

# Kluwer Competition Law Blog

## New rules on digital gatekeepers ramp up antitrust enforcement in Germany

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In January 2021, the latest reform of the German competition law (“ARC”) entered into force, including significant new rules regarding digital platform markets. These include new powers for the Federal Cartel Office (“FCO”) under Section 19a ARC regarding digital gatekeepers with paramount cross-market significance for competition (for more details on the new norm, see [here](#)).

A big gamechanger in Section 19a ARC is that the rule does not necessarily require the finding of any anticompetitive effects. The FCO can prohibit certain practice categories listed in the law, unless the company can prove the practice is objectively justified. Some practice categories are further detailed by so-called regulatory examples. (The official English translation of the updated ARC, including Section 19a, can be found [here](#)). The new law has ramped up enforcement against digital gatekeepers. This post gives an overview of the pending proceedings and a first impression. [fn]Disclaimer: the author is active for a complainant against Apple. However, views expressed here are her personal ones.

### Proceedings under Section 19a ARC

The FCO has used the new powers swiftly. It has opened several proceedings – currently against all “GAFA” companies – under Section 19a ARC since the new law entered into force. Interestingly, the FCO follows a different pattern in each case: some proceedings concern the first step under Section 19a ARC only, i.e., to determine whether the company has a paramount cross-market significance for competition (gatekeeper) and is thus an addressee of the norm. Others combine this with the second step, i.e., investigating specific practices that can be prohibited if they meet the categories/regulatory examples set out in Section 19a (2) ARC.

### Facebook

**Oculus.** As early as January 28, 2021, the FCO has opened the first case under Section 19a ARC against Facebook, regarding the linkage between Oculus virtual

reality products and Facebook's social network (see [here](#)). Facebook operated the Oculus and its social network platforms separately, but then integrated Oculus into the social network platform (as an additional function). As a result, a Facebook account became mandatory to use the new generation of Oculus glasses, and existing Oculus accounts could no longer be used for registration purposes for the new hardware.

The FCO had already opened proceedings into this in December 2020 under traditional abuse of dominance rules (see [here](#)), referring to tying as the possible theory of harm. The practice seems different from traditional tying, however, where sales of the dominant product/service are combined with sales of a non-dominant one. Here, it seems to be the inverse: tying the sale of VR equipment to the use of the social network.

After Section 19a ARC entered into force, the FCO extended the scope of the proceedings to the new rule. The press release does not clarify which practice category of the new law may be relevant: one possibility could be Section 19a (2) no. 3 ARC (envelopment, i.e., impeding competitors in markets, into which the company can rapidly expand its activities without being dominant). In particular, the regulatory example in lit. b of the rule may apply, which covers leveraging the cross-market significance through tying separate services, irrespective of any dominance.

## **Amazon**

On May 18, 2021, the FCO has opened Section 19a ARC proceedings against Amazon (see [here](#)). In this case the FCO currently only deals with the first step under the new law, i.e., determining whether Amazon is a gatekeeper within the meaning of Section 19a (1) ARC. The press release highlights the role of Amazon's marketplaces and its many other, often digital offers, which could represent an ecosystem across markets with an almost uncontestable position.

The release does not mention any specific practices the FCO would review in a second step. The FCO only generally refers to its power to prohibit self-preferencing, envelopment, or creating or increasing barriers to entry through processing data relevant for competition under the new rule. This statement almost sounds like fishing for complaints.

The release mentions other pending proceedings against Amazon practices under traditional abuse of dominance rules: potentially influencing the sellers' pricing on its platform through price control mechanisms and algorithms, and agreements between Amazon and branded goods manufacturers (including Apple), excluding third-party sellers from selling branded products on the platform (so-called "brand-gating"). It is unclear, however, whether the FCO would also extend these proceedings to Section 19a ARC, like it has done in *Facebook-Oculus*.

## **Google**

The FCO has opened two sets of two proceedings under Section 19a ARC against Google.

**Addressee of Section 19a ARC.** On May 25, 2021, it has opened proceedings regarding the first step, i.e., whether Google is a gatekeeper within the meaning of Section 19a (1) ARC (see [here](#)). The FCO refers to Google's large number of digital services that could form a potentially uncontestable ecosystem in this context, including the Google search engine, YouTube, Google Maps, the Android operating system and the Chrome browser.

**User data processing terms practice.** Simultaneously, the FCO has opened proceedings into Google's practice on user data processing terms. The FCO examines whether Google extensively processes user data across different services and whether it offers them a sufficient choice. The press release explicitly refers to the practice category in Section 19a (2) no. 4 ARC: "significantly raising barriers to entry, by processing data relevant for competition or demanding terms and conditions allowing such processing"; and to the regulatory example listed in lit a: "making the use of services conditional on the user agreeing to the processing of data from other services or a third-party provider without sufficient choice as to whether, how and for what purpose such data are processed."

Overall, this sounds similar to the theory of harm in the FCO's Facebook case on exploitative user terms under dominance rules (now pending with the Court of Justice in Luxemburg), which has indeed inspired Section 19a (2) no. 4a ARC.

**News Showcase practice.** On June 4, 2021, the FCO has also opened proceedings into Google's planned News Showcase offer (see [here](#)). The service offers publishers the possibility to present news content in a prominent and more detailed way through story panels integrated into Google's News app and Google News on the desktop. Google now plans to integrate the offer into Google's general search results. Following a complaint, the FCO has started investigating the planned practice. This seems to be the first case aimed at preventing an addressee to implement a prospective practice under the new rules.

In particular, the FCO investigates whether the practice constitutes (i) self-preferencing; and /or (ii) threatens to impede those services offered by competing third parties. The first would fall within the practice category of Section 19a (2) no. 1 ARC. The FCO does not mention the relevant practice category for the second alternative, but it could be envelopment (Section 19a (2) no. 3 ARC), and the regulatory example set out in lit. a (linking the use of one offer to the automatic use of another one, without that being necessary, and without giving the user sufficient choice).

The FCO also examines whether Google's News Showcase terms would impose unreasonable conditions to the detriment of the participating publishers, through making it disproportionately difficult for them to enforce their ancillary copyright ("*Leistungsschutzrecht*" introduced by the German legislator in May 2021). Again, the FCO does not mention the relevant practice category. It could be Section 19a (2) no. 2 ARC, which allows prohibiting measures that impede other (non-competing)

companies in their business activities on supply or sales markets, where the addressee is an intermediary for access to such markets.

## **Apple**

On June 21, 2021, the FCO has opened proceedings against Apple under Section 19a ARC, see [here](#)).

**Addressee of Section 19a ARC.** The proceedings only concern the first step, i.e., determining whether Apple is a gatekeeper within the meaning of Section 19a (1) ARC. The press release refers to Apple's proprietary operating system iOS, various devices, including iPhones, and several services related to these, as a potential integrated digital ecosystem within the meaning of the norm, including the App Store, iCloud, AppleCare, Apple Music, Apple Arcade, Apple TV+. The FCO will mainly focus on the App Store operation, through which Apple can influence third party businesses.

The approach is similar to the Amazon proceedings, in which the FCO also only examines the first step under Section 19a ARC. However, in contrast to Amazon, the press release explicitly says that the FCO intends to investigate Apple's practices in a second step, and that it has received several complaints in this regard. At the same time, the FCO clarifies that no decision on further proceedings has been taken yet.

The FCO highlights a complaint by the advertising and media industry against Apple's practice to **restrict user tracking** with the introduction of its iOS 14.5 operating system, and a complaint against exclusive pre-installation of Apple's own applications in this context as possible self-preferencing.

The release also refers to complaints by app developers against several **App Store rules**: the mandatory use of Apple's own in-app purchase system, a related 30% commission, as well as marketing restrictions. The FCO does not say which practice category of Section 19a (2) ARC may be relevant here, but says that these complaints have much in common with Spotify's complaint against Apple pending with the European Commission concerning self-preferencing. The FCO clarifies that it would contact the Commission and other authorities where necessary.

In addition to self-preferencing mentioned in the press release, the restriction of user tracking and the App Store rules could also fall within the practice category of Section 19a (2) no. 2 ARC, namely that an intermediary for access to a platform impedes (non-competing) third party companies. The legislative materials for this category explicitly mention app store rules in this context.

## **First impressions**

The new proceedings illustrate that the FCO is keen on using its new powers, and aims at a fast pace. It remains to be seen how long the proceedings under Section 19a ARC will ultimately take. The companies concerned can seek separate judicial review

against being designated as an addressee of the norm (i.e., against the first step), and will likely exercise their rights. The law has shortened the judicial review to one instance only, namely directly to the Federal State Court. Still, that may take some time, and the provision is new for everyone: the parties, the FCO and the courts.

The recent practice reflects the FCO's different possibilities under Section 19a ARC: it can carry out the different procedural steps separately or combine them from the outset, i.e., the question whether a company is an addressee of the new rule and investigating specific practices. It is unclear which criteria the FCO has applied when opting for the different alternatives, and it would be interesting to know more on this as the cases evolve. It will also be interesting to see which practice categories and regulatory examples the FCO will ultimately apply in these cases, and how it will handle the burden of proof issue in the various categories.

Section 19a ARC cases may involve coordination among the FCO and the European Commission and other NCAs. Legally, Section 19a ARC is a special national rule on unilateral conduct, which may be stricter than Article 102 TFEU (see Article 3(2) 2 Reg. 1/2003). If the FCO only applies Section 19a ARC and not EU competition law, there are no parallel competences, and the Commission could not take over proceedings under Article 11(6) Reg. 1/2003. So the coordination may be more of a practical than strictly legal nature.

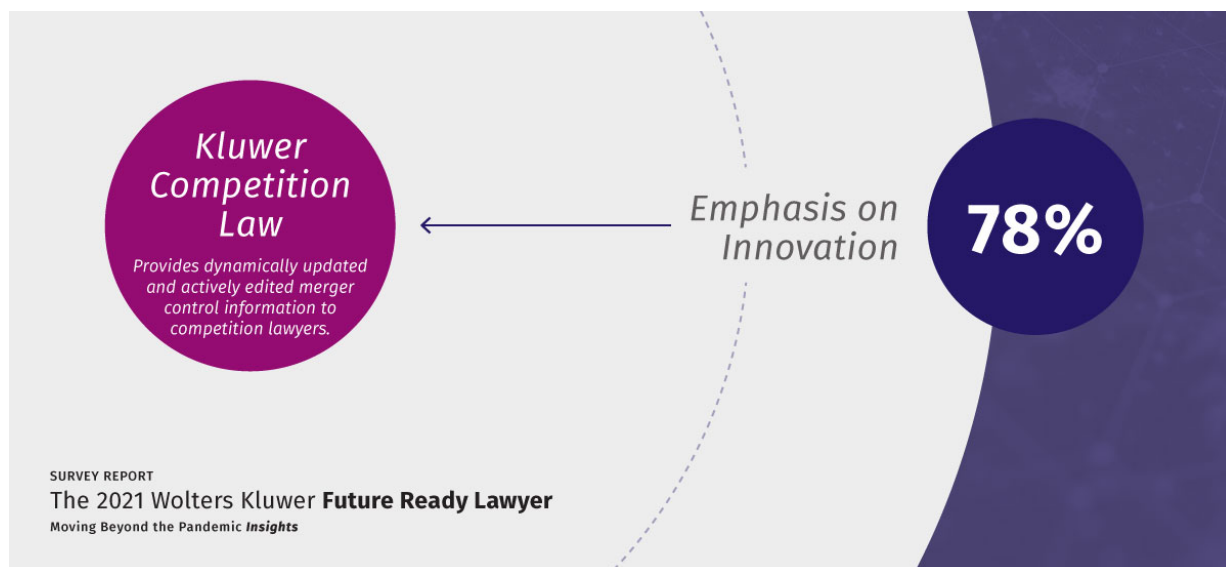
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