

Stöhr, Annika

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Section 19a GWB as a measure of counter-power against "Undertakings with Paramount Significance for Competition across Markets"

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**Section 19a GWB as a measure of counter-power against “Under-
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Markets”**

Annika Stöhr

Dezember 2024

Institute of Economics

Ehrenbergstraße 29

Ernst-Abbe-Zentrum

D-98 693 Ilmenau

Phone 03677/69-4030/-4032

Fax 03677/69-4203

<https://www.tu-ilmenau.de/iedp/>

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Section 19a GWB as a measure of counter-power against “Undertakings with Paramount Significance for Competition across Markets”

*Annika Stöhr**

Abstract:

A central component of the modernization of German abuse control, implemented with the 10th amendment of the German Act Against Restraints of Competition (“Gesetz gegen Wettbewerbsbeschränkungen”, GWB), is Section 19a, which has been the subject of considerable discussion both before and after its implementation. The amendment introduces a new criterion for determining market power, namely the designation of undertakings with so-called "paramount significance for competition across markets" (UPSCAM) (Sec. 19a (1) GWB). This is designed to serve as a measure of counter-power and as a means of overcoming the limitations of traditional market power determinations in digital (platform) markets. Moreover, it allows for the implementation of ex-ante measures that prohibit conduct deemed to be particularly anti-competitive (Sec. 19a (2) GWB). This article examines the initial case practice of the German Federal Cartel Office (FCO) with the new instrument and subjects it to an economic analysis.

The introduction of Sec. 19a GWB has provided a further intervention option for addressing specific competition issues within digital ecosystems. This enables the competition authority to intervene in a more effective and timely manner when cross-market power is exploited. However, the assessment of the criteria set forth in Sec. 19a (1) GWB has thus far been rather haphazard. This issue should be addressed through further concretization in the context of future case practice and, if necessary, the issuance of corresponding guidelines.

The first case practice of Sec. 19a (2) GWB has yielded promising results, including the imposition of commitments and swift alterations in the behavior of the firms in question. Furthermore, the possibility of incorporating these Sec. 19a GWB proceedings into ongoing ones highlights the distinctive role of Sec. 19a GWB as a genuinely novel instrument within the domain of antitrust law. However, it is essential to acknowledge that the absence of enforcement and sanctioning mechanisms in the event that no commitments are reached by the firms may present a potential limitation.

* Chair for Economic Theory, Institute of Economics, Ilmenau University of Technology, Germany, Email: annika.stoehr@tu-ilmenau.de.

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A. Introduction

The 10th amendment to the German Act Against Restraints of Competition (“Gesetz gegen Wettbewerbsbeschränkungen”, GWB) was designed by legislators with the objective of "modernize(-ing) antitrust law with regard to the digitalization and globalization of the business world".¹ The necessity for modernization was evidenced by the waning intensity of competition and the accompanying increase in concentration in platform markets and digital ecosystems.² The resulting market power problems³ include the "tipping" of markets resulting from the combination of direct and indirect network effects,⁴ which is reinforced by natural or strategically created incompatibilities and switching costs,⁵ the data power of individual firms that is not or hardly contestable, as well as economies of scope that create opportunities for anti-competitive vertical and conglomerate leveraging, for example in the form of self-preferencing.⁶ The efficacy of existing antitrust instruments in addressing these challenges has

¹ CDU/CSU/SPD, Koalitionsvertrag zwischen CDU, CSU und SPD, 19th legislative period, 2018, para. 2755f.

² inter alia, *Autor/Dorn/Katz/Patterson/Van Reenen*, Concentrating on the Fall of the Labor Share, 107(5) *American Economic Review* (2017), 180; *Gutiérrez/Philippon*, Ownership, Concentration, and Investment, 108 *AEA Papers and Proceedings* (2018), 432; *Grullon/Larkin/Michaely*, Are US Industries Becoming More Concentrated?, 23(4) *Review of Finance* (2019), 697; *De Loecker/Eeckhout/Unger*, Rise of Market Power and the Macroeconomic Implications, 135(2) *The Quarterly Journal of Economics* (2020), 561; *De Loecker/Eeckhout*, Global market power, 2021, <https://www.janeeckhout.com/wp-content/uploads/Global.pdf> (accessed November 4, 2024); *Budzinski/Mendelsohn*, Regulating Big Tech: From Competition Policy to Sector Regulation?, 72-73 *ORDO* (2023), 217, 220f.

³ inter alia, *Kerber*, Updating competition policy for the digital economy? An analysis of recent reports in Germany, UK, EU, and Australia, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469624 (accessed November 4, 2024); *ACCC*, Digital platforms inquiry. Final report, 2019, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> (accessed November 4, 2024); *Barreto/Morita Sakowski/Park*, The First Report of the BRICS Competition Authorities Working Group on the Digital Economy, 3(2) *The Antitrust Chronicle* (2019), 66; *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en> (accessed November 4, 2024); *Furman/Coyle/Fletcher/Marsden/McAuley*, Unlocking digital competition. Report of the digital competition expert panel, 2019, https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf (accessed November 4, 2024); *Haucap/Kerber/Schweitzer/Welker*, Modernizing the Law on Abuse of Market Power in the Digital Age: A Summary of the Report for the German Ministry for Economic Affairs and Energy, 3(2) *The Antitrust Chronicle* (2019), 39; *Schallbruch/Schweitzer/Wambach*, A New Competition Framework for the Digital Economy – Report by the Commission “Competition Law 4.0”, 3(2) *The Antitrust Chronicle* (2019), 33; *Schweitzer/Welker*, Competition Policy for the Digital Era, 3(2) *The Antitrust Chronicle* (2019), 16; *Scott-Morton/et al.*, Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee, Report, 2019, <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C> (accessed November 4, 2024); *Steenbergen/Snoep/Barthelmé*, Benelux Competition Authorities on Challenges in a Digital World 3(2) *The Antitrust Chronicle* (2019), 54.

⁴ *Farrell/Saloner*, Standardization, Compatibility, and Innovation, 16(1) *Rand Journal of Economics* (1985), 70; *Katz/Shapiro*, Network Externalities, Competition, and Compatibility, 75(3) *American Economic Review* (1985), 424; *Rochet/Tirole*, Platform Competition in Two-Sided Markets, 1(4) *Journal of the European Economic Association* (2003), 990; *Rochet/Tirole*, Two-sided markets: a progress report, 37(3) *Rand Journal of Economics* (2006), 645; *Caillaud/Jullien*, Competition among Intermediation Service Providers, 34 *Rand Journal of Economics* (2003), 309; *Armstrong*, Competition in two-sided markets, 37(3) *Rand Journal of Economics* (2006), 668; *Budzinski/Mendelsohn* (n. 2), 233.

⁵ *Klemperer*, Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade, 62(4) *Review of Economic Studies* (1995), 515.

⁶ inter alia, *Farrell/Katz*, Innovation, Rent Extraction, and Integration in Systems Markets, 48(4) *Journal of Industrial Economics* (2000), 413; *Zhu/Liu*, Competing with complementors: An empirical look at Amazon.com, 39(10) *Strategic Management Journal* (2018), 2618; *De Cornière/Taylor*, A model of biased intermediation,

been demonstrated, prompting a discussion and implementation of various reforms, novel approaches, and instruments worldwide.

A central component of the modernization of German abuse control and one of the most discussed new instruments is Sec. 19a GWB.⁷ The legislation introduces a new power criterion, namely the designation of undertakings with so-called "paramount significance for competition across markets" (UPSCAM). This is intended to help overcome the limits and problems of classic market power determinations.⁸ Furthermore, the possibility is provided to adopt ex-ante measures in order to prevent anti-competitive behavior and enable effective competition. This article examines the initial case practice of the German Federal Cartel Office (FCO) in determining the paramount significance of firms for competition across markets (Sec. 19a (1) GWB, "Stage 1") and prohibiting specific conduct by these companies (Sec. 19a (2) GWB, "Stage 2").

I first provide an overview of the genesis of Sec. 19a GWB (chapter 2) and the first cases (chapter 3). Chapter 4 presents a discussion of the first case practice, the economic arguments employed, and the initial learnings by the FCO. The article concludes with some general policy implications.

B. Objectives and Genesis of the Instrument

Sec. 19a GWB establishes a two-stage procedure for implementing more expedient and efficacious intervention options for the FCO with regard to the abuse of dominance. The objective of this process is to foster legal certainty and ensure the harmonization of competition law within the European context. This kind of a two-stage process is analogous to that employed in "conventional" cases of abuse of market power. However, Sec. 19a GWB empowers the FCO to determine the "paramount significance for competition across markets" of individual companies in the first stage, which extends beyond the scope of traditional market power. The basis for this determination is a non-exhaustive list of criteria, as set forth in Sec. 19a (1) GWB. The criteria include: (1) the existence of a dominant position on one or more markets, (2) the financial strength of the firm or its access to other resources, (3) vertical and conglomerate integration/activity, (4) the access of the firm to competition-relevant data, and (5) the importance of the firm for/influence on the business activities of third parties, in particular on the upstream and downstream market access of these third parties. These criteria largely correspond to those that apply to the determination of market dominance by an individual company in accordance with Sec. 18 GWB. Nevertheless, the aforementioned criteria are now applied on a cross-market basis. This approach entails a comprehensive examination of the relevant sources of power of digital companies as a whole. To illustrate, a company may occupy

50(4) The RAND Journal of Economics (2019), 854; *De Cornière/Taylor*, Data and Competition: a General Framework with Applications to Mergers, Market Structure, and Privacy Policy, TSE Working Paper February 2020, n. 20-1076; *Hagiu/Teh/Wright*, Should platforms be allowed to sell on their own marketplaces?, 53(2) The RAND Journal of Economics (2022), 297; *Peitz*, CERRE Issue Paper November 2022, The Prohibition of Self-Preferencing in the DMA, https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf (accessed November 4, 2024); *Bougette/Budzinski/Marty*, Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses, 67(2) The Antitrust Bulletin (2022), 190.

⁷ *Budzinski/Gaenssle/Stöhr*, Der Entwurf zur 10. GWB Novelle: Interventionismus oder Laissez-faire?, 46 List Forum für Wirtschafts- und Finanzpolitik (2020), 157; *BKartA*, Press Release: Amendment to the Act against Restraints of Competition, 2021, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html (accessed November 4, 2024).

⁸ *Mendelsohn*, Reconsidering Conglomerates – How are digital conglomerates different from those in the past? Theory and implications, 15(1) Competition Law Review (2023), 83.

a dominant or powerful position in Market A, possess data resources in Market B, and exert relative power over upstream firms in Market C. All of these factors can be taken into account when assessing whether an undertaking is of paramount significance for competition across markets. Furthermore, this can be determined even in the absence of a dominant firm in an identifiable and clearly defined market. The legislator has explicitly stated that the criteria set forth in Sec. 19a (1) GWB need not be met cumulatively. By evaluating all criteria in each individual case, the concept aims to assess the overall significance of a firm within a digital ecosystem.⁹ The list of criteria for Stage 1 includes the presence of an actual dominant market position, which serves as an indicator of the existence of paramount significance of a firm for competition across markets. This criterion combines traditional criteria for assessing individual market dominance with elements of economic dependence or relative market power, thereby establishing a novel category of market power, which could be referred to as “systemic market power”. This approach is based on the rationale of ecosystem theory.¹⁰ The determination of paramount significance for competition across markets is limited to a period of five years from the date on which it becomes effective. This is done in order to guarantee proportionality and legal certainty, including the potential cases and obligations that may arise from Stage 2.¹¹

Stage 1 can be described as an expression of the so-called ecosystems theory.¹² The theory posits that the respective firms as a whole are not exposed to sufficient competition (pressure), yet it does not explicitly address the issue of a specific lack of competition in certain markets.¹³ This is corroborated by the necessary preliminary step of ascertaining substantial activity on multi-sided or platform markets as defined in Sec. 18 (3a) GWB and the additional criteria set forth in Sec. 19a (1) GWB that substantiate "cross-market significance". From an economic perspective, the market structures encompassed by the ecosystem concept are intricate conglomerate and lateral systems that are challenging to grasp within the conventional frameworks of market power. The existing intermediation power within individual platforms, as well as cross-platform power, can give rise to a system of multiple economic dependencies. This enables a variety of self-preferencing strategies and the leveraging of market power, the strategic creation of incompatibilities, and the creation or strengthening of barriers to market entry, without there being a dominant position of the company in one of the individual markets involved. This makes it more challenging to address these issues using "traditional" competition law instruments.¹⁴

In the event that an undertaking is deemed to be of paramount significance for competition across markets, the FCO may, in a subsequent step (Stage 2), prohibit the undertaking in question from engaging in specific conduct that is considered to be particularly harmful to competition (Sec. 19a (2) GWB): (1) the preferential treatment of its own services and goods (self-preferencing) when arranging access to sales and procurement markets, (2) taking measures that hinder third parties in their business activities on procurement or sales markets if the UPSCAM's activities are important for access to these markets, (3) directly or indirectly impeding competitors in a market in which the UPSCAM can rapidly expand its position, even

⁹ *Budzinski/Gaenssle/Stöhr* (n. 7); *Budzinski/Gaenssle/Stöhr*, Outstanding relevance across markets: A new concept of Market Power?, *Concurrences* N° 3-2020, 38; German Bundestag of 19.10.2020, printed matter 19/23492, GWB Digitization Act (2020), 73ff.

¹⁰ *Budzinski/Gaenssle/Stöhr* (n. 7).

¹¹ German Bundestag (n. 9), 75.

¹² *Heidhues/Kösters/ Kőszegi*, A Theory of Digital Ecosystems, *ECONtribute Discussion Paper No. 329* (2024); *Lianos/Eller/Kleinschmitt*, Towards a Legal Theory of Digital Ecosystems, *Centre for Law, Economics and Society Research Paper Series: 2/2024* (2024).

¹³ German Bundestag (n. 9); *Hornung*, Ecosystem Concept, the DMA, and Section 19a GWB, *Journal of Antitrust Enforcement* (2023), jnad049.

¹⁴ *Budzinski/Gaenssle/Stöhr* (n. 9); *Haucap/Kerber/Schweitzer/Welker* (n. 3).

if it is not dominant, (4) creating or increasing barriers to entry or otherwise impede third parties through the processing of competitively sensitive data collected by the UPSCAM, or requiring terms and conditions that permit such processing, (5) denying or impeding the interoperability of products or services or restricting the portability of data, (6) inadequately informing third parties about the scope, quality or success of the service provided or commissioned by the UPSCAM or otherwise making it difficult for them to assess the value of this service, and (7) demanding advantages for the treatment of offers from third parties that are disproportionate to the reason for the demand. These practices are not deemed abusive if they can be objectively justified. The burden of proof for such justifications rests with the designated UPSCAM.

C. First Cases

Since the enactment of Sec. 19a GWB in January 2021, the FCO has initiated and partially concluded proceedings against a total of five companies. Alphabet, Amazon, Apple, Meta and Microsoft have already been designated as of paramount significance for competition across markets. Furthermore, proceedings to prohibit certain types of conduct in accordance with Sec. 19a (2) GWB have already been initiated and, in some cases, concluded against the aforementioned companies. These actions were taken concurrently with the ongoing Stage 1 proceedings. Table 1 provides an overview of the status of the proceedings at both Stages.

Table 1: Overview of FCO proceedings on the basis of Section 19a Competition Act - as of September 2024¹⁵

<i>Firm</i>	<i>Stage 1 – Sec. 19a (1) GWB</i>	<i>Stage 2 – Sec. 19a (2) GWB</i>
Alphabet	Determination of paramount significance for competition across markets completed in December 2021 (legally binding)	<ul style="list-style-type: none"> - Google News Showcase (completed 12/22) - Google data processing (completed in 10/23) - Google Maps platform and Google Automotive Services (ongoing, warning in 06/23)
Meta	Determination of paramount significance for competition across markets completed in May 2022 (legally binding)	<ul style="list-style-type: none"> - VR glasses/Facebook (ongoing, introduction of meta account in 11/22)
Amazon	Determination of paramount significance for competition across markets completed in July 2022 (legally binding)	<ul style="list-style-type: none"> - Price control (ongoing, extended to Sec. 19a (2) GWB in 11/22) - Brandgating (ongoing, extended to Sec. 19a (2) GWB in 11/22)
Apple	Determination of paramount significance for competition across markets completed April 2023 (pending before court)	<ul style="list-style-type: none"> - App Tracking Transparency Framework (ongoing, initiated 06/22)
Microsoft	Determination of paramount significance for competition across markets completed in September 2024	<ul style="list-style-type: none"> - Currently no examination of specific behavior

¹⁵ *BKartA*, Proceedings against large digital companies on the basis of Sec. 19a GWB, as of September 2024 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Downloads/List_proceedings_digital_companies.pdf?__blob=publicationFile&v=12 (accessed November 4, 2024).

I. Alphabet

In the case of Alphabet, the FCO conducted the most expeditious procedure to date for determining a norm addressee status within the meaning of Sec. 19a (1) GWB. The proceedings were initiated on April 29, 2021, and concluded on December 30 of the same year. The FCO identified Google's search engine as the core product with which the company operates on markets within the meaning of Sec. 18 (3a) GWB to a significant extent in relation to the company's overall activities and in relation to its competitors.¹⁶ In this case, the FCO undertook a comprehensive examination of all of the UPSCAM criteria, and determined that Google has a dominant position in the national market for general search services.¹⁷ In addition to this dominant position, there were also indications that the firm held strong positions in adjacent markets, such as markets for search-based advertising and operating systems for mobile devices. However, the FCO did not delineate these markets nor pursue further investigations into potential dominance, as it deemed sufficient dominance to be present in the core market.¹⁸ In defining the market and determining market dominance, the FCO was guided in its conclusions by the findings of the European Commission (most recently in 2018) and other competition authorities and courts. These findings demonstrated that Alphabet did not contest the existence of Google's dominance in these other cases.¹⁹

Alphabet did not submit any appeals contesting its designation as a norm addressee in accordance with Sec. 19a (1) GWB. Subsequently, the FCO initiated three Stage 2 proceedings. The first investigation pertained to Google News Showcase, which was alleged to have exerted undue pressure and crowded out competitors and to have engaged in discriminatory practices towards participating publishers. The second case focused on data processing conditions and was prompted by concerns arising from Sec. 19a (2) s. 1 no. 4a GWB. The third case pertains to Google Maps and Google Automotive Services, including the alleged imposition of restrictions on the combination of Maps with third-party map services. These proceedings were not conducted in isolation but were integrated into larger, more comprehensive abuse proceedings. The initial two cases have already been concluded with commitments from Google, while the proceedings concerning Maps and Google Automotive Services are still ongoing following an initial warning and the preliminary legal assessment of the FCO in June 2023.²⁰

II. Meta

On January 28, 2021, just a few days after the 10th Amendment to the GWB came into force, the FCO initiated the first proceedings under Sec. 19a (1) GWB against the company Meta Platforms. These proceedings built on the abuse proceedings that had been ongoing since December 2020 due to the linking of the use of the virtual reality goggles Oculus with a

¹⁶ *BKartA* decision of 30.12.2021, B7-61/21 – Feststellung der überragenden marktübergreifenden Wettbewerbsbedeutung von Alphabet/Google, Rn. 53ff.

¹⁷ *Ibid.*, Rn. 62.

¹⁸ *Ibid.*, Rn. 231.

¹⁹ *Ibid.*, Rn. 235ff.; *European Commission* 18.07.2018, AT.40099 – Google Android, Rn. 674ff.; *European Commission* 27.06.2017, AT.39740 – Google Search (Shopping), Rn. 271ff., confirmed by ECJ ruling of 10.11.2021, T-612/17 – Google and Alphabet / Commission (Google Shopping).

²⁰ *BKartA* decision of 21.12.2022, V-43/20 – Fallbericht: Kartellrechtliche Prüfung von „Google News Showcase“; *BKartA*, Press release: Statement of objections issued against various of Google's practices in connection with Google Automotive Services and Google Maps Platform, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/21_06_2023_Google.html (accessed November 4, 2024); *BKartA* (n. 16).

Facebook profile.²¹ The decision to designate Meta as the norm addressee pursuant to Sec. 19a (1) GWB was issued on May 2, 2022. In this designation, the FCO identified Facebook as a relevant core service with which Meta holds a dominant position on the national market for social networks with a private user base.²² The identification of significant activities on markets within the meaning of Sec. 18 (3a) GWB was primarily based on Meta's activities in the domain of social media, including platforms such as Facebook, Instagram, Facebook Messenger, and WhatsApp. These platforms were deemed to exhibit the characteristics of a multi-sided market or network, particularly in view of their business models. In the course of the proceedings, all criteria set forth in Sec. 19a (1) GWB for a potential UPSCAM position were examined and found to be present. This included the dominant position of the core service Facebook and a strong market position of Meta in the area of social media advertising, as defined in Sec. 19a (1) s. 2 no. 1 GWB.²³ Meta did not contest its designation as an UPSCAM within the meaning of Sec. 19a (1) GWB. Concurrently, however, the company explicitly indicated that this did not necessarily signify its concurrence with the entirety of the FCO's findings and conclusions.²⁴

With respect to Stage 2 proceedings, the proceedings against Meta, which were initiated in 2020 due to the linking of the Facebook and Instagram services with the use of Oculus (now "Quest 2"), served as the basis for these proceedings.²⁵ In response to the concerns raised by the FCO regarding competition, Meta introduced the so-called "Meta account" in August 2022. This account allows users to utilize Oculus glasses without the requirement of registering with Instagram or Facebook, a feature that was made available in January 2023. In this regard, it is imperative that users be afforded the autonomy to determine whether to link the services in an uninhibited and impartial manner. However, the FCO underscored that the matter is not yet fully resolved, as the legality of potential cross-service data processing remains undetermined.²⁶

III. Amazon

The proceedings to ascertain whether Amazon constitutes a norm addressee as defined in Sec. 19a (1) GWB were initiated by the FCO on May 18, 2021, and the decision was issued on July 5, 2022. In this case, the designation was confirmed by the German Federal Court of Justice (BGH) in April 2024, as Amazon had filed an appeal against the FCO's decision.²⁷ A preliminary hearing was conducted in June 2023.²⁸ In addition to the issues raised by Amazon

²¹ *BKartA*, Press release: First proceeding based on 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 (accessed November 4, 2024).

²² *BKartA* decision of 02.05.2022, B6-27/21 – Übertreffende marktübergreifende Wettbewerbsbedeutung von Meta/Facebook, Rn. 117, 123.

²³ *Ibid.*, Rn. 83f.; Rn 123.

²⁴ *BKartA*, Press release: New rules apply to Meta (formerly Facebook) – Bundeskartellamt determines its "paramount significance for competition across markets", 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html (accessed November 4, 2024).

²⁵ *BKartA* (n. 22).

²⁶ *BKartA* decision of 23.11.2022, B6-55/20 – Fallbericht: Verknüpfung von Meta Quest (vormals Oculus) mit dem Facebook-Netzwerk (Meta).

²⁷ *BGH*, Press Release No. 097/2024: Federal Court of Justice confirms Amazon's paramount significance for competition across markets, https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2024_en/2024097.html (accessed November 4, 2024).

²⁸ *BGH*, Pressemitteilung: Verhandlungstermin am 27. Juni 2023 um 11.30 Uhr, Saal E 101, in Sachen KVB 56/22 (Amazon.com, Inc. - Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb), 2023, <https://www.bundesgerichtshof.de/SharedDocs/Termine/DE/OhneTermin/KVB56-22.html> (accessed November 4, 2024).

regarding the obstacles to the application of Sec. 19a GWB (potential notification obligations at the EU level and the relationship to the Digital Markets Act) arising from higher-ranking legislation, the firm questioned the market definition conducted by the FCO and the market dominance identified on the national market for the provision of online marketplace services for commercial traders.²⁹ The Competition Senate of the BGH has upheld the FCO's decision, declaring Amazon to be of paramount significance for competition across markets under Sec. 19a (1) GWB. This ruling represents the first final decision on an appeal concerning a declaratory decision under this section, underscoring Amazon's expansive operations in multi-sided markets and its strategic potential to influence competition. Furthermore, the ruling observed that Sec. 19a (1) GWB functions concurrently with the European Union's Digital Markets Act (DMA) without conflict, as it constitutes a national competition law provision.³⁰

In addition to conducting its own investigations, the FCO had also considered the findings of other competition authorities in determining Amazon to be an UPSCAM. These authorities had previously identified dominant positions held by Amazon on other geographic markets for the provision of marketplace services or intermediary services via online marketplaces.³¹ Concurrently, the FCO's decision indicates that even in the absence of a dominant position held by Amazon on the market for the provision of online marketplace services for commercial traders, the company would nevertheless possess considerable market power. It is also noteworthy that the criterion of market dominance or existing market power, as outlined in Sec. 19a (1) GWB, does not necessarily have to be met for the existence of an UPSCAM position to be established.³² In addition to a comprehensive examination of the existence of a dominant market position held by Amazon, all other criteria outlined in Sec. 19a (1) GWB were also examined in this case and found to be applicable by the FCO.

The Stage 2 proceedings in accordance with Sec. 19a (2) GWB were conducted concurrently with the proceedings before the BGH. Two ongoing proceedings concerning the abuse of algorithmic price control mechanisms and the potential discrimination of marketplace traders with regard to the admission or exclusion of traders from the sale of branded goods were extended in November 2022 to Sec. 19a (2) GWB.³³

IV. Apple

The BGH is currently deliberating on the question of whether Apple can be regarded as a norm addressee within the meaning of Sec. 19a (1) GWB. The respective determination was made by the FCO on April 3, 2023, and the company filed an appeal. However, the precise arguments advanced by the company in this case remain largely undisclosed.³⁴ The (to date) longest-

²⁹ *BKartA* decision of 05.07.2022, B2-55/21 – Feststellung einer überragenden marktübergreifenden Wettbewerbsbedeutung von Amazon, Rn. 87; *Legal Tribune Online*, BGH verhandelt über Kartellverfahrensbeschwerde. Hat Amazon eine "überragende marktübergreifende Bedeutung"?, 2023, <https://www.lto.de/recht/hintergruende/h/bgh-kvb5622-amazon-kartellrecht-kartell-bundeskartellamt-beschwerde-bgh-marktmacht-plattform-digital/> (accessed November 4, 2024).

³⁰ *BGH* (n. 28).

³¹ *BKartA* (n. 29), Rn. 263ff.

³² *BKartA* (n. 29).

³³ *BKartA*, Press release: Extension of ongoing proceedings against Amazon to also include an examination pursuant to Section 19a of the German Competition Act (GWB), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_11_2022_Amazon_19a.html (accessed November 4, 2024).

³⁴ According to Apple, the weighting of the competition concerns raised by the FCO against the business model pursued by the firm, which prioritizes the privacy and data security of consumers, is flawed. See: *Schätzler*, *fieldfisher.com*, *Bundeskartellamt: Apple ist ebenfalls Unternehmen mit überragender marktübergreifender*

running Stage 1 proceedings commenced on June 21, 2021. In a manner analogous to the circumstances surrounding the Amazon case, the FCO initially determined that Apple occupied a dominant position in the mobile hardware markets based on the iPhone, iPad, and Apple Watch products. This position is further reinforced by the technical exclusion of alternative offerings with regard to central platform markets for mobile operating systems and software distribution. Consequently, Apple is also dominant in the relevant markets with the iOS operating system and the App Store. For all three markets, the FCO determined that, even in the absence of market dominance, Apple occupied a dominant position in the relevant markets with the iOS operating system and the App Store.³⁵ This conclusion was reached after a comprehensive examination of the entire list of criteria set forth in Sec. 19a (1) GWB, which revealed that all characteristics were present.

Even prior to the conclusion of the Stage 1 proceedings, the FCO initiated further proceedings against Apple in accordance with Sec. 19a (2) GWB. The App Tracking Transparency Framework, introduced by the firm in 2021, is currently under investigation to determine whether it may potentially constitute self-preferencing. This is due to the fact that the user choices in question pertain solely to the utilization of their data in third-party products (apps).³⁶

V. Microsoft

The most recently (September 30, 2024) decided Stage 1 proceedings pertain to Microsoft and have been ongoing since March 28, 2023. The determination acknowledges the extensive digital ecosystem of Microsoft, which encompasses a range of significant markets, including PC operating systems (Windows), productivity software (Office), cloud services (Azure), gaming (Xbox), and professional networking (LinkedIn). As the FCO asserts, Microsoft's ecosystem has become a crucial part of the IT infrastructure for businesses, government agencies, and individuals, reinforced by technical interconnections and complementary offerings that extend its influence across multiple sectors. This network of interrelated products has enabled Microsoft to establish strong market positions both in traditional domains and in emerging areas such as cloud services and artificial intelligence (AI), particularly through its collaboration with OpenAI. Microsoft's ecosystem advantage allows it to offer a wide range of integrated solutions, which can potentially influence competition by fostering dependencies and limiting interoperability for third-party developers who must align their products with Microsoft's standards. Although Microsoft is also designated as a gatekeeper under the EU's DMA, this designation imposes only limited obligations, which pertain to specific services such as Windows and LinkedIn. The FCO's Sec. 19a GWB designation explicitly extends this regulatory oversight to Microsoft's broader ecosystem, thereby addressing potential anti-competitive practices that fall outside the scope of the DMA.³⁷

Bedeutung für den Wettbewerb, <https://www.fieldfisher.com/de-de/insights/bundeskartellamt-apple-ist-ebenfalls-unternehmen-mit-marktuebergreifender-bedeutung> (accessed November 4, 2024).

³⁵ *BKartA* decision of 03.04.2023, B9-67/21 – Feststellung der überragenden marktübergreifenden Wettbewerbsbedeutung von Apple, Rn. 233f.

³⁶ *BKartA*, Press release: Bundeskartellamt reviews Apple's tracking rules for third-party apps, 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html (accessed November 4, 2024).

³⁷ *BKartA*, Press release: Examination of Microsoft's significance for competition across markets, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_03_2023_Microsoft.html (accessed November 4, 2024); *BKartA*, Press Release: Microsoft also subject to extended abuse control pursuant to Section 19a GWB – Bundeskartellamt determines paramount significance across markets, 2024, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/30_09_2024_Microsoft_19a.html (accessed November 4, 2024).

At the time of writing, the FCO had not initiated any Stage 2 proceedings. However, the press release regarding the designation decision explicitly names the latest developments at the EU level regarding the separation of the Teams application from Microsoft's Office program and the takeover of games developer Activision Blizzard as matters of interest for the authority.³⁸

D. Learnings from first Case Practice

I. Stage 1

The recently introduced instrument under Sec. 19a GWB is designed to address potentially anti-competitive practices by firms that leverage diverse digital business models. In comparison with the EU's DMA, Sec. 19a GWB differs substantially in terms of the criteria used to assess and designate firms as having “paramount significance for competition across markets”. In accordance with the DMA, a company's designation as a so-called “gatekeeper” is based on clear, quantifiable thresholds. In particular, the DMA stipulates that a firm qualifies as a gatekeeper if it (a) has a significant impact on the internal market, evidenced by a minimum annual Union turnover of EUR 7.5 billion over the past three financial years, or an average market capitalization of at least EUR 75 billion in the last financial year, with operations across at least three EU Member States; (b) provides core platform services that serve as critical gateways for businesses to access end users, demonstrated by the company's service reaching at least 45 million monthly active EU users and 10,000 yearly active EU-based business users in the last financial year; and (c) enjoys a stable, entrenched market position, or is expected to achieve such a position imminently, evidenced by consistently meeting these thresholds over three financial years (Art. 3 DMA). This cumulative, data-driven approach ensures that firms with a significant and established market presence are designated as gatekeepers. In contrast, the UPSCAM determination process of Sec. 19a GWB is not characterized by the presence of definitive, quantitative criteria. In contrast, the assessment is based on a broad wide range of qualitative factors, none of which are obligatory, cumulative, or assigned a specific weight in determining a firm's standing. This structure allows the FCO considerable discretion in its determinations, which means that the process may be seen as inherently more flexible but also as less predictable. While the DMA's criteria provide a transparent threshold-based framework, however worthy of discussion they may be, Sec. 19a GWB's reliance on qualitative, non-exhaustive factors can create an environment of ambiguity, as the FCO has room to interpret and prioritize factors based on the specifics of each case. The only mandatory requirement under Sec. 19a GWB is that the firm must operate in multi-sided or network markets. This is a necessary condition for a firm to be considered for UPSCAM designation, regardless of whether its substantial cross-market importance is directly linked to platform-based services. Overall, the justifications for the determinations of an UPSCAM-position, as evidenced in the decisions by the FCO, exhibit notable differences in terms of the weighting assigned to individual factors. With regard to the FCO's case practice with respect to the individual criteria, the following initial observations can be made:

³⁸ *European Commission*, Press release: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705 (accessed November 4, 2024); *European Commission*, Press release: Commission opens investigation into possible anticompetitive practices by Microsoft regarding Teams, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3991 (accessed November 4, 2024); *Linde*, blogs.microsoft.com, Microsoft announces changes to Microsoft 365 and Office 365 to address European competition concerns, <https://blogs.microsoft.com/eupolicy/2023/08/31/european-competition-teams-office-microsoft-365/> (accessed November 4, 2024); *BKartA*, 2024, (n. 37).

- (1) *existence of a dominant position on one or more markets*: While definitive proof of a dominant market position is not a prerequisite for determining an UPSCAM-position, the FCO has nevertheless examined this factor in each of the cases thus far. Furthermore, this factor may be of significant consequence when the paramount significance for competition across markets is observed in a platform or network market within a digital ecosystem. Moreover, strong (but not necessarily dominant) market positions can be taken into account as well. It is therefore not necessary to precisely delineate all affected submarkets. A strong market position of the firm under investigation in at least one core market is generally sufficient to fulfill the criterion of Sec. 19a (1) s. 2 n. 1 GWB.³⁹
- (2) *financial strength of the firm or its access to other resources*: In its interpretation of Sec. 19a (1) s. 2 n. 2 GWB, the FCO makes reference to the ecosystem concept. Specifically, the examination considers the extent to which the company under investigation has the corresponding financial strength or other resources that can be used across markets and thus to expand or secure an ecosystem. All capabilities available to the firm are taken into account, with a focus on the company's innovation potential. Potentially competitive self-reinforcement effects are also considered.⁴⁰
- (3) *any vertical and conglomerate integration/activity*: Sec. 19a (1) s. 2 n. 3 GWB has the objective of capturing the distinctive characteristics of digital ecosystems, extending beyond the vertical or conglomerate user-side connection of the services and products offered. The FCO's analyses focus on the extent to which these connections facilitate competitive advantages or control over market access for the firm in question. The assessment of vertical and/or conglomerate connections does not result in a differential weighting; rather, it represents the corresponding "breadth" and "depth" of the services and products connected to the core market.⁴¹
- (4) *access of the firm to competition-relevant data*: The FCO considers the potential data power in accordance with Sec. 19a (1) s. 2 n. 4 GWB to be of considerable relevance, whereby data is considered a separate resource (in addition to the resources examined in Sec. 19a (1) s. 2 n. 3 GWB) with great significance for the formation and strengthening of an ecosystem. The term "data" is interpreted in a broad sense, encompassing any information accessible to the firm. In the context of "shareable inputs", which can be utilized across services and devices within an ecosystem, the FCO assesses access to competition-relevant data across markets and evaluates both the quantity and quality of data in various forms.⁴²
- (5) *importance of the firm for/influence on the business activities of third parties, in particular on the upstream and downstream market access of these third parties*: Sec. 19a (1) s. 2 n. 5 GWB addresses the rule-setting and intermediation power of firms - and thus, once again, the possibility of either creating or strengthening an ecosystem. Notwithstanding the stipulation that the individual criteria are not to be weighted, the FCO explicitly states in its explanations that the potential dependencies of other market participants can be an essential characteristic of the norm addressee position pursuant to Sec. 19a (1) GWB. This is due to the resulting opportunities to shape (or distort) the competitive process in a manner that benefits the firm. The criterion only requires that the activity of the (potential) norm addressee be significant with respect to third parties' access to procurement and sales markets, but not that it possess any market power that goes beyond this.⁴³

It is of particular significance that the stipulation that a dominant market position must be determined has been repealed. In this regard, Sec. 19a GWB attempts to encompass

³⁹ See, for example, *BKartA* (n. 29), Rn. 87; *BKartA* (n. 35), Rn. 233f.

⁴⁰ See, for example, *BKartA* (n. 16), Rn. 53ff.

⁴¹ *Ibid.*

⁴² See for example *BKartA* (n. 22), Rn. 117, 123.

⁴³ See, for example, *BKartA* (n. 16).

concentrations of power that either exceed traditional market dominance (i.e., establish cross-market power) or are caused by factors beyond prices (such as data, access, attention, etc.). In the absence of a precise market definition⁴⁴ and the determination of a dominant market position, it was previously exceedingly challenging to discern the presence of abusive market structures and behavior. The new approach allows the FCO to take action on the basis of alternative criteria and other forms or sources of economic power, thereby enhancing the capacity of competition law to address the distinctive features of digital ecosystems and the concentrations that emerge in these markets. Nevertheless, a dominant market position has been identified in all cases falling under Sec. 19a GWB to date.

Despite the FCO's comprehensive treatment of the entire list of Stage-1-criteria in relative detail, the relationship between these criteria and their respective weighting remains unclear. It is conceivable that the necessary specification will only become evident in the course of subsequent (judicial) proceedings. While the interim review findings may be convincing, they are, at times, somewhat vague and lacking in specificity. Two firms have already initiated legal proceedings, with one case having been decided in favor of the FCO's decision and reasoning. In both cases, the firms have contested the existence of a dominant market position. It remains questionable whether the finding of paramount significance for competition across markets can be considered fully convincing in the absence of a determination of market dominance. Moreover, it is unclear what level of substantiation is necessary and to what additional criteria must be met in cases where market power is not established.

II. Stage 2

Sec. 19a (2) GWB provides an exhaustive list of the types of conduct that may be prohibited by the FCO following the determination of an UPSCAM. Notably, the prohibition is *ex-nunc* in nature. It is noteworthy that the FCO is not required to demonstrate concrete harm or specific anti-competitive effects in order to enforce these prohibitions. This allows for the preemptive regulation of potentially harmful conduct. In contrast, gatekeepers under the DMA are subject to a predefined set of obligations and prohibitions that apply uniformly across core platform services. Unlike the approach taken by Sec. 19a GWB, which addresses firms' conduct on a case-by-case basis, the DMA sets out explicit and direct compliance obligations, as outlined in Articles 5-7. These articles mandate, for example, that gatekeepers refrain from practices such as combining user data without consent (Art. 5), restricting business users' ability to offer better terms on third-party platforms (Art. 5), and prohibiting preferential treatment of their own services over competitors (Art. 6). Additionally, Article 7 emphasizes the importance of ensuring interoperability between communication services provided by gatekeepers and other platforms. In essence, the obligations set forth in the DMA and the prohibited conduct to be established by the FCO under Sec. 19a GWB are largely analogous in nature and draw upon existing case law pertaining to major platform firms. However, with regard to the enforcement and sanctioning mechanisms, Sec. 19a GWB is deficient. The legislation does, however, include procedural options for managing anti-competitive conduct, such as structural and behavioral remedies under Sec. 32 GWB and the possibility for interim measures (Sec. 32a GWB) or commitments (Sec. 32b GWB), but it lacks a robust enforcement framework with direct sanctions comparable to the DMA's regime.

⁴⁴ On the discussion of market definition in merger control see, *Markovits*, On the Inevitable Arbitrariness of Market Definitions, 47(4) *The Antitrust Bulletin* (2002), 571; *Kaplow*, Why (Ever) Define Markets?, 124(2) *Harvard Law Review* (2010), 437; *Schwalbe*, e-Competitions Market definition in the digital economy (2019), Art. No. 91832; *Robertson*, Competition Law's Innovation Factor - The Relevant Market in Dynamic Contexts in the EU and the US, Hart 1st edn. 2020.

Table 2 provides a more detailed overview of the current and completed Stage-2-cases, including the types of conduct addressed in each case.

Table 2: Theories of harm of the proceedings pursuant to Sec. 19a (2) GWB - as of September 2024⁴⁵

<i>Case (firm)</i>	<i>Current status of the proceedings</i>	<i>Addressed conduct pursuant to Sec. 19a (2) GWB</i>
Microsoft	No examination of specific behavior as of November 2024	
Google News Showcase (Alphabet)	<ul style="list-style-type: none"> - Completed (12/22) without formal commitment decision - Monitoring the implementation of the following measures in a separate follow-up procedure: <ul style="list-style-type: none"> • Non-integration of Google News Showcase into Google Search • Adjustment of showcase contracts and negotiations on ancillary copyright - No confirmation of the suspected restriction of press publishers' access to the Google News Showcase service 	<ul style="list-style-type: none"> - self-preferencing within the meaning of Sec. 19a (2) s. 1 n. 1 GWB through planned integration of the Showcase service in the general Google search - through this planned integration, also examination of the existence of a measure hindering other companies in their business activities within the meaning of Sec. 19a (2) s. 1 n. 2 GWB - claiming undue advantages within the meaning of Sec. 19a (2) s. 1 n. 7 GWB in the contracts with publishing houses
Google Data Processing (Alphabet)	<ul style="list-style-type: none"> - completed (10/23) with following commitments: <ul style="list-style-type: none"> • Obligation to either introduce new options or specify the data processing conditions • Transparent design of the options in such a way that users can make a voluntary, informed and unambiguous decision • Application/design coherent with the DMA with regard to the collected data and (cross-service) data processing operations 	<ul style="list-style-type: none"> - Data processing conditions vis-à-vis end users that provide for the possibility of cross-service processing of user data without giving end users sufficient choice, in this respect exploitative behavior vis-à-vis users, which is regularly accompanied by an obstruction of other companies, within the meaning of Sec. 19a (2) s. 1 n. 4 a) GWB

⁴⁵ *BKartA*, Press Release: Proceedings against Google for possible restrictions of competition in map services (Google Maps Platform), 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/21_06_2022_Google_Maps.html (accessed November 4, 2024); *BKartA* decision of 21.12.2022, V-43/20 – Fallbericht: Kartellrechtliche Prüfung von „Google News Showcase“; *BKartA*, Press release: Statement of objections issued against various of Google’s practices in connection with Google Automotive Services and Google Maps Platform, 2023, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/21_06_2023_Google.html (accessed November 4, 2024); *BKartA*, FAQs relating to the “Google News Showcase” proceeding, 2022, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/FAQ_GoogleNews_Showcase.pdf?__blob=publicationFile&v=3 (accessed November 4, 2024); *BKartA* (n. 15); *BKartA*, Press release: Improvements for publishers when using Google News Showcase, 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/21_12_2022_Google_News_Showcase.html (accessed November 4, 2024); *BKartA* (fn. 21); *Hornkohl*, competitionlawblog.kluwercompetitionlaw.com, Brand Gating: German Competition Authority Once Again Launches An Investigation Into Amazon (and Apple), <http://competitionlawblog.kluwercompetitionlaw.com/2020/11/06/brand-gating-german-competition-authority-once-again-launches-an-investigation-into-amazon-and-apple> (accessed November 4, 2024); *BKartA*, (n. 26).

Google Maps platform (Alphabet)	<ul style="list-style-type: none"> - Ongoing - Preliminary legal assessment in connection with Google Automotive Services (06/23) 	<ul style="list-style-type: none"> - Restriction of the combination of own services with third-party services <ul style="list-style-type: none"> • Potentially reference to Section 19a (2) s. 1 n. 3 GWB or Sec. 19a (2) s. 1 n. 5 GWB
Google Automotive Services (Alphabet)	<ul style="list-style-type: none"> - Ongoing - Preliminary legal assessment and warning in connection with Google Maps platform (06/23) 	<ul style="list-style-type: none"> - Bundling of automotive infotainment services <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 2 GWB or Sec. 19a (2) s. 1 n. 3 GWB - Participation in advertising revenue from the use of Google Assistant agreed with some vehicle manufacturers on the condition that only Google Assistant is installed as a voice assistant in the infotainment platform <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 7 GWB - Obstruction of market access through contractual provisions that oblige licensees to set Google services as standard or to display them on the screen before other applications <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 2 GWB - Impediment or refusal of interoperability of the infotainment platform with third-party services <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 5 GWB
Price control (Amazon)	<ul style="list-style-type: none"> - Ongoing - Extension of an existing procedure to Sec. 19a GWB (11/22) 	<ul style="list-style-type: none"> - Obstruction of third-party sellers through algorithmic review of their pricing on the Amazon marketplace and initiation of measures or account blocking in the event of "excessive" prices <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 2 GWB or Sec. 19a (2) s. 1 n. 4 GWB
Brandgating (Amazon)	<ul style="list-style-type: none"> - Ongoing - Extension of an existing procedure to Sec. 19a GWB (11/22) 	<ul style="list-style-type: none"> - Obstruction of marketplace traders by Amazon's agreements with (brand) manufacturers concerning the admission or exclusion of traders for the sale of (brand) products <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 1 GWB or Sec. 19a (2) s. 1 n. 2 GWB

App Tracking Transparency Framework (Apple)	<ul style="list-style-type: none"> - Ongoing - initiated (06/22) 	<ul style="list-style-type: none"> - Self-preferential treatment within the scope of the regulations on app tracking of third-party apps <ul style="list-style-type: none"> • Potentially reference to Sec. 19a (2) s. 1 n. 1 GWB
VR glasses/ Facebook (Meta)	<ul style="list-style-type: none"> - Ongoing - Extension of an existing procedure to Sec. 19a GWB (01/21) - With the introduction of the meta-account (11/22), permission was granted to also sell VR glasses in Germany; proceedings on the permissibility of cross-service data processing are ongoing 	<ul style="list-style-type: none"> - Connection of the use of the Facebook account and Oculus/Meta Quest offers within the meaning of Sec. 19a (2) s. 1 n. 3a) GWB - Through this connection of services, also cross-service processing of data within the meaning of Sec. 19a (2) s. 1 n. 4a) GWB

In the cases that have not yet been concluded, the FCO makes only unspecific reference to the conduct set forth in Sec. 19a (2) GWB. The potential specific norm assignments (number references) incorporated into table 2 were derived from the descriptions of the business practices to be addressed included in the corresponding press releases. Furthermore, Alphabet's conduct with regard to Google Maps and Google Automotive Services has been listed separately for the sake of clarity, whereas these are addressed collectively by the FCO.

It is not yet evident that the FCO is focusing on particular forms of anti-competitive behavior or specific patterns in case practice. This may also be attributed to the limited number of proceedings that have been initiated thus far. In consideration of the specific potential norm assignments posited here pertaining to proceedings that have not yet been concluded, instances of abuse within the meaning of Sec. 19a (2) s. 1 n. 2 GWB have thus far been addressed most frequently with four cases. Conversely, the strategic creation of non-transparency of business-relevant information within the meaning of Sec. 19a (2) s. 1 n. 6 GWB has not yet been specifically addressed in any case.

The initial proceedings of Stage 2 of Sec. 19a GWB are noteworthy for two key reasons. Firstly, in contrast to the application of the DMA, some of the cases have been integrated into ongoing abuse proceedings. Secondly, first "successes" have already been documented in the form of commitments and prompt changes in the firms' behavior. In the two proceedings that have already been concluded with respect to Alphabet and the advanced proceedings concerning Meta, the firms have exhibited a willingness to cooperate with the FCO. In either case, the firms have either accepted commitments or offered commitments themselves. In the case of Google News Showcase, the FCO has even elected to forego a formal commitment decision. However, the "successes" thus far may also be somewhat deceptive. The commitments and behavioral changes by Alphabet and Meta are what are known as "*low hanging fruits*", or easy wins, as they concern practices that are now recognized as new rules of fair competition in the digital age, either due to recent rulings⁴⁶ or due to overwhelming consensus and findings in the literature⁴⁷. It is yet to be seen whether comparable successes can be achieved in cases where there is a lack of comparable agreement or evidence, or where firms are less cooperative. In view of the proceedings before the Federal Court of Justice regarding the designation as UPSCAM's, it seems unlikely that commitments will be forthcoming from Apple and Amazon. In this context, it can again be argued that Sec. 19a GWB is deficient in terms of its enforcement and sanctioning mechanisms. In general, it seems reasonable to suppose that some degree of success can be achieved with relative ease and expediency, which may contribute to a more open competitive climate. Nevertheless, substantial and particularly structural changes in digital markets and ecosystems appear to be unlikely.

E. Conclusion

Sec. 19a GWB is explicitly designed to address the challenges posed by digital ecosystems and platform markets that are dominated by a few large firms. By designating certain companies as

⁴⁶ An example of such a development is the Facebook decision of the FCO, which involved all instances, *BKartA* decision of 06.02.2019, B6-22/16 – Untersagung der Zusammenführung von Nutzerdaten aus verschiedenen Quellen (Facebook); OLG Düsseldorf, of 26.08.2019, Kart 1/19 (V); *BGH* decision of 23.06.2020, KVR 69/19; *CJEU* decision of 04.07.2023, Case -C252/21 - Meta Platforms Inc. v Bundeskartellamt.

⁴⁷ *Colangelo/Maggiolino*, Data accumulation and the privacy–antitrust interface: insights from the Facebook case, 8(3) *International Data Privacy Law* (2018), 224; *Budzinski/Grusevaja/Noskova*, The economics of the German investigation of Facebook's data collection, 5(1) *Market and Competition Law Review* (2021), 43; *Kerber/Zolna*, The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law, 54(2) *European Journal of Law and Economics* (2022), 217; *König*, Stärkung des Wettbewerbs- und Datenschutzes gegenüber marktbeherrschenden Onlineplattformen, 41 *NJW* (2023), 2979.

having "paramount significance for competition across markets", Sec. 19a GWB empowers the FCO to preemptively restrict practices that could impede competition. This framework diverges from conventional approaches to competition law, which frequently can only intervene after anti-competitive harm has been presented. From an economic perspective, Sec. 19a addresses the complexities of digital markets, where multi-sided network effects, data power, and vertically integrated services can result in entrenchment of dominance, the creation of barriers to entry, and the facilitation of self-preferencing practices that limit market dynamism and consumer choice. In doing so, Sec. 19a often addresses not only matters of competition but also (indirectly) issues of data protection, areas which frequently overlap in digital markets and may give rise to interconnected market failures. In digital ecosystems, a firm's market dominance frequently intersects with issues of privacy and information access, which can reinforce each other, thereby complicating the separation of these policy domains. This interplay complicates the formulation of regulatory responses, as addressing anti-competitive conduct may simultaneously impact privacy protections and vice versa. It would be advantageous for future proceedings under Sec. 19a GWB to draw upon case history, particularly in instances where competition and privacy concerns are intertwined, as exemplified by the German Facebook case.⁴⁸ Based on economic theory, this phenomenon represents a convergence of multiple market failures. This intersection is generally under-researched. Insights from welfare economics, particularly the "theory of the second best"⁴⁹, indicate that addressing one type of market failure does not necessarily lead to an overall increase in market efficiency if other market failures remain unaddressed. In digital markets, attempts to address issues of market dominance may potentially exacerbate effects on data protection – and vice versa – or give rise to unintended consequences at the policy level. These interaction effects require a comprehensive approach to enforcement, as case practice focused exclusively on addressing a single market failure may yield unintended (side-)effects. Consequently, the pursuit of welfare-enhancing outcomes in digital markets necessitates an examination of the cumulative effects and interconnections of multiple market failures. In light of the ongoing Stage 2 proceedings under Sec. 19a GWB, it is imperative to consider these interaction effects. Nevertheless, the current proceedings have not yet thoroughly addressed these intersections. It would be beneficial in the future to acknowledge and incorporate these insights into the enforcement of competition law, which could result in more balanced and sustainable outcomes.

In examining the relationship between Sec. 19a GWB and the DMA, it becomes evident that while both instruments share certain objectives and can complement each other, there are also notable differences in their approaches. In contrast to the DMA's structured and immediate obligations for designated gatekeepers, Sec. 19a GWB operates on a case-by-case basis for the Stage 2 proceedings, allowing the FCO greater flexibility but also introducing legal uncertainty for firms. Moreover, Sec. 19a GWB does not provide for direct sanctions for non-compliance, instead relying on structural or behavioral remedies, which could limit the effectiveness of enforcement in cases where firms resist voluntary commitments (as demonstrated, for example, in the cases involving Alphabet and Meta). The introduction of more explicit guidelines and sanctions for non-compliance could enhance the effectiveness of Sec. 19a GWB.

In summary, Sec. 19a GWB empowers the FCO to address instances of multi- and cross-market dominance, thereby aligning with contemporary economic theories on digital ecosystems. This approach can facilitate a more comprehensive understanding of market power by accounting for the cumulative impact of digital firms' activities across multiple markets. Nevertheless, the practical effectiveness of Sec. 19a GWB is contingent upon the consistent and transparent

⁴⁸ Kerber/Zolna, (n. 47).

⁴⁹ Lipsey/Lancaster, *The General Theory of Second Best*, 24(1) *Review of Economic Studies* (1956), 11.

application by the FCO, as well as its capacity to adapt to evolving market dynamics. Future amendments, such as those proposed by the Monopolies Commission in summer 2024, could enhance Sec. 19a GWB by refining the criteria for UPSCAM determination and strengthening its enforcement mechanisms, ultimately aligning it more closely with the economic realities of digital ecosystems⁵⁰. As further case practice unfolds, insights from both Sec. 19a GWB and the DMA may help refine regulatory strategies, supporting a balanced approach to fostering innovation while preventing anti-competitive behavior.

⁵⁰ In its 2024 Annual Report, the Monopolies Commission proposes amendments to Sec. 19a GWB. It wants to include an ‘economic test concept for digital ecosystems’ in the regulation. To this end, the catalogue of criteria for determining the ‘paramount significance across markets’ of an undertaking (Sec. 19a (1) s. 2 GWB) should either be completely rewritten or at least supplemented by further criteria, *Monopolkommission*, Hauptgutachten XXV: Wettbewerb 2024, Chapter III.