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Germany's 'Lex Apple Pay': Payment Services Regulation Overtakes Competition Enforcement

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Abstract

As of January 2020, Section 58a of the German Payment Services Supervisory Act (PSSA) provides a right for payment service providers and e-money issuers to access technical infrastructure that contributes to mobile and internet-based payment services. This right of access is intended to promote technological innovation and competition in the consumers' interests in having a wide choice among payment services, including competing solutions for mobile and internet-based payments. The provision has been dubbed 'Lex Apple Pay' as it seems to have been saliently motivated by the objective to give payment service providers the right of direct access to the NFC interfaces of Apple's mobile devices. In enacting Section 58a PSSA, the German legislature has rushed forwards, overtaking the EU Commission's ongoing competition investigation into Apple Pay as well as the pending reform of the German Competition Act, which is aimed precisely at operators of technological platforms, which enjoy a gatekeeper position. This article explores the scope of application and the statutory requirements of this right of access as well as available defences and possible legal barriers. We point out that, to restore a level playing field in the internal market, the natural option would be to further harmonize EU payment service regulation, including the availability of a right of access to technical infrastructure for mobile and internet-based payment services and e-money issuers.

Keywords: 'Lex Apple Pay'; Technology platforms; Antitrust; Payment Services Regulation; Mobile Payment; Access to NFC interfaces; Wallet Apps; Internal Market Regulation

JEL Classification: K21, K22

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I. Introduction

Mobile payments appear to be the payment technology of the near future in the point-of-sale business. As in most markets when a wave of digitalization sweeps through, incumbents, big tech companies and newcomers are all struggling to secure the biggest slice of the cake for themselves. In Germany, recent regulatory intervention has the potential to rebalance the relative strengths of the protagonists: the legislature enacted a provision with effect from 1 January 2020 that aims to help payment service providers to access the ‘technical infrastructure’¹ that contributes to mobile and internet-based payment services. This new Section 58a of the German Payment Services Supervisory Act (PSSA) has become known as the ‘Lex Apple Pay’ since its immediate objective is widely understood as providing payment service providers, particularly established banks such as German savings banks, access to the iPhone’s contactless payment chip, which is called the near-field communication (NFC) interface.²

While mobile phones operating on Google’s Android operating system allow third parties access to its NFC interfaces via their own apps, under Apple’s product management the NFC interface can only be accessed via Apple Pay, Apple’s default wallet app, which was created in 2014.³ Hence, payment service providers cannot integrate their own payment solutions into the iPhone’s NFC system without using the Apple Pay App. Yet, integrating into Apple Pay has proved to be an expensive move: in addition to an onboarding fee, which is said to cost the banks millions of Euros, Apple charges a fee for each transaction. According to media reports, in the U.S., for credit card transactions, card issuers must pay 0.15 per cent of the amount paid and for debit card transactions even 0.5 per cent.⁴ Given that, under EU payment services regulation, the interchange fees that card issuers can charge for consumer debit card transactions are capped at 0.2 per cent and for consumer credit cards at 0.3 per cent of the value of the transaction,⁵ it is obvious why Apple’s product management and pricing strategy is

¹ If not otherwise indicated, throughout this text all translations are by the authors.

² On the NFC functionality of personalized multifunctional payment cards and its classification as a payment instrument within the meaning of Article 4(14) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35 (Payment Services Directive 2 – PSD2) see Case C-287/19 *DenizBank* EU:C:2020:322, Opinion of AG Campos Sánchez-Bordona, paras 2, 27–51.

³ Users of the iPhone are prompted to sign up for Apple Pay by entering their credit card details. When a user skips this step, an iPhone or iPad will permanently show a red-coloured alert to signal that they have not finished setting up their product – a fact Commissioner Vestager focused on in an interview (‘We would like to understand how you allow for a different payment system when you yourself have a payment system that is quite insistent to be installed on your phone ... I still have these red dots. My phone is telling me “I don’t feel complete because you have not installed the Apple Pay system.”’) <<https://www.bloomberg.com/news/articles/2019-10-18/vestager-s-nagging-iphone-helps-put-apple-pay-on-antitrust-radar>> (18 October 2019, accessed 29 March 2020).

⁴ <<https://www.itnews.com.au/news/banks-surrender-on-apple-pay-fee-fight-450874>> (13 February 2017, accessed 27 March 2020). In addition, it is said that credit card issuers have to pay 7 cents (Visa) or 50 cents (Mastercard) for each card a customer adds to an Apple wallet. Note that it has been reported that, pursuant to Apple’s standard agreements, payment service providers must not pass on the transaction fee to its customers. <<http://www.wigleylaw.com/assets/Uploads/How-does-Apple-make-money-from-Apple-Pay.pdf>> (July 2015, accessed 11 May 2020). This is arguably to be understood as a prohibition of passing on on a one-for-one basis, which means that card issuers that pass on costs incurred by Apple’s transaction fees must effectively burden all their customers, whether or not they use Apple Pay and Apple Wallet.

⁵ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions [2015] OJ L 123/1, arts 3 and 4 (hereinafter Regulation 2015/751). The Regulation’s cap on interchange fees is related to four-party payment card schemes (e.g. Visa and Mastercard) and, hence, does not apply to transactions with payment cards issued by three-party payment card schemes, as in the case of American Express or Diners Club (Regulation 2015/751, art 1(3)(c)), yet with the notable exception that payment cards are issued with a co-branding partner (Regulation 2015/751, art 1(5)). It must be noted that ‘co-branding’ is broadly defined in Article 2(32) of Regulation 2015/751 as ‘the inclusion of at least one payment brand and at least one non-payment brand on the same card-based

meeting with considerable resistance from payment service providers in Europe.⁶ In particular, the transfer of Apple's U.S. pricing policy would mean that debit cards – traditionally an important product of banks in Germany and in Europe – could not be integrated into Apple Pay.

It is against this background that the German Savings Banks Association in particular has lobbied for legislative change to improve payment service providers' position vis-à-vis Apple.⁷ Although Section 58a PSSA has been dubbed 'Lex Apple Pay', its scope is not limited to Apple's mobile devices; rather, it may apply to all operators of platforms that can be used by customers as technical infrastructure for mobile or internet-based payment services. Thus, payment service providers' attention appears also to have turned, for instance, to Amazon and Google, which, they complain, do not give their clients the option of initiating payment transactions via their virtual assistants, Alexa and Google Assistant, respectively.⁸

II. Outpacing Competition Enforcement

By adopting the 'Lex Apple Pay', the German legislature has overtaken (potential) competition enforcement on the matter by the European Commission and the Bundeskartellamt, the German Federal Cartel Office.⁹

As early as August 2018, immediately after Apple announced that it would offer its Apple Pay payment services in Germany, the European Commission was asked by a German Member of the European Parliament about its position regarding access to Apple's NFC interface.¹⁰ Commissioner Vestager answered that:

The Commission monitors compliance with competition rules by operators active in the payments systems sector, including mobile payments systems. In that regard, the Commission is aware that Apple does not make the Near-Field-Communication interface to Apple Pay accessible to other financial service providers.¹¹

It was therefore not surprising that access to the iPhone's NFC interface was placed on the agenda, alongside other concerns, when it was made public in October 2019 that the European Commission was scrutinizing 'possible anti-competitive market practices and abusive conduct'¹² in the context of Apple Pay, and that it was gathering information from payment service providers, app businesses,

payment instrument'. Accordingly, the ECJ has adopted a broad concept of four-party payment card schemes; see Case C-304/16 *American Express* EU:C:2018:66, paras 52 et seq.

⁶ A loosening of the EU regulation of interchange fees may not be expected. Most recently, the European Commission has published a study evaluating the effects of this regulatory intervention, which essentially concludes that it has achieved its main objectives. European Commission, 'Study on the application of the Interchange Fee Regulation, Final Report' (prepared by Ernst & Young and Copenhagen Economics) 2020.

⁷ This can be seen from various media reports; see e.g. <<https://www.boersenzeitung.de/index.php?li=1&artid=2018239002>> (12 December 2018, accessed 30 March 2020).

⁸ Statement by a spokesman of the German Savings Banks Association <<https://finanzfwd.com/de/sparkassen-apple-nfc>> (24 January 2020, accessed 27 March 2020).

⁹ In November 2017, the Danish Consumer Council (Forbrugerrådet Tænk) had already lodged a complaint with the Danish Competition and Consumer Authority concerning, among other things, limited access to Apple's NFC interfaces. See <https://taenk.dk/om-os/presserum/forbrugerraadet-taenk-melder-apple-pay-til-konkurrencemyndighederne> (14 November 2017, accessed 14 June 2020). In response to our inquiry, the Authority stated that, after a preliminary investigation, it had decided not to prioritize the case at that given point in time. However, the Authority stressed that it had reserved the right to reopen the case at any time if it found that such a step were warranted.

¹⁰ Parliamentary questions, 2 August 2018, Question for written answer P-004223-18 to the Commission, Nadja Hirsch (ALDE).

¹¹ P-004223/2018 Answer given by Ms Vestager on behalf of the European Commission (1 October 2018).

¹² Statement by a European Commission spokesman <<https://www.competitionpolicyinternational.com/eu-regulator-looking-into-applepay-over-antitrust-concerns>> (16 October 2019, accessed 27 March 2020).

online retailers and other market players. In November 2019, at a press conference, Commissioner Vestager stated that:

We get many, many concerns when it comes to Apple Pay for pure competition reason ... people see that it becomes increasingly difficult to compete in the market for easy payments.¹³

On 16 June 2020 the Commission opened a formal investigation into Apple practices regarding Apple Pay that, among other things, concerned ‘Apple’s limitations of access to the [NFC] functionality (“tap and go”) on iPhones for payments in stores.’¹⁴ This investigation fits, in general terms, into essential notions of the Commission’s competition policy regarding the platform economy, as prominently featured in *Google Shopping*¹⁵ and *Google Android*¹⁶ – the latter in turn being in the tradition of the *Microsoft*¹⁷ decision: multi-sided digital platforms should be kept open, even to competing firms; their operators must not eliminate intra-platform competition. Nonetheless, it is not certain where the investigation into Apple Pay will lead to, in particular whether Apple can be regarded as an addressee of Article 102 TFEU at all in this respect, and under which circumstances – if any – restrictions on access to Apple’s mobile devices’ NFC interfaces are to be regarded as an abuse.

While Apple Pay is also on the radar of the Bundeskartellamt, there is (as far as is known) no ongoing investigation by the German competition authority into the platform.¹⁸ However, the introduction of Section 58a PSSA has in certain respects overtaken the development of competition law in Germany, because the legislature is about to amend the Gesetz gegen Wettbewerbsbeschränkungen (‘Act against Restraints of Competition’, hereinafter ‘Competition Act’) in order to provide more effective protection against abusive behaviour by multi-sided digital platforms.¹⁹ In this vein, in April and June 2019, when responding to questions by members of the Bundestag, the government made it clear that it considered the proposed amendments to the Competition Act to be the appropriate measure to promote competition in the market for payment services, including (if necessary) by forcing technical interfaces such as the NFC interface to be opened up. The possibility of sector-specific regulation was not hinted at in the official response by the government,²⁰ but it had apparently already been taken into consideration by members of the Bundestag involved in the topic.²¹

¹³ Press Conference at Web Summit 2020 in Lisbon (7 November 2019) <<https://www.youtube.com/watch?v=QGvj12gd3UU>>, minute 4:00 (accessed 27 March 2020).

¹⁴ European Commission, Press release ‘Antitrust: Commission opens investigation into Apple practices regarding Apple Pay’ (16 June 2020).

¹⁵ *Google Search (Shopping)* Case AT.39740.

¹⁶ *Google Android* Case AT.40099.

¹⁷ *Microsoft* Case COMP/C-3/37.792.

¹⁸ In a written response of the government to a question by various members of the Bundestag, it was stated that the Bundeskartellamt had not received any complaints about allegedly abusive behavior by Apple, but that the authority would consider taking a closer look at the competitive conditions in the market for mobile-payment systems. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Bettina Stark-Watzinger, Christian Dürr, Markus Herbrand, weiterer Abgeordneter und der Fraktion der FDP, BT-Drs 19/11043 (21 June 2019), 3.

¹⁹ See Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz) (hereinafter ‘Referentenentwurf GWB-Digitalisierungsgesetz’). Note that the latest version of this draft bill was made public on 24 January 2020, but that an earlier version had already been publicly available since 7 October 2019, i.e. before Section 58a PSSA was enacted.

²⁰ Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Danyal Bayaz, Anja Hajduk, Lisa Paus, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN, BT-Drs 19/9175 (8 April 2019), 6, and Antwort der Bundesregierung (n 18), 3–4.

²¹ The then chair of the Finance Committee of the Bundestag, Stark-Watzinger, was quoted as stating, ‘The Federal Government must ensure that Apple opens its NFC interface’ and ‘If no agreement can be reached with Apple, it [viz. the government] must examine regulatory measures to create equal start-up opportunities for German businesses’ <<https://background.tagesspiegel.de/digitalisierung/apple-pay-bundeskartellamt-erwaegt-pruefung>> (25 June 2019, accessed 3 April 2020).

Through the proposed reform of the Competition Act, the arsenal of competition enforcement is about to be expanded to better address the abusive use of the gatekeeper position that (certain) digital platforms enjoy. The notion of ‘intermediation power’ is intended to play a key role here. This is essentially reflected in three measures proposed.²²

First, the concept of ‘intermediation power’ is to be integrated into the market dominance test.²³ Thus, the amendment will make it easier to subject operators of multi-sided platforms (such as Apple as the operator of various mobile devices) to the prohibition of abusive conduct in Section 19 of the Competition Act,²⁴ even if their market shares among users on one ‘market side’ (e.g. the purchasers of Apple’s mobile devices) may well be below the threshold above which dominance appears conceivable. More specifically, the amendment will allow the power that a platform derives from a multi-homing/single-homing framework (‘competitive bottleneck’) to be considered when assessing whether the platform enjoys a dominant position vis-à-vis the multi-homing side (e.g. the app developers in the case of mobile devices) in a somewhat flexible way, i.e. separately from market definition.²⁵

It should be noted, however, that in clear-cut ‘competitive bottleneck’ scenarios the recognition of a market for each platform is available as a more straightforward approach to assessing the monopoly power a platform may exercise towards the multi-homing side.²⁶ In this vein, the Commission asserted in *Google Android* that ‘app stores for non-licensable [operating systems] such as Apple’s AppStore and BlackBerry’s BlackBerry World do not belong to the same product market as Android app stores’.²⁷ By the same token, in *TWINT/Apple*, the Swiss Competition Commission identified ‘indications’ that a separate market for access to the integrated iOS platform for developers of mobile payments apps could be defined. The competition authority ultimately left this open because it considered that the market share of the integrated iOS platform in a market that also included Android and other devices would still amount to 60 to 70 per cent of the usage of mobile payment apps.²⁸

Second, the reform aims to ensure that Section 20(1) of the Competition Act, which extends the applicability of the prohibition of exclusionary abuses to firms with mere *relative* market power, can also be used as an instrument against abusive practices by (large) digital platforms. For this reason, as a result of the reform, the provision will be available not only to small and medium-sized enterprises but also to major firms, and the concept of relative market power will be extended to include the notion of ‘intermediation power’.²⁹

²² The proposed implementation of the concept of ‘intermediation power’ into Sections 18 and 20 of the Competition Act follows a recommendation of a report written on behalf of the Federal Ministry for Economic Affairs and Energy. H Schweitzer, J Haucap, W Kerber and R Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (29 August 2018), 66–77.

²³ Section 18(3b) of the draft law amending the Competition Act. Referentenentwurf GWB-Digitalisierungsgesetz (24 January 2020), 9, 71–72.

²⁴ Under German law, Section 19 of the Competition Act is the equivalent provision to Article 102 TFEU.

²⁵ Note that in this respect the proposed amendment resembles the Commission’s approach in the merger case *Travelport/Worldspan*, where the authority considered the multi-homing/single-homing framework not in the context of market definition but when discussing potential theories of harm through non-coordinated effects. See Case M.4523, para 81.

²⁶ See J-U Franck and M Peitz, *Market Definition and Market Power in the Platform Economy* (CERRE Report 2019), 55–56; see also 71–72.

²⁷ Case AT.40099 *Google Android* para 306.

²⁸ 31-0519 *TWINT/Apple* para 159. This result is because users of Apple devices are more likely than those using competing devices to use mobile payment services.

²⁹ Section 20(1) of the draft law amending the Competition Act: Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz) (24 January 2020), 10, 81–82.

Third, the draft law introduces a new regime to prohibit abusive conduct, the application of which would be particularly aimed at enterprises in the information technology industry that operate large multi-sided (digital) platforms.³⁰ The Bundeskartellamt would be given the power to formally establish, as a first step, that an undertaking is of ‘outstanding cross-market importance for competition’. Thus, undertakings could be subject to the prohibition of exclusionary conduct in markets that they do not dominate. Based on this, as a second step, the competition authority would be entitled to prohibit the undertaking from engaging in certain specified forms of conduct. ‘Intermediation power’ is mentioned as an essential factor in identifying whether an undertaking has ‘outstanding cross-market importance’.³¹ This is related to the fact that self-preferencing – defined as ‘treating offers of competitors differently from own offers when arranging access to procurement markets and sales markets’ – is listed first in the list of prohibitable behaviours.³²

Thus, with a view to (unilateral) practices by digital gatekeepers and the use of their intermediation power, these three amendments taken together would have the effect of widening the scope of the prohibition of abusive conduct under German competition law significantly beyond Article 102 TFEU.³³ Nevertheless, the German legislature ultimately did not want to rely on potential enforcement measures based on a (possibly) amended Competition Act or on the European Commission’s ongoing investigation. Instead, it opted for a (complementary) ex ante regulation to provide payment service providers with a right to access the technical infrastructure integrated in mobile phones and other devices. Two assets of sector-specific regulation are likely to have been instrumental in this regulatory decision: the clarity and certainty of the law and the promptness of its regulatory effect.

First of all, as a result of the reform of the Competition Act and the implementation of the concept of ‘intermediation power’, the (large) digital platforms the legislature seeks to address by Section 58a PSSA³⁴ – if not already market dominant pursuant to Article 102 TFEU and/or Sections 18 and 19 of the Competition Act – will, in general, at least be subject to the prohibition of abuse of (relative) market power as enshrined in Section 20(1) of the Competition Act. There remains, however, significant uncertainty as to the circumstances under which denying or restricting access to mobile-payment infrastructure could be qualified as ‘abusive’ under Article 102 TFEU or Sections 19 and 20(1) of the Competition Act. In particular, it seems unclear whether and to what extent a doctrine of abusive ‘self-preferencing’, which may be developing in relation to multi-sided (digital) platforms,³⁵ will provide a right of access beyond the conventional ‘refusal to supply’ doctrine, which is characterized by an

³⁰ Section 19a of the draft law amending the Competition Act. Referentenentwurf GWB-Digitalisierungsgesetz (24 January 2020), 8–10, 75–81.

³¹ Section 19a(1) No 5 of the draft law amending the Competition Act. Referentenentwurf GWB-Digitalisierungsgesetz (24 January 2020), 9 and 77.

³² Section 19a(2) No 1 of the draft law amending the Competition Act. Referentenentwurf GWB-Digitalisierungsgesetz (24 January 2020), 10 and 78.

³³ See P Alexiadis and A de Streel, *Designing an EU Intervention Standard for Digital Platforms* (EUI Working Papers RSCAS 2020/14) 6 (‘... the “digital gatekeeper” concept nevertheless has as yet no jurisprudential foundation under Article 102 TFEU to constitute a self-standing legal test of dominance’). But see the Commission’s initiatives of 2 June 2020 for a ‘New Competition Tool’ <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-new-competition-tool>> and for a ‘Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers’ <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-digital-services-act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>> (accessed 4 June 2020).

³⁴ See below Section IV.

³⁵ The Commission’s *Google Shopping* decision could prove to be a catalyst here. Case AT.39740 *Google Search (Shopping)*. An appeal is pending before the General Court (Case T-612/17 *Google and Alphabet v Commission*). See B Vesterdorf, ‘Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin’ (2015) 1(1) *Competition Law & Policy Debate* 4; N Petit, ‘Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf’ (2015) 1(3) *Competition Law & Policy Debate* 4; J Crémer, Y-A de Montjoye and H Schweitzer, *Competition Policy for the Digital Era* (Final Report 2019), 7, 65–68; I Graef, ‘Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence’ (2019) 38 *Yearbook of European Law* 448.

especially high intervention threshold, requiring in particular that a facility (such as a platform) be *indispensable* for entering a neighbouring market and, therefore, a refusal to grant access would be likely to eliminate *all* competition in this market.³⁶

It is true that the German legislature could have waited to see whether the courts established the desired legal standard under Article 102 TFEU or Sections 19 or 20(1) of the Competition Act, whether in the course of private litigation or following enforcement measures by the European Commission, the Bundeskartellamt or any other national competition authority. However, it could easily have taken several years before clarification in the case law was reached, and whether the result would have actually satisfied the legislature was naturally uncertain.

Admittedly, the comparison of two provisions that are not yet ‘law in action’ is somewhat speculative. Yet it appears that the proposed mechanism under Section 19a of the Competition Act would in all likelihood have the potential to establish essentially the same regulatory content foreseen by Section 58a PSSA. Section 19a of the Competition Act addresses all operators of (large) multi-sided platforms and, thus, also applies to those that dispose of infrastructure that may contribute to mobile-payment services. Moreover, as self-preferencing is explicitly mentioned as conduct that may be prohibited, the provision certainly had the potential to impose an obligation to grant competitors access to platform facilities such as Apple’s NFC chip.

However, when Section 58a PSSA was adopted, the legislature did not know whether and when Section 19a of the Competition Act would enter into force (and in fact this is still unclear today). Since the proposed amendment would bring a far-reaching expansion to the existing system of ‘abuse control’, it is still quite a controversial topic of discussion. Therefore, it seems understandable that the German legislature, when it assumed that it was indeed necessary to grant that right of access, sought to implement the policy promptly by way of *ex ante* regulation. Otherwise it would have had to worry that in the meantime structural developments in the market for mobile payments would take place that could not be corrected by subsequent competition enforcement. In addition, the legislature appeared to have been concerned with creating a *right* of access under Section 58a PSSA that payment service providers could invoke and also enforce directly before the courts. In contrast, under Section 19a the payment service providers would have to trust that the Bundeskartellamt would intervene on their behalf.

It is not a new phenomenon, especially with regard to payment services, that financial market regulation reacts to or even overtakes competition law enforcement. We have analysed this elsewhere in a case study on the prevention of market entry barriers to the detriment of payment initiation services and account information services.³⁷ investigations by the Bundeskartellamt – which ultimately led to a decision against German banking associations,³⁸ and investigations by the Commission, which

³⁶ Case C-7/97 *Bronner* EU:C:1998:569, para 41; Case C-241/91 P and C-242/91 P *RTE and ITP v Commission* (‘Magill’) EU:C:1995:98, para 56; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para 332. The ‘indispensability’ criterion is explicitly mentioned in Section 19(2) No 4 of the Competition Act and acknowledged by the judiciary; see BGH 11.12.2012, KVR 7/12, Juris, para 15 – *Fährhafen Puttgarden II*. The ongoing reform also aims to clarify in the text of Section 19(2) No 4 of the Competition Act that a right of access exists only if ‘a refusal threatens to eliminate effective competition on this market [which the applicant wishes to enter with help of access to the facility]’.

³⁷ J-U Franck and D Linardatos, ‘Schutz der Robo Advisor vor Marktbarrieren’ in D Linardatos (ed), *Rechtshandbuch Robo Advice* (2020), 284, 293–305. Also available as ZEW Discussion Paper at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486118&download=yes>.

³⁸ BKartA 29.6.2016, B 4– 71/10 – *Zahlungsauslösedienste*, upheld on appeal by OLG Düsseldorf 30.1.2019, VI-Kart 7/16 (V) and BGH 7.4.2020, KVR 13/19, Juris.

were finally closed³⁹ – were overtaken by a reform of the EU Payment Services Directive.⁴⁰ This case nicely illustrates how competition enforcement can be helpful in paving the way for sector-specific regulation:⁴¹ on the one hand, the competition authority has the expertise and investigative powers necessary to monitor the affected markets and assess the conditions of competition. On the other hand, the authority's legal analysis may provide indications as to whether ex ante regulation can be considered necessary and which instruments could be appropriate to address a competition problem.⁴²

III. A Surprise Move by the Bundestag

Some circumstances surrounding the adoption of Section 58a PSSA by the German Federal Parliament, the Bundestag, do seem worth mentioning. On 13 November 2019, the Financial Committee of the Bundestag met to discuss a bill to amend the law on money laundering.⁴³ At least to outside observers, it was indeed surprising that Section 58a PSSA was put on the committee's agenda in the morning,⁴⁴ and eventually adopted late in the evening of the same day.⁴⁵ According to media reports, several members of the Bundestag confirmed that in the meantime Apple had intervened at the Federal Chancellery to prevent the decision – both directly and via the then U.S. Ambassador Grenell.⁴⁶ While the latter denied any interference, the German government neither confirmed nor denied the fact.⁴⁷ The next day, the bill was approved by the full Parliament and finally passed the Bundesrat on 29 November 2019 without further ado.

We are not in a position to clarify, analyse and evaluate these political events. Nevertheless, the legislature's course of action gives us cause to make two comments. First, even if many observers were taken by surprise when Section 58a PSSA was put on the agenda and inserted into an ongoing legislative procedure, there is nothing to indicate that, in the course of passing the provision, procedural rules were breached or circumvented. Second, while we do not know the reasons for the short-notice inclusion of Section 58a PSSA on the agenda of the Financial Committee, it should not be

³⁹ European Commission, Memo, 13 June 2013, Antitrust: Commission closes investigation of EPC but continues monitoring online payments market.

⁴⁰ See Article 64(2), sentence 2, and Article 66 as well as recital 69 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35 (Payment Services Directive 2), arts 64(2), sentence 2, and 66.

⁴¹ This aspect was explicitly mentioned by the Bundeskartellamt in its press release accompanying its decision <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/05_07_2016_Sofort%C3%BCberweisung.html;jsessionid=4039EC02B81B4251405CD77E626486F4.1_cid378?nn=3591568> (5 July 2016, accessed 6 April 2020).

⁴² Franck and Linardatos (n 37) 302.

⁴³ The legislative proposal was essentially restricted to the transposition of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73.

⁴⁴ Finanzausschuss: Ausschussdrucksache 19(7) 344, Änderungsantrag Nr. 21 der Fraktionen CDU/CSU und SPD.

⁴⁵ Remarkably, the insertion of the provision in the bill was supported not only by the governing parties (CDU/CSU and SPD) but also by three of the opposition parties (FDP, DIE LINKE, Bündnis90/Die Grünen). Bericht des Finanzausschusses (7. Ausschuss), BT-Drs 19/15196 (14.11.2019), 18 (hereinafter 'Report of the Financial Committee').

⁴⁶ <<https://amp2.handelsblatt.com/finanzen/recht-steuern/nfc-schnittstelle-finanzausschuss-bringt-gesetz-gegen-apple-pay-monopol-auf-den-weg/25222218.html>> (14 November 2019, accessed 31 March 2020) and <<https://www.tagesspiegel.de/wirtschaft/hat-der-us-botschafter-intervenierte-wie-der-streit-um-apple-pay-zum-krimi-im-bundestag-wurde/25234382.html>> (15 November 2019, accessed 30 March 2020).

⁴⁷ See answer given on 19 December 2019 by Parliamentary State Secretary Sarah Ryglewski on behalf of the Bundesregierung to the question by the member of the Bundestag Michael Leukert (BT-Drs. 19/16190, 20 December 2019, 11–12). Previously, however, the German government had confirmed that an opening of the NFC interfaces was the subject of a discussion between Chancellor Merkel and Apple's CEO Cook on 22 October 2018. Antwort der Bundesregierung (n 18)20, 2.

overlooked that an abridged legislative procedure comes at a price. Comprehensive discussion in Parliament and the parliamentary committees and, in particular, a vibrant debate in the public at large, including critical assessments of independent experts, will not only strengthen the democratic legitimacy of a law but will often have a positive effect on its ‘technical’ quality in terms of, for instance, the clarity of the legal terms and concepts used and the avoidance of unintended legal consequences.⁴⁸ What is more, even those who are in no doubt that the right of access had to be adopted in the general interest can hardly deny that it interferes with the entrepreneurial freedom and business opportunities of the operators of the infrastructure concerned. Not only does it therefore seem fair for those concerned to be given the opportunity to present and defend their position in a public consultation; it may also have a pacifying effect as it can increase acceptance of a regulatory intervention.

IV. Objectives and Justification of Section 58a PSSA

The explanatory memorandum that accompanies Section 58a PSSA states the regulatory *objectives* that are pursued by granting payment service providers and e-money issuers the right of access, and the reasons *why* the legislature considered the associated obligation imposed on the operators of certain infrastructure to be *justified*.⁴⁹ As explained in the legislative materials, the adopted right to access certain technological infrastructure is supposed to promote technological innovation, which in turn is regarded as a driver of competition and economic prosperity. This will concurrently protect consumers’ interests in having a wide choice among payment services, including competing solutions for mobile and internet-based payments.⁵⁰ Thus, the regulatory objective is essentially defined as an increase in consumer welfare through enhanced competition and gains in dynamic and allocative efficiency.

The legislature reasoned that this objective requires imposing an obligation on operators of the technical infrastructure contributing to mobile-payment services, to make this infrastructure available on the market on fair terms and prices. This obligation naturally means that those infrastructure operators must assist firms to access new markets and business opportunities, which are in fact their (at any rate *potential*) competitors on adjacent markets, such as the market for the issuing of payment cards or the market for mobile or internet-based payment applications. The legislature considers this justified because these operators of technical infrastructure enjoy a *gatekeeper position*, controlling access, for instance, to interfaces of mobile devices.⁵¹ It is emphasized that these operators are ‘generally speaking large digital enterprises’ that operate multi-sided platforms with a large customer base, which enables them to generate and manage significant positive network effects, which, in turn, allow them to move into new markets and also offer payment services.⁵² More specifically, it is argued that these operators are in a position to self-preference their own services over those of their rivals, as they may deny or restrict access to their technical infrastructure.⁵³

Another characteristic linked to their gatekeeper function is the ability of infrastructure operators to offer their customers a whole ecosystem of hardware and applications that work well together and, thus, provide an intuitive and attractive user experience. As a result, typical customers will be more reluctant to switch a physical device as this also requires adapting to new software. This effect can be mitigated to at least some extent if competing software can be made available on any mobile device: users of an Apple mobile device that use an application from a (competing) payment service provider

⁴⁸ See, for instance, certain uncertainties as to the provision’s scope of application; below Section V. A.

⁴⁹ Report of the Financial Committee (n 45) 52. The explanatory memorandum in the report of the Bundestag’s Financial Committee was taken from the corresponding motion of the governing parties; see Ausschussdrucksache 19(7) 344, Änderungsantrag Nr. 21 der Fraktionen CDU/CSU und SPD.

⁵⁰ Report of the Financial Committee (n 45) 52.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

(that directly and easily interacts with the mobile device's NFC interface) will to a lesser extent associate their user experience with the manufacturer. But, of course, the mere availability of competing applications on Apple's mobile devices will not change the user experience of those customers that (only) use Apple Pay (in combination with Apple Wallet) and, thus, will not affect their readiness to switch their hardware. Nonetheless, we may assume that, by aiming to separate mobile hardware and software in the eyes of users, the objective of Section 58a PSSA is not limited to increasing competition for mobile-payment applications; it also (indirectly) facilitates competition for mobile hardware.

V. Scope of Application, Statutory Requirements and Defences

As outlined before, Section 58a PSSA aims to facilitate technological innovation in payment services and e-money. The provision is tailored towards internet-based and mobile payments, as well as voice banking. Stationary online banking or fixed payment terminals, although they might be connected to the internet, are not subject to Section 58a PSSA.

To encourage product innovation, the legislature considered it essential for payment service providers and e-money issuers to have access to relevant technical infrastructure, in particular the functionalities of the operating systems of internet-based (mobile) devices and the respective NFC interfaces.⁵⁴ The unit comprising the device and the matching interface has been defined as '*technische Infrastrukturleistungen*' ('technical infrastructure services'). In its first sentence, Section 58a(1) PSSA defines the operator of the relevant infrastructure as the '*Systemunternehmen*' (which translates literally as 'system undertaking'; we will refer to this hereinafter as the 'infrastructure operator') and requires it to grant access to its infrastructure upon the request of a payment service provider or an e-money issuer. Section 58a(2) PSSA limits the scope of this right of access by defining exceptions. Section 58a(3) provides for defences that can be raised by the infrastructure operator. Section 58a(4) establishes a right to damages in the case of an infringement of the right of access. Section 58(5) clarifies that competition law enforcement is not affected by the payment-specific regulation.

A. Technical Infrastructure Contributing to Payment Services

Pursuant to Section 58a(1) PSSA, the right of access applies only if the infrastructure operator contributes to providing payment services or to the execution of e-money transactions *by means* of its technical infrastructure. This broad and unspecific wording has triggered a debate on whether Section 58a PSSA applies to any technical infrastructure that is (actively) involved in the processing of payments. Consideration was given, for instance, to whether data centres that are processing data related to payment transactions might be obliged to grant access to their processing services to a payment service provider or e-money issuer.⁵⁵

Yet, such considerations are wide of the mark. The legislature sought to address those device manufacturers or service providers that enjoy a *gatekeeper position* because of their privileged access to the (final) consumers that make up their customer base. Mobile phones and similar mobile devices served as samples and standard examples for the concept of 'technical infrastructure'. In contrast, firms that merely provide technical services for the processing of payments, such as data centres, do not have the chance to develop a large customer base comparable to mobile phone operators and,

⁵⁴ *ibid.*

⁵⁵ See for instance A Grohé, '*Lex Apple Pay*' – *Da stellen wir uns mal ganz dumm...was sind eigentlich technische Infrastrukturleistungen?* <<https://amp2.handelsblatt.com/finanzen/recht-steuern/nfc-schnittstelle-finanzausschuss-bringt-gesetz-gegen-apple-pay-monopol-auf-den-weg/25222218.html>> (accessed 31 March 2020).

therefore, do not have the kind of intermediation power that prompted the adoption of the right of access under Section 58a PSSA.⁵⁶

In addition, it is telling for the scope of Section 58a PSSA that, in its statement of reasons, the right to access certain infrastructure was associated with access to NFC interfaces and with enabling payment service providers to emulate cards⁵⁷ (i.e. to store digital credit cards or debit cards on a mobile device).⁵⁸ This indicates that Section 58a PSSA is not meant to be invoked against *any* operator that is involved in the technical processing of (mobile) payment transactions and provides its services through interfaces. Rather, in the context of mobile payments, the right of access only concerns those operators who might also provide the possibility of card emulation.

What is more, as already argued, Section 58a PSSA also aims to offset, at least to some extent, the competitive edge that infrastructure operators enjoy by offering a whole ecosystem of hardware and software solutions and, thus, may provide their customers with a specific ‘user experience’. Against this background, it is apparent that Section 58a PSSA should apply to any (hardware-based) technical infrastructure and internet-based devices with close proximity to their customers, such as cars equipped with a payment device (so-called in-car payments⁵⁹), devices connected to the internet of things (such as refrigerators or washing machines) and, most importantly, voice control systems that are connected to loudspeakers for private use (e.g. Amazon Echo or Google Smart Speaker). In all these cases, the device manufacturers or distributors enjoy a relevant gatekeeper position as envisaged in Section 58a PSSA as they have privileged access to the final customer base.

In sum, while the wording used in Section 58a(1) PSSA is rather broad, given the motivation behind the provision the concept of ‘technical infrastructure’ can be narrowed down to devices that the payer comes into direct contact with and that – at least as far as mobile-payment solutions are concerned – can (if needed) be utilized to run an emulated payment card.

B. Request by a Payment Service Provider or E-money Issuer

Providers have to grant access to their ‘technical infrastructure’ upon request by a *payment service provider* or *e-money issuer* as defined in Article 1(1) of the EU Payment Services Directive (PSD2).⁶⁰ As outlined in the German legislature’s reasoning,⁶¹ Section 58a PSSA does not apply to payment initiation service providers (PISPs) or account information service providers (AISPs).⁶² This restriction can arguably be explained by the fact that these service providers do not issue any *payment instruments* for mobile or internet payments and, therefore, were considered not to need to access an NFC interface themselves. AISPs do not initiate a payment transaction at all; PISPs will initiate a payment transaction – and even an internet-based one – but based on the existing payment instrument (e.g. bank transfer via the payer’s online banking account with its main bank). Hence, they are not issuing emulated payment cards or other instruments that depend on a NFC interface and are, therefore, not within the scope of Section 58a PSSA.

⁵⁶ See nn 51–53 and accompanying text.

⁵⁷ For technical explanation see e.g. <<https://developer.android.com/guide/topics/connectivity/nfc/hce>> (accessed 21 April 2020).

⁵⁸ Report of the Financial Committee (n 45) 52–53.

⁵⁹ See, for instance, D Linardatos *Rollende Kreditkarten – zahlungsdienstrechtliche Fragen bei In-Car-Payments*, *Recht der Zahlungsdienste (RdZ)*, 2020, 36; S Korschinowski *Auto – technisches Device zum Bezahlen und Datensammeln*, *Recht der Zahlungsdienste (RdZ)*, 2020, 66.

⁶⁰ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

⁶¹ Report of the Financial Committee (n 45) 53.

⁶² Defined in PSD2, art 4(15) and (16).

The legislature has not explicitly addressed whether or not so-called third-party issuers (TPIs) – whose market access has been permitted by the PSD2 – should benefit from the right of access under Section 58a PSSA.⁶³ A TPI is an issuer of payment cards that does not maintain the account that will be debited by the card transaction; in other words, the card-issuing institution is not the same as the payer’s account-holding institution. From the regulatory perspective of the PSD2, TPIs – like PISPs and AISPs – are a subset of third-party service providers (TPSPs) as they do not keep a payer’s account. One could be inclined, therefore, to argue that, for the sake of consistency, no TPSP can invoke Section 58a PSSA. Yet, unlike PISPs and AISPs, TPIs issue their own payment instruments (that may depend on NFC interfaces) and thus have to be regarded as payment service providers within in the meaning of Section 58a PSSA.⁶⁴ A remarkable consequence of applying Section 58a PSSA to TPIs is that, for instance, Google could issue a credit card as a TPI,⁶⁵ and then request access to Apple’s NFC interface.⁶⁶

No particular form is prescribed for a request to access technical infrastructure. As stated in the legislative materials, it is sufficient for the infrastructure operator to recognize that the request concerns technical infrastructure within the scope of Section 58a PSSA.⁶⁷ Moreover, it is stressed that a request must not be regarded as solely concerning the individual company addressed. Rather, under Section 58a PSSA the obligated party is to be regarded as the entire group of companies, which may jointly provide a requested service or functionality.⁶⁸ This is apparently intended to relieve the requesting party from having to determine in detail which company/ies within a group is/are actually in charge of operating – solely or jointly – a particular piece of technical infrastructure.

C. *De Minimis Exception*

Pursuant to the de minimis exception laid down in Section 58a(2) PSSA, the right of access presupposes that, at the time of the request, (i) the operator’s technical infrastructure is used by more than ten payment service providers⁶⁹ or e-money issuers⁷⁰ or⁷¹ (ii) the infrastructure operator has more than two million registered users. In the text of the provision, a double negative is used,⁷² indicating that it is the requested infrastructure operator that bears the burden of demonstrating that neither alternative is fulfilled and that it is, therefore, not obliged to grant access to its technical infrastructure.⁷³ The de minimis rule will ensure that only those operators with a relevant (domestic) gatekeeper position are burdened with the obligation to grant access to their infrastructure. The

⁶³ See PSD2, recital 68; see Böger *Neue Rechtsregeln für den Zahlungsverkehr – Zahlungskontengesetz und Zahlungsdiensterichtlinie II*, Bankrechtstag 2016, 193 (282); Linardatos in: Münchener Kommentar zum Handelsgesetzbuch, vol. 6, Bankvertragsrecht (4th edn, 2019), sub G, paras 14 et seq.

⁶⁴ TPIs are carrying out payment services according to Section 1(1) sentence 2 no 5 in conjunction with Section 1(35) sentence 2 PSSA and are, therefore, payment service providers as defined in Section 1(1) sentence 1 no 1 PSSA.

⁶⁵ Note that, alternatively, Google could tout its software solution together with the payment application of a card issuer (‘co-branding’ pursuant to Regulation 2015/751, art 2(32)). In this case, however, only the card issuer that is also providing the payment application – but not Google – would be considered a payment service provider and, thus, would be entitled to invoke Section 58a PSSA.

⁶⁶ In this scenario, Apple could possibly rely on the defence enshrined in Section 58a(3) PSSA; see in detail Section V D.

⁶⁷ Report of the Financial Committee (n 45) 54.

⁶⁸ *ibid.*

⁶⁹ Within the meaning of PSSA, s 1(1), sentence 1, numbers 1 to 3 (payment institutions (‘Zahlungsinstitute’), electronic money institutions (‘E-Geld-Institute’), and credit institutions that are captured by the Capital Requirements Regulation (EU) No 575/2013 (‘CRR-Kreditinstitute’)).

⁷⁰ Within the meaning of PSSA, s 1(2), sentence 1, numbers 1 or 2.

⁷¹ Report of the Financial Committee (n 45) 54 (‘[Section 58a(2) PSSA] describes two cases which may occur alternatively or cumulatively’).

⁷² PSSA, s 58a(2) reads: ‘[The right to access to a technical infrastructure pursuant to Section 58a(1) PSSA] does not apply, if the [operator of the infrastructure] is *not* an undertaking which ...’ (emphasis added).

⁷³ This allocation of the burden of proof is explicitly confirmed in Report of the Financial Committee (n 45) 55.

legislature assumes that, as a consequence, the provision will typically not apply to small and medium-sized enterprises.⁷⁴

The first alternative is met in cases where the ‘technical infrastructure’ is, albeit indirectly, de facto used by more than ten payment service providers or e-money issuers. It is irrelevant whether the company granted access (only) upon request. Moreover, even unauthorized use by a payment service provider reflects the intermediation power of an infrastructure operator and, therefore, has to be considered. This is a conceivable scenario because, on the one hand, infrastructure operators are not always in a position to detect or prevent unauthorized use and, on the other hand, the payment service provider’s customers, while usually not inclined to use unauthorized payment services, will often not be aware of this fact.

The second alternative refers to the total number of users.⁷⁵ A payment service provider may invoke Section 58a PSSA against any infrastructure operator with more than two million registered users. It is irrelevant whether these users make use of its payment services or the e-money business.⁷⁶ Only the number of *domestic* users is relevant. Although this does not explicitly follow from the text of Section 58a(2) of the PSSA, it is, first of all, indicated by the reference to Section 58a(1) of the PSSA, which refers to the relevance of the technical infrastructure for *domestic* payment services. Moreover, as the legislative materials reveal,⁷⁷ the user threshold has been adopted from Section 1(2) of the German Network Enforcement Act (‘Netzwerkdurchsetzungsgesetz’),⁷⁸ which refers to the number of *domestic* users. In both cases it was the legislature’s intention to make the particular significance of a platform for the German market a prerequisite for the application of a provision.

D. *Defences: Threats to Security and Integrity of the Technical Infrastructure*

A requested operator may refuse access to its infrastructure if it provides an objective justification for doing so.⁷⁹ In particular, the operator can argue that granting access would *actually* endanger the security or integrity of the technical infrastructure.⁸⁰ Thus, access cannot be denied only by reference to a firm’s business or marketing strategy. If an operator wishes to invoke, for example, security or integrity concerns, submitting general considerations will not suffice. Rather, it has to consider in detail the specific technical conditions of the requesting payment service provider and, moreover, it is even required to make reasonable efforts itself to reduce risks to the security or integrity of its technical infrastructure.⁸¹ Only the residual risks, if any, may justify a refusal.

Furthermore, in refusing access, the operator is obliged to give comprehensible reasons for its decision.⁸² The requesting firm must have a fair chance to evaluate whether the denial is indeed objectively justified and to assess the (financial) risks of losing a possible lawsuit. Therefore, an operator that culpably fails in its obligation to state reasons for denial of access will be liable for damages.⁸³ In particular, it will have to compensate for the legal costs incurred by a requesting party

⁷⁴ Report of the Financial Committee (n 45) 54.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ In particular, the Act contains compliance rules applicable to providers of social networks regarding the handling of user complaints about hate crime and other criminal content.

⁷⁹ PSSA, s 58a(3), sentence 1 (‘sachlich gerechtfertigte Gründe’).

⁸⁰ PSSA, s 58a(3), sentence 2.

⁸¹ Report of the Financial Committee (n 45) 55. Note that the infrastructure operator cannot make excuses referring to the incurring costs since it is entitled to claim adequate compensation; see below Section VI.

⁸² PSSA, s 58a(3), sentence 3.

⁸³ The legal basis for such a damages claim is provided by the doctrine of *culpa in contrahendo* (Sections 311(2) and 241(2) in conjunction with Section 280(1) of the German Civil Code (Bürgerliches Gesetzbuch) and possibly also by Section 823(2) of the Civil Code, a provision that is equivalent to the common law tort of breach of a statutory duty).

that loses a lawsuit (due to a successfully invoked defence) that it would never have brought if the denial had been properly reasoned in the first place. Furthermore, given the absence of any public enforcement of the obligations established in Section 58a PSSA,⁸⁴ there must be effective procedural mechanisms available to prevent an operator from discouraging legal action by strategically infringing its obligations to state reasons, thus leaving the requesting parties in doubt as to the relevant evidential means of substantiating an invoked defence. Therefore, where there has been a systematic denial of access without giving comprehensive reasons, the courts should consider barring an operator from presenting new evidence in judicial proceedings.

As a general rule, so long as the requesting payment service provider's technical infrastructure complies with the generally applicable regulatory standards, the operator cannot invoke concerns relating to network and information security.⁸⁵ According to Section 53 PSSA, a payment service provider shall establish, maintain and apply adequate risk mitigation measures and control mechanisms to manage the operational and security risks associated with the payment services it provides. The German Federal Financial Supervisory Authority has issued guidelines that contain, inter alia, requirements on information security management.⁸⁶ Since only regulated payment service providers can invoke Section 58a PSSA, and since the Supervisory Authority should have checked beforehand whether they meet the criteria for being licensed to process electronic payments, operational security concerns should not, in principle, play a significant role as a justification for a denial of access. Certainly, safety-related incidents may occur unexpectedly after licensing (e.g. due to technical novelties, abusive attacks on the interfaces, or serious operational or safety incidents: Section 54 PSSA). But these incidents are typically only temporary and, thus, will not give reason to permanently refuse access to requested infrastructure.

VI. The Right to Access at a Fair Price and on Reasonable Terms and Conditions

Requested infrastructure operators must grant access at a fair price and on reasonable terms and conditions. It is not specified whether the operator has to allow direct access, for instance to the NFC interface of a mobile device, or whether it is enough to provide access via a dedicated application such as Apple's Wallet app.⁸⁷ In the legislative materials, it is merely stated that access to the NFC interface must 'be possible', the necessary 'software development kits' must be made available, and 'the possibility for card emulation must be given'.⁸⁸

As outlined before,⁸⁹ the rule aims to facilitate innovation in financial technologies in the sector of payment services and e-money. Given this general policy objective and the policy choice to adopt an access right to the mobile devices' interface, it seems coherent to apply Section 58a PSSA in a way that competition at the level of (mobile-)payment applications ('wallet apps') will also be facilitated. This may even have a favourable impact on competition for mobile or stationary hardware as consumers might thus perceive hardware and software solutions as not necessarily integrated. Therefore, Section 58a PSSA should be read as providing an option for payment service providers to request access to the payment interface via dedicated software that competes with the gatekeeper's wallet app.

⁸⁴ See below Section VII.

⁸⁵ Report of the Financial Committee (n 45) 55.

⁸⁶ The so-called 'Supervisory Requirements for IT in Financial Institutions'. An English version is available at <https://www.bafin.de/SharedDocs/Downloads/EN/Rundschreiben/dl_rs_1710_ba_BAIT_en.html?nn=9866146> (14 September 2018, accessed 15 April 2020).

⁸⁷ The latter reading is naturally the one preferred by the infrastructure operators such as Apple <<https://www.heise.de/mac-and-i/meldung/Sparkassen-und-Lex-Apple-Pay-Kein-Interesse-mehr-an-iPhone-NFC-Zugriff-4645383.html>> (24 January 2020, accessed 19 April 2020).

⁸⁸ Report of the Financial Committee (n 45) 52–53.

⁸⁹ See above Section IV.

The requesting payment service provider or issuer of e-money must pay adequate remuneration to the operator for making the infrastructure available to them.⁹⁰ 'Adequate' is remuneration that covers the costs incurred by the operator, including a profit margin that amounts to a return of capital common in the sector. The remuneration must also compensate for the operator's reasonable efforts to reduce the risks to the security or integrity of its technical infrastructure that result from providing access and, in particular, from facilitating the enrolment of the requestee's app. Thus, the remuneration should guarantee, on the one hand, incentives for the operator to provide efficient integration of the requestee's services into its infrastructure without being discriminatory in nature or effectively hindering competition. The infrastructure operator will not be compensated, however, for having to give up its gatekeeper position and the prospect of monopoly returns associated with it.

Access is to be granted upon reasonable terms and conditions. Consequently, the operator may not impose any unfeasible or overly burdensome technical requirements or contractual terms regarding, for instance, the allocation of liability.

VII. Remedies and Sanctions

Section 58a(1) PSSA confers on the payment service provider a *right* to obtain access to the requested technical infrastructure *without undue delay*. This right can be asserted by filing an action against the infrastructure operator. Moreover, Section 58a(4) PSSA clarifies that, where there has been a negligent denial of access, the requesting party may bring an action for damages against the infrastructure operator. In particular, the requesting party may claim compensation for profit lost due to stalled access to the requested technical infrastructure.

It is remarkable that the legislature refrained from granting the Federal Financial Supervisory Authority (or any other authority at all) the competence to enforce Section 58a PSSA. More specifically, the Supervisory Authority's general enforcement power pursuant to Section 4 PSSA is not applicable as it is restricted to the enforcement of *obligations* on the part of payment service providers and issuers of e-money but does not concern the enforcement of their *rights* against other parties such as operators of technical infrastructure under Section 58a PSSA.

Finally, Section 58a(5) PSSA clarifies that the competition authorities⁹¹ may in parallel bring enforcement actions based on the Competition Act.

VIII. Potential Barriers to Section 58a PSSA: EU Law and (German) Constitutional Law

A. Full Harmonization through PSD2

The PSD2 strives for full harmonization: within its given scope, Member States must not deviate from the regulatory standard envisaged by the Directive. Stricter or more lenient national regulations are prohibited. Yet, the Directive does not contain any rules on 'technical infrastructure' that contributes to carrying out (mobile or internet-based) payment services, and there is nothing to indicate that the EU legislature had implicitly excluded a (national) right to access such infrastructure as embodied in Section 58a PSSA.⁹² Hence, Section 58a PSSA is reconcilable with the PSD2.

⁹⁰ PSSA, s 58a(1); Report of the Financial Committee (n 45) 53.

⁹¹ The reference to 'competition authorities' in PSSA, s 58a(5) encompasses the Bundeskartellamt in Bonn and – due to Germany's federal structure – the 16 competition authorities in each *Land* (state). See Competition Act, ss 48 and 49.

⁹² Note that the Commission's impact study on the PSD1 does not touch upon the regulation of 'technical infrastructure' as it is subject of Section 58a PSSA. 'Study on the Impact of Directive 2007/64/EC on Payment Services in the Inter Market and on the Application of Regulation (EC) No 924/2009 On Cross-Border Payments in the Community, Contract MARKT/2011/120/H3/ST/OP', Final report, February 2013.

B. Notification Procedure under Directive 2015/1535: Financial Services Exception Applies

Member States have to notify any draft technical regulation⁹³ for products and information society services (online services including e-commerce) to the Commission in accordance with the procedure laid down in Directive 2015/1535.⁹⁴ A notifying Member State has to comply with a three-month standstill period, which allows the Commission and the Member States to examine the envisaged regulation. A Member State's failure to fulfil these obligations renders the regulation inapplicable, a consequence that may be relied upon in proceedings between individuals.⁹⁵

According to the Commission's Technical Regulations Information Systems database,⁹⁶ Germany has not reported the (envisaged) adoption of Section 58a PSSA. However, this does not constitute an infringement of the notification obligation enshrined in the Directive.

First of all, it is already doubtful that Section 58a PSSA is a 'technical regulation'⁹⁷ that has to be notified in accordance with Articles 5 to 7 of the Directive. That would be so only if Section 58a PSSA could be considered a 'rule on services' within the meaning of Article 1(1)(e) of the Directive, which presupposes that the obligation to grant access to technical infrastructure is 'a requirement of a general nature relating to the taking-up and pursuit of service activities'. As the latter is, in turn, defined in Article 1(1)(b) of the Directive, the question arises: do the operators of technical infrastructure that are regulated by Section 58a PSSA provide an 'information society service', i.e. a 'service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'? The concept of a 'service ... provided ... at a distance' has been derived from the notion of a 'distance contract'⁹⁸ as embodied (now) in the Consumer Rights Directive 2011/83/EU.⁹⁹ However, a 'distance contract' presupposes that the contracting parties are present neither during negotiations nor when the contract is concluded.¹⁰⁰ This is not necessarily the case, of course, when a contract is concluded between a payment service provider and an operator for the provision of the technical infrastructure (such as for access to a NFC interface).

Yet, Section 58a PSSA is in any case exempted from the notification procedure as it relates 'to matters which are covered by Union legislation in the field of financial services'.¹⁰¹ This might seem uncertain at first glance because Section 58a PSSA does not specify any requirements for the provision of financial services. Rather, Section 58a PSSA regulates the market conduct of the addressed operators of technical infrastructure. But the provision is at any rate *related* to the provision of financial services,

⁹³ As defined in Directive 2015/35, art 1(1)(f) and (g).

⁹⁴ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (codification) [2015] OJ L 241/1.

⁹⁵ Case C-299/17 *VG Media* EU:C:2019:716, para 39.

⁹⁶ <https://ec.europa.eu/growth/single-market/barriers-to-trade/tris_en> (accessed 5 May 2020).

⁹⁷ Article 1(1)(f) of the Directive.

⁹⁸ K Stuurman in S Gijrath, S van der Hof, A. R. Lodder and G-J Zwenne (eds), *Concise European Data Protection, E-Commerce and IT Law* (3rd edn, 2018) 762.

⁹⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304/64.

¹⁰⁰ Directive 2011/83/EU, art 2(7) and recital 20.

¹⁰¹ Directive 2015/35, art 1(4). Note that 'banking services' are listed as a form of 'financial services' in Annex II to Directive 2015/35. In the legislative proceedings leading to the Directive, this exception was motivated as follows: 'The Council has seen fit to adopt specific provisions for financial services, which are subject to different requirements from other services. Accordingly, the Council has made provision for ... the specific exclusion of rules relating to matters already covered by Community legislation in the field of financial services ...' Common Position (EC) No 11/98 adopted by the Council on 26 January 1998 with a view to adopting Directive 98/.../EC of the European Parliament and of the Council substantively amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ C 62/48.

for Section 58a PSSA is, in the first place, driven by a political and regulatory impetus related to the supply of payment and e-money services,¹⁰² i.e. to matters that are covered by the PSD2. This is already evident from the fact that the legislature has included the right of access in the Payment Services Supervision Act. Ultimately, applying the exemption seems convincing because Section 58a PSSA extends an essential regulatory objective of PSD2 to the field of mobile and internet-based payments: payments that are domestic in nature (e.g. when a German consumer pays his bill in a German supermarket) should be easily supplied by a payment service provider established in another Member State (e.g. a French payment card issuer). But if the card is now used digitally on a device (mobile phone, car etc.), the payment service provider needs to have access to the interfaces of the (mobile) devices used. In this sense, by enacting Section 58a PSSA, the German legislature has further elaborated on the idea of a single market for payment services as enshrined in the PSD2 and facilitated their cross-border provision; it can, therefore, rely on the exemption from the notification procedure pursuant to Article 1(4) of the Directive.

C. *Free Movement of Services (Article 56 TFEU)*

Section 58a PSSA imposes a regulatory standard on operators of technical infrastructure that may be stricter than the standards in other Member States where those operators may be established. Consequently, operators that are subject to the access rights enshrined in Section 58a PSSA might find it less attractive to offer their products across the border in Germany. But, as the provision is indistinctly applicable, disparities in the level of regulation may as such only be considered a restriction if they ‘affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade’.¹⁰³ Indistinctly applicable national rules that were considered a ‘restriction’ include, for instance, the setting of compulsory minimum fees – or at least giving national authorities control over the fees charged¹⁰⁴ – or advertising bans,¹⁰⁵ since such restrictions on the use of price as a marketing tool and of other marketing instruments affect firms that are contemplating penetrating a market more severely than firms that are already active on a market. It does not appear, however, that Section 58a PSSA will have a similar differential impact on operators that seek to enter the market for technical infrastructure as on incumbent operators.

In any event, indistinctly applicable measures that amount to ‘restrictions’ can be justified on overriding grounds in the general interest, provided that they are suitable and necessary to attain the objective pursued,¹⁰⁶ leaving a margin of discretion to Member States.¹⁰⁷ Section 58a PSSA is primarily designed to facilitate market access and to provide consumers with a wide choice among payment services including mobile and internet-based payment services,¹⁰⁸ and it seems at least plausible that the provision will indeed result in lower entry barriers. In particular, the access right has the potential to enhance competition at the level of wallet apps and might even have a pro-competitive effect in the hardware markets. Therefore, even if Section 58a PSSA were to be considered a restriction of Article 56 TFEU, it should in any event be regarded as justified.

D. *Fundamental Rights under the German Constitution*

The obligations imposed by Section 58a PSSA restrict the fundamental rights of the addressed infrastructure operators, in particular their right to property pursuant to Article 14(1) of the

¹⁰² See above Section IV.

¹⁰³ Case C-518/06 *Commission v Italy* EU:C:2009:270 para 64.

¹⁰⁴ Case C-465/05 *Commission v Italy* EU:C:2007:781 para 125.

¹⁰⁵ Case C-405/98 *KO v GIP* EU:C:2001:135 paras 18–25 (on Article 34 TFEU).

¹⁰⁶ See, e.g., Case C-518/06 *Commission v Italy* EU:C:2009:270, para 72.

¹⁰⁷ *Ibid* paras 84–85.

¹⁰⁸ See above Section IV.

Grundgesetz, the German constitution.¹⁰⁹ A restriction on the right to property may be justified by the public interest objective of enhancing competition.¹¹⁰ Owing to the gatekeeper position that is attached to them and their resulting intermediation power, the infrastructure operators captured by Section 58a PSSA are of major social importance, which gives the legislature relatively wide leeway in their regulation. Nevertheless, any restriction on the right to property must be proportionate and must not be excessively burdensome for the owner.¹¹¹ Given the limited scope of application, available defences and the operator's right to a fair compensation, there is, however, nothing to indicate that Section 58a PSSA would not be within the discretion open to the legislature.

IX. A Message to Brussels: Towards PSD3!

While the German legislature, in enacting Section 58a PSSA, has rushed forward, overtaking the EU Commission's competition investigation into Apple Pay, the ball is now back in the court of the Commission. Certainly, on the one hand, the Commission could sit back in peace, view this intervention as an experiment, and observe its results in order to learn from them. On the other hand, though, the Commission has reason to be alarmed about regulatory fragmentation in the internal market, in particular as it not only affects an important emerging market but also concerns the regulation of large technological platforms and, thus, an area that is particularly sensitive from a political point of view. Therefore, one may assume that the calls to the Commission to ensure an EU-wide level playing field are getting louder. Most notably, in its recent report to the Commission, the Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG) stressed that the lack of a harmonised regulatory framework may hamper the scaling up of FinTech within the internal market.¹¹² The Group recommended, among other things, that the Commission should strive to introduce 'ex ante rules to prevent large, vertically integrated platforms from discriminating against product and service provision by third parties', pointing in particular to obstacles to innovation if providers of smartphone operating systems refused competing payment applications access to the relevant NFC interfaces.¹¹³

As there is well-established sector-specific EU regulation, the natural option of 'levelling the playing field' would be an amendment of the PSD2, (further) harmonizing the right of access to technical infrastructure for mobile and internet-based payment services.¹¹⁴ Regulating access rights in order to

¹⁰⁹ Note that the technical infrastructure in the form of digital interfaces, applications etc. that are affected by Section 58a PSSA are typically protected by patents and other intellectual property rights that fall within the scope of Article 14 of the Grundgesetz.

¹¹⁰ H.-J. Papier and F. Shirvani in G. Herzog, M. Herdegen, R. Scholz and H. H. Klein (eds), *Maunz/Dürig Grundgesetz* Art. 14 para 626 (in regard to network access provisions).

¹¹¹ See for the application of the principle of proportionality with regard to the legal obligation of cable operators to broadcast public service programs on their network BGH 16.6.2015, KZR 83/13, *Juris*, paras 29–31 – *Einspeiseentgelt*.

¹¹² ROFIEG, 30 Recommendations on Regulation, Innovation and Finance, Final Report to the European Commission (13 December 2019) 12 and 72–73.

¹¹³ *Ibid* 79–80.

¹¹⁴ Alternatively, such a right to access could be included by way of extending Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57 ('Platform to Business Regulation') or through a new ex ante regulatory instrument for platforms acting as gatekeepers. Remarkably, during her hearing before various committees of the European Parliament, Margrethe Vestager referred to the Platform to Business Regulation when asked 'we have digital infrastructure, such as app stores, digital wallets for payments and search engines, and in some cases all this infrastructure has become unintended digital gateways that are creating a number of barriers to compete, innovate or reach customers ... what will you do to eliminate the new bottlenecks, such as inflexible terms for access, limited access to operating system functionalities, or access to user transaction data?' Hearing of Margrethe Vestager, executive vice president-designate of the European Commission (Europe Fit for the Digital Age), 8 October 2019, Verbatim Report 20–21. See the Commission's initiative of 02 June 2020 for a 'Digital Services Act package' which is restricted, however, to ex ante regulation of 'very large *online* platforms acting as gatekeepers' (emphasis added). See the policy options as outlined in the Inception Impact Assessment - Ares(2020)2836174 3–4 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418->

lower barriers to entry and to promote competition would not be a foreign element to the Directive. With essentially the same objective, Article 66 of the PSD2 provides that, if authorized by the account user, under certain conditions banks must give PISPs and AISPs access to a payment account.¹¹⁵ Certainly, as the PSD2 is based on a concept of full harmonization, the alignment of the regulatory standard could take place in both ways: the EU legislature could effectively abolish the right of access as provided in Section 58a PSSA or it could implement an EU-wide right of access inspired by and modelled after the German regulatory solution. However, the former alternative seems highly unlikely, given that the regulatory intervention could rely on broad political support in Germany¹¹⁶ and given that a stricter regulation of the major technological platforms seems in principle to meet with sympathy in the European Parliament.¹¹⁷ The latter alternative, in contrast, is the one that the German legislature may have had in mind from the very beginning: implementing a unilateral national measure that takes into account technical innovations to exert pressure on the EU legislature in order to be able to push through a EU-wide right of access in a yet-to-come PSD3¹¹⁸ in the same vein as Section 58a PSSA – possibly in a version improved in the light of first experiences in Germany. Whether this will become reality is, of course, difficult to assess at the moment. In any case, we can expect tougher and more protracted political disputes at the EU level than we have seen in Germany – not least because the infrastructure operators are now alerted.

X. Concluding Remarks

Will Section 58a PSSA achieve its regulatory objectives? Will it foster technological innovation and increase competition in the interest of consumers? And, more specifically: can we expect that the right to access NFC interfaces will result in mobile apps available, for instance, on Apple’s devices that successfully compete with Apple Pay and Apple Wallet?

First of all, it is important to stress that the scope of application and the regulatory effects of Section 58a PSSA go much further than granting a right to access Apple’s NFC interfaces. Indeed, the provision may affect not only mobile-payment services but also payment services rendered via internet-based devices (in particular, in-car payments), for devices connected to the internet of things (such as refrigerators) and voice command devices.

However, actual competition for ‘wallet apps’ on Apple’s mobile devices does indeed not seem particularly likely at the moment. Apple is obviously effective at creating a whole ecosystem of device applications that work well with each other and satisfy its customers. Against this background, it is not surprising that in January 2020 the German savings banks – i.e. those stakeholders who most strongly advocated Section 58a PSSA – announced their decision to use Apple Pay and, thus, to forgo the option of direct access to the NFC interface through their own apps.¹¹⁹

However, as such a development might well meet the interests of the typical users of Apple’s ecosystem, it is important to recognize that a lack of any *actual* competition for ‘wallet apps’ etc. should not necessarily be regarded as a failure of Section 58a PSSA. Instead, one must not overlook that it is the *conditions* under which infrastructure such as Apple’s NFC interfaces may be accessed that matter: in this respect, negotiating in the shadow of Section 58a PSSA may make a significant

digital-services-act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> (accessed 4 June 2020).

¹¹⁵ See n 40 and accompanying text.

¹¹⁶ See n 45.

¹¹⁷ See nn 10 and 114.

¹¹⁸ As outlined above (VIII B), to insert such a provision in a PSD3 would merely elaborate on the idea of a single market for payment services as enshrined in the present PSD2.

¹¹⁹ <<https://finanzenfwd.com/de/sparkassen-apple-nfc>> (24 January 2020, accessed 14 April 2020).

difference, because incumbents are constrained by the mere possibility of innovative entrants. Yet, for *potential* competition to work, entry barriers must be low.

Wherever the limits of the right of access under Section 58a PSSA may lie, and how difficult and cumbersome it might be to practically enforce this right, it will contribute to lower barriers to entry and, thus, to generating some competitive pressure and creating incentives for operators of infrastructure for mobile or internet-based payment services not to let up on innovation and product quality. Therefore, it is important to see that Section 58a PSSA may well have pro-competitive effects even without any party ever initiating legal proceedings.

To revisit the example of mobile payments via Apple's devices: we do not know the terms on which the German savings banks and Apple have agreed. It is worth noting, however, the announcement that in the future the banks' customers' debit cards can also be integrated into Apple Pay¹²⁰ – a step that until recently seemed quite unlikely in view of Apple's pricing policy.¹²¹ In any case, this is in the interests of not just the banks (as it may result in a shift of rents from the platform operator to the banks) but also consumers, who will have a wider choice on the market for payments.

This illustrates that Section 58a PSSA will at any rate affect payment service providers' and e-money issuers' conditions for accessing technical infrastructure and that, consequently, there will be benefits for their customers. However, it is difficult to estimate how strong this effect will be, whether the provision will indeed have a significant effect on the market structure and, more specifically, whether it will actually facilitate the entry of new players that offer innovative solutions.

Moreover, one should not overlook that, by enacting Section 58a PSSA, the German legislature took a political stance, showing its willingness to intervene in markets against the interests of large technology enterprises where it considered appropriate in the public interest. The legislative intervention may be interpreted as a signal of its preparedness to also intervene in nascent markets, where the effects of an intervention are particularly difficult to assess and, thus, to deliberately take certain regulatory risks.

Finally, Section 58a PSSA must be regarded as another instance – alongside the right to data portability enshrined in Article 20 of the General Data Protection Regulation¹²² or the various prohibitions of price-parity clauses enacted under national law,¹²³ for example – where presumed competition problems entailed by the practices of large technology platforms are addressed through ex ante sector-specific regulation and not (solely) through competition enforcement. We may expect to see more regulatory intervention of this kind in the future, possibly including EU-wide regulation of access to technical infrastructure for mobile and internet-based payment services.

¹²⁰ This seems to be linked to the fact that it was reported that the German savings banks will in future offer their debit cards with Mastercard debit co-badging <<https://stadt-bremerhaven.de/sparkasse-girocard-kuenftig-mit-mastercard-co-badging-erhaeltlich>> (30 March 2020, accessed 14 April 2020).

¹²¹ See nn 4 to 6 and accompanying text.

¹²² 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) [2016] OJ L 119/1.

¹²³ Most famously, the so-called 'Loi Macron' prohibited the use of all forms of price-parity clauses by online-booking platforms in France. Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité e l'égalité des chances économiques, art 133.