pricing. But they can also create the opportunity for collusion: "spreading false information, misleading others about the true position of the market or creating false trades..... have a long and infamous history in the world of securities trading.."[3] It can also be relatively simple to obtain price, cost and output information of competitors and use them for a cartel in the market. The potential danger of collusion is increasing through the growing number of privately owned exchanges.

The management of information sharing therefore plays an important role: Each participants access to non-aggregated information concerning not his own transactions has to be restricted, penalties – e.g. exclusion from the exchange – should be in place for improper use of information, data should be collected by third parties, available data should be more than three months old and at least

[1] M.A. Lemley, L. Lessig, The End of End to End: Preserving the Architecture of the Internet in the Broadband Era, 48 UCLA Law Review 1 (2001), p.21.

[2] R. E. Litan, Law and Policy in the Age of the Internet, Duke Law Journal Vol.50:1045, p. 1080.

[3] A.B. Sculley, W.W.A. Woods, B2B Exchanges: The Killer Application in the Business-to-Business Internet Revolution, wwwisipublications.com, and Comments Regarding B2B Electronic Marketplaces for the FTC, July 20, 2000, p. 2.

five parties should provide data for every published figure[1]. Kühn points out[2] the collusive use of communications about planned future conduct – e.g. demand plans or prices – illustrated by examples from the US automobile industry and the US v. Airline Tariff Publishing company case. Especially in banking information sharing may serve as a collusive device as Gehrig and Stenbacka show[3].

The German competition authority (Bundeskartellamt) decided against a third party, on-line output-statistics initiative which could be used as a basis for a quota cartel.

3.2. Fair trade

The e-commerce related fair trade issues mainly imply advertising or commercial communication in the words of the EU directive on e-commerce. Some of the new problems coming into existence with the internet are: legal differences between the country of origin and the country of destination (virtual illegality, which will be covered by paragraph 4.1), improper use of new forms of communication – advertising which is not recognisable as such or unsolicited advertising – and changes in privacy policy. The cited issues – national or federal state legal differences apart – seem to be less controversial.

3.2.1. New forms of advertising

All new forms of hidden or not properly labeled advertisements are prohibited in analogy to offline law. This applies to banners looking like system messages, scrollbars functioning as links, unstoppable interstitals, not indicated web sponsoring, covered associate partnerships, paid placements in search engines and advertising in chat fora. Shop bots (e.g. Bizrate.com (US) or Guenstiger.de) probably could get entangled as well, as they increasingly come closer to advertisement listings: they frequently do not show the cheapest offer but the biggest

[1] R.E. Bloch, S.P.Perlman, Analysis of Antitrust Issues Raised by B2B Exchanges, FTC Workshop on B2B Exchanges, June 29-30, 2000, p. 10; and Statement No. 5 of the DoJ and FTC Statements of Antitrust Enforcement Policy in Health Care, August 1996.

[2] K.-U. Kühn, Fighting collusion by regulating communication between firms, in Economic Policy, April 2001, p.180 f.

[3] Th. Gehrig, R. Stenbacka, Information Sharing in Banking: A Collusive Device?, forthcoming CEPR publication.

advertiser without making the customer aware of this fact. A recent decision of LG Frankfurt[1] Mucos Pharma GmbH v. Database Marketing prohibits the "junking" of search engines – the use of technology in a way that the first eighty eight places led to a foreign internet pharmacy and not the owner of the trademark (and producer of the product) – as a practice restricting competition. The decision indicates that search-engines might be regulated by jurisdiction more strictly. Self regulation could be requested in order to avoid practices which are in-transparent and deceptive for the user. Though this may cut into the potential for gathering fees via search-engines, consumer trust and use may offset these disadvantages.

Spam – sending unsolicited e-mail with advertising or defamatory content – is after several similar decisions of second instance courts based on a first decision of LG Traunstein[2] no longer allowed in Germany. Though the valid EU regulations do not prohibit spamming a more restrictive national regulation is authorised by Art. 14 S. 1 of the distance selling directive[3]. Similar restrictions are valid for Austria, Denmark, Finland and Italy. In other EU member states spam with advertising content is not banned.

3.2.2. Changes of privacy policy

Two US cases have dealt with changes in privacy policy so far: in the Toysmart case the FTC forced the bankrupt company which wanted to sell its customer database in breach of its expressed privacy policy to enter into "privacy friendly" arrangements with potential purchasers.

In a second case complaints of consumer groups about changes of Amazon's privacy policy led into an investigation of the FTC. Amazon originally had declared not to sell, trade or rent personal information to others and now notified all customers of a potential transfer of the database to the buyer in case of an acquisition. Even though the FTC found a deception of customers likely, en-

[1] Frankfurter Allgemeine Sonntagszeitung, Tricksen im Internet wird schwieriger, 21.10.2001, Nr. 42, p. 41.

[2] Az 2 HKO 3755/97, NJW-CoR 8/1997, p.494 f.

[3] A short version can be found at europa.eu.int/comm/consumers/policy/developments/dist_sell/dist02_en.htm

forcement action was not taken as all customers had been notified and the revision reflected its policy more accurately[1].

3.3. Consumer protection

The illustration of technical uncertainties in consumer protection will mainly deal with privacy regulation (the questions of applicable law will be covered by paragraph 4.2.). A significant part of personal data had already been protected by offline law. In Germany this was the Federal Data Protection Act (Bundesdatenschutz Gesetz, BDSG). According to this law protected "personal" data are those which might interfere with his personality rights when handled or processed. Personality rights might be impaired if the data sets are "identifiable" i.e. can be related to only one person[2].

Another, telecom specific law also regulated data protection in Germany: the Information and Communication Services Act (IuKDG). This law, though, relied on the definition of "personal" in the BDSG. The IuKDG goes farther than the BDSG as it may imply clickstream data in personal data. "Sensitive" data, e.g. utilisation, accounting and contractual data are subjet to specific protection: they have to be anonymised for use and erased as soon as possible. User profiles are restricted – if no explicit consent exists – to data sets which have been made anonymous. A combination with identifiable data is not allowed. Only anonymised data are available for market research.

In France and the U.K. anonymity is encouraged but not a precondition. Further use of the data has to ensure that consent is based on full information and voluntary. The definitions of "identifiable" vary between member states. A closer look onto the situation before harmonisation can be found in Reidenberg and Schwartz[3].

Three years ago, in October 1998, the EU directive on data protection came into force. A new directive on a common regulatory framework for electronic

[1] G. Brooks, Amazon.com cleared of Privacy Breach, in BerwinLeightonPaisner, data protection update, August 2001, p.3.

[2] S. Simitis, U. Dammann et.al., Kommentar zum Bundedatenschutzgesetz, § 3, 11.

[3] J.R. Reidenberg, P.M. Schwartz, Data Protection Law and On-line Services: Regulatory responses, europa.eu.int/comm/internal_market/en/dataprot/regul.pdf

communication networks and services with further restrictions – regarding mobility information from 3G networks – is in preparation[1]. As of March 2001, Austria, Belgium Finland, Greece, Italy, the Netherlands, Portugal, Spain Sweden and the U.K. had proposed or adopted final legislation. Denmark, France, Germany, Ireland and Luxemburg had failed to implement.

The valid EU directive does not achieve convergence on the definition of identifiability and has only encouraged the use of anonymity. Whereas convergence exists for direct and indirect collection notices, it is only limited for special notices for on-line services. Other main features characterising the current legal situation are "consent", "access" and "standard contractual clauses".

Consent to the use of personal data and access rights of the individual to the own personal data continue more or less the principles of prior national regulation. A new feature are the standard contractual clauses regulating the transfer of data to countries, which do not have an adequate level of protection: these imply all non EU countries except Hungary, Switzerland and, in part, the US as far as the companies adhere to the Safe Harbor agreement. E.g. a company from the US not adhering to the Safe Harbor agreement or from Japan which has a subsidiary in the EU can only transfer customer data to the main seat without customer consent if standard contractual clauses are applied. EU member states can block the data if the importer did not respect the contractual clauses. If the customer has consented to the transfer of his data to any country, the export poses no problems.

The definition of "consent", thus, is the critical problem in privacy. The more so, as "many consumers are still unaware of how the personal information they supply to a particular web site may be used"[2]. Does indirect/passive collection of data need consent? Can consent be obtained via an opt-out or an opt-in policy or does it need at least a written assent (electronic signature)? Which scope of use will be covered: single or multiple; use by the collector or by third parties? What are sensitive data? Can personal or sensitive data be identifiable? Can

[1] COM (2000) 393 final

[2] R.E. Litan, Law and Policy in the Age of the Internet, in Duke Law Journal, Vol. 50:1045, p.1063.

they be aggregated with other personal information? Kobayashi and Ribstein[1] propose an industry oriented view against federal regulation which, in their eyes would straightjacket emerging technologies and business practices. Their argument neglects consumer property rights on personal and sensitive information.

4. "Systemic" uncertainties from applicable jurisdiction and regulatory differences

Systemic uncertainties stem from the differences in national competition regulations. They can result in the illegality of e-commerce acts in a country of access though they are lawful in their country of origin, e.g. characterised by server location or act of establishment (we call this virtual illegality). The problem of legitimacy posed is quite close to the problem of venue – applicable jurisdiction – which is treated separately. Differences in regulation are also influenced by legal definitions of key policy issues like dominance and privacy rights or the differences in existing institutions and legal procedures. The wide margin of differences in all domains indicates not only a significant potential legal uncertainty but also a major problem for harmonisation.

4.1. Virtually illegal commercial communication

"Virtually" illegal commercial communication – the placement of ads or sales offers on the internet which are legal in the state or country of lieu but illegal in some states/ countries where they can be accessed – gained wide coverage through the Yahoo case. Several commentators saw virtual illegality as an attempt to limit the freedom of speech or to impose national regulations on the net insinuating that the internet is unregulated and world-wide. But there are numerous accepted restrictions e.g. on child pornography, defamation. The real issue brought up is the question of legitimacy: Which law governs content and

[1] B.H. Kobayashi, L.E. Ribstein, A Recipe for Cookies: State Regulation of Consumer Marketing Information, in George Mason University School of Law, Law and Economics Research Paper Series, Paper No. 01-04, p. 42.

access in a country or state? Several other disputes over alcohol and cigarette sales via the internet in the US or pharmaceuticals in Germany may further illustrate the problems.

In the Yahoo case the Tribunal de Grande Instance de Paris re-issued a preliminary injunction ordering Yahoo to prevent the access in France to its US web pages containing Nazi objects for auction or any Nazi sympathy or holocaust denial[1]. Yahoo objected that the French court could not properly assert jurisdiction over the matter as its French site yahoo.fr did not contain Nazi content and yahoo.com its US site was mainly targeting an American audience and lawful under US regulation. Though Yahoo removed the content from its site, it contested the validity of the French court's order in a California court.

Though the French court's order is contested in the US, US courts had no qualms about their legitimacy in deciding the Twentieth Century Fox v. iCraveTV.com[2] and People v. World Interactive Gaming Corporation[3] cases. Though iCraveTV, a Canadian internet startup, conducted legal activities in Canada and had conditioned access on verifications and agreements to ensure that only Canadians could lawfully access its service, the possibility of fraudulent use from the US was enough to confer jurisdiction to an American court. ICraveTV had to give up business. In the other case a New York court ordered an Antigua based casino to stop offering internet gambling – legal in Antigua – to New Yorkers. The close contact between the US parent and the casino was seen to provide sufficient grounds for US jurisdiction.

A more complicated case is the German decision against a internet order pharmacy in the Netherlands[4]. The EU e-commerce directive demands in general the application of country of origin law to commercial communication. This means that inside the EU no virtually illegal commercial communication exists. Possible exceptions for the validity of the directive are among others[5] public health related cases. There is a German interdiction of mail-order distribution for

[1] www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm

[2] M. Geist, Is There a There There? Toward Greater Certainty for Internet Jurisdiction, paper for the Uniform Law Conference of Canada and Industry Canada, 2001, p.6.

[3] J.R. Reidenberg, The Yahoo! Case and the International Democratization of the Internet, Fordham University School of Law, Research Paper 11, April 2001, p. 9.

[4] OLG Frankfurt, Urteil vom 31.5.2001 – 6 U 240/00 WRP 2001, 951.

[5] Intellectual property rights, trademarks, private contractual obligations of consumers.

medicine bound to be sold via pharmacies as mail order could not safeguard adequate counsel. The OLG Frankfurt and the KG Berlin decided on these grounds that German law was applicable and banned the distribution into Germany. This view is contested by Koenig[1], who insists that the client could equally well be given counsel via telecom means and the ban was more or less a protectionist measure.

Similar positions were taken in US decisions on internet distribution of alcohol and cigarettes into states where this is forbidden. A New York District Court decided to overturn a state law prohibiting internet distribution of cigarettes on the grounds of unconstitutional interference with interstate commerce and discriminatory favoring of local retailers[2]. In the cases of alcohol distribution the "Dormant Commerce Clause" doctrine was invoked to invalidate the existing state regulation on alcohol sales. Denning[3] shows that these decisions may belie a wrong interpretation of the validity of the Twenty-first Amendment.

4.2. Applicable jurisdiction

The question of applicable jurisdiction – relating to fair trade and consumer protection issues of competition law – has been addressed in several ways: a partial harmonisation of law was attempted in the European Union whereas the US tried to solve the problem via case law. Both approaches have tried to reduce legal uncertainty. This was achieved in some cases but aggravated in others.

The EU e-commerce directive designated the country of origin law as applicable jurisdiction for commercial communication with the exceptions of intellectual property rights, trademarks, private contractual obligations of consumers[4] and public health issues. Though there is now a common regulation of jurisdiction for the B2B segment inside the EU, this partial harmonisation has potentially

[1] Frankfurter Allgemeine Zeitung vom 14.9.2001.

[2] Wall Street Journal Europe, Online Cigarette Sites Spark Health Concerns, Sept. 24, 2001, p. 27.

[3] B.P. Denning, Smokey and the Bandit in Cyberspace: the Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales, paper available through the SSRN network.

[4] Where offline law continues to be valid.

increased legal uncertainties by creating parallel systems of law with different rules for

- Offline and online jurisdiction and for
- Member State companies and third country (non-EU) companies.

A difference between online and offline jurisdiction may lead to a distortion of competition by privileging firms from low regulation member states over local (offline) mail-order distributors (this might be circumvented by defining e-tailing as a different market). Similar effects may arrive from differences between EU and non-EU firms. It might also lead to advantages for non-EU multinationals with production inside EU against smaller foreign companies which produce outside. It is still unclear, on which base defamatory content in commercial communication (e.g. in comparative advertising) will be treated.

The US approach does not lead to parallel systems of applicable law. Uncertainties come here from different doctrines. The following summary is based on the detailed analysis of Geist[1]. He develops advantages and shortfalls of the active/ passive doctrine and proposes a targeting approach derived from the effects doctrine.

The active/ passive doctrine goes back to the Zippo Manufacturing Co. v. Zippo Dot Com Inc. case[2]. The court stated that the nature and quality of the commercial activity conducted on the internet was the basis for jurisdictional analysis. The decision says that “a passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction”. “If the defendant enters into contracts with residents of a foreign jurisdiction[3] that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper”. A great number of US and Canadian decisions followed the active/ passive doctrine. Shortcomings, though, showed up e.g. in defamation cases where activity was no adequate criterion or in cases where differences between the potential to sell

[1] M. Geist, Is There a There There? Toward Greater Certainty for Internet Jurisdiction, paper for the Uniform Law Conference of Canada and Industry Canada, 2001, p.6.

[2] 952 F. Supp. 1119 (W.D. Pa. 1997).

[3] Here California and Pennsylvania.

and actual selling had to be made. The test might also inhibit e-commerce by discouraging interactive (thus active) web sites.

In 1999 after the shortcomings of the doctrine became more evident, the effects doctrine was established by the US Supreme court in Calder v. Jones[1]. According to this doctrine personal jurisdiction (defining venue) is proper when a) the defendant's tortious actions b) expressly aimed at the forum state c) causes harm to the plaintiff in the forum state, of which the defendant knows is likely to be suffered.

The idea of targeting as a base for analysis is accepted by several international organisations which seek to develop global minimum legal standards. The OECD Consumer Protection Guidelines[2] refer to this concept as well as the Hague Conference on Private International Law's Draft Convention on Jurisdiction and Foreign Judgements[3].

4.3. Regulatory differences

In order to analyse the type and extent of internet regulation among industrialised countries I split up the internet into composing elements – protocols, domains, networks, network related information, network services and content – and subdivided regulation into four types – self-regulating "clubs" (Cl), sector specific regulation (R), competition regulation (C) and common law (L; see table 2). There are several areas with internationally uniform regulation: the self regulated areas of domain names and protocols, due to a US led technical standardisation of the internet. In other self regulated areas e.g. parts of content (entertainment and other information) different national self regulation schemes may exist but they do not pose a problem.

Difficulties arrive from areas with specific legislation: networks, network information, network services and advertising. Networks, core network services (ac-

[1] 465 U.S. 783 (1984)

[2] www.oecd.org/dsti/sti/it/consumer/ prod/CPGuidelines_final.pdf

[3] www.hcch.net/e/conventions/draft36e.html

Table 2

Rough regulatory overview on internet and e-commerce related components

Infrastructure						***Network services***		***Content***	
Protocols	**Regu-lation**	**Networks**	**Regu-lation**	**Network-information**	**Regu-lation**		**Regu-lation**		**Regu-lation**
Voice	Cl	Backbone telecom net-work	R[1] C[2] Cl[3]	Traffic	R	Access	R[1] C[2]	Advertising	C Cl
Text	Cl	Local loop fixed line	R[1] C[2] Cl[3]	Billing	R	Unbundling	R[6]	Contractual	L
Data	Cl	Terrestrial radio	RS C Cl[3]	Clicks	N	Transport	R[1]	Entertainment	Cl L
Images	Cl	Satellite radio	RS C	Personal	C[4] Cl[5]	Value-added services	C	Other Information	Cl L
Music	Cl	CATV	R C	Sensitive personal	C[4]	Broadcast	MC		
Video	Cl	Powerline	N			Netcast	N		

Cl= Club model self- regulation; R= sector specific regulation; C= Competition regulation; RS= spectrum regulation; N= not regulated; MC= must carry regulations; L= common law. 1) not in New Zealand; 2) New Zealand; 3) Australia; 4) in the EU; 5) US (Safe Harbor); 6) in some EU countries e.g. Germany.

cess, transmission, bundling) and network information like traffic and billing are subject to sector specific regulation in a majority of industrialised countries. A wide variation of institutional and procedural organisation exists between the countries[1]. The US, for example, have a system of local, state and federal authorities where the federal authority has the power of a first instance court, in Japan regulation is part of the Ministry of Post and Telecommunications – no independent authority exists – in New Zealand no sector specific regulation exists and Australia has a mixed model of self regulation and authorities (regulation and competition). Appeals procedures are very different as well. Even in the EU where a basic harmonisation of regulation exists, regulation details and procedures differ significantly.

The extent of regulation can also vary strongly. A good example is privacy: " legislative protections for data collected from individuals are almost nonexistent in the United States despite the widespread conception of privacy as a "legal norm""[2] with one exception, the firms which have signed the Safe Harbor Agreement. The EU data protection directive – which became effective in October 1998 – requires consent prior to collection, use and transmission to third parties of identifiable personal data within the EU and the use of standard contractual clauses for the transfer of data without consent to most non-EU countries. German regulations are even stricter (see above). Other examples could be dominance related procedures, access and unbundling.

Many economists still see governmental regulation especially of the internet as inefficient. A closer look onto the standard setting universe worked out by Rutkowski (see next page) shows an extremely complex network of self regulation clubs and bodies. Detailed studies by Mueller of the cases of deregulation in New Zealand[3] and the domain name regulation by ICANN[4] as well as the com-

[1] E.g. Ch. Koenig, J. Kühling, B. Pieper, H. Schedl, Liberalisierung der Telekommunikationsordnungen – ein Rechtsvergleich, Heidelberg, 2000.

[2] A.E. Shimanek, Do You Want Milk with Those Cookies? Complying with the Safe Harbor Privacy Principles, The Journal of Corporation Law, Winter 2001, p. 463.

[3] M.L. Mueller, On the Frontier of Deregulation: New Zealand Telecommunications and the Problem of Interconnecting Competing Networks, in Gabel, Weiman: Opening Networks to Competition, 1998.

[4] M.L. Mueller, ICANN and the internet governance: sorting through the debris of self regulation, info, Vol. 1 No. 6, 1999.

Rutkowski graph

parison of government and self regulation efficiency in telecoms[1] provoke reasonable doubt.

4.4 Governance options

Three layers of the problem: institutional, legal and operational
Duration of procedures
Cultural differences
Case to case approach vs. law approach
Legitimacy
Enforcement

5. Conclusions

E-commerce and the internet are still developing dynamically. A premature regulation by law might impair innovation in some cases. Decisions of courts on a case to case basis can more easily adapt to the development and help to develop basic principles. We propose the following on the institutional, legal and operational levels.

Institutional level

Dominance

- Separation of the assessment of dominance (the *legal* decision based on known facts) from the assessment of its potentially positive effects and the exemption privilege (the *political* decision based on unknown future developments)

Customer protection

- Clear, transparent and standardised settlement procedures
- Creation of international warranty funds (state funds with regress to inhabitants or national firms)

[1] Ch. Koenig, J. Kühling, B. Pieper, H. Schedl, Liberalisierung der Telekommunikationsordnungen – ein Rechtsvergleich, Heidelberg, 2000, p. 230 f.

- "Ombudsman" (independent referee) system (e.g. co-financed by industry selling over the net, effectuated by consumer-protection bodies)
- Designation of specialised courts for international settlements
- International appeals court.
- International enforcement warranties

Legal level

Dominance

- Dominance should be monitored by national authorities according to similar, standardised criteria. Evaluations on an individual case to case base.
- The defendant has the burden of proof in dominance cases, not the plaintiff.
- No tying of products/services or detailed information with dominant products or services
- No bundling of demand leading to a dominant position
- No denial of access and equal access in cases of dominance or not existing competition

Collusion

- Separation of exchange ownership and participation
- No proliferation of exchange information to participants or third parties (no information on buyers, sellers, amounts or prices)
- Only "firm" prices can be quoted on the exchange
- No information about planned demand or planned prices

Customer protection

- Opt in as a principle of data collection
- Notify customers about the use of collected data
- Sensitive personal data and far reaching information about the customer remain in the customers property. Any proliferation needs case-specific individual authorisation.
- Sensitive data have to be anonymised for use, erased as soon as possible and encrypted for storage of consented to.
- Internationally enforceable sanctions in cases of abuse are necessary.

Venue

- Contractual for enterprises except small enterprise (e.g. <10 employees)
- Country of delivery for consumers and small enterprise

- Location of victim in defamation cases
- Country of origin in unilingual – not country of reception adapted – commercial communication with warranty to respect national limitations on notification

Operational level

Antitrust

- National competition authorities of the EU, Japan and the US should intensify their co-operation in important cases.
- Co-operative development of dominance issue guidelines on a contextual case to case base

Customer protection

- Pre-selection of opt-out in all browsers
- Damage limits (e.g. to price tag for consumers and SE; exclusion of dangerous products) or contractual agreements
- Informal pre-settlement consultancy

Exemptions for developing nations?