Discussion Paper Series – CRC TR 224

Discussion Paper No. 673
Project B 05

Implementing and Enforcing the EU's Digital Gatekeeper Regulation: A German Perspective on the Role of National Authorities

Jens-Uwe Franck[1]

March 2025

[1]University of Mannheim and Mannheim Centre for Competition and Innovation (MaCCI), Email :franck@uni-mannheim.de.

Support by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation) through CRC TR 224 is gratefully acknowledged.

Implementing and Enforcing the EU's Digital Gatekeeper Regulation: A German Perspective on the Role of National Authorities

Jens-Uwe Franck*

Abstract

In this paper I review the measures taken in Germany to implement and publicly enforce the Digital Markets Act (DMA) and the Digital Services Act (DSA). A focus is on the institutional design aspects of these measures, their impact on and interaction with existing national instruments, and their interplay with the new EU rules. I describe the Bundeskartellamt's powers to investigate infringements of the DMA and discuss the complementary role that the special abuse regime for digital gatekeepers under section 19a of the German Competition Act can play. Moreover, I explain why Germany has not yet played the role that the Commission would like it to play in referring merger cases to Brussels via the 'Article 22 EUMR route', as envisaged in Article 14 of the DMA, as well as the legal sticking points for the emerging restrictive interpretation of the transaction value-based threshold. I also outline the institutional arrangements intended to ensure the administrative enforcement of the DSA. Finally, I show that the DSA required the repeal of national digital gatekeeper regulation and the enactment of new substantive law to maintain the legal status quo ante, taking into account the scope for national specifications and for national supplementary regulation left by the DSA.

Keywords: digital gatekeeper, regulation, DMA, DSA, public enforcement, competition law, merger law, Digital Services Coordinator

JEL classification: K21, K23, K42, L43

---

* University of Mannheim, Department of Law, and Mannheim Centre for Competition and Innovation (MaCCI), Mannheim, Germany, franck@uni-mannheim.de. The author gratefully acknowledges support from the Deutsche Forschungsgemeinschaft (DFG) through CRC TR 224 (Project B05). All URLs cited in this article were last accessed as of 20 February 2025.

Contents

Introduction

The EU's Digital Markets Act (DMA) and the Digital Services Act (DSA) stand out in the regulatory landscape: two pieces of regulation that are globally visible, highly controversial, and certain to have a lasting impact on the digital economy in Europe and beyond. Both legal instruments are perceived as the EU's footprint in the field of digital gatekeeper regulation. This is of course justified, as they are the result of political initiatives, processes and compromises at EU level. But it is also correct from a legal point of view, as they have been adopted as regulations and therefore apply directly without the need for transposition through national legislation. Nevertheless, their practical effectiveness depends on the cooperation of Member States, in particular on the adaptation of substantive law and the provision of capable enforcement mechanisms. The EU has taken on a Herculean task that cannot be accomplished with the resources of its institutions alone.

Against this background, this paper examines and illustrates German measures to implement the DMA and the DSA in the context of public enforcement of digital gatekeeper regulation. The focus is on aspects of institutional design, the impact on existing national instruments regulating digital gatekeepers and their interplay with the new EU regulation. This seems particularly fruitful for a comparative perspective, as Germany has in some respects played a pioneering role in addressing the challenges posed by digital gatekeepers. On the one hand, this means that public authorities already have some experience of enforcement against digital gatekeepers. On the other hand, it also means that there is a need to adapt legislation, or at least to limit the application of national instruments, to take account of the primacy of the new EU instruments.

Below, I will examine these DMA- and DSA-related national adjustments, new institutional arrangements and interactions between EU and German law in five main parts. First, in section 1.1, I will first describe the powers of the Bundeskartellamt to investigate possible infringements of the DMA by which the German legislature has made use of the option provided by Article 38(7) of the DMA. I will point out the (dubious) power to publish the results of investigations and the incentive problems that may prove to be a decisive obstacle to the effective use of these powers. Second, in section 1.2, I will briefly introduce the '19a tool', which, although embodied in competition law, should be seen as the German (functional) equivalent of the DMA. The section will analyse the role that this instrument can play as a complement to the DMA, which in its Article 1(6)(b) leaves room for the use of such a national instrument. Third, in section 2, after briefly outlining how Article 14 of the DMA is intended to extend the reach of EU merger control via the 'Article 22 EUMR route', I will discuss why Germany has so far not played the role in procuring merger cases for the Commission that Brussels would like to see. The legal sticking points for the restrictive handling of the transaction value-based threshold, which is currently emerging but which is still contested, are explained. Fourth, in section 3, I will discuss the institutional arrangements by which the German legislature intends to ensure the administrative implementation of the DSA, the challenge being that this is in an area where public enforcement in Germany has traditionally not been very strong and where, in addition, there is a tendency for competences to be fragmented, particularly owing to the federal system. Finally, in section 4 I will explain and illustrate, on the one hand, how the DSA required the repeal of national digital gatekeeper

regulation and, on the other hand, the enactment of new substantive law in order to maintain the (German) legal status quo ante, taking into account the scope for national specifications and for national supplementary regulation left by the DSA.

1. The Bundeskartellamt's Twofold Complementary Role under the DMA Framework

The Bundeskartellamt was one of the first competition authorities to turn its attention to the digital gatekeepers. The authority's antitrust practice inspired various obligations that are now embodied in the DMA:[1] Its Facebook decision, based on section 19 of the German Competition Act,[2] laid the foundations for the rule that only freely given user consent can allow the combination and cross-use of data in digital ecosystems, which is now enshrined in Article 5(2) of the DMA. The Bundeskartellamt's prohibition of the use of narrow (price) parity clauses by Booking.com[3] (together with corresponding legislative interventions in four Member States including France and Italy[4]) laid the groundwork for the strict ban on parity policies in Article 5(3) of the DMA. Indeed, as far as can be seen, prior to the DMA, the German competition authority was the only national competition authority within the EU to prohibit Booking.com (or any other online travel agency) from using the narrow form of (price) parity clauses, i.e. a parity policy that only prevented hotels from offering favourable conditions on their direct channel but allowed better conditions on competing online travel agencies.[5] The Bundeskartellamt's investigation into various practices related to Amazon Marketplace was closed without a formal decision after the company announced that it would address the concerns. Among other things, Amazon abandoned plans to oblige sellers to inform the platform if public authorities are contacted.[6] The case thus inspired Article 5(6) of the DMA, which states that digital gatekeepers should not prevent users from raising issues with public authorities.

---

[1] For an overview of DMA obligations and related antitrust cases, see Crémer et al (2023), p. 331, Table 1.

[2] Bundeskartellamt, 6 February 2019, B6-22/16, Facebook Data Processing. An appeal against this decision was pending before the Düsseldorf Higher Regional Court (Kart 2/19 (V)). The court referred questions to the ECJ on the relationship between the GDPR and antitrust enforcement, which the ECJ decided in its preliminary ruling of 4 July 2023, Case C-252/21, Meta Platforms, ECLI:EU:C:2023:357. The case ended when Meta withdrew its appeal in October 2024. See Bundeskartartellamt, Case Summary of 10 October 2024, Case B6-22/16, p. 14.

[3] Bundeskartellamt, 22 December 2015, B9-121/13, Booking.com. The decision was initially successfully challenged by Booking before the Düsseldorf Higher Regional Court (4 June 2018, Kart 2/16(V)), but was ultimately upheld by the Bundesgerichtshof, the Federal Court of Justice (19 May 2021, KVR 54/20).

[4] European Commission, Impact Assessment Report, SWD(2020) 363 final, Part 2/2, 111. For an overview of these legislative interventions and their motivation see Franck and Stock (2020), pp. 362–370.

[5] In 2015, the Swedish, French and Italian competition authorities had accepted Booking.com's commitment to reduce its wide parity clause to a narrow parity clause. In Sweden, private litigation against Booking's use of narrow parity clauses was also ultimately unsuccessful. See Franck and Stock (2020), pp. 359–360 (text accompanying notes 149–151 and 160–161). In 2024, the Spanish competition authority considered Booking.com's use of narrow (price) policy clauses (combined with a policy of 'undercutting', i.e. reserving the possibility of unilaterally reducing prices at the expense of its commission) to be an exploitative abuse. See Comisión Nacional de los Mercados y la Competencia, 29 July 2024, S/0005/21, Booking, para. 498.

[6] Bundeskartellamt, Case Summary of 17 July 2019, B2-88/18, p. 6.

In addition, Germany has been at the forefront of countries that have provided competition authorities with new instruments to address competition concerns related to large digital platforms. The new instrument came into force on 19 January 2021 and is enshrined in section 19a of the German Competition Act (the '19a tool'). It is a functional equivalent of the EU's DMA. As it was adopted when the DMA proposal was only a few weeks old, it can be seen as a catalyst for the adoption of the DMA and Amazon, Meta, Alphabet, Apple and Microsoft have been designated as '19a undertakings'. By December 2024, the authority had initiated seven abuse proceedings under this special regime. Three proceedings have been fully or partially closed as a result of commitments or changes in the behaviour of the gatekeepers.[7]

Against this background, it is apparent that the Bundeskartellamt had to redefine its role in the protection of competition with regard to digital gatekeepers when the DMA came into force. Two facets of this new role will be examined in this section.

First, it has been sobering for the Bundeskartellamt to learn that in enforcing the DMA it can only play the role of an assistant investigator to the Commission. After all, the German legislature has granted the authority all the investigative powers necessary for this purpose.

Second, the authority may continue to enforce EU or national competition law against the digital gatekeepers. However, enforcement of national competition law in respect of unilateral conduct is only possible under the restrictions of Article 1(6)(b) of the DMA. The implications of this for the application of the special abuse control regime under section 19a of the Competition Act will be the subject of the second part of this section.

1.1 The Bundeskartellamt as the Commission's 'Assistant Investigator' for DMA Infringements (Article 38(7) of the DMA)

Public enforcement of the DMA is monopolised at the EU level: only the Commission can establish that an infringement has occurred and impose sanctions on the designated gatekeepers.[8] Given that the enforcement powers of national authorities are limited to their jurisdiction, this appears to be a sound institutional choice in principle, as it allows the Commission to establish consistent, EU-wide solutions for EU-wide digital gatekeeper activities. On the other hand, the administrative challenges associated with the implementation of the DMA are so immense that it is impossible to see how it can be managed even halfway with the Commission's resources alone. In addition, it seems reasonable to pave the way for the use of the intimate knowledge that competition authorities have of national markets and their established relationships with market players and stakeholders.[9]

---

[7] See section 2.2.

[8] See Article 38(7) of the DMA ('to support the Commission in its role as sole enforcer of this Regulation'); see also recital 91 to the DMA ('The Commission is the sole authority empowered to enforce this Regulation'). It is true that national authorities are given a supporting role in various contexts, for example in dawn raids and interviews (Article 22 of the DMA) or in the conduct of market investigations (Article 38(6) of the DMA). However, supportive involvement of national authorities in these contexts requires a request from the Commission. They are not allowed to act on their own initiative. See MPI Innovation and Competition (2023), para. 55; Gappa and Käseberg (2024), paras 23–24.

[9] See MPI Innovation and Innovation (2023), para. 54.

With this in mind, the German government, together with France and the Netherlands, had argued in the DMA legislative process for a stronger role for national competition authorities in enforcing the DMA. In a position paper of 8 September 2021, the three governments ('Friends of an effective DMA') had proposed that, while the Commission should remain primarily responsible for the enforcement of the DMA, it should have the option to refer cases to national competition authorities. This could ensure, so it was argued,

> that the DMA can be swiftly and effectively enforced, the workload is optimally allocated at European and national levels, and that Commission and national competition authorities have adequate leeway to set own enforcement priorities.[10]

As we know, things turned out differently: according to Article 38(7) of the DMA, national authorities may – if they have been granted the relevant powers under national law – investigate on their own territory whether infringements of Articles 5, 6 and 7 of the DMA have been committed. However, national authorities do not have any further enforcement powers. The Commission must be notified prior to taking the first formal investigative measure and must be informed of the results of the investigation. When the Commission initiates proceedings under Article 20 of the DMA, all investigative powers of the national authorities cease.[11] In contrast to EU antitrust proceedings,[12] the Commission does not have to consult the national authorities in order to 'take over' an investigation.[13]

1.1.1 Investigation Powers under Section 32g of the Competition Act

The German legislature has made use of the option provided in Article 38(7) of the DMA[14] in the course of the 11th amendment to the Competition Act and stipulated in section 32g(1) of the German Competition Act that,

> In the event of possible non-compliance with Articles 5, 6 or 7 of [the DMA] by an undertaking designated pursuant to Article 3 of the [DMA], the Bundeskartellamt may carry out an investigation.

This first of all clarifies that these powers of investigation only apply after the Commission has designated a gatekeeper and its core platform services (CPSs). This already follows from Article 38(7) of the DMA, because a case of possible non-compliance can only exist after a designation decision has been made.

---

[10] Federal Ministry for Economic Affairs and Energy, Ministère de l'économie, des finances et de la relance, and [Dutch] Ministry of Economic Affairs and Climate Policy (2021), p. 2 and Annex 2.

[11] In its opening decisions, the Commission explicitly refers to Article 38(7) of the DMA and the fact that national competition authorities are deprived of any investigative powers. See, e.g., Commission, 25.3.2024, DMA.100193 - *Alphabet Online Search Engine - Google Search* - Article 6(5).

[12] See Article 11(6) of Regulation 1/2003.

[13] Gappa and Käseberg (2024), para. 29.

[14] Prior to this, as of 1 January 2023, the Hungarian legislature had already granted its national competition authority the right to investigate possible violations of the DMA. See Hungarian Competition Authority (GVH) (2023). In the Netherlands, a corresponding bill has been drafted. See MPI Competition and Innovation (2023), para. 57. The Italian competition authority was granted powers to investigate DMA violations by a regulation dated 23 July 2024 ('Measures for the Implementation of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022').

Section 32g(2) of the Competition Act further states that for these investigations the Bundeskartellamt 'may conduct all inquiries necessary'. The powers and instruments that apply to the investigation of infringements of competition law under sections 57 to 59b and section 61 of the Competition Act therefore also apply to these investigations into infringements of the DMA: the authority may collect all necessary evidence, question witnesses, seize objects, request information, examine business documents, and carry out searches.

The restriction of investigations to the national territory required by Article 38(7) of the DMA naturally follows from the limits of enforcement jurisdiction as recognised under international law. It does therefore not require an explicit provision in national law. Some authors refer to section 185(2) of the Competition Act.[15] On the basis of its wording,[16] however, this provision seems to regulate only the scope of legislative jurisdiction.

The obligation to inform the Commission prior to the first formal investigation measure is not explicitly provided for in section 32g of the Competition Act. This is entirely natural because this obligation applies directly under Article 38(7) of the DMA. A declaratory reproduction in national law would have entailed the risk of blurring the Union law nature of this obligation and, in particular, concealing the fact that the relevant concepts are subject to autonomous interpretation under EU law.

As to possible violations of Article 7 of the DMA, the rules on the interconnection of communications services, during the proceedings, the Federal Network Agency (the Bundesnetzagentur) must be given the opportunity to comment on a case.[17] The aim is to make use of the specific expertise of this authority. Under section 21(2) of the German Telecommunications Act, the authority already has the right to require providers of messenger services to ensure interoperability.[18]

Although the wording of section 32g(1) of the Competition Act refers only to 'possible violations of Articles 5, 6 or 7' of the DMA, this reference must be understood as also giving the Bundeskartellamt the power to investigate possible violations of the anti-circumvention provisions of Article 13(4) and (6) of the DMA. When analysing the concept of public enforcement under the DMA, it is clear that Articles 29, 30 and 31 of the DMA in particular apply without distinction as to whether the conduct of a gatekeeper is directly covered by Articles 5, 6 or 7 of the DMA or (only) in conjunction with Article 13(4) or (6) of DMA. Against this background, it is more than reasonable to interpret the ancillary enforcement competence under German law as also including investigations into circumvention. Indeed, Article 13(4) and (6) of the DMA should generally be understood as an extension of the scope of the obligations under Articles 5, 6 and 7 of the DMA.[19]

---

[15] Wirtz (2024), para. 3.

[16] Section 185(2) of the Competition Act reads: 'The provisions of Parts 1 to 3 of this Act shall be applied to all restraints of competition having an effect within the area of application of this Act, even if they were caused outside the area of application of this Act.'

[17] Section 32g(2), 3rd sentence of the Competition Act.

[18] Wirtz (2024), para. 4.

[19] Franck and Peitz (2024-1), pp. 303–305.

1.1.2 The (Dubious) Authorisation to Publish Investigation Results

Section 32g(3) of the Competition Act provides that 'the Bundeskartellamt will report the results of the investigation … to the European Commission', followed by conferral of the power to 'publish a report on the results of the investigation'. While the first statement is a mere acknowledgement of what is already required under Article 38(7) of the DMA, the second statement is indeed quite remarkable. Under German law, the publication of the results of an investigation requires explicit legal authorisation as it interferes with the fundamental rights of the companies under investigation. It is therefore crucial that they are given a fair hearing.[20] But is this publishing permitted under EU law? The German legislature seems to have assumed that the issue of publication of the results of the investigation is neither positively nor negatively regulated by Article 38(7) of the DMA[21] and that there is therefore scope for national regulation. Certainly, if the Bundeskartellamt were to publicly announce that it had found evidence of a violation of the DMA, this could have a detrimental effect on the investigated company, in particular on its reputation, even if it is clear that these are only preliminary findings, the publication of which has no immediate legal consequences. Therefore, such activities may well be seen as having an enforcement element – which could amount to a 'naming and shaming' mechanism – that could undermine the Commission's role as the sole enforcer of the DMA. Irrespective of these fundamental concerns about compatibility with EU law, publication is at the discretion of the Bundeskartellamt, which in exercising its powers must also take account of the interests of the European Commission, to which it has delegated the powers of investigation. The publication of preliminary results has to be omitted if the publication is likely to hamper the further investigation of the Commission.[22]

1.1.3 The (Obvious) Incentive Problem to Actually Use the Powers to Investigate

Investigations into possible DMA infringements under section 32g of the Competition Act are conducted at the Bundeskartellamt's discretion.[23] To date, no results from such investigations are known. A possible starting point could be proceedings under section 19a of the Competition Act, as all addressees designated so far under this provision are also gatekeepers under the DMA. If, in the course of a 19a procedure, the Bundeskartellamt becomes aware of a suspected infringement of the DMA,[24] it may suspend the 19a procedure and first investigate whether this suspicion is substantiated and, if so, forward its findings to the Commission. Ideally, an efficient division of tasks between national authorities and the European Commission could be achieved and national, and thus potentially internal market-dividing, interventions avoided.

From the Commission's point of view, it is indeed essential to mobilise national resources to monitor the compliance of digital gatekeepers with their obligations under the DMA. However,

---

[20] Wirtz (2024), para. 6.
[21] Kumkar (2024), para. 49.
[22] Kumkar (2024), para. 50.
[23] Kumkar (2024), paras 34–35.
[24] See Recital 91, 3rd sentence, to the DMA ('[Investigatory powers by national competition authorities] could in particular be relevant for cases where it cannot be determined from the outset whether a gatekeeper's behaviour is capable of infringing this Regulation, the competition rules which the national competent authority is empowered to enforce, or both').

it is unclear whether the Bundeskartellamt will ever carry out such investigations: the current incentive mechanisms seem too unfavourable as the national authority does not receive any visible credit for the (successful) use of its resources.[25] One way to improve this would be to prominently acknowledge where national authorities have contributed to the enforcement of the DMA in a particular case. A more ambitious and sophisticated way forward, inspired by the Single Supervisory Mechanism for the largest banks in the Eurozone, could be the creation of 'joint supervisory teams' staffed by the Commission and national competition authorities.[26]

1.2 The German '19a Tool' and the Imposition of 'Further Obligations' on DMA Gatekeepers (Article 1(6)(b) of the DMA)

National competition law may impose 'further obligations' on DMA gatekeepers by way of rules that prohibit other forms of unilateral conduct than abuses of dominant positions.[27] In this section, I will elaborate on the Bundeskartellamt's use of this regulatory leeway, focusing on the use of section 19a of the Competition Act as this instrument was introduced specifically to combat possible abuses by digital gatekeepers, and because the Bundeskartellamt appears to channel abuse cases against companies designated as '19a undertakings' (which are all also designated as DMA gatekeepers) into abuse proceedings under this special abuse regime.

1.2.1 Key Features of the '19a Tool', Revealing Its Conceptual Overlap with the DMA

Section 19a of the Competition Act[28] is characterised by a 'two-step activation' design.[29] First, the Bundeskartellamt must declare that a platform operator is an undertaking of 'paramount significance for competition across markets' ('designation decision'). Second, the authority can prohibit the designated undertakings from engaging in conduct falling within one of seven categories listed in the provision (ranging from self-preferencing by vertically integrated firms to the demanding of disproportionate compensation from business customers) ('abuse decision'). Firms may provide objective justification.

The '19a tool' is therefore only activated for a particular undertaking after it has been the subject of two decisions (which can be combined[30]). The instrument thus differs not only from traditional competition law (which contains self-executing obligations) but also from the DMA, in which the embodied obligations automatically apply to designated CPSs. The role of the Bundeskartellamt under section 19a of the Competition Act is thus similar to that of a regulatory authority in that it has discretion to intervene or not.

---

[25] See Monti (2022), p. 26 ('The incentive for this step [by the German legislature to adopt section 32g of the Competition Act] is that the national authority can then contribute to shaping the DMA'); MPI Innovation and Competition (2023), para. 56 ('[National authorities] will only be willing to participate in the Commission's investigations if they benefit from this cooperation, for instance by gaining specialised knowledge that could be relevant for their own (related) national cases').

[26] Crémer et al (2023), p. 346.

[27] Article 1(6)(b) DMA.

[28] For a detailed overview of the structure, scope, covered conduct, procedural and judicial remedies, see Franck and Peitz (2021), pp. 513–528. See also Bauermeister (2022).

[29] Franck (2024-1), pp. 25–26.

[30] Section 19a(2), 5th sentence of the Competition Act. Hence, the designation procedure and the abuse procedure can be carried out in parallel.

Section 19a of the Competition Act is designed to deal with unilateral conduct by undertakings in a gatekeeper position. In essence, the provision is aimed at undertakings that provide key intermediation services and thus control an interface between markets, regardless of whether their position could be characterised as dominant in a defined market.[31] While the actual criteria used in the law do not limit the scope of the instrument to digital business models (however precisely defined), the '19a tool' is clearly aimed at the (large) digital gatekeepers.

This concept has been implemented through two main criteria:[32] the instrument can only apply to undertakings that are 'active to a significant extent in markets within the meaning of section 18(3a) [of the Competition Act]', which in turn refers to 'multi-sided markets and networks'. The latter terminology seems to be misleading, since multi-sidedness is a characteristic at the firm level but not (or not necessarily) at the market level. Therefore, the reference means that only firms that operate a two-sided platform, thus acting as intermediaries between different user groups and creating cross-group network effects, can be designated.

Second, the undertakings addressed must have achieved a position of 'paramount significance for competition across markets' or, in the words of the drafting parliamentary committee, 'be particularly well placed to extend their power beyond market boundaries or to secure their unassailable position by virtue of their financial, technical or data resources or as a cross-market digital ecosystem or platform'. The provision lists five (non-exhaustive) criteria to be taken into account in this assessment: dominance in one or more markets; financial strength and access to resources; vertical integration and activities in otherwise related markets; access to competitively sensitive data; and the importance of its activities for third parties' access to supply and sales markets. A designation decision is valid for five years.

So far, the Bundeskartellamt has designated Amazon,[33] Meta,[34] Alphabet,[35] Apple[36] and Microsoft[37] as '19a firms'. Amazon and Apple have appealed against their designation and Amazon's appeal was rejected.[38] Although it is easy to imagine other platform operators in addition to these five major digital gatekeepers for which a 19a designation could be considered,[39] from the Bundeskartellamt's point of view this seems to be a question of efficient use of resources: can the synergies and facilitations in abuse proceedings outweigh the costs of a designation procedure?

Section 19a of the Competition Act lists seven practices, drafted in a rather broad terms, that reveal the specific anti-competitive potential of 19a companies,[40] in particular practices that

---

[31] For a detailed analysis of whether and in what form an 'ecosystem concept' underlies section 19a of the Competition Act and what role such a concept plays in the Bundeskartellamt's designation decisions, see Hornung (2023).
[32] Franck (2024-1), pp. 26–27.
[33] Bundeskartellamt, 5 July 2022, B2-55/21.
[34] Bundeskartellamt, 2 May 2022, B6-27/21.
[35] Bundeskartellamt, 30 December 2021, B7-61/21.
[36] Bundeskartellamt, 3 April 2023, B9-67/21.
[37] Bundeskartellamt, 27 September 2024, B6-26/33.
[38] BGH, 23 April 2024, KVB 56/22 – Amazon.
[39] See Franck and Peitz (2021), pp. 517–519 (considering Booking.com and CTS Eventim as possible candidates for a 19a designation).
[40] Franck (2024-1), pp. 28–29.

allow an undertaking to transfer market power to other markets. Looking at the list, it is clear that the provision covers much of the conduct regulated by the DMA:

- self-preferencing by vertically integrated firms,
- impediment of other undertakings' procurement and sales activities (e.g. exclusive pre-installation of own offers),
- impediment of other undertakings' activities on markets where the 19a undertaking can rapidly expand its position (e.g. exclusivity agreements, tying and bundling practices),
- processing and collecting data to raise entry barriers,
- refusing interoperability or data portability,
- providing other undertakings with insufficient information about the service provided (information about consumer click patterns, ranking parameters etc.),
- demanding disproportionate 'benefits' (e.g. transfer of data, rights) from business customers for intermediation services.

These (exhaustive) categories are equivalent to 'rebuttable presumptions': the 19a undertaking may provide evidence of objective justification. It must demonstrate factors, in particular efficiencies, on the basis of which the practice in question should be considered not to be anti-competitive. This allocation of the burden of proof is intended to take account of the systematic information advantages of digital gatekeepers. The absence of an objective justification, however, does not automatically entitle the authority to impose a prohibition of conduct captured by section 19(2) of the Competition Act: this is not to be understood as a 'tick-box exercise' on the part of the authority.[41] Rather, the Bundeskartellamt is entitled to exercise its discretion in this respect. It must assess the economic and legal context and is bound by the principle of proportionality. It does not seem clear what the resulting requirements for an abuse decision would be. It has been argued that the authority must be able to present a theory of harm in the sense that it can at least plausibly argue that, taking into account the market situation and other contexts, the conduct in question poses a threat to open markets and undistorted competition, and that this can be remedied by the intervention. However, as the intervention threshold under section 19a of the Competition Act is deliberately lower than in traditional abuse control, it is important not to set too high a standard for the evidence required by the authority.[42]

1.2.2 Overview of Abuse Proceedings under Section 19a of the Competition Act

So far, the Bundeskartellamt has initiated seven abuse proceedings against designated 19a firms, the statuses of which are presented in Table 1.[43]

---

[41] Franck (2024-1), pp. 30–31.

[42] See more in detail on normative calibrations for the efficiency and welfare analyses required under section 19a of the Competition Act Franck (2024-1), pp. 31–32.

[43] For an overview of ongoing cases see https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Downloads/Liste_Verfahren_Digitalkonzerne.pdf?__blob=publicationFile&v=8 (in German) and at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Downloads/List_proceedings_digital_companies.pdf?__blob=publicationFile&v=14 (in English).

Table 1	
Case	**Status**
Google News Showcase (V-43/20)	Proceedings closed on 21.12.2022 following various measures taken by Google to address the competition concerns (Case Report of 1.8.2023)
Google Data Processing (B7-70/21)	Commitment Decision of 5.10.2023
Google Maps Platform and Google Automotive Services	Pending proceeding; initiated on 14.2.2022 (Press Release) Statement of objections of 21.6.2023 (Press Release) Market test regarding commitments proposed by Google (Press Release of 20.12.2023)
Amazon Price Control	Pending proceeding; initiated on 15.5.2020, extended to sec 19a(2) in November 2022 (Press Release of 14.11.2022)
Amazon Brandgating	Pending proceeding; initiated on 3.9.2020, extended to sec 19a(2) in November 2022 (Press Release of 14.11.2022)
Apple App-Tracking-Transparency Framework (ATTF)	Pending proceeding; initiated on 14.6.2022 (Press Release)
Meta VR Glasses (B6-55/20)	Pending proceeding; initiated on 10.12.2020, extended to sec 19a(2) on 28.1.2021 (Press Release) Meta responds to competition concerns (Press Release and Case Summary of 23.11.2022)

The overview shows that three cases have been fully or at least partially closed because of commitments or changes in behaviour by digital gatekeepers.[44]

In the Meta VR Glasses case, the Bundeskartellamt persuaded Meta not to make the use of Oculus VR glasses (later branded 'Meta Quest') dependent on registering with Facebook. Instead, from August 2022, Meta allowed the use of VR glasses by logging in with a Meta account. The tying of Meta's VR glasses with Facebook registration is not covered by the DMA: while Facebook is designated as a CPS, tying a CPS with VR services is not explicitly prohibited by Article 5(7) of the DMA, and Meta's VR glasses are not designated as a CPS, so Article 5(8) of the DMA does not apply.

In the case of Google News Showcase, the Bundeskartellamt investigated the integration of the service into other Google services and the conditions under which it was offered to publishers. The case was closed by informal notice in December 2022 after Google implemented and committed to several measures. Google abandoned plans to integrate News Showcase into Google Search and promised not to treat press publishers differently in its search algorithm depending on whether they cooperated with Google Showcase or not. In addition, Google has made certain changes to the contractual agreements underlying the service that would or could have limited the ability of participating publishers to enforce their ancillary copyrights against Google. The case has an overlap with the (subsequently applicable) DMA: as Google Search has been designated as a CPS, any preferential treatment of News Showcase in the display of search results is prohibited under Article 6(5) of the DMA. Moreover, Article 6(12) of the DMA, which guarantees fair, reasonable and non-discriminatory (FRAND) access to online search engines, would not allow any preferential treatment of publishers that cooperate with

[44] For a more detailed account of each of these three cases, see Franck (2024-1), pp. 34–44. The following overview is based on these findings.

Google News Showcase. However, other aspects of the case are not covered by the DMA: Google News is not a search engine within the meaning of the DMA and therefore access to the service cannot be subject to Article 6(12) of the DMA. Furthermore, as Google News (including Showcase) does not meet the criteria for being an 'online intermediation service', it could not be designated as such in order to then be subject to DMA obligations such as the prohibition on self-preferencing in ranking under Article 6(5) of the DMA.[45]

In a commitment decision dated 5 October 2002, Google agreed to significantly extend users' choice regarding the processing of data.[46] In effect, the Bundeskartellamt used the 19a instrument to supplement the DMA by extending beyond its scope the obligations to which Google was already subject under Article 5(2) of the DMA. To avoid overlap between the commitments and the scope of the DMA, the commitments apply only to the sharing and combination of user data (including data obtained from third-party websites or applications) across Google services that are not designated as CPSs. Thus, the commitments do not apply to any data processing activities in which a CPS is involved, such that Article 5(2) of the DMA applies. Should the Commission designate additional Google services, the scope of the commitments will automatically be reduced (and vice versa should services lose their status as CPSs in the future).[47] The Bundeskartellamt emphasised that it had been in regular contact with the Commission throughout the proceedings.[48] It was said that the latter had indeed commented on the draft commitments.[49]

1.2.3 Integration of Abuse Procedures under Section 19a of the Competition Act with the DMA Framework

The legal basis for the additional role played by 19a procedures in regulating digital gatekeepers in a pro-competitive manner is provided by Article 1(6)(b) of the DMA:

> [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.

This transfers a key idea of Article 3(2) of Regulation 1/2003 to the DMA: with regard to unilateral conduct, national competition law may impose stricter rules on designated gatekeepers than those imposed by the DMA. The application of this rule presupposes that abuse proceedings under section 19a of the Competition Act are to be regarded as 'national competition law', which is questioned in the literature.[50] It is true that the 19a proceedings and the role of the Bundeskartellamt differ significantly from traditional abuse proceedings.[51] Nevertheless, the essential characteristics of 'national competition law' according to recital 10 of the DMA are fulfilled. It states:

---

[45] Franck (2024-1), pp. 40–41.
[46] Bundeskartellamt, 5 October 2023, B7-70/21.
[47] Bundeskartellamt (n 46), paras 74–75.
[48] Bundeskartellamt (n 46), para. 27.
[49] Bundeskartellamt (n 46), paras 36 and 38.
[50] See Deselaers (2024), p. 369.
[51] See above section 2.2.1; Franck (2024-1), pp. 25–32.

> [S]ince this Regulation aims to complement the enforcement of competition law, it should apply without prejudice … to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question.

Thus, the DMA uses essentially the same criteria that have been established in the literature for the definition of 'national competition law' within the meaning of Article 3(2) and (3) of Regulation 1/2003.[52] Not only is the designation of a 19a gatekeeper based on an individual, multi-faceted analysis, but so is the determination of whether any particular conduct is abusive: The gatekeeper may submit an objective justification (including, for example, efficiency gains) and even without such a submission the Bundeskartellamt must assess the individual economic and legal context in order to argue that conduct falling under the categories listed in section 19a(2) of the Competition Act poses a threat to open markets and undistorted competition. Therefore, using the '19a tool', the Bundeskartellamt may indeed impose 'further obligations' on DMA gatekeepers.[53]

It has also been argued that the fact that Article 1(6)(b) of the DMA allows for the prohibition of 'other forms' of unilateral conduct means that only matters not covered by the DMA obligations can be addressed by national competition law. With regard to the Bundeskartellamt's Google Data Processing case, it is therefore argued that, if Article 5(2) of the DMA only restricts the cross-use and combination of data if a CPS is involved in the processing, this cannot be extended to data processing between non-CPSs on the basis of national competition law because it is not a question of prohibiting 'other forms' of conduct.[54] However, this is a misinterpretation of the provision: the expression 'other forms of unilateral conduct' refers to the previous point (a), which already provides for the applicability of national competition law to unilateral conduct in the form of 'abuse of a dominant position'. Thus, Article 1(6)(b) of the DMA refers to national competition law provisions such as section 19a of the Competition Act that do not correspond (in their scope of application) to Article 102 of the DMA.[55]

The application of section 19a of the Competition Act to gatekeepers designated under the DMA remains subject to the limitation that only 'further obligations' may be imposed on them. This includes not only the imposition of other categories of obligations but also the tightening of obligations in a matter covered by the DMA. The condition that only 'further obligations' are allowed seems to be intended to prevent Member States from replicating DMA obligations through a specific competition instrument. Otherwise, the rules for the enforcement of DMA obligations, in particular the role of the Commission as the sole (public) enforcer, could be undermined.

---

[52] See Franck and Stock (2020), pp. 324 and 345–356.
[53] See Franck and Peitz (2021), p. 526; Schweitzer (2024), paras 44 and 61–67; Blockx (2023), pp. 330–331; Käseberg and Gappa (2024), para. 28.
[54] Deselaers (2024), p. 369.
[55] Käseberg and Gappa (2024), para. 24.

Against this background, various scenarios can be outlined in which the Bundeskartellamt may impose 'further obligations' on gatekeepers designated under the DMA via section 19a of the Competition Act. First, the Bundeskartellamt can impose additional obligations in connection with a CPS designated under the DMA. For example, the authority prevented Meta from tying the use of its VR glasses to Facebook registration, which is not prohibited under Article 5(7) or Article 5(8) of the DMA.

Second, the Bundeskartellamt can use the '19a tool' to impose obligations on platform services operated by an organisation that is DMA gatekeeper, but which is not designated as a CPS under the DMA. On the one hand, this may be the case because the service is not covered by the list of possible CPSs under Article 2(2) of the DMA. For example, Alphabet's services Google News and Google News Showcase are of a type that cannot be considered a CPS because they do not qualify as online intermediation services[56] or as online search engines.[57]

On the other hand, this may also arise because a service included in the list of potential CPSs does not meet the threshold of being 'an important gateway for business users to reach end users'.[58] For example, Alphabet's Google Flights service qualifies as an online intermediation service (Article 2(2)(a) of the DMA), Android Automotive OS qualifies as an operating system (Article 2(2)(f) of the DMA) and Google Assistant qualifies as a virtual assistant (Article 2(2)(h) of the DMA). These services are not designated as CPS under the DMA, but the Bundeskartellamt's Google Data Processing decision effectively puts them on the same footing as the DMA with regard to the cross-platform use and aggregation of data.

All in all, the '19a instrument' is more flexible than the DMA. First, once designated, it applies to all platforms of the digital gatekeeper (not just the designated CPS) and, second, the catalogue of abusive practices is vaguer and therefore much broader. This means that the tool could be deployed more quickly, for example, in response to new developments such as the emergence of generative AI tools, in particular large language models, and the potential for abuse that these may entail. The Bundeskartellamt, using the '19a tool', could thus play a pioneering role by providing a basis for testing and considering possible extensions to the scope of the DMA. One obstacle, however, is that it will not always be clear to the Bundeskartellamt how far the obligations of the DMAs extend. However, the authority has to form an opinion on this, as its competence is limited to imposing 'further obligations' on the DMA gatekeepers. Finally, section 19a of the Competition Act does not provide for the possibility of imposing stricter merger control on digital gatekeepers or even structural measures such as ownership unbundling.[59] In this respect, the German instrument cannot go beyond the DMA.

---

[56] Article 2(5) DMA.
[57] Article 2(6) DMA
[58] Articles 1(b) and 3(9) DMA.
[59] To be sure, if an addressee infringes a behavioural obligation imposed on it under section 19a of the Competition Act, the general remedies available to the Bundeskartellamt apply, including (in a subsidiary manner) structural measures. See section 32(2), 3rd sentence of the Competition Act.

2. Digital Gatekeeper Acquisitions: 'Case Procurement' for the European Commission?

Where mergers have a significant cross-border dimension in the internal market, the European Commission should be the competent authority to decide whether to clear or block them, taking into account the effects throughout the internal market and allowing for a single decision (including remedies). However, regarding acquisitions by digital gatekeepers, the thresholds of Article 1 of the EU Merger Regulation (EUMR) are too high, as the target firms are often acquired at a stage in their business life cycle where they have (yet) generated no or only a little revenue. Nevertheless, these acquisitions can have a significant impact on competition, as illustrated by the sometimes very high transaction values. In particular, there are fears that digital gatekeepers will discontinue or delay the scaling of business models, digital technologies or other innovations of the acquired firms, or at least replace their own innovation projects with the acquired capabilities, thereby significantly reducing the overall ability of the market to innovate.[60]

Against this background, I will first briefly explain how Article 14 of the DMA is intended to help extend the reach of EU merger control in practice. I will then examine the supporting role that German merger control law and the Bundeskartellamt can play in this context.

2.1 Article 14 of the DMA as an Instrument Facilitating the 'Article 22 EUMR Route' to Brussels

Under Article 14 of the DMA, digital gatekeepers are required to inform the European Commission of intended acquisitions, irrespective of whether they are notifiable under the EUMR or under national merger control law. The provision does not apply with regard to any acquisition by a designated gatekeeper but (only) 'where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data'.[61]

The rationale behind this provision is essentially threefold. First, the Commission may use this information to verify the status of a gatekeeper and to adjust the list of CPSs provided by a gatekeeper.[62] Second, the information will be used to monitor 'broader contestability trends in the digital sector' and feed into market investigations under Articles 16 to 19 of the DMA.[63] Third, while Article 14 of the DMA does not impose a notification duty and thus, as such, does not extend EU merger review, it is intended to indirectly strengthen merger control of gatekeeper acquisitions on the basis of the EUMR. As explicitly endorsed by Article 14(4) and (5) of the DMA, the Commission should transmit the information to the competent authorities of the Member States so that they can consider, in particular, whether to refer concentrations to the Commission on the basis of Article 22 of the EUMR.[64] In other words, Article 14 of the

---

[60] For a comprehensive overview of the economics, and the antitrust theories or harm of so-called 'killer acquisitions' see Tzanaki (2023), sub I. ('The economics of killer acquisitions: why merger control thresholds and the law matter'), pp. 7–23.

[61] Article 14(1) DMA.

[62] Recital 71, 1st sentence, DMA.

[63] Recital 71, 2nd sentence, DMA.

[64] Recital 71, 3rd sentence, DMA.

DMA is intended to implement the 'Article 22 EUMR route' for (de facto) extending the scope of EU merger control. The minimum information listed in Article 14(2) of the DMA, which the gatekeeper must provide to the Commission, allows the Commission and subsequently the Member States to consider a referral under Article 22 of the EUMR.

This 'Article 22 EUMR route' is unsatisfactory for several reasons. The Commission cannot (unlike in the case of below-threshold referrals under Article 4(5) of the EUMR) examine the effects of an acquisition in relation to the whole internal market but only in relation to the territory of the Member States that actually make a referral. Whether the general interest in a 'one-stop shop' review in Brussels, which often seems to prevail in the case of digital gatekeeper acquisitions, is taken into account depends thus on the political will of individual Member States. In addition, following the ECJ's Illumina judgment, it is clear now that referrals under Article 22 of the EUMR are only possible where an acquisition is subject to merger control under national law.[65] The practical effectiveness of this route therefore depends not only on the political will of Member States in individual cases but also more generally on the legal framework for merger control in a Member State. But, for now,[66] it remains the only way to fill a gap in the scope of EU merger control in a particular case.

It is therefore clear that the Commission will have to continue to rely on the cooperation of the Member States in order to fill the identified gap in merger control via the 'Article 22 EUMR route': Member State authorities must first be able to take up and control the relevant acquisitions under national law and second there must be the political will to refer these cases to Brussels where appropriate. Based on the above, I will turn in the following section to consider the legal framework and practice of merger review in Germany.

2.2 German Merger Law and Practice and the 'Article 22 EUMR' Route to Brussels

Two acquisitions of digital gatekeepers come to mind that the Commission reviewed on the basis of referrals under Article 22 of the EUMR: Apple/Shazam[67] and Meta/Kustomer.[68] While seven EEA states referred the Apple/Shazam merger to the Commission[69] and ten EEA states

---

[65] ECJ, 3 September 2024, Case C-611/22 P, *Illumina v Commission*, ECLI:EU:C:2023:205.

[66] A pragmatic way to extend the Commission's competence to review mergers by legislation would be to use the simplified legislative procedure under Article 1(5) of the EU Merger Regulation to 'revise the thresholds and criteria' of Article 1(3) of the EU Merger Regulation. See ECJ, 3 September 2024, Case C-611/22 P, *Illumina v Commission*, ECLI:EU:C:2023:205, paras 183–184 and 216. However, it is not clear whether this simplified procedure would also allow for the introduction of an additional threshold based on the value of the transaction. For an overview of other possible options to extend the Commission's merger powers, see Tzanaki (2024), p. 7. The Commission is sceptical about amending the EUMR because it was adopted on the basis of (now) Article 352 TFEU (which requires unanimity in the Council). However, the EU can also adopt merger legislation on the basis of Article 114 TFEU. See Franck, Monti and de Streel (2021).

[67] 6.9.2018, Case M.8788 (clearance without commitments).

[68] 21.2.2022, Case M.10262 (clearance with commitments).

[69] European Commission, Press release of 6.9.2018, 'Mergers: Commission clears Apple's acquisition of Shazam' (noting that the Commission had accepted a request from Austria, France, Iceland, Italy, Norway, Spain and Sweden to assess the acquisition).

referred the Meta/Kustomer merger to the Commission,[70] Germany was not among them in either procedure. Why was this the case?

First of all, unlike the European Commission, the Bundeskartellamt has – rightly, as it turned out, if one follows the ECJ judgment in *Illumina* – taken the view that it is not in a position to refer cases under Article 22 of the EUMR to the Commission if the thresholds under German merger control law are not met. As German merger law does not provide for a 'call-in' power to require notification of acquisitions below the legal thresholds and as it appeared that the notification thresholds were not met (Apple/Shazam) or at least this seemed uncertain (Meta/Kustomer), the Bundeskartellamt abstained from making a referral:

> Germany did not join the application for referral to the EU Commission because in the Bundeskartellamt's general practice a referral requires a merger to be subject to notification based on national competition law, which still has to be clarified in the present case.[71]

According to the turnover-based notification criteria under German law, all parties together must have a combined worldwide turnover of more than EUR 500 million, one of the parties must have a turnover of more than EUR 50 million in Germany and another party must have a turnover of more than EUR 17.5 million in Germany.[72] The latter requirement may not be met in typical acquisitions of digital gatekeepers, even though they may have a significant impact on the competitive conditions in Germany. In order to close this gap,[73] a threshold based on transaction value was introduced in 2017: If no second party with a turnover in Germany of more than EUR 17.5 million is involved, notification is still required if:

- the consideration for the acquisition exceeds EUR 400 million, and
- the target has substantial operations in Germany.[74]

Thus, as far as can be seen, the Apple/Shazam merger did not have to be notified because the transaction value threshold was not met. The reported purchase price was USD 400 million,[75] equivalent to around EUR 340 million at the time.

---

[70] European Commission, Press release of 2.8.2021, 'Mergers: Commission opens in-depth investigation into proposed acquisition of Kustomer by Facebook' (noting that the Commission had accepted a request from Austria, which was joined by Belgium, Bulgaria, France, Iceland, Ireland, Italy, the Netherlands, Portugal and Romania).

[71] Bundeskartellamt, Press Release of 23.7.2021, Bundeskartellamt Examines whether Facebook / Kustomer Merger is Subject to Notification https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_07_2021_Facebook_Kustomer.html.

[72] Section 35(1) Competition Act.

[73] Section 32f(2) of the Competition Act also allows for the extension of merger control to cases below the threshold. Following a sector inquiry, the Bundeskartellamt can require companies to notify any acquisition. The focus of this instrument is to protect competition in regional markets. See Franck and Peitz (2024-2), pp. 7–8.

[74] Section 35(1a) Competition Act. The current version of the provision is based on an amendment made in 2021, which removed inconsistencies from the original version. The focus of this instrument is the protection of competition in regional markets.

[75] See BBC News (10 December 2017) 'Apple "to buy Shazam for $400m"', https://www.bbc.com/news/business-42299207.

In the Facebook/Kustomer case, where the reported purchase price was USD 1 billion[76] (around EUR 850 million), the issue at stake was (and still is) whether Kustomer was sufficiently active in Germany within the meaning of the provision. Kustomer is a provider of customer relationship management (CRM) services, which it offers based on a software-as-a-service (SaaS) business model. The company had barely any customers in Germany. However, Kustomer's customers had a significant number of end users in Germany. After some initial uncertainty, the Bundeskartellamt finally concluded that the processing of these end customers' data constituted sufficient domestic activity. The authority ordered Meta and Kustomer to notify the merger.[77]

This led to the unusual situation that the Bundeskartellamt was investigating the acquisition in parallel with the European Commission, which caused some irritation in Brussels, to say the least. After all, given the potential cross-border effects of the merger, the Commission considered itself to be in the best position to assess the merger. The Commission cleared the merger subject to extensive commitments regarding public access to APIs to avoid foreclosing the CRM market.[78] The Bundeskartellamt investigated the merger based on a concurrent theory of harm, suggesting that significantly increased access to end user data would allow Meta to expand its digital ecosystem and gain an advantage over competitors in relation to various services. In the end, the authority cleared the merger in phase 1.[79] The Bundeskartellamt found that the acquisition could have negative indirect effects on competition in markets where Meta already had a strong position. However, these anti-competitive effects could not be predicted with the degree of probability required for a prohibition. Therefore, in the words of its president, the authority cleared the acquisition 'with unease'.[80]

Subsequently, however, the Düsseldorf Higher Regional Court, in proceedings concerning the Bundeskartellamt's decision on costs, found that the merger did not have to be notified because Kustomer did not have significant activities in Germany.[81] The court considered the provision of CRM services to customers based in Germany to be the only relevant factor for measuring Kustomer's domestic activities. Thus, the processing of data from German end customers was considered to be part of the activity in relation to Kustomer's customers. The court also acknowledged that Kustomer's data processing could have an impact on the competitive situation in Germany. However, while this may have been sufficient in the eyes of the court to

---

[76] See Forbes (30 November 2020) 'Facebook confirms to buy Kustomer for $1 billion', https://www.forbes.com/sites/ilkerkoksal/2020/11/30/facebook-confirms-to-buy-kustomer-for-1-billion/.

[77] Bundeskartellamt, Press Release of 9 December 2021, 'Bundeskartellamt considers Meta/Kustomer merger to be subject to notification', https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09_12_2021_Meta_Kustomer.html?nn=3591568.

[78] 21.1.2022, Case M.10262.

[79] Bundeskartellamt 11.2.2022, B6-21/22.

[80] Bundeskartellamt, Press Release of 11 February 2022, 'Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)', https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html.

[81] OLG Düsseldorf, 23 November 2022, Kart 11/21 (V).

establish the German legislature's power to regulate the merger,[82] it was not sufficient to establish market-related domestic activity within the meaning of section 35(1a) of the Competition Act.[83] As the share of the turnover that Kustomer generated with customers based in Germany was very small, the domestic activity of Kustomer was considered to be negligible.[84] Moreover, the court argued that the fact that the company serviced German customers from the United States, did not offer German support and did not provide the software in German indicated that the German market was not of particular importance to the company.[85]

In addition, the Higher Regional Court seems to have considered as an (unwritten) additional criterion that the relevant domestic activities of the target must not be in a 'mature' market. Otherwise, the (low) turnover of the target could be regarded as a sufficiently meaningful parameter and the threshold based on the transaction value should not apply. Without taking a final position on the issue, the court said that it doubted whether Kustomer was operating in an immature market, given that CRM services had been offered in the form of SaaS since the 1990s.[86] The Bundeskartellamt has appealed against the decision and the case is pending before the Federal Court of Justice.[87]

These details of the application of the transaction value-based threshold, as they have been endorsed by the Düsseldorf Higher Regional Court, make it clear that this interpretation, if it prevails[88], is too restrictive to capture all potentially anti-competitive digital gatekeeper transactions. After all, the Bundeskartellamt pursued a plausible 'digital ecosystem-based' theory of harm in this case. Even if the merger is ultimately cleared, it is important that such acquisitions can be scrutinised because only then will the authorities have a chance to develop and test new theories of harm in the field of acquisitions of digital gatekeepers. Thus, if the Federal Court of Justice does not correct this restrictive view, a reform of the transaction value threshold should be considered.

Subsequently, the Bundeskartellamt, without applying a particularly strict standard in interpreting the criterion of 'substantial operations in Germany', concluded that this requirement was not met in the *Microsoft/OpenAI*[89] and *Microsoft/Inflection*[90] cases and that these merger cases could thus not be taken up by the authority. Therefore, even leaving the

---

[82] Section 185(2) of the Competition Act.
[83] OLG Düsseldorf, 23 November 2022, Kart 11/21 (V), Juris, paras 63–70.
[84] OLG Düsseldorf, 23 November 2022, Kart 11/21 (V), Juris, paras 75–76.
[85] OLG Düsseldorf, 23 November 2022, Kart 11/21 (V), Juris, para. 77.
[86] OLG Düsseldorf, 23 November 2022, Kart 11/21 (V), Juris, para. 72.
[87] Case KVR 77/22.
[88] For a critical account, see Göbel (2024), pp. 46–49.
[89] Bundeskartellamt 25.9.2023, B6-34/23. Crucially, the authority considered that the legal definition of a concentration would be met in 2019 and 2021. At that time, however, OpenAI had no significant domestic activities. Although the latter has been the case since January 2023, there has been no deepening of the cooperation since then that could be considered a notifiable concentration. However, if Microsoft were to increase its influence on OpenAI in the future, a notification obligation could arise. See Case summary of 15 November 2023, pp. 2–3.
[90] Bundeskartellamt, Press Release of 29.11.2024, 'Taking over employees may be subject to merger control in Germany – Bundeskartellamt not competent to review Microsoft/Inflection transaction as Inflection has no substantial operations in Germany.'

Facebook/Kustomer litigation aside, a legislative softening[91] and possibly even the abolition of the criterion that the target company must have significant domestic activities should be seriously considered.[92]

What is not to be expected, however, is the enactment of 'call-in' powers for the Bundeskartellamt, a reform along the lines much appreciated by the European Commission[93] in the wake of the ECJ's *Illumina* ruling:

> Another direction is to rely on Member States to expand their own jurisdictions, thus allowing for more referrals under the 'traditional approach' to Article 22 [EUMR]. This is already happening. Eight Member States [Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden] have introduced such powers in their toolbox.[94]

In addition to political concerns that this would make Germany less attractive as a location for venture capital investments, the guarantee of legal certainty for companies has always been a high priority in the political debate,[95] and this was also emphasised by the Bundeskartellamt in the debate on Article 22 EU merger referrals prior to *Illumina*. A 'call-in' power would be in tension with this.

2.3 Conclusion

Germany has not yet proved to be a reliable 'case procurer' under Article 22 of the EUMR – in the sense desired by the European Commission – to fill the merger control gap at EU level for acquisitions of low-turnover targets by digital gatekeepers. Whether this will change in the future will depend, inter alia, on the pending decision of the Federal Court of Justice in the Facebook/Kustomer case and, possibly as a reaction to this decision and the then prevailing interpretation of section 35(1a) of the Competition Act, but also more generally, on the willingness of the German legislature to make the transaction value threshold less restrictive. However, the enactment of a 'call-in' competence for the Bundeskartellamt, which would allow it to refer all cases that the Commission would like to see in Brussels, seems at any rate rather unlikely from today's perspective.

On the other hand, it would be wrong to suggest that the Bundeskartellamt is unwilling to refer merger cases to the Commission. In particular, the authority does not appear to have advocated that Germany should refuse a referral in any of the numerous requests concerning acquisitions by digital gatekeepers under Article 4(5) of the Merger Regulation.[96] However, from the

---

[91] According to an internal draft of the Federal Ministry of Economic Affairs and Climate Protection dated May 2024, it was planned to amend section 35(1a) of the Competition Act so that it would be sufficient if the target company was expected to carry out substantial activities in Germany within a projected period of three to five years. See Käseberg (2025), o. 1.

[92] See Göbel (2024), 50–51.

[93] See Tzanaki (2024), pp. 7–8.

[94] Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association (6 September 2024), https://ec.europa.eu/commission/presscorner/detail/en/speech_24_4582.

[95] Käseberg (2025), p. 2; see also Göbel (2024), pp. 74–76.

[96] The Bundeskartellamt's activity report ('Tätigkeitsbericht') for the years 2021 and 2022 mentions that the Bundeskartellamt has referred one merger case to the European Commission pursuant to Article 22 of the EUMR which was notifiable because the transaction value threshold pursuant to Section 35 (1a) of the Competition Act was met. Deutscher Bundestag, Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2021/2022 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet. Drucksache

Bundeskartellamt's point of view, there seems to be an inappropriate post-*Illumina* debate in Brussels, according to which the thresholds under national law are only of practical relevance for these cases to be referred to the Commission. The authority is obviously confident enough to take up these cases itself if appropriate.

3. Administrative Enforcement of the DSA: The Bundesnetzagentur as the Principal Enforcer and Home of the Digital Services Coordinator

In Germany, the Digitale-Dienste-Gesetz (DDG),[97] the German Digital Services Act, came into force on 14 May 2024. The Act establishes a framework for the effective implementation and enforcement of the EU DSA. It confers powers to enforce the EU Digital Services Act and designates the competent authorities.

3.1 Competent Authorities and Coordination

The Bundesnetzagentur (the Federal Network Agency) plays the central role in the enforcement of the DSA. It acts as the default enforcer[98] and the Digital Services Coordinator[99] – referred to in the German legislative texts as the 'Koordinierungsstelle für digitale Dienste' (Digital Services Coordination Unit) – has been established as part of the Bundesnetzagentur.[100] Further, the German legislature has assigned certain specific tasks or sectors to other competent authorities:[101]

- For the protection of minors,[102] both a specialised authority at federal level (Bundeszentrale für Kinder- und Jugendmedienschutz) and various authorities at state level are designated as competent enforcement authorities.[103] This split in competences results from the differentiated distribution of regulatory powers for the protection of minors from harmful media between the federal level and the Länder.[104]
- Enforcement of the DSA in data protection[105] is the responsibility of the federal authority specialised in this area, the Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragter für den Datenschutz und die Informationsfreiheit).[106]

20/7300, 26.7.2023, p. 32. However, the case is not specified. It seems possible that the Bundeskartellamt has referred the *Booking/eTraveli* merger under Article 22 of the EUMR, but that this referral was ultimately irrelevant because the parties requested the case be referred to the Commission under Article 4(5) of the EUMR based on the fact that the transaction could have been reviewed under the national merger control laws of (at least) three Member States (Austria, Cyprus, Germany). 25.9.2023, Case M.10615 – *Booking Holdings / eTraveli Group,* paras. 6-8.

[97] See https://www.gesetze-im-internet.de/ddg/.
[98] Section 12(1) German DSA.
[99] See Articles 49 to 51 DSA.
[100] Section 14(1) DSA. See https://www.dsc.bund.de/DSC/DE/_Home/start.html?r=1.
[101] See Article 49(2) DSA.
[102] Articles 14(3) and 28(1) DSA.
[103] Section 12(2) of the German DSA.
[104] See Jungbluth and Engel (2024), pp. 402–403.
[105] Articles 26(3) and 28(1) and (3) DSA.
[106] Section 12(3) German DSA.

For a complainant, this fragmentation of responsibility in the enforcement of the DSA should not be detrimental. For this reason, section 20(1) of the German DSA designates the Digital Services Coordination Unit as the 'central contact point for complaints' (*zentrale Beschwerdestelle*) thus implementing a 'one-stop-shop principle'.[107] As a result, even if the Digital Services Coordination Unit transfers a complaint to another competent authority, it remains, by default, the contact point for the complainant.

Section 18(1) of the German DSA requires the DSA enforcement authorities to work together 'in a spirit of cooperation and trust'. In particular, they shall 'share with each other observations and findings that may be relevant to the performance of their respective duties'. Details may be set out in an administrative agreement between the authorities.[108] The authorities are authorised to exchange and use data, including personal data.[109]

The cooperation of the DSA enforcement authorities with other authorities, for example the Bundeskartellamt, is specifically dealt with in Section 19 of the German DSA. With regard to data protection law, for example, it is stipulated that, where the task of the Digital Services Coordination Unit includes the verification of compliance with the GDPR[110] or other data protection rules, decisions must be taken in consultation with the relevant data protection supervisory authority.[111]

The Federal Criminal Police Office (Bundeskriminalamt) has been designated as the central body (*Zentralstelle*)[112] for receiving reports of 'suspicions of criminal offences' under Article 18 of the DSA. German law requires the federal government to submit an annual report to the Bundestag on the type and number of offences reported to the Federal Criminal Police Office under this provision.[113] The information obtained in this way should contribute to the preparation of a proposal for a more precise definition of the offences to be reported under Article 18 of the DSA.[114]

3.2 The Digital Services Coordination Unit and Its Head as a Key Figure in DSA Enforcement

The institutional requirements for the Digital Services Coordinator set out in Article 50 of the DSA – resources, budget autonomy and independence – are implemented by sections 14(2) and (3) and 15 of the German DSA.

According to information provided by the federal government in August 2024, a total of 15 positions for the Digital Services Coordinator at the Bundesnetzagentur were earmarked in the

---

[107] Kraul (2024), p. 520, para. 17.
[108] Section 18(2) German DSA.
[109] Section 18(3) German DSA.
[110] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4.5.2016, pp. 1–88.
[111] Section 19(1) German DSA. The competent data protection authorities are the data protection authorities of the respective German federal states or the Federal Commissioner for Data Protection and Freedom of Information.
[112] Section 13, 1st sentence, German DSA.
[113] Section 13, 2nd sentence, German DSA.
[114] Jungbluth and Engel (2024), p. 403.

2024 federal budget, of which 12.5 positions were already filled. In addition, 33 positions were created by transferring tasks from another agency, although the final financing of these positions beyond 2025 had not been clarified at that time. It is said that the Bundesnetzagentur wanted to fill all the available positions by the end of 2024.[115] In spite of all the caution that must be exercised in making external assessments, it can be said that the staffing levels do not appear to be generous, at least so far.

In Germany, the independence of an authority, as provided for by law for the Digital Services Coordinator, is still the exception, although it can now be found in a few instances due to the influence of EU law in the area of economic regulation. It is noteworthy, for example, that the independence of the Bundeskartellamt from instructions from the Federal Ministry of Economic Affairs, although accepted in practice, is not explicitly laid down in the German Competition Act,[116] despite the fact that this is required by Article 4(2)(a) of the ECN+ Directive.[117] Traditionally, in Germany any break with the classic hierarchical administration has been seen as problematic because it weakens the legitimacy and accountability to parliament required by the principle of democracy. However, the ECJ did not consider these concerns to be legally compelling because:

> The existence and conditions of operation of such authorities [outside the classic hierarchical administration] are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts.[118]

The head of the Digital Services Coordination Unit has a crucial role to play, as they have to make all the decisions provided for by the DSA.[119] In particular, the head represents Germany in the European Board for Digital Services[120] and exercises voting rights there.[121]

The head of the Digital Services Coordination Unit is a civil servant exercising a five-year term of office, though a one-off extension of five years is permitted.[122] This extension option is not ideal for ensuring independent management of the unit, as it may create incentives to meet political expectations. The eligibility requirements and the selection and appointment process are designed to ensure the democratic legitimacy and accountability of the head's actions, while avoiding undue politicisation of the process. Only those with the necessary qualifications, experience and expertise, in particular in business models for digital services and knowledge of the legal framework for digital services, are eligible to head the Digital Services Coordination

---

[115] Bundesregierung (2024), p. 2.
[116] See Franck (2024-2), pp. 640 and 644.
[117] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. OJ L 11, 14.1.2019, pp. 3–33.
[118] Case C-518/07, *Commission v Germany*, ECLI:EU:2010:125, para. 42.
[119] Article 16(1) German DSA.
[120] Articles 61 to 63 DSA.
[121] Section 16(2) German DSA.
[122] Section 16(3) German DSA.

Unit.[123] In any case, the principle of best selection applies to access to public office pursuant to Article 33(2) of the Grundgesetz (Basic Law), the German Constitution. Following a public call for tenders, the president of the Bundesnetzagentur proposes an individual to the Federal Ministry for Economic Affairs for the position of head of the Digital Services Coordination Unit. The federal president then appoints the head.[124] In order to ensure the independence of the unit, the head cannot own or be a member of the board of directors or the supervisory board of any company in the digital economy. The head must also not be a member of the government or a parliament.[125]

The position of head of the Digital Services Coordination Unit was publicly advertised on 12 December 2024. In the meantime, the president of the Bundesnetzagentur is managing the unit.[126]

3.3 Investigatory Powers and Sanctions

Under Article 51(1) to (3) of the DSA, the Digital Services Coordinator is granted certain investigatory powers and enforcement powers. Measures taken in the exercise of these powers:

> shall be effective, dissuasive and proportionate, having regard, in particular, to the nature, gravity, recurrence and duration of the infringement or suspected infringement to which those measures relate, as well as the economic, technical and operational capacity of the provider of the provider of the intermediary services concerned where relevant.[127]

Therefore, it is on the Member States to:

> lay down specific rules and procedures for the exercise of the [investigatory and enforcement] powers pursuant to [Article 51] paragraphs 1, 2 and 3 and shall ensure that any exercise of those powers is subject to adequate safeguards laid down in the applicable national law in compliance with the Charter and with the general principles of Union law.[128]

Against this background, sections 24 to 27 of the German Digital Services Act provide for complementary investigatory and enforcement powers: the power to conduct investigations and gather the necessary evidence; to request information, to conduct searches and to seize objects; and to enforce the resulting obligations and, in particular, to impose penalties in the event of non-compliance. Section 28 of the German Digital Services Act empowers the Digital Services Coordinator and other authorities responsible for enforcing the DSA to inform the public about their activities and the ‘situation and developments in their area of responsibility’. To this end, they may disseminate any information that may be relevant from the perspective of consumers and other market participants, in particular through their websites. The measures permitted under Article 51(3) of the DSA are specified in section 29 of the German Digital Services Act.

---

[123] Section 16(4) German DSA.
[124] Section 16(5) German DSA.
[125] Section 16(6) German DSA.
[126] Section 16(5), 4th sentence, German DSA.
[127] Article 51(5) DSA.
[128] Article 51(6), 1st sentence DSA.

The sanctioning of DSA infringements via fines – as provided for in Article 52 of the DSA – is specified in section 33(4) to (8) of the German Digital Services Act.

3.4 A Peculiar German Feature: the Advisory Board at the Digital Services Coordination Unit

A specific feature of the German implementation of the DSA is the Advisory Board, which is set up at the Digital Services Coordination Unit in accordance with section 21 of the German Digital Services Act. The Advisory Board is composed of members from academia (four members), civil society including consumer protection organisations (eight members) and business associations (four members). Representatives may be appointed if they have specific legal, economic, sociopolitical or technological experience or proven scientific knowledge of the activities of digital services. The members of the Advisory Board are nominated by the German Bundestag and appointed by the Federal Ministry of Economics in consultation with the Federal Ministry of Digital Affairs and Transport. On 18 September 2024, the Advisory Board held its first meeting.[129]

The role of the Advisory Board is, first, to advise the Digital Services Coordinator and the other enforcement authorities on fundamental issues relating to the application and enforcement of the DSA; second, to make general recommendations for the effective and consistent implementation of the DSA; and, third, to bring scientific issues to the attention of the competent authorities, in particular with regard to data handling.

3.5 First Practical Steps Taken by the Bundesnetzagentur

The Digital Services Coordinator has launched a complaints portal where online users from Germany and institutions, organisations or associations tasked with safeguarding rights under the DSA can complain about violations of the DSA.[130] According to the authority, 222 complaints had been received through the portal by 12 August 2024, although not all of these were complaints under Article 53 of the DSA.[131]

As far as is publicly known, the Digital Services Coordinator has so far only carried out preliminary investigations;[132] it has not yet initiated any formal proceedings. However, it has already supported formal proceedings of the EU Commission under Article 66(1) of the DSA, e.g. in the case of the digital platforms TikTok and X.[133]

On 12 August 2024, the Digital Services Coordinator announced that it had certified the first (and so far only[134]) national out-of-court dispute settlement body under Article 21(3) of the DSA, namely User Rights GmbH, Berlin.[135]

---

[129] See https://www.bundesnetzagentur.de/1028472. The website lists the current members of the Advisory Board.
[130] See https://www.dsc.bund.de/DSC/DE/3Verbraucher/3VB/start.html. The total cost of developing the complaints portal was EUR 157,452.71, according to the authority. Bundesregierung (2024), p. 7.
[131] Bundesregierung (2024), p. 4.
[132] Bundesregierung (2024), p. 3.
[133] Bundesregierung (2024), p. 3.
[134] See https://www.dsc.bund.de/DSC/DE/5Streitb/start.html.
[135] See https://www.bundesnetzagentur.de/1019662.

The status of 'trusted flagger' was granted to an organisation for the first time on 1 October 2024, namely the 'Meldestelle Respect!' Foundation for the Promotion of Youth in Baden-Württemberg, based in Sersheim.[136] The original press release from the Digital Services Coordinator on this issue sparked a controversial debate about the role of the 'trusted flagger'. This was partly owing to an inaccurate wording in the press release, which implied that 'trusted flaggers' would have a privileged role in reporting not only illegal content (as is indeed foreseen under Article 22(1) in conjunction with Article 16 of the DSA), but also 'hate and fake news'.[137] However, even recognising the limited role of trusted flaggers as whistleblowers on illegal content, they are partly seen as a threat to freedom of expression, especially as the line between legal and illegal behaviour (as defined in Article 3(h) of the DSA) is often difficult to draw.[138]

It is too early to say how effective supervision will be in Germany. On the one hand, it is important to put in place the necessary human resources and technical infrastructure. On the other hand, as is always the case with bureaucratic enforcement, it will depend on good, motivating leadership with a realistic and appropriate prioritisation of tasks that makes the best use of limited resources.

4. Implementing the DSA: Amendments to Substantive Law

As a regulation,[139] the DSA is directly applicable in its entirety throughout the EU and is part of national legal systems without the need for an implementing measure. Indeed, the transposition into national law of the standards and rules laid down in a regulation may obscure their nature as EU law and may therefore be considered contrary to Article 288(2) of the TFEU.[140] This will require adaptations to national law, in particular the repeal of provisions relating to matters within the scope of the DSA. In addition, new rules may be enacted, or the scope of existing rules may be adjusted to deal with matters not covered by the DSA.

4.1 Ensuring Full Harmonisation by the DSA: Repeal of the Network Enforcement Act

The DSA sets out (fully) harmonised rules for 'the provision of intermediary services in the internal market'[141] with the aim of creating a 'safe, predictable and trusted online environment'.[142] In Germany, the Network Enforcement Act (Netzwerkdurchsetzungsgesetz) had been the functional equivalent of the DSA since 2017, as it imposed reporting obligations and the maintenance of an effective complaint management system for dealing with defined illegal, indeed criminal content on large social media platforms. The Act applied to platforms with more than 2 million registered users in Germany. In particular, social network operators

---

[136] See https://www.bundesnetzagentur.de/1029736.
[137] See Ruschemeier (2024), sub 'Illegale Inhalte vs. "legal but harmful content"'.
[138] See Lindner (2024).
[139] Article 288(2) TFEU.
[140] Case C-34/73, *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, ECLI:EU:C:1973:101, paras 10–11.
[141] Article 1(2) DSA.
[142] Article 1(1) DSA.

had to remove or block access to 'manifestly illegal content' (as defined in the law) within 24 hours of receiving the complaint.[143]

As the provisions of the Network Enforcement Act are largely superseded by the DSA and therefore no longer applicable, they have been repealed by the German legislature. The current version of the Act[144] essentially only contains an obligation for social network providers from non-EU countries to appoint an authorised representative for service of process in Germany[145] and provisions allowing the continuation and termination of administrative fine proceedings for past offences.[146]

4.2 Supplementing the DSA to Maintain the German Status Quo Ante: Liability of Intermediary Services Providers

Articles 4 to 10 DSA provide for a (conditional) exemption from liability for intermediary service providers and thus replace[147] Articles 12 to 15 of the Electronic Commerce Directive.[148] Consequently, the provisions in German law[149] that had previously implemented the liability rules of the Electronic Commerce Directive have been repealed. However, the German legislature provided for the continued application of some provisions by incorporating them into the German Digital Services Act. It did so on the assumption that the DSA does not provide for an exhaustive regulation of the subject matter and thus leaves some room for national supplementary measures.

First, since Article 4(1) of the DSA does not specify what is covered by the liability from which exemption is granted, section 7(3) of the German Digital Services Act makes it clear that the exemption from liability under the DSA (also) excludes claims for injunctive relief and damages. Second, section 7(1) and (4) of the German Digital Services Act states that the conditional exemptions from liability, as provided for in the DSA and specified in the German Digital Services Act, also apply to public and free WLAN networks. Third, section 7(3) of the German Digital Services Act also ensures that claims for injunctive relief against access providers are excluded. This was not the case under Article 12(1) of the Electronic Commerce Directive, as interpreted by the ECJ,[150] which is why liability had been explicitly excluded under German law.[151]

As compensation for this exclusion of liability on the part of the access provider, German law grants a (subsidiary[152]) right to demand that access providers block information that infringes intellectual property rights. This right is now set out in section 8 of the German Digital Services

---

[143] Section 3(2) no. 2 Network Enforcement Act.
[144] See https://www.gesetze-im-internet.de/netzdg/.
[145] Section 5 Network Enforcement Act.
[146] Section 6 no. 2 Network Enforcement Act.
[147] See Article 89 DSA.
[148] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, pp. 1–16.
[149] Ex-sections 7 and 8 of the German Telemedia Act ('Telemediengesetz').
[150] Case C-484/14, McFadden, ECLI:EU:C:2016:689, para. 79.
[151] Ex-section 8(1), 2nd sentence of the German Telemedia Act ('Telemediengesetz').
[152] See recital 27, 2nd sentence of the DSA.

Act. There is room for such a national rule,[153] since the DSA provides for limitations and procedural requirements with regard to the liability of access providers, but not 'when a provider can be held liable, which is for the appliable rules of Union or national law to determine'.[154] At the same time, Article 8, 3rd sentence of the Enforcement Directive[155] requires Member States to ensure that 'rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right'.[156]

Concluding Remarks

Germany was and is one of the Member States that does not solely rely on the EU when it comes to regulating digital gatekeepers but has itself taken a hands-on approach with some results to show for it. Examples of legislative initiatives specifically targeting digital gatekeepers include the Network Enforcement Act of 2017, and the introduction of the '19a tool' in the Competition Act in 2021.

Against this background, it is not surprising that, on the one hand, Germany has not been reluctant to adopt legislative measures to implement the DSA and the DMA and to create the conditions for effective enforcement. In particular, Germany is one of the jurisdictions that has given its competition authority the power to investigate infringements of the DMA. On the other hand, it was necessary to react to the (partly) exhaustive nature of the EU regulation. The legislature had to repeal measures such as the Network Enforcement Act or to limit them to certain complementary functions to the DSA. The latter also applies to the '19a tool', as the Bundeskartellamt will have to take the requirements of the DMA into account when applying it. It is too early to assess the effectiveness of national enforcement instruments.

Of particular practical importance will be how the Bundesnetzagentur will fulfil its role as Digital Services Coordinator. For the time being, only institutional arrangements can be observed, such as the start of work of the Advisory Board, the certification of the first out-of-court dispute settlement body and the first recognition of an organisation as a 'trusted flagger'.

Finally, it will depend on the forthcoming decision of the Federal Court of Justice (and possible reactions by the legislator) how tightly the network is meshed with which digital gatekeeper (gap) mergers can be captured by the transaction value-based threshold. Whatever the outcome, only time will tell how actively the Bundeskartellamt will pursue the 'Article 22 EUMR' route to Brussels, as envisaged in Article 14 DMA for such acquisitions.

---

[153] See Hofmann (2024), 82.

[154] Recital 17, 2nd sentence of the DSA. See also Article 4(3) DSA.

[155] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.4.2004, pp. 45–86.

[156] See also Case C-314/12, UPC Telekabel Wien, ECLI:EU:C:2014:192, para. 64 (relates to Article 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167, 22.6.2001, pp. 10–19).

References

Bauermeister T (2022) Section 19a GWB as the German 'Lex GAFA' – lighthouse project or superfluous national solo run? Yearbook of Antitrust and Regulatory Studies 15(26):75–102

Blockx, J (2023) The expected impact of the DMA on the antitrust enforcement of unilateral practices. Journal of European Competition Law & Practice 14:325–333

Bundesregierung (2024) Antwort auf die Kleine Anfrage der Fraktion der CDU/CSU – Drucksache 20/12286 – Aktueller Stand der Umsetzung des Digitale-Dienste-Gesetzes und zur Einsetzung der Koordinierungsstelle für digitale Dienste in Deutschland. BT-Drs. 20/12584, 12.08.2024. https://dserver.bundestag.de/btd/20/125/2012584.pdf.

Crémer J et al (2023) Enforcing the Digital Markets Act: institutional choices, compliance, and antitrust. Journal of Antitrust Enforcement 11:315–349

Deselaers, W (2024) Die ersten Verfahren des Bundeskartellamtes nach § 19a GWB – gelöste und ungelöste Fragen. Neue Zeitschrift für Kartellrecht 12:366–369

Federal Ministry for Economic Affairs and Energy, Ministère de l'Économie, des Finances et de la Relance, and [Dutch] Ministry of Economic Affairs and Climate Policy (2021) Strengthening the Digital Markets Act and its enforcement. https://www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4.

Franck JU (2024-1) Abuse proceedings against digital gatekeepers under section 19a of the German Competition Act: taking stock of early results. In: Ruiz Peris JI, Estevan de Quesada C (eds) New European competition trends in digital markets. Atelier, pp 23–51

Franck JU (2024-2) Das Bundeskartellamt zwischen Condor, Kranich und 'Mutterhaus': Von der Freiheit vor politischer Einflussnahme. Wirtschaft und Wettbewerb 639–646

Franck JU, Monti G, de Streel A (2021) Options to strengthen the control of acquisitions by digital gatekeepers in EU Law. TILEC Discussion Paper No. DP2021-16

Franck JU, Peitz M (2021) Digital platforms and the new 19a tool in the German Competition Act. Journal of European Competition Law and Practice 12:513–528

Franck JU, Peitz M (2024-1) The Digital Markets Act and the whack-a-mole challenge. Common Market Law Review 61:299–344

Franck JU, Peitz M (2024-2) Germany's new competition tool: sector inquiry with remedies. Discussion Paper Series – CRC TR 224, Discussion Paper No. 598

Franck JU, Stock N (2020) What is 'competition law'? – Measuring EU Member States' leeway to regulate platform-to-business agreements. Yearbook of European Law 39:320–386

Gappa, S, Käseberg T (2024) Article 38 [DMA]. Cooperation and coordination with national competent authorities enforcing competition rules. In: Podszun R (ed) Digital Markets Act. Nomos, pp 454–462

Göbel, M (2024) „Gotta catch ‘em all?” – Instrumente zum Aufgreifen von „Gap cases“ in der formellen Fusionskontrolle. Zeitschrift für Wettbewerbsrecht 37–77

Hofmann F (2024) Auf leisen Sohlen angeschlichen: Internetangebotssperren im Digitale-Dienste-Gesetz (DDG). Gewerblicher Rechtsschutz und Urheberrecht 81–82

Hornung P (2023) The ecosystem concept, the DMA, and section 19a GWB. Journal of Antitrust Enforcement 12:396–437

Hungarian Competition Authority (GVH) (2023) Changes in Competition Law: expanding GVH toolbox and less administrative burden for undertakings. Press Release of 1 January 2023. https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/changes-in-competition-law-expanding-gvh-toolbox-and-less-administrative-burden-for-undertakings.

Jungbluth A, Engel C (2024) Das Digitale-Dienste-Gesetz: Zentrale Punkte, regulatorische Herausforderungen und Lösungen. Computer und Recht 401–406

Käseberg T, Gappa S (2024) Article 1 [DMA]. Subject matter and scope. In: Podszun R (ed) Digital Markets Act. Nomos, pp 17–27

Käseberg T (2025) Ein ‚Inflection‘-Punkt für die Fusionskontrolle? Neue Zeitschrift für Kartellrecht (KartR) 1–2

Kraul T (2024) Die Durchsetzung des Digital Service Act nach dem neuen deutschen Digitale-Dienste-Gesetz: Behörden- und Aufsichtsstruktur. Gewerblicher Rechtsschutz und Urheberrecht in der Praxis (GRUR Prax) 16:529–531

Kumkar LK (2024) § 32g GWB. Untersuchung von möglichen Verstößen gegen die Verordnung (EU) Nr. 2022/1925 (Digital Markets Act). In: Jaeger W et al (eds) Frankfurter Kommentar zum Kartellrecht. Otto Schmidt, 107. Lieferung, 1/2024

Lindner JF (2024) Trusted Flagger als Gefahr für die Meinungsfreiheit: eine Replik auf Hannah Ruschemeier. VerfBlog, 2024/11/08 https://verfassungsblog.de/trusted-flagger-als-gefahr/.

Monti G (2022) Procedures and institutions in the DMA. Centre on Regulation in Europe (CERRE), Issue Paper December 2022

MPI Innovation and Competition (2023) Drexl J et al. Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA) GRUR International 72:864–875

Ruschemeier H (2024) Flagging Trusted Flaggers: Zur Rolle vertrauenswürdiger Hinweisgeber unter dem Digital Services Act. VerfBlog, 2024/11/04 https://verfassungsblog.de/flagging-trusted-flaggers/.

Schweitzer H (2024) § 19a GWB. Missbräuchliches Verhalten von Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb. In: Körber T, Schweitzer H, Zimmer D (eds) Immenga/Mestmäcker, Wettbewerbsrecht, Band 2, GWB. CH Beck, pp 750–831

Tzanaki A (2023) Dynamism and politics in EU merger control: the perils and promise of a killer acquisitions solution through a law and economics lens. Working Paper. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4574948.

Tzanaki A (2024) *Illumina*'s light on Article 22 EUMR: the suspended step and uncertain future of EU merger control over below-threshold 'killer' mergers. CPI Antitrust Chronicle December 2024

Wirtz M (2024) § 32g GWB. Untersuchung von möglichen Verstößen gegen die Verordnung (EU) Nr. 2022/1925 (Digital Markets Act). In: Körber T, Schweitzer H, Zimmer D (eds) Immenga/Mestmäcker, Wettbewerbsrecht, Band 2, GWB. CH Beck, pp 1379–1382