

## **New Competition Tool – Consultation**

### **Bertelsmann**

Bertelsmann SE & Co. KGaA (Bertelsmann) is a media, services and education company that operates in about 50 countries around the world. It includes the broadcasting and production company RTL Group, the trade book publisher Penguin Random House, the magazine publisher Gruner + Jahr, the music company BMG, the service provider arvato, the Bertelsmann Printing Group, the Bertelsmann Education Group, and the international network of funds Bertelsmann Investments.

Bertelsmann is confronted with structural problems in a broad variety of digital markets where it is active. Through its divisions, Bertelsmann provides digital services in particular related to media products such as e-books, music, magazines, audiovisual entertainment and advertising services in a number of channels.

Structural risks for competition in digital markets result from network effects, economies of scale, single-homing and lock-in effects. This applies in particular to markets where digital platforms are active and successful.

A large user base of a digital platform leads to strong network effects and the accumulation of valuable and diverse data. This gives the platform the potential to leverage market power into new areas of activity (and become a competitor of their customers) and often times users/consumers don't have alternative services available and will eventually be locked-in with that digital platform.

Digital platform markets have a strong tendency to "tip", successful platforms can likely become gatekeepers and use their power gained for further monopolization.

As experienced in the past, once the tipping point has been exceeded or a gatekeeping position has been achieved, it is often too late to secure the remainder of competition on digital markets. Recent cases enforced under Art. 102 TFEU have proven that the development towards monopolization cannot be stopped after tipping or gatekeeping, inter alia due to the length of the proceedings and the reluctance to issue interim measures. Even during those proceedings digital platforms can profitably grow further.

Therefore, Bertelsmann definitely sees a need to complement Art. 101 and Art. 102 TFEU in digital platform markets:

- On the one hand a new enforcement tool is required that enables the authorities to prevent structurally endangered markets from a foreseeable tipping, gatekeeping or monopolization scenario.
- On the other hand there is a need for other market participants (not operating a digital platform) to collaborate and join forces to be better able to compete with the large digital platforms (be it search engines, e-commerce platforms, social networks or other digital platforms). From a competition law perspective more flexibility in allowing cooperation will be required and parties should be provided with more legal certainty, e.g. via a general horizontal block exemption.

Bertelsmann is aware that Competition tools will not stand-alone be sufficient to create a real level playing field in digital markets and therefore also refers to the Bertelsmann response on the open public consultation regarding the Digital Services Act package.

Bertelsmann does not see a need for another tool regarding monopolistic or oligopolistic structures outside of digital platform markets. Typical oligopolistic effects can sufficiently be addressed by merger control.

For Bertelsmann digital platforms are not only intermediaries, distributors or e-commerce service providers, but also competitors, in particular in advertising markets or in markets they leverage their power into.

Bertelsmann notices that third-party digital platforms act as closed ecosystems, which do not make the data available to media companies that is necessary for them to target advertising outside of the respective platform ecosystem. Digital platforms have more data about media companies' services than the companies themselves.

In the marketing of digital content, technologies and methods for targeted and target group-relevant advertising ("targeting") are market standard and form a business-critical ability of media companies in the context of refinancing content via the advertising market. There is no targeting on market level possible for media companies without access to cross-platform, content-related user and usage data. This also includes cases where digital platforms (technically) are in the exclusive position to obtain consent from the user for the usage of data.

This also applies for Bertelsmann's music activities. Digital platforms only grant limited access to data about how music is consumed via digital platforms and inhibit the ability of the creators, recording artists and songwriters, to reach and connect with their fan-bases.

Also in the book business Bertelsmann does not have access to its individual consumer data via digital retail platforms, who do benefit from that information.

Therefore, from a Bertelsmann perspective the main issues to be addressed by the New Competition tool are:

- Access to data, including consent management
- Winner takes it all: economies of scale and tipping of markets
- Gatekeeping
- Network effects (both direct and indirect)
- Leveraging into other markets

Since the New Competition Tool only looks at market structure and does not refer to any misconduct to be applicable, the tool requires some legal safeguards:

- It needs to be clearly defined, when the New Competition Tool shall be applicable. First, a determination of structurally critical situation is necessary.
- Once determined, behavioral orders to limit the scope of action of certain platforms can be issued: e.g. prohibit self-preferencing, granting access to data, limit leveraging potential
- Only ultimately, structural remedies, e.g. divestitures, shall be possible.
- A flexible system to issue interim measures is required to address issues before it is too late.