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Google's Automotive Services under the Scope of Section 19a ARC

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On 21 June 2023, the Bundeskartellamt, the Federal Cartel Office (FCO), sent a statement of objections to Google and published its preliminary legal assessment of Google's practices in connection with Google Automotive Services (GAS).

According to the Authority's preliminary evaluation, Google's practices regarding the licencing of services for infotainment systems in vehicles fulfil the requirements of several criteria of Section 19a(2) of the Act against Restraints of Competition (ARC).

Section 19a ARC

Section 19a ARC is the key provision of the 10th amendment to the German Competition Act enacted in 2021 (see here and here). It allows the Bundeskartellamt to intervene against certain potential anti-competitive practices of digital companies.

Therefore Sec. 19a follows a two-step approach: Under Para. 1 the FCO can determine the paramount significance of an enterprise for competition across markets. Para. 2 then endows the Authority the competence to prohibit certain enumerated potentially harmful conducts in accordance with the rules of the special abuse control.

The Alphabet/Google proceedings within the scope of Section 19a ARC

The FCO's preliminary assessment of Google's licencing practices follows up on a proceeding against Alphabet/Google initiated on 25 May 2021 to determine its paramount significance for competition across markets within the meaning of Section 19a(1) ARC (see the case summary).

The now-following proceeding concerning Google's licencing practices is just one of several investigations against Alphabet/Google under Section 19a(2) ARC. The FCO inter alia took an in-depth analysis of Google's data processing terms followed by a statement of objections (see here and see the case summary published on 01 August 2023). Additionally, the Agency concluded a proceeding with regard to Google's News Showcase and most recently conducted a third investigation to examine possible anti-competitive restrictions on map services (Google Maps

Platform) based on the Agency's assumption that Google may be restricting the combination of its own map services with third-party map services.

Licencing practices of Alphabet/Google as anti-competitive conduct under Section 19a(2) ARC

With the focus now shifting towards the expansion of the Google ecosystem to infotainment systems, the FCO's preliminary assessment in particular concerns the licencing of Google Automotive Services to vehicle manufacturers. It comprises the Google Maps map service, a version of the Google Play app store and the Google Assistant voice assistant. GAS runs on a version of Android developed by Google, the Android Automotive Operating System (AAOS).

Agreements on sharing advertising revenue and obligations to prefer Google Automotive Services

With regard to the licencing practice, the Authority states that particular problems may arise from agreements that Google has entered into with some vehicle manufacturers on sharing the advertising revenue generated through the use of Google Assistant on the condition that Google Assistant is the only voice assistant installed on the GAS infotainment platform. These so-called revenue sharing agreements (RSAs) can lead to strong incentives to favour Google's product bundle over its competitors which could result in potentially harmful effects for competition on the markets concerned. Since potential effects are already substantive and these effects are even presumed under Sec. 19a(2)1 ARC, there is no need to show the exclusionary effects of such agreements (in contrast to e.g. an 'as efficient competitor' (AEC) test performed in Android).

Moreover, according to the Authority's preliminary assessment, contractual provisions imposed by Google that oblige GAS licence holders to set Google services as a default or display its own services before displaying other applications may qualify as exclusionary conduct that hinders market access (barriers-to-entry theory). Such default settings could give rise to a so-called '*status quo bias*' as a result of the tendency of users to use apps available which bears the risk of alternative services being hardly noticed leading to a competitive disadvantage.

Therefore the licencing practices may fall within Section 19a(2)1 No 1 and No 2 ARC addressing exclusionary conduct through self-preferential behaviour (even though the FCO left an assignment open). While Section 19a(2)1 No 1 ARC deals with self-preference merely in the case of existing intermediary market power and covers self-preferencing, inter alia through a more favourable presentation of services (litera a)) (see also Google Shopping case) or their pre-installation or integration (litera b)), No 2 is more broadly applicable to disparate conditions in general and complementary covers behaviours that indirectly result in effects targeted by No 1**.** Overall, both norms address forms of technological tying. In addition, the licencing agreements could also fall within Section 19a(2)1 No 3 ARC which targets enrolment and leverage effects due to bundling or tying, as Google might use the licencing practice to expand its market power to still competitive markets.

As this case shows a certain practice may comprise several potential anti-competitive behaviours in itself. However, to the extent that a plausible theory of harm can be presented by the FCO, an

exclusive assignment to one of the conduct elements enumerated in Section 19a(2) ARC is not required (see here, with further references).

The allegations made in the preliminary assessment are also similar to the findings within the proceeding of the European Commission in the Android judgement under Article 102 TFEU, which served as a precedent for the potentially harmful effects that Section 19a(2)1 No 1 and 2 ARC are intended to cover. Therein the Commission has concluded that the objective of the restrictions on manufacturers of Android mobile devices and mobile network operators was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements.

Obstructing Interoperability

Besides the bundling practice, according to the preliminary judgment, Google could also hamper or refuse interoperability of its services with third-party services on the GAS infotainment platform. As a result, the use of functions or services provided by its competitors is restricted or not possible at all.

The underlying ratio of the interoperability provision in Sec. 19a(2)1 No 5 is obvious considering the importance of network effects for the markets addressed by Sec. 19a ARC (see Sec. 18(3a) ARC) and the negative consequences on competition and contestability as a result of proprietary networks and lock-in effects.

Similar allegations of interoperability obstruction in connection with Android Auto, an app for Android OS (for the differences see here), were already the subject of a decision by the Italian Competition Authority (AGCM) under Article 102 TFEU in 2021 (see here; see also another investigation on interoperability obstruction against Google concluded on 31 July 2023 here). In its decision, the AGCM had to refer to the essential facilities doctrine to justify the abuse of market power even though an alternative to the use of Android Auto existed in the use of the relevant app directly through the smartphone, which showed the difficulties of the doctrine in digital markets an also marked a tendency of the Authority towards a convenient facility doctrine. This controversial argument regarding alternatives may not be necessary under Section 19a ARC, as here the potentially harmful effects of an interoperability obstruction are presumed, although the Bronner criteria probably are fulfilled here as well.

Application of Section 19a in contrast to the framework of the DMA

In contrast to this special abuse control under Sec. 19a ARC applied by the Bundeskartellamt in this case, the Digital Markets Act intends to comprehensively regulate the gatekeeper power of the largest digital companies. Although the DMA is without prejudice to the application of national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers, the relevance of Sec. 19a ARC under the provisions of the DMA remains unclear and mainly depends in particular on the rather vague distinction between competition law and regulatory law and the extent to which Section 19a ARC can be assigned to competition law (see here).

In contrast to Section 19a ARC, the DMA does not contain a general prohibition of self-preferencing. For example, the prohibition of exclusive pre-installation was considered by the Commission in the legislative process but later found to be disproportionate (see here). Article 6(3) DMA instead obliges gatekeepers to enable the uninstallation of any apps. The interoperability obstruction in contrast gives an example for future overlaps, since Article 6(7) DMA also provides a corresponding vertical interoperability obligation with respect to soft- and hardware and also might have been applicable in this case because of Google's dual role as app developer and owner of the AAOS platform, as well as being the gatekeeper for reaching AAOS users.

Outlook

The Google Automotive Services case promises clarification on the further application of Section 19a ARC especially in the context of the now applicable DMA. While there is no abusive behaviour captured by Section 19a that could not be addressed by Article 102 TFEU as well, it also will be interesting to see how the two standards in similar cases (e.g. the AGCM decision) differ from each other, particularly whether in practice the Section 19a(2) ARC leads to a simplification of procedure.

As this is a preliminary legal assessment, it remains to be seen what the Authority's final decision will be. As the statement of objections states a justification of Google's licencing practices remains possible (Section 19a(2)2 ARC), even though the company bears the burden of presentation and proof (Section 19a(2)3 ARC).

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