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COMPETITION V. SECTOR REGULATION OF ONLINE PLATFORMS. THE DIGITAL MARKETS ACT

**CICLO DI SEMINARI PIATTAFORME, BIG DATA E DISCIPLINA DELLE
CONCORRENZA NEI MERCATI DIGITALI**

11 May 2023

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DMA AND PRIVATE ENFORCEMENT

Private enforcement provisions of the DMA

- The DMA itself makes limited provision for private enforcement, despite calls for clear provisions facilitating private enforcement.
 - See e.g. the Friends of an effective Digital Markets Act (that includes the Ministries of Economic Affairs of France, Germany and the Netherlands), Strengthening the Digital Markets Act and Its Enforcement, 27.05.2021
 - “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.”

Private enforcement provisions of the DMA

- **The state-of-the-art after the final text of the DMA**
- National courts will decide on follow-on actions and grant due compensations to those that have been damaged by infringing conduct previously found by the Commission.
- National courts will also play a complementary role to the Commission in **stand-alone actions, identifying violations of the obligations under Articles 5, 6 and 7 of the DMA and ordering infringers to cease and desist**. These kinds of actions will probably be even more effective than in competition law, due to the per-se nature of most of the prohibitions imposed by the DMA.

Private enforcement provisions of the DMA

- **The state-of-the-art after the final text of the DMA**
- More specifically, after the Commission designates a gatekeeper (Article 3 DMA), **victims could request an injunction before a national court to enforce the directly applicable obligations** (Article 5 DMA). These obligations could, in principle, be easily argued before a Court.
- Moreover, private enforcement could also provide very effective and quick protection through **interim measures**. Indeed, following the example of the **Broadcom case**, **individual victims could request an interim measure before a national court**, providing even faster relief in the market than in the case of interim measures adopted by the Commission under Article 24 DMA.
- Last, national courts could also play a complementary role in cases of **obligations specified or updated after the regulatory dialogues provided for by Articles 8 and 12 DMA**. In these scenarios, when a decision by the Commission under these articles establishes certain remedies or limitations on the behavioural commitments of the designated gatekeeper, victims could, to the extent this is required, request enforcement before a national court.

Private enforcement provisions of the DMA

- **The state-of-the-art after the final text of the DMA**
- Moreover, national judicial bodies should also contribute, together with the CJEU, to determining the proper implementation of the DMA by the Commission, **thus providing a judicial review of the (still wide) discretion attributed to the Commission in this matter.**
- For example, when assessing an infringement, **a national court might request a preliminary ruling under Article 267 TFEU** on the validity (or the interpretation) of an implementing act specifying the obligations provided under Articles 6 and 7 DMA, should it have any doubts on the legitimacy of such an act. Under Article 265 TFEU, the CJEU will instead have exclusive jurisdiction in remedying a failure by the Commission to designate as a gatekeeper an undertaking meeting the criteria established by Article 3 DMA.

Private enforcement provisions of the DMA

- **The state-of-the-art after the final text of the DMA**
- **Even if the DMA had not provided with specific reference to private enforcement and civil litigation**, as long as its provisions enjoyed horizontal direct effect and the regulation itself did not exclude or limit private enforcement expressis verbis, national courts could have adjudicated disputes among individuals and grant appropriate remedies.
- **Indeed, a right to damages for harm sustained as a result of a violation of the DMA should exist as a matter of EU law, without the need to refer to national law.** On that point, the CJEU'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 (Case C-453/99), which introduced the right to damages for competition law violations as a matter of primary EU law, the CJEU held in Muñoz (Case C-253/00) 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."

Private enforcement provisions of the DMA

- The standing of the DMA's private enforcement architecture builds on and resembles that of Articles 15 and 16 of the Regulation 1/2003
- **Recital 42 of the DMA** refers to the role of national courts in safeguarding the right of business- and end-users to raise concerns about possible infringements of the DMA by gatekeepers.
 - “To safeguard a fair commercial environment and protect the contestability of the digital sector it is important to safeguard the right of business users and end users, including whistleblowers, to raise concerns about unfair practices by gatekeepers raising any issue of non-compliance with the relevant Union or national law with any relevant administrative or other public authorities, including national courts. [...]”

Private enforcement provisions of the DMA

- In addition, **Art. 39 in conjunction with Recital 92** establishes mechanisms for cooperation between national courts and the Commission when national courts enforce the DMA.
 - Article 39 – Cooperation with national courts
 1. In proceedings for the application of this Regulation, **national courts may ask the Commission to transmit to them information** in its possession or its opinion on questions concerning the application of this Regulation.
 2. **Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of this Regulation.** Such copy shall be forwarded without delay after the full written judgment is notified to the parties.
 3. Where the coherent application of this Regulation so requires, **the Commission, acting on its own initiative, may submit written observations to national courts.** With the permission of the court in question, it may also make oral observations.
 4. For the purpose of the preparation of their observations only, the Commission may request the relevant national court to transmit or ensure the transmission to the Commission of any documents necessary for the assessment of the case.
 5. **National courts shall not give a decision which runs counter to a decision adopted by the Commission** under this Regulation. They shall also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. To that effect, the national court may assess whether it is necessary to stay its proceedings. This is without prejudice to the possibility for national courts to request a preliminary ruling under Article 267 TFEU

Private enforcement provisions of the DMA

- In addition, **Art. 39 in conjunction with Recital 92** establishes mechanisms for cooperation between national courts and the Commission when national courts enforce the DMA.
 - Recital 92: “In order to safeguard the harmonised application and enforcement of this Regulation, it is important to ensure that national authorities, including national courts, have all necessary information to ensure that their decisions do not run counter to a decision adopted by the Commission under this Regulation. National courts should be allowed to ask the Commission to send them information or opinions on questions concerning the application of this Regulation. At the same time, the Commission should be able to submit oral or written observations to national courts. This is without prejudice to the ability of national courts to request a preliminary ruling under Article 267 TFEU.”

Private enforcement provisions of the DMA

- Relationship between private enforcement and public enforcement
- Information sharing

To facilitate private enforcement, the DMA also contains a framework for cooperation between national courts and the Commission. National courts are entitled to request information in the Commission's possession and the Commission's opinion on the DMA. The Commission also has the right to submit written observations to the Court on its own initiative to preserve the coherency of the DMA's application.

- Duty to stay proceedings

To avoid practical conflict between the Commission's public enforcement and any parallel private enforcement, the DMA also imposes a de facto duty on national courts to stay any parallel proceedings as national courts must avoid judgments that would conflict with a decision contemplated by the Commission.

See CJEU's seminal ruling in *Masterfoods* (Case C-344/98)

Private enforcement provisions of the DMA

- Relationship between national courts and the EU Courts
- Referral process

National courts have the right to refer questions concerning the interpretation of the DMA to the Court of Justice of the EU for a preliminary ruling.

Private enforcement provisions of the DMA

- The EU Commission has emphasized that actions before national courts are appropriate.
 - Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets, 2 May 2023
- “Will private damages be available to those harmed by gatekeeper conduct?”**

The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers.”

- Due to the “self-executing” nature of gatekeeper obligations under Art. 5 DMA, it is likely that private enforcement actions may be brought on a stand-alone basis, i.e., without a prior Commission non-compliance decision under Art. 29 of the DMA. In such cases, the Art. 39 cooperation mechanisms (e.g., the Commission submitting written and oral observations in proceedings before national courts) between national courts and the Commission will be important. Given the need to avoid fragmentation, it is likely that the Commission would use these mechanisms more often than it has done in competition law proceedings before national courts.

Private enforcement provisions of the DMA

- An example of the close collaboration between the Commission, the national legislature and national courts could be the first-mover approach taken by the German legislature.
- On 20 September 2022, the Federal Ministry for Economic Affairs and Climate Action (BMWK) published the draft 11th amendment of the German Competition Act (GWB), making proposals for private enforcement of the DMA and to harmonization of those provisions with those for competition law:
 - **Claims for injunction and rectification, liability for damages (§ 33(1) GWB-draft):** This provision, regulating claims for injunction and rectification relating to infringements of Art. 101 and 102 TFEU (and actions for damages under § 33a GWB), would be amended to include infringements of Art. 5, 6 and 7 of the DMA. Business- and end-users making claims under the DMA would do so under the civil law toolkit already available for infringements of competition law. While claimants could also benefit from § 33a(3) GWB, enabling courts to quantify the harm in actions for damages, the provision that sets out a rebuttable presumption that harm occurred (§ 33a(2) GWB) could not be used for DMA-based claims as it only applies to (horizontal) cartels.
 - **Binding effect of decisions (§ 33(b) GWB-draft):** Decisions by the Commission or EU Courts will be binding in damages proceedings before German courts for infringements of the DMA. However, whether this provides significant relief for claimants in practice remains to be seen, since the Commission's decisions under the DMA may provide far less detail to establish a claim than Commission decisions under antitrust laws.

Private enforcement provisions of the DMA

- An example of the close collaboration between the Commission, the national legislature and national courts could be the first-mover approach taken by the German legislature.
 - **Disclosure (§ 33(g) GWB-draft):** Actions for damages for infringements of the DMA would benefit from the disclosure rules in § 33(g) GWB-draft. Both claimants and gatekeepers could require the other party to disclose relevant information necessary to claim or to defend claims for damages.
 - **Statute of limitation (§ 33(h)(6) GWB-draft):** Claims for injunctions, rectification and damages based on infringements of the DMA must be made within five (based on knowledge) or ten (irrespective of knowledge) years of the date on which the infringement ceased.
 - **Concentration of first instance jurisdiction (§§ 87, 89 GWB-draft):** States in Germany concentrated private enforcement proceedings at one Regional Court (Landgericht) per state for more effective proceedings (e.g., the Regional Court of Hannover reviews actions for damages based on competition law in the state of Lower Saxony). The same concentration would apply to DMA-based private enforcement.
- Originally, it was expected that the German Federal Government would vote on the draft amendment in late 2022. However, for political reasons (mainly relating to provisions allowing the Federal Cartel Office (BKartA) to break-up companies as ultima ratio), it is now unclear whether the draft will be introduced to the parliamentary process this year.