



Federal Ministry  
for Economic Affairs  
and Energy

# Competition and Regulatory Policy

## Regulating Platforms – German and EU Approaches

### The Berkeley Roundtable on the International Economy

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# Overview

- I. The background for reforms
- II. Reform of the German Act Against Restraints of Competition
- III. Going forward – the EU Digital Markets Act

# I. The background for reforms

- Abuse of dominance law on EU and national level
  - Treaty on the Functioning of the EU and Regulation 1/2003
  - Act Against Restraints of Competition
- Background for reforms
  - Need for speed – challenges: market definition, effects-based approach, more economic approach
  - Potential gaps: Super-dominance, data access, untipped markets
  - Studies
  - Political will / Coalition agreement
  - No industrial policy for digital markets

# II. Reform of the German Competition Act

## Intermediation power

- **Market definition:** concept of intermediation power Sec. 18 para (3b) (and Sec. 20 para. (1))

“When assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets.”

# II. Reform of the German Competition Act

## Essential facilities

- **Redraft of Essential Facilities Doctrine (Sec. 19 para (2) no. 4):**

“An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services (...)

refuses to supply another undertaking with this product or commercial service against adequate remuneration, including access to data, networks or other infrastructure,

the supply is objectively necessary in order to operate on an upstream or downstream market; and

the refusal to supply threatens to eliminate effective competition on that market, unless the refusal to supply is objectively justified.”

# II. Reform of the German Competition Act

## Concept of relative dominance

- **Deletion of SME requirement for relative dominance:**  
Protection granted by Sec. 20 para (1) is no longer restricted to small and medium sized enterprises

“Sec. 19(1) in conjunction with para (2) no. 1 shall also apply to undertakings and associations of undertakings to the extent that [...] (other undertakings) **depend on them** in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist and, because of a **clear asymmetry**, the dependence is not offset by corresponding countervailing power of the suppliers or customers of the undertaking with a strong market position (**relative market power**). Sec. 19(1) in conjunction with para 2 No. 1 shall also apply to undertakings acting as **intermediaries on multi-sided markets** in so far as undertakings are dependent on their intermediary services with regard to access to supply and sales markets in such a way that sufficient and reasonable alternative possibilities do not exist.”

# II. Reform of the German Competition Act

## Access to data and relative dominance

- **Access to data and relative dominance:**

“Dependency in the meaning of paragraph 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. The refusal of access to such data may constitute an unfair impediment even if there is not yet a commerce opened for such data.”

# II. Reform of the German Competition Act

## Tipping

- **Tipping:** new provision with preventive character Sec. 20 para. (3a)

“It shall also be an unfair impediment within the meaning of paragraph 3 sentence 1 if an undertaking with superior market power on a market in the sense of section 18(3a) impedes the independent attainment of positive network effects by competitors and thereby creates a serious risk that competition on the merits is restricted to a not inconsiderable extent.”



# II. Reform of the German Competition Act

## Sec. 19a Undertakings with paramount significance

### **Sec. 19a Abusive Conduct of Undertakings with paramount significance for competition across markets:** administrative procedure only, no fines

- Undertaking must be active to a significant extent in multi-sided markets or networks and has paramount significance based on (*inter alia*)
  - its dominant position on one or more markets,
  - its financial strength or its access to other resources
  - its vertical integration and its activities on otherwise related markets
  - its access to data relevant for competition ,
  - the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities.

# II. Reform of the German Competition Act

## Sec. 19a Undertakings with paramount significance

**Sec. 19a Abusive Conduct of Undertakings with paramount significance for competition across markets:** administrative procedure only, no fines

- Undertaking must be active to a significant extent in multi-sided markets or networks and has paramount significance
- **Step 1:** determine the „paramount significance for competition across markets“ by decree of FCA – market dominance no necessary precondition
- **Step 2:** prohibition of a certain conduct by FCA, burden of proof is reversed

## 2. Abuse control (continued)

### Conduct which may be prohibited, Sec. 19a para. (2) GCA

1. **Self-preferencing**, in particular through
  - a) Preferential treatment of own offers in the presentation over competitors
  - b) Exclusive pre-installation or other integration of own offers on devices
2. **Obstruction on procurement and sales markets**, in particular through
  - a) Exclusive pre-installation or other integration of offers of the company with dominant position
  - b) Obstruction of other companies to advertise their own offers or to reach customers via other access points than those provided or mediated by the company with dominant position

## 2. Abuse control (continued)

### Conduct which may be prohibited, Sec. 19a para. (2) GCA

#### 3. „Rolling up“ of markets not yet dominated

- a) Automatic and unnecessary linking of two independent services without granting sufficient possibilities of choice
- b) Requirement to use one offer of the company dependent on the use of another offer

#### 4. **Processing of competitively sensitive data**, esp. through

- a) Requiring the user's consent to the processing of data from other services of the company/ third party providers for the use of a service, without granting the user an adequate choice
- b) Processing of competitively sensitive data of other companies for purposes other than those necessary for the provision of the company's own service to that company, without giving the company an adequate choice

## 2. Abuse control (continued)

### Conduct which may be prohibited, Sec. 19a para. (2) GCA

5. **Hindering the interoperability of products and the portability of data**
6. **Providing insufficient information to other undertakings about the scope, quality or success of the service provided or commissioned/ other difficulties in assessing the value of the service**
7. **„Tapping“, in particular through**
  - a) **Promoting the transfer of data/rights that are not necessary for the offer**
  - b) **Linking the quality with the transfer of data/rights that are unreasonable**

# III. EU Digital Markets Act

## Key mechanisms



- Online mediation services,
- Online search engines,
- Online social network services,
- Video sharing platform services,
- Number independent interpersonal communication services,
- Operating systems,
- Cloud-Computing services,
- Advertising services

- the company has significant impact on the internal market,
- **is an important access gateway for commercial users to end users, and has a**
- consolidated and permanent position.

# III. EU Digital Markets Act

## Gatekeepers

**Quantitative criteria:** Rebuttable presumption in the case of:

- more than €6,5 billion annual turnover in the EEA, or more than €65 billion average market capitalisation, and active platform service in at least 3 EU member states, as well as
- more than 45 million active end-users per month and more than 10,000 annual active commercial users in the EU, and
- fulfilment of these criteria in the last three financial years.

**Qualitative criteria:** By way of market investigation, consideration of:

- Size, turnover, user numbers
- Barriers to market entry, economies of scale, lock-In effects
- Structural market characteristics

# III. EU Digital Markets Act

## Selection of behavioural obligations of gatekeepers

- Prohibition of exclusivity or most-favoured-nation clauses
- Prohibition of linking different services
- Prohibition of self-favouring when ranking information
- Prohibition of impeding user switching and multihoming
- Interoperability requirements
- Information requirements for advertisers and publishers



# III. EU Digital Markets Act

## Comparison Sec. 19a GWB

### Digital Markets Act

- Gatekeeper (approx. 10-15)
- Obligations of conduct are directly applicable
- Prohibitions are concrete and narrow (“rules”)
- Hardly any exceptions

→ „Rigid“ system with automatic application

### Sec. 19a GCA

- Companies with „paramount significance for competition across markets“ (approx. 5)
- Behavioural obligations are „activated“ by the FCA
- Prohibitions are open (“standards”), include regulatory examples
- Possibility of justification

→ „Flexible system“ with application after case-by-case assessment

# Food for thought and discussion

- 19a ice-breaker / trailblazer / stepping stone?
- DMA = antitrust 2.0 or animal on its own?
- From hipster to mainstream also in the U.S.?
- Missing pieces:
  - merger control
  - structural separation
  - bigger debate on public infrastructure/governance



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Thank you!