Section 19a GWB as the German 'Lex GAFA' – lighthouse project or superfluous national solo run?

by

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CONTENTS

Abstract

As the European Union kept on struggling with its Digital Markets Act, Germany forged ahead and implemented its own 'Lex GAFA' in early 2021. The paper will introduce this new Section 19a and explain its inner workings. Furthermore, Section 19a will be compared to classic Article 102 TFEU-procedure and contrasted

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with the DMA. Thereby, the paper will present the advantages and disadvantages of Section 19a in comparison to existing and future European law to assess whether Section 19a is in fact the lighthouse project it was presented to be – or rather a superfluous national solo run.

Resumé

Alors que l'Union européenne continue de se débattre avec sa législation sur les marchés numériques (DMA), l'Allemagne est allée de l'avant en mettant en œuvre sa propre 'Lex GAFA' au début de l'année 2021. Cet article présente la nouvelle Section 19a et explique son fonctionnement interne. En outre, la Section 19a y est comparée à la procédure classique de l'article 102 TFUE et mis en contraste avec le DMA. Cet article présente les avantages et inconvénients de la Section 19a au regard du droit positif européen, ainsi que celui qui doit encore entrer en vigueur, afin de déterminer si la Section 19a est vraiment le projet phare qui a été promis, ou au contraire un solo national superflu.

Keywords: Section 19a; DMA; Digital Markets Act; undertaking of paramount significance; intermediary power; gatekeeper.

JEL: K20, K21, K23

I. Introduction

In quite a lot of ways, the digital realm and the 'old', analogue world differ widely. Competition and markets are no exception.[1] This is why, all over the world, legal scholars and practitioners alike have been discussing new legislation specially designed to help control 'the big four', that is, *Google* (*Alphabet*), *Amazon*, *Facebook* (*Meta*), and *Apple*.[2]

As the European Union kept on struggling with its Digital Markets Act (hereinafter: DMA), Germany forged ahead and implemented its own 'Lex GAFA' in early 2021. Roughly one year later, on 30 December 2021, the German competition authority (*Bundeskartellamt*) issued a declaratory decision designating *Google* (*Alphabet*) as an addressee of the discussed norm (hereinafter: the norm's addressee).[3] In May and July 2022, *Facebook*

[1] In depth: Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era* (2019).

[2] Some augment this circle to cover 'the big five', also including Microsoft (e.g. Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' [2021] Journal of European Competition Law & Practice 513, 515).

[3] *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21 3 (BKartA).

(*Meta*) and *Amazon* followed.[4] Supporters of the new Section 19a of the German Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen'; hereinafter: *GWB*) rightfully point out that lasting between 12 and 18 months is quite a short time in comparison to past proceedings against Big Tech.[5] However, these decisions are only the first of (at least) two steps: first, the *Bundeskartellamt* must designate a company as the norm's addressee and second, it must issue a prohibition decision establishing that a certain form of conduct of the designated company is illegal. Moreover, by now, the European Parliament and the Council of the EU have given their final approval to the Digital Markets Acts.[6] The final version was published on 12 October 2022.[7] It will apply from 2 May 2023. Both the facts that until now, the *Bundeskartellamt* has not issued any prohibition decisions based on Section 19a, and that the common European solution start to apply in spring 2023, raise the question of whether Section 19a is indeed the lighthouse project it was presented to be[8] – or rather a superfluous national solo run.[9]

This paper will introduce Section 19a and its inner workings (II.). Afterwards, Section 19a will be compared to the classic Article 102 TFEU-procedure (III.) and contrasted with the Digital Markets Act (IV). Their solutions to current challenges will be compared, and thereby their differences, advantages, and disadvantages highlighted.

II. Section 19a – its inner workings

Section 19a is based on a two-step approach: Paragraph 1 stipulates the conditions under which an undertaking falls within its scope; Paragraph 2 governs potential abusive conduct. However, both the norm's addressee

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[4] *Meta (vormals Facebook): Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B6 – 27/21 (BKartA); *Amazon.com, Inc.: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B2 – 55/21 (BKartA).

[5] See e.g. the *Google Shopping* case to which the Journal of European Competition Law & Practice recently dedicated an entire issue (Volume 13, Issue 2, March 2022).

[6] Council of the EU, *DMA: Council gives final approval to new rules for fair competition online* (Press Release: 2022).

[7] 2022 O.J. (L 265) 1.

[8] Compare Rupprecht Podszun and Fabian Brauckmann, 'GWB-Digitalisierungsgesetz: Der Referentenentwurf des BMWi zur 10. GWB-Novelle' [2020] GWR 436, 437: 'downright revolutionary' ('geradezu revolutionär').

[9] Compare Andreas Grünwald, '"Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' [2020] MMR 822, 826: 'Deutscher Sonderweg' (literally: 'German special path'; negative connotation).

and the prohibition do not operate *ipso iure.* Instead, the legal rule must be 'activated'[10] by the *Bundeskartellamt*. That is, the competition authority must first issue a declaratory decision designating an undertaking as an addressee (1), and afterwards, for a concrete form of behaviour to become illegal, a second decision, in this case, a prohibition decision, must follow (2).

1. Declaratory decision designating an undertaking the norm's addressee

Section 19a(1) stipulates two cumulative requirements under which the *Bundeskartellamt* may designate an undertaking which thereby will become liable to prohibition orders: First, the undertaking has to be active to a significant extent on multi-sided markets or networks (1.1.), and second, it must be of paramount significance for competition across markets (1.2.).

1.1. Significant activities on multi-sided markets or networks

The requirement regarding an undertaking's economic activities can be split into two components: Activities on multi-sided markets or networks and their significance.

The restriction to multi-sided markets or networks is not directly stipulated in Section 19a but results from its referral to Section 18(3a) *GWB*. Section 18 is a legal provision clarifying under which conditions an undertaking controls a market. Its Paragraph 3a is fairly new itself, as it just came into force with the 9th Amendment to the *GWB* in June 2017. It introduces additional criteria (such as consumer costs in switching platforms) to be considered when evaluating market dominance regarding 'multi-sided markets and networks'. According to the reasoning behind the law published by the government for the former 9th Amendment, multi-sided markets are characterised by having at least two different user groups to whom goods or services are offered. The explanatory notes further state that multisided markets exhibit indirect network effects. That is, the utility of one user group is linked to the existence and size of the other user group. In contrast, according to the communication from the government, networks are characterised by their direct network effects. That is, the utility of one user increases with the total number of users.[11] To give an

[10] Thomas Höppner, 'Plattform-Regulierung light' [2020] WuW 71, 77; Tobias Lettl, 'Der neue § 19a GWB' [2021] WRP 413, recital 4.

[11] Gesetzesentwurf der Bundesregierung, 9th Amendment 11 July 2016, BT-Drs. 18/10207 (Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen) 47.

example: According to Section 18(3a), social media platforms are networks, whereas sales platforms are multi-side markets. As the legal provision includes both terms, further clarification, especially regarding border cases (such as a social media platform with regards to advertising agencies) is not necessary for its practical application.[12]

It is currently rather controversial whether the scope of Section 19a is further restricted to digital markets.[13] This is because on the one hand, even though the explanatory notes published to Section 18(3a) indicate that it was especially introduced with regards to digital markets, credit card systems, and shopping malls are explicitly identified as real-world examples.[14] Thus, at least Section 18(3a) is not limited to digital markets.[15] By contrast, the reasoning behind the law published by the government for the the 10th Amendment states that Section 19a shall be restricted to digital markets.[16] Within the German legal system, the meaning of a law is determined by its wording, its (in general objectively determined)[17] purpose, its systematic position, and by the documents published during the legislation process.[18] Yet, regarding

[12] For further economic research see i.a. Lapo Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10(2) Journal of Competition Law & Economics 293–329. With regards to competition law: Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11(1–2) International Economics and Economic Policy 49.

[13] In favour: Nothdurft, '§ 19a GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022) 23; Florian C Haus and Lukas Rundel, 'Neue Missbrauchsaufsicht für digitale Ökosysteme' [2022] RDi 125, recital 10; Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' [2020] GRUR Int 233, 246. Against: Lettl (n 9), recital 9; Thorsten Mäger, 'Die 10. GWB-Novelle: Eine Plattform gegen Big Tech?' [2020] NZKart 101, 101; Torsten Körber, '"Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle: Macht im Netz IV: Maßvolle Antwort oder übertriebene Regulierung der Digitalwirtschaft?' [2020] MMR 290, 293 ff.; Stephan M Nagel and Katharina Hillmer, 'Die 10. GWB-Novelle – Update für die Missbrauchsaufsicht in der Digitalwirtschaft' [2021] DB 327, 329; Franck and Peitz (n 2), 516, 517.

[14] Gesetzesentwurf der Bundesregierung, 9th Amendment (n 10), 49.

[15] Töllner, '§ 18 GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022) recital 171; Franz J Säcker and Peter Meier-Beck (eds), *Münchener Kommentar zum Wettbewerbsrecht: Band 2 Deutsches Wettbewerbsrecht* (3rd ed., Beck 2020) recital 47; Fuchs, '§ 18 GWB' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: Band 2.* GWB/Teil 1 (6th ed., Beck 2020) recital 140.

[16] Gesetzesentwurf der Bundesregierung, 10th Amendment 9 July 2020, BT-Drs. 19/23492 (GWB-Digitalisierungsgesetz) 74.

[17] Markus Würdinger, 'Das Ziel der Gesetzesauslegung – ein juristischer Klassiker und Kernstreit der Methodenlehre' [2016] JuS 1; Karl Larenz, *Methodenlehre der Rechswissenschaft* (3th ed., Springer 1995) 333.

[18] BVerfGE 133, 168, 205.

the latter, it must be taken into account that some of them, such as the aforementioned explanatory notes, are issued by the government, but it is the parliament that finally passes the law. On top of that, these documents are published at the very beginning of the legislative process, and it is not unusual for a legal provision to be altered during the legislative proceedings.[19] As neither the wording nor the systematic position supports a restriction to digital markets only, such delimitation is difficult to justify. Nonetheless, despite all academic discussions, it must not be forgotten that the most pressing addressees of Section 19a belong to a small circle of undertakings mainly operating on digital markets.[20] Therefore, at least in the near future, its actual scope of application will be limited to digital markets.[21]

The undertaking's activities on multi-sided markets or networks must be significant as to their extent. This criterion contrasts the 'relevant' activities of the enterprise with its other economic activities.[22] It is not yet clear whether the undertaking must realise the majority of its economic activities on markets addressed by Section 18(3a) – or whether it is sufficient that these activities are not entirely negligible.[23] This is why some legal scholars predict delimitation problems.[24] Still, currently, the *Bundeskartellamt* focuses its efforts on a handful of international groups active mostly on digital markets. Hence, delimitation problems will at least not occur in the near future – if ever.

Finally, it is worth noting that the 'significant extent' criterion is a dynamic one. An undertaking's activities may rapidly shift from the analogue to the digital world. One must only think of the swift changes realised during

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[19] See Thomas Spitzlei, 'Die Gesetzesbegründung und ihre Bedeutung für die Gesetzesauslegung' [2022] JuS 315, 316.

[20] Compare the reasoning behind the law published by the government (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15) 74, 75): 'targets a small circle of undertakings' ('zielt auf einen kleinen Kreis von Unternehmen'), 'only for a few undertakings' ('nur für wenige Unternehmen'), 'strictly limited circle of addressees' ('eng begrenzte[r] Adressatenkreis').

[21] See also, to this effect, Haus and Rundel (n 12), recital 10.

[22] See, however, the reasoning behind the law published by the government according to which the comparison of the scrutinised company to other undertakings present on the relevant market shall be taken into account as well (Gesetzesentwurf der Bundesregierung, 10th Amendment [n 15] 74). With regards to the 'paramount significance' criterion, this does not make sense. Nothdurft (n 12) recital 27 states that because of changes in the legislation process, this aspect has become obsolete and thus may be ignored.

[23] E.g. see the reasoning behind the law published by the government (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15) 74): 'only undertakings with a focus on digital business models' ('nur Unternehmen mit Schwerpunkt im Bereich digitaler Geschäftsmodelle') – 'Therefore, undertakings are not encompassed for whom their activities as platform or network […] only play a very minor role' ('Nicht erfasst sind damit Unternehmen, bei denen die Tätigkeit als Plattform oder Netzwerk (…) nur eine vollkommen untergeordnete Rolle spielt').

[24] E.g. Haus and Rundel (n 12), recital 11.

the COVID-19 pandemic. Thus, undertakings currently not relevant may suddenly become the addressees of the norm.[25]

1.2. Paramount significance for competition across markets

In second place, Section 19a(1) only addresses undertakings of 'paramount significance for competition across markets'. This requirement shall guarantee the relative importance of an undertaking. Because of the wording 'across markets', some scholars argue that an undertaking has to be active on at least two different markets to become the norm's addressee.[26] Yet, the point of reference is competition itself. Moreover, according to the reasoning behind the law published by the government, this specific wording was chosen to highlight that the position of significance does not refer to one specific market, but to an overall picture of all the markets the undertaking operates on.[27] Therefore, no delimitation of the different markets is necessary,[28] and hence, the *Bundeskartellamt* is not obliged to make this distinction.[29]

Even though at first glance, 'paramount significance' looks like a hard criterion to fulfil, it intends the opposite. It was introduced as a requirement below the threshold of market dominance, yet still indicating a certain leading position.[30] The idea behind this difference is twofold. Firstly, the reasoning behind the law published by the government states that within the digital realm, 'importance' results from undertakings operating on various markets, in particular from realising network effects – possibly without being in a position of dominance on even one of them.[31] Secondly, there is the rather pragmatic thought that determining market power on digital markets is difficult and time-consuming. Though there have been cases against *Google*, *Amazon*, *Apple*, and *Facebook* in the past at both European and national level, the final decisions took several years to reach and were generally considered too late.[32] Therefore, speeding up the process is one of the most important goals of Section 19a(1).[33]

[25] Compare Nothdurft (n 12), recital 26.

[26] Lettl (n 9), recital 10.

[27] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 74 f.

[28] Marco Botta, 'Sector Regulation of Digital Platforms in Europe' [2021] Journal of European Competition Law & Practice 500, 503.

[29] Nothdurft (n 12), recital 28; Mischau (n 12), 246. See however Franck and Peitz (n 2), 517 still stressing the importance of defining markets.

[30] Lettl (n 9), recital 12.

[31] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 73.

[32] See i.a. Rupprecht Podszun, 'Die 10. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)' (23 November 2020) Ausschussdrucksache 19(9)887 7, 8; Thorsten Käseberg, 'Kapitel 1' in Florian Bien and others (eds), *Die 10. GWB-Novelle* (2021) recital 174; Giorgio Monti, 'The Digital Markets Act: Improving Its Institutional Design' [2021] CoRe 90, 90.

[33] Compare Nothdurft (n 12), recitals 4, 5.

While the first sentence of Section 19a(1) only stipulates abstract criteria, its second sentence denominates various factors relevant to determining an undertaking's significance. As the term 'in particular' indicates, all of them are just examples – they do not have to be present at the same time, and are not to be considered exclusively. Moreover, according to the reasoning behind the law published by the government, the order in which they are named does not imply their quantification.[34]

Interestingly, the very first factor denominated is market dominance. Even though, as stated before, dominance is not necessary for finding a position of 'paramount significance', the *argumentum e contrario* shall be possible. Nonetheless, this highlighted position is rather unfortunate as – contrary to the idea of establishing a different approach – it instead invites scholars to point out that a decision based on market dominance is better justified than one based on the other criteria.[35]

Further aspects that are explicitly named are 'financial strength' and 'access to other resources'. The especially relevant 'access to data'[36] is denominated in a recital of its own. Finally, 'vertical integration' and its 'significance for third parties', that is, intermediary power,[37] are stipulated.

2. Prohibition decision regarding a concrete form of behaviour

Section 19a(2) denominates a catalogue of potentially harmful acts. However, the legal provision only stipulates the option of prohibiting certain activities, but does not contain a prohibition in itself. Instead, the *Bundeskartellamt* must take further action. Consistently, the utilised terms are rather abstract. The underlying idea is that the *Bundeskartellamt* may assess the circumstances on a case-by-case basis, and thus concretise the course of action outlined by Section 19a(2).[38] Only after, first, being designated as an undertaking of paramount significance; and second, after receiving a prohibition decision, must the undertaking comply with the stipulated rules of conduct. Only then, third, and if the undertaking infringes the legal prohibition decision, an administrative fine may be imposed or a harmed party may sue for damages.[39]

[34] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[35] E.g. Haus and Rundel (n 12), recital 13. See, however Boris P Paal and Fabian Kieß, 'Digitale Plattformen im DSA-E, DMA-E und § 19a GWB' [2022] ZfDR 1, 12: 'argumentum e contrario' ('Umkehrschluss').

[36] Cf. Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[37] Ibid.

[38] Matthias Heider and Konstantin Kutscher, 'Die 10. GWB-Novelle und die Missbrauchsaufsicht digitaler Plattformunternehmen' [2022] WuW 134, 136.

[39] Cf. Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

It is worth noting that the title of the legal rule refers to 'abusive conduct' even though Paragraph 2 does not qualify the listed actions as abusive. The second sentence of Paragraph 2 provides a justification-opportunity for the addressed undertaking.[40] That is, the undertaking may outline why its conduct is compliant with competition. However, as Sentence 3 explicitly points out, the burden of proof lies with the undertaking.[41] That is, the legal provision does not state that the listed conducts are abusive, but contains a rebuttable presumption.[42] The President of the *Bundeskartellamt*, *Andreas Mundt*, explains this as follows: 'It describes "typically abusive" behaviour which may be prohibited by the *Bundeskartellamt* without the need of substantiating the abusiveness.'[43]

Moreover, the *Bundeskartellamt* does not have to elaborate on the harmfulness of the conduct in more detail. There is not even a defence of 'not being harmful'. Section 19a(2) simply implies that the behaviour will have negative consequences.[44]

In total, Section 19a(2) lists seven conducts. Section 19a(2)(1)(1) addresses the role of intermediaries and the problem of self-preferencing. Therefore, it only applies to vertically integrated intermediaries. This is why Number 2 deals with gatekeepers in general and with disparate conditions in different enterprises. Both Numbers 1 and 2 are special forms of exclusionary conduct.[45] Number 3 targets enrolment and leverage effects. The legal provision gives examples of linking the use of an offer to the automatic use of another offer, and making the use of an offer conditional on the use of another offer. Number 4 tackles data. Making the use of a service conditional on the user agreeing to the processing of data from other services is just one of the examples listed. According to Number 5, interoperability and data portability may be enforced. The underlying idea is to prevent lock-in effects because of missing interoperability and data portability.[46] Number 6 imposes an information duty as its shortage complicate comparability.[47] Finally, Number 7 contains a special form of exploitative abuse banning the undertaking from

[40] Compare Heider and Kutscher (n 37), 136, stressing its importance.

[41] In depth: Marcel Scholz, 'Regulierung nach § 19a GWB' [2022] WuW 128.

[42] Compare Botta (n 27), 505.

[43] Andreas Mundt, 'Wandel der kartellbehördlichen Aufsicht und die aktuellen Herausforderungen' [2021] WuW 418, 419: 'Sie benennt 'typischerweise missbräuchliche' Verhaltensweisen, die das Bundeskartellamt den betreffenden Digitalunternehmen untersagen kann, ohne die Missbräuchlichkeit des Verhaltens zusätzlich umfänglich begründen zu müssen.' (Translation TB).

[44] Compare Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 78.

[45] Compare ibid 75, 76.

[46] Ibid 76.

[47] Ibid 77.

demanding disproportionate benefits for the handling the offers of another undertaking. That is, the undertaking of paramount significance shall not be able to gain advantages simply because of its position.[48]

The listed actions are not intended to be mutually exclusive. On the contrary; to avoid regulatory gaps, they are specially designed to overlap.[49] At the beginning of the legislative process, the behaviour was outlined in rather vague terms. In reaction to the Commission's 2020 Proposal for the DMA[50] that stipulated concrete duties, the German draft list was augmented, and, additionally, specific examples were included.[51] These examples shall ensure effectivity and legal certainty, but shall not indicate that a certain behaviour that is not mentioned is in fact legal.[52] However, it is not far-fetched that undertakings concerned will use a similar line of defence, most likely highlighting the differences between their activities and the examples given.

In theory, the prohibition decision should implement an *ex ante* regulation. Yet, the reasoning behind the law published by the government states that such a decision may only be issued if there is 'Erstbegehungsgefahr' (hazard of first infringement) or 'Wiederholungsgefahr' (hazard of repetition).[53] These terms originate from civil proceedings; to obtain injunctive relief, a claimant must demonstrate that the respondent will soon engage in unlawful conduct, by presenting serious and tangible factual indications. If the respondent has previously committed infringements, there is a general presumption of repetition. As these are civil procedure terms and since there is no such indication in the wording of Section 19a(2), the statement in the reasoning behind the law published by the government is rather surprising.[54] Indeed, legal scholars have pointed out that the *Bundeskartellamt* may not act without sufficient cause, but that this is a question of 'pflichtgemäße Ermessensausübung' (reasonable discretion) resulting in a slightly different review standard.[55] Notwithstanding this academic dispute, in the end, it is important to highlight that the *Bundeskartellamt* may not issue a prohibition decision without due cause. In particular, it will not be possible to issue the very same prohibition decision to

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[48] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie 13 January 2021, BT-Drs. 19/25868 117.

[49] Nothdurft (n 12), recital 50.

[50] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final).

[51] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (n 47), 113.

[52] Ibid 114. Rightfully sceptical: Andreas Grünwald, '§ 19a GWB' in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht* (100th ed., 2021) recital 59.

[53] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[54] Haus and Rundel (n 12), recital 25.

[55] Compare Lettl (n 9), recital 22.

every undertaking of paramount significance under Section 19a(1) whenever a certain form of behaviour comes up. Section 19a(2) does not give to the *Bundeskartellamt* the authority to create quasi-laws. This is why in practice, Section 19a will most likely result in *ex post* control.

3. Norm inherent criticism

Section 19a polarises views. Several potential problems result from its vagueness, especially in Paragraph 1, but to a certain extent in Paragraph 2 as well. Regarding Paragraph 1, some legal scholars allege that because of being too imprecise, denominating an undertaking requires difficult, demanding, and thus time-consuming investigations.[56] Depending on one's point of view, the first three cases of *Google*, *Meta* and *Amazon* justify these fears – or disprove them. Though Section 19a was specially designed with regard to the big four, it took the *Bundeskartellamt* 12 to 18 months to issue a declaratory decision directed at them. However, the reasoning behind the law published by the government foresaw a process durations of two years[57] and, in comparison with past proceedings against Big Tech, 12 to 18 months is indeed an improvement.

In this context, it is worth noting that the highlighted position of market dominance, as the first listed factor for assessing the paramount significance across markets, is rather unfortunate. Contrary to the idea of establishing a different approach, it rather invites scholars to point out that a decision based on market dominance is better justified than one based on other criteria.[58] Consequently, or possibly only to be on the safe side, the *Bundeskartellamt* did indeed establish *Google*'s market dominance[59] – this careful approach might have played its part in the decision taking an entire year to be issued.

Those in favour of Section 19a respond that formulating a declaratory decision might be time-consuming, but has to be made only once.[60] Thereafter, prohibition decisions are alleviated. Moreover, even a declaratory decision in itself may have positive effects in making an undertaking aware of its

[56] Ibid recital 15. Regarding the government draft: Podszun (n 31), 9, 11; Wirtz in Philipp M Steinberg and Markus Wirtz, 'Der Referentenentwurf zur 10. GWB-Novelle: Ein Dialog zwischen dem BMWi und der anwaltlichen Praxis (Teil 1)' [2019] WuW 606, 611.

[57] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 61.

[58] E.g. Haus and Rundel (n 12), recital 13.

[59] *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21 3 (BKartA).

[60] Haus and Rundel (n 12), recital 15. See Nothdurft (n 12), recital 129: 'Vorratscharakter' (storage nature).

position.[61] For instance, following the *Bundeskartellamt*'s decision, *Google* itself suggested remedies to remove competition concerns.[62] Yet, one cannot fail to notice that Section 19a generally requires two steps and that makes the proceedings cumbersome.

Regarding Paragraph 2, there are two opposing lines of criticism. On the one hand, some scholars state that it is too vague, and moreover names forms of behaviour such as self-preferencing which, in general, are perfectly acceptable in competitive markets.[63] On the other hand, one might allege that because examples were included, the legal provision ceased to be sufficiently abstract to fulfil its purpose of capturing yet unknown activities. Though the reasoning behind the law published by the government states that the *argumentum e contrario* shall not be admissible, the undertakings concerned will most likely try to utilise the examples in their favour. For instance, they might argue that their actions are so different from the examples given that they do not fall within the scope of a certain clause.

The norm's vagueness also leads to the accusation of legal uncertainty[64], and an unnecessary shift in power towards the executive.[65] By contrast, supporters argue that only this vagueness guarantees the necessary flexibility for such dynamic markets.[66] The reasoning behind the law published by the government states that the requirement of first designating an undertaking and, second, prohibiting concrete activities sufficiently mitigates the problem of legal uncertainty.[67] However, Section 19a(2)(1) allows for a joint decision incorporating both the designation and the prohibition.[68] Furthermore, the problem of a shift in power remains.

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[61] Yet, on the negative side, this may also lead to paralysis (Romina Polley and Rieke Kaup, 'Paradigmenwechsel in der deutschen Missbrauchsaufsicht' [2020] NZKart 113, 116).

[62] Haus and Rundel (n 12), recital 5 referring to BKartA, *Google News Showcase – Bundeskartellamt konsultiert Vorschläge Googles zum Ausräumen wettbewerblicher Bedenken* (Press Release: 2022).

[63] Lettl (n 9), recital 25; Torsten Körber, 'Datenzugang und Datennutzung in der Digitalwirtschaft im Fokus der 10. GWB-Novelle' in Tobias Klose, Martin Klusmann and Stefan Thomas (eds), *Das Unternehmen in der Wettbewerbsordnung: Festschrift für Gerhard Wiedemann zum 70. Geburtstag* (C.H. Beck 2020) 367 ff.

[64] Körber 2020 (n 12), 294; Paal and Kieß (n 34), 15; Polley and Kaup (n 59), 116. See, however, Höppner (n 9), 78 who rightfully points out that the legal provision was designed with regards to very few undertakings so 'a designation' should not come as a surprise to them.

[65] Bernhard Jakl, 'Jenseits des Datenschutzes' [2021] RDi 71, recital 42.

[66] Nothdurft (n 12), recital 51; Philipp Steinberg, Raphael L'Hoest and Thorsten Käseberg, 'Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU' [2021] WuW 414, 416.

[67] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 74.

[68] Compare Körber 2020 (n 12), 294.

Finally, Section 19a has the huge disadvantage of being limited to the German territory.[69] Of course, with the DMA being delayed at the beginning of the legislation process, the only alternative available to Germany was not acting at all.[70] Some argued that German endeavours could function as a lighthouse project convincing the rest of Europe of its necessity, and therefore paving the way for the DMA.[71] Yet, despite all good intentions, the risk of market fragmentation remains.[72] Perhaps, for simplicity's sake, an undertaking addressed by a prohibition decision will change its conduct in all (European) markets. In an ideal world, there could be a race to the top, or at least a race to be the first competition authority to issue a decision. Yet, a decision by the *Bundeskartellamt* would not impede another competition authority from issuing a second decision asking for slightly different remedies. Even taking into account the latest developments regarding *ne bis in idem*,[73] the possibility of various decisions remains, since Section 19a(2) does not involve any fines but only the prohibition of certain forms of conduct.[74] On top of that, economically speaking, the resulting duplication of efforts makes no sense. Therefore, at least when other member states introduce their own 'lex GAFA', there will be frictional losses and problems of alignment.

III. Section 19a and Article 102 TFEU

After analysing Section 19a on its own, to gain further insights, this legal provision will now be compared to traditional antitrust law. However, first of all, it is important to note that even though Union law is applied primarily, according to Article 3(2)(2) of Regulation (EC) No 1/2003, Member States

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[69] Bernhard Jakl, 'Jenseits des Datenschutzes' [2021] RDi 71, recital 13; Paal and Kieß (n 34), 27.

[70] Therefore in favour of Section 19a: Torsten J Gerpott, 'Neue Pflichten für große Betreiber digitaler Plattformen: Vergleich von § 19a GWB und DMA-Kommissionsvorschlag' [2021] NZKart 273, 279.

[71] Ibid.

[72] European Commission, *Impact Assessment Report: accompanying the document Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)* (SWD[2020] 363 final 2020) recital 29. Further: Boris P Paal and Lea K Kumkar, 'Wettbewerbsschutz in der Digitalwirtschaft' [2021] NJW 809, recital 20; Scholz (n 40), 134.

[73] Case C-151/20 *Bundeswettbewerbsbehörde v. Nordzucker a.o.* EU:C:2022:203.

[74] In depth: Ranjana A Achleitner, 'Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden' [2022] NZKart 359, 364. Regarding conflicts resulting from the application of both, Article 102 TFEU and the DMA see Lukas Harta, 'Der Digital Markets Act und das Doppelverfolgungsverbot' [2022] NZKart 102; Monti (n 31), 98.

may adopt stricter national law which prohibits unilateral conduct. Hence, Article 102 does not precede Section 19a.[75]

Comparing Section 19a to controlling abuse of market power reveals various similarities – even up to identical parts – but great differences as well. The first difference manifests itself regarding the *modus operandi*: Article 102 directly prohibits certain forms of behaviour. By contrast, Section 19a requires two 'activations', and is thus more dependent on the actions of the *Bundeskartellamt*. Whereas under Article 102, private individuals may sue the infringers directly, Section 19a requires the *Bundeskartellamt* to take action first.[76] Still, as stand-alone actions rarely take place, this discrepancy will hardly ever manifest in real life.

Another modification can be seen with regards to the norm's addressees. Though both refer to a position of power, Article 102 requires market dominance, whereas, with Section 19a, a position of paramount significance suffices. This aspect should allow for more undertakings to be watched. Moreover, it is supposed to simplify the work of the *Bundeskartellamt*. Yet, especially considering that market dominance is a criterion for determining the position of paramount significance, there is reasonable doubt whether this intended simplification will work.

Section 19a's point of reference is not one single market but competition itself. Furthermore, only markets with special characteristics are to be considered. Still, scholars do not agree whether the restriction ends with multi-sided markets and networks, or whether on top of that, the undertaking must operate in the digital realm. Nonetheless, in the end, Section 19a's scope of application is narrower.

Finally, regarding the relevant behaviour, both Section 19a and Article 102 target abusive forms of conduct.[77] Though Article 102 does not denominate the problematic activities in much detail, the listed practices are similar. Scholars mostly agree that there is no abusive behaviour captured by Section 19a that could not be targeted by Article 102 or its German equivalent, Section 19 GWB.[78] Yet, by directly naming certain forms of conduct, and on top of that giving examples, Section 19a intends to lighten the burden of proof for the *Bundeskartellamt*. However, scholars doubt whether this really results

[75] Nothdurft (n 12), recital 136. However, there is some critical debate whether Section 19a differs so much from traditional competition law, that Article 3(2)2 does not even apply (see Grünwald, '"Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' (n 7), 824; Paal and Kumkar (n 70), recital 18).

[76] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[77] Compare ibid referring to Section 19a as 'real abuse control' ('echte Missbrauchsaufsicht').

[78] Nothdurft (n 12), recital 4, 49; Körber 2020 (n 12), 295.

in a simplification of procedure in practice – or whether this concretisation rather leads to a different, yet comparable effort.[79]

Summing up, Section 19a and Article 102 both target abusive conduct by undertakings in a position of power. Regarding its scope, Section 19a is narrower, but within, both legal provisions could be applied to the very same case.[80] Hence, in the end, Section 19a can only have lasting importance if it allows for more effective control of abusive practices. At least its design is intended to be better suited to tackle GAFA. Yet, as its wording is rather vague, there is justifiable doubt about its manageability.[81]

IV. Section 19a and the Digital Markets Act

1. The Digital Markets Act

On 25 March 2022, the rapporteur of the European Parliament *Andreas Schwab*, the French Secretary of State *Cédric O*, the Commission Executive Vice-President *Margrethe Vestager*, and the Commissioner for the Internal Market *Thierry Breton* held a joint press conference announcing that a deal on the European Digital Markets Act (hereinafter: DMA) had been reached.[82] On 5 July, the European Parliament, and on 18 July, the Council of the EU gave their final approval.[83] Thereafter, the DMA was published on 12 October 2022.[84] It will apply from 2 May 2023. The following statements are not intended as a full assessment of the DMA[85], but as a summary allowing for its comparison to Section 19a.

[79] See, however, Gerpott (n 68), 277 who forecasts problems regarding the DMA's vagueness as well.

[80] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[81] See Lettl (n 9), recital 51.

[82] Andreas Schwab and others, 'Press conference on the Digital Markets Act (DMA) – results of the trilogue' (25 March 2021) <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-results-of-trilogue_20220325-1000-SPECIAL-PRESSER> accessed 12 April 2022.

[83] Council of the EU, *DMA: Council gives final approval to new rules for fair competition online* (Press Release: 2022).

[84] 2022 O.J. (L 265) 1.

[85] See i.a. Achleitner (n 72); Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' [2021] Journal of European Competition Law & Practice 493; Florian C Haus and Anna-Lena Weusthof, 'The Digital Markets Act – a Gatekeeper's Nightmare?' [2021] WuW 318; Björn Herbers, 'Der Digital Markets Act (DMA) kommt – neue Dos and Don'ts für Gatekeeper in der Digitalwirtschaft' [2022] RDi 252; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] Journal of European Competition Law & Practice

The most important term and nucleus of the DMA is that of a 'gatekeeper'. Article 2(1) defines them as undertakings 'providing core platform services', which according to Article 2(2) may refer to many services typical to the digital realm. However, some services such as streaming services are not included.[86] The list is exhaustive but, according to Article 19(1), the Commission may add new services following a market investigation.

An undertaking offering core platform services does not automatically become the norm's addressee. Article 3 introduces further criteria to safeguard that the undertaking at stake actually carries weight within the digital realm. On top of that, Article 3 establishes a designation procedure. Article 3(1) depicts a set of qualitative designation criteria, in particular the need for the core platform service to be an important gateway for business users to reach end-users. That is, gatekeepers are indirectly defined by their intermediary power.[87]

However, the Commission need not rely on a complicated qualitative assessment. Instead, Article 3(2) introduces certain quantitative thresholds regarding the number of active users, the number of EU Member States the undertaking is active on, and its turnover or market capitalisation/fair market value.[88] When reaching these thresholds, the undertaking shall be presumed a gatekeeper. However, Article 3(5) and (8) give leeway in both directions. On the one hand, the undertaking may present arguments to demonstrate that, due to special circumstances, it does not in fact satisfy the qualitative requirements

561; Lea K Kumkar, 'Der Digital Markets Act nach dem Trilog-Verfahren: Neue Impulse für den Wettbewerb auf digitalen Märkten' [2022] RDi 347; Jürgen Kühling and Thomas Weck, 'Der Digital Markets Act und die Regulierung von Ökosystemen' [2021] ZWeR 487; Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] Journal of European Competition Law & Practice 529; Rupprecht Podszun, Philipp Bongartz and Sarah Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' [2021] EuCML 60; Romina Polley and Friedrich A Konrad, 'Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte' [2021] WuW 198; Fabian Seip and Matthias Berberich, 'Der Entwurf des Digital Markets Act' [2021] GRUR-Prax 44; Alexandre de Streel and Pierre Larouche, 'The European Digital Markets Act: A Revolution Grounded on Traditions' [2021] Journal of European Competition Law & Practice 542; Monti (n 31); Daniel Zimmer and Jan-Frederick Göhsl, 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' [2021] ZWeR 29.

[86] Therefore, critical Podszun, Bongartz and Langenstein (n 83), 63; Zimmer and Göhsl (n 83), 39.

[87] Compare Chirico (n 83), 494

[88] Though Article 3(2)a does not make it clear whether the requirement of being active in at least three Member States is only linked to a fair market value of EUR 75 billion, or if it's a criterion which must always be fulfilled, recital 17 connects turnover and core platform services in at least three Member States, thereby clarifying that the latter condition is an independent one (see also Podszun, Bongartz and Langenstein [n 83], footnote 24).

listed in Article 3(1). On the other hand, the Commission shall 'designate' any undertaking not meeting the thresholds but fulfilling the qualitative criteria. Hence, Article 3 makes the designation process transparent, accordingly establishes legal certainty, and yet also allows for special circumstances to be considered.

Another important feature of the designation process is the notification duty of undertakings whereby Article 3(3) obliges those meeting the thresholds to notify the Commission 'without delay and in any event within 2 months'. Thus, in general, it is not up to the Commission to monitor markets regarding the emergence of new gatekeepers.

Once designated as gatekeeper, an undertaking must comply with all the obligations listed in Article 5. Furthermore, Article 6 shows obligations that can be further specified by the Commission. Correspondingly, some of the actions outlined by Article 6 are rather vague.[89] Nonetheless, as well as Article 5, Article 6 contains a self-executing blacklist.[90] According to Recital 23, there is no 'efficiency defence'.[91] In Article 7, there are special obligations regarding interoperability. As *Schwab* pointed out during the press conference, the advantage of stipulating obligations within the act means that undertakings get 'a very clear direction of what fair markets mean'.[92] Yet, to a certain extent, Articles 5 and 6 are 'backward-looking'.[93] However, on top of these fixed duties, Article 12 empowers the Commission to adopt delegated acts to update the obligations to address new forms of behaviour. They shall be based on market investigations carried out by the Commission according to Article 19 – which, however, might take up to 24 months.[94] Moreover, Article 12(2) limits the possibility of updates to certain forms of obligations. Therefore, although there is a flexibility clause, it does not allow for quick adaptations or for tackling something completely new and thus unforeseen.

Taking a closer look at Article 5 reveals obligations regarding either end-users, or business-users as well as duties concerning both user groups.[95] Article 5(2) addresses the usage of personal data. In particular, the clause forbids an undertaking from processing personal data for advertising services using services of third parties, combing personal data gathered

[89] Therefore, i.a. critical regarding the obligation to refrain for self-preferencing formerly stipulated by Article 6(1)(d), now Article 6(5): Polley and Konrad (n 83), 201.

[90] Podszun, Bongartz and Langenstein (n 83), 61; Petit (n 83), 535.

[91] Critical: Kumkar (n 83), recital 16.

[92] Schwab and others (n 80).

[93] Ibid.

[94] Therefore, critical: Haus and Weusthof (n 83), 320; Monti (n 31), 99; Podszun, Bongartz and Langenstein (n 83), 66.

[95] Petit (n 83), 535.

from different services, cross-using personal data, and signing in end-users to combine personal data. Article 5(3) and (4) entail obligations concerning business-users. The gatekeeper is forbidden from hindering business-users from offering the same products or services on other channels at different prices or conditions; business-users must also be allowed, free of charge, to communicate and promote offers to end-users acquired via its core platform service or through other channels. According to Article 5(5), end-users must be allowed access via the software application of a business-user. Article 5(6) hinders gatekeepers from preventing either of the user group from raising contentious issues with a public authority. Article 5(7) impedes gatekeepers from making it mandatory to use their identification services, web browser engines, payment services, or technical services. On top of that, according to Article 5(8), gatekeepers are not allowed to make the use of one core platform service mandatory in order to be granted access to another one. Finally, both Article 5(9) and (10) concern online advertisement and the provision of the necessary information.

Article 6 contains thirteen paragraphs depicting further obligations such as: allowing for an easy un-installing of any software application on its operating system (Article 6(3)); the installation of third-party software (Article 6(4)); or impeding the gatekeeper from treating its own services and products more favourably in raking, indexing, etc. (Article 6(5)).

Regarding the obligations listed, opinions on whether they present a coherent picture differ. On the one hand, they have been called 'a random "best of" competition law cases'.[96] On the other hand, they can be quite convincingly grouped by the types of the market failures they address (lack of transparency, hazard of platform envelopment, restrained user mobility and unfair practices).[97]

Finally, a note on enforcement: Unlike Articles 101 and 102 TFEU, the DMA is to be enforced solely by the European Commission.[98] According to Article 38(7), a national competition authority (hereinafter: NCA) may 'conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 […] on its territory.' However, the Commission may take over or terminate such proceedings at any time. Bearing in mind that the DMA is only addressed to a few undertakings active in most Member States, there is certain merit to this centralised approach.[99] Yet, one cannot fail to notice that the approach disregards the expertise of NCAs such as the one gathered by the *Bundeskartellamt* in applying Section 19a.

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[96] Podszun, Bongartz and Langenstein (n 83), 65.

[97] Monti (n 31), 91. For a similar classification see Petit (n 83), 535 ff.

[98] Critical: Haus and Weusthof (n 83), 323.

[99] In depth: Monti (n 31), 92 ff.

2. Comparison

Contrasting the DMA and Section 19a, one big similarity stands out: Both of them focus on digital platforms.[100] While in the case of Section 19a, one has to consult the reasoning behind the law published by the government,[101] the DMA directly addresses gatekeepers, which are defined in relation to the digital realm and their importance for digital services. Thus, both their scopes of application and their purpose point in the same direction, that is, regulating undertakings carrying weight in the online world. In particular, it is the intermediary power that they assess.

Taking a closer look at how an undertaking becomes the norm's addressee, Article 3 of the DMA and Section 19a both establish a 'designation procedure'. However, though Article 3(1) names qualitative criteria, Article 3(2) establishes a presumption according to certain thresholds.[102] Because of these thresholds, the European Commission will have an easier job than the *Bundeskartellamt*, most likely resulting in fewer delays. Moreover, for the undertakings concerned, thresholds enhance legal certainty.[103] At first glance, Section 19a has the advantage of greater flexibility. Yet, Article 3(8) of the DMA also leaves room for further designation relying on quantitative criteria. Therefore, regarding the norm's addressee, Article 3 augments the manageability and legal certainty while still encompassing the flexibility of Section 19a.[104]

The second stage regarding the prohibited conduct manifests even greater differences. Once designated as a gatekeeper, that undertaking must follow the obligations stipulated in Articles 5 and 6 of the DMA. By contrast, according to Section 19a(2), the *Bundeskartellamt* must always take action first and may only prohibit concrete practices. Even activities similar to the ones addressed by the prohibition decision will not be captured.[105] Moreover, the *Bundeskartellamt* must not issue a prohibition decision without due cause. In practical terms, this will most likely lead to an undertaking first engaging in a certain behaviour, and the *Bundeskartellamt* only reacting to that fact. Thus, there are more steps to be taken in Germany before finally addressing the actual problem. Moreover, the solution will most likely not be as lasting as

[100] In depth Paal and Kieß (n 34), 3 ff.

[101] See Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 73: 'role of a gatekeeper' ('Gatekeeper-Funktion').

[102] Compare Botta (n 27), 504: 'major differences'.

[103] Gerpott (n 68), 275.

[104] See, however, Haus and Weusthof (n 83), 320 criticising the lack of flexibility in the DMA's designation process, pointing also at another weak spot in the market investigation following an undertaking rebutting its designation.

[105] Höppner (n 9), 77.

that on the basis of the DMA. By contrast however, because of its generalized approach, the DMA bears the risk of overregulation.[106]

Section 19a(2) is supposed to allow for a case-by-case approach giving the *Bundeskartellamt* the means of taking individual circumstances into account. Yet, even though the listed activities are still rather abstract, within the legislative process, examples were ultimately included into the final draft. This was due to the fact that the Commission's 2020 Proposal for the DMA[107] was published. However, as Section 19a – unlike the DMA – relies on a prohibition decision, this alignment did not make sense. Now, Section 19a allows for less flexibility while still having the problem of requiring a prohibition decision first. Moreover, Section 19a does not contain a flexibility clause. The list stipulated within Section 19a(2) is exhaustive. Therefore, there is no room for prohibiting completely new forms of behaviour.

Comparing the concrete duties imposed by Section 19a(2) and the DMA, the first thing to stand out is that there are many more obligations listed within the DMA than within Section 19a. On the one hand, this is because Section 19a only depicts the forms of conduct in abstract terms, requiring the *Bundeskartellamt* to make a prohibition decision. Even though it is sometimes vague as well, the DMA contains blacklists in itself. Yet, taking a closer look at the various obligations, one cannot fail to notice that, on the other hand, Section 19a(2) almost exclusively focuses on other undertakings being hindered in their business endeavours. While some of the examples, in particular Number 4(a) ('making the use of services conditional on the user agreeing to the processing of data'), allow for 'end-users' to be considered, the abstract clauses refer to 'competitors' and 'other undertakings'. By contrast, the obligations listed in the DMA address both business-users as well as consumers. At the same time, however, the behaviour outlined by Section 19a(2) has an equivalent within Articles 5 and 6 of the DMA.[108] Thus, apart from its other advantages, the DMA also has a broader scope.

3. Section 19a after the DMA applies

According to its Article 54, the DMA will apply from 2 May 2023. This upcoming event leads to the question of Section 19a's future. It is twofold:

[106] Paal and Kieß (n 34), 20 f.

[107] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final).

[108] Ibid 18.

first, one must ask whether Section 19a will violate European law, and, if not, one must consider its future relevance.

3.1. Legal admissibility

Similar to the 2020 Proposal, the final version of the DMA draws a line between competition law and regulatory law. Article 1(6)(b) declares that Member States are still allowed to apply their national competition rules prohibiting other forms of unilateral conduct insofar as 'they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers'. Thereby, on the one hand, the legal provision repeats and confirms Article 3(2)(2) of Regulation (EC) No 1/2003.[109] On the other hand, however, there is a restriction as well – only clauses stipulating stricter obligations remain admissible.

By contrast, Article 1(5) of the DMA forbids 'further obligations on gatekeepers […] for the purpose of ensuring contestable and fair markets.' Still, Member States may impose obligations on gatekeepers 'for matters falling outside the scope of this Regulation, provided that those obligations […] do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.'

As the DMA was explicitly designed as regulatory law,[110] this leads to the conclusion that Section 19a's destiny depends on it either being categorised as competition law or as regulatory law. If it was competition law, it would fall within the scope of Article 1(6)(b), and thus be still admissible, at least insofar as it establishes stricter obligations than the DMA. Otherwise, the DMA would take precedence once an undertaking had been named a 'gatekeeper'.[111]

As Section 19a was designed to tackle Big Tech, its main scope concerns the very same undertakings as the ones identified as 'gatekeepers' by the DMA. In making a counter-exception for undertakings, explicitly addressed by the DMA because of their status as gatekeepers, the wording at the very end of Article 1(5) makes it clear that the clause prohibits all national laws to impose obligations on undertakings with a similar objective as the DMA. Hence, Section 19a would be inadmissible with regard to gatekeepers.

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[109] Zimmer and Göhsl (n 83), 58.

[110] Schwab and others (n 80). Compare also Recital 10: The 'Regulation aims to complement the enforcement of the competition law'.

[111] Andreas Grünwald, 'Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs' [2021] NZKart 496, 496 f.

Within the Proposal, the Commission referred to the DMA as installing an *ex ante* regulation, in contrast to competition law relying on an *ex post* control regime.[112] As an alternative or additional criterion, it has been pointed out that regulatory law only targets specific sectors, such as telecommunications, whereas competition law follows a universal approach.[113] Notwithstanding these rather clear delimitation possibilities, categorising Section 19a is difficult, and German Scholars have been disputing its nature ever since it was first introduced:[114] Although Section 19a allows for an *ex ante* decision, in practice *ex post* prohibitions are far more likely.[115] As well as the DMA, Section 19a primarily addresses a special sector.[116] Yet, the wording is not restricted to the digital realm. Thus, Section 19a can be considered to be somewhere in-between, and has been rather befittingly called a 'chimaera'.[117]

In the final version of the DMA, Recital 10 refers to national competition law as 'rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour'. This definition hints at Section 19a being 'competition law' by European standards. Yet, in the end, if the *Bundeskartellamt* keeps applying Section 19a, it is up to the CJEU to decide whether a legal provision such as Section 19a falls within the scope of

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[112] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final) 4. As '[s]anctions under competition law aim to influence future behaviour' critical: Haus and Weusthof (n 83), 324.

[113] Justuts Haucap and Heike Schweitzer, 'Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht' [2021] Perspektiven der Wirtschaftspolitik 17, 19; Haus and Weusthof (n 83), 324.

[114] In favour of competion law: Haus and Weusthof (n 83), 323; Dragan Jovanovic and Jakob Greiner, 'DMA: Überblick über den geplanten EU-Regulierungsrahmen für digitale Gatekeeper' [2021] MMR 678, 679; Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] ZEuP 503, 509; Wolfgang Bosch, 'Die Entwicklung des deutschen und europäischen Kartellrechts' [2021] NJW 1791, recital 45; Franck and Peitz (n 3), 526; Nothdurft (n 12), recital 139 ff.; Gunnar Wolf and Niklas Brüggemann, 'AGENDA 2025: Der Digital Markets Act und §19a GWB' (19 July 2022) <https://www.d-kart.de/blog/2022/07/19/agenda-2025-der-digital-markets-act-und-%c2%a719a-gwb/> accessed 26 August 2022; Zimmer and Göhsl (n 83), 58 f. In favour of regulatory law: Grünwald, '§ 19a GWB' (n 50), recital 27; Gerpott (n 68), 279; Nagel and Hillmer (n 12), 330; Zimmer and Göhsl (n 83), 59; Polley and Konrad (n 83), 199.

[115] Compare Paal and Kieß (n 34), 19; Podszun (n 31), 9. Therefore critical: Höppner (n 9), 77

[116] Compare Philipp Bongartz, '§ 19a GWB – a keeper?' [2022] WuW 72, 73.

[117] Torsten Körber, 'Lessons from the Hare and the Tortoise: Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1' [2021] NZKart 379, 381. Moreover: Steinberg, L'Hoest and Käseberg (n 64), 416.

Article 1(5) or (6) of the DMA. As Article 1(5) commences with 'In order to avoid the fragmentation of the internal market' and Section 19a bears exactly this risk, despite Recital 10, there is the real possibility of the CJEU ruling against the future admissibility of Section 19a.

Nonetheless, a decision against Section 19a would not hinder the *Bundeskartellamt* from applying Section 19a to undertakings not meeting the requirements of the gatekeeper status under the DMA. As the presumption of Article 3(2) of the DMA requires the scrutinised undertaking to offer core platform services in at least three Member States, undertakings only operating on a national level come to mind in particular. Thus, even if Section 19a was to be considered regulatory law, an admissible scope of its application would remain. Yet, when looking at the reasoning behind the law published by the government, Section 19a was not established with these smaller businesses in mind, but with regard to Big Tech. Therefore, it would lose its main application scope.

3.2. Future relevance

Even if Section 19a was to be considered admissible after the DMA applies, the question of future relevance remains.

According to the reasoning behind the law published by the government, Section 19a was designed as a legal rule allowing for a case-by-case approach and thus great flexibility in reacting to new practices.[118] Yet, its necessary vagueness results in the *Bundeskartellamt* being obliged to produce well-founded decisions – which of course takes time. In the case of *Google*, the declaratory decision mounts up to 173 pages and took almost an entire year to be issued.[119] In comparison to the DMA's straightforward approach of thresholds combined with a notification duty, the German procedure appears cumbersome, especially when one considers that this decision, of designating an undertaking the norm's addressee, does not result in any legal obligations. Instead, it requires a second, specific decision.

Hence, after the DMA applies, apart from undertakings not big enough to reach the thresholds, only one relevant future application comes to mind – a conduct yet to arise, not addressed by either Article 5, 6, 7 of the DMA and not suitable to be tackled by the flexibility-clause of Article 12. However, comparing the lists of Section 19a(2) and of Articles 5, 6, 7 and 12 of the DMA, this scenario seems rather unlikely.

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[118] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[119] See *Alphabet Inc. Google Germany GmbH* (2021) B7-61/21 (BKartA).

Therefore, even if Section 19a were to remain in its entirety, its future relevance would most likely be restricted to enterprises not big enough to be considered a gatekeeper on the EU scale.

V. Conclusion

A lighthouse project or a superfluous national solo run? The paper has listed several weak points regarding Section 19a's design. In particular, the need for a prohibition decision makes the process overly complicated. However, in comparison to traditional competition law and its ability to tackle Big Tech, Section 19a still has the potential to speed up the process. Indeed, as Google proposed remedies on its own after being designated the norm's addressee, Section 19a may have greater practical value than its design suggests.

Still, there is the risk of market fragmentation as the legal rule is limited to German territory. Nevertheless, with the DMA being delayed at the beginning of the legislation process, the only alternative left to Germany was not acting at all. On top of that, instead of market fragmentation, there might be positive spill-over effects. Thus, Section 19a has the potential to compensate for a temporary regulatory deficit, possibly preventing markets from tipping in the meantime.[120] During this interim phase, Section 19a is beneficial.

However, once the DMA applies, continuing the effort of designating undertakings as of paramount significance, that are also gatekeepers, will at least lead to unnecessary duplication of effort. Therefore, other Member States should not copy the approach of establishing their own 'Lex GAFA', even if it was designed as competition law within the meaning of Article 1(6) (b) of the DMA.

Finally, because of the quantitative designation thresholds and its direct prohibitions, the DMA is better suited to tackle Big Tech. That is why even if Section 19a is not abolished, it will become redundant or its scope of application will be reduced to addressing undertakings only operating on a national market.

Thus, the term 'lighthouse project' might be too grand. However, regarding the interim phase, Section 19a is not a superfluous national solo run either. Instead, Section 19a should be considered a useful bridge for the time gap before the DMA applies.

[120] Paal and Kieß (n 34), 28.

Literature

Achleitner RA, 'Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden' [2022] NZKart 359.

Ausschusses für Wirtschaft und Energie, Beschlussempfehlung und Bericht, 13 January 2021, BT-Drs. 19/25868.

BKartA, *Amazon.com, Inc.: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B2 – 55/21.

—— *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21.

—— *Google News Showcase – Bundeskartellamt konsultiert Vorschläge Googles zum Ausräumen wettbewerblicher Bedenken* (Press Release: 2022).

—— *Meta (vormals Facebook): Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B6 – 27/21.

—— *Verfahren gegen Apple nach neuen Digitalvorschriften (§ 19a Abs. 1 GWB)* (Press Release: 2021).

Bongartz P, '§ 19a GWB – a keeper?' [2022] WuW 72.

Bosch W, 'Die Entwicklung des deutschen und europäischen Kartellrechts' [2021] NJW 1791.

Botta M, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' [2021] Journal of European Competition Law & Practice 500.

Chirico F, 'Digital Markets Act: A Regulatory Perspective' [2021] Journal of European Competition Law & Practice 493.

Conseil de l'Union européenne, 'Lettre du président du COREPER à la présidente de la Commission' (Bruxelles 11 May 2022) 2020/0374(COD).

Council of the EU, *DMA: Council gives final approval to new rules for fair competition online* (Press Release: 2022).

Crémer J, Montjoye Y-A de and Schweitzer H, *Competition policy for the digital era* (2019).

European Commission, 'Digital Markets Act (DMA)' <https://ec.europa.eu/competition-policy/sectors/ict/dma_en> accessed 2 June 2022.

—— *Impact Assessment Report: accompanying the document Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)* (SWD(2020) 363 final 2020).

—— *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final).

Filistrucchi L and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10(2) Journal of Competition Law & Economics 293–329.

Franck J-U and Peitz M, 'Digital Platforms and the New 19a Tool in the German Competition Act' [2021] Journal of European Competition Law & Practice 513.

Fuchs, '§ 18 GWB' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: Band 2.* GWB/Teil 1 (6th ed., Beck 2020).

Gerpott TJ, 'Neue Pflichten für große Betreiber digitaler Plattformen: Vergleich von § 19a GWB und DMA-Kommissionsvorschlag' [2021] NZKart 273.

Gesetzesentwurf der Bundesregierung, 10th Amendment 9 July 2020, BT-Drs. 19/23492 (GWB-Digitalisierungsgesetz).

Gesetzesentwurf der Bundesregierung, 9th Amendment 11 July 2016, BT-Drs. 18/10207 (Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen).

Grünwald A, '"Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' [2020] MMR 822.

—— 'Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs' [2021] NZKart 496.

—— '§ 19a GWB' in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht* (100th ed., 2021).

Harta L, 'Der Digital Markets Act und das Doppelverfolgungsverbot' [2022] NZKart 102.

Haucap J and Heimeshoff U, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11(1–2) International Economics and Economic Policy 49.

Haucap J and Schweitzer H, 'Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht' [2021] Perspektiven der Wirtschaftspolitik 17.

Haus FC and Rundel L, 'Neue Missbrauchsaufsicht für digitale Ökosysteme' [2022] RDi 125.

Haus FC and Weusthof A-L, 'The Digital Markets Act – a Gatekeeper's Nightmare?' [2021] WuW 318.

Heider M and Kutscher K, 'Die 10. GWB-Novelle und die Missbrauchsaufsicht digitaler Plattformunternehmen' [2022] WuW 134.

Herbers B, 'Der Digital Markets Act (DMA) kommt – neue Dos and Don'ts für Gatekeeper in der Digitalwirtschaft' [2022] RDi 252.

Höppner T, 'Plattform-Regulierung light' [2020] WuW 71.

Ibáñez Colomo P, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] Journal of European Competition Law & Practice 561.

Jakl B, 'Jenseits des Datenschutzes' [2021] RDi 71.

Jovanovic D and Greiner J, 'DMA: Überblick über den geplanten EU-Regulierungsrahmen für digitale Gatekeeper' [2021] MMR 678.

Käseberg T, 'Kapitel 1' in Florian Bien and others (eds), *Die 10. GWB-Novelle* (2021).

Körber T, 'Datenzugang und Datennutzung in der Digitalwirtschaft im Fokus der 10. GWB-Novelle' in Tobias Klose, Martin Klusmann and Stefan Thomas (eds), *Das Unternehmen in der Wettbewerbsordnung: Festschrift für Gerhard Wiedemann zum 70. Geburtstag* (C.H. Beck 2020).

—— '"Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle: Macht im Netz IV: Maßvolle Antwort oder übertriebene Regulierung der Digitalwirtschaft?' [2020] MMR 290.

—— 'Lessons from the Hare and the Tortoise: Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1' [2021] NZKart 379.

Kühling J and Weck T, 'Der Digital Markets Act und die Regulierung von Ökosystemen' [487–517] ZWeR.

Kumkar LK, 'Der Digital Markets Act nach dem Trilog-Verfahren: Neue Impulse für den Wettbewerb auf digitalen Märkten' [2022] RDi 347.

Larenz K, *Methodenlehre der Rechswissenschaft* (3th ed., Springer 1995).

Lettl T, 'Der neue § 19a GWB' [2021] WRP 413.

Mäger T, 'Die 10. GWB-Novelle: Eine Plattform gegen Big Tech?' [2020] NZKart 101.

Mischau L, 'Market Power Assessment in Digital Markets – A German Perspective' [2020] GRUR Int 233.

Monti G, 'The Digital Markets Act: Improving Its Institutional Design' [2021] CoRe 90.

Mundt A, 'Wandel der kartellbehördlichen Aufsicht und die aktuellen Herausforderungen' [2021] WuW 418.

Nagel SM and Hillmer K, 'Die 10. GWB-Novelle – Update für die Missbrauchsaufsicht in der Digitalwirtschaft' [2021] DB 327.

Nothdurft, '§ 19a GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022).

Paal BP and Kieß F, 'Digitale Plattformen im DSA-E, DMA-E und § 19a GWB' [2022] ZfDR 1.

Paal BP and Kumkar LK, 'Wettbewerbsschutz in der Digitalwirtschaft' [2021] NJW 809.

Petit N, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] Journal of European Competition Law & Practice 529.

Podszun R, 'Die 10. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen (GWB): Stellungnahme für den Ausschuss für Wirtschaft und Energie des Deutschen Bundestages' (23 November 2020) Ausschussdrucksache 19(9)887.

Podszun R, Bongartz P and Langenstein S, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' [2021] EuCML 60.

Podszun R and Brauckmann F, 'GWB-Digitalisierungsgesetz: Der Referentenentwurf des BMWi zur 10. GWB-Novelle' [2020] GWR 436.

Polley R and Kaup R, 'Paradigmenwechsel in der deutschen Missbrauchsaufsicht' [2020] NZKart 113.

Polley R and Konrad FA, 'Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte' [2021] WuW 198.

Säcker FJ and Meier-Beck P (eds), *Münchener Kommentar zum Wettbewerbsrecht: Band 2 Deutsches Wettbewerbsrecht* (3rd ed., Beck 2020).

Schnelle U and Wyrembek ES, 'Die moderne Missbrauchsaufsicht – volle Kraft voraus mit § 19a GWB?' [2021] GRUR-Prax 432.

Scholz M, 'Regulierung nach § 19a GWB' [2022] WuW 128.

Schwab A and others, 'Press conference on the Digital Markets Act (DMA) – results of the trilogue' (25 March 2021) <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-results-of-trilogue_20220325-1000-SPECIAL-PRESSER> accessed 12 April 2022.

Schweitzer H, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] ZEuP 503.

Seip F and Berberich M, 'Der Entwurf des Digital Markets Act' [2021] GRUR-Prax 44.

Spitzlei T, 'Die Gesetzesbegründung und ihre Bedeutung für die Gesetzesauslegung' [2022] JuS 315.

Steinberg P, L'Hoest R and Käseberg T, 'Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU' [2021] WuW 414.

Steinberg PM and Wirtz M, 'Der Referentenentwurf zur 10. GWB-Novelle: Ein Dialog zwischen dem BMWi und der anwaltlichen Praxis (Teil 1)' [2019] WuW 606.

Streel A de and Larouche P, 'The European Digital Markets Act: A Revolution Grounded on Traditions' [2021] Journal of European Competition Law & Practice 542.

Töllner, '§ 18 GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022).

Wolf G and Brüggemann N, 'AGENDA 2025: Der Digital Markets Act und §19a GWB' (19 July 2022) <https://www.d-kart.de/blog/2022/07/19/agenda-2025-der-digital-markets-act-und-%c2%a719a-gwb/> accessed 26 August 2022.

Würdinger M, 'Das Ziel der Gesetzesauslegung – ein juristischer Klassiker und Kernstreit der Methodenlehre' [2016] JuS 1.

Zimmer D and Göhsl J-F, 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' [2021] ZWeR 29.