Private Enforcement of the DMA Rules before the National Courts

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1. Introduction

The adoption of the Digital Markets Act (DMA)\(^1\) has changed the regulatory landscape for the digital sector in Europe and beyond. The DMA amounts to a complete system of \textit{ex ante} rules that provide for a specific \textit{clausus numerus} of obligations and prohibitions and aims at fostering contestability and fairness in the area of large digital platforms. In reality, it amounts to a regulatory regime that is mostly aimed at intra-platform competition and at protecting business users and smaller scale companies that rely on the large digital platforms. The DMA is ostensibly not competition law, since it functions \textit{ex ante} and not \textit{ex post}, but in reality, it is very much influenced by competition law and, therefore, is very much seen as the \textit{ex ante} side of the same coin, the other side of the coin being the \textit{ex post} competition rules. Like in competition law, the question of private enforcement takes a central role in the overall system of enforcement.

The purpose of the present contribution is to shed light on the private enforcement of the DMA rules. In particular, it examines, first, the preliminary question, i.e. whether the enforcement of the DMA is restricted to public authorities (the European Commission), or whether the DMA is also enforced by the courts in civil law disputes between private parties. Second, it considers the questions of available remedies in private enforcement, the applicable procedural rules and the rules on jurisdiction and conflict of laws (private international law). Finally, it centres on risks of fragmentation and the DMA mechanisms to remedy this problem.

2. Availability of private enforcement

a. The DMA Proposal

The DMA Proposal itself included no reference at all to the possibility of private enforcement. There were no provisions on the role of national courts or national remedies or, indeed, on mechanisms of cooperation between the Commission and national courts. However, EU officials, in their statements,\(^2\) had stressed the “self-executing” nature of the DMA rules and seemed to take private enforcement for granted. The key players in the legislative process, i.e. Member States and the European Parliament, seemed also to take

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\(^{2}\) See e.g. Guillaume Loriot, ABA Panel - EU Digital Markets Act and Gatekeeper Platforms (2 March 2021).
private enforcement as granted and also stressed the need for the DMA to expressly acknowledge the possibility of private enforcement and to provide for specific mechanisms to enhance it. For example, the joint letter of 27 May 2021, signed by the Ministers of Economy of France, Germany and the Netherlands, specifically mentioned the need to clarify that private enforcement of the DMA obligations is possible. In addition, the European Parliament was unwavering in its support of private enforcement. Commentators also believed that the DMA would give rise to private enforcement, although some would prefer the introduction of special dispute resolution mechanisms that echo the P2B Regulation.

b. The final text of the DMA

Indeed, the final text of the DMA remedied this gap. The DMA now includes specific provisions on the application of its substantive rules by national courts. First, Recital 92 and Article 39 DMA refer to co-operation mechanisms between the Commission and national courts and also include a duty for national courts to pay respect to Commission DMA decisions. This obviously presupposes that actions before the national courts are available. Second, Recital 104 and Article 42 DMA include specific references to Directive 2020/1828 on representative actions and provide that the Directive “shall apply to the representative actions brought against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers”. Therefore, the DMA envisages consumer collective claims.

c. General principles of EU law

In any event, even if the DMA had mentioned nothing about private enforcement, this would not have been material. Private parties can enforce the DMA rules before the national courts as an automatic consequence of the DMA taking the form of an EU Regulation. Regulations, pursuant to Article 288 TFEU, are binding in their entirety and directly applicable in all Member States. The direct applicability of regulations means

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3 “Private enforcement would further increase the effectiveness of the DMA. Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible.”


that “by reason of their nature and their function in the system of the sources of [EU] law, [they] have direct effect and are, as such, capable of creating individual rights which national courts must protect.”

Normally, the direct applicability of regulations means that they are also directly effective, i.e. they can be “invoked before the national courts by a natural or legal person without there being any need for further implementing provisions”. As a matter of EU law, there are two aspects to direct effect: a vertical and a horizontal aspect. Vertical direct effect refers to the relationship between individuals and the State. This means that individuals can invoke an EU provision against Member States. Horizontal direct effect refers to relations between individuals. This means that an individual can invoke an EU provision against another individual. Private enforcement presupposes the existence of horizontal direct effect. In the case of directly effective regulations, the distinction is irrelevant, because direct effect is horizontal always.

However, the fact that a regulation is directly applicable does not necessarily mean that every single provision has direct effect. The provisions of a regulation will still need to be sufficiently precise and unconditional to create rights for individuals and thus to be relied upon by them before national courts. If they are conditional on the exercise of discretion by the EU or the Member States, they cannot (yet) confer rights on individuals. For example, in Monte Arcosu, the Court of Justice held that certain provisions of a regulation were not directly effective and did not confer rights on individuals, because Member States retained discretion in their implementation.

**d. Scope of the direct effect**

In the case of the DMA, the substantive provisions are mainly in Articles 5, 6 and 7 (which include the lists of the substantive obligations imposed on the gatekeepers). Articles 8(1) and 12(3)-(6) DMA, on effective compliance and the prohibition of circumvention, can also be raised before the national courts, in conjunction with the substantive provisions of Articles 5-7 DMA. The other provisions of the DMA are

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7 Case 43/71, Politi, ECLI:EU:C:1971:122, para. 9, emphasis added. See also Case 93/71, Leonesio, ECLI:EU:C:1972:39, paras 18, 23.
10 Case C–253/00, Muñoz, Opinion of AG Geelhoed, ECLI:EU:C:2001:697, para. 39: “In the caselaw horizontal direct effect as a distinguishing criterion in regard to vertical direct effect plays a significant role in the case of directives but not in the case of directly applicable rules (such as regulations).”
11 Ibid, para. 47.
12 Case C–403/98, Monte Arcosu, ECLI:EU:C:2001:6, para. 28.
13 Articles 5, 6 and 7 DMA contain twenty-two main substantive obligations. As commentators have rightly noted, there is no logic in the systematisation of these obligations. In other words, the fact that a specific obligation is listed in Article 5 and not in Article 6 DMA, has no consequence in terms of substance or interpretation. See Nicolas Petit, “The Proposed Digital Markets Act (DMA): A Legal and Policy Review”, 12 JECLAP 529 (2021), p. 535. The only difference is procedural: the gatekeeper can submit a “regulatory dialogue” request and the Commission can adopt specification decisions only for the Article 6 and 7 DMA obligations. See further below.
mostly of a procedural nature and relate to the enforcement of the DMA by the Commission. So, in reality, the question of direct effect arises for Article 5, 6 and 7 DMA only.

The provisions of Articles 5, 6 and 7 DMA rely on the notion of “gatekeepers” and Article 3 DMA is critical. From paragraphs 3 to 10, it is clear that only the Commission has competence to designate “gatekeepers”. This is an exclusive competence. The designation of “gatekeepers” takes place by means of an individual implementing decision of the Commission addressed to the undertaking concerned, pursuant to Article 3(4),(5),(8),(9) DMA. It is only after the Commission has designated a “gatekeeper” that the latter is bound by Articles 5, 6 and 7. Indeed, under Article 3(10), “[t]he gatekeeper shall comply with the obligations laid down in Articles 5, 6 and 7 within 6 months after a core platform service has been listed in the designation decision pursuant to paragraph 9 of this Article”. Paragraph 9 states that “For each undertaking designated as a gatekeeper pursuant to paragraph 4 or 8, the Commission shall list in the designation decision the relevant core platform services that are provided within that undertaking and which individually are an important gateway for business users to reach end users as referred to in paragraph 1, point (b).”

It follows from the above that (i) the national courts (exactly like national authorities) cannot designate “gatekeepers,” since this is an exclusive competence of the Commission, and (ii) prior to the Commission’s decision designating a “gatekeeper”, the rules of Articles 5, 6 and 7 DMA do not create obligations and, therefore, cannot be invoked before the national courts. Therefore, the possibility of private enforcement of Articles 5, 6 and 7 DMA arises only after the Commission has designated a “gatekeeper”. This means that for the first wave of designated gatekeepers (and the corresponding core platform services – CPSs), private enforcement has been possible only as of 7 March 2024.

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14 Article 11 DMA, on the duty to provide to the Commission compliance reports and to publish non-confidential summaries of the reports, Article 14 DMA, on the duty to inform the Commission of intended concentrations, Article 15 DMA, on the duty to submit to the Commission an independently audited description of any techniques for profiling of consumers and to publish an overview of the audited description, and Article 28 DMA, on the duty to introduce a compliance function, contain rules of a mostly procedural nature and their compliance is checked by the Commission. However, under certain circumstances, they could be seen as directly effective and thus be raised before national courts. E.g. the failure to publish a non-confidential summary of the compliance report (per Article 11 DMA) or an overview of the audited description of profiling techniques (per Article 15 DMA) could be raised in private litigation, although this would have little practical value, since the Commission would intervene to ensure compliance anyway.

15 Emphasis added.

16 Emphasis added.

17 On 5 September 2023, the Commission designated as “gatekeepers” for a number of core platform services six undertakings: Alphabet, Amazon, Apple, Meta, Microsoft and ByteDance. See the designation decisions in [https://digital-markets-act-cases.ec.europa.eu/search](https://digital-markets-act-cases.ec.europa.eu/search). On 1 March 2024, the Commission announced that it had received new notifications from Booking, ByteDance and X (Twitter) for new core platform services that they had met as of 1 January 2024 the quantitative thresholds of Article 3(2) DMA. The Commission had 45 working days, i.e. until 13 May 2024, to decide whether to designate the companies as “gatekeepers”.
The fact that a designated “gatekeeper” has challenged its designation\(^\text{18}\) does not stand in the way of the DMA obligations’ direct effect, unless the EU Courts have ordered the suspension of the designation decision. However, in cases of legal challenges against the designation decisions, a national court is likely to decide to stay proceedings, while the designation decision’s legality is pending before the EU Courts. This is usually the state of affairs in competition law cases.\(^\text{19}\) Alternatively, the national court may decide to directly address a preliminary reference to the Court of Justice and *inter alia* enquire about the legality of the Commission’s designation decision.\(^\text{20}\) In any event, the national court will need to be prudent. There will be no need to suspend proceedings if the challenge to the designation decision is entirely irrelevant to the national litigation (e.g. the gatekeeper is challenging an aspect of the CPS delineation but it is clear that the national litigation refers to services that clearly fall within the scope of the CPS and there is no dispute about them).

As for Articles 5, 6 and 7 DMA, there is no doubt that these are sufficiently unconditional and precise and therefore can be invoked before the national courts by individuals that base rights on them. The fact that the title of Article 6 refers to “Obligations for gatekeepers susceptible of being further specified under Article 8” has no impact on direct effect. A closer look at how “specification” works shows that the title of Article 6 should not be critical for our purposes. It becomes clear from Article 8(2)\(^\text{21}\) and Recital 65 DMA\(^\text{22}\) that the specification process is not varying or affecting the nature of each of the rules contained in Articles

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\(^\text{19}\) See e.g. Case C-344/98, *Masterfoods*, ECLI:EU:C:2000:689, para. 57: “When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts”.

\(^\text{20}\) In that case, if the gatekeeper has challenged the designation decision before the General Court and, at the same time, the national court decides to address a preliminary reference to the Court of Justice, the General Court may decide to suspend proceedings and await the Court of Justice’s judgment. This is what happened in the *van den Bergh Foods / Masterfoods* litigation: on 21 April 1998, there was a challenge against the Commission decision before the General Court (then, the Court of First Instance) (Case T-65/98); on 21 September 1998, the Court of Justice received a preliminary reference from the Irish Supreme Court (Case C-344/98); and on 28 April 1999, the General Court stayed the proceedings in Case T-65/98 pending delivery of judgment in Case C-344/98.

\(^\text{21}\) “The Commission may adopt an implementing act, specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7.”

\(^\text{22}\) “It may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned and after enabling third parties to make comments, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with obligations that are susceptible of being further specified or, in the event of circumvention, with all obligations. In particular, such further specification should be possible where the implementation of an obligation susceptible to being further specified can be affected by variations of services within a single category of core platform services. For this purpose, it should be possible for the gatekeeper to request the Commission to engage in a process whereby the Commission can further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations.

The Commission should have discretion as to whether and when such further specification should be provided, while respecting the principles of equal treatment, proportionality, and good administration. In this respect, the Commission should provide the main reasons underlying its assessment, including any enforcement priorities.”
6 and 7 DMA but only relates to effective compliance measures that need to be taken by the gatekeeper. In other words, the rules of Articles 6 and 7 DMA are not specifiable and adjustable in themselves; only the required compliance measures are. The content of the legal rule is not affected by the specification process. Indeed, the specification process is not limited only to Articles 6 and 7 DMA but can also be put in motion ex officio by the Commission, in the event of circumvention, for the obligations of Article 5 DMA, which are certainly not “susceptible of being further specified”. Therefore, although a Commission decision may specify the necessary compliance measures, the Articles 6 and 7 DMA obligations themselves are unconditional and precise legal rules, and to that extent they are also generally applicable and directly effective.

In that sense, the compliance measures that may be “specified” by means of a Commission decision under Article 8 DMA are very different from the Article 101(3) TFEU “individual exemption decisions” that the Commission had exclusive competence to adopt prior to 2004. In that case, the “exemption” was an integral part of the legal rule: a particular practice was prohibited only if it restricted competition per Article 101(1) TFEU and the conditions of Article 101(3) TFEU were not fulfilled. On the other hand, the prohibitions of Articles 6 and 7 DMA are complete and apply, irrespective of a possible “regulatory dialogue” between the Commission and the gatekeeper and a possible specification decision. Thus, in conclusion, the possible “specification” process would not make the Article 6 and 7 DMA rules less unconditional or less susceptible of direct effect. Of course, a different question is how the specification process can affect the national proceedings. I examine that question in Section 4.

In conclusion, Articles 5, 6 and 7 DMA can be invoked by individuals before national courts and private enforcement of the DMA should be taken for granted. The fact that the DMA rules are enforced by the Commission and that the DMA provides for a particular method of public enforcement does not mean per se that private enforcement is excluded. Public enforcement does not exclude private enforcement of the DMA, in the same way as it does not do so in the area of competition law or other areas.

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23 Recital 65 DMA now refers simply to a “dialogue”, as opposed to the DMA Proposal’s “regulatory dialogue” (Recitals 29, 33, 58 and 60).

24 In that sense, I do not share the view expressed by some commentators that “the regulatory dialogue according to Art. 7 [now Art. 8 DMA] would shield gatekeepers from private enforcement as long as there are no clear decisions on the exact obligations”; see Rupprecht Podszun, Philipp Bongartz and Sarah Langenstein, “Proposals on how to Improve the Digital Markets Act”, 18 February 2021, available at SSRN: https://ssrn.com/abstract=3788571, p. 9; Rupprecht Podszun, “Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act”, 13 JECLAP 254 (2022), p. 264, with more nuanced views (“For obligations under Article 6 of the draft DMA it is less clear whether private enforcement is possible”).

25 Compare Case C–253/00, Muñoz, Opinion of AG Geelhoed, ECLI:EU:C:2001:697, para. 55: “It is not to be inferred from the regulation itself […] that enforcement by the authorities of the Member States has to be the sole method of supervision. In other words, the regulation grants no monopoly in regard to enforcement. Nor is any such monopoly to be inferred from the context of Regulation No 2200/96. Nor is that altered by the fact that the regulation itself solely makes provision for
3. Substantive remedies, procedural rules, jurisdiction and applicable law

a. Types of remedies

National courts, while adjudicating disputes among individuals based on Articles 5, 6 and 7 DMA, will be called upon to grant appropriate remedies. In my view, certain remedies are available as a matter of EU law, without the need to refer to national law. This is the case for the right to damages for harm sustained as a result of a violation of the DMA. On that point, the Court of Justice’s case law is quite clear. Regulations can generally qualify as basis for EU law-based tort liability claims. Indeed, soon after the seminal *Courage* ruling,26 which introduced the right to damages for competition law violations as a matter of primary EU law,27 the Court held in *Muñoz* that generally and directly applicable EU regulations, “owing to their very nature and their place in the system of sources of [EU] law […] operate to confer rights on individuals which the national courts have a duty to protect”.28 The Court’s reasoning in *Muñoz* echoed that in *Courage*.29 The Court stressed the instrumental nature of such claims and held that the availability of tort claims strengthens the effectiveness of the rules on quality standards and, in particular, the practical effect (*effet utile*) of the obligations laid down therein. Therefore, a careful reading of the Court’s ruling leads to the conclusion that the right to damages is EU and not national law based.30

However, that does not mean to say that national laws recognizing the right to damages for DMA violations are useless. The existence of such laws provides for more legal certainty as to the existence of a right to damages and, of course, they may include specific rules on the more detailed conditions for exercise of that right. So far, to my knowledge, only German law explicitly provides for a right to damages in cases of DMA violations. The latest amendment of the German Competition Act (GWB) of 2023 has essentially extended the private enforcement apparatus for German and EU competition law to the DMA.31 Thus, Section 33a(1) GWB in conjunction with Section 33(1) GWB explicitly provides for a right to damages for violations of Articles 5, 6 and 7 DMA. In other national legal systems, general national regimes of civil enforcement by means of public law. [EU] law does not operate on the notion that enforcement by means of private law is precluded where provision is made expressis verbis solely for enforcement under public law.”

liability should easily accommodate the violation of the DMA and, in principle, should offer a right to damages.\textsuperscript{32}

Apart from damages claims, national courts can grant other remedies as provided for by both EU\textsuperscript{33} and national law. One particularly important remedy is permanent injunctions, i.e. court-ordered measures requiring an infringer to cease and desist from any DMA-infringing conduct. Like in the case of the right to damages, EU law has now progressed sufficiently to provide such a remedy itself. In \textit{AOK Bundesverband}, Advocate General Jacobs stressed that, in the competition law area, “\textit{both damages and injunctive relief would as a matter of [EU] law be available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness. As the Court has held, the full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition of Article [101(1) TFEU] would be put at risk if it were not open to any individual in proceedings before a national court to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. The same analysis would in my view apply equally to injunctive relief.”\textsuperscript{34} Based on the principles derived from \textit{Muñoz}, a similar rule can be extended to violations of the directly effective provisions of EU regulations.

Like with the right to damages, national laws usually provide for the possibility of injunctions in cases of breach of statutory law. German law is unique in recognising the right to an injunction in cases of violations of Articles 5, 6 and 7 DMA (Section 33(1) GWB).\textsuperscript{35} A permanent injunction can contain detailed negative and positive orders aiming at changing the defendant’s conduct specifically \textit{vis-à-vis} the victim of the unlawful conduct.

Another available remedy is preliminary injunctions (interim measures), which can generally be granted by national courts, notwithstanding the parallel competence of the Commission to order them (Article 24


\textsuperscript{33} The EU Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. L 349/1) or, to be more correct, the national laws transposing it, would not apply here, since private actions rely on the infringement not of the EU competition rules but only of the DMA. There is, of course, a question as to which is the applicable law, if the civil action is based on the infringement of both the DMA and EU or national competition law.

\textsuperscript{34} Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, \textit{AOK Bundesverband}, AG Jacobs’s Opinion, ECLI:EU:C:2003:304, para. 104.

\textsuperscript{35} Section 33(1) GWB refers to “affected persons” and Section 33(3) GWB defines “affected persons” as “competitors or other market participants impaired by the infringement”. The term “market participants” should also cover end users and consumers. See Christian Kersting, in: Loewenheim, Meessen, Riesenkampff, Kersting & Meyer-Lindemann (Eds.), \textit{Kartellrecht, Kommentar zum deutschen und europäischen Recht} (Beck: Munich, 2020), § 33 Rn. 26; Joachim Bornkamm and Jan Tollkitt, in: Bunte (Ed.), \textit{Kartellrecht - Kommentar}, Vol. I, \textit{Deutsches Kartellrecht} (Luchterhand: Munich, 2022), § 33 GWB Rn. 23, 41. My sincere thanks go to Professor Rupprecht Pohszun and his research assistant Vincent Weber, as well as to Professor Florian Wagner von Papp, for confirming the point to me.
DMA). Such court-ordered interim measures are of a civil nature and are aimed at the protection of private interests by provisionally securing civil claims, whereas the Commission-ordered interim measures are of an administrative nature and are aimed at safeguarding the public interest. Nothing in the text of the DMA stands in the way of national courts adopting interim measures based on the DMA.\footnote{Article 24 DMA provides that “[i]n case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers, the Commission may adopt an implementing act ordering interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Article 5, 6 or 7. That implementing act shall be adopted only in the context of proceedings opened with a view to the possible adoption of a non-compliance decision pursuant to Article 29(1). It shall apply only for a specified period of time and may be renewed in so far this is necessary and appropriate.” This specific provision does not apply to national courts and does not impose any limitations on their powers.}

Other remedies include restitutio

Other remedies include restitutionary and declaratory relief, as well as the pronouncement of the nullity of contracts or juridical acts that are not in conformity with the DMA obligations. Restitution may be a more convenient remedy for claimants, particularly in cases where proving the existence of harm and of a causal link between the harm and the alleged violation is too onerous, as it is sufficient in restitution cases to prove that an infringer has enriched itself in an unjustified manner, to the detriment of the victim of that conduct. Most national legal systems also allow parties to seek a judicial declaration concerning the legality or illegality of certain conduct. A declaratory judgment may be quite useful for a litigant, because it clearly states the legal situation at a specific point in time and has a \textit{res judicata} effect \textit{inter partes}. Finally, agreements or other juridical acts that are incompatible with the DMA substantive rules will be considered illegal and, therefore, void under national law. Thus, e.g. under French, German, and Greek law, contracts that are incompatible with a legal prohibition will be null.\footnote{See, respectively, Articles 6 and 1131 \textit{Code Civil}; Section 134 BGB and Article 174 of the Greek Civil Code. For German law, see Marcel Zober, “Durchsetzung des DMA-E und dessen Verhältnis zum Kartellrecht”, 9 NZKart. 611 (2021), p. 615.}

b. \textbf{Procedural rules}

In the absence of EU law provisions on procedures and sanctions related to the enforcement of the DMA by national courts, the latter apply national procedural law and - to the extent that they are competent to do so - impose sanctions provided for under national law, under the principle of “procedural/remedial and institutional autonomy” of the Member States. The application of these national provisions must, nevertheless, be compatible with the general principles of EU law, in particular the twin principles of “equivalence” and “effectiveness”.

The principle of equivalence requires that the rules on procedures and sanctions that national courts apply to enforce EU law must be no less favourable than the rules applicable to the enforcement of equivalent national law provisions.\footnote{Case 33/76, \textit{Rewe}, ECLI:EU:C:1976:188, para. 5; Case 199/82, \textit{San Giorgio}, ECLI:EU:C:1983:318, para. 12; Case C–231/96, \textit{Edis}, ECLI:EU:C:1998:401, paras 36–37.} This does not, however, mean that a Member State is obliged to extend its most
favourable rules governing liability under national law to all actions based on a breach of EU law.\textsuperscript{39} Before
the principle of equivalence can be relevant, it is necessary that actions based on a breach of EU law and
those based on an infringement of national law be similar, i.e. comparable.\textsuperscript{40} In the context of the DMA,
the principle of equivalence may play a role, when a Member State has introduced special rules for digital
gatekeepers. The fact that such rules may not represent a form of \textit{ex ante} but only \textit{ex post} intervention\textsuperscript{41} is,
in my view, immaterial, since the requirement of comparability seems to be satisfied. Currently, only
Germany has introduced such special rules, but the question of equivalence does not arise, since German
law expressly provides for the private enforcement of Articles 5, 6 and 7 DMA.

The principle of effectiveness, which is a direct corollary of the principles of direct effect and supremacy,
requires that national rules on procedures and sanctions that national courts apply to enforce EU law must
not make such enforcement excessively difficult or practically impossible.\textsuperscript{42} It reflects a more general
guiding principle of EU law, namely that of full and useful effectiveness (\textit{effet utile}). Whether a national
procedural provision renders the exercise of the rights conferred on individuals by the EU legal order
impossible or excessively difficult must be analysed by reference to the role of that provision in the
procedure, its progress, and its special features, viewed as a whole.\textsuperscript{43}

Certain commentators\textsuperscript{44} regret the fact that the DMA did not echo the P2B Regulation and did not include
a provision that specifically requires Member States to ensure “adequate and effective enforcement” of the
DMA obligations.\textsuperscript{45} Incidentally, the Digital Services Act (DSA),\textsuperscript{46} unlike the DMA, includes specific rules
on remedies and Article 54 DSA provides that “[r]ecipients of the service shall have the right to seek, in
accordance with Union and national law, compensation from providers of intermediary services, in respect
of any damage or loss suffered due to an infringement by those providers of their obligations under this
Regulation”. However, while a similar provision in the DMA would certainly have been a welcome

\begin{footnotes}
\item[41] See e.g. Section 19a GWB.
\item[42] Case 45/76, \textit{Comet}, ECLI:EU:C:1976:191, para. 12; Case 79/83, \textit{Harz}, ECLI:EU:C:1984:155, paras 18, 23; Case C-169/14,
\item[45] Regulation (EU) 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 O.J. L 186/57, Article 15: “1. Each Member State shall
ensure adequate and effective enforcement of this Regulation. 2. Member States shall lay down the rules setting out the
measures applicable to infringements of this Regulation and shall ensure that they are implemented. The measures provided
for shall be effective, proportionate and dissuasive.” On the question of private enforcement of the P2B Regulation see Jens-
Uwe Franck, “Individual Private Rights of Action under the Platform-to-Business Regulation”, 4 October 2022, available at
SSRN: \url{https://ssrn.com/abstract=4237397}.
\end{footnotes}
clarification, the EU case law already described is clear on the duties of national courts to provide for effective enforcement of the rights that individuals base on EU law.

c. Jurisdiction and applicable law

When it comes to rules on jurisdiction and applicable law, national courts will have to apply the Brussels I and Rome II Regulations. As to jurisdiction, a possible violation of the DMA has to be examined as a tort (breach of a statutory obligation or equivalent) and, therefore, the special basis of jurisdiction under Article 7(2) of the Brussels I Regulation would apply, apart from the general basis of jurisdiction, which is the defendant’s domicile (Article 4). It will then be up to the national court to establish which is the “harmful event”, on which Article 7(2) of the Brussels I Regulation relies, and where it “occurred”.

As to the applicable law to the civil law aspects of the liability, based on Article 4(1) of the Rome II Regulation, it will be the law of the place where the damage occurs. For the part of the tort dispute that relates to the illegal nature of the conduct (i.e. whether there has been a violation of statutory duty), if the substantive conditions for the application of the DMA are fulfilled, then the DMA is part of the applicable law, as a matter of overriding mandatory law of the forum (Article 16 of the Rome II Regulation).

A separate question, of course, is whether the substantive conditions of the DMA are fulfilled. In other words, if the DMA is “applicable law” as a matter of private international law, does the specific DMA provision really apply to the dispute in question? Certain DMA provisions include an explicit territorial limitation or specification (e.g. Article 7 DMA, which refers to “offering or intending to offer such services in the Union”). Otherwise, one would need to take account of the general territorial clause of Article 1(2) DMA, which provides that “[t]his Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.”

4. Conflicts of resolution and mechanisms of co-operation

a. Fragmentation risks

From the foregoing analysis it is obvious that private enforcement of the DMA is a reality. National courts enjoy full competence to apply Articles 5, 6 and 7 DMA and decide whether there has been an infringement of the obligations contained therein. Apart from adjudicating on claims for damages or other restitutionary or declaratory relief, as explained above, they would also be competent to grant permanent or interlocutory

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injunctions and order the gatekeepers to take specific measures of a negative or positive nature, to the extent the applicable national procedural law gives them such powers. Such judicial pronouncements will constitute res judicata inter partes, i.e. as between the gatekeeper and the claimant, unlike Commission non-compliance and specification decisions pursuant to Articles 29 and 8 DMA, respectively, which have erga omnes declaratory effect.  

However, such national judgments may inevitably result in a considerable degree of fragmentation within the EU. Notwithstanding the centralized system of public enforcement in the hands of the Commission, the DMA also entails a decentralization to the level of countless national courts of a generalist nature deciding on countless cases, leading to countless “mini-regulations” with inter partes effects within the EU. Such judgments may not produce erga omnes effects and would only bind the parties to the litigation, but, from a practical point of view, their disintegration and fragmentation effects are obvious. Especially the fragmentation of remedial outcomes would be prejudicial to the effectiveness of the whole system, detrimental to the internal market and burdensome and disproportionate for the undertakings concerned.

Too much fragmentation may also have a negative impact on public enforcement. It is true that judgments of national courts cannot bind the Commission and the latter is entitled to adopt at any time individual decisions, even where a gatekeeper’s conduct has already been the subject of a judgment by a national court and the Commission’s decision conflicts with that national judgment. However, a degree of disruption is inevitable.

We can take as an example the Article 6 DMA obligations and the specification process of Article 8 DMA. The effectiveness of that procedure and of the “regulatory dialogue” may be reduced, if national courts systematically pre-empt it. Even outside the area of the formal specification process, the gatekeepers may have also received informal assurances by the Commission as to their compliance efforts (e.g. with regard

48 Indeed, apart from national law, which makes clear that such judgments do not enjoy an erga omnes effect, also EU law prohibits such an effect, since that would be contrary to Article 12(2)(c) DMA, which essentially grants exclusive power to the Commission to adopt delegated acts of general application “specifying the manner in which the obligations laid down in Articles 5 and 6 are to be performed by gatekeepers in order to ensure effective compliance with those obligations”. No national organ can usurp that exclusive power of the Commission.

49 See Assimakis P. Komninos, “The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement”, in: Charbit & Gachot (Eds.), Liber Amicorum Eleanor M. Fox, Antitrust Ambassador to the World (Concurrences: Paris, 2021), p. 426 et seq. In that article, I had proposed that, in order to reduce the risks of fragmentation, the DMA Regulation should adopt a rule of precedence of public over private enforcement and allow only follow-on private enforcement. The EU legislator, however, decided otherwise, so stand-alone private enforcement is also possible. For a similar critique and proposal, see Torsten Körber, “Lessons from the Hare and the Tortoise: Legally Imposed Self-regulation, Proportionality and the Right to Defence under the DMA – Part 2”, 8 NZKart. 436 (2021), p. 442.

50 See, by analogy, Case C-344/98, Masterfoods, ECLI:EU:C:2000:689, para. 48.

51 See also CERRE, DMA Recommendations for the Council and the Parliament (Apr. 2021), p. 74, with an acknowledgement of the risk of divergent interpretations of the DMA particularly in the area of Article 6 obligations that are being “specified” (“A national court may find an infringement of Article 6 in settings where the Commission might not, or vice versa”).
to Article 5 DMA obligations). Since such assurances can never take the form of a decision, unless the Commission initiates the Article 8 DMA specification process, they cannot bind the national courts, which are – legally speaking – free to ignore the Commission’s informal approach.

Besides, there are serious risks for the uniform, consistent and effective application of the DMA rules. National courts are called upon to adjudicate on a highly complex and entirely new system of legal rules which inevitably relies on a number of nebulous concepts. Unlike the 2004 decentralization drive and the subsequent enhancement of private enforcement in the area of EU competition law, where the national courts could count on a 40-year body of precedent (1962–2004), the application of the DMA rules by national courts is expected to be a difficult exercise, at least at the beginning and until the Commission produces Guidelines and builds its decisional practice and the EU Courts produce case law.

b. Cooperation and corrective mechanisms

These risks cannot be brushed aside simply by counting on the role of the Court of Justice and of the Article 267 TFEU preliminary reference proceeding, which acts as an ultimate safeguard that ensures the uniformity and consistency of application of EU law. For this reason and following criticism, unlike the original DMA Proposal, the final text of the DMA includes (i) mechanisms of coordination and cooperation between the Commission (acting as DMA enforcer) and national courts (Article 39(1)-(4) DMA) and (ii) a rule of supremacy for Commission decisions (Article 39(5) DMA).

In particular, Article 39(1) DMA is a replica of Article 15(1) of Regulation 1/2003 and provides for the right of the national courts to seek the Commission’s opinion on the application of the DMA or to transmit information in its possession (e.g. on the progress of an investigation). That possibility is without prejudice to the possibility or the obligation for a national court to refer questions to the Court of Justice for a preliminary ruling regarding the interpretation or the validity of the DMA in accordance with Article 267 TFEU.

Unlike Article 10 of Regulation 1/2003, which provides for the possibility to adopt non-infringement or positive decisions, no such type of decisions is possible under the DMA. In addition, the DMA does not provide for formal complaints and, therefore, there will be no decisions rejecting complaints, which again could be relied upon before national courts, like in the competition enforcement field.

Apart from being mentioned in the DMA (Recital 10), these principles have always been considered central to EU law. On the principle of uniform application of EU law, see Joined Cases C–453/03, C–11/04, C–12/04 and C–194/04, ABNA, ECLI:EU:C:2005:741, para. 104 (“the uniform application of [EU] law, which is a fundamental requirement of the [EU] legal order”); Case C–411/17, Inter-Environnement Wallonie, ECLI:EU:C:2019:622, para. 177. With particular reference to Regulations, see Case 94/77, Fratelli Zerbone, ECLI:EU:C:1978:17, para. 25 (“simultaneous and uniform application of [EU] regulations throughout the whole of the [EU]”).


TFEU. Article 39(3) DMA echoes Article 15(3)(a) of Regulation 1/2003 and provides for the power of the Commission to intervene before the national court as amicus curiae in cases that have important policy implications for the application of the DMA and submit written or (with national court’s permission) oral observations. To that aim, under Article 39(4) DMA, which again echoes Article 15(3)(b) of Regulation 1/2003, the Commission may request the relevant national court to transmit to the Commission any documents necessary for the assessment of the case. The amicus curiae mechanism, which has not really succeeded in the competition enforcement area, as the Commission intervenes very rarely and probably for the wrong reasons, is particularly necessary in the early stages of DMA enforcement, when there is no sufficient body of precedent. So, at least in the early stages, the Commission must be more generous and willing to intervene. All the above mechanisms are nothing but leges speciales of the more general principle of loyal cooperation contained in Article 4(3) TEU and should aim at promoting the coherent application of the DMA rules in the internal market.

Article 39(5) DMA also includes a principle of supremacy for Commission decisions, which is modelled on Article 16(1) of Regulation 1/2003. The latter provision was a codification of the Court of Justice’s seminal ruling in Masterfoods and, therefore, has a primary law provenience. Thus, where the national litigation takes place before the Commission has adopted a decision, the national court must avoid adopting a decision that would conflict with the decision contemplated by the Commission. The national court may, for reasons of legal certainty, consider staying its proceedings until the Commission has reached a decision. If, on the other hand, the Commission has already reached a decision, Article 39(5) DMA makes clear that the national court cannot rule in a manner running counter to a Commission decision. The only alternative for a national court intending to rule in a manner running counter to a Commission decision, is to refer a question to the Court of Justice for a preliminary ruling under Article 267 TFEU. The CJEU will then decide on the compatibility of the Commission’s decision with EU law.\(^{56}\) It is noteworthy that Article 39(5) DMA is a faithful replica of Article 16(1) of Regulation and did not adopt the approach in Article 9(1) of the Damages Directive, which goes a step further and facilitates private enforcement by introducing an irrefutable presumption of the existence of an antitrust infringement when there is a national competition authority infringement decision. Article 39(5) DMA, on the other hand, includes a different rule that is of a more general nature. It aims at safeguarding “the harmonised application and enforcement” of the DMA Regulation, as Recital 92 DMA stresses.

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57 If the Commission’s decision is, however, being challenged before the EU Courts pursuant to Article 263 TFEU, and the outcome of the dispute before the national court depends on the validity of the Commission’s decision, the national court should stay its proceedings pending final judgment by the EU Courts unless it considers that, in the circumstances of the case, a reference to the CJEU for a preliminary ruling on the validity of the Commission decision is warranted. See Article 39(5) DMA in fine and Case C-344/98, Masterfoods, ECLI:EU:C:2000:689, paras 52–59.
c. Strategic litigation and respective scenarios

In conclusion, the above principles alleviate somewhat but do not eliminate the risks of conflicts and fragmentation. National courts have full competence to apply Articles 5, 6 and 7 DMA and are now competent to grant *inter alia* permanent or interim injunctions or declaratory relief. It is with this specific form of private litigation, which can be strategically used by parties, that the risks of conflicts and fragmentation are particularly acute.

If the Commission has already initiated non-compliance proceedings pursuant to Article 20 DMA, with a view to adopting an Article 8 DMA specification decision or an Article 29 DMA non-compliance decision, or *a fortiori* has already adopted such decisions, Article 39(5) DMA can provide a solution. However, if the Commission is not contemplating opening such proceedings, Article 39(5) DMA is of little use. The national court can, of course, have recourse to Article 267 TFEU or to the co-operation mechanism of Article 39(1) DMA, but it may choose not to do so or it may simply misapply the DMA rules. While the national court’s injunctions and other judicial pronouncements will not have *erga omnes* effects, they would still constitute *res judicata inter partes*, i.e. as between the gatekeeper and the other parties to the litigation.

Practically speaking, I can think of at least four scenarios here:58

**Scenario 1:** If the Commission has already specified compliance measures either directly by means of an individual specification decision addressed to the gatekeeper or indirectly in a non-compliance decision,59 the national court will need to respect such decisions and avoid taking measures against their effectiveness. Recital 92 and Article 39(5) DMA specifically impose this duty on national courts.60 Of course, the possibility that the national court may go further than the measures “specified” by the Commission cannot be excluded. If such “over-enforcement” does not prejudice the effectiveness of the Commission decision and the uniform and effective application of the DMA in the internal market,61 it may be allowed under EU law.

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59 Under Article 29(5) DMA, “the Commission shall order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision”. While a general cease and desist order will not include specific compliance measures that the gatekeeper has to adopt, it cannot be excluded that the reasoning in the non-compliance decision may indirectly point to the types of measures that are required for the non-compliance to cease.

60 See also Case C-344/98, *Masterfoods*, ECLI:EU:C:2000:689, para. 49.

61 See Recitals 7, 8, 9, and 10 DMA.
Scenario 2: If there is concurrently a pending specification or non-compliance proceeding before the Commission and a judicial proceeding before a national court, the national court could stay the proceedings until the Commission has adopted its specification or non-compliance decision, especially if there is a risk of conflict between the measures to be specified or otherwise required by the Commission and those considered by the national court. Recital 92 and Article 39(5) DMA again include a clear recommendation to that effect.62

Scenario 3: If there is neither a final specification or non-compliance decision nor a pending proceeding before the Commission, the national court retains unfettered discretion. Of course, the gatekeeper may decide to act strategically and seek to pre-empt a possibly erratic outcome in national litigation, by engaging in a “regulatory dialogue” with the Commission and notifying certain measures under Article 8(2) DMA. If then the Commission decides to open proceedings under Article 20 DMA, we go back to the second scenario above. If the Commission does not open proceedings, the national court’s discretion remains intact. Another possibility linked to this scenario is for the Commission to intervene before the national court and submit observations per Article 39(3) DMA. This procedure, however, has rarely been used in the antitrust area (and probably in the wrong kinds of cases) and the Commission retains full discretion to intervene. In all cases, the national courts can always address preliminary reference questions to the Court of Justice, but the number of such references will not be high anyway.

Scenario 4: If there is a final judgment of a national court ordering specific measures or even finding no DMA infringement, before the Commission has opened proceedings with a view to adopting a specification or non-compliance decision, obviously the national judgment does not bind the Commission. Indeed, such were the facts in Masterfoods and the Court of Justice unequivocally held that “the Commission is […] entitled to adopt at any time individual decisions under Articles [101 and 102] of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court’s decision”.63 The potential conflict is rather easy to resolve if the pre-existing national judgment is not final and is therefore still open to appeal or cassation. In that case, the higher court will be bound to respect the Commission’s final or contemplated decision under the principles established in Masterfoods and Article 39(5) DMA. Formidable problems arise when the national judgment is no longer open to review and thus produces res judicata inter partes effects.64

63 Case C-344/98, Masterfoods, ECLI:EU:C:2000:689, para. 48.
64 See Assimakis P. Komninos, EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts (Hart: Oxford/Portland, 2008), pp. 124-136, where I have examined various scenarios and the possible ways to resolve such conflicts. Mutatis mutandis the same applies here.
5. Conclusion

A new brave world has started on 7 March 2024. The DMA has become fully enforceable and its obligations are binding on designated “gatekeepers”. National courts retain unfettered powers to apply the DMA substantive provisions and can do so in parallel with the Commission. Private enforcement of the DMA follows the EU law norm: EU law is primarily enforced in the Member States, by national authorities and courts, in the latter case when it is directly effective. So there is nothing abnormal in the new reality. However, at least in the early stages, the fragmentation risks are very real and cannot be avoided. In order to manage such risks, a close cooperation is called for among the Court of Justice, the Commission, and the national judges.