The Race to Regulate Big Tech – Lessons from Germany

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While Australia has only recently joined the contest between regulators to create innovative competition tools to cope with the challenges of digital markets and big tech, Germany is assembling a first set of decisions under its new rules, the famous s 19a. The article describes the first cases and decisions conducted and taken by the German competition regulator and analyses the challenges and legal risks of this innovative tool against the background of the Australian Competition and Consumer Commission's regulatory proposals.

Legislators around the world have joined a race to regulate the big tech firms. Google, Apple, Facebook (now Meta), Amazon and Microsoft (also referred to as "GAFAM"), are not only subject to a tighter scrutiny resulting in investigations and cases that are popping up almost on a daily basis, but seem to have become the focus in a legislative contest to push the boundaries of traditional competition law and create the best framework to cope with the challenges of digital markets and big tech.

In the meantime, one model seems to be emerging as the most promising option: a set of rules that are aimed at regulating big tech firms ex ante by containing their conduct upfront, rather than punishing them after the fact. The United States saw a striking number of sweeping tech bills but could not find a consensus in 2022 and has decided to sit on the sideline (for now). In the meantime, Australia has gained ground. In 2022, the Australian Competition and Consumer Commission (ACCC) published the fifth interim report for the digital platform services inquiry, suggesting regulatory reforms for the digital economy. Like most regulators engaged in this race, the ACCC recommended, in particular, the implementation of "targeted up-front (or ex ante) competition obligations"[1] applicable to companies that would be designated as addressees of such new rules. The practices that the ACCC would like to address include self-preferencing, tying, exclusive pre-installation agreements and defaults, frustrating consumer switching, denying interoperability, exploitation of data advantages, lack of transparency, and unfair terms for business users, including exclusive agreements and price parity clauses.[2] The ACCC has recently repeatedly renewed its call for measures that target these practices in its new report focusing on social media and on expanding ecosystems of digital platform service providers.[3]

In its reports, the ACCC takes into consideration several international reform efforts as blueprints for its plan in the contest for the world's best competition law framework. The ACCC outlines Australia's starting position in the race, by making reference to a "common recognition in numerous jurisdictions that the harms arising from the activities of digital platforms across a range of issues are significant, and that competitive pressures, self-regulation or industry-led initiatives are not enough to address these

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[1] ACCC, *Digital Platform Services Inquiry*, Interim Report No 5 – Regulatory Reform (2022) 13.

[2] ACCC, n 1, s 6.

[3] ACCC, *Digital Platform Services Inquiry*, Interim Report No 6 – Social Media Services Australia (2023) s 3.7; ACCC, *Digital Platform Services Inquiry*, Interim Report No 7 – Expanding Ecosystems of Digital Platform Service Providers (2023) s 8.2.

harms".[4] The ACCC[5] goes on to refer to reforms pursued by the other participants in the race, among others, the European Union,[6] Germany, the United Kingdom[7] and Japan.[8]

While all of these efforts are worth being watched closely, the German initiative stands out. The German legislator was the quickest out of the block and provided the German Federal Cartel Office (*Bundeskartellamt*, FCO) in January 2021 with s 19a of the *Act Against Restraints of Competition* (*Gesetz gegen Wettbewerbsbeschränkungen*, ARC). In contrast to what the numbering of the provision might suggest, this new tool is far from being a small annex to the prohibition of the abuse of a dominant position in s 19 of the ARC. It is a far reaching and innovative ex-ante regulation targeting big tech. With the implementation of the new rules, Germany has, as the President of the FCO, Andreas Mundt, put it, "assumed an international pioneer role"[9] and, as the former Chair of the ACCC, Rod Sims, acknowledged, "won"[10] the race. The FCO has started to make use of its new powers immediately in 2021. It has since designated several gatekeepers, or in the words used in the law, companies with "paramount significance for competition across markets" as addressees, initiated multiple proceedings against them and closed first ones against commitments.

> *This article draws initial lessons from the German experiment by taking into consideration the FCO's first decisions and the scope of the investigations initiated since January 2021. It thereby follows the two-stage procedure foreseen by s 19a of the ARC consisting of a designation of a company as a gatekeeper (see Part I.) and the actual prohibition of a specific conduct of such a designated gatekeeper (see Part II.).*

I. DESIGNATION OF ADDRESSEES

Consistent with the mechanism proposed by the ACCC for its additional competition measures,[11] s 19a of the ARC is not self-implementing. For the law to create an effect and to enable the FCO to issue specific orders prohibiting a certain behaviour or ordering to implement specific measures, it requires the FCO to designate a company as an addressee.

Under s 19a(1) of the ARC, only companies that have a "paramount significance for competition across markets" qualify for a designation. This requires the companies to be active to a significant extent on multisided markets and within networks as defined in s 18(3)(a) of the ARC, making the law tailored to target digital platforms. Regarding the scope of the companies' activities, s 19a(1) of the ARC does not provide for specific quantitative thresholds, but mentions several indicators for a "paramount significance". When contemplating a designation decision, the FCO shall take into account, (1) a dominant position on one or more markets, (2) financial strength or access to resources, (3) vertical

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[4] ACCC, n 1, 60.

[5] Compare ACCC, n 1, s 2.5 and ACCC, n 3, s 3.7.

[6] For more details, see also among others Pinar Akman, "Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act" (2022) 47(1) EL Rev 85; Natalia Belloso and Nicolas Petit, "The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory" (2023) 48(4) EL Rev 391; Nicolas Petit, "The Proposed Digital Markets Act (DMA): A Legal and Policy Review" (2021) 12(7) JECL & Pract 529; Anne Witt, "The Digital Markets Act: Regulating the Wild West" (2023) 60(3) CML Rev 625.

[7] Oles Andriychuk, "Comparing the Incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA" (Concurrences n°3-2023, 2023) Art N°113202.

[8] Regarding the discussion in Japan see Souichirou Kozuka, "Japan's Regulatory Response to Digital Platforms: Comparisons with European and Asian Approaches" (2019) 48 ZJapanR | J Japan L 95.

[9] FCO, *Amendment of the German Act against Restraints of Competition* (19 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html> (all online sources last accessed on 20 October 2023).

[10] Regarding Rod Sims' concession, see Brussels Conference 2023, *Expanding the Antitrust Agenda: Do We Need New Lawyer, or just New Posture* <https://www.brusselsconference.com/event-photography-and-video> (minute 1:05:34).

[11] ACCC, n 1, s 5.4, 189.

integration or activities on otherwise related markets, (4) access to competitively relevant data, and (5) influence on activities of third parties, in particular access to supply and sales markets. Notably, a company does not need to fulfil all of these criteria to become an addressee of s 19a of the ARC and this list is not exhaustive. Rather, the FCO has to make an overall assessment of all circumstances[12] and may also look at other factors and consider these as decisive in order to declare a company to be an addressee of s 19a of the ARC.

Contrasting the approach of the EU regulation 2022/2065, commonly referred to as the *Digital Markets Act* (*DMA*), a designation decision under s 19a(1) of the ARC extends to the entire undertaking and all its services. It is not limited to core platform services. Based on a designation, the FCO can therefore take actions concerning all areas of the business of a gatekeeper. While this approach entails legal certainty around the question of who the regulated companies are (only those explicitly designated) and which business areas might be subject to regulation (all), the procedure might at the same time bear considerable risks both in practical and legal terms.

A. The Risk of an Enforcement Bottleneck

First, the designation provides the FCO with considerable powers, but it creates a point of congestion in the FCO's line of cases against big tech. The FCO is required to invest considerable resources and time without achieving the desired results in terms of market effects. In fact, after almost three years, despite the significant information gathered in proceedings in the past under traditional competition law, the FCO was only able to designate four of the five "GAFAM", namely Google (Alphabet),[13] Facebook (Meta),[14] Amazon[15] and Apple.[16] The German legislator had foreseen this bottleneck and provided for a solution by allowing the FCO to conduct the designation in parallel to prohibition proceedings concerning a potential addressee's business conduct (s 19a(2) sentence 4 of the ARC). The FCO has made use of this possibility, for example, in the case of Apple.[17] However, it appears that this is not a sufficient solution for the bottleneck. Despite having received complaints against all five tech company comprising the acronym "GAFAM" from the beginning of the implementation of the new rules,[18] some designation decisions have taken much longer than others and the proceedings against Microsoft have been formally initiated only after almost all other designation decisions had been taken.[19] The President

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[12] German Parliament printed papers (*Bundestagsdrucksache*) no 19/23492, 75.

[13] FCO, *Alphabet/Google Subject to New Abuse Control Applicable to Large Digital Companies – Bundeskartellamt Determines "Paramount Significance Across Markets*" (5 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html;jsessionid=DB8DD7E165E13F0E5A1EB9372CEE7EA0.2_cid387?nn=3591568>.

[14] FCO, *New Rules Apply to Meta (formerly Facebook) – Bundeskartellamt Determines Its "Paramount Significance for Competition Across Markets*" (4 May 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html>.

[15] FCO, *Amazon Now Subject to Stricter Regulations – Bundeskartellamt Determines Its Paramount Significance for Competition Across Markets (Section 19a GWB)* (6 July 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/06_07_2022_Amazon.html>.

[16] FCO, *Apple also Subject to Provisions for Large Digital Companies under Section 19a GWB* (5 April 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/05_04_2023_Apple_Abschluss.html;jsessionid=D780D240AE1CE31E2BD7CF0384BB845A.1_cid509?nn=3591568>.

[17] FCO, *Proceeding against Apple based on New Rules for Large Digital Companies (Section 19a(1) GWB) – Bundeskartellamt Examines Apple's Significance for Competition across Markets* (21 June 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html;jsessionid=54DA99564822E56B9725E40A8C2072F6.2_cid387?nn=3591568>.

[18] Regarding Microsoft see, eg, Der Spiegel, *Deutsche Softwarefirma beschwert sich beim Bundeskartellamt über Microsoft* (26 November 2021) <https://www.spiegel.de/wirtschaft/unternehmen/deutsche-softwarefirma-beschwert-sich-beim-bundeskartellamt-ueber-microsoft-a-45932126-240e-4756-9058-b5a0e85c2a79>.

[19] FCO, *Examination of Microsoft's Significance for Competition Across Markets* (28 March 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_03_2023_Microsoft.html;jsessionid=B06F8FC3B1FDD1357571FFE64CAE215E.2_cid509?nn=3591568>.

of the FCO noted that the initiation of designation decisions "is also a resource issue". He bemoaned the fact that "the new law gave them lots of powers, but that the FCO did not get many additional new staff".[20]

B. The Risk of Distorting Existing Competition

Second, the issue of not tackling all the "GAFAM" in parallel creates a considerable risk of compromising the competitive balance between the big tech companies. While they may not have viable third-party competitors, they themselves exert competitive restraints on each other. Prioritizing proceedings against only some companies bears the risk that the regulator harms this fragile balance between the "GAFAM" and thereby creates, even if only temporarily, an absolute monopoly for one big tech company in a particular business. The inefficiencies brought about by the bottleneck of the designation requirement could thus ultimately harm the existing competitive environment in the digital sector.

C. The Risk of Surpassing Constitutional Boundaries

In order to provide the FCO with a means to designate companies with regard to any part of the business, the legislator created a very broad and flexible but at the same time somewhat vague definition of the potential addressees. While the designation step makes it predictable whether the new rules apply to a company, it is unclear whether the flexibility and vagueness of s 19a(1) of the ARC holds up to basic constitutional principles, such as the principle of legal certainty. In particular in light of the broad prohibition powers of the FCO and the fact that the burden of proof for justifying conduct that the FCO wants to prohibit lies with the gatekeeper, the requirements for legal certainty must be rather high.

Precedents that might clarify the rules are under way, but this process might take some time. Unlike Google and Meta, Amazon and Apple have appealed the FCO's designation decisions.[21] These proceedings are currently pending before the Federal Court of Justice (*Bundesgerichtshof*, FCJ), the one and only court that will look at the decision as per the rules set out in s 19a of the ARC. Notably, the FCO's designation decisions remain preliminarily enforceable in the meantime. Yet, if the FCJ, in the course of the court proceedings, were to have general concerns with regard to the flexibility and vagueness of s 19a(1) of the ARC and find that the law is non-compliant with EU law or fundamental rights, the FCO's efforts with regard to the designated gatekeepers might ultimately all be in vain.

II. Regulated Conduct – Prohibitions and Obligations

The new law does not, as such, create any behavioural rules that need to be followed; neither does a designation decision. Rather, it is for the FCO to "flip the switch". If a company is designated as a gatekeeper, the FCO may issue prohibition orders concerning specific business conduct. The list of conduct that may be prohibited resembles a "medley" of the European Commission's (EC) and the FCO's enforcement practice and ongoing competition investigations in the digital economy. Overall, the new law provides a list of seven types of conduct that may be exhaustive. While the list is definitive, each item leaves room for interpretation and creates a considerable amount of leeway for the FCO.

A. Self-preferencing

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[20] See Handelsblatt, *Kartellamtschef Mundt: Mir soll keiner erzählen, ein Monopol sei gut für Innovation* (8 February 2022) <https://www.handelsblatt.com/politik/deutschland/interview-kartellamtschef-mundt-mir-soll-keiner-erzaehlen-ein-monopol-sei-gut-fuer-innovation/28045166.html>.

[21] Compare FCO, *Extension of Ongoing Proceedings against Amazon to also Include an Examination Pursuant to Section 19a of the German Competition Act (GWB)* (14 November 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_11_2022_Amazon_19a.html?nn=3591568>.

The list kicks off with a thunderbolt by incorporating one of the currently hotly debated theories of harm into law that also features the ACCC's "wish list".[22] S 19a(2) no 1 of the ARC allows the FCO to prohibit vertically integrated gatekeepers from self-preferencing by providing more favorable treatment to their own products or services to the detriment of non-affiliated rivals, in particular with regard to a preferential presentation or pre-installation of the gatekeeper's own offering. The German legislator[23] makes no secret of the fact that this prohibition is based on the EC's milestone Google Shopping decision.[24] It was this decision that put self-preferencing on the radar of European competition enforcement.

1. The Unsolved Conflicts with Traditional Competition Law Principles

The EC's Google Shopping decision was almost entirely upheld by the European General Court (GC) in its judgment dismissing Google's appeal in November 2021. However, the whole concept of self-preferencing as an anti-competitive conduct is rather new and the exact scope of the theory remains to be clarified. While the Google Shopping case is still pending before the European Court of Justice (ECJ), it remains to be seen where the line between an unfair self-preferencing and the well-established maxim that in principle no one – not even a dominant company – is obliged to promote competition to its own detriment[25] will be drawn. The ACCC acknowledges that "not all forms of self-preferencing […] are problematic, and some may be benign or even pro-competitive".[26] However, based on the German law, it is unclear whether the legislator departed from this principle or if the FCO is required to take it into account which makes the application of the law difficult for the FCO, the gatekeepers and third-parties inclined to raise a complaint against a gatekeeper.[27] Against this background, in all likelihood, a prohibition decision under s 19a(2) no 1 of the ARC will be the subject of a tough legal battle, the end of which is hard to foresee.

2. The FCO's Case against Apple

For now, the FCO seems to cope with this uncertainty and risk by limiting the application of the law to behaviour that was or is subject to parallel investigations under traditional competition law. In particular, the FCO is looking into the Apple App-Tracking-Transparency Framework.[28] The authority is concerned that Apple is self-preferencing by introducing new preconditions for user tracking through third-party apps used on its devices and not implementing such additional hurdles for data tracking to its own services. Against the background of the ambiguities of the new law, this case does not constitute relevant

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[22] ACCC, n 1, s 6.1 and ACCC, n 3, s 3.7.

[23] German Parliament printed papers no 19/23492, 75.

[24] See EC, case AT 39740, *Google Search (Shopping)*, decision of 27 June 2017.

[25] Compare with regard to German competition law see FCJ, Judgment of 11 November 1991, Case KZR 2/90, *Aktionsbeiträge*, para 27 and Judgment of 11 November 2008, case KVR 17/08, *Bau und Hobby*, para 24.

[26] ACCC, n 1, 125.

[27] In this regard see FCO, case report of 3 April 2023, case B9-67/21, *Apple Inc – Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb*, 5 which assumes that the theory applies also to a "grey area" below the dominance threshold and thereby seems to maintain a broad scope of application.

[28] FCO, *Bundeskartellamt Reviews Apple's Tracking Rules for Third-Party Apps* (14 June 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html?nn=3591568>.

risks for the FCO, given that the French,[29] Italian,[30] Polish[31] and Romanian[32] competition agencies are investigating the same behaviour under traditional competition law rules and will thus probably legitimise a possible decision by the FCO under the new rules.

B. Impediments to Supply and Sales Activities

The second option on the list of prohibitions and obligations concerns impediments to procurement and sales activities of other undertakings. Under s 19a(2) no 2 of the ARC, the FCO may order a gatekeeper not to impede other undertakings in their activities on supply and sales markets if the gatekeeper's activities are relevant for access to such markets. This prohibition overlaps with the prohibition of self-preferencing, but is broader. Unlike the prohibition of self-preferencing, it does not require a direct link between the gatekeeper's conduct and market foreclosure and it does not presuppose a preferential treatment of the gatekeeper's own products and thus no vertical integration. Examples of such conduct are Apple's highly debated business terms, payment policies and fees for the App Store, that are already being investigated by the EC[33] under traditional competition rules based on complaints by Spotify and Epic Games.[34]

1. The FCO's Case against Amazon

In implementing this option, for now, the FCO focused on Amazon. The FCO is known as one of the most active enforcers against Amazon[35] and had initiated two new proceedings under traditional antitrust rules before the new law came into effect. Despite Amazon's appeal against its designation decision, the FCO is currently conducting these proceedings under s 19a of the ARC.[36] They concern practices around algorithmic price control over third party sellers on the Amazon marketplace and whether Amazon creates disadvantages for third-party sellers through "various instruments", including agreements with brand manufacturers that allow Amazon to sell brand products on the Amazon marketplace but prevent third-party sellers from doing the same.

2. The Risk of Precipitance

The proceeding against Amazon exemplifies the time pressure under which the FCO is operating. The legislator's intent and expectation are that the FCO will solve cases against big tech faster under the new rules compared to proceedings under traditional competition law.[37] However, this will be difficult to achieve, given that the FCO already acted quite swiftly in the past and regulators are becoming faster in

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[29] Autorité de la concurrence, *Publicité sur applications mobiles iOS: le rapporteur général indique avoir notifié un grief au groupe Apple* (25 July 2023) <https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/publicite-sur-applications-mobiles-ios-le-rapporteur-general-indique-avoir>.

[30] Autorità Garante della Concorrenza e del Mercato, *A561-A561B – "Italian Competition Authority: Investigation Opened against Apple for Alleged Abuse of Dominant Position in the App Market"* (11 May 2023) <https://en.agcm.it/en/media/press-releases/2023/5/A561-A561B>.

[31] Urząd Ochrony Konkurencji i Konsumentów, *Apple – The President of UOKiK Initiates an Investigation* (13 December 2021) <https://uokik.gov.pl/news.php?news_id=18092%20>.

[32] Consiliul Concurentei, *Investigheză piata publicității prin aplicatii instalate pe dispositive mobile Apple (iOS)* (19 October 2023) <https://www.consiliulconcurentei.ro/wp-content/uploads/2023/10/Inv-App-oct-2023.pdf>.

[33] EC, "Antitrust: Commission Opens Investigations into Apple's App Store Rules" (IP/20/1073, 16 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073>.

[34] For a discussion of this case, see Damien Geradin and Dimitrios Katsifis, "The Antitrust Case against the Apple App Store" (2021) 17(3) J Competition Law Econ 503.

[35] FCO, *Bundeskartellamt Obtains Far-Reaching Improvements in the Terms of Business for Sellers on Amazon's Online Marketplaces* (17 July 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html>.

[36] FCO, *Extension of Ongoing Proceedings against Amazon to also Include an Examination Pursuant to Section 19a of the German Competition Act (GWB)* (14 November 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_11_2022_Amazon_19a.html>.

[37] German Parliament printed papers no 19/23492, 2.

applying traditional competition law rules. For example, the Italian Competition Authority concluded its recent investigation into Amazon within less than two years.[38] Within that time period, it established, among other things, that Amazon's algorithm for selecting featured offers that appear in the "BuyBox" discriminates against merchants who are not using Amazon as their logistics provider.[39] Given the parallels to the FCO's investigation, the Italian Competition Authority's swift investigations set high bars for the FCO to conclude its investigation in an even shorter time frame. This entails the risk of sacrificing thoroughness at the expense of speed in particularly complex cases.

C. Leveraging

The third option at disposal of the FCO refers to leveraging a position to other markets. Under s 19a(2) no 3 of the ARC, the FCO may order a gatekeeper not to impede other undertakings on markets on which the gatekeeper is not dominant, but into which it may leverage its position quickly, in particular through exclusive agreements and tying or bundling strategies. The underlying theory of harm follows the logic of the cases that have shaped the regulatory practice in abuse of dominance proceedings in the past, such as the EC's investigations against Microsoft[40] and Google,[41] and is reflected in the ACCC's list of recommendations for additional obligations.[42]

1. The FCO's Case against Google

To make use of this option, since June 2022, the FCO has been investigating the Google Maps Platform for "possible anti-competitive restrictions imposed […] to the detriment of alternative map services providers"[43] and has recently issued a statement of objections.[44] The FCO is examining whether Google restricts the combination of its own map services with third-party map services, for example, regarding embedding location data, the search function or Google Street View into maps not provided by Google. The authority's concern is that Google could further expand its "position of power regarding certain map services" and will in particular examine "terms and conditions for the use of Google's map services in vehicles".

2. The Risk of Sacrificing Procompetitive Effects

The theory of harm on which s 19a(2) no 3 of the ARC is based, is well established and does not entail the same risks as those based on more recent case law such as the self-preferencing prohibition. However, the risks might lie in the detail. The draft law of s 19a of the ARC limited a prohibition of bundling and tying strategies to cases where these strategies were considered "unfair". This means, that the FCO would have had to establish and prove such unfairness. As this requirement was deleted

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[38] See Autorità Garante della Concorrenza e del Mercato, *A528 – "Amazon: Investigation Launched on Possible Abuse of a Dominant Position in Online Marketplaces and Logistic Services"* (16 April 2009) <https://en.agcm.it/en/media/press-releases/2019/4/A528 and Autorità Garante della Concorrenza e del Mercato>; *A528 – "Italian Competition Authority: Amazon fined over € 1,128 Billion for Abusing Its Dominant Position"* (9 December 2021) <https://en.agcm.it/en/media/press-releases/2021/12/A528>.

[39] Regarding this proceeding and the expansive approach endorsed by the Italian Competition Authority see Giuseppe Colangelo, "Antitrust Unchained: The EU's Case Against Self-Preferencing" (2023) 72(6) GRUR Int 1, 12–13.

[40] EC, case COMP/C-3/37.792, *Microsoft*, decision of 21 April 2004 and EC, case COMP/39.530, *Microsoft (Tying)*, decision of 16 December 2009.

[41] EC, case AT.4009, *Google Android*, decision of 18 July 2018, para 740.

[42] ACCC, n 1, s 6.2 and s 6.9.

[43] FCO, *Proceeding against Google for Possible Anti-Competitive Restrictions of Map Services (Google Maps Platform)* (21 June 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/21_06_2022_Google_Maps.html?nn=3591568%20>.

[44] FCO, *Statement of Objections Issued against Various of Google's Practices in Connection with Google Automotive Services and Google Maps Platform* (21 June 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/21_06_2023_Google.html;jsessionid=1F44889323F65C6C98DFBFACE25EE45B.1_cid509?nn=3591568>.

subsequently, under the logic of s 19a(2) of the ARC which, on the whole, operates with a reversed burden of proof, now it might be the gatekeeper that has to justify its conduct. With respect to the example of leveraging, this is of particular significance. Unlike other theories of harm that only allow for comparatively limited opportunities for justifying a certain conduct,[45] exclusive agreements and tying or bundling strategies are not by their nature anti-competitive. They may in certain circumstances even have procompetitive effects and intensify competition. Especially in an industry that is relatively young and extremely dynamic, to level the evaluation of exclusive agreements and tying or bundling strategies and rely on companies to put forward procompetitive effects might be risky. In contrast to the German legislator, the ACCC seems to be aware of this risk and therefore only calls for "tailored [obligations] to address the specific tying conduct that is likely to cause anti-competitive harm, rather than […] a broad prohibition on any and all tying by [a gatekeeper]"[46] on top of a general exception mechanism.[47]

D. Exploitation of User Data

The fourth option refers to an advantage of scope due to a gatekeeper's accumulation of data from multiple sources. Under s 19a(2) no 4 of the ARC, the FCO may order a gatekeeper to implement user consents for data exchanges between its services if these data exchanges create or significantly increase entry barriers or impede other undertakings in other ways. The underlying theory of harm contends that gatekeepers can exploit user data due to their market power and effectively foreclose digital markets by combining the data collected from various of their services to create entry barriers for their competitors.[48] The remedial action is the implementation of user consents for data exchanges between individual services offered by a gatekeeper.

1. The FCO's Case against Meta

This option is modelled after a case through which the FCO has tried to shape competition law. In early 2019, after a four-year investigation, the FCO imposed extensive restrictions on Meta (Facebook) regarding the processing of user data based on the traditional competition law provisions governing abuse control and privacy law.[49] This unconventional combination of two fields of law has led to an open disagreement between the German courts[50] on the scope of the traditional competition rules.[51] This case and the following court proceedings are one of the driving forces behind the German gatekeeper rules and fed the regulator's narrative that traditional competition law is not suited to cope with the challenges of the digital industry. While the original case is still being litigated in court,[52] the FCO has started to investigate Meta for the same conduct under the new gatekeeper rules.[53] In November 2022,

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[45] See GC, case T-612/17*, Google (Shopping)*, ECLI:EU:T:2021:763, Judgment of 10 November 2021, paras 162–164.

[46] ACCC, n 1, s 6.2.3, 137.

[47] ACCC, n 1, s 6.2.3, 164.

[48] German Parliament printed papers no 19/23492, at 76.

[49] FCO, case B6–22/16, *Facebook*, decision of 6 February 2019.

[50] Higher regional court (*Oberlandesgericht*) Düsseldorf, case VI-Kart 1/19 (V), *Facebook*, Judgment of 26 August 2019 and FCJ, case KVR 69/19, *Facebook*, Judgment of 23 June 2020.

[51] For a more detailed analysis, see Malte Frank and Sabrina Frank, "A Facelift to the Abuse of Dominance – The German Perspective on Facebook" (2020) 28 AJCCL 188; Wolfgang Kerber and Karsten Zolna, "The German Facebook case: The Law and Economics of the Relationship between Competition and Data Protection Law" (2022) 54(2) Eur J Law Econ 217; Rupprecht Podszun, "Regulatory Mishmash? Competition Law, Facebook and Consumer Protection" (2019) 8(2) EuCML 49; Giulia Schneider, "Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's Investigation against Facebook" (2018) 9(4) JECL & Pract 213; Rachel Scheele, "Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice" (2021) 12(1) JECL & Pract 34.

[52] Regarding the most recent decision in this saga, see ECJ, case C-252/21, *Meta Platforms*, ECLI:EU:C:2023:537, Judgment of 4 July 2023.

[53] FCO, *Bundeskartellamt Examines Linkage between Oculus and the Facebook Network* (10 December 2020) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/10_12_2020_Facebook_Oculus.html;jsessionid=595ED149CBC159B16C9869ACD4C07981.2_cid371?nn=3591568 and 28 January 2021; *First Proceeding Based on*

Meta partially settled this proceeding so far as Quest devices – formally sold under the Oculus brand – were concerned.[54] To settle the case, Meta committed to allow German users to use the Quest devices without a Facebook or Instagram account and thereby to restrict the data exchange with other Meta services insofar Quest devices are concerned. The FCO continues to examine the combination of data from other Meta services. This will allow the FCO to recast its 2019 decision under the traditional competition rules if Meta wins the ongoing court battle. If, on the other hand, the FCO wins the appeal, Meta will already be obliged to change its conduct on the basis of the 2019 decision and the ongoing proceeding under the gatekeeper rules will very likely be discontinued without a decision. While Meta's fate remains unclear, the FCO most recently has issued a decision obliging Google to introduce consents for data exchanges between services.[55]

2. The Risk of Losing Sight of Consumer Interests

The consents will likely come on top of existing consents that are already required in the European Union under privacy and regulatory law.[56] These multiple layers of consents have the potential to overwhelm users and, thus, to degrade their consents. It is a scientifically proven and long known phenomenon that having to make many decisions leads to a lower decision quality and ultimately to decision fatigue.[57] Against this background, there are considerable doubts as to whether the remedial action to implement consents can have a meaningful impact. The implementation of additional consents might be counterproductive, as it could overload consumers and cause them to disengage with both the existing and any new consents. This would lead to less real choice and ultimately harm consumer interests.

E. Interoperability and Portability of Data

The fifth option addresses network and lock-in effects.[58] Under s 19a(2) no 5 of the ARC, the FCO may order a gatekeeper to refrain from "refusing the interoperability of products or services and data portability, or making it more difficult, and in this way impeding competition". This obligation resembles various obligations that the ACCC is requesting for its toolbox.[59]

1. The FCO's Inactivity

It might well be that the FCO is considering applying s 19a(2) no 5 of the ARC in some of the currently ongoing investigations. However, judging by the FCO's public statements, it has, so far, refrained from opening an investigation based primarily on concerns that arise with regard to the interoperability of products or services and data portability.

2. The Risk of Jeopardising the Balance of Competition Law

New Rules for Digital Companies – Bundeskartellamt also Assesses New Section 19a GWB in Its Facebook/Oculus Case <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html;jsessionid=3165D0E3A9AEFA837FF6C64772F92505.2_cid371?nn=3591568>.

[54] FCO, *Meta (Facebook) Responds to the Bundeskartellamt's Concerns – VR Headsets Can Now Be Used without a Facebook Account* (23 November 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/23_11_2022_Facebook_Oculus.html;jsessionid=B7056BB3B6BB70AC0123B9EEC7DFF727.2_cid387?nn=3591568>.

[55] FCO, *Bundeskartellamt Gives Users of Google Services Better Control Over Their Data* (5 October 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/05_10_2023_Google_Data.html;jsessionid=C0E81B14D60119275C61CD586433B6B7.1_cid371?nn=3591568>.

[56] See inter alia Art 5(1), 6(3), 9(1) Directive 2022/58/EC, referred to as ePrivacy Directive, Art 6(1)(a) Regulation 2016/679 referred to as the *General Data Protection Regulation* (GDPR) and Art 5(2) of the DMA.

[57] David Hirshleifer et al, "Decision Fatigue and Heuristic Analyst Forecast" (2018) 133(1) *Journal of Financial Economics* 83.

[58] Compare German Parliament printed papers no 19/23492, 77.

[59] ACCC, n 1, ss 6.5 and 6.6 and ACCC, n 3, s 3.7.

This provision follows the EC's historically leading case against tech companies, its ground-breaking investigation against Microsoft regarding the Windows Media Player.[60] Yet, it remains to be seen whether it will sufficiently consider the risks and established boundaries of access rights.[61] While granting access rights might encourage competition in the short term, it can harm competition on the long run, given that potential competitors would have less incentive to develop their own products or services and the obliged company would be less inclined to invest. Against this background, it is recognized that access to resources of other companies cannot be allowed too easily.[62] In light of these considerations, the ACCC's proposal appears more reflected than s 19a(2) no 5 of the ARC because it provides for exceptions.[63]

F. Transparency

The sixth option of the FCO's list requires gatekeepers to be transparent. This is again a measure that is also considered by the ACCC as a necessary means to promote competition.[64] Under s 19a(2) of the no 6 ARC, the FCO may intervene if a gatekeeper does not inform other undertakings about the scope, quality or success of a service or "mak[es] it more difficult for such undertakings to assess the value of [a] service". The underlying theory of harm appears to be that because of difficulties over access information, such as usage data, costs incurred, click behaviour or ranking criteria, customers of gatekeepers cannot assess a service's value and, thereby, do not consider a change of service providers which ultimately leads to market foreclosure.[65]

1. The FCO's Inactivity

The FCO has so far not made any use of this rule. However, it launched a sector inquiry in the online advertising industry before s 19a of the ARC entered into force which investigates, among other things, the allegation that gatekeepers have created "walled gardens" by denying advertisers and publishers deeper insights into the results of their services, thereby making it more difficult to measure advertising coverage and impact.[66] After an almost six-year investigation, a final report was published in May 2023.[67] While the FCO assumes that the results confirm the initial suspicions, unsurprisingly, the investigated platforms disagree.[68]

2. The Risk of Obsolescence

In light of the alleged information gap in the digital economy, the fact that the FCO has so far not made use of the power conferred to it by s 19a(2) no 6 of the ARC but continued its work on a sector inquiry, may come as a surprise. However, this inactivity could be explained by referring back to the ongoing race to regulate the digital economy. S 19a(2) no 6 of the ARC might have become obsolete, given the

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[60] EC, case COMP/C-3/37.792, *Microsoft*, decision of 21 April 2004.

[61] *Esser/Höft*, in: Bien/Käseberg/Klumpe/Körber/Ost (eds), Die 10. GWB-Novelle, 2021, Kapitel 1 para. 259.

[62] Recently reconfirmed in ECJ, case C-152/19P, *Slovak Telekom*, ECLI:EU:C:2021:238, Judgment of 25 March 2021, para 47.

[63] ACCC, n 1, s 7.2.4.

[64] ACCC, n 1, ss 6.6, 6.7 and ACCC, n 3, s 3.7.

[65] Compare German Parliament printed papers no 19/23492, 77.

[66] FCO, *Bundeskartellamt Launches Sector Inquiry into Market Conditions in Online Advertising Sector* (1 February 2018) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html>.

[67] FCO, *Inquiry into Non-search Online Advertising: Significant Market Position of Alphabet/Google, Insufficient Transparency in Programmatic Advertising* (31 May 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/31_05_2023_SU_online_Werbung.html;jsessionid=EAB1A1BB40D2232F93E9B910DF692609.2_cid371?nn=3591568>.

[68] Regarding the doubts about the FCO's findings see Bundesverband Digitale Wirtschaft (Association of Digital Business), *zum veröffentlichten Diskussionsbericht des Bundeskartellamtes zum Sektor Online-Werbung* (28 October 2022) <https://www.bvdw.org/fileadmin/bvdw/Upload/publikationen/20221028_BVDW_Stellungnahme_Sektoruntersuchung_Online-Werbung_final.pdf>.

comprehensive transparency requirements imposed on very large online platforms and online search engines by Art 39 of the EU regulation 2022/2065, commonly referred to as *Digital Services Act* (*DSA*), and Arts 5(9)–(10), 6(8) and 6(10) of the *DMA*.[69]

G. Exploitation

The seventh option available to the FCO is also included on the ACCC's list but it is conceptually more advanced compared to the ACCC's recommendation.[70] It allows the FCO to prohibit a gatekeeper from imposing unfair terms and conditions on other undertakings. S 19a(2) no 7 of the ARC names demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting offers as an example. Further, making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose is also captured.

1. The FCO's Case against Google

While the controversies between big tech and press publishers concerning the use of press articles have been ongoing for a long time in Europe. and especially in Germany, the discussion in Australia gave this conflict a new momentum and certainly contributed to this option of s 19a of the ARC. Shortly after s 19a of the ARC was enacted, publishers filed a complaint against Google with regard to its News Showcase product offering publishers options to present their content within a specific framework set by Google. The FCO picked up on this and started an investigation into News Showcase, raising, among other issues, the concern that "publishers [participating in similar services offered by other providers] could be unreasonably disadvantaged by Google".[71] The FCO closed the proceeding in December 2022 based on commitments. Google confirmed, inter alia, that it will not impede publishers licensing their ancillary copyright separately from their participation in News Showcase. Further, Google committed to provide more detailed information on essential framework conditions for this service, thereby working towards a non-discriminatory access to News Showcase for all publishers.[72]

2. The Risk of Unfulfilled Expectations

While many expected the FCO to look into the remuneration for the licensing of the publishers' ancillary copyrights in the proceeding, the FCO refrained from taking a position. As the FCO's president admitted, this "was not easy" for the regulator.[73] It reveals the limits of s 19a of the ARC. S 19a of the ARC cannot overrule existing regulatory schemes. In this case – similar to the Australian News Media and Digital Platforms Mandatory Bargaining Code – the FCO held that the renumeration was to be determined in an arbitration proceeding at the German Patent and Trademark Office (*Deutsches Patent- und Markenamt*).

III. Conclusion

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[69] In this regard see, however, President of the GC, order of 27 September 2023, T-367/23 R, *Amazon*, ECLI:EU:T:2023:589 which suspended the obligation under Art 39 of the DSA due to concerns related to the confidential nature of the information that has to be disclosed in the advertisement library.

[70] ACCC, n 1, s 6.8 and n 3, s 3.7.

[71] FCO, *Google News Showcase – Bundeskartellamt Holds Consultations on Google's Proposals for Dispelling Competition Concerns* (12 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/12_01_2022_Google_News_Showcase.html>.

[72] FCO, *Improvements for Publishers Using Google News Showcase* (21 December 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/21_12_2022_Google_News_Showcase.html>.

[73] Compare Horizont, *Wie sich Andreas Mundt mit den Digitalkonzernen anlegt* (24 February 2023) <https://www.horizont.net/medien/nachrichten/bundeskartellamt-wie-sich-andreas-mundt-mit-den-digitalkonzernen-anlegt-206327?crefresh=1>.

Germany's "pioneer role" definitely merits close attention and analysis as it implements many lessons from competition law, particularly in the more recent cases in the tech sector. It includes several bold ideas and wants to enable a more efficient regulatory approach. But, as any first mover, to a certain extent, the German legislator has taken a gamble. In the worst case, based on Amazon's and Apple's appeals, the designation process could be declared unconstitutional or inconsistent with EU law and all prohibition decisions against gatekeepers taken to date could be overturned. The FCO, which sees its capacity tied up by designation decisions and has not initiated any proceedings under the traditional rules against gatekeepers since the introduction of s 19a of the ARC, could have lost valuable time and ultimately even impaired competition by inconsistently prioritizing proceedings against some of the "GAFAM" over others. Needless to say, in such an event, Germany would fall back to the last place in the race to create the world's best competition law framework.