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Digital blueprint

A German proposal for tackling dominance and data

by **Aline Blankertz**

The draft 10th amendment to the German Competition Act[1] is one of the first concrete sets of action to expand a competition authority's toolbox in response to the developments on digital markets. It may well serve as a blueprint for changes elsewhere, including at the European level. The draft amendment includes a broad range of changes, from increased merger thresholds to easier application of interim measures. This article discusses two of the most important changes, first, the new Article 19a, which targets digital ecosystems, and second, a set of measures to ensure pro-competitive data use.

Tackling digital ecosystems

Article 19a addresses platforms with a strong position across markets by imposing "regulation close to competition law", as Andreas Mundt, head of the Bundeskartellamt, has termed it publicly. In contrast to ex ante regulation applied to a pre-defined set of firms, however, the article gives the Bundeskartellamt powers to investigate certain types of conduct.[2] This creates the risk of inconsistent enforcement where, even if an investigation is based on economic evidence, the decision which firms and markets to investigate may be open to other motives.

Article 19a targets "undertakings with paramount significance for competition across markets" (UPSCAMs) and provides a non-exhaustive list of factors to guide whether a firm is in scope:

- Market power on one or more markets;
- Access to financial/other resources;
- A vertically or otherwise integrated product offering;
- Access to data and its cross-market use; and
- A "gatekeeper" position.

Five forms of conduct can be investigated based on Article 19a:

1. Treating a competitor's offer differently;
2. Leveraging;
3. Raising barriers to entry by using data from other markets;
4. Hindering interoperability or data portability; and
5. Providing insufficient information about the value of other firms' service.

We first comment on how the UPSCAM indicators should be used to capture complementarities across markets, before discussing issues in the assessment of effects of two of the forms of conduct.

How to define an UPSCAM

When assessing digital markets, is it appropriate to define and examine individual markets only? Ample evidence[3] demonstrates the importance of cross-market effects, and their potential pro and anti-competitive effects, in providing a rationale for ensuring that authorities have the necessary tools to address anti-competitive behaviour with effects across markets. How close markets are depends on the degree of complementarities between them, ie to what extent consumers (or producers) prefer to consume (or offer) products from different markets together rather than separately. An evidence-based approach to complementarity (implicit in the third to fifth factor on the list above) should guide whether firms qualify as UPSCAMs.

Digital markets have seen the emergence of new forms of complementarities. For example, telephone books, maps and encyclopedias traditionally constituted separate markets. Online search has turned into an important access point for all of these, blurring the lines between them. Such a combination of products tends to reduce competition on individual markets and can ultimately merge them into one. For consumers, however, this process can create large benefits in the form of, for example, reduced search costs and higher convenience. If consumers seek the increased convenience of a well-integrated ecosystem, this may (partially) offset the harm that relaxed competition may create.

When assessing complementarities in order to identify UPSCAMs, [consumer] demand often plays an important role. For example, even though both Microsoft and Google offer email, video conference and autonomous driving solutions, the first two products are much more likely to exhibit complementarities (for example, by accessing a

joint contact list) and form an ecosystem. Whether or not autonomous driving products should be considered part of the same ecosystem is an open question; it may well be reasonable to distinguish between different ecosystems (or one ecosystem and separate markets) by the same firm.

In practice, authorities can assess the degree of complementarity by examining the extent to which consumers use products from ecosystems by different firms (for example, pay with Apple Pay when using a Chrome browser). If many consumers do so, complementarity is likely to be weak and less likely to hamper competition. Even if consumers prefer staying within one ecosystem, it is important to consider the benefits of greater product integration and convenience when assessing competition.

What it means to self-prefer

Assuming an UPSCAM has been identified as such, the first prohibited form of conduct is differential treatment of a competitor's offering. In other words, an UPSCAM may not self-prefer. However, it is far from clear what this means in practice. Some of the potential readings are:

- An UPSCAM uses information on supply or sales markets to improve its product. In order not to self-prefer, should UPSCAMs not use such information anymore? This would mean foregoing the value of the information for the sake of a level playing field. Alternatively, should they make the information accessible to potential competitors? This may reduce their incentive to process information in the first place, as they are no longer allowed to use insights as a competitive advantage.
- An UPSCAM uses the same information to improve an algorithm and the product sorted by the algorithm. In order not to self-prefer, should UPSCAMs keep the algorithm and the sorted product separate? This would prevent information from algorithms and products to be exchanged, annihilating the complementarities between them. Alternatively, should they provide access to the information they use? As above, this would reduce their incentive to collect information and, thereby, to provide an integrated service.
- An UPSCAM more deeply integrates its product with other services than with competing services. In order not to self-prefer, should UPSCAMs refrain from innovating where they can do so by combining products? This would leave complementarities and associated consumer benefit unused. Alternatively, should they offer full interoperability instead?

In these cases, the latter option of making information more widely available may be preferable to prohibiting the use of information in the first place. The challenge, however, is in distinguishing between information essential for the competitive process, and information that should be considered a firm's business secret that it can exploit for its own benefit (and a grey area in between, giving some discretionary options to policy-makers). We will come back to this below when discussing data-sharing obligations.

Why interoperability is a choice of business model

The fourth form of conduct that the draft amendment prohibits is hindering interoperability or data portability in order to reduce competition. In principle, interoperability is often desirable from a consumer perspective as it tends to facilitate multi-homing and switching, ie the parallel use of multiple ecosystems. However, firms set the degree of interoperability also with other factors in mind, such as whether they wish to more deeply integrate their own services to, for example, increase convenience and usability. Apple has pursued a strategy with a very low degree of interoperability in order to develop innovative products known for their consumer-friendly usability.

The draft leaves open whether it envisages turning a firm's status-quo level of interoperability into a "competitive" reference point or whether it aims to establish a competitive level of interoperability to be applied across firms. If the status quo is to serve as a reference point, undesirable results may emerge if firms are held to a specific level of interoperability when they cross the UPSCAM-threshold, turning path-dependent decisions about a firm's business model into a competitive benchmark. A path-independent level of interoperability is preferable and should be based on market characteristics (such as network effects and barriers to entry) in order to balance the benefits from innovation (firms offering new products more closely integrated with their existing range) and those from static competition (more firms offering interoperable products).

Whether convenience can be an objective justification

Article 19a allows for an objective justification and puts the burden of proof on the UPSCAMs. What makes for a justification is an open question. One recurring theme in the points made above is how to weigh up concrete benefits of, for example, increased convenience on the one hand and the often less concrete and longer-term harm for competition. Increased convenience means, for example, to reduce the number of clicks required to perform an action or providing more relevant information in one place. This may drive more consumers to use a product, without necessarily being anti-competitive. However, the same action can also reduce the visibility of competitors and new entrants, hampering competition in the longer term. The potential harm can be substantial, as higher barriers to entry make it difficult for competitors to offer new ideas to consumers. In principle, large ecosystems can innovate as well, but they are much more likely to do so if actual or potential competitors keep them on their toes.

Trading off short-term consumer benefit and longer-term contestable markets is an issue underlying various ongoing proceedings (including appeals) such as Google Shopping, Google Android, Amazon, and app stores. The

exploitation of complementarities across markets leads to ambiguous effects that require a case-by-case assessment. This assessment should put sufficient emphasis on the empirical analysis of complementarities and it should take into consideration that preventing UPSCAMs from self-preferring or from reducing interoperability can dampen innovation if applied too broadly.

A framework for pro-competitive data use

Data has become a valuable input for effective competition and innovation on digital markets. The draft amendment attempts a balancing act between addressing excessive data concentration in order to facilitate innovation on the one hand and providing more legal certainty for voluntary data collaboration on the other hand.

When data access should be mandated

Some firms may wield power over data collections that are closed off to other market participants which may wish to create value from that data. This concern has led to new provisions to facilitate mandating data access in a variety of constellations:

- Dominant firms – Article 19 stipulates that refusing to supply data essential for competition on downstream or upstream markets against adequate remuneration constitutes an abuse of market power;
- UPSCAMs – Article 19a prohibits the use of data from one market to increase the barriers to entry on others (as per the third item on the list of prohibited types of conduct above); and
- Firms with relative or superior market power – Article 20 addresses a group of firms below the market power threshold that other firms may depend on for their business activities (this is already well-established in the German Competition Act). The draft amendment explicitly names data as a possible source of commercial dependency and states that the refusal to supply such data may constitute an unfair impediment.

Most of these provisions appear to explicitly foster more sharing of data, which may lead to the value of data being created instead of suppressed. This principle should be followed consistently in the application of data-driven interventions. Ambiguously, the commentary to Article 19a suggests that data “can be used to unfairly exclude competitors” and that cross-market aggregation has a “particular potential to harm competition […] as usually only firms with significant market power are able to do it”.[4] From an economic point of view, data-aggregation practices (assuming their legality from a data protection perspective) should not be suppressed, but where competition can be shown to suffer from the inability to replicate combined datasets, wider sharing should be considered.

A major challenge for the application of the provisions is likely to be that there is very limited specific guidance regarding which data should be shared due to competition concerns. Across sectors, data is costly and used as a competitive advantage, exemplified by, for example, business models of firms such as Nielsen and Bloomberg, which build on the value of information. The commentary to Article 20 suggests that “the benefit from re-using the data needs to exceed the harm from the loss of exclusivity,”[5] suggesting a potentially very wide sharing obligation.

In a competition law context, a key variable to determine the scope of data-sharing obligations should be replicability, ie the extent to which other firms can build datasets that allow them to perform similar analyses. If data can be replicated at a reasonable cost, then it will be difficult to make a case for mandated data sharing. The degree to which data is replicable can vary considerably:

- It tends to be low if the data required to offer a service is very specific because it linked to a device or customer (such as data about a specific car’s maintenance status); and
- It can be much higher if the data is used to produce aggregated insights (such as car usage patterns).

This does not preclude the option of, for example, additional sector regulation to open the data of value to more stakeholders or other measures to facilitate voluntary data sharing.

When data collaboration should be allowed

Firms that wish to pool or exchange data may find it difficult to assess whether their plans are compliant with competition law. The draft amendment, in its change to Article 32c, broadens the scope for requests for an opinion by the Bundeskartellamt. The Bundeskartellamt has issued such opinions in the past, for example in the context of steel trading platforms and the steel trading association, providing input into the design of the platform and guiding the exchange of information through the association to prevent potential anti-competitive information uses.[6]

The new rule allows firms to reach out to the Bundeskartellamt and ask for a statement to be provided within six months. The Bundeskartellamt can also decide not to issue an opinion – for example, due to resource constraints, or if the case is too ambiguous. If this tool is used as indicated in the commentary to the amendment, it can provide constructive assistance to firms to design pro-competitive data sharing agreements. This assumes that, given the informal nature of the process, the authority strikes a reasonable balance between benefits from more data sharing and harm from potential anti-competitive uses of the same data.

Reaching a balance

The draft amendment goes a long way towards implementing many of the changes suggested by various expert groups. In their application, authorities should be clear about the trade-offs that restricting ecosystems entails and work towards a framework to balance short-term benefits and

long-term potential harm. The provisions on data sharing should focus on areas where insights from data required to compete cannot be replicated at a reasonable cost. Firms may strongly benefit from more guidance on how to make data sharing compliant with competition law.

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Endnotes

1. Bundesministerium für Wirtschaft und Energie (2019), Referentenentwurf: Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), as of 7 October, 6:14pm. The current version has been shared informally on public websites as the official draft has not yet been released.
2. The Furman Report suggests a new authority to oversee digital markets and adopt a model closer to ex-ante regulation, see Furman, J, Coyle, D, Fletcher, A, McAuley, D and Marsden, P, (2019), *Unlocking Competition: Report of the Digital Competition Expert Panel*.
3. For an overview, see eg Bourreau, M and de Streel, A (2019), "Digital Conglomerates and EU Competition Policy", (11 March 2019). http://dx.doi.org/10.2139/ssrn.3350512.
4. Bundesministerium für Wirtschaft und Energie (2019), op cit, at p 76, own translation.
5. Bundesministerium für Wirtschaft und Energie (2019), op cit, at p 80, own translation.
6. Bundeskartellamt (2018), Fallbericht Wirtschaftsvereinigung Stahl: Reformierte Verbandsarbeit, B5-16/18-001, 17 September and Bundeskartellamt (2018), Fallbericht Aufbau einer elektronischen Handelsplattform für Stahlprodukte (XOM Metals GmbH), B5-1/18-001, 27 March.

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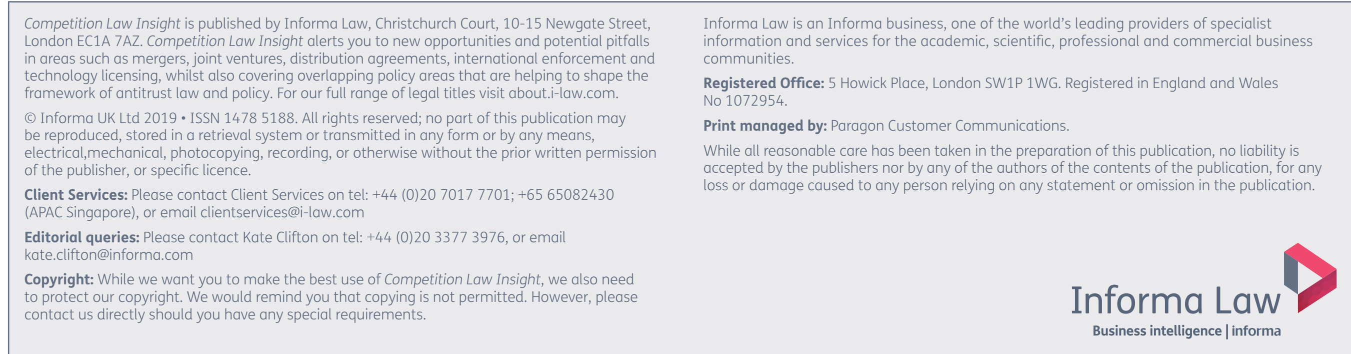

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