

Germany's Legislative Reform for Competition in Digital Markets: GWB- Digitalisierungsgesetz

Seoul National University – SAPI Webinar

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This presentation reflects
the presenter's views only.

11 March 2021

Monopolies Commission – a competition adviser

- Independent expert panel established by law (§ 44 of Competition Act – *Gesetz gegen Wettbewerbsbeschränkungen*, GWB) and advising the German government and legislature in the areas of:
 - Competition policy
 - Competition legislation
 - Regulation
- 5 Commission members and 15 members of staff
- Statutory obligation to submit:
 - Biennial Reports (*re* online markets: XIV §§ 331 ff.; XX §§ 1 ff.; XXI §§ 1174 ff.; XXII §§ 164 ff., 654 ff.)
 - Sector Reports (regulated industries)
 - Special Reports (topics of special interest, ministerial merger authorizations) (*re* online markets: 68 §§ 1 ff.)





Monopolies Commission – a competition adviser

- New function as advisory institution for the judiciary in the platform economy (§§ 73(5), 75(5) GWB)
 - Federal Court of Justice (*Bundesgerichtshof*, BGH) as sole court of fact and law in antitrust proceedings against platform ecosystems (§ 19a GWB)
 - Federal Court of Justice may “seek opinion of Monopolies Commission”



How do digital ecosystems build up their power?

- Relevant factors include (see BGH *Werbeblocker III*):

1. User dependence



- Level of network effects
- Provision of different services to same user groups
- Exclusive access to data
- Innovation-driven competitive pressure

2. Room for potential competition to enter market

Which competition problems can arise?



1. "Risk to competition" scenario
= tipping of relevant markets
2. "Lack of competition" scenario
= creating unassailable ecosystems across markets



What does the existing abuse law (not) cover?

- Abuse rules allow to intervene when operators of dominant platform ecosystems restrict competition through their behavior
- However...
 - Abuse rules require proof of dominance on individual relevant markets
→ timely intervention difficult where platform operators cause markets to tip and/or leverage power into other markets
 - Ecosystems may become unassailable and damage competition structurally and permanently → competition difficult to restore even where abuse rules apply



Which new tools do we need?

- German approach: new rules to complement existing abuse provisions
 - § 20(3a) GWB for "risk to competition" scenario
 - § 19a GWB for "lack of competition" scenario



What will § 20(3a) GWB (not) change?

- § 20(3a) GWB extends existing prohibition of abuses of superior bargaining position to platforms
 - Operates as anti-monopolization rule
- But: no special procedural rules to ensure timely intervention



What will § 19a GWB (not) change?

- § 19a(1) GWB targets platforms (§ 18(3a) GWB) of „paramount cross-market significance“
- § 19a(2) GWB empowers Federal Cartel Office (*Bundeskartellamt*) to prohibit relevant platform operators from engaging in specified conduct
- New rule applies beside current abuse rules
 - See FCO, [opening of proceedings against Facebook \(Oculus\)](#), 28-Jan-2021.
 - However, new rule itself does not foresee intervention only post-infringement



More specifically: “paramount cross-market significance”

Federal Parliament (*Bundestag* [Committee Printed Paper 19\(9\)926\(new\)](#), 12-Jan-2021)

- “In contrast to the existing abuse control [...], Section 19a only covers a very small circle of potential addressees. [...] These companies have such extensive resources and a central strategic position that they exert considerable influence on the business activities of numerous other companies on a wide range of markets.
- “They [...] regularly control both market access as such and the conditions for the activities of other companies on these markets. They benefit in a special way, for example, from network effects or from the advantages resulting from superior access to data, and therefore a particular risk exists that other markets will quickly become theirs.
- “[C]ompanies with superior cross-market positions use these in practice to protect and extend their dominance (U.S. House of Representatives, Investigation of Competition in Digital Markets, page 390).
 - “Due to their special market position, they can enforce demands that would not be feasible in a competitive environment.
 - “Since the users are dependent on the mediation by certain platforms and have no economically reasonable alternative, they have to accept the conditions imposed by these companies. [...]”

→ Case-by-case assessment necessary



More specifically: conduct prohibitions and enforcement

- Conduct prohibitions (§ 19a(2) GWB)
 - Self-preferential treatment (to give rivals an edge over ecosystem operators)
 - Impediments to competition/other companies (*re* essential upstream services, markets where ecosystem operator can rapidly expand, use of data, reduction of interoperability/data portability)
 - Impediments to assessing the value of services (to reduce information asymmetries)
 - Demand of disproportionate advantages in return for services (exploitation)
- Enforcement
 - Where an abuse has been established, the FCO may use its general powers (§§ 32 ff. GWB) to intervene.
 - Interim decisions generally at lower intervention standard (than previously)
 - Only one appeal in law and facts



How does § 19a GWB compare with EU DMA?

- Digital Markets Act (DMA) is a preventive instrument
 - Formal designation of “gatekeepers” without individual assessment (review upon application = reversal of burden of proof)
 - Obligations *re* impediments to competition, but without need to show anticompetitive object/effect on any relevant market
 - Obligations to facilitate entry on markets where competition is difficult to sustain (interoperability/data sharing obligations)
 - Other obligations give rivals an edge over “gatekeepers” (strict MFN and self-preferencing prohibitions)
- However, DMA may apply on (still) competitive markets
 - § 19a GWB unclear (abuse rule!)
- Procedural focus on identifying relevant gatekeepers/obligations, not on pursuing infringements



How does § 19a GWB compare with EU DMA?

§ 19a GWB

- Paramount cross-market significance assessed in individual case
- Prohibition of impediments to competition/other companies
- Prohibition of self-preferential treatment
- Prohibition of impediments to assessing the value of services
- Prohibition of demands of disproportionate advantages in return for services
- Use of general enforcement tools
- Only one appeal in law and facts

EU DMA

- Formal designation of “gatekeepers” with review only upon application
- Obligations *re* impediments to competition, but without need to show anticompetitive object/effect on any relevant market
- Obligations to facilitate entry on markets where competition is difficult to sustain
- Other obligations give rivals an edge over “gatekeepers” (incl. self-preferencing prohibition)
- Procedural focus on identifying relevant gatekeepers/obligations, not on pursuing infringements



What are the open questions of the new German rules?

- Relationship to EU law
 - Art. 102 TFEU (+ Art. 3 Reg. 1/2003)?
 - Prospective: Digital Markets Act?
- Link to competition
 - When do markets tip permanently (§ 20(3a) GWB)?
 - How is the “paramount cross-market significance” (§ 19a GWB) different from market dominance?
 - + Which are the special characteristics of abuses of companies with “paramount cross-market significance” (theory of harm)?
- Agency intervention
 - Under which factual conditions is there reason for authorities to intervene?
 - Which intervention is suitable to effectively eliminate the abusive practices?



What is the Monopolies Commission position (to date)?

- Existing abuse rules must be enforced more effectively
- § 20(3a) GWB on tipping scenarios justified if timely intervention can be ensured
- Reservations regarding § 19a GWB:
 - Concept of “paramount cross-market significance” (subs. 1) not based on established economic authority
 - Abuse groups (subs. 2) address very different types of behavior
 - Impediment of competitors should be required for all prohibited abuses (missing in Nos 1, 6 and 7)
- Basically left to agencies/courts to determine what the characteristics of abuses under § 19a are (legal uncertainty)
- That said, enforcement of national rules can be informative for DMA legislation



Thank you for your attention!

For more information

Monopolies Commission, Biennial Report XXIII, 2020, §§ 45 ff., 73, 80:

https://www.monopolkommission.de/images/HG23/Main_Report_XXIII_Control_of_abusive_practices_in_the_digital_platform_economy.pdf

Monopolies Commission, Policy Brief No 4:

https://www.monopolkommission.de/images/Policy_Brief/MK_Policy_Brief_4_en.pdf

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