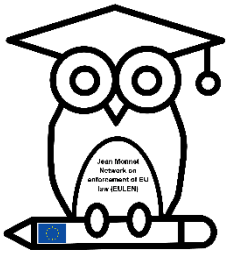

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Section 19a GWB as the German "Lex GAFA" – lighthouse project or superfluous national solo run?

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As the European Union kept on struggling with its Digital Markets Act (DMA), Germany forged ahead and implemented its own "Lex GAFA" in early 2021. First of all, this paper will introduce this new Section 19a of the German Competition Act and its inner workings. Secondly, Section 19a will be compared to the classical Article 102 TFEU-procedure and thirdly, set in contrast to European DMA-endeavours. Thereby, the paper will present advantages and disadvantages of Section 19a in comparison to existing and future European law with the aim of assessing whether Section 19a is in fact the lighthouse project it was presented to be – or rather a superfluous national solo run.

Keywords:

Section 19a, DMA, Digital Markets Act, Big Tech, GAFA, undertaking of paramount significance, network effects, intermediary power, gatekeeper, digital platforms.

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I. Introduction

In quite a lot of ways, the digital realm and the "old", analogue world differ widely. Competition and markets are no exception.[1] That is why, all over the world, legal scholars and practitioners alike have been discussing new legislation especially designed to facilitate controlling "the big four", id est *Google* (*Alphabet*), *Amazon*, *Facebook* (*Meta*) and *Apple*.[2] As the European Union kept on struggling with its Digital Markets Act (DMA), Germany forged ahead and implemented its own "Lex GAFA" in early 2021. This new Section 19a of the German Competition Act ("Gesetz gegen Wettbewerbsbeschränkungen"; *GWB*) addresses "undertakings of paramount significance for competition across markets" and allows the *Bundeskartellamt* as the German Competition Authority to impede certain abusive behaviour. Yet, until now, its outcome seems to be meagre: Proceedings in declaring *Apple*, *Facebook* (*Meta*) and *Amazon* as undertakings of paramount significance are still ongoing.[3] And even though after nearly an entire year of assessment, the *Bundeskartellamt* declared *Google* (*Alphabet*) to be an undertaking of paramount significance,[4] concrete steps against certain conduct have yet to be taken. This raises the question whether Section 19a is in fact the lighthouse project it was presented to be[5] – or rather a superfluous national solo run.[6]

The paper will introduce Section 19a and its inner workings (II.). Afterwards, Section 19a will be compared to the classical Article 102 TFEU-procedure (III.) and set in contrast to European endeavours with the DMA (IV). These solutions to current challenges will be compared, and thereby the differences highlighted. To assess this German "Lex GAFA", the paper will present advantages and disadvantages of Section 19a in comparison to existing and future European law.

II. Section 19a – its inner workings

Section 19a is based on a two-step approach: Paragraph 1 stipulates the conditions under which an undertaking falls within its scope and Paragraph 2 governs potential abusive conduct. However, both the norm addressee and the forbidden behaviour do not result ipso iure but must be "activated"[7] by the *Bundeskartellamt*. That is, at the first stage, the competition authority must issue a declaratory decision designating an undertaking, and in a second step, for it to become illegal, the *Bundeskartellamt* must prohibit a concrete behaviour.

1. Declaratory decision naming an undertaking as norm addressee

Section 19a(1) determines two cumulative conditions under which the *Bundeskartellamt* may designate an undertaking which thereby will become liable to prohibition orders: Firstly, the undertaking has to be active to a significant extent on multi-sided or network markets, and secondly, it must feature paramount significance for competition across markets.

[1] In depth: Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era* (2019).
[2] Some augment this circle to „the big five", also including Microsoft (e.g. Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the Ger-man Competition Act' [2021] Journal of European Competition Law & Practice 513, 515).
[3] Compare BKartA, *Verfahren gegen Apple nach neuen Digitalvorschriften* (Press Release: 2021). For a short discription of all four cases see Ulrich Schnelle and Elisabeth S Wyrembek, 'Die moderne Missbrauchsaufsicht' [2021] GRUR-Prax 432.
[4] *Alphabet Inc. Google Germany GmbH* (2021) B7-61/21 (BKartA).
[5] Compare Rupprecht Podszun and Fabian Brauckmann, 'GWB-Digitalisierungsgesetz: Der Referentenentwurf des BMWi zur 10. GWB-Novelle' [2020] GWR 436, 437: "downright revolutionary" ("geradezu revolutionär").
[6] Compare Andreas Grünwald, '„Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' [2020] MMR 822, 826: "Deutscher Sonderweg" (literally: "German special path"; negative connotation).
[7] Tobias Lettl, 'Der neue § 19a GWB' [2021] WRP 413, recital 4.

a) Significant activities on multi-sided or network markets

The condition regarding an undertaking's economic activities can be split up into two components: Activities on multi-sided or network markets and its significance.

The restriction to multi-sided markets or networks is not stipulated directly in Section 19a but results from a referral to Section 18(3a). Section 18 is actually a norm clarifying under which conditions an undertaking controls a market. Its Paragraph 3a is fairly new itself as it just came into force with the 9th Amendment to the *GWB* in June 2017. It introduces additional criteria (such as consumer costs in switching a platform) to be considered when evaluating market dominance regarding "multi-sided markets and networks". According to the grounds of the law to this former 9th Amendment, multi-sided markets are characterised by having at least two different user groups to whom goods or services are offered. They exhibit indirect network effects. That is, the utility of one user group is linked to the existence and size of the other user group. In contrast, according to the grounds of the law, networks are characterised by their direct network effects. Id est, the utility of one user increases with the total number of users.[8] To give an example: In accordance with Section 18(3a), social media platforms are networks whereas sales platforms are multi-side markets. As the norm includes both terms, clarifying border cases (such as the social media platform with regards to advertisement agencies) is not necessary.

It is currently rather controversial if the scope of Section 19a is further restricted to digital markets.[9] This is because on the one hand, even though the grounds of the law to Section 18(3a) indicate that it was especially introduced with regards to digital markets, credit card systems and shopping malls are explicitly pointed out as real-world examples.[10] Thus, at least Section 18(3a) is not limited to digital markets.[11] In contrast, the grounds of the law to the 10th Amendment state that Section 19a shall be restricted to digital markets.[12] Within the German legal system, the grounds of the law are not binding as they are published by the government, but it is parliament that finally passes a law. Instead, the wording of a norm, its (in general objectively determined)[13] purpose and its systematic position are considered to be of greater importance. As neither wording nor systematic position supports a restriction to digital markets, such a delimitation is difficult to justify. Nonetheless, despite all academic discussion, it must not be forgotten that the most pressing addressees of Section 19a belong to a small circle of undertakings mainly operating on digital markets.[14] Therefore, at least in the near future, its actual scope of application will be limited to digital markets.[15]

The undertaking's activities on multi-sided or network markets must mount up to a significant extent. This criterion contrasts the relevant enterprise's activities as a platform or network to its other economic activities.[16] That is, the undertaking must operate to a certain amount on multi-sided or network markets. It is not yet clear whether on top of that, the undertakting must realise the majority of its economic activities on markets

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

[9] Pro: Nothdurft, '§ 19a GWB' in Hermann-Josef Bunte (ed), *Kartellrecht* (14th ed. 2022) 23; Florian C Haus and Lukas Rundel, 'Neue Missbrauchsaufsicht für digitale Ökosysteme' [2022] RDi 125, recital 10. Contra: Lettl (n 7), recital 9; Thorsten Mäger, 'Die 10. GWB-Novelle: Eine Plattform gegen Big Tech?' [2020] NZKart 101, 101; Torsten Körber, '„Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle' [2020] MMR 290, 293 et sqq; Stephan M Nagel and Katharina Hillmer, 'Die 10. GWB-Novelle' [2021] DB 327, 329; Franck and Peitz (n 2), 516, 517.

[10] Gesetzesentwurf der Bundesregierung, 9th Amendment (n 8) 49.

[11] Töllner, '§ 18 GWB' in Hermann-Josef Bunte (ed), *Kartellrecht* (14th ed. 2022) recital 171; Fuchs, '§ 18 GWB' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht* (6th ed. 2020) recital 140.

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

[13] Compare Markus Würdinger, 'Das Ziel der Gesetzesauslegung' [2016] JuS 1.

[14] Compare the grounds of the law (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 74, 75): "targets a small circle of undertakings" ("zielt auf einen kleinen Kreis von Unternehmen"), "only for a few undertakings" ("nur für wenige Unternehmen"), "strictly limited circle of norm addressees" ("eng begrenzte[r] Adressatenkreis").

[15] See also, to this effect, Haus and Rundel (n 9), recital 10.

[16] See however the grounds of the law according to which the comparison to other undertakings present on the relevant market shall be taken into account as well (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 74). With regards to the paramount significance-criterion, this does not make sense. Nothdurft (n 9) recital 27 states that because of changes in the legislation process, this aspect has become obsolete and thus may be ignored.

addressed by Section 18(3a) – or whether it is sufficient that these activities are not entirely negligible.[17] Therefore, some legal scholars predict delimitation problems.[18] But again: Currently, the *Bundeskartellamt* focuses its efforts on a handful of digital, international groups. Hence, delimitation problems will at least not occur in the near future – if ever.

Finally, it is worthwhile noting that the significant extent-criterion is a dynamic one: An undertaking's activities may rapidly shift from the analogue to the digital world. One must only consider the swift changes realised during the COVID-19 pandemic. Thus, undertakings currently not considered may suddenly become norm addressees.[19]

b) Paramount significance for competition across markets

In the second place, Section 19a(1) only addresses undertakings of paramount significance for competition across markets. This requirement shall guarantee the relative importance of an undertaking. Because of the wording "across markets", some scholars argue that an undertaking has to be active on at least two different markets to become a norm addressee.[20] Yet, the point of reference is clearly competition itself. Therefore, no market definition is necessary[21] and hence, the *Bundeskartellamt* is not obliged to establish the activities on different markets.[22]

Even though, at a first glance, "paramount significance" looks like a hard criterion to fulfil, it is intended as the opposite: Traditional competition law, especially Article 102 TFEU, only addresses undertakings in a position of dominance. In Section 19a, the threshold is deliberately lower while still indicating a certain leading position.[23] The idea behind this difference is twofold: Firstly, the grounds of the law state that within the digital realm, importance results from undertakings operating on various markets and especially realising network effects – possibly without being in a position of dominance on even one of them.[24] Secondly, there is the rather pragmatic thought that determining market power on digital markets is difficult and time consuming. Though there have been cases against *Google*, *Amazon*, *Apple* and *Facebook* in the past at both the European and national level, the final decisions took several years and were generally considered too late.[25] Therefore, speeding up the process is one of the most important goals of Section 19a(1).[26]

While the first sentence of Section 19a(1) only stipulates abstract criteria, its second sentence denominates various factors relevant for determining an undertaking's significance. As the term "especially" indicates, all of them are just examples, do not have to be present at the same time, and are not to be considered exclusively. Moreover, according to the grounds of the law, the order in which they are named does not imply any quantification.[27]

[17] E.g. see the grounds of the law (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 74): "only undertakings with a focus on digital business models" ("nur Unternehmen mit Schwerpunkt im Bereich digitaler Geschäftsmodelle") – "Therefore, undertakings are not encompassed for whom their activities as platform or network […] only play a very minor role" ("Nicht erfasst sind damit Unternehmen, bei denen die Tätigkeit als Plattform oder Netzwerk […] nur eine vollkommen untergeordnete Rolle spielt").
[18] E.g. Haus and Rundel (n 9), recital 11.
[19] Compare Nothdurft (n 9) recital 26.
[20] Lettl (n 7), recital 10.
[21] Marco Botta, 'Sector Regulation of Digital Platforms in Europe' [2021] Journal of European Competition Law & Practice 500, 503.
[22] Nothdurft (n 9) recital 28. See however Franck and Peitz (n 2), 517 still stressing the importance of defining markets.
[23] Lettl (n 7), recital 12.
[24] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 73.
[25] Rupprecht Podszun, 'Die 10. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)' (23 November 2020) Ausschussdrucksache 19(9)887 7, 8; Thorsten Käseberg, 'Kapitel 1' in Florian Bien and others (eds), *Die 10. GWB-Novelle* (2021) recital 174.
[26] Compare Nothdurft (n 9) recitals 4, 5.
[27] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 75.

Interestingly, the very first factor denominated is market dominance. Even though, as stated before, dominance is not necessary for a position of paramount significance, the argumentum e contrario is admissible. Further aspects explicitly named are financial strength and the access to other resources. The particularly relevant access to data[28] is denominated in a recital of its own. Finally, vertical integration and its significance for third parties, that is intermediary power,[29] are stipulated.

2. Prohibition decision regarding certain behaviour

Section 19a(2) denominates a catalogue of potentially harmful acts. However, the norm only stipulates the option of prohibiting certain activities but does not contain a prohibition in itself. Instead, the *Bundeskartellamt* must take further action.

Consistently, the outlined behaviour is rather vague. The underlying idea is that the *Bundeskartellamt* may assess the circumstances on a case-by-case basis and thus concretise the course of action outlined by Section 19a(2).[30] Only after being designated an undertaking of paramount significance and after having received a prohibition decision, the undertaking must comply with the stipulated rules of conduct and only then, if the undertaking infringes the legal prohibition decision, an administrative fine may be imposed or a harmed party sued for damages.[31]

It is worthwhile noting that the title of the norm refers to "abusive conduct" even though Paragraph 2 does not denominate the listed actions as abusive. Correspondently, the second sentence of Paragraph 2 provides a justification-opportunity to the addressed undertaking.[32] That is, the undertaking may outline why its conduct is compliant to competition. However, as Sentence 3 explicitly points out, the burden of proof lies with the undertaking.[33] That is, the norm does not state that the listed conducts are abusive, but contains a rebuttable presumption.[34] The President of the *Bundeskartellamt Andreas Mundt* explains this as follows: "It denominates 'typically abusive' behaviour which may be prohibited by the *Bundeskartellamt* without the need of substantiating the abusiveness."[35]

What is more, the *Bundeskartellamt* does not have to elaborate on the harmfulness of the conduct in more detail. There is not even a defence of unharmfulness. Section 19a(2) simply implies that the behaviour will have negative consequences.[36]

In total, Section 19a(2) lists seven conducts: Section 19a(2)1 No 1 addresses the role of intermediary and the problem of self-preference. Therefore, it only applies to vertically integrated intermediaries. That is why Number 2 deals with gatekeepers in general and disparate conditions to different enterprises. Both Number 1 and 2 are special forms of exclusionary conduct.[37] Number 3 targets enrolment and leverage effects. The norm gives the examples of linking the use of an offer to the automatic use of another offer and making the use of an offer conditional on the use of another offer. Number 4 particularly approaches data. Making the use of services conditional on the user agreeing to the processing of data from other services is just one of the examples denominated. According to Number 5, interoperability and data portability may be enforced. The

[28] Compare ibid.
[29] Ibid.
[30] Matthias Heider and Konstantin Kutscher, 'Die 10. GWB-Novelle und die Missbrauchsaufsicht digitaler Plattformunternehmen' [2022] WuW 134, 136.
[31] Compare Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 75.
[32] Compare Heider and Kutscher (n 30), 136 stressing its importance.
[33] In depth: Marcel Scholz, 'Regulierung nach § 19a GWB' [2022] WuW 128.
[34] Compare Botta (n 21), 505.
[35] Andreas Mundt, 'Wandel der kartellbehördlichen Aufsicht und die aktuellen Herausforderungen' [2021] WuW 418, 419: "Sie benennt „typischerweise missbräuchliche" Verhaltensweisen, die das Bundeskartellamt den betreffenden Digitalunternehmen untersagen kann, ohne die Missbräuchlichkeit des Verhaltens zusätzlich umfänglich begründen zu müssen." (Translation TB).
[36] Compare Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 78.
[37] Compare ibid 75, 76.

underlying idea is to prevent lock-in effects because of missing interoperability and data portability.[38] Number 6 imposes an information duty as deficits therein complicate comparability.[39] Finally, Number 7 contains a special form of exploitative abuse banning the undertaking from demanding disproportionate benefits for handling the offers of another undertaking. That is, the undertaking of paramount significance shall not be able to gain advantages simply because of its position.[40]

The list is not intended to be mutually exclusive. On the contrary: To avoid regulatory gaps, they are especially designed to overlap.[41] In the beginning of the legislative process, the behaviour was just outlined in rather vague terms. In reaction to the DMA-Proposal stipulating concrete duties, the list was augmented and furthermore, examples were included.[42] These examples are to ensure effectivity and legal certainty but do not indicate that a behaviour not mentioned is legal.[43]

In theory, the prohibition decision should implement an ex-ante regulation. Yet, the grounds of the law state that such a decision may only be issued if there is "Erstbegehungsgefahr" (hazard of first infringement) or "Wiederholungsgefahr" (hazard of repetition).[44] In general, these terms refer to a situation in civil proceedings: To obtain an injunctive relief, a claimant must demonstrate that the respondent will engage in unlawful conduct in the near future by presenting serious and tangible factual indications. If the respondent has previously committed infringements, there is a general presumption of repetition. As they are civil proceeding-terms and, moreover, as there is no such indication in the wording of Section 19a(2), this statement in grounds of the law is rather surprising.[45] Legal scholars have pointed out that indeed, the *Bundeskartellamt* may not act without sufficient cause, but that this is a question of "pflichtgemäße Ermessensausübung" (reasonable discretion) resulting in a slightly different standard of review.[46] Notwithstanding this academic dispute, in the end, it is important to highlight that the *Bundeskartellamt* may not issue a prohibition decision without due cause. Especially, it will not be possible to issue the very same prohibition decision to every undertaking of paramount significance pursuant to Section 19a(1) whenever a certain behaviour comes up. Section 19a(2) does not hand the authority to create quasi-laws to the *Bundeskartellamt*.

3. Norm inherent criticism

Section 19a polarises. Several potential problems result from its vagueness, especially in Paragraph 1 but to a certain extent in Paragraph 2 as well. Regarding Paragraph 1, some legal scholars allege that because of being too sketchy, denominating an undertaking requires difficult, demanding and thus time-consuming investigations.[47] The very first case of *Google* seems to justify these fears: Though Section 19a was especially designed with regards to the big four, it took the *Bundeskartellamt* almost one year to issue its declaratory decision.[48] In this context, it is worthwhile noting that the highlighted position of market dominance as the first factor denominated for assessing the paramount significance across markets is rather unfortunate, as well. Contrary to the idea of establishing a different approach, it rather invites scholars to point out that a decision based on market dominance is better justified than one based on the other criteria.[49] Consequently or possibly

[38] Ibid 76.
[39] Ibid 77.
[40] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie 13 January 2021, BT-Drs. 19/25868 117.
[41] Nothdurft (n 9) recital 50.
[42] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (n 40) 113.
[43] Ibid 114. Sceptical: Andreas Grünwald, '§ 19a GWB' in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht* (100th ed. 2021) recital 59.
[44] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 75.
[45] Haus and Rundel (n 9), recital 25.
[46] Compare Lettl (n 7), recital 22.
[47] Ibid recital 15. Regarding the government draft: Podszun (n 25) 9, 11.
[48] However, note that the grounds of the law foresaw process durations of two years (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 61).
[49] E.g. Haus and Rundel (n 9), recital 13.

only to be on the safe side, the *Bundeskartellamt* did indeed establish *Google*'s market dominance[50] – which might have taken even more time. Those in favour of Section 19a respond that indeed, the declaratory decision is time-consuming, but has to be made only once.[51] Thereafter, prohibition decisions are alleviated. Moreover, even the declaratory decision may have positive effects in making an undertaking aware of its position.[52] As following the *Bundeskartellamt*-decision, *Google* itself suggested remedies to remove competition concerns,[53] this presumption seems to be correct. Yet, one cannot fail to notice that Section 19a generally requires two steps which makes the proceedings cumbersome.

Another point of criticism resulting from Section 19a's vagueness is the accusation of legal uncertainty and an unnecessary shift in power towards the executive.[54] In contrast, supporters argue that only this vagueness guarantees the necessary flexibility for such dynamic markets.[55] These two interests are definitely opposed to each other. The grounds of the law state that the requirement of firstly designating an undertaking and secondly prohibiting a concrete behaviour sufficiently mitigates the problem of legal uncertainty.[56] Yet, the problem of a shift in power remains.

Finally, Section 19a has the huge disadvantage of being limited to German territory.[57] Of course, with the DMA being delayed time after time, the only alternative was not acting at all.[58] Some argued that German endeavours could function as a light house project convincing the rest of Europe of its necessity and therefore paving the way for DMA.[59] Yet, despite all good intentions the risk of market fragmentation remains.[60]

III. Section 19a and Article 102 TFEU

After analysing Section 19a on its own, to gain further insights, the norm will now be set into comparison to traditional antitrust law. However, first of all, it is important to note that, though Union law is primarily applied, according to Article 3(2)2 Regulation (EC) No 1/2003, Member States may adopt stricter national law which prohibits unilateral conduct. Hence, Article 102 does not precede Section 19a.[61]

Comparing Section 19a to market abuse control reveals various similarities up to identical parts but great differences as well. The first difference manifests itself with regards to the modus operandi: Article 102 directly prohibits certain conducts. In contrast, Section 19a twice requires "activation" and is thus more dependent on the *Bundeskartellamt*'s actions. Whereas with Article 102, private individuals may sue without further intervention of a competition authority, this door is closed with Section 19a.[62] Yet, though this may be a huge discrepancy in theory, one must not forget that in real life, stand-alone actions are very few.

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[50] *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21 3 (BKartA).
[51] Ibid recital 15. See Nothdurft (n 9) recital 129: "Vorratscharakter" (storage nature).
[52] Yet, on the negative side, this may also lead to paralysis (Romina Polley and Rieke Kaup, 'Paradigmenwechsel in der deutschen Missbrauchsaufsicht' [2020] NZKart 113, 116).
[53] Haus and Rundel (n 9), recital 5 referring to BKartA, *Google News Showcase* (Press Release: 2022).
[54] See Körber 2020 (n 9) 294; Polley and Kaup (n 51), 116.
[55] See Nothdurft (n 9) recital 51; Philipp Steinberg, Raphael L'Hoest and Thorsten Käseberg, 'Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU' [2021] WuW 414, 416.
[56] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 74.
[57] Bernhard Jakl, 'Jenseits des Datenschutzes' [2021] RDi 71, recital 13.
[58] Therefore in favour of Section 19a: Torsten J Gerpott, 'Neue Pflichten für große Betreiber digitaler Plattformen: Vergleich von § 19a GWB und DMA-Kommissionsvorschlag' [2021] NZKart 273, 279.
[58] See Podszun (n 25) 10.
[59] See Podszun (n 25) 10.
[60] European Commission, *Impact Assessment Report* (SWD(2020) 363 final 2020) recital 29. Further: Boris P Paal and Lea K Kumkar, 'Wettbewerbsschutz in der Digitalwirtschaft' [2021] NJW 809, recital 20; Scholz (n 33), 134.
[61] Nothdurft (n 9) recital 136. However, there is some critical debate whether Section 19a differs so much from traditional competition law that Article 3(2)2 does not even apply (see Grünwald, '„Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' (n 6) 824; Paal and Kumkar (n 59), recital 18).
[62] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 75.

Another modification can be seen with regards to the norm addressee: Though both in a position of power, Article 102 requires market dominance whereas with Section 19a, a position of paramount significance suffices. This aspect allows for more undertakings to be considered. Moreover, it is supposed to simplify the work of the *Bundeskartellamt*. Yet, especially considering that market dominance is a criterion for determining the position of paramount significance, there is reasonable doubt whether this intended simplification works.

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

Finally, regarding the relevant behaviour, both Section 19a and Article 102 target abusive conduct of undertakings.[63] Therefore, the relevant conduct is rather similar. Though Article 102 does not point out problematic behaviour in such detail, there is no abusive behaviour captured by Section 19a that could not be targeted by Article 102.[64] Yet, by directly naming certain conducts and on top of that giving examples, Section 19a intends to lighten the burden of proof for the *Bundeskartellamt*. However, scholars doubt whether in practice, this really results in a simplification of procedure – or whether the concretisation leads to a different, yet comparable effort.[65]

Summing up, Section 19a and Article 102 both target abusive conduct of undertakings in a position of power. Regarding its scope, Section 19a is narrower, but within, both norms could be applied to the very same case.[66] Hence, in the end, Section 19a can only become of relevance if – in practical terms – it allows a more effective control of abusive practices. At least its design is intended to be better suited to tackle GAFA. Yet, as the wording is rather vague, there is justifiable doubt on its manageability.[67]

IV. Section 19a and the Digital Markets Act

On March 25th, Parliament's rapporteur *Andreas Schwab*, French Secretary of State *Cédric O*, Commission Executive Vice-President *Margrethe Vestager*, and Commissioner for the Internal Market *Thierry Breton* gave a joint press conference announcing that a deal on European Digital Markets Act had been reached.[68] And though a final document has yet to be published, in the words of *Vestager* "the co-legislatures have kept the main architecture of [the] proposal", especially "the centralised enforcement on EU-level, the designation process of a gatekeeper, the series of dos and don'ts and the tools of enforcement".[69] Consequently, the DMA-Proposal[70] can still serve as a basis for comparing Section 19a with European legislation yet to come.

Contrasting DMA and Section 19a, one big similarity stands out: Both of them focus on Big Tech. While with Section 19a, one has to consult the grounds of the law,[71] the DMA directly focuses on gatekeepers which are defined in relation to core platform services requiring a link to the digital realm.[72] On top of that, both the

[63] Compare ibid referring to Section 19a as "real abuse control" ("echte Missbrauchsaufsicht").
[64] Nothdurft (n 9) recital 4, 49; Körber 2020 (n 9) 295.
[65] See however Gerpott (n 57), 277 who forecasts problems regarding DMA's vagueness as well.
[66] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 75.
[67] See Lettl (n 7), recital 51.
[68] Andreas Schwab and others, 'Press conference on the Digital Markets Act (DMA) – results of the trilogue' (25 March 2021) <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-results-of-trilogue_20220325-1000-SPECIAL-PRESSER> accessed 12 April 2022.
[69] Margrethe Vestager, ibid.
[70] Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) 15 December 2020, SEC(2020) 437 final.
[71] See Gesetzesentwurf der Bundesregierung, 10th Amendment (n 12) 73: "role of a gatekeeper" ("Gatekeeper-Funktion").
[72] See Article 2 No 1 and 2. In depth: Florian C Haus and Anna-Lena Weusthof, 'The Digital Markets Act – a Gatekeeper's Nightmare?' [2021] WuW 318, 320.

undertakings of paramount significance and gatekeepers have to be designated.[73] However, though Article 3(1) DMA-Proposal names qualitative criteria, Paragraph 2 establishes a presumption according to certain thresholds.[74] Because of these thresholds, the European Commission will have an easier job than the *Bundeskartellamt*, most likely resulting in less delays. Moreover, for the undertakings concerned, thresholds enhance legal certainty.[75] At a first glance, Section 19a has the advantage of greater flexibility. Yet, Article 3(6) DMA-Proposal also leaves room for further designation relying on quantitative criteria. Therefore, regarding the norm addressee, Article 3 DMA-Proposal augments the manageability and legal certainty while still encompassing the flexibility of Section 19a.

The second stage regarding the prohibited conduct shows even more differences: Article 5 and 6 DMA-Proposal enlist concrete obligations. As *Schwab* pointed out during the press conference, the advantage of this is that undertakings get "a very clear direction what fair markets mean".[76] Yet, to a certain extent, Articles 5 and 6 are "backward looking"[77] and leave little room for new developments. In contrast, according to Section 19a(2), it is mostly up to the *Bundeskartellamt* to concretise these obligations. And though by now stipulating examples, Section 19a(2) has become more concrete than in the beginning of the legislation process, it still allows for further discretion than Articles 5 and 6. However, unlike Article 10 of the DMA-Proposal, there is no real flexibility clause. In the end, the list of Section 19a(2) is exhaustive. Therefore, it is the DMA which reveals more development opportunities. On top of this, Section 19a's case-by-case approach is fairly close to traditional antitrust law and thus to its problem of being time consuming.

Although the distinction between competition law and regulatory law is fuzzy,[78] the DMA was explicitly designed as regulatory law.[79] In contrast, Section 19a is something different: As shown above, the link to abusive conduct remains, but it is weakened compared to Article 102. While theoretically, there is the possibility of an ex ante-decision, in practice ex post-prohibitions are far more likely.[80] However, Section 19a – at least in practical terms – focuses on a special circle of undertakings belonging to the digital world. Therefore, as the DMA, Section 19a primarily addresses a special sector and hence, puts a certain distance between itself and traditional antitrust law.[81] In the past, Section 19a has been somewhat befittingly called a chimera as it is not competition law any more nor regulation law but something in between.[82] Unfortunately, it is this very distinction which will most likely decide on the future of Section 19a.[83] If Section 19a was to be considered competition law, the DMA's coming into force would not result in any changes.[84] If, however, it was to be considered regulatory law and if Article 1(5) of the DMA-Proposal was to stay in the final version, Section 19a would not be admissible any more.[85]

[73] See Article 3 DMA-Proposal and Section 19a(1).
[74] Compare Botta (n 21), 504: "major differences".
[75] Gerpott (n 57), 275.
[76] Schwab and others (n 67).
[77] Ibid.
[78] In depth: Justuts Haucap and Heike Schweitzer, 'Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht' [2021] Perspektiven der Wirtschaftspolitik 17, 19.
[79] Schwab and others (n 67).
[80] Compare Podszun (n 25) 9.
[81] Compare Philipp Bongartz, '§ 19a GWB – a keeper?' [2022] WuW 72, 73.
[82] Torsten Körber, 'Lessons from the Hare and the Tortoise – Part 1' [2021] NZKart 379, 381. Moreover: Steinberg, L'Hoest and Käseberg (n 54), 416.
[83] In depth: Andreas Grünwald, 'Gekommen, um zu bleiben?' [2021] NZKart 496.
[84] Compare Haus and Weusthof (n 71), 323; Dragan Jovanovic and Jakob Greiner, 'DMA: Überblick über den geplanten EU-Regulierungsrahmen für digitale Gatekeeper' [2021] MMR 678, 679; Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair' [2021] ZEuP 503, 509; Wolfgang Bosch, 'Die Entwicklung des deutschen und europäischen Kartellrechts' [2021] NJW 1791, recital 45; Franck and Peitz (n 2), 526; Nothdurft (n 9) recital 139 et sqq.
[85] Compare Grünwald, '§ 19a GWB' (n 43) recitial 27; Gerpott (n 57), 279; Nagel and Hillmer (n 9), 330; Daniel Zimmer and Jan-Frederick Göhsl, 'Vom New Competition Tool zum Digital Markets Act' [2021] ZWeR 29, 59; Romina Polley and Friedrich A Konrad, 'Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte' [2021] WuW 198, 199

V. Conclusion

Currently, we are in an interim phase: An agreement on the DMA has been reached, yet it will not come into force until autumn 2022.[86] Assessing its structure and functioning, one might get the impression of Section 19a mirroring this development: While still having a connection to abusive conduct, there are considerable differences between traditional competition law and the new norm. Yet, with its focus on the individual case, it is not regulation law either but something in between.

Because of this interim time, it is not yet clear whether Section 19a will remain. Though some already start mourning the potential loss,[87] one must ask whether, with the DMA coming into force, Section 19a has maybe fulfilled its purpose. If its goal was to break the ice for the DMA, this would definitely be the case. If its function was bridging the time gap before a European norm, Section 19a would become obsolete as well. If, however, the objective was to enable a case-by-case analysis with special circumstances of digital markets in mind, a certain scope of application could persist.[88] Nonetheless, even with this in mind, the disadvantage of market fragmentation remains. Especially when considering that Article 102 TFEU already entails an instrument for individual abuse control. Therefore, the more convincing conclusion is that with DMA coming into force, Section 19a has served its principle purpose. Therefore, Section 19a should neither be considered lighthouse project nor superfluous national solo run but a useful bridging of a regulatory interim phase.

[86] In the press conference, Margrethe Vestager prognosticated October.
[87] Compare Steinberg, L'Hoest and Käseberg (n 54), 416.
[88] See Bongartz (n 81).

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