



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the European Union

Internal Market Sub-Committee

Inquiry on

ONLINE PLATFORMS AND THE EU DIGITAL SINGLE MARKET

Evidence Session No. 9

Heard in Public

Questions 81 - 89

TUESDAY 10 NOVEMBER 2015

10 am

Witnesses: Professor Daniel Zimmer and Dr Thomas Weck

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on
www.parliamentlive.tv.

Members present

Lord Whitty (Chairman)
 Lord Aberdare
 Baroness Donaghy
 Lord Green of Hurstpierpoint
 Lord Mawson

Examination of Witnesses

Professor Daniel Zimmer, Chair of the Monopolies Commission, Germany, and **Dr Thomas Weck**, Senior Legal Analyst, Monopolies Commission, Germany

Q81 The Chairman: Thank you very much for giving us your time today. I will open up. Perhaps you could describe as background the role of the Monopolkommission. I gather that you are not a regulator but an advisory body. Could you describe that role and tell us a bit about the report that you have done—report No. 68, I understand—on individual online platforms and the market features that you identified there as requiring special action?

Professor Zimmer: Thank you very much, Lord Whitty, for the invitation and the kind reception. First, I am the chairman of the German Monopolies Commission. I am accompanied by Dr Weck, who is the senior legal analyst or counsel working with the Monopolies Commission. He was much involved in the preparation of this report, so I am afraid that I know much less than he does.

The Chairman: Everybody knows more than we do.

Professor Zimmer: The German Monopolies Commission is a body that was introduced or erected in the 1970s. Its name derives from the British Monopolies Commission that existed at that time. In Germany, people are very traditional and things change very slowly, so it celebrated its 40th birthday last year. We observe that in Britain every couple of years the institutional setting changes, so that is interesting for us.

The Chairman: Yes.

Professor Zimmer: Our tasks are to give advice to the German Government and Parliament. One of the main tasks is to prepare a report every second year—a biennial report—which we call a general report. There we analyse the development of competition in Germany and, a little, in Europe. We have to evaluate to a certain degree what the agencies—the Federal Cartel Office and the regulators—are doing. Then we formulate suggestions regarding

legislation. That is more or less the core task. Over the years, the Monopolies Commission has got more tasks regarding the network industries—telecommunication, electricity, postal services and railways—so we also give advice in that field.

The Monopolies Commission also has the right to give advice, whether it is asked to or not, regarding areas of interest in the field of competition. Last year it decided to prepare a report on the digital economy, as at that time everybody was talking about Google, Facebook and all those companies. The central question for us was: is there competition, how is competition working in this field, is there a reason for concern, and, if so, what would be appropriate policy measures to be taken? That was the background. It cost us about a year to prepare this report. We did a lot of research, talked to a lot of stakeholders and, in the end, issued the report, which has now also appeared in English, so we are also recognised on a European level.

That is the background. I could tell you a few major points regarding the results, if that is of interest.

The Chairman: That would be helpful.

Professor Zimmer: For us, one of the insights is that, if there is an important concentration in certain fields such as search engines and social networks, in particular, there are economic reasons that might easily explain that concentration. Those might be cost reasons—cost structures, particularly economies of scale. If you want to set up a search engine, for example, you need a lot of money and a lot of servers. You have to invest permanently in the update of the web index. You have to improve permanently—at least, the search engine operators do—the algorithms, so you have a lot of costs. It is an interesting issue. We cannot really give a final answer on whether or not this is a field that, for that reason alone, tends to a natural monopoly. If you have a water supply infrastructure, you know that it would not be worth digging up the streets for a second one, because that would not earn its money. So economies of scale are an interesting issue here.

There are more issues. One of them is quality. If you are the biggest search engine, you know more quickly and better what the people are interested in, because you have all of these search queries. The big search engines—all of us know the names—constantly analyse automatically on which links on the generic link list people click, so they have a constant update on what the relevant pages are. They can order their rank lists on that basis. If you

have more queries, you have better information about what people are interested in. That is the second reason for concentration.

The third one, of course, which is also present in other fields, is network effects. Here, in particular, there are indirect network effects. If you have many users—more than others—you are more interesting for advertisers, can generate more income on that side of your platform and can invest more in the quality of your platform, so arguably you have an indirect network effect.

If you have this analysis that there are certain reasons for the very strong position of any one particular search engine—interestingly, the same is true where Google is not present, in China and Russia, where you also have one main search engine—and that is an insight, the question is whether it makes sense to intervene in the sense of break-up or divestiture. As you know, some politicians are considering such interventions. Based on its findings, however, the German Monopolies Commission says, “Be careful. If you intervene strongly in the market here and, for example, reduce the size of structures, you might”—I do not know whether this is a saying in English, too—“give the people stones instead of bread”. The question is whether there will be a benefit for consumers or, on the contrary, whether there may be disadvantage for consumers.

However, there is a concern. If we stay for a minute with this branch—search engines—there is one dominant firm. The question is whether it has leeway—whether it can behave like a monopolist. From a competition policy viewpoint, a very important question is whether a strong position is vulnerable—whether or not it is contestable. If it is contestable, even the quasi-monopolist is not in the position to lean back and to offer low quality at high prices. The disciplinary effect of, at least, potential competition is interesting in this field. That led us to one of the recommendations, which is always to follow closely what happens in these markets—this also applies to the other digital services—and to improve the legal framework in certain respects. We have made two specific recommendations we could talk about.

The Chairman: Yes, please.

Professor Zimmer: It should be ensured that at least the potential for competition is protected or guarded as far as possible, this is one of the conclusions. We may talk in a minute about those recommendations that apply not only to search engines but also to

social networks, after I have added a little information on the Monopolies Commission's general understanding of social networks and other branches.

For social networks, the situation appears to be somehow similar and somehow different as compared to search engines. It is similar in respect of the cost situation. Here the reasoning that you often encounter in the digital economy applies—namely, that setting up a certain structure or infrastructure is highly expensive, but rolling out this service to more and more consumers is very cheap. Economists sometimes use the term “zero marginal cost”. If you are the first in the field or the one who for a certain reason has an advantage and you are the incumbent, it may be very difficult for other firms that are newcomers, in particular, to be successful. That certainly applies for social networks.

With social networks, the situation is a little different from that with search engines, in so far as you have direct network effects. We talk about indirect network effects if you have different user groups such as, with a search engine, the people who are searching, the people who are advertising and the people who want their websites to be found. It appears to be at least a three-sided market. With social networks, you necessarily have users of the same kind—people who like to communicate over a social network—so this could appear to be a one-sided market only. Of course, they are themselves financed by advertisements, so in that respect it is a two-sided market. However, the interesting concentration effect is due to direct network effects between the users—the regular members of the social network. If all of my friends are on Facebook, I would not stay away. In particular, I would not use another social network, so the winner takes it all in this field.

Of course, one has to be careful in different respects. First, there are not only general social networks, such as Facebook, but also specialised ones for professional contexts—LinkedIn and so on—so one has to be careful when talking about market shares, monopolies and so on. However, for the regular private person, Facebook is more or less the one that is interesting, because all their friends are there. It would be a real challenge to attack that social network. So you have cost effects—economies of scale—similar to those in the search engine market, and you have direct network effects, in particular, that may explain why you have a quasi-monopoly in this field with respect to general social networks. The issue is: is that a reason for concern? Again, the answer for us seems to be that you might give no benefit to consumers if you intervened. If you imagine the hypothetical situation of having three different networks, the users would have to look for their friends on three different

platforms, which would be less efficient and attractive. Again, the issue is, if you accept that there are efficiencies and economies due to this very strong market position, how do you deal with it? You have to make sure that the market position is as vulnerable as possible, in order to have a risk of competition and potential competition.

To be very brief on other fields, we also dealt with other platforms such as e-commerce, hotel booking services and so on. Here again you have indirect network effects, because you have different user groups—the sellers and the buyers, for example. However, the more sellers there are on one particular platform, the more attractive that platform is for potential buyers, and vice versa. This explains why firms such as eBay have a very strong market position. However, you have a certain amount of competition. You also have Amazon Marketplace and many smaller platforms that are, in a way, specialised but that exert a certain pressure—including competitive pressure—on the more general platforms. Again, this is a situation where we have high concentration in some fields and the same questions.

How should competition policy or legislators react to the particular issues posed by search engines, social networks and other platforms? One answer of the Monopolies Commission is to keep these markets and market positions contestable. We made two recommendations. One is in the field of merger control and one is in the field of abuse control.

I will start with merger control. We observed that mergers in the field of the digital economy, particularly with regard to young companies, are often not subject to merger control, at the European level as well as, for example, in German law. Why is that? It is because, in many jurisdictions, up till now the application of merger control has been dependent on certain turnovers. Those are historical turnovers, meaning turnovers that have been realised in the past. In the digital economy, in contrast, you often have very young companies that are bought away from the market at a very early stage. You have companies that have been established as start-ups in Silicon Valley, in particular, but also in such areas in Britain or Germany, with young people, some of whom are smart and have good ideas. If they have set up such a structure and such a firm, they may be bought away by the Googles, the Amazons or whatever, which have deep pockets and can do that. That is a particular concern if those acquirers are somehow in the same or neighbouring markets to that of the target, because then they may buy their competition or potential competition from the market.

One recommendation that we gave, both to the European and to the national legislature, was to widen the scope or reach of merger control by saying, “You should look not only at historical turnovers but also at the price for which the firm is sold”. In some cases, the price is more indicative than the turnover. There are firms with no turnover that are sold for billions. Everybody knows the story of Facebook and WhatsApp. WhatsApp had very low turnovers. For that reason, it was not subject directly to European merger control, but it was sold for \$19 billion and acquired by Facebook. Of course, they were somehow competitors, as both were offering communication services—messenger services and things like that. Perhaps one could argue and discuss whether it was direct competition, but they were at least working in the same field. The much bigger firm, with very strong resources, bought a relatively new and highly successful company from the market. Due to very low turnovers, particularly in Europe, that transaction would almost not have been subject to review under European merger control regulation. We therefore said that one should introduce one alternative criterion for the scope of application of merger control. That is—you can say it in general words—the price that is offered or paid. We have another wording for it: “transaction volume”. Often there is no price in terms of currency paid, but the transaction is financed by issuing new shares. You exchange the shares, and then it is not a price in the narrow sense of the word.

That is one of the recommendations. The other concerns abuse control. There we observed that the main Google proceedings with the European Commission have now lasted for five years. Five years is a lot of time in a fast-moving market. If a firm that is arguably dominant and might abuse its position has five more years to act, that can be decisive with regard to market structures. It is five more years of possible exploitation of consumers or whomever. In dynamic markets, in particular, it is very unsatisfactory if a proceeding lasts so long. We therefore said, first, that we encourage the European Commission to apply interim measures, for example, in such cases. That means that it should say, “We order now and for the time of this proceeding that the firm has to refrain from certain behaviour”. That is one of the recommendations. Then we said that there should be an incentive for both sides—for the agency or authority as well as for the firm in question—to get through to timely

¹ The Commission may take a “commitment decision” (or “Article 9 decision”) based on Article 9 of Regulation 1/2003. That provision allows companies to offer commitments that are intended to address competition concerns identified by the Commission. If the Commission accepts these commitments it adopts a commitment decision making them binding on the parties without, however, establishing an infringement.

decisions. Up till now, commitment decisions, which were introduced a number of years ago in order to have an acceleration of proceedings, have lasted very long, sometimes longer than other proceedings.¹ The firms offer certain measures and commitments, there are negotiations and then one side is not satisfied by what the other side says and so on. That has a retarding effect. The recommendation is that closing the case with a commitment decision—which means, in a way, a consensual decision, based on consensus between the authority and the firm—should be possible only within a limited time. We said that if there is no such commitment and no such decision within, for example, one year—which is extremely short, of course, but this would give the competition authorities a strong direction—the only way is to get to a disputed decision. That means that the firms cannot get out with commitment. The European Commission has to decide.

I will stop at this point, because that was a lot of information.

The Chairman: Thank you very much for going into it in such detail. We will come back to some of those things; indeed, you have anticipated some of the questions. Could Lord Mawson lead off for us?

Q82 Lord Mawson: Which market features of different types of platform most concerned your commission? Are switching costs and barriers to entry similar in each of these markets?

Professor Zimmer: We consider switching costs in the wide sense of the term—that is to say, disadvantages that would be caused by switching provider. With a social network you have huge switching costs, particularly if you cannot take your friends with you—you are locked in. If there is no possibility of taking your friends with you—of course, you will have to convince all of them—you have very high switching costs, which means that you may not have any more friends in the digital sphere. That would be the switching cost.

Of course, there are aspects that are related to that. One is interoperability. Interestingly, in the telecommunications sector interoperability was a regulatory requirement from the beginning. Telecom providers had and still have an obligation to connect you with telephone users who use another network—who have another provider—so you can communicate easily via mobile or other forms of telecommunication. In the field of social networks, for example, there is no such interoperability requirement. We do not advocate such a requirement, but it shows you that, because of a certain setting, the competition situation is different from that in other fields.

A friend of mine had to rescue his child, who had jumped into a pool, and he had his smartphone in his pocket. It was destroyed by this action, and he wanted to switch to another phone brand using different software. He wanted to get to his backup address book and to take the addresses with him. That was denied to him, so he bought another phone from the same producer. You can see that there are a lot of business conditions that lock you into a certain service. Dr Weck, would you like to add something?

Dr Weck: Thank you. I have just one clarification. When introducing the general report, Professor Zimmer said that we looked at several factors. We were interested mainly in how concentration comes about in digital markets, particularly platform markets. Basically, your question relates to the other side of the market. We were interested mainly in finding out how an enterprise such as a search engine or a social network gains market power. Basically, we always looked at five features: economies of scale, indirect network effects, congestion, platform differentiation and the possibility of multihoming.

Those aspects address your question, but from the other side—from the platform side. For example, on the possibility of multihoming or switching, it is relevant, in a way, to say whether the platform will gain market power. However, if you ask particularly about switching costs, it is about the cost to the consumer. We did not focus on that point when developing the issues that we wanted to examine, but we came to it at a later stage. We described first how platforms gain market concentration and what you have to do about that. As Professor Zimmer has already said, basically the substantive rules are okay, but we need some tweaks in merger control procedure and then in abuse procedure.

Then we made another recommendation. You also have to look at the other side and to strengthen the users of platforms, because if the market concentrates towards a platform, protecting consumers and so on gets more and more important. There, the question of switching costs came up again. For example, you have to make sure that consumer rights, content rights and data protection rights are respected and that there is a possibility of data portability, so that it all links together. I just wanted to emphasise that our basic interest was more the platform than the other side.

Professor Zimmer: I have one more thing to say. In a way, these are two sides of the same coin. High switching costs can support the market position of the other side—the provider—so this belongs together. There is another example that shows that the issue is difficult and one should refrain from giving very general statements and conclusions regarding “the”

digital economy. Switching costs are also addressed when it comes to reviews and evaluations. For example, if you have book reviews on Amazon—if you have written a book and there are reviews by customers on the site—that is a lock-in effect. I am not sure, but I guess that Amazon would refuse to allow you to take those reviews with you to another platform and say, “This has been reviewed very favourably on the Amazon site”. Such services, which give benefit, without question, to one or the other side of the market—interestingly, in this case, it is the seller side—may lock people or firms into a certain service. That also limits competition.

The Chairman: Lord Green has a question on competition.

Q83 Lord Green of Hurstpierpoint: Thank you for that. It was very helpful. There was a lot of interesting information there. I would like to pose a question that is stepping back for a moment. You have talked about the implications of natural monopolies—winner takes all and the way in which networking effects can reinforce the natural monopoly. Can you reflect for us for a minute on the question of whether this world we are talking about really is one of natural monopolies or whether, in fact, there is so much dynamic change in the industry that we are worrying about something we do not need to worry about that much? If you look backwards, you think of the famous Myspace. We need to be reminded of Myspace, but it used to be a prominent feature of the landscape. You think of Microsoft, which for a while was dominant, until the emergence of the social networking world and Apple and Google. It is still important in its own sphere, but there was a time when we worried about the universal dominance of Microsoft. We do not worry about that any longer. Are we worrying too prematurely about the dominance of, for example, Google or Amazon?

Professor Zimmer: That is a very important point. I think that I also expressed a reluctance to say that there is a natural monopoly. I said that whether one believes that search engines, for example, are a natural monopoly would be an issue to discuss. This is just rephrasing what you said, but it is also to say that the better is always the enemy of the worse. If a new company comes up with a better solution, an existing monopoly may be history within one or two years. We saw that with SMS messages. Today all of our children are communicating by WhatsApp, because that is free and SMS is relatively costly. This is a very important aspect. That is why we said that we should be concerned about the potential for competition and should look at that side. That seems to be preferable to saying, “Now we have this monopolistic or quasi-monopolistic situation and must break it up”. I am convinced that if

firms—even firms like the ones that we have talked about—really make a mistake, many people will turn away. Interestingly enough, they do not charge any money through their main user group. An interesting question would be whether a firm like Google or Facebook would be able to charge a considerable amount or whether that would be the end of their success. If you think about these issues, you can really question whether they have a dominant position. Dr Weck, do you want to add something?

Dr Weck: Basically, you have said everything. I agree on all these points. The main problem from our perspective is that, as long as innovation drives competition, you may have concentration, which may lead regulators and politicians, for example, to think that it may be necessary to intervene just because there is concentration. Our concern was that that may be premature. As long as innovation drives the market, it is perfectly fine—there is no problem with it. The problem arises only if that concentration becomes permanent because the market tilts, for example, and the dominant company finds out, “Okay, I can protect my dominant position. I do not need to innovate any more”. There is a fine line there, but we did not consider a monopoly in digital markets to be a true natural monopoly. Rather, we considered it to be a monopoly arising out of innovation.

Lord Green of Hurstpierpoint: That is very interesting. The implication might be that, in order to ensure that potential competition continues to be lively and effective in forcing change, you do not allow the big apparent natural monopolies to make any material acquisitions. You talked about Facebook and WhatsApp, but that is an example of a more general problem. Theoretically, if you wanted to ensure the emergence of competition, you would not let Google, Amazon and Facebook make acquisitions.

Dr Weck: That is a very interesting question. Basically, we have to distinguish within merger control between market power arising out of innovation and market power arising out of other market behaviour. Whereas concentration as such may be beneficial and has to be permitted, other market conduct may give rise to concerns. The question then becomes: when you have a merger control situation and a case has been notified, will the market structure that arises out of that concentration be driven by the innovative factors or more by this other behaviour?

Basically, we were very cautious in providing any advice there. We did not make a specific recommendation regarding substantive merger control. We just said that, first, you have to be careful not to look just at one individual market. If markets are connected through a

platform, it is necessary to look at the entire platform, that is, at all the affected markets. Secondly, you have to distinguish between the effects of the concentration—basically, the fact that this may create a new, better platform. As long as a company just buys competition from the market, that is clearly something you have to worry about, but if Facebook's acquisition of WhatsApp enables Facebook to create something that has not been present on the market so far, that gives rise to new efficiencies. The authorities have to be very careful in the substantive assessment. Just saying, "There is a dominant position arising here", is not sufficient to block the merger.

On the third point, we were very open. I will just mention it, because we had a very short paragraph on this. It seemed interesting, but we did not really touch on it. It is the issue of a company being able to combine data that are relevant to different markets. The company may find out, "The markets I am in will develop in a certain direction. If I want to block arising competition, I have to expand into this or that market", just based on the data the company has access to. Then the question really is, what kind of animal is this? Is this just innovative behaviour, because the company is following market developments and creating new products, or is it not really foreclosure, based on data access?

Professor Zimmer: I would like to say one more thing. In merger control, you always have to distinguish very clearly between the issue of scope of application and that of substantive evaluation. Our recommendation to look not only at turnovers but also at the price paid relates only to the first issue—scope of application. That means: is a case—an acquisition—caught by merger control or not? It does not say anything about the outcome—the substantive decision. The recommendation that we made to catch cases where a very high price is paid would mean that you could catch those cases. Of course, with regard to the substantive issues and evaluation, you would not say, "We block every merger where Google is involved". As I said, for Facebook, WhatsApp was really a provider on a neighbouring market. Any authority would be more concerned and critical with regard to such a case than with regard to a case where Facebook acquired a taxi firm.

Lord Green of Hurstpierpoint: Thank you. I have a final quick question. Was that recommendation directed at the Kartellamt or the European Commission—or both?

Professor Zimmer: The recommendation regarding the criteria for scope of application?

Lord Green of Hurstpierpoint: Yes.

Professor Zimmer: At both levels.

Q84 Baroness Donaghy: If I have understood your recommendations correctly, you indicated that there was no need to change competition law but there was a need to strengthen enforcement. You have already referred to the interim measures. You have talked about transforming the process from a “commitment” to a “termination and penalty procedure”. Can you describe in more detail the distinctions between these procedures and why, in your view, DG Competition and others have been reluctant to adopt such an approach in the past?

Professor Zimmer: I will be very brief and then hand over to Dr Weck. With regard to your first sentence, perhaps we were not too clear in our wording. We did not say that we do not recommend any change in competition law. Our recommendation or suggestion regarding the scope of application—the price paid, instead of turnovers—would require a change in the law. With regard to abuse control, to have the incentive to get to timely decisions would also require a change in the statutes or the regulation regarding cartel procedure. We may have been misunderstood on that point. The other question is Dr Weck’s issue.

Dr Weck: Let me rephrase the question, and please jump in if I do so incorrectly. Basically, the question was: what are the differences between termination procedures and commitment procedures, and what were our recommendations here? This touches on a general trend that we see in competition enforcement—that there is much use of informal procedures leading to a consensual decision in the end. The problem is related less to how you deal with digital markets than to how you deal with complex cases arising in fast-moving markets and whether consensual decisions are a good tool there.

We found that a consensual, agreed decision that terminates the possibly infringing behaviour may be a good tool in complex cases, but when it comes to dynamic markets, where it is difficult really to solve all of the issues within a short timeframe, you should perhaps abstain from using such an instrument and use other instruments instead. In the end, a termination proceeding may be best. That may take very long—it may even take much longer than a commitment proceeding—but you also have the tool of interim measures. If it is a dynamic market, why not resort to interim measures instead and use them? That is usually not consensual. There is an option of having consensual interim measures, but let us not go into that field now. The main point is that there you get an interim decision. That interim decision can be reviewed, so any mistakes committed in reaching it can be remedied. That appeared very important to us.

Professor Zimmer said that we would probably need change in the law. That is because nowadays when you look at, for example, the European Union level, it is possible to use commitment proceedings as a substitute tool for interim measures, as there is no restriction on when to apply the tool. It is very attractive, because the agency knows that it will be consensual, so it will not be appealed. That is a bit of a problem, because there is at least an incentive to use the tool much more than it should be used. We said in our report that, basically, you should have a certain timeframe. When you expect your proceeding to last longer than that timeframe—for example, the Google proceeding has now lasted more than four years, which is clearly a very long timeframe—you should really think, “What do I want to achieve?”. If I want to remedy market concerns within a short timeframe, I have to resort to interim measures. If I want to have a final decision but that can be reached only within a longer timeframe, I have to resort to a commitment proceeding or a termination proceeding. In any event, I am also able to combine the two. If it is necessary first to remedy concerns arising out of the dynamic nature of the market and if, on the other hand, it is a complex case, so I also need to get a final decision at some point, I should use the two of them, but I should not use the commitment proceeding as a substitute tool.

The Chairman: Thanks very much. We are beginning to run out of time.

Baroness Donaghy: On the final bit of my question, why do you think that DG Competition and others have been reluctant to adopt this approach?

Dr Weck: In our report we could rely only on publicly available information. We noticed, first, that there are some national agencies using interim measures, so there is no legal impediment to resorting to interim procedures. At conferences, for example, you hear European Commission officials talk about interim measures. They said that there was a case called IMS Health where the European courts imposed a very high standard on the agency when bringing an interim measures case. Officials say that they are reluctant to use the instrument now because, if it is challenged, it is very possible that they will lose the case and end up in a worse position than before.

The Chairman: We are due to end at 11 o'clock. There are a number of issues that we wish to tackle. Can you stay until a quarter past 11?

Professor Zimmer: We can stay.

The Chairman: Okay. In that case, I have a question from Lord Aberdare.

Q85 Lord Aberdare: Moving on to the question of cross-border trade in Europe and why there is not more of it in this field, I understand that in your submission you suggested that one reason might be the problem of regulatory fragmentation, but another might be the behaviour of businesses themselves and the sort of agreements that they are reaching with one another—specifically, the question of price parity clauses, as an example. Could you say something about price parity clauses, how pervasive and significant they are and what your own recommendations or proposals were? I understand that you advised against a ban on such clauses. What would your recommendations be in relation to price parity clauses?

Professor Zimmer: A price parity clause seems to be a good thing for consumers, if a firm says, “If you find my service cheaper somewhere else or find that a different provider is cheaper, I will meet their price”. Of course, price parity clauses of this kind also discourage competition, because for other firms it may not make sense to offer better prices because they know that that price will be met by the incumbent, if it is an incumbent that is offering the price parity clause. Economists say that often they may not be beneficial but, on the contrary, may cause a disadvantage to consumers. If one major firm says, “We employ a price parity clause”, the price is more or less fixed in the market, so it may have the same effect as a cartel.

On the other hand, price parity clauses may be a good way to protect firms’ investment. For example, that is what hotel booking platforms such as Booking.com are saying. They say, “Imagine that we are setting up this platform that costs however many millions. People may find a nice hotel on our site, call the hotel and say, ‘Why do we not share what you would have to pay as an agency commission to this platform? Why do you not give me the room £10 cheaper?’”.² That is the situation. The investments may also be put in question if rival platforms then come and offer the same at a lower price. Some platform owners say that price parity clauses are necessary in order to avoid free-riding behaviour by others. They are also considered by some economists to be a good instrument to protect investments.

Against this background, we say that the economic analysis of price parity clauses is ambiguous. Sometimes they may be beneficial and efficiency enhancing, but sometimes they may clearly cause concerns with regard to competition. As there is no really clear case in favour or not in favour of such clauses, our position is to say that one should not have clear-

² The witness wishes to add: “Because such a practice might devalue the investment the platform has made regarding its technical infrastructure and its sales promotion, hotel booking platforms required hotels in the past not to undercut the prices offered on the platform when contracting with third parties.”

cut rules such as per se prohibition—that is the position of the German Cartel Office, which says that they are prohibited per se—but that they also should not be legal per se. We say that, as there is an ambiguous situation, with no very clear line, even among economic researchers, one should have the rule of reason analysis that we have in other fields. That seems to be the line in countries other than Germany. We are slightly in opposition to what the authority in Germany does and perhaps more in favour of European solutions—this is the second argument—because in a single market it will be difficult if you have very different rules on price setting, particularly if you have cross-border dealing. In short, that is our position.

Lord Aberdare: You have answered the supplementary, which was about the effect that this could have on competition and whether some action should be taken at EU level, as opposed to national level. That was very helpful.

Q86 The Chairman: Thanks very much. Can we move to an area we have touched on, which relates to data and their potential abuse? Platforms, particularly dominant platforms, have access to a huge amount of data on individuals—data that can be analysed, used and sold on in some form or other, in different circumstances. To some people, this is the major area of potential market abuse of a dominant situation. Do you think that the regulators at national and European level have a handle on this and whether it is the key potential abuse of competitive dominance? Are there recommendations that you would wish to make in relation to data, their ownership and their use?

Professor Zimmer: This is highly complex.

The Chairman: Yes.

Professor Zimmer: First, if we recognise that privacy is a fundamental right, it becomes clear that there must be a fundamental protection, not only protection in the situation of market power. The basic rules of data protection must apply, irrespective of the market situation of a firm. There is a special situation where competition law can come into play, which is when a dominant firm is able, because of its dominance, to gain consent by the user to the use of his or her data. One could think about disputing a consensual agreement regarding the use of data in the situation of market power. The question is how important that issue is, if you say that data or privacy has to be protected in general. The question for me—I do not really have an answer—is whether there is a very important potential beyond that, for this special situation of dominance where, as I said, consent may be forced consent.

The Chairman: Part of the problem is that the consumers of the services—the search engine or whatever major platform—do not really know what use is being made of the data. In a sense, they click “consent” and give consent freely, because they are getting a service for free. That is the price that they pay, but they do not know the real price. Do you think that there is an issue, either in relation to the dominant position or more generally, of the transparency, both to the consumer and to the regulators, of how data are used?

Professor Zimmer: Here again I am in doubt about whether we are talking about a problem that is a specific problem of competition law and situations of dominance or whether we are talking about a transparency problem that is also present if you deal with a company that has no strong market position. That company may want your consent to the use of your data, but you do not know what it is really doing and are just accepting the general clauses. By using the service, you are accepting those. The first question is whether transparency is to be required in any such situation, even in the absence of market power. That is more a question of consumer law, perhaps, or privacy law, where people have to be protected against deprivation—

The Chairman: Yes. To some extent that is true, but a large, dominant platform can use the data in a much more effective way, simply because it has more data. There is a huge political worry about the state having those data and being able to use them—or, in recent weeks, in terms of the United States surveillance programme, about other states having access to data—yet actually a private monopoly, or near-monopoly, has access to similar data and could make use of them. That is slightly different from dealing with a firm that is in a competitive situation, which, if challenged, could lose competitive advantage, because it has a competitor.

Professor Zimmer: I agree that huge firms with very diversified portfolios or services may be able to use your data better than very specialised firms, but that is not due to their market power. Market power is the concern of competition law. Without market power, you are not really in the field of application of competition law. I fully understand your concern, but I would answer that, again, it is a more general concern that one should address by rules on privacy and transparency and with regard to disclosure requirements. It should not be dealt with in competition law.

Dr Weck: I have two short remarks. As Professor Zimmer pointed out, there are basically two issues. We addressed both of them in our report, but we made very clear where we see the

dividing line. One is whether the instruments of competition law should be applied in the case of a dominant platform provider and whether you may have an abuse of market power if you have such a platform provider infringing on data protection rights. There we said, “Be cautious, because this is not really a competition issue. It is more a data protection issue, even though you may be able to apply the instruments of competition law”.

The other question arises if you look at the other market participants. As I said before, we looked first at the platform and then at the other side of the platform—the consumers and so on. There you have a competition aspect to it. You can say that consumers need to be protected on grounds of competition. If consumers do not know how their data are used, if consumer rights are not respected and content provider rights are not respected, perhaps because the platform is so powerful that it does not need to heed those rights, then that harm to consumers is a competition related problem. However, then you should still change consumer regulation—make it and the means of enforcing consumer rights stronger—and not use the tools of competition law, because they are not very suited to that and the heart of the problem lies somewhere else. That is what was meant.

Lord Green of Hurstpierpoint: I am puzzled by that argument. I think that we are conflating two different questions; I do not know whether we got this yesterday, too. There is a privacy issue about data and there is a market value to data. Clearly the former does not apply only to monopolies or near-monopolies—it applies to all sorts of businesses, and the data protection regulation is supposed to address that. The latter is an issue about market power. If you have large amounts of consumer data and the consumer does not know how much you have, what you are doing with them or what their value is, that is surely a market power question. It is brought into particular focus with near-monopolies, but not only with near-monopolies. You can think of oligopoly situations where this would still be an issue, if the consumer does not understand how much data you have, how they are being used and what their monetisable value is. Let me put this as a question. Could you not argue for transparency in those circumstances, as a means of helping the consumer to understand how much economic rent the platform was getting out of the consumer’s use of it—quite separately from the privacy question?

Dr Weck: I discussed this point with my economist colleague when we were preparing for this meeting, so that may be helpful in this context. It also relates to your other question, in

which you ask whether special rights should be attached to data, because those rights may protect the commercial value that also has to be protected by transparency rules and so on. I think that we are on the same page, basically, but we would still use different tools. My economist colleague said that it would be helpful to have a right attached to data, because that makes it easier, for example, to say which transparency you need to provide. We also made the recommendation in our report that a right should be granted to the owners of data. The question then is: who is the owner of which data, particularly when you have digital markets where you have many intermediaries adding their own data? The consumer may have the first right to their data, but then you have some server providers or whatever who also have some legitimate claim, probably, on some data, so that becomes very difficult.

We said that, while it is advisable to attach a certain right to data, we would not go down the route of saying that you have here a factor of competition, which needs to be protected by competition law, and applying the abuse of dominance rules, for example, to an exploitation of those rights. We would rather say that the commercial value is essentially based on the personal value of the data, so this is still something that could be addressed well by strong enforcement of data protection laws and consumer rights. There you already have the concept that transparency has to be provided to the market participant. If this is strengthened so much that a consumer, as a market participant, can also enforce those rights, it is okay and you do not need competition law.

The Chairman: Okay. You have covered some of the other questions that we had, but we can still pursue Lord Mawson's question.

Q87 Lord Mawson: Your evidence also recommended improving the enforcement of the GDPR, when implemented, through the shared monitoring of cases by Member States and the Commission. How likely is it that that will be achieved?

Professor Zimmer: This is hard to tell. The negotiations regarding the general data protection regulation—the GDPR—are at an advanced stage. The question is whether there is a chance of change. Right now the drafts provide a solution where the national authorities would enforce the regulation, which means that the authority in Britain would enforce it there and Dublin would enforce it with regard to Google, Apple and so on. You would have a decentralised solution.

Our impression, having in mind the example of competition law, is that it might be a good idea to have a dual structure, where you have a strong, centralised authority that deals with big international and transnational cases and local or national agencies that deal with cases of regional importance. The question is whether authorities, particularly in smaller Member States, have the resources and power to enforce such important rules when it comes to enforcement involving very mighty and important companies that are acting globally. The question is whether we might not have a race to the bottom with regard to enforcement, because firms might choose the country where they installed their European headquarters not only with regard to tax questions, as is the case today, but also with regard to data protection questions. We think that it might be better with regard to enforcement to have a dual structure, where the cases that had an importance for the whole European Union, for example, were administered by one central agency. To answer your question, it is hard to tell whether there is still a chance to have a change in that sense.

The Chairman: Lord Green, are you happy that your question on this has been covered?

Lord Green of Hurstpierpoint: Yes, it has been covered.

The Chairman: Can we end on a couple of more societal questions?

Q88 Baroness Donaghy: Your written submission suggests that Germany is currently considering additional regulation for news aggregating websites and social media sites, which take on a “special significance for the formation of opinions in a democratic state”. Could you go into further detail about the context of your concerns and describe what form such additional regulation might take?

Professor Zimmer: I will say some general words and then hand over to Dr Weck. With respect to digital services, we have the situation again and again that new providers face old business models and become their competitors. Then the incumbents like to say that the new services should be subject to the same regulation as the old ones. The taxi business says that Uber has to be subject to the taxi regulation, for example. The same is true for hotel owners, who say, “Airbnb is a new competitor, so it has to be subject to the same regulation”. Interestingly, we also have such a discussion in the field of telecoms—that WhatsApp should be subject to the same regulation as telecom firms. We have the same discussion with regard to the media. We have traditional—I wanted to say “old fashioned”, but that is not the case—TV and public broadcasting services in many Member States, and competing private ones. All of them are subject to certain rules on the hours when you can

show ads, publicity and so on. Now you have new competition via the internet—for example, internet TV.

One of our main theses is that the first question should always be: do we still need the old regulation, or does competition lead to outcomes that make regulation superfluous? Regulation has often been introduced to overcome market failures—for example, to ensure a certain quality of services, for taxis and so on. If you have more competition—new forms of competition—perhaps the regulation is no longer necessary. That should be the first question. When there are special reasons for one or other kind of regulation, such as media regulation, in the context of freedom of speech and political rights, it becomes very complex, of course. The question is whether we have a reason to extend the existing rules regarding, for example, broadcasting services to the new offerors of such services.

Dr Weck: Those were the most important points. There is just one small additional aspect. Professor Zimmer's basic point was that the business models are different. We wanted to find some kind of compromise, because there is a strong movement in some parties towards more regulation, including of new services. It is legitimate, because there is obviously potential for influencing opinions if nothing is done.

Our recommendation was to look at the core of the business models. Then you see that these new media do not depend on an editorial board that may filter opinions and decide which product offer a newspaper or a broadcaster makes to its audience. On the internet, the business model is based more on attention—where do you get most attention from? The more attention you get from the interests of the audience in a certain topic, the easier it is to sell ads, for example, if the business model depends on ads. If it is not a real business but an individual blogger, it is still the attention that counts, basically.

You should ask yourself whether we need more transparency, again, so that consumers know that there is no editorial board and that what I get from a news aggregation site, for example, is just the previous data that I submitted to that service. For example, if I use Google News, Google News knows what my interests are and therefore just selects information that may be particularly relevant to me. If concern arises that that selection of news might influence the formation of opinion, it may be necessary to inform consumers that this news service is based on the collection of previous searches—of search data—and that it is not objective. Basically, it is the consumer preferences. Those preferences are also used, for example, to fund ads that are then displayed on the same page, where the

consumer gets the impression that everyone—even the other product suppliers—is talking about a certain thing, which may not be the case for someone else using the same service.

Q89 The Chairman: In Britain, and, I suspect, in Germany, we have particular rules about the ownership of traditional media that dominate the news—newspapers, television and crossover between them. However, that crossover does not extend to the social media or, indeed, to Google News, for example, so there is a new phenomenon. If we think that it is right to intervene to ensure pluralism in newspapers and in broadcasting, is it also sensible to try to extend that into the new media?

Professor Zimmer: First, it is interesting that, with regard to the printed press and the new forms, we do not have particular ownership rules in Germany. Of course, after the war there was a need to have an official concession—a public licence—in order to publish a newspaper, but that has been history for decades. Today—and for many decades now—the situation is that anybody can be the owner of a newspaper. We have certain rules regarding newspapers in our merger control. I said earlier that we always look at the turnovers when it comes to the question of whether a merger is subject to merger control. With regard to the press, the thresholds are much lower—

The Chairman: That is the same with us.

Professor Zimmer: Okay. There we have a special regulation. Of course, one might argue about whether those thresholds should also apply to media companies that only have digital business models. Dr Weck, what did we say?

Dr Weck: It is again the editorial aspect. If you have a business model where an editorial board decides what is placed as an article in a newspaper, you may need those turnover thresholds to make sure that the newspapers can still compete content-wise, because if the threshold is too high newspapers will merge and the same editorial board will decide on the content. Basically, this is the product that an interested consumer is buying, so here we have a strong link between formation of opinions, on the one hand, and market power, on the other. The business model for news aggregation sites, as opposed to newspapers, is just different. We were therefore against extending this regulation, because for news aggregation sites it is really just the preference of the user. It does not matter whether it is just one news aggregation site or whether it buys another one and integrates that into the same service. There transparency is the more important aspect—and, obviously, general market power.

The Chairman: It could be subject to abuse.

Dr Weck: Yes, but—

The Chairman: You do not need an editorial board if you have a distorted algorithm, if you see what I mean.

However, we have taken up enough of your time. You have been very generous and we have learnt a lot. You have obviously thought about these issues in some depth. We will ensure that we read your report very thoroughly before we reach our conclusions, because it was very helpful to us to have your perspective and to hear about the way in which you have systematically gone through the arguments. Thank you very much indeed. If there is anything else that you think we should know, please let us have it. We are aiming to produce a report ourselves by March.

Professor Zimmer: Thank you so much for the invitation. It was a pleasure to be here. If you have more questions, do not hesitate to contact us. We can also provide information in writing.

The Chairman: Thank you very much indeed.