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Ex-Ante Regulation and Competition in Digital Markets – Note by Germany

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

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1. This contribution describes what led to the 10th Amendment to the German Competition Act (I.) and provides an overview of the legislative changes introduced by the amendment (II.). The contribution then addresses the proceedings that have already been initiated by the Bundeskartellamt pursuant to its new core provision, Section 19a German Competition Act (III.). This note also contrasts Section 19a German Competition Act with the European Commission's proposal on the Digital Markets Act (IV.). The paper closes by drawing some general conclusions (V.).

1. Introduction

2. Digitalisation is rapidly gaining momentum across all industries and has triggered tremendous transformation processes, both for companies and consumers as well as for competition. There are no doubts about the benefits of the digital economy for society. The COVID-19 pandemic impressively demonstrated the welfare-enhancing effects associated with the digital economy since working from home and video conferences would hardly have been conceivable without the use of digital products and services.

3. But the digital economy also presents us with particular challenges. Therefore, the impact of digitalisation on the competitive landscape has been a major focus of competition policy discussions for some years. Apparently, there is a broad consensus among legislators around the world that the existing tool-kit needs an update which has resulted in several legislative initiatives.

4. In today's debate competition law is sometimes erroneously perceived as a less effective tool for solving digital competition concerns. However, competition agencies have proven that competition law is a functioning tool vis-à-vis the digital economy. The Bundeskartellamt, for example, has a long-standing and varied enforcement record with regard to large digital platforms. Among the most popular digital cases are the following proceedings against Amazon, Facebook and Booking.com.

1.1. Amazon

5. In 2013, the Bundeskartellamt ensured that Amazon abandoned its price parity clauses for good.¹ In these proceedings the Bundeskartellamt cooperated with the British competition authority within the scope of the Network of European Competition authorities, ECN. The authorities thus ensured the abandonment of the price parity clauses EU-wide.

6. In 2019, the Bundeskartellamt obtained far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces.² The amendments addressed the numerous complaints about Amazon that the Bundeskartellamt had received from sellers.

¹ Bundeskartellamt, press release of 26 November 2013, available here: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html?nn=10160192.

² Bundeskartellamt, press release of 17 July 2019, available here: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html.

They concerned the unilateral exclusion of liability to Amazon's benefit, the termination and blocking of sellers' accounts, the court of jurisdiction in case of a dispute, the handling of product information and many other issues. The case was settled within eight months, and Amazon adjusted its terms of business for sellers worldwide.

1.2. Facebook

7. In the Bundeskartellamt's landmark decision against Facebook in 2019, the authority imposed extensive restrictions on the company with regard to the processing of user data.³ The Bundeskartellamt's decision in particular requires Facebook to refrain from using terms and conditions which entitled the platform to gather data from numerous sources outside the social network facebook.com without its users' freely given consent to combine them with "on-Facebook" data.⁴

8. At Facebook's request, the Düsseldorf Higher Regional Court ordered the suspensive effect of the company's appeal due to serious doubts as to the legality of the decision. The result of such an order is that the decision rendered by the Bundeskartellamt may not be enforced until the court has ruled on the appeal.⁵

9. In 2020, the German Federal Court of Justice annulled the decision of the Düsseldorf Higher Regional Court and rejected the request to order the suspensive effect of the appeal, stating that there were no serious doubts about the legality of the Bundeskartellamt's decision.⁶

10. The main proceedings are still pending before the Düsseldorf Higher Regional Court. In April 2021, the court referred the case to the European Court of Justice with regard to the interpretation of the General Data Protection Regulation. The case is still pending.

1.3. Booking.com

11. In 2016, the Bundeskartellamt had required Booking.com to refrain from the use of narrow price parity clauses in its terms of business applicable to hotels listed on the platform. Those clauses prohibited hotels from undercutting prices shown on Booking.com in their direct online and offline sales. Since the Bundeskartellamt's decision Booking.com has no longer applied these clauses. However, the company has had the decision reviewed by a court. In May 2021, the German Federal Court of Justice confirmed the Bundeskartellamt's decision.

³ Bundeskartellamt, case summary 15 February 2019, available here: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

⁴ Bundeskartellamt, press release of 7 February 2019, available here: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html.

⁵ Düsseldorf Higher Regional Court, decision of 26 August 2019, available here: <https://openjur.de/u/2179185.html> (in German only).

⁶ Federal Court of Justice, decision of 23 June 2020, KVR 69/19; Courtesy translation of Press Release No 080/2020 published by the Federal Court of Justice on 23 June 2020 provided by the Bundeskartellamt: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_20_20_BGH_Facebook.pdf?__blob=publicationFile&v=2.

2. Amendments to German Competition Law

12. Although significant successes could be achieved in recent years, in particular the highly dynamic digital economy and the rapid growth of large digital platforms have shown the need to amend the existing competition law. The German legislator reacted to this very early on.

13. The 9th Amendment to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter “GWB”), which entered into force in 2017, already provided *inter alia* some additional criteria for the assessment of market power particularly aimed at digital markets.⁷

14. The amendment clarified that goods or services provided free of charge can also constitute a market as defined under competition law. Moreover, aspects that are critical for the market power of platforms and networks - such as network effects and access to data - were expressly introduced into the law as new criteria for assessing market power. Lastly, the merger control thresholds were revised to include a threshold that is based on the transaction value. The previously applied turnover thresholds are not sufficient to cover all relevant mergers and acquisitions in innovative sectors. The merger between Facebook and WhatsApp, for instance, is a clear example of the new types of acquisition where high purchase prices are paid for companies which so far have achieved little or hardly any turnover.

15. With the entry into force of the 10th Amendment to the German Competition Act “amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions (“GWB-Digitalisierungsgesetz” – GWB Digitalisation Act)” in January 2021⁸ Germany continued to push forward.⁹ Besides changes with regard to the protections of competition in the digital economy the amendment concerns changes in merger control, the implementation of the ECN Plus Directive and changes regarding administrative proceedings.

2.1. Important changes regarding the protection of competition in the digital economy

16. A key element of the amendment is the modernisation of abuse control in light of the challenges associated with protecting competition in the digital economy.

17. Most significantly, the amendment allows the Bundeskartellamt to intervene at an early stage, faster and more effectively, in cases where companies of paramount significance for competition across markets engage in certain types of conduct. The respective newly introduced provision (Section 19a) stipulates a two-step-approach: First, the Bundeskartellamt can declare an undertaking to be of paramount significance, taking into consideration factors such as its strategic position and resources. As a second step, the Bundeskartellamt can intervene even on markets where the company is not yet dominant and prohibit certain types of behaviour. Conduct that the Bundeskartellamt can prohibit

⁷ The English translation of the 9th Amendment to the German Competition Act is available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.html>.

⁸ The decision of the German Bundestag on the GWB Digitalisation Act (Bundesrat publication 38/21) can be downloaded here https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s002.pdf%27%5D_1611043118542.

⁹ English version available at: https://www.gesetze-im-internet.de/englisch_gwb/.

includes the self-preferencing of a group's own services or envelopment strategies. While traditional abuse control allows terminating or penalising the anticompetitive practices of a dominant undertaking ex-post, the Bundeskartellamt is now able to prohibit companies of paramount significance for competition across markets from engaging in certain types of conduct much earlier. It can take measures that are, in a certain sense, preventive and that can contribute decisively to curbing the power of large digital ecosystems that extend across various markets.

18. The German lawmaker has also reinforced the effectiveness of the new provision by shortening the legal process. Appeals against decisions issued by the Bundeskartellamt under Section 19a will be brought directly to the Federal Court of Justice as the first and last instance on all disputes in this regard. The court is called upon to reassess the substance of a case to uphold the legal right to be heard.

19. Important changes also affect other areas. Further internet-specific criteria have been added to provisions governing traditional abuse control. In respect of the assessment of market power, the GWB now explicitly clarifies that a platform's power of intermediation can constitute a relevant factor in the assessment and that access to data can also be relevant in cases outside multi-sided markets and networks.

20. Apart from an update of the rules on prohibited conduct of undertakings with relative market power, also in light of the platform economy, another new feature is that under certain preconditions, the Bundeskartellamt can order in favour of dependent undertakings that access to data must be granted in return for adequate compensation. The GWB also affords the Bundeskartellamt special competences to intervene in cases where an undertaking with superior market power on a platform or network market impedes the independent attainment of network effects by competitors, which might create a serious risk of a market 'tipping' towards a larger supplier.

2.2. Changes in merger control

21. The Act also aims at easing the bureaucratic burden on companies by readjusting the turnover thresholds in merger control. In Germany, most merger projects must be notified by the companies concerned only if their worldwide or domestic turnover reaches certain minimum thresholds. In the future mergers will be subject to merger control only if, among other conditions, one of the companies concerned achieves an annual turnover in Germany of at least 50 million euros (previously 25 million euros) and if another company participating in the merger achieves an annual turnover in Germany amounting to at least 17.5 million euros (previously five million euros).

22. Furthermore, the Bundeskartellamt will be able to oblige companies active in certain economic sectors to notify mergers even if they do not reach the turnover thresholds. This is subject to specific conditions being fulfilled, including e.g. reaching certain threshold values, and the Bundeskartellamt must have previously conducted a sector inquiry in one of the economic sectors concerned.

2.3. Implementation of the ECN Plus Directive

23. The 10th Amendment to the German Competition Act also served the implementation of the ECN Plus Directive, in particular strengthening the effectiveness of cartel prosecution. In line with the system in place at EU level, companies and their employees are required to cooperate to a certain extent in establishing the facts of a case. This requirement will also benefit proceedings with regard to digital markets.

24. Another important step is the fact that the amendment strengthens the competition authorities' position in judicial proceedings concerning administrative fines. Even after an objection has been filed against a fining decision, the Bundeskartellamt will remain the competent enforcement authority (not the General Prosecutor's Office as has previously been the case) and will in future have the same rights in these proceedings as the public prosecutor's office.

25. The amendment also includes several new provisions regarding administrative fines. New rules apply to fines imposed on associations of companies. In addition, the leniency programme has now been enshrined in law. The Bundeskartellamt adjusted its notices accordingly.

2.4. Changes regarding administrative proceedings

26. The amendment lowers the requirements for ordering interim measures as a further step to improve the Bundeskartellamt's ability to take faster and more efficient action in vulnerable markets. This change benefits the protection of digital markets in particular.

27. While also oral hearings will become possible in cartel administrative proceedings, more detailed provisions on granting parties to the proceedings and third parties' access to files will provide more legal clarity.

28. Lastly, the established practice of providing companies with informal advice in the form of a letter by the Chair of a Decision Division has now been embodied in law.

3. New proceedings based on Section 19a

29. With its new competences from the 10th Amendment to the German Competition Act the Bundeskartellamt has already initiated designation proceedings against Facebook, Amazon, Google and Apple based on Section 19a GWB to determine whether the respective undertaking is of paramount significance for competition across markets. Parts of these proceedings are combined with proceedings regarding a company's conduct based on the new law or on traditional abuse rules.

3.1. Facebook

30. In December 2020, the Bundeskartellamt initiated abuse proceedings against Facebook due to the linkage between Oculus and the Facebook network.¹⁰ Immediately after the latest amendment and the changes it brought, the Bundeskartellamt extended the scope of its proceedings and also examined whether Facebook is subject to the provision in Section 19a GWB applying to undertakings of paramount significance for competition across markets, and whether linking the services is to be assessed on this basis.¹¹

¹⁰ Bundeskartellamt, press release of 10 December 2020, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/10_12_2020_Facebook_Oculus.html?nn=10321672.

¹¹ Bundeskartellamt, press release of 28 January 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html?nn=10321672.

3.2. Amazon

31. In May 2021 the Bundeskartellamt initiated a proceeding against Amazon based on Section 19a GWB to examine whether Amazon is of paramount significance for competition across markets.

32. Parallel to this proceeding the Bundeskartellamt is also conducting two proceedings against Amazon based on the abuse control rules which were already in place before the latest amendment to the competition act came into effect. In one proceeding the authority is examining to what extent Amazon influences the pricing of sellers on Amazon Marketplace by means of price control mechanisms and algorithms. In a second proceeding the authority examines to what extent agreements between Amazon and brand manufacturers, including Apple, which exclude third-party sellers from selling brand products on Amazon Marketplace constitute a violation of competition rules.¹²

3.3. Google

33. In May 2021 the Bundeskartellamt has also initiated a proceeding to determine whether Google is of paramount significance for competition across markets based on Section 19a GWB.¹³

34. In a second proceeding initiated on the same day which is based on the general classification, the authority undertakes an in-depth analysis of Google's data processing terms. A key question in this context is whether consumers wishing to use Google's services have sufficient choice as to how Google will use their data.

3.4. Google News Showcase

35. The Bundeskartellamt has initiated a proceeding against Alphabet Inc., Mountain View, USA, and its affiliates ("Google") to examine under competition law the Google News Showcase service offered by the company.¹⁴ The examination is mainly based on the authority's new competences under the new legal provisions applicable to large digital companies.

36. In this respect it follows up on the above-mentioned proceeding against Google which the Bundeskartellamt initiated in May 2021.

37. Google News Showcase is a Google service which offers the possibility to present the news content of publishers in a prominent and more detailed way. Google has made the service available to a number of German publishers. On 1 October 2020 Google had announced the launch of its Google News Showcase service in Germany.

¹² Bundeskartellamt, press release of 15 May 2021, available here:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html.

¹³ Bundeskartellamt, press release of 25 May 2021, available at:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html?nn=10321672.

¹⁴ Bundeskartellamt, press release of 4 June 2021, available at:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html?nn=10321672.

38. Acting upon a complaint from a corporation of media enterprises, the Bundeskartellamt is examining in this proceeding whether the announced integration of the Google News Showcase service into Google's general search function is likely to constitute self-preferencing or an impediment to the services offered by competing third parties. The authority is also examining whether the relevant contractual conditions include unreasonable conditions to the detriment of the participating publishers and, in particular, make it disproportionately difficult for them to enforce the ancillary copyright for press publishers introduced by the German Bundestag and Bundesrat in May 2021. It is also important to examine how the conditions for access to Google's News Showcase service are defined.

3.5. Apple

39. In June 2021 the Bundeskartellamt started a proceeding against the technology company Apple based on the new provision Section 19a GWB.¹⁵ The authority will examine whether Apple is of paramount significance for competition across markets.

40. With its proprietary operating system iOS, Apple has created a digital ecosystem around its iPhone that extends across several markets. A main focus of the investigations will be on the operation of the App Store as it enables Apple in many ways to influence the business activities of third parties.

4. DMA

41. As said at the beginning, there are several initiatives aiming at addressing the challenges raised by the digital economy. One of the key proposals originates from the European Commission.¹⁶

42. On 15 December 2020, the European Commission (COM) published a proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act, DMA).¹⁷

43. The COM's initiative was expressly welcomed by competent Ministers in the Competitiveness Council and the heads of the European competition authorities organised

¹⁵ Bundeskartellamt, press release of 21 June 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html?nn=10321672.

¹⁶ This part is based on the Bundeskartellamt's Background Paper for the Meeting of the Working Group on Competition Law on 7 October 2021, available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2021/Working_Group_on_Competition_Law_2021.html?nn=3590872.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) of 15 December 2020.

in the European Competition Network (ECN).¹⁸ The Federal Government of Germany also provided a positive assessment of the initiative.¹⁹

44. Even though the DMA is still a “moving target”, a comparison between the COM’s draft regulation and Section 19a GWB shows that both share several similarities: The obligations of the DMA have roots in numerous competition law proceedings and require investigative approaches that are similar to those prescribed under competition law. The DMA’s provision regarding the addressees of the regulation also shares an important feature with Section 19a GWB insofar as all areas of regulation only ‘asymmetrically’ apply to certain categories of undertakings.

45. But there are also some differences between the DMA and Section 19a GWB which will be discussed in more detail below.

4.1. Personal scope of application

46. Section 19a(1) GWB provides for a certain flexibility in making the constitutive designation decision, which is a precondition for the application of Section 19a GWB, as subsection (1) sentence 1 focuses on an undertaking’s paramount significance for competition across markets. In contrast, the Commission’s draft for the DMA allows predominantly for a quantitative assessment, while a qualitative assessment is possible when these thresholds are not met.

47. Another important difference between the DMA and Section 19a GWB is that the latter does not include any criteria based on which an undertaking can be assumed to be an addressee of the norm. The factors under Section 19a(1) sentence 2 which are particularly to be considered in the assessment are basically of a qualitative nature; based on the legislative material, however, these factors are not intended to be exhaustive or meant to be fulfilled cumulatively. However, the COM can also engage in case-by-case assessment due to the fact that the DMA also allows for a qualitative assessment and the presumptions are rebuttable.

48. Moreover, the reference point of the decision under Section 19a(1) sentence 1 GWB is the undertaking as an economic entity, whereas under Article 3(1) in the DMA drafts the designation only pertains to the operation of certain gateway CPS. Contrary to the exhaustive list of CPS specified in the DMA, the criteria regarding the norm addressees under Section 19a GWB are not limited to certain areas of the digital economy.

4.2. Obligations

49. In respect of the obligations, distinct structural differences between the DMA and Section 19a GWB become apparent.

50. The DMA sets out obligations for those parts of an undertaking which have been designated as gatekeepers. These obligations apply immediately, directly and without a prior prohibition decision issued by an authority or a court being required whereas Section

¹⁸ Heads of the national competition authorities of the EU, Joint paper: How national competition agencies can strengthen the DMA, 23 June 2021

(https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_06_2021_DMA.html).

¹⁹ See Steinberg/L’Hoest/Käseberg, Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU, *Wirtschaft und Wettbewerb*, WuW 2021, pp. 414 ff. (416 ff.).

19a(2) GWB requires an individual decision. This can result in a certain delay but at the same time ensures proportionality more reliably than the more uniform approach taken by the DMA.

51. The criteria provided for in Section 19a(2) nos. 1-7 GWB to some degree contain examples which bear similarities to the practices prohibited under Articles 5 f. of the DMA drafts. However, unlike the DMA, Section 19a(2) sentence 2 GWB provides a possibility to objectively justify a company's behaviour. In this respect, the burden of demonstration and proof lie with the respective company.

52. In addition, the combination of more abstract criteria and more specific examples is likely to create fewer problems associated with the long-term viability of the provisions than the static rules and prohibitions of the DMA drafts.

4.3. Enforcement

53. The starting point of the DMA is that the obligations for gatekeepers apply directly without a constitutive decision taken by an authority.

54. The so-called regulatory dialogue is intended to set out the concrete terms of certain obligations contained in the DMA. The gatekeeper's request to initiate the regulatory dialogue has no suspensive effect. If the enforcing authority assumes that the obligations have not been complied with, it can – independently of the regulatory dialogue – initiate a non-compliance proceeding and order the gatekeeper to cease and desist with the non-compliance. It can also impose fines.

55. In addition to these proceedings which relate to individual infringements of the obligations, the DMA also allows for a market investigation to be conducted *inter alia* in the case of systematic non-compliance with the obligations.

56. The DMA stipulates that the COM is the sole enforcement authority. National competition authorities will have no competence to enforce the DMA. The idea is thus to establish a strongly centralised law enforcement system not dissimilar to the earlier role played by the COM in enforcing European competition law under Regulation 17/62.

57. Based on the more specific formulation of the obligations compared with competition law, there is hope on the COM's part that the DMA will result in lower law enforcement effort because gatekeepers would comply with the obligations "by design".

58. However, there is reason to doubt whether the DMA fully meets the self-imposed expectations of a consistently clear definition of the relevant criteria. If the COM's hope is not fulfilled this would inevitably increase the need for law enforcement.

59. It is argued that this centralistic approach runs the risk of proceedings being delayed or not even initiated due to a lack of resources. Therefore, the DMA provisions on law enforcement would benefit from a stronger involvement of national competition authorities. Involving national authorities could strengthen the DMA enforcement and prevent the COM becoming a bottleneck. Against this background, Germany together with France and the Netherlands published a [joint position paper](#) pushing especially for a stronger role for national authorities in the enforcement of the DMA.²⁰ Also, European national competition authorities jointly expressed that the way forward to ensure an effective and quick implementation of the DMA should include the primary application of

²⁰ Federal Ministry for Economic Affairs and Energy, Ministère de l'Économie, des Finances et de la Relance, Ministry of Economic Affairs and Climate Policy, Joint Non-Paper: Strengthening the Digital Markets Act and its Enforcement, 8 September 2021.

the DMA by DG COMP at the COM and a complementary possibility of enforcement of the DMA by national competition authorities.²¹ To this end, the Council has put forward the idea that national competition authorities can support the enforcement activities of the COM.

60. Diverging decisions between the national authorities could be addressed by modelling the cooperation mechanism on the example of the European Competition Network (ECN) and the risk of diverging decisions would be reduced by the “rule-based approach” of the DMA.

5. Conclusion

61. To address the challenges of the digital economy, an effective competition law that can keep pace with the developments in this economy is of utmost importance. With a view to legal security, competition law should provide clear guidelines for companies. The legislator should ensure that competition provisions are not overregulating and thus prevent innovation.

62. The Amendment to the German Competition Act in January 2021 was a significant legislative step in order to keep up with the developments on digital markets.

63. We do welcome the DMA as an additional tool. However, national competition authorities should be a complementary relay for enforcing the DMA. This will strengthen competition authorities in their mission to keep digital markets open and contestable as well as prevent consumer harm.

²¹ Heads of the national competition authorities of the EU, Joint paper: How national competition agencies can strengthen the DMA, 23 June 2021.