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Digital Platforms and the New 19a Tool in the German Competition Act

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Digital Platforms and the New 19a Tool in the German Competition Act[*]

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Abstract

In this article we present and critically evaluate the newly introduced section 19a of the German Competition Act. The provision applies to operators of two-sided platforms and networks that the Bundeskartellamt classifies as being of 'paramount significance for competition across markets'. Using examples of previous abuse cases, we discuss which firms may eventually be the addressees of the new instrument. We analyse the list of prohibitable practices and point to normative uncertainties as regards the assessment of platform activities. We discuss the merits of the abridged judicial review. Finally, we consider the prospect of continuing fragmentation in the legal treatment of digital platforms in the internal market and assess the interaction with the Digital Markets Act as proposed by the European Commission.

Keywords: competition law; abuse of market power; digital platforms; gatekeeper; Big Tech

JEL-Classification: K21

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I. Introduction

Around the globe, legislatures have become active in providing competition authorities with new tools and resources to curb the market power of large digital platforms. Germany is one of the countries at the forefront of these developments. On 18 January 2021, the German legislature adopted the Tenth Amendment to the German Competition Act[1] ('Gesetz gegen Wettbewerbsbeschränkungen'), which includes a number of legal changes aimed at protecting competition in times of digitalization. Its major innovation is the competition instrument enshrined in section 19a of the Competition Act, which will give new powers to the Bundeskartellamt, the German competition authority, when dealing with large digital platforms (the '19a tool'). The new tool deviates in substance and procedure from traditional competition law and approaches the role of a regulatory instrument targeting the digital platform industry.

II. The mechanics of the 19a tool

As a first step, the Bundeskartellamt needs to decide whether a firm[2] is of 'paramount significance for competition across markets'.[3] Such a decision will be effective for five years.[4] Once it has done so, it can then prohibit the firm from engaging in certain types of conduct perceived to be anticompetitive.[5] The declaratory decision and the prohibition decision can be combined. The new law contains an exhaustive list of seven types of practice the German competition authority may prohibit, which can be roughly described as follows:

(1) self-preferencing by vertically integrated firms;

(2) hindering supply or sales activities of other firms (including noncompetitors);

(3) hindering competitors in markets where the 19a firm may rapidly expand its position;

(4) using collected data to raise market entry barriers or requiring users' permission for such use;

(5) hindering competition by denying or impeding interoperability or portability of data;

(6) withholding information on the 19a firm's performance;

(7) demanding disproportionate (monetary or non-monetary) compensation from business customers.

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[1] Bundesgesetzblatt (Federal Law Gazette), January 18, 2021, Part I No. 1, 2 et seq. Available at https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121001.pdf%27%5D__1611317574622.

[2] While throughout this paper we use the non-technical term 'firm', it should be noted that section 19a of the Competition Act refers to the addressed entities as 'undertakings' ('*Unternehmen*') and, thus, incorporates the concept of an 'undertaking' as it has been developed in EU competition practice and, at least as a matter of principle, as it has also been adopted by German Competition Law. See Jens-Uwe Franck, 'Defining the Leeway for Business Cooperation: Remaining Peculiarities under German Competition Law after Its Europeanisation' (2017) 5–6, available at https://ssrn.com/abstract=2942777.

[3] Section 19a(1), 1st and 2nd sentences of the Competition Act.

[4] Section 19a(1), 1st and 2nd sentences of the Competition Act.

[5] Section 19a(1), 3rd sentence of the Competition Act.

Except for numbers (5) and (6), the descriptions of these categories of prohibitable conduct are each complemented by two illustrative examples in the law. The 19a firm can demonstrate that behaviour that comes under this list is 'objectively justified' but carries the burden of proving this.

The Bundeskartellamt's decisions under section 19a of the Competition Act[6] can be challenged before the Bundesgerichtshof ('BGH'), the German Federal Court of Justice. In these cases, the court will decide as the first and only avenue of appeal.[7] A 19a firm that infringes a prohibition decision commits an administrative offence[8] and may be fined by the Bundeskartellamt. Other market players may bring actions for injunctions[9] or damages.[10]

III. Conceptual deviations from traditional competition law

If we compare the 19a tool with traditional instruments of competition law, four distinct features stand out in particular:

(1) Addressing firms' positions as intermediaries or gatekeepers. Article 102 TFEU and section 19 of the Competition Act target the unilateral conduct of firms that dominate a defined market.[11] By contrast, section 19a of the Competition Act addresses unilateral practices by digital platforms because of their specific position as intermediaries and gatekeepers, as firms that offer essential intermediation services and control an interface between markets, regardless of whether they actually dominate one defined market.[12]

(2) Burden of proof. Pursuant to the principle of ex officio investigation applicable in competition proceedings, the Bundeskartellamt is entrusted with the task of determining, measuring and balancing pro- and anticompetitive effects and/or the efficiency losses and gains of a scrutinized practice. On a case-by-case basis, firms may be obliged to provide information available in their respective sphere of influence under procedural obligations to cooperate[13] and, if they fail to do so, must accept that the possible procompetitive effects or efficiency gains are not (fully) appreciated by the authority. In contrast, section 19a of the

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[6] As the declaratory finding of an addressee status under section 19(1) of the Competition Act already concerns the economic interests of the undertaking in question, it can be challenged on its own. Deutscher Bundestag, Drucksache 19/23492, 19.10.2020, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), 74.

[7] Section 73(5) of the Competition Act.

[8] Section 81(2) no. 2a) of the Competition Act.

[9] Section 33 of the Competition Act.

[10] Section 33a of the Competition Act.

[11] Note that section 20(1) of the Competition Act extends the applicability of the prohibition of exclusionary practices (as embodied in section 19(1) and (2) no. 1 of the Competition Act) to firms with mere relative market power. Remarkably, due to the recent reform, the provision now applies more broadly against abusive practices by (large) digital platforms because: first, the provision can be invoked now by any undertaking (and not only by small and medium-sized firms) and, second, the concept of relative market power has now been extended to also include the notion of 'intermediation power'.

[12] Certainly, section 19a of the Competition Act and traditional competition law instruments are not strictly separated; their scope of application overlaps. This can be seen from the fact that market dominance is an important indication for identifying 19a firms. See section 19a(1), 2nd sentence, no. 1 Competition Act.

[13] Section 26(2) of the Administrative Procedures Act (Verwaltungsverfahrensgesetz). See BGH, 15 May 2012, KVR 51/11 – *Wasserpreise Calw*, paras 18–19; Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, para 124.

Competition Act provides for an explicit shift of the burden of proof applicable to a list of practices that are presumed to be abusive.[14]

(3) No self-executory obligations. Conventional competition law provides for standards and rules, established by the legislature and refined through authorities' and courts' practice, which are directly binding on the market players that are addressed and which are directly applicable and, therefore, can also be directly invoked and enforced by private parties before the courts. This is different in section 19a of the Competition Act, where the prohibition of the listed practices in an actual case depends on an intervention by the Bundeskartellamt, which enjoys discretion in this regard. The role of the competition authority thus comes closer to that of a regulatory authority.

(4) Abridged judicial review. While decisions by the Bundeskartellamt are usually subject to a two-level system of judicial review, the authority's 19a decisions can only be reviewed by the BGH, acting as the court of first and last instance.

IV. A tool only to address (very) large digital platforms?

The reform of the Competition Act should facilitate better protection of competition in the field of digital ecosystems, which are often characterized by the fact that certain firms hold a gatekeeper position.[15] Thus, it is stated in the explanatory memorandum to the Competition Act Reform Bill that:

> Section 19a therefore creates a basis which should enable the Bundeskartellamt to more effectively control those large digital groups which have a paramount position across markets.[16]

One may therefore assume that the drafters certainly had the Big Five ('GAFAM'[17]) in mind when envisaging potential addressees of the 19a tool. However, to precisely define the group of firms that could be addressed, the prerequisites and criteria listed in section 19a(1) of the Competition Act must be examined more closely.

A. Significant activities as operator of a two-sided platform or a network

First of all, section 19a(1) of the Competition Act addresses only firms that are 'active to a significant extent on markets within the meaning of section 18(3a)' of the Competition Act; the latter provision refers to 'multi-sided markets and networks'. The law's reference to 'multi-sided markets' is borrowed from the economic theory literature on the topic. However, multi-sidedness is a feature at the firm and not necessarily the market level. The reference to section 18(3a) of the Competition Act thus means that the 19a tool shall apply to firms that operate two-sided platforms[18] and act, therefore, as intermediaries between different user groups

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[14] A reversal of the burden of proof with regard to a possible objective justification also applies in the case of discriminatory practices covered by section 19(1) and (2), no. 1 and 3 of the Competition Act.

[15] Gesetzentwurf (n 6), 73.

[16] Id.

[17] Acronym for Google (Alphabet), Amazon, Facebook, Apple and Microsoft.

[18] Certainly, many platforms cater to more than two groups that are linked through cross-group network effects and should therefore be called 'multi-sided'. Since the term 'two-sided platform' is widely used, we follow this convention with the understanding that at least two groups are involved.

that are linked through cross-group network effects.[19] This includes all sorts of digital platforms: search engines, online marketplaces, mobile operating systems and app stores, online travel agencies, video and audio streaming platforms, real-estate portals, online dating platforms and the like. Yet two-sidedness is not a feature unique to digital platforms. Even when section 18(3a) of the Competition Act was introduced, it was pointed out that the term 'multi-sided markets' also included, for instance, shopping centres, advertising-financed media (newspapers, radio and television), technical standards (such as Blu-ray), game consoles and credit card systems.[20] Further, by including 'networks' in the provision, it has been clarified that business models and products should already be covered when they are characterized by direct network effects between their users, as, for example, in case of computer software, social networks or messaging apps.[21]

Moreover, a firm may only be addressed if its activities as a two-sided platform or network are 'significant'. As explained in the legislative memorandum, the criterion has been inserted to clarify that only firms 'with a *focus* on digital business models are subject to the rule'.[22] The point of this statement is arguably not to exclude non-digital business models but to exclude companies whose activities as two-sided platforms or networks play only a 'completely subordinate role' compared to their other activities or which play only a 'minor role' on the relevant market compared to their competitors.[23] This can be relevant, for instance, if firms, in addition to their core business as manufacturers or (traditional) distributors, launch a digital platform.

A case in point is Klöckner, a large-scale steel and metal distributor with a global distribution network, which in 2018 set up 'XOM Material', an online trading platform for the sale of steel, metals and plastics.[24] In 2019 and 2020, sales of the wholly owned subsidiary XOM Materials GmbH accounted for only 0.0013 per cent and 0.0024 per cent of total Klöckner Group sales, respectively.[25] This numbers suggest that Klöckner's relevant activities as an operator of a two-sided platform will not have to be considered 'significant', so the application of section 19a of the Competition Act would already fail on this first condition.

Another case in point may be car manufacturers. In-vehicle infotainment nowadays integrates various functions including navigation systems, video players and in-car internet. Cars may also be equipped with payment devices ('in-car payments'). Thus, as cars could ul-

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[19] We speak of a positive cross-group network effect that side A exerts on side B if a user on side B benefits if more users on side A participate (or if users on side A increase their usage volume). If these cross-group network effects operate in both directions, then there are indirect network effects on each side. For example, a user on side A indirectly benefits from more users on its own side because these users make it more attractive for users on side B to join; additional users on side B then benefit the user on side A.

[20] Deutscher Bundestag, Drucksache 18/10207, 7.11.2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 49.

[21] Id., 48–49.

[22] Gesetzentwurf (n 6), 74 (emphasis added).

[23] Id. However, it is not clear how the second alternative relates to Article 19a(1), 2nd sentence of the Competition Act; it is hard to see which cases can effectively be excluded from the scope of application that potentially meet the requirements of Article 19a(1), 2nd sentence of the Competition Act.

[24] See Bundeskartellamt, 27 February 2018, B5-1/18-001 – *XOM Metals GmbH*.

[25] See Klöckner & Co SE, 'Annual Report 2019', 136 (sales of the Klöckner group: EUR 6,314,719,000) and 260–261 (sales of XOM Materials GmbH: EUR 80,638); 'Annual Report 2020', 148 (sales of the Klöckner group: EUR 5,130,106,000) and 276–277 (sales of XOM Materials GmbH: EUR 121,873).

timately function as mobile devices in a similar way as mobile phones, car manufacturers might grow more and more into the role of network operators, exploiting a gatekeeper position they may enjoy in the future vis-à-vis app developers or payment service providers that comes with their privileged access to final consumers. While car manufacturers for the time being are already not (yet) addressed by section 19a of the Competition Act, as they are arguably not significantly active as platform or network operators, this could change with the ongoing transformation of the car into a digital ecosystem.

It must be emphasized, however, that, while the legislature intended a certain privileging of firms whose business models are essentially of a 'traditional' nature, the required 'significance' of platform or network activities must not result in (potentially) essential intermediaries or gatekeepers being filtered out too quickly. Therefore, the explanatory memorandum ('completely subordinate') should be taken at its word. In addition, the insignificance of activities as operators of two-sided platforms or networks should have to be substantiated not only quantitatively (i.e. considering in particular the relevant share of turnover and/or profit), but also qualitatively, taking into account the relevance of the platform activities for the strategic positioning of the undertaking as a whole.[26]

B. Paramount significance for competition across markets

The essential criterion for the application of section 19a of the Competition Act is that it addresses firms that are of 'paramount significance for competition across markets'.[27] In the memorandum prepared by the responsible parliamentary committee to report the finalized version of the Tenth Amendment to the Competition Act, the potential addressees of the 19a tool are described as firms that,

> for example due to their financial, technical or data-related resources or as cross-market digital ecosystems or platforms, are particularly capable of extending their position of power across market boundaries or securing their unassailable position.[28]

Section 19a(1), 2nd sentence of the Competition Act contains a non-exhaustive list of five criteria that shall be taken in account:

(1) dominance on one or more markets,

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[26] To take up the example of Klöckner, one should thus take into account the firm's stated objective 'to expand the independent open industry platform XOM Materials to become the dominant vertical platform for the steel and metal industry and its neighboring industries', available at https://www.kloeckner.com/en/investors/investors.html.

[27] This term adds to the repertoire of labels for powerful digital platforms used elsewhere. In the study by the European Parliamentary Research Service, Digital Services Act – European added value assessment, October 2020, the term 'systemic platforms' is used interchangeably with the term 'gatekeeper'. In Annex I of that study, using the term 'systemic platform' there is an explicit reference to the report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy, 2019, Federal Ministry for Economic Affairs and Energy (BMWi), which laid the groundwork for the tenth amendment to the German Competition Act. However, the authors of that report use the term 'dominant platform', as do Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer in their expert report to the European Commission, 'Competition Policy for the Digital Era' (2019). The Furman report in the UK speaks of firms with 'strategic market status' (Furman, Coyle, Fletcher, McAuley, and Marsden, Unlocking Digital Competition, 2019, Report of the digital competition expert panel to the UK government, available at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel).

[28] Deutscher Bundestag, Drucksache 19/25868, 13.01.2021, Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss), 112. See https://dip21.bundestag.de/dip21/btd/19/258/1925868.pdf.

(2) financial strength and access to resources,
(3) vertical integration and activities on otherwise related markets,
(4) access to data relevant for competition,
(5) gatekeeper position.[29]

These criteria are designed to identify those firms that pose particular risks to competition that, from the legislature's point of view, cannot be adequately addressed by the existing competition instruments to control against abuse of market power.[30]

The explanatory memorandum to the Bill mentions three potential risks to competition that are to be better captured. First, network effects, superior access to data and related positive feedback effects may trigger 'strong and rapid concentration tendencies' in digital markets that require early intervention. Second, these circumstances, together with economies of scale and advantages in access to resources, may lead to unassailable market positions of incumbent firms. Third, certain firms hold 'key strategic positions' that lead to 'multiple dependencies' of other market players and enable the said firms to distort competition to their favour and to transfer market power to other markets.[31]

While it is obvious that these competitive risks were described with a view to the digital economy, it should be noted that the first three criteria listed are not specifically linked to digital business models. In relation to access to data and the gatekeeper position, such a connection is apparent, but it seems certainly possible that operators of two-sided platforms or networks that do not belong to the digital economy (however defined) may also fulfil these criteria.

It is clear from the text of the provision and the memorandum of the responsible parliamentary committee[32] that the 19a tool may be applied to firms that are not (yet) dominant *in any* relevant market. This is an important lowering of the intervention threshold compared to Article 102 TFEU or section 19 of the Competition Act, and it will facilitate the Bundeskartellamt's establishment of the addressee status.

However, the competition authority will not be at liberty to avoid defining markets. Both the general criterion of 'paramount significance for competition across markets' and some of the listed sub-criteria ('dominant position on … markets', 'otherwise related markets', 'access to supply and sales markets') explicitly presuppose the concept of definable markets. On the one hand, one can therefore expect that there will be considerable dispute about correct market definition, which in fact poses particular challenges in the context of

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[29] Section 19a(1), 2nd sentence, no. 5 of the Competition Act reads 'the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities'.

[30] In its proposal for a Digital Markets Act, the European Commission has a similar objective. However, it focuses on a firm's gatekeeper position and defines in Article 3(1): 'A provider of core platform services shall be designated as gatekeeper if: (a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.' European Commission, COM(2020) 842 final, 15 December 2020, 36.

[31] Gesetzentwurf (n 6), 73.

[32] Beschlussempfehlung (n 28), 113 ('The dispensing with the requirement of dominance of at least one market considerably facilitates the application of the provision and takes into account the objective of accelerating competition proceedings, in particular with regard to digital markets').

two-sided platforms.[33] On the other hand, the 19a tool may ease disputes about appropriate market definition, because market dominance is not necessarily required for its application. Calculated market shares and resulting presumptions of market dominance[34] are therefore less important. For example, two-sided platforms may be addressed more easily[35] without the need to establish that the platform enjoys a dominant position towards its business users on one side, in case it provides exclusive access to its customers on the other side, which may be the case, for example, in a single-homing/multihoming framework[36] or for other specific reasons, such as in the case of ad blockers.[37]

In sum, we may conclude that the German legislature introduced the new tool to address risks to competition in digital markets. Moreover, it has been emphasized that the provision should target a 'small group of firms' or 'digital ecosystems'.[38] The 'Big Five' ('GAFAM') are likely to be included as important parts of their activities satisfy the five criteria of section 19a(1) of the Competition Act. For example, Microsoft, with its desktop operating system, its desktop software and its social network, LinkedIn, satisfies them and seems therefore an obvious candidate as a 19a addressee. While it is, therefore, plausible to assume that the legislature had above all (or possibly even only) the 'Big Five' in mind when adopting the 19a tool, there is no criterion in the provision that would a priori restrict its application to digital platforms (however defined[39]), let alone to a limited group of specific platform operators (such as GAFAM) whose activities are currently attracting particular attention from a competition policy point of view. It is only natural therefore to ponder which firms beyond GAFAM might actually find themselves in the crosshairs of the German competition authority over the next few years.

C. Some reflections on potential addressees beyond GAFAM

As we have seen, the legislature has stipulated two overriding criteria for identifying 19a addressees: they are operators of two-sided platforms or networks that are capable of securing their unassailable market position or of extending their position of power across market

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[33] See Jens-Uwe Franck and Martin Peitz, 'Market Definition in the Platform Economy' (2021) Discussion Paper Series – CRC TR 224, Discussion Paper No. 259, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773774.

[34] Section 18(4) of the Competition Act provides for a presumption of market dominance for firms with a market share of at least 40 per cent. The ECJ has established a presumption of dominance applicable to undertakings with a market share of 50 per cent or more. Case C-62/86 *AKZO v Commission*, EU:C:1991:286, para 60.

[35] It should also be noted that under the reformed German Competition Act the concept of 'intermediation power' has been integrated into the market dominance test. See Section 18(3b) of the Competition Act. This amendment also allows to consider the power that a platform derives within a multihoming/single-homing framework in a somewhat flexible way when assessing whether the platform enjoys a dominant position vis-à-vis the multihoming side.

[36] See, for instance, Case AT.40099, *Google Android*, para 306 (European Commission defined a market for app stores for the Android mobile operating system, which is dominated by Google's app store).

[37] See BGH, 8 October 2019, KZR 73/17 – *Werbeblocker III*, paras 23–34.

[38] Beschlussempfehlung (n 28), 113. Note that the language used in the legislative memoranda to describe the set of potentially addressed firms is not consistent. The most restrictive description can be found in the context of the justification of the abridged legal review. See Beschlussempfehlung (n 28), 120 (Section 19a applies only to a 'very small circle of potential addressees' and 'these firms have such extensive resources and a central strategic position that they have considerable influence on the operations of numerous other firms in a wide range of markets').

[39] Note that neither the text of section 19a nor the accompanying legislative memoranda provide any guidance where a line between digital and non-digital business models could be drawn.

boundaries.[40] As these criteria have been drafted as alternatives and as not all of the indicative factors listed in section 19a(1) of the Competition Act have to be fulfilled in each case, there remains scope for the Bundeskartellamt to consider firms beyond GAFAM to be potential 19a addressees. This will be illustrated by two examples: Booking and CTS Eventim. While quite a few other operators of two-sided platforms and networks may also come to mind as 19a candidates – payment services providers such as Mastercard, Visa or PayPal; an international hub airport such as Frankfurt Airport; or a major marketplace organizer for the trading of various types of securities such as the Deutsche Börse Group – we focus on these two operators of digital platforms as they have already been the addressees of abuse decisions by the Bundeskartellamt and hence, there are already findings by the authority on their respective market positions and it can be expected that these platforms will continue to be scrutinized by the authority.

In light of the Bundeskartellamt's decision prohibiting the use of price parity clauses by Booking,[41] it is natural to consider whether this online travel agency (OTA) could be addressed under section 19a of the Competition Act. Clearly, Booking's scope may be seen as rather limited compared to, for instance, Amazon or Google. In addition, it still faces other platforms offering substitute services and, arguably at least for hotel chains, bypass possibilities exist. In 2019, the share of bookings via OTAs in Germany was 29.6 per cent, whereas 58.5 per cent of reservations were made directly with the hotels.[42] Nonetheless, distribution via OTAs has an essential role to play: between 2013 and 2019, the share of OTA bookings rose steadily from 20.9 to 29.6 per cent.[43] OTAs contribute in particular by attracting new customers[44] and, according to the hotels' perception, controlling the data of the hotels and their customers.[45] The Bundeskartellamt found that 'small and medium-sized hotel companies that continue to characterize the German hotel market are especially reliant' on OTAs to attract a sufficient number of customers.[46] Therefore, as Booking is by far the largest OTA on the German market, it enjoys a gatekeeper position. Given its market share of 66.6 per cent (2019),[47] it can be considered dominant[48] in the market for 'intermediation services by hotel portals' as defined by the Bundeskartellamt.[49] Moreover, Booking is active on adjacent markets, in particular as it operates a rental car platform ('rentalcars.com') and acquired the res-

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[40] See quote and text accompanying n 28 above.

[41] See Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*. An English version of the decision is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.html?nn=3591568. On appeal, the decision was annulled, essentially because the court considered the use of 'narrow' price parity clauses a legitimate ancillary restraint and, thus, for reasons unrelated to Booking's market position. OLG Düsseldorf, 4 June 2019, Kart 2/16(V) – *Booking.com ('Enge Bestpreisklausel')*. An appeal by the Bundeskartellamt is pending before the BGH after it was admitted by the court's order of 14 July 2020, KVZ 56/19.

[42] Roland Schegg, 'European Hotel Distribution Study 2020, Key Figures', 21. Available at https://www.hevs.ch/media/document/4/2020_european_hotel_distribution_survey_hotrec_16072020_keyfigures.pdf

[43] Id.

[44] OLG Düsseldorf, 4 June 2019, Kart 2/16(V) – *Booking.com ('Enge Bestpreisklausel')*, Juris, para 81. See also Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, para 52.

[45] Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, para 53.

[46] Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, para 310.

[47] Roland Schegg, 'European Hotel Distribution Study 2020, Key Figures', 35.

[48] As the Bundeskartellamt did not rely on Article 102 TFEU or section 19 of the Competition Act, the question of market dominance was ultimately left open. Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, para 315.

[49] Bundeskartellamt, 22 December 2015, B9-121/13 – *Booking*, paras 129–151.

taurant reservation platform OpenTable for $2.6 billion in 2014.[50] Also, it operates various meta search engines for hotels, vacation, rentals, flights etc. ('agoda.com', 'Momondo',[51] 'HotelsCombined',[52] 'Kayak'[53] and 'priceline.com').[54] Past acquisitions such as that of OpenTable indicate Booking's considerable financial strength.[55] All these observations suggest that the Bundeskartellamt may well consider Booking to be part of the group of firms that can fall under section 19a of the Competition Act.

Given the Bundeskartellamt's findings in abuse proceedings[56] and one merger case[57] involving CTS Eventim, these cases may shed some light on whether the firm might become a 19a addressee. CTS Eventim operates a ticketing system as a two-sided platform that provides intermediation services, on the one side, to live event organizers and, on the other side, to advance booking offices and online ticket shops. The Bundeskartellamt has assumed that, on nationwide markets for ticketing system services, CTS Eventim has a dominant position both vis-à-vis the ticket office side and vis-à-vis the event organizers' side.[58] Remarkably, CTS Eventim is vertically integrated on both platform sides: on the one hand, it operates its own online shop with a particularly large end customer base.[59] On the other hand, the group hosts many popular live events itself. The Bundeskartellamt has listed 16 tour and festival promoters that were acquired by CTS in the last few years.[60] Furthermore, the Bundeskartellamt has established that CTS Eventim's cross-market activities secure the firm a significant lead in access to competition-relevant data.[61] As the leading ticketing system by far, CTS Eventim enjoys a strong gatekeeper position as its services are in fact indispensable both for many event organizers and for advance booking offices. Thus, in particular in light of its apparently unassailable market position,[62] CTS Eventim seems to be a plausible 19a candidate.

To summarize, the Bundeskartellamt seems to have various prioritization options available, which are certainly not mutually exclusive. The authority could focus on digital platforms particularly able of extending their position of power across market boundaries.

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[50] See https://www.wsj.com/articles/priceline-to-buy-opentable-for-2-6-billion-1402660209
[51] See European Commission, 17 July 2017, M.8416 – *The Priceline Group/Momondo Group Holdings*.
[52] See European Commission, 23 October 2018, M.9005 – *Booking Holdings/Hotelscombined*.
[53] See Office of Fair Trading, 9 May 2013, ME/5882-12 – *Priceline.com/Kayak Software Corporation*.
[54] See https://www.bookingholdings.com
[55] An overview of acquisitions is provided at https://en.wikipedia.org/wiki/Booking_Holdings
[56] Bundeskartellamt, 4 February 2017, B6-132/14-2 – *CTS Eventim*. An English version is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-132-14.pdf?__blob=publicationFile&v=4. An appeal against the decision has been rejected. OLG Düsseldorf, 3 April 2019, VI-Kart 2/18 (V) – *Ticketvertrieb II*, Juris.
[57] Bundeskartellamt, 23 November 2017, B6-35/17 – *CTS Eventim/Four Artists*, Case Summary available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2019/B6-35-17.pdf?__blob=publicationFile&v=2. An appeal against the decision has been rejected. OLG Düsseldorf, 5 December 2018, VI-Kart 3/18 (V) – *Ticketvertrieb II*, Juris.
[58] Bundeskartellamt, 4 February 2017, B6-132/14-2 – *CTS Eventim*, paras 149–227; Bundeskartellamt, 23 November 2017, B6-35/17 – *CTS Eventim/Four Artists*, paras 142–223.
[59] Bundeskartellamt, 4 February 2017, B6-132/14-2 – *CTS Eventim*, paras 59, 138, 176–178.
[60] Bundeskartellamt 4 February 2017, B6-132/14-2 – *CTS Eventim*, para 57.
[61] Bundeskartellamt 4 February 2017, B6-132/14-2 – *CTS Eventim*, paras 195–200.
[62] According to press releases, Amazon abandoned its plans to enter the ticketing services markets worldwide. In 2018, after two years, the firm discontinued its activities in the UK, which apparently had been considered a test market. See https://www.handelsblatt.com/unternehmen/handel-konsumgueter/veranstaltungskarten-amazon-scheitert-mit-angriff-auf-ticket-haendler/20987408.html

This could amount to a relatively extensive behavioural regulation of GAFAM (and possibly a few other platform operators with a broad set of activities such as Uber Technologies). On the other hand, a wider circle of platforms could be the target of 19a activities, some of which operate on a much smaller scale than GAFAM but nevertheless may have an unassailable position they seek to secure through restrictive and exploitative conduct.

V. Conduct presumed to be abusive

The list of prohibitable practices under section 19a(2) of the Competition Act is meant to address the particular competitive risks posed by 19a firms:[63] the risk that these firms use their 'key strategic position',[64] first, to expand their market power and to distort competition; second, to transfer market power to other markets; and, third, to exploit economically dependent market players. Of the seven listed practices, numbers 2 and 7 were not included in the government's original draft, but were only included in the course of the legislative process.[65]

A. Seven categories of prohibitable practices: an overview

First, the Bundeskartellamt may prohibit 19a firms from treating 'the offers of competitors differently from its own offers when providing access to supply and sales markets' (no. 1). Such self-preferencing is regarded as (potentially) abusive as it may lead to market foreclosure and prevent competitors from developing and marketing innovative offers and thus restricts 'competition on the merits' ('*Leistungswettbewerb*'). Such competitive risks are said to arise particularly in the case of self-preferencing by vertically integrated firms and conglomerates.[66] For illustration, the legislative materials refer to the Commission's decision in *Google Shopping*,[67] the ranking and advertisement of apps in app stores and the exclusive pre-installation or integration of own offers by firms that also act as intermediaries.[68]

Second, the possibility to prohibit self-preferencing is supplemented by the option to ban practices that 'hinder other undertakings in their business activities on procurement or sales markets' (no. 2). Captured are thus restrictive practices that are not directed against competitors but which 'digital ecosystems' may employ to secure their unassailability. Examples mentioned include the pre-installation or pre-setting of search engines in browsers, mobile and desktop devices or voice assistants, as well as 'commercial hurdles' erected by a search engine for the search for individual terms that are protected under trademark laws.[69]

Third, the authority can prohibit practices that 'indirectly or directly hinder competitors on a market on which the [19a] undertaking can rapidly expand its position' (no. 3). The provision covers strategies through which competitors in markets that are not (yet) dominated

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[63] Gesetzentwurf (n 6), 73.
[64] See supra text accompanying n 31.
[65] That is why explanations in regard to these categories are given only in the Beschlussempfehlung (n 28), but not in the Gesetzentwurf (n 6).
[66] Gesetzentwurf (n 6), 75–76.
[67] Commission Decision of 27 June 2017 in *Google Search (Shopping)* (Case COMP/AT.39740).
[68] Beschlussempfehlung (n 28), 114.
[69] Beschlussempfehlung (n 28), 115.

are to be driven out: predatory pricing, anticompetitive exclusivity agreements or tying and bundling practices.[70]

Fourth, 19a firms may be prohibited from processing collected data 'to create or appreciably raise barriers to market entry or otherwise hinder other undertakings' or 'to require terms and conditions that permit such processing' (no. 4). A particular 'potential for harm' is seen in the fact that 19a firms can typically combine competitively relevant data from different sources.[71] The provision thus ties in[72] with the Bundeskartellamt's decision in *Facebook*,[73] which was upheld (at least against application for interim relief measures) by the Bundesgerichtshof on the basis of a theory of harm that combines elements of exploitative and exclusionary abuse.[74]

Fifth, the Bundeskartellamt may prohibit 19a firms from denying or impeding 'the interoperability of products or services or the portability of data, thereby hindering competition' (no. 5). The gist of the provision is thus to weaken lock-in effects and to make it easier for users to switch to competitors.[75]

Sixth, the competition authority may force 19a firms to provide its business customers with 'information about the scope, quality or success of the service provided or commissioned' and may prevent 19a firms from 'otherwise mak[ing] it difficult … to assess the value of this service' (no. 6). Addressed are thus essentially information asymmetries to the detriment of business users of two-sided platforms. The latter can be forced to hand over usage data or information about costs, consumers' click patterns or parameters determining how the platform ranks goods and services. This is to enable business users to better assess the quality and value of a platform's intermediation services and to facilitate switching to other providers.[76]

Finally, the Bundeskartellamt is allowed to intervene where a 19a firm requests from its business customers disproportionate consideration (in particular in the form of a transfer of data or rights[77]) for its intermediation services (no. 7). While the provision is framed as an exploitative abuse, protecting the interest of (presumably) dependent business customers, it should be conceived as resting on a hybrid theory of harm. The wording and the reasoning of the legislature[78] make it clear that the provision is inspired by a category of abuse contained in

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[70] Gesetzentwurf (n 6), 76; Beschlussempfehlung (n 28), 116.
[71] Gesetzentwurf (n 6), 76.
[72] Beschlussempfehlung (n 28), 116.
[73] Bundeskartellamt, 6 February 2019, B6-22/16 – *Facebook*.
[74] BGH, 23 June 2020, KVR 69/19 – *Facebook*, Juris. By adopting such a hybrid theory of harm, the court avoided taking a stance on whether exploitative abuse requires causality to be shown, i.e. that the undertaking addressed by section 19 of the Competition Act could not have imposed the terms and conditions in question but for its market dominant position. In the meantime, the German legislator has amended the wording of section 19(1) of the Competition Act to make it clear that only "normative causality" is required to show an exploitative abuse. There is thus considerably more flexibility to consider the imposition of terms and conditions that violate consumer protection law, mandatory contract law or data protection law as abusive within the meaning of section 19 of the Competition Act. See Gesetzentwurf (n 6), 71–72.
[75] Gesetzentwurf (n 6), 77.
[76] Gesetzentwurf (n 6), 77.
[77] Beschlussempfehlung (n 28), 118. See Bundeskartellamt, 17 July 2019, B2-88/18 – *Amazon*, Case Summary, 2 and 4 (assessing obligations imposed by Amazon on its sellers to irrevocably grant Amazon as the marketplace operator extensive rights to use their product material (e.g. product images, descriptions).
[78] Beschlussempfehlung (n 28), 117.

section 19 of the Competition Act[79] that is meant to address an abuse of buyer power by dominant firms (in particular by retailers in the agri-food supply chain) that demand 'unjustified benefits from suppliers' (so-called '*Anzapfverbot*'). Regarding this latter provision, the BGH has clarified that it is meant to protect both competing buyers from distortions of competition ('passive discrimination') and suppliers from terms and conditions regarded as unfair.[80] Therefore, in the context of section 19a of the Competition Act, the rule should be understood as protecting not only the 19a firm's business users but also the interests of operators of two-sided platforms and networks that compete with the 19a firm and which are not in a position to impose terms and conditions that are equally beneficial to them vis-à-vis their business users. The Bundeskartellamt might now initiate abuse proceedings such as the one against Amazon regarding its terms of business and practices towards sellers on the marketplace[81] based on this new provision.

B. The key challenge: weighing pro- and anticompetitive effects

The categories of prohibitable practices are (deliberately) drafted broadly: the fact that a behaviour falls under these categories will only indicate an anticompetitive potential, which may unfold precisely because a 19a firm is involved. Yet by no means should section 19a(2) of the Competition Act be construed as, or practically amount to, a list of per se prohibitions.

First of all, there may be legal boundaries that will prevent the authority from declaring a certain practice as abusive. For instance, a 19a firm's refusal to disclose certain information related to the intermediation services it provides[82] is not abusive where it is legally required to protect personal data[83] or trade secrets.[84][85] But, most of all, the listed categories are so broad that they include scenarios in which practices are captured that in fact are procompetitive and consumer welfare-enhancing. As the following examples show, a certain conduct must only be prohibited (or required) in an individual case after a careful balancing of potential competitive and welfare effects.

For instance, final consumers may benefit from vertically integrated offers that are shown prominently and provide a minimum quality of service such as quick delivery, adequate packaging or authentic products. This applies, for example, to products directly shipped by Amazon in contrast to products sold by independent sellers. Thus, self-preferencing[86] may to a certain extent in fact be in the interest of final consumers. But at this point, as in other contexts, possible welfare-promoting effects are only considered in part in the legislative

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[79] Article 19(2) no. 5 of the Competition Act (addressing market-dominant firms). Note that the provision is also applicable to 'undertakings in relation to [other] undertaking which depend on them'. Article 20(2) of the Competition Act.

[80] BGH, 23 January 2018, KVR 3/17 – *Hochzeitsrabatte I*, Juris, paras 55–57.

[81] Bundeskartellamt, 17 July 2019, B2-88/18 – *Amazon*.

[82] See section 19a(2), 1st sentence, no. 6 of the Competition Act.

[83] See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[84] See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1.

[85] Gesetzentwurf (n 6), 77; Beschlussempfehlung (n 28), 113–114.

[86] Within the meaning of section 19a(2), 1st sentence, no. 1 of the Competition Act.

memoranda. As regards self-preferencing, it is stated that exclusive integration of a firm's own offers may be justified if necessary 'for the utility of core functions of the hardware', such as the 'telephone, camera, message feature or file management of a mobile phone'.[87] Yet the example of the mobile phone reveals that consumers' expectations of what constitute a product's 'core functions' evolve dynamically and are in fact the result of competition between more- or less-integrated product designs. This shows that the concept of 'core functions' merely begs the question of where to draw the line between consumer welfare-enhancing and procompetitive integration of a firm's own offers and abusive self-preferencing.

Another example is the use of bundling as a strategy to enter a market.[88] In the presence of network effects, the best hope for limiting dominance by a firm in one market might sometimes be that (another) 19a firm challenges it.[89] For example, if Microsoft falls under section 19a of the Competition Act, its hands may be tied with respect to its search engine, Bing, which in any case has a hard time challenging Google Search in many countries.

Yet another example concerns the practice of requesting (monetary or non-monetary) compensation from business customers that is disproportionate in relation to the services offered.[90] According to the explanatory memorandum, an implied (and possibly disproportionate) demand may be seen in the fact that 'a search engine is technically designed in such a way that the display of certain hits is made dependent on the granting of rights or data'.[91] However, a search engine that prioritizes news outlets that provide unrestricted access or allow snippets to be placed in conjunction with the search results may be disliked by some media outlets but has clear consumer benefits. Everything else being equal, listing the link to a free access article above a similar article with a paywall is clearly in the interest of consumers. The same holds true if lower-priced items are shown ahead of higher priced items on a search engine. Stimulating competition among sellers is typically not construed to be exploitative or restrictive behaviour.

More generally speaking, in light of the said provision the whole business model of advertising-financed platforms may appear suspicious of being anticompetitive or exploitative. For it is in the nature of these platforms that the business customers that are the most willing to pay for their visibility (be it in money or be it in a transfer of data or rights) will receive preferential treatment. An undifferentiated and overreaching application of this rule therefore seems particularly precarious. Consequently, a 'double safety net' is meant to prevent such an overenforcement: for one thing, 19a firms accused of such a practice may invoke the (generally applicable) option of objective justification and can seek to legitimize their business model. Yet, for another thing, the Bundeskartellamt must in any case show that the 19a firm's demand is 'disproportionate' ('*unangemessen*'). This already presupposes a balanc-

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[87] Beschlussempfehlung (n 28), 115.
[88] As it may be covered by section 19a(2), 1st sentence, no. 3 of the Competition Act.
[89] See Gesetzentwurf (n 6), 76 ('As far as the opening of completely new markets or an entry into markets in which there is no effective competition at all is concerned, it has to be taken into account that by entering a market [of a 19a firm] positive competitive effects can be expected').
[90] Section 19a(2), 1st sentence, no. 7 of the Competition Act.
[91] Beschlussempfehlung (n 28), 117.

ing of interests, independently of the 19a firm's option to demonstrate objective justification. The legislature considered this the appropriate instrument to avoid excessive intervention, noting that 'given the broad scope of application of the provision, the requirements for "inappropriateness" ["*Unangemessenheit*"] are generally high',[92] but this is not (clearly) reflected in the specifying criteria mentioned in the legislative memorandum. First, it is stipulated that the less the benefits demanded by the 19a firm are 'necessary' to provide the intermediation service, the more this request may be considered 'disproportionate'.[93] A narrow reading of this criterion of 'necessity' would seem to exclude barter transactions in which business users have to provide data to the 19a platform in return for attractive conditions. Second, the 'inappropriateness' of the conditions for the use of the platform is said to be indicated if the 19a firm has not offered 'serious negotiations' on the terms and conditions, in particular on an 'adequate compensation for requested benefits'.[94] This latter hint might raise new hopes in particular among press publishers that competition enforcement will help them to force digital platforms such as Google to pay compensation for the use of their media services.[95] However, refused negotiations are not conclusive in indicating unfairness ('inappropriateness'): a platform operator typically does not negotiate but sets conditions. This saves transaction costs and prevents accusations of anticompetitive discrimination, to which a 19a firm is otherwise easily exposed.[96] Finally, if the provision is applied to monetary compensation a 19a firm requests from its business users, an assessment of inappropriateness does not appear to be a trivial matter either: is it fair ('disproportionate') that Apple charges app developers a 30% commission on all subscription fees?[97]

Whether the 19a tool will lead to socially desirable outcomes will very much depend on whether the Bundeskartellamt – and eventually the BGH – succeeds in identifying and weighing the pro- and anticompetitive effects of those practices that may be captured by section 19a(2) of the Competition Act. Ideally, as a result of the authority's practice and the case law of the BGH, a subset of rules will develop over the years that specifies which conduct will be prohibitable under which conditions, taking into account in particular the considerable differences in the monetization models pursued by the digital platforms addressed.[98] However, the risk remains that competition practice will amount to a rather mechanical assessment, so that certain practices will be prohibited based on a quasi-per se rule that does not sufficiently take into account the circumstances of the individual case. The hope is that this will not hap-

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[92] Beschlussempfehlung (n 28), 117.
[93] Beschlussempfehlung (n 28), 117 (emphasis added).
[94] Beschlussempfehlung (n 28), 117–118.
[95] So far, in Germany, this hope has been disappointed by the competition authority and the courts. See Bundeskartellamt, 8 September 2015, B6-126/14 – *Google/VG Media*; LG Berlin, 19 February 2016, Juris – *Google Snippets*.
[96] See Article 102(c) TFEU as well as sections 19(2) no. 1 and 20(1) of the Competition Act.
[97] See the Commission's ongoing investigations into Apple's App Store rules. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 (Press Release of 16 June 2020).
[98] Economic theory has shown that platform incentives with respect to certain practices may well depend on the platform's monetization model (see, e.g. Tat-How Teh, 2019, 'Platform Governance', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521026, and Jay Pil Choi and Doh-Shin Jeon, 2020, 'Two-Sided Platforms and Biases in Technology Adoption' CESifo Working Paper No. 8559, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699239). This is reflected by a recent opinion piece by Cristina Caf-

pen, and that the reversal of the burden of proof instead makes competition law work in the digital sector, as it opens the door to anticompetitive effects receiving the consideration they deserve and addresses the asymmetric information problem the Bundeskartellamt (as other competition authorities) has faced elsewhere.

C. Settled and unsettled issues as to the appropriate welfare standard

The reversal of the burden of proof as regards 'objective justification' will make it more likely that the facts needed to comprehensively assess the competitive implications and welfare effects of a relevant practice are on the Bundeskartellamt's table. However, the reform does not eliminate essential uncertainties of a normative nature that are related to the assessment of platform activities.

1. What we know

The explanatory memorandum to the Bill states that, 'within the context of objective justification, a balancing of interests is required, which, on the one hand, takes into account the law's objective of protecting free competition and, on the other hand, the legitimate freedom of business and possible procompetitive elements' of the conduct in question.[99] The rhetoric of 'protection of free competition' must not be read as contradicting the consumer welfare criterion as the principal normative guideline: the protection of competition on the market can essentially be understood as a means of enhancing consumer welfare. In any case, the relevance of certain general conceptual disputes as regards efficiency considerations should not be overestimated: critics of an efficiency defence (along the lines of Article 101(3) TFEU) under German abuse control also concede that the considerations made in this respect in the competition practice on Article 102 TFEU can be integrated in the context of an 'objective justification'.[100]

More important than the rhetorical framing of efficiency considerations is therefore specific normative guidance provided with regard to certain trade-offs that are often involved in competition practice: short-term efficiencies vs. long-term objectives; risks of underenforcement ('false negatives') vs. risks of overenforcement ('false positives'); lower implementation costs via per se rules vs. detailed effects analyses on a case-by-case basis. In this respect, the explanations to the draft law actually give some indications: in the light of the characteristics of the markets concerned, particular weight should be given to the long-term objectives associated with section 19a of the Competition Act – limiting economic power, keeping markets open, and protecting the competitive process – as opposed to, in particular, short-term efficiencies for the benefit of affected businesses and consumers.[101] Thus, particular emphasis

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farra and Fiona Scott Morton ('The European Commission Digital Markets Act: A Translation' (voxeu.org, 5 February 2021) in the context of the proposed DMA and also applies to section 19a of the Competition Act.

[99] Beschlussempfehlung (n 28), 113.

[100] See, for instance, Jörg Nothdurft, '§ 19 GWB' in Hermann-Josef Bunte (ed), *Langen/Bunte, Kartellrecht*, vol 1 (Luchterhand 2018), para 41. This is particularly remarkable as Jörg Nothdurft heads the Litigation and Legal Division at the Bundeskartellamt.

[101] See Gesetzentwurf (n 6), 77. This passage was not taken up by the parliamentary committee in its final memorandum on the bill. See Beschlussempfehlung (n 28), 113–114. Whether this was done deliberately is unclear, because the explanato-

should be placed on low barriers to entry and higher competitive pressure – even if this would (possibly) entail short-term losses of efficiency. What is more, risks of underenforcement should be weighted higher in the context of the concerned digital markets. These are gradual shifts as regards the implementation of the consumer welfare criterion that may support a more interventionist competition practice. However, we do not find any indication that the legislature intended to curtail the necessity of detailed case-by-case analyses. We reiterate that it would be a serious flaw if practices covered by section 19a(2) of the Competition Act were to evolve into quasi-per se prohibitions.

2. What we don't know

Where competition law considers potential harm and benefit a certain practice may have on 'consumers', it encompasses effects not only on final consumers but also on intermediate buyers such as distributors or manufacturers that used a product as input.[102] With this in mind, the conclusion has been drawn that, when assessing the consumer welfare implications of platform practices, effects on producers of goods and services who are affected as (business) users of the platform service must be taken into account when thinking of theories of harm.[103] Yet, the assumption immediately raises the question of how to deal with a scenario in which a platform practice has opposite effects on different user groups. A response to this may require crucial value judgments to be made, in particular in the case of two-sided platforms that cater to business users and final consumers (as, for example, Amazon Marketplace or Apple's App Store) and where, for instance, a platform practice may harm business users but benefit the final consumers.[104]

One possible solution would be to net countervailing welfare effects for these two groups. However, although competition practice in general does not preclude a netting of divergent efficiency effects to different groups of consumers (even across markets),[105] it typically seeks to reduce the leeway for such netting as it requires intersubjective comparisons and, thus, entails measurement problems and involves distributional concerns. Therefore, for instance, under Article 101(3) TFEU the EU Commission considers cross-market netting of welfare effects possible only in cases where 'the group[s] of consumers … are substantially the same'.[106] Whether this criterion would be met in the case of a two-sided platform that

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ry memorandum in regard to those rules, the text of which remained unchanged during the legislative process (as in the case of the objective justification in section 19a(2), 2nd and 3rd sentences of the Competition Act), is generally less detailed than the explanations accompanying the original draft bill.

[102] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 19; Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 84. This is also recognized in German competition practice. See, for example, OLG Düsseldorf, 13 November 2013, VI-U (Kart) 11/13 – *Badarmaturen*, Juris, para 64.

[103] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019), 41.

[104] Moreover, a particular platform practice may affect a group of consumers who do not even consider using the platform. For instance, price parity clauses also affect the welfare of those buyers who do not engage with the platform and always choose to purchase via a direct sales channel.

[105] See for an overview of relevant EU competition practice Jens-Uwe Franck and Martin Peitz, *Market Definition and Market Power in the Platform Economy* (Cerre 2019), 42–46.

[106] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 43. German competition practice generally follows the Commission's guidelines. See, for instance, Bundeskartellamt, 10 August 2007, B4-31/05 – *Wirtschaftsprüferhaftpflicht*, paras 186 and 190.

serves businesses and final consumers seems rather doubtful. A follow-up question with regard to the 'objective justification' would be whether a 19a firm should in fact then be obliged to provide comprehensive information on all welfare implications and their net effect, which would appear to be an (almost) unsurmountable task.

The opposite solution would be that a two-sided platform's practice can already be considered consumer welfare-reducing (and, thus, prohibitable) if it has a negative effect on only one user group. Yet, does it really seem advisable to disregard the interdependencies between the welfare effects on interrelated user groups and to prohibit a two-sided platform's practice solely because of detrimental effects on its business users without even considering (possibly very positive) welfare effects on the final consumers? No one, including those who are in general critical of an efficiency defence in abuse cases, seems to be suggesting that.[107]

In competition practice, and in particular in light of the BGH's case law on section 19 of the Competition Act,[108] the finding of divergent effects on different user groups will in all likelihood result in a balancing exercise. The result of such balancing processes will depend considerably on how the interests of the respective user groups are normatively weighted and, moreover, to what extent indirect effects on final consumers are taken into account when considering the relevance of effects on business users.

In fact, there are fundamental doubts as to whether, from a consumer welfare point of view, effects on the welfare of a platform's business users should be given weight equal to those on a user group consisting of final consumers. If one considers the treatment of traditional distribution chains under competition law, as a matter of principle, positive effects on producers are not regarded as relevant welfare enhancements per se, but only insofar as they are assumed to (indirectly) benefitting the final consumers.[109] Whether and why this should be viewed differently because a good or service does not reach the end consumer along a vertical supply chain but through intermediation of a two-sided platform would need to be explained and legitimized.

In view of the practices by two-sided platforms and their effect on the ecosystem they control, a complication is that indirect effects on final consumers are often difficult to assess and may go beyond pass-through of platform fees paid by business users. In particular, seller quality and innovation by sellers may be the first-order issue from a consumer perspective. A case in point is the consumer benefit from ad-financed apps that are made available on a platform such as Apple's App Store. Owing to this complication, one may contemplate considering the effects on a two-sided platform's business users as a proxy for the (indirect) consumer

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[107] See, for instance, Jörg Nothdurft, '§ 19 GWB' in Hermann-Josef Bunte (ed), *Langen/Bunte, Kartellrecht*, vol 1 (Luchterhand 2018), para 135 ('If, in [two-sided] markets, only one side is charged a fee which, according to general principles, is to be regarded as abusively excessive, this cannot, however, be justified solely by the fact that the other side receives a service for free. The justifying effect of such efficiencies is, at least in German law, subject to narrow limits').

[108] See, for instance, BGH, 8 October 2019, KZR 73/17 – *Werbeblocker III*, paras 51–63 (considering the interests of the internet users that install ad-blockers and the providers of ad-financed websites).

[109] This can be seen, for instance, in the EU competition practice on Article 102 TFEU, which is said to be 'concerned with the protection of competition [for the benefit of consumers] rather than the protection of competitors.' Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018), 202–203 (referring in particular to the ECJ's judgments *Deutsche Telekom*, *TeliaSonera*, *Post Danmark I*, *Post Danmark II* and *Intel* and the Guidance on the Com-

welfare effects. Regardless of whether one finds this convincing (the authors do not), if in the view of the competition practice on two-sided platforms an adaptation of the established welfare standard is intended, this should be made explicit.

Moreover, a direct consideration of supplier welfare will in some cases rest on particular policy objectives: some types of small businesses such as Uber drivers[110] may be seen in a different light from traditional businesses for reasons of distributive justice. The welfare of newspaper publishers (which are, for instance, business users of Google's search service) might enjoy special consideration as they are viewed as guarantors of freedom and pluralism of media. Certainly, albeit politically controversial, such adaptations of the consumer welfare standard for particular policy reasons may be legitimate. Yet, first, such considerations should be made explicit and, second, it needs to be explained why they should only be relevant in the context of two-sided platforms.[111]

All in all, we may conclude that the yardstick by which (potential) pro- and anticompetitive effects and welfare effects in the context of two-sided platform activities are to be weighted is an open question. The reform may thus be regarded a missed opportunity to provide normative guidance for authorities and courts that have to cope with these challenges in the context of 19a cases and beyond.

VI. Prompt and effective intervention: abridged judicial review

In principle, decisions of the Bundeskartellamt can first be challenged before the Düsseldorf Higher Regional Court (Oberlandesgericht),[112] where six specialized divisions have been set up to handle these cases. The Higher Regional Court's decisions may then in turn be appealed against before the BGH.[113] It is most remarkable that this well-established judicial protection mechanism will not apply to decisions under section 19a of the Competition Act. Bypassing the Düsseldorf Higher Regional Court, the BGH will decide as a court of appeal in the first and last instance.[114] The legislature has gone to great lengths to justify this abridged judicial review.[115] It is argued that the particularities of digital markets require particularly swift intervention to be effective. It is assumed that, in light of the generally available instruments of judicial protection, the Bundeskartellamt's option to order immediate enforceability of its de-

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mission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 5, 6, and 23).

[110] Assuming that Uber drivers are to be considered undertakings within the meaning of competition law.

[111] In fact, we also see in certain contexts a preferential treatment of supplier welfare for distributional reasons or for the promoting of media diversity in the context of vertical supply chains: farmers are in part exempted from competition law and allowed to coordinate their sales and other activities via producer organizations. See the so-called Omnibus Regulation, which introduced, among other things, a horizontal competition derogation that permits, for instance, joint distribution, including joint selling platforms or joint transportation. Article 152 of Regulation (EU) No 1308/2013 (as amended). As regards the distribution of newspapers and magazines, section 30(1) of the German Competition Act exempts vertical agreements that guarantee resale price maintenance. Section 30(2a) of the German Competition Act exempts industry agreements between associations of publishers and associations of wholesalers.

[112] Section 73(4) of the Competition Act.

[113] Section 77(1) of the Competition Act.

[114] Section 73(5) of the Competition Act. This provision shall also apply if the Bundeskartellamt bases proceedings concurrently on section 19a of the Competition Act and Article 102 TFEU and/or section 19 of the Competition Act. See Beschlussempfehlung (n 28), 122.

[115] See Beschlussempfehlung (n 28), 119–122.

cisions does not suffice to do justice to this necessity. The legislature refers at this point to the current Facebook litigation: the firm succeeded with its application for an order of suspensive effect before the Higher Regional Court,[116] which, however, was overturned by the BGH.[117] Facebook then initiated a second summary proceeding, whereupon the Higher Regional Court again ordered suspensive effect by an interim decision.[118] After all of that, Facebook has for the time being withdrawn its application, so the Bundeskartellamt's order[119] is temporarily enforceable,[120] albeit after almost two years of interim legal proceedings. In light of this, the legislature saw the risk that, given the options for judicial review currently available, the enforceability of the Bundeskartellamt's future 19a decisions could remain in dispute for a number of years.[121]

The single-tier judicial review of decisions by public authorities is not unheard of under German law. It does not conflict with constitutional law.[122] Yet, what is lost by reducing judicial review to one appeal instance must not be overlooked or underestimated. The BGH will have to rule on decisions of the Bundeskartellamt, which will significantly interfere with the entrepreneurial freedom of the platform operators concerned and which will heavily influence the development of digital markets in Germany and (possibly) beyond. As the legislature itself emphasized, the application of the new competition tool will typically involve complex questions of fact and unresolved legal questions. What is more, the number of cases is expected to remain small.[123] Therefore, for a prudent development of the law under section 19a of the Competition Act, we submit that it would have been fruitful for the Düsseldorf Higher Regional Court, which has been familiar with competition proceedings for many years, to deal with these cases first. The possibility of obtaining an opinion from the Monopolies Commission,[124] which was introduced specifically for these proceedings before the BGH to support the court in its analysis of economic issues,[125] is not adequate to compensate for these disadvantages. Finally, it should be noted that, to address the need for rapid intervention in digital markets, the reform made it considerably easier for the Bundeskartellamt to order interim measures.[126] As this instrument also applies in the context of 19a procedures,[127] it is all the

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[116] OLG Düsseldorf, 26 August 2019, VI-Kart 1/19(V) – *Facebook I*, Juris.
[117] BGH, 23 June 2020, KVR 69/19 – *Facebook*, Juris.
[118] OLG Düsseldorf, 30 November 2020, *Kart* 13/20 (V), Juris.
[119] Bundeskartellamt, 6 February 2019, B6-22/16 – *Facebook*.
[120] In the main proceedings, the Higher Regional Court has in the meantime initiated a preliminary ruling procedure (Article 267 TFEU). See OLG Düsseldorf, 24 March 2021, Kart 2/19 (V), Juris. https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210324_PM_Facebook2/index.php
[121] See Beschlussempfehlung (n 28), 121. Yet it would not be a good reason to bypass the Düsseldorf court just because it has occasionally been quite critical of the competition authority's views, especially in the course of the Facebook proceedings.
[122] As stipulated by the German Constitutional Court (Bundesverfassungsgericht–BVerfG), the Constitution does not guarantee a multitiered judicial review. See BVerfG, 30 April 2003, 1 *PBvU* 1/02, *BVerfGE* 107, 395, 402, Juris, para 18.
[123] Id.
[124] Section 75(5) of the Competition Act.
[125] Beschlussempfehlung (n 28), 122.
[126] Section 32a of the Competition Act. See Gesetzentwurf (n 6), 83–86.
[127] Section 19a(2), 4th sentence of the Competition Act ('Section 32a … shall apply mutatis mutandis').

more questionable whether the (relative) benefits of the abridged judicial review outweigh the drawbacks.[128]

VII. Towards ever-increasing regulatory fragmentation in the internal market?

By moving ahead and enacting section 19a of the Competition Act, the German legislature has put pressure on the EU to more effectively address the perceived competition problems caused by the big digital platforms. The recently proposed EU Digital Markets Act ('DMA')[129] is intended to be the functional equivalent of Germany's new competition tool. To be sure, it is by no means settled in which form, when or whether at all the DMA will enter into force. Yet, in the EU's legislative process, the Commission's new powers to regulate Big Tech under the DMA will be benchmarked against section 19a of the Competition Act. Suffice to mention here, two differences seem to be apparent: first, the circle of potential addressees of the DMA appears to be wider, in particular in view of the qualitative criteria, which trigger a (rebuttable) presumption that the firm may be designated as a gatekeeper.[130] Second, the regulatory design of the DMA is closer to conventional ex ante regulation, as a firm that is designated as a gatekeeper is automatically obliged to comply with the obligations laid down in the DMA,[131] while the gatekeeper may apply for a suspension where compliance 'would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union'[132] or request an exemption for overriding reasons of public interest.[133]

What is more, with the 19a tool, the German lawmakers have opened up a testing ground for digital platform regulation. Ideally, other rule-makers, particularly in the EU, will watch and learn from the wanted and unwanted effects of the Bundeskartellamt's future 19a interventions.[134]

It is foreseeable, however, that national competition enforcement and ex ante regulation will lead to increasing differences in digital platform regulation across EU Member States. Such legal fragmentation is in particular problematic as it may hamper the scaling up of innovative homegrown digital business models. While the EU could react by striving for a full harmonization of domestic laws including competition law, this is not to be expected. The DMA proposal aims at harmonizing Member States' gatekeeper regulation, which is adopted

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[128] However, we acknowledge that the practical effectiveness of the reformed section 32a of the Competition Act has yet to be demonstrated and that interim measures will in fact also benefit from the abridged judicial review foreseen in 19a cases. See section 73(5), no. 2 of the Competition Act.

[129] 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.

[130] Article 3(2) of the DMA proposal (n 129).

[131] Articles 5 and 6 of the DMA proposal (n 129).

[132] Article 8 of the DMA proposal (n 129).

[133] Article 9 of the DMA proposal (n 129).

[134] Beschlussempfehlung (n 28), 10 ('However, the federal structure of the European Union can be used to gather experience with slightly different regulatory structures at national level with the aim of finding the best possible form of regulation').

'for the purpose of ensuring contestable and fair markets'.[135] Pursuant to the proposal, Member States will remain free, however, to adopt stricter gatekeeper regulation to pursue 'other legitimate interests'.[136] Further, 'national competition rules prohibiting other forms of unilateral conduct' (than those that fall under Article 102 TFEU) and that impose 'additional obligations on gatekeepers' will also remain unaffected by the DMA.[137] Pursuant to recital 9 of the DMA proposal, the

> Regulation is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behavior that are based on an individualised assessment of market positions and behavior, including its likely effects and the precise scope of the prohibited behavior, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behavior in question.[138]

Section 19a of the Competition Act shares the objective of Articles 101 and 102 TFEU and the corresponding domestic provisions to protect competition from distortion, which essentially means that it aims at keeping markets open and preserving consumers' freedom and range of choice. As has been repeatedly stressed in this article, the appropriate application of section 19a of the Competition Act requires a detailed case-by-case analysis, including a thorough evaluation of the market position and the scrutinized conduct of the addressed undertaking and, more specifically, allows the latter to justify its behaviour and to invoke an efficiency defence in doing so. Hence, section 19a of the Competition Act should be considered an 'other national competition rule' according to the said criteria and would therefore be exempt from harmonization through the DMA.

For the foreseeable future, digital platforms and their users will therefore have to bear the costs of fragmented rule-making in the EU's internal market. When deciding in a particular case whether or not to impose a certain rule on a digital platform, national competition authorities cannot be expected to consider these costs in any meaningful way. However, we foresee that, in the medium term, some 'soft' EU-wide convergence will result from exercise, exchange and experience.

VIII. Concluding remarks

The 19a tool is a revolution in German competition law. It sits between traditional competition law and sector regulation. Targeted at Big Tech, it aims to rebalance the power between the Bundeskartellamt and powerful firms. In particular, the competition authority benefits from a reversal of the burden of proof regarding the anticompetitive nature of certain conduct by 19a firms. We see this a positive innovation in light of the information asymmetry between the competition authority and Big Tech and the resources available to the latter.

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[135] Article 1(5), 1st sentence of the DMA proposal (n 129). Note that the DMA proposal seeks to distinguish the objective of gatekeeper regulation from the objective pursued by Articles 101 and 102 TFEU. See recital 10 of the DMA proposal (n129). Yet as this involves the interpretation of primary EU law, it is the ECJ that will have the final say on this matter.

[136] Article 1(5), 2nd sentence of the DMA proposal (n 129).

[137] Article 1(6), 2nd sentence of the DMA proposal (n 129).

[138] Recital 9 of the DMA proposal (n 129). Essentially the same criteria can be employed to define which provisions of national law qualify as 'national competition law' within the meaning of Article 3(2) and (3) of Regulation 1/2003. See Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"?—Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements' (2020) 39 Yearbook of European Law 320.

However, bypassing the specialized competition law court and making the BGH the first and only appeal instance does not appear to us to be the last word in wisdom. What is more, drafting the practices covered in wide terms that may be interpreted as per se prohibitions might lead to outcomes that particularly hurt final consumers because special interest groups obtain undue considerations. Whether the tool is employed for good use will mostly depend on the Bundeskartellamt and eventually also on the BGH. The competition authority already took the opportunity to put its new instrument to the test and initiated its first 19a proceedings against Facebook, investigating the linking of Oculus, a subsidiary of Facebook that produces virtual reality devices, with Facebook's social network.[139] Only time will tell whether the 19a tool has sharp teeth and to what effect it will be used.

Notably absent from Germany's reform is an update of merger rules to better meet the challenges posed by digital platforms.[140] The new section 19a of the Competition Act aims at prohibiting certain behaviours, but the amended Competition Act does not provide sharpened tools to go against acquisitions by Big Tech firms. In fact, German lawmakers are pinning their hopes on the EU here. The German parliament has called on the federal government to work at the EU level:

> to establish mechanisms to prohibit undertakings of paramount significance for competition across markets ['19a firms'] from hindering innovation and competition by strategically buying up competitors (so-called 'killer acquisitions').[141]

However, while the Commission currently seems to be reluctant to engage in a substantial reform of EU merger control,[142] it is notable that, under the proposed DMA, designated digital gatekeepers will have an obligation to inform the Commission about any intended concentration regardless of whether or not it is notifiable under the EU Merger Regulation or national merger rules.[143] This fits in with the Commission's Guidance on Article 22 of the EU Merger Regulation, which clarifies that the Commission will accept and indeed under certain

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[139] See the Bundeskartellamt's press release of 28 January 2021, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.pdf?__blob=publicationFile&v=2

[140] An additional, value-based jurisdictional threshold was already introduced with the previous amendment to the Competition Act in 2017. See section 35(1a) of the Competition Act. The newly introduced power of the Bundeskartellamt to impose an obligation on a certain undertaking to notify every merger would appear to be a useful instrument in the field of the digital economy. However, the conditions for the application of this instrument preclude it from effectively addressing the challenges posed by mergers in the digital industry. See section 39a of the Competition Act, which requires, among other things, that the Bundeskartellamt has previously conducted a sector inquiry pursuant to section 32 of the Competition Act and that the target firm generated sales of more than two million euros in the previous year and that it generated more than two-thirds of its sales in Germany.

[141] Beschlussempfehlung (n 28), 10. Note that the relevant acquisitions may in fact rather constitute 'reverse killer acquisitions' according to which a new service is integrated into the existing offer replacing plans for developing a competing service in-house. See Cristina Caffarra, Gregory Crawford and Tommaso Valletti, '"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions' (voxeu.org, 11 May 2020).

[142] The merger policy package of 26 March 2021 is confined to procedural and jurisdictional aspects of EU merger control. See Commission Staff Working Document SWD(2021) 66 final. The Commission seeks to address shortfalls of the existing merger thresholds through the encouragement of referral requests alone (see below note 144 and accompanying text). As regards the substance of merger assessments, Commissioner Vestager remarked 'So we're open to ideas, no matter where they come from. But we'll only take a decision when we've considered all the evidence. So we won't immediately be drafting new merger guidelines.' Margrethe Vestager, 'The Future of EU Merger Control' (International Bar Association 24th Annual Competition Conference, 11 September 2020).

[143] Article 12 of the DMA proposal (n 129).

circumstances encourage[144] referral requests by Member States also in cases in which the merger in question does not 'meet the respective jurisdictional criteria of the referring Member States'.[145] In the light of this new policy, it would have made sense to impose a corresponding information obligation on 19a firms. However, one may assume that the Commission will signal to a Member State when it considers a referral request to be appropriate.[146]

What are the repercussions of the 19a tool for platform users in Germany and beyond? On the one hand, Germany as a mid-sized country may well be important enough from the perspective of the (very) large digital platforms to comply with its legal peculiarities and to adapt their business models instead of simply withdrawing from the market. On the other hand, stricter (and conceivably far-reaching) regulation in Germany is unlikely to significantly influence platforms' global investments in new services, while it may affect country-specific investments. Overall, there remain several uncertainties about how the 19a tool will be used and play out in practice. The legislature seems to be aware of this issue as section 19a of the Competition Act requires its provisions to be evaluated after four years.[147]

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[144] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (C(2021) 1959 final), paras 13–26.

[145] Guidance on Article 22 referrals (n 144), para 6.

[146] See Article 22(5) of the EU Merger Regulation.

[147] Section 19a(4) of the Competition Act (imposing an obligation on the Federal Ministry of Economics to report to the legislature after four years on the experience acquired).