

Sector inquiry into comparison websites

From October 2017 until April 2019 the Bundeskartellamt has carried out a sector inquiry into comparison and order websites from a consumer rights perspective. Comparison websites are used and valued by a large number of consumers. Their economic significance is thus increasing. These platforms can help to make the search process more transparent and cost-effective, enabling consumers to make well-informed decisions. They also increase competition between suppliers. Consumers count on the objectivity, transparency and reliability of comparison websites in fulfilling their key function which is to compare different offers on a specific product, service or contract. However, using such a comparison website can create uncertainty due to a lack of clarity. This can possibly mislead consumers, pressurise them and cause them to make decisions they would otherwise not have taken.

1. Legal background

Since the 9th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB) in 2017, the Bundeskartellamt can conduct an investigation into a specific sector of the economy if it has reasonable grounds to suspect substantial, permanent or repeated infringements of consumer protection law provisions, which harm a large number of consumers (Section 32e (5) GWB).

Various problem areas in the use of comparison websites have been exposed in letters from consumers, court proceedings, media reports and several national and international studies. Some websites have already reacted to the critical studies by initiating their own investigations. Among the problem areas identified are the websites' market coverage, how rankings are set, the importance of commission and how (fake) reviews are handled. Questions have also been raised about interdependencies and cooperations between the websites and whether subtle forms of pressure are applied in the indication of the availability of offers. Any misleading information, masked advertising and undue influence could constitute a breach of the prohibition on unfair commercial practices (Sections 3 ff. Act against Unfair Competition (UWG)).

2. Aim of the inquiry

The aim of the sector inquiry was to objectively and extensively uncover any possible breaches of consumer law by comparison websites. Although the problems mentioned were not new, previous knowledge had generally only been based on publicly available information, in some cases supported by consumer surveys or "mystery shopping". The Bundeskartellamt's investigative powers, however,

allowed it to conduct obligatory questionnaires among operators of comparison websites and to demand the submission of internal documents. The operators could not refuse this information on the grounds that it might contain trade and business secrets, such as e.g. information about the algorithm used for ranking. The Bundeskartellamt has years of experience in handling such sensitive information.

The Bundeskartellamt cannot remedy any specific violations of consumer law provisions which are identified in an inquiry because it has not yet been granted the powers to intervene in consumer protection issues. However, the sector inquiry could clarify enforcement deficits, which can only be addressed through the intervention of public authorities. This is because the internal processes of the websites such as ranking, pricing and review systems cannot be assessed and violations cannot be effectively remedied with the instruments of a civil process.

Regardless of this the results of the sector inquiry and the Bundeskartellamt's public relations work can give consumers valuable information about how comparison websites function and recommend ways of using with them with greater awareness. The sector inquiry's findings can also give the suppliers incentives to make voluntary adjustments. The inquiry can thus create an evidence base to make consumer protection in regard to competition websites more effective without introducing a rigid form of regulation which especially in the dynamic digital economy might be too sluggish.

Even if the inquiry and its results primarily concern consumer rights, it is also in the interest of protecting competition and the law-abiding companies if any distortions of competition identified in the inquiry, e.g. due to manipulated rankings, can be remedied.

3. Subjects of the investigation

The topics for examination in the sector inquiry covered the regular problems areas which as yet have not been intensively examined. The Bundeskartellamt has defined the following group of topics:

(1) Corporate links and cooperations: Who is behind the incalculable number of comparison websites? Who maintains contracts with the suppliers and who generates its own comparison calculator? Who only integrates the comparison calculator of another website on its own website without the consumers noticing this?

(2) Market coverage: Can a comparison website really offer a comprehensive overview of the market in line with consumer expectations and how are consumers informed of the absence of important suppliers?

(3) Pre-selection and ranking: According to which criteria is pre-selection performed? How does the comparison website determine the order of placement in the search results list with the use of an

algorithm? On what criteria is this based? What role does the rate of commission play? What parameters are taken into account, e.g. in the calculation of the effective price shown? According to what criteria are individual offers optically highlighted on the website?

(4) Exertion of pressure and incentives: What additional factors does a website use to influence a consumer's decision? How significant are indications of shortages or incentives such as additional bonuses?

(5) Reviews: Which users can give reviews? When are users asked to give a review? Are reviews systematically monitored by the website and what happens in the case of an abuse?

4. Stages of the proceeding

In a first questionnaire ("structure questionnaire") conducted between November 2017 and January 2018 the Bundeskartellamt asked around 150 of the best known websites from the sectors in which comparison sites are often used (travel, telecommunications, energy, bank services and insurance) for basic information about their structure and activities.

The analysis of their replies and several investigative talks conducted in parallel with market participants offered the Bundeskartellamt a first insight into market structures and corporate links and cooperation between the comparison websites. This knowledge helped the Bundeskartellamt to appropriately select the most important independent websites in each sector for the following questionnaire.

In May 2018 nearly 40 websites were requested by formal decision to answer extensive "sector questionnaires" on the sectors flights, hotels, insurance, loans, telecommunications and energy and to provide documents. In addition to the evaluation of the responses to these questionnaires the Bundeskartellamt hold further clarifying discussions with market participants and other consumer protection agencies in Germany and abroad.

The results from both investigations as well as a first legal assessment of the topics looked at were published in a consultation paper in December 2018. The companies concerned as well as other interested stakeholders were invited to comment on this consultation paper until February 2019.

After the evaluation of the approx. 30 statements received the Bundeskartellamt published its final report on the sector inquiry into comparison tools in April 2019.

5. Results of the sector inquiry

The comprehensive and detailed investigations have shown that the problem areas vary according to the sector and according to the website looked at. For example the problem of low market coverage mainly occurs with insurances and comparison tools in this sector have different approaches to inform the consumer about this. At the same time a direct influence of the amount of commission paid on the

ranking of the result was only found in the hotel sector. Displaying selected (partly paid) offers above the actual ranking seems to be a problem of the energy and telecommunications sector and only some comparison websites clearly label those offers.

The legal assessment of the results of the investigations has made clear that some behaviours of the comparison tools can be violations of consumer law provisions. The report on the sector inquiry also shows that the possibilities of civil lawsuits and regulation are limited and that in the area of comparison tools there is a need for supplementing public enforcement powers. The Bundeskartellamt has compiled the main advices resulting from the report for consumers on how to deal with comparison websites in a video.

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