Sec. 19 a ARC – Not just virtual, but legal reality

24 November 2022

On 23 November 2022, the Federal Cartel Office (*FCO*) declared that – for the time being – it does not object to the distribution of Meta VR headsets in Germany. The reason is that Meta has voluntarily refrained from linking its VR headsets to Facebook accounts. This case showcases the first application of Sec. 19a of the Act against Restraints of Competition (*ARC*) with the effect that a Big Tech company changed its business conduct. In the meantime, further cases are pending before the FCO with the outcome eagerly awaited.

Within a short period after its coming into force in January 2021 (see our briefing), Section 19a ARC has become an important part of the reality of German competition law. However, going forward this could be blurred by the EU Digital Markets Act (*DMA*), as the interplay between the two laws in practice is not yet fully clear.

Meta VR headsets – what's the background?

In 2020, the FCO initiated proceedings against Meta for making it mandatory for users to set up or link an existing Facebook account in order to use its VR headsets. The investigation was based on "classical" market dominance abuse provisions in Sec. 19 ARC and Art. 102 TFEU. In early 2021, only 10 days after the entry into force of the new Section 19a ARC, the FCO extended the basis of its proceedings to this new provision, which targets the exploitation of an existing gatekeeper position.

Sec. 19a ARC can only be applied once the FCO has found a company to have so-called *paramount significance across markets* (**Step 1**); it can then investigate whether that company engages in abusive conduct, i.e. exploits its gatekeeper position in order to strengthen an existing market power in the given market or to expand it into other markets (**Step 2**) (for the specific requirements, see our briefing). A list of targeted conduct is included in Sec. 19 a (2) ARC.

After the FCO had completed Step 1 against Meta, Meta voluntarily refrained from selling its new VR headsets in Germany as a precautionary measure and expressed interest in an "amicable solution" with the FCO. As a result of the negotiations with the FCO, Meta eventually refrained from linking its VR headsets to the Facebook network altogether and now offers the possibility to set up the VR headset using a separate Meta account.

Happy end for Meta? Not really. The FCO reserved its right to continue monitoring the availability and specific design of users' options with regard to the combined use of Meta and VR services. In addition, the FCO continues its investigations in a parallel proceeding against Meta on the permissibility of data processing across services without user consent (e.g. for security purposes).

Who else is in the focus of the FCO?

Meta is not the only company in the FCO's focus. Two other Big Tech companies were already designated as so-called *companies of paramount significance across markets* by the FCO, namely Google (December 2021) and Amazon (July 2022). The FCO is obviously not afraid to use Sec. 19a ARC as its favourite new tool against the Big Tech companies.

Currently, the following investigations are being conducted under Sec. 19a ARC:

- Alphabet / Google: Google is under parallel investigation for three potentially abusive conducts, namely for (i) anti-competitive restrictions of Google Maps to the detriment of alternative mapping services, (ii) Google's terms and conditions in the area of data processing, and (iii) the potential self-preferencing of Google News Showcase for its own news offerings compared to third-party news services.

- Amazon: Amazon is under investigation for (i) price control mechanisms, i.e. the practice of algorithmically controlling third-party pricing on Amazon marketplace, and (ii) so-called brandgating, i.e. agreements between Amazon and (brand) manufacturers as to whether individual (non-authorized) sellers may sell (brand) products on Amazon marketplace.

So far, only Amazon has appealed the FCO's Step 1 decision, which remains preliminarily enforceable, however, pending the decision of the Federal Court of Justice. Both Google and Meta have decided not to appeal. One can only speculate whether they prefer a cooperative approach or whether they trust it may be easier to demonstrate objective justifications for specific conduct in Step 2 rather than challenging a gatekeeper position across multiple markets.

Who will be next?

Although the FCO has initiated Sec. 19a ARC (Step 1) proceedings against Apple as early as 2021, the company has not yet been designated as a *company of paramount significance across markets.* However, the FCO is currently investigating Apple for dominance abuse control with regard to (i) self-preferencing in relation to tracking restrictions for third-party apps (the well-known "Ask app not to track" pop-up), (ii) pre-installation requirements for Apple apps, and (iii) forced use of Apple Pay for in-app purchases. As

demonstrated in other cases, the legal basis of these proceedings could easily be extended to Sec. 19a ARC if the FCO completes its Step 1 review with a finding of paramount significance across markets.

In the meantime, bets are high whether Microsoft is also in the line-up. So far, the FCO has not initiated an investigation. However, following recent interview statements from the FCO president, Andreas Mundt, and the increased commercial comeback of Microsoft, especially with Teams, Onedrive and Linkedin, it is not at all unlikely that Microsoft could be up next for the FCO.

How will Section 19a ARC play out in the context of the Digital Markets Act?

Given the broad application of Section 19a ARC by the FCO, many are wondering how the interplay with the EU DMA will work in the future. The DMA entered into force on 1 November 2022 and will apply from 2 May 2023. While Section 19a ARC is based on a more flexible and technology-neutral approach, the DMA is clearer and more predictable in terms of the targeted types of conduct and services. Under the DMA, the European Commission will designate companies that provide core platform services and meet certain qualitative criteria as so-called gatekeepers. These gatekeepers must meet specified self-executing obligations; specifically, the DMA includes a blacklist of 13 "do's" and 9 "don'ts" which gatekeepers must comply with (see our briefing).

Since both the DMA and Section 19a ARC aim to limit the power of gatekeepers, it is still unclear how the laws will compete in practice. For example, so-called self-preferencing constitutes both a "don't" under the DMA and abusive conduct under Section 19a ARC. In addition, both laws provide for data access claims, although it is not entirely clear how these will be implemented against the backdrop of EU data protection legislation (e.g. GDPR, ePrivacy Directive and Data Act).

Although the future legal reality is still quite blurry, intensive work is currently underway in the EU. The Commission is working on implementing regulation that will cover key procedural aspects of the DMA's notification and designation process. In parallel, the German legislator is working on the 11th ARC Amendment (to be passed by the end of this year) to pave the way for effective enforcement of the DMA provisions in Germany. It remains to be seen whether there will still remain room for the enforcement of Section 19a ARC in parallel to the DMA.

BLOMSTEIN will continue to monitor and inform about antitrust enforcement trends in the digital economy in Germany and across Europe. If you have any questions on European or German competition laws addressing Big Tech or so-called Gatekeepers, please contact Anna Huttenlauch, Jasmin Mayerl, and BLOMSTEIN's entire competition law team for advice.