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Digital Markets – Regulation – Compliance: The Art of Making Complexity a Harmonious Triad

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Ever since its introduction in 2021, Section 19a of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or "**GWB**") has attracted attention, not only in Germany, but also around the globe. Through this provision, the national legislator strengthened the regulatory framework against **potentially** anti-competitive practices by specific market players, namely "undertakings of **p**aramount **c**ross-**m**arket **s**ignificance for competition" ("**PCMS**"; *Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb*). Germany was one of the first jurisdictions to introduce specific rules that specifically target Big Tech and, thus, had a pioneering role in the global competition law environment.

Recently, with the EU's Digital Markets Act ("**DMA**") becoming fully applicable as of 7 March 2024 and the European Commission ("**Commission**") swiftly making use of the new tools given to it, much of the attention shifted towards Brussels. With respect to Section 19a ARC the very fundamental question as to the relation between the DMA and Section 19a ARC had already been looming on the horizon. A new ruling by Germany's Federal Court of Justice (*Bundesgerichtshof* or "**BGH**") has now spelled out the German perspective on this.

The decision of 23 April 2024 (case number: KVB 56/22) is the BGH's first one considering Section 19a ARC on the merits. Also, for the court itself it is a premiere in that it is the first time the BGH acted as the first and last instance court at the same time. To address concerns on efficiency and speed of proceedings in the highly dynamic tech sector, the BGH was granted this unique role making the appeal a judicial one-shot matter. It took less than two years from the *Bundeskartellamt's* (German Federal Cartel Office or "**FCO**") decision on 5 July 2022 until the final court ruling. On the merits, the court upheld the FCO's designation of Amazon as a PCMS.

Section 19a ARC was introduced as enforcement in potential market power abuse cases had been facing ever longer proceedings, particularly in the context of the digital economy. The gap between real-world dynamic observed on digital markets due to characteristically strong network effects on the one hand and increasingly complex investigations and enforcement proceedings on the other seemed to be ever widening.

Ushering in the Era of Next-Generation Competition Tools: The German Way

Through Section 19a ARC the FCO received the power to

- in a first step **designate** an undertaking as PCMS. This is particularly relevant for large digital companies that could potentially leverage their power from one market to another, with the potential to result in competition concerns in multiple areas. In that, the regulatory concept defies the virtual borders drawn as part of market definition in classic antitrust law. Instead of referring to specific conduct, Section 19a ARC relies on **structural criteria** such as vertical integration, access to data relevant for competition or financial strength.
- Based on this designation the FCO in a second step can then initiate targeted proceedings and eventually **impose individually tailored measures** on a PCMS to prevent them from engaging in practices that could potentially hinder competition.

While being rooted in the same cause as the DMA, both regimes differ fundamentally in their design. The EU opted for so-called 'self-executing' or rather *one size fits all* type of provisions. Art. 5-7 DMA comprise a catalogue of rather specific obligations and prohibitions that need to be fulfilled by all undertakings designated as gatekeepers. As far as Art. 8(2) DMA provides a mechanism for executive specification measures by the Commission (*ex officio* or upon application by a gatekeeper) it is explicitly referring to the enforcement of Art. 6 and 7 DMA. In contrast, Germany's Section 19a ARC is aimed at targeted regulation through specifically tailored executive measures.

Against this background, the BGH's judgment focused on Amazon's **dual role as a marketplace operator and a competitor to the merchants (commercial users) on its own platform**. The BGH acknowledged the FCO's assessment about Amazon's ability to leverage its power across different markets. The court specifically looked at the significance of internal data policies, access to competitively sensitive data, and Amazon's positioning across markets.

Duel of regulations?

The BGH's ruling not only affirms the designation of PCMS but also highlights the **complementary nature of Section 19a ARC and the DMA**. While the DMA is designed to address systemic issues within the digital market at the EU level, Section 19a ARC offers a purely case-specific approach relying on the FCO to tailor individual measures that must withstand judicial review. Together, these regulatory frameworks provide a comprehensive approach to digital market regulation.

This dual-regulatory environment presents digital companies with increasingly complex compliance challenges. Major players must take into account national and EU regulations, each with its own nuances and enforcement mechanisms. This ongoing trend creates the necessity for large digital companies to invest in robust compliance structures that can adapt to today's rapidly evolving legal environment.

One critical aspect that the BGH decision underlines is the importance of data management practices. Given the importance of data for digital markets, how a company collects, uses, and shares data has become a central consideration especially for competition authorities. Market players like Amazon will need to be constantly vigilant on an array of potential issues to avoid enforcement of national regulations like Section 19a ARC while at the same time securing

effective compliance with the DMA.

Juggling Compliance with the DMA and National Laws: A Tightrope Walk on Different Ways

In conclusion, the BGH's ruling is a significant milestone in the evolution of competition law enforcement in the digital age. It not only reaffirms the relevance of Section 19a ARC in the German context but also illustrates its self-perceived role as a complement to the broader European framework established by the DMA. As such, digital companies are faced with the challenge of ensuring compliance with a multi-faceted and dynamic regulatory regime. It is incumbent upon these companies to stay ahead of the curve, anticipating regulatory shifts and adapting their practices accordingly.

For stakeholders within these digital companies, the message is clear: vigilance and agility are as paramount as their potential cross-market significance. The road ahead will be marked by meticulous internal reviews, strategic planning, and continuous dialogue with regulators. By embracing these challenges and fostering a culture of compliance, digital players can not only navigate this complex landscape but also play a pivotal role in shaping the future of digital market regulation.

As the digital economy continues to expand and evolve, the interplay between Section 19a ARC and the DMA will undoubtedly be a focal point for competition law experts and digital market participants alike. Also, other national legislators seem poised to equip their own authorities with similar tools seeking to gear up their very own enforcement capacities. The BGH's decision only accounts for the German, i.e., national interpretation of the parallelism of such national laws. It remains to be seen if European courts, especially the Court of Justice of the European Union will reach the same conclusion with respect to Section 19a ARC and/or other (future) national laws – especially whether or not Section 19a ARC is within the regulatory leeway Art. 1(5) and (6) DMA leaves Member States with.

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