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The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement

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Abstract

The DMA Proposal is silent about private enforcement, although the general view takes this as granted. Indeed, as the Commission’s Proposal currently stands, national courts would apply Articles 5 and 6 and enforce the related obligations in civil litigation. However, the prospect of unlimited private enforcement raises concerns about fragmentation, especially in view of the novel nature of the DMA rules. For this reason, the EU legislator would be well-advised to introduce certain limitations on private enforcement and provide for a rule of precedence for public enforcement. Private enforcement should be allowed in its follow-on but not in its stand-alone form. This limitation could be revisited after a number of years and once a body of precedent on the DMA has been built. The DMA should also include concrete mechanisms of co-ordination and co-operation with the European Commission, with a view to safeguarding the consistent application of its rules in the Union.

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I. Introduction

The European Commission’s proposal of December 16, 2020 for an EU Digital Markets Act (DMA Proposal) is going to result in a major paradigm shift in the European Union. The fact that the DMA is presented as a “regulatory” tool, as opposed to a competition law statute, should not distract from the reality that the DMA is inspired by competition law cases and relies heavily on competition law concepts and methodologies. That being said, when the DMA is adopted, there will be a change of focus for the digital markets (i) from ex post to ex ante intervention, (ii) from an effects-based analysis to a list of per se prohibitions, and (iii) from flexible prohibitions based on general clauses (Articles 101 and 102 TFEU) to a numeros clausus of specific but inflexible prohibitions. While mainstream competition law will still apply, it is expected that the DMA enforcement will supplant (to a degree) competition law enforcement.

The purpose of the present paper is not to critically present the DMA Proposal but rather to shed light on a particular question that has received relatively little attention, the role of private enforcement. In particular, we examine whether the enforcement of the DMA will be restricted to public authorities, i.e. the European Commission (if the DMA Proposal’s exclusion of decisional competence for national authorities is retained), or whether it will also be enforced by the courts in civil law disputes between private parties.

This question is addressed from two angles. First, we analyze how private enforcement will work under the current version of the DMA Proposal (de lege lata). We show that, as the DMA Proposal currently stands, private enforcement is clearly possible with regard to all provisions that are unconditional and grant individuals actionable rights; in other words, for all provisions that enjoy “direct effect.” This is certainly the case for the prohibitions contained in Articles 5 and 6 of the DMA Proposal. Then, we examine whether this is a desired policy option

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(de lege ferenda). We examine the fragmentation risks that an unlimited private enforcement would entail for the enforcement of the DMA and develop arguments for introducing certain limitations on it. In particular, we argue for limiting the role of private enforcement only to “follow-on” cases for a reasonable period, until the DMA comes to maturity. Finally, we advocate the introduction of appropriate cooperation and coordination mechanisms between the Commission and national courts in the EU.

II. The (Unspoken) Role of Private Enforcement in the DMA

The role of private enforcement of EU competition law is well established and well known. The process was not without obstacles. It took 40 years from the recognition of the competition rules’ direct effect to the adoption of the EU Damages Directive. And it took over 20 years from the Commission’s 1999 White Paper on modernization, which commenced the process of decentralization of EU competition enforcement, for private antitrust enforcement to take off.

What about the DMA? Is there space for private enforcement? The DMA Proposal itself includes no reference at all to the potential of private enforcement. There are 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, have stressed the “self-executing” nature of the DMA rules and seem to take private enforcement for granted. The key players in the legislative process, i.e. Member States (which together form part of the Council) and the Parliament, seem also to take private enforcement as granted and, indeed, stress 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 May 27, 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

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7 Unlike Regulation 1/2003, which includes numerous references to the role of national courts and cooperation mechanisms between them and the European Commission.

obligations is possible.\textsuperscript{9} In addition, the European Parliament is unwavering in its support of private enforcement.\textsuperscript{10}

The fact that the DMA Proposal mentions nothing about private enforcement is not 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 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.”\textsuperscript{11} Thus, 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.”\textsuperscript{12}

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.\textsuperscript{13} In the case of directly effective regulations, the distinction is irrelevant, because direct effect is horizontal always.\textsuperscript{14}

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 individuals before national courts.\textsuperscript{15} If they are conditional on the exercise of discretion by the EU or Member States, they cannot (yet) confer rights on individuals. For example, in\textit{ Monte Arcosu}, the Court of Justice (CJEU) held that certain provisions of a regulation were

\textsuperscript{9} “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.”


\textsuperscript{11} Case 43/71, Politi s.a.s. v. Ministero delle finanze della Repubblica Italiana, ECLI:EU:C:1971:122, ¶ 9, emphasis added. See also Case 93/71, Orsolina Leonesio v. Ministero dell’agricoltura e foreste, ECLI:EU:C:1972:39, ¶¶ 18, 23.

\textsuperscript{12} Case C-253/00, Antonio Muñoz y Cia SA and Superior Fruitecticola SA v. Frumar Limited and Redbridge Produce Marketing Limited, Opinion of AG Geelhoed, ECLI:EU:C:2001:697, ¶ 57.

\textsuperscript{13} See KOMNINOS, supra note 4, at 178.

\textsuperscript{14} Case C-253/00, Antonio Muñoz y Cia SA and Superior Fruitecticola SA v. Frumar Limited and Redbridge Produce Marketing Limited, Opinion of AG Geelhoed, ECLI:EU:C:2001:697, ¶ 39: “In the case law 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).”

\textsuperscript{15} Id., ¶ 47.
not directly effective and did not confer rights on individuals, because Member States retained discretion in their implementation.\footnote{16}

In the case of the DMA, the substantive provisions of the future regulation are mainly in Article 3 (on the criteria for designating “gatekeepers”), and Articles 5 and 6 (which include lists of obligations). The other provisions of the DMA Proposal are mostly of a procedural nature and relate to the enforcement of the DMA by the Commission. So the question of direct effect arises for the former provisions only.

The provisions of Articles 5 and 6 rely on the notion of “gatekeepers” and Article 3 therefore is critical. Article 3 is both a substantive and a procedural rule. Paragraphs 1 and 2 relate to the qualitative and quantitative criteria/conditions that need to be fulfilled for an undertaking to be designated as a “gatekeeper.” Paragraphs 3 to 8 relate to the mechanism for that designation. From the latter paragraphs, it is clear that only the European Commission would have competence to designate “gatekeepers.” This is an exclusive competence. The designation of “gatekeepers” would take place by means of an individual decision by the Commission, addressed to the undertaking concerned, pursuant to Article 3(4), (6), (7). It is only after the Commission has designated a “gatekeeper” that the latter will be bound by Articles 5 and 6. Indeed, under Article 3(8), “the gatekeeper shall comply with the obligations laid down in Articles 5 and 6 within six months after a core platform service has been included in the list pursuant to paragraph 7 of this Article.”\footnote{17} Paragraph 7 states that “for each gatekeeper … the Commission shall identify the relevant undertaking to which it belongs and list the relevant core platform services that are provided within that same undertaking and which individually serve as an important gateway for business users to reach end users …”\footnote{18}

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 and 6 do not create obligations and, therefore, cannot be invoked before the national courts. Therefore, the possibility of private enforcement of Articles 5 and 6 arises only after the Commission has designated a “gatekeeper.”

As for Articles 5 and 6, 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


\footnote{17} Emphasis added.

\footnote{18} Emphasis added.
for gatekeepers susceptible of being further specified,” 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 7(2)\(^\text{19}\) and Recital 58\(^\text{20}\) that the “specification” process is not varying or affecting the nature of each of the rules contained in Article 6 but only relates to effective compliance measures that need to be taken by the gatekeeper. In other words, the rules of Article 6 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. Therefore, although a Commission decision may specify the necessary compliance measures, the Article 6 obligations themselves are unconditional and precise legal rules, and to that extent they are also generally applicable and directly effective.

Indeed, the compliance measures that may be “specified” by means of a Commission decision under Article 7(2) 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 Article 6 of the DMA Proposal 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 rules less unconditional or less susceptible of direct effect.\(^\text{21}\)

Of course, practically speaking, when the national courts would apply Article 6 and consider imposing remedies on gatekeepers by way of an injunction, the specification process of Article 7(2) may come into play. We can think of three scenarios here:\(^\text{22}\)

First scenario: If the Commission has already “specified” compliance measures by means of an individual decision addressed to the gatekeeper, the national court will need to respect that decision and avoid taking measures against its effectiveness. Although there is no explicit provision in the DMA Proposal to

\(^{19}\) “Where the Commission finds that the measures that the gatekeeper intends to implement pursuant to paragraph 1, or has implemented, do not ensure effective compliance with the relevant obligations laid down in Article 6, it may by decision specify the measures that the gatekeeper concerned shall implement.”

\(^{20}\) “It may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations that are susceptible of being further specified. This possibility of a regulatory dialogue should facilitate compliance by gatekeepers and expedite the correct implementation of the Regulation.”

\(^{21}\) In that sense, we do not share the view expressed by some commentators that “the regulatory dialogue according to Art. 7 would shield gatekeepers from private enforcement as long as there are no clear decisions on the exact obligations”; see Podszun et al., supra note 3, at 9. In our view, the specification process cannot “shield” gatekeepers from private enforcement risks related to Article 6.

that extent, a general duty to do so emanates from Article 4(3) TEU. 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 is not prejudicing the effectiveness of the Commission decision, it may be allowed under EU law.

Second scenario: If there is concurrently a pending specification process before the Commission, the national court could suspend proceedings until the Commission has taken a specification decision, especially if there is a risk of conflict between the measures specified by the Commission and those considered by the national court.

Third scenario: If there is neither a final specification decision nor a pending proceeding before the Commission, the national court retains unfettered discretion. Of course, the litigant-gatekeeper may decide to act strategically and seek to engage in a “regulatory dialogue” with the Commission by notifying it of certain measures under Article 7(2). If then the Commission decides to open proceedings under Article 18, we go back to the second scenario above. If the Commission does not open proceedings, the national court’s discretion remains intact.

In conclusion, as the DMA Proposal currently stands, Articles 5 and 6 can and will definitely be invoked by individuals before national courts. Therefore, 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.

Indeed, most commentators agree that the DMA will give rise to private enforcement, although some would prefer the introduction of special dispute resolution mechanisms that echo the P2B Regulation. In particular, under such

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23 Masterfoods, supra note 23, ¶ 49.
24 See, however, infra on the fragmentation problem.
25 See, by analogy, Stergios Delimitis, supra note 23, ¶ 52.
26 Another scenario is for the gatekeeper to invite the Commission to intervene before the national court and submit observations. The Commission retains full discretion to do so. There is no legal basis for such amicus curiae intervention in the DMA Proposal, but Art. 4(3) TEU should make this possible. See, by analogy, Case C–288/88 Imm, J. J. Zwartveld and Others, Order of the Court, ECLI:EU:C:1990:440.
27 Compare, Opinion of AG Geelhoed, supra note 13 ¶ 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 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.” (emphasis added.)
mechanisms gatekeepers could be asked to institute internal systems for handling complaints, and if the matter is not resolved, there should be recourse to a mediation procedure. Enforcement may also be by representative organizations or public bodies which could take action in national courts.  

III. Available Remedies in the Current (Default) Situation

This all means that the default situation is the following: even if the future DMA Regulation has no specific reference to private enforcement and civil litigation, as long as its provisions enjoy horizontal direct effect and the regulation itself does not exclude or limit private enforcement expressis verbis, national courts can adjudicate 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, which introduced the right to damages for competition law violations as a matter of primary EU law, the CJEU 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.” In fact, the CJEU’s reasoning in Muñoz echoed that in Courage. The CJEU 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 CJEU’s ruling leads to the conclusion that the right to damages is EU and not national law-based.


30 Id. See, however, further infra on the possibility of EU secondary law to exclude or limit private enforcement.


Apart from damages claims, national courts can grant other remedies as provided for by both EU 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. A permanent injunction can contain detailed negative and positive orders aiming at changing the defendant’s conduct specifically vis-à-vis the victim of the unlawful conduct. Another available remedy is interim measures. Preliminary injunctions can generally be granted by national courts, notwithstanding the parallel competence of the Commission to order them. The former are of a civil nature and are aimed at the protection of private interests by provisionally securing civil claims, such as a claim for damages, whereas the latter are of an administrative nature and are aimed at safeguarding the public interest – at least as far as the Commission is concerned. Nothing in the current text of the DMA Proposal stands in the way of national courts adopting interim measures based on the DMA.

Other remedies include restitutionary and declaratory relief. 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. Finally, most national legal systems 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 res judicata effect inter partes.

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 favorable than the

36 The EU Damages Directive (supra note 6) or, to be more correct, the national laws transposing it, would not apply here, since private actions would 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. These are scenarios to which the Damages Directive gives no answer.

37 Article 22(2) provides that “[a] decision pursuant to paragraph 1 [ordering interim measures] may only be adopted in the context of proceedings opened in view of the possible adoption of a decision of non-compliance pursuant to Article 25(1).” This specific provision does not apply to national courts and does not impose any limitations on their powers.
rules applicable to the enforcement of equivalent national law provisions. This does not, however, mean that a Member State is obliged to extend its most favorable rules governing liability under national law to all actions based on a breach of EU law. 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. 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 *ex ante* but only *ex post* intervention is, in our view, immaterial, since the requirement of comparability seems to be satisfied.

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. It reflects a more general guiding principle of EU law, namely that of full and useful effectiveness (*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 analyzed by reference to the role of that provision in the procedure, its progress, and its special features, viewed as a whole.

Some commentators have proposed that the DMA should echo the P2B Regulation and include a provision that specifically requires Member States to ensure “adequate and effective enforcement” of the DMA obligations. That would certainly be a welcome clarification, though 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.

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41 *See, e.g.*, the new § 19a of the German Competition Act.


45 *See CERRE, DMA Recommendations*, supra note 3, at 72–73.

46 *See P2B Regulation*, Art. 16: “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.”
IV. The Risk of Fragmentation

From the foregoing analysis it is obvious that, as the DMA Proposal currently stands, private enforcement will be a reality, notwithstanding the Proposal’s silence. National courts would have full competence to apply Articles 5 and 6 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, they would also be competent to grant permanent or interlocutory 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 not obviously have *erga omnes* declaratory effect, like a non-compliance decision of the Commission pursuant to Article 25 of the DMA Proposal. They would constitute *res judicata* *inter partes*, i.e. as between the gatekeeper and the claimant.

However, such national decisions may inevitably result in a considerable degree of fragmentation within the EU. In parallel to and notwithstanding the centralized system of enforcement by the Commission, there will be full 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. They may not produce *erga omnes* effects and would only bind the parties to the litigation, but, from a practical point view, their disintegration and fragmentation effects are obvious.

Such disintegration and fragmentation within the internal market will be distractive and will mean increased compliance costs, since gatekeepers, instead of interacting with one centralized enforcer, or at worst with 1 + 27 enforcers (if national authorities were to be given certain competencies), will need to defend their business practices before an innumerable number of courts. 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.

The ideas of harmonization and avoidance of fragmentation are central to the DMA Proposal. Indeed, its legal basis is Article 114 TFEU, since it aspires to adopt a harmonized legal regime at Union level. The DMA Proposal is quite definitive and explicit on why there should be no national competence to legislate and enforce the DMA rules. It makes significant effort to highlight the risk of fragmentation but for the adoption of the DMA, including a number of references to “regulatory initiatives by Member States,” which “without action at EU level … will be further aggravated,” “could lead to fragmentation,” and create “a risk

47 The problem of fragmentation is accentuated by the parallel application (and confusion) among different policy tools, such as consumer and data protection laws, on top of competition law. See further S. Yakovleva et al., *Kaleidoscopic Data-related Enforcement in the Digital Age*, 57 COMMON MKT L. REV. 1461 (2020).
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of divergent regulatory solutions.”⁴⁸ In addition, both the DMA Proposal itself and its Impact Assessment Report spend pages highlighting the risks that a fully decentralized system of enforcement (with emphasis on the role of national authorities) would bring and defend the choice of centralization at the EU level.⁴⁹ Yet, if a risk of fragmentation exists with 27 specialist administrative authorities, surely the risk is much higher with potentially thousands of generalist courts having full decisional powers on Articles 5 and 6 of the DMA Proposal.

An unlimited private enforcement may also disrupt public enforcement. It is true that judgments of national courts cannot bind the Commission and the Commission will be entitled to adopt at any time individual decisions under Articles 7, 8, 9, 15, 16, 22, 23(1), 25, 26 and 27 of the DMA Proposal, even where a gatekeeper’s conduct has already been the subject of a judgment by a national court and the decision contemplated by the Commission conflicts with that national judgment.⁵⁰ However, a degree of disruption in that case is inevitable. We can take as an example the Article 6 obligations and the “specification” process of Article 7.⁵¹ The idea behind that process is that a “regulatory dialogue” ensues between the Commission and the gatekeepers.⁵² The effectiveness of that procedure and of the “regulatory dialogue” may be reduced, if national courts systematically preempt it.⁵³

Besides, there are serious risks for the uniform, consistent and effective application of the DMA rules.⁵⁴ National courts will be called upon to adjudicate on a highly

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⁴⁸ See Explanatory Memorandum to the DMA Proposal.

⁴⁹ See, e.g., Explanatory Memorandum to the DMA Proposal and Recital 9; Commission Staff Working Document, Impact Assessment Report, Part I, §5, SWD(2020) 363 final (Dec. 15, 2020), in particular §5, ¶ 192: “Given the pan-European reach of the targeted companies, a decentralized enforcement model does not seem to be a conceivable option, including in light of the fragmentation that the initiative is supposed to address, nor would it be proportionate given the limited number of gatekeepers that would be in scope of the proposed framework.

⁵⁰ See, by analogy, Masterfoods, supra note 23, ¶ 48.

⁵¹ See also, CERRE, DMA Recommendations, supra note 3, at 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”).

⁵² See Recitals 29 and 33 of the DMA Proposal.

⁵³ The risk appears lower, if not inexistent, if the Article 7(2) “specification” decision by the Commission precedes in time the national litigation. In that case, the national courts would be bound not to take decisions running counter to a decision adopted by the Commission pursuant to Article 1(7) of the DMA Proposal. That provision refers only to “national authorities” (see also infra) but should be interpreted broadly. In any event, this is just a lex specialis to the lex generalis of Article 4(3) TEU.

⁵⁴ Apart from being mentioned in the DMA Proposal (Recital 9), 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, The Queen on the application of ABNA Ltd and Others v. Secretary of State for Health and Others, ECLI:EU:C:2005:741, ¶ 104 (“the uniform application of [EU] law, which is a fundamental requirement of the [EU] legal order”); Case C–411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministers, ECLI:EU:C:2019:622, ¶ 177. With particular reference to Regulations, see Case 94/77, Fratelli Zerbone Snc v. Amministrazione delle finanze dello Stato, ECLI:EU:C:1978:17, ¶ 25 (“simultaneous and uniform application of [EU] regulations throughout the whole of the [EU]”). See also generally F. Fines, L’application uniforme du droit communautaire dans la jurisprudence de la Cour de justice des Communautés européennes, in LES DYNAMIQUES DU DROIT EUROPÉEN EN DÉBUT DE SIÈCLE: ÉTUDES EN L’HONNEUR DE JEAN-CLAUDE GAUTRON 334 (2004).
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, when the national courts could count on a 40-year body of precedent (1962–2004), unlimited private enforcement here would mean putting the cart before the horse. Even in the case of the application of competition law by national courts, the EU legislator recognized the risks to the consistent application of EU competition rules and introduced a number of safeguards in Articles 15 and 16 of Regulation 1/2003, in particular, duties of cooperation with the Commission and a powerful supremacy clause. These were supplemented by appropriate soft law measures adopted by the Commission, in particular the 2004 Co-operation Notice. The DMA Proposal, on the other hand, is entirely silent on that point. So the already-increased risks are accentuated by the complete absence of any cooperation and coordination mechanisms.

These risks cannot be brushed aside simply by counting on the role of the CJEU and of the preliminary reference proceeding, which acts as an ultimate safeguard that ensures the uniformity and consistency of application of EU law. While decentralized enforcement remains the rule in EU law and centralization is the exception, a degree of centralization and the introduction of certain rules of precedence is sometimes appropriate. We elaborate further on this in the following section. In any event, if the competition rules can be a guide, a centralized model existed in effect for 40 years (1962–2004), and even today the role of the Commission in enforcing EU competition law is paramount. In addition, there are other areas of EU law in which the Commission enjoys exclusive competence.

V. Arguments in Favor of Limiting Private Enforcement to Follow-on Claims

From public statements of senior officials, it seems that the European Commission does not seem too concerned about the risks of fragmentation of unlimited private enforcement. The Commission seems to think that the involvement of national courts can be beneficial in terms of filling the “enforcement gap”


56 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004 O.J. (C 101) 54. See also the older Notice of 1993: Commission Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, 1993 O.J. (C 39) 6.

57 See Article 105 TFEU.

58 See CERRE, DMA Recommendations, supra note 3, at 68, with references to the Commission’s exclusive competence in merger enforcement (for concentrations of an EU dimension), the European Central Bank’s exclusive competence to supervise systemically significant banks, and other examples.

59 MLE, EU “gatekeeper” law should expose Big Tech to national court suits, Guersent says (June 10, 2021).
generated by the perceived inability of the Commission to deal with all attention-worthy cases. This line of argument sits in stark contrast with the DMA Proposal’s exclusion of national authorities as enforcement organs, which is precisely premised on the need to avoid the risk of fragmentation. It is unclear why fragmentation will be avoided if a finite number of specialist national organs are excluded but the infinite number of generalist organs are included.

For the reasons explained above, we believe that the EU legislator would be well advised to introduce certain proportionate limitations on the private enforcement of the DMA rules or a “rule of precedence” for public enforcement. Private enforcement should only be allowed in its “follow-on” form, i.e. only after the Commission has taken a decision and has declared *erga omnes* that a particular gatekeeper has violated the DMA rules. In that case, there is no reason why aggrieved parties could not pursue follow-on claims against the infringer. Indeed, they should be able to bring damages claims for harm suffered as a result of the DMA infringement. They should also be able to bring other civil claims (e.g. nullity, restitutionary or declaratory claims) to the extent they have a legal interest. Such private enforcement would enhance the deterrent effect of DMA prohibitions and convey the message that a DMA infringement could result not only in administrative fines but may also give rise to damages and other civil sanctions.

However, the EU legislator should accord precedence to public enforcement and should not allow for private enforcement in its “stand-alone” form, i.e. before the Commission has had the chance to declare the infringement of a DMA rule by a gatekeeper and has also possibly ordered specific remedies. This form of litigation could be distractive and would thus bring about an intolerable degree of legal uncertainty. It would result in fragmentation in the Union and prejudice the consistent and effective application of the DMA rules.

The introduction of a rule of precedence of public over private enforcement does not have to be permanent but could be reexamined by the legislator at an appropriate time, e.g. in 10 years’ time, after the Commission has had a chance to build up a body of precedent and after the EU Courts have delivered their first rulings on the interpretation of the DMA.

We can again take the example of the EU competition rules to support that proposition. Although the direct effect of those rules was recognized in 1974, it took 40 years of case law (1962–2004) for the EU legislator to opt for a full decentralization of the application of the rules (of Article 101(3) TFEU), with the introduction of Regulation 1/2003. It took 10 more years for the EU legislator to introduce specific measures aimed at enhancing private antitrust enforcement in Europe and to adopt a harmonized system of civil liability for damages with

\[ 60 \text{ Belgische Radio v. SABAM, supra note 5.} \]
the Damages Directive. If that was the case with EU competition law, a fortiori a degree of prudence is called for in the case of the novel regime of the DMA.

The question arises whether such a limitation would be possible and defensible from an EU law point of view. To our mind, there is no doubt that it would. The DMA is not primary law; i.e. it is not part of the Treaties. If that were the case, it would not have been open to secondary law (a regulation) to restrict the direct effect of a Treaty provision. Since, however, the DMA is the product of secondary EU legislation (a regulation), it is open to EU legislation to introduce limitations on competence and, thus, on the direct effect of the legal rules it contains. In Muñoz, Advocate General Geelhoed considered that the provisions of an EU Regulation were directly effective and that they could be applied by national courts in private enforcement cases, relying on the following reasoning:

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 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.

E contrario, there is nothing precluding the EU legislator to provide expressis verbis for a limitation on the competence of national authorities and courts to enforce the secondary EU rules it introduces. This is precisely what we advocate here, with a view to safeguarding the effective, consistent and uniform application of the DMA rules. As explained, this rule could be revisited at a time when the DMA Regulation will have produced a sufficient body of precedent.

Indeed, secondary EU law includes examples where private enforcement and thus by implication the horizontal direct effect of EU law was excluded altogether or restricted. For example, Article 3(3) of the Environmental Liability Directive provides that “without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such
damage.”\(^{64}\) In other words, the Directive provides for the exclusive competence of administrative authorities, i.e. for public enforcement exclusively.\(^{65}\)

There are also examples where the CJEU restricts private enforcement, in order to protect the effectiveness of EU sectoral regulation in certain areas. For example, in CTL Logistics,\(^{66}\) the CJEU held that the German courts could not use a national doctrine based on the German Civil Code (BGB) to perform a review based on equity of the charges levied by railway infrastructure undertakings. Such levies were already regulated by Directive 2001/14/EC\(^{67}\) (later repealed by Directive 2012/34/EU\(^{68}\)), and there was a sectoral regulator in Germany which had competence to deal with the matter. In essence, the CJEU thought that this constituted “excessive protection” incompatible with the requirements and objectives of EU sectoral legislation. In particular, the CJEU held that the assessment of fairness of a contract, carried out by virtue of the BGB, on the one hand, and sectoral regulation flowing from Directive 2001/14, on the other hand, related to different considerations which, if applied to a single situation, could lead to contradictory results.\(^{69}\)

Staying in the same area, the pending DB Station & Service case before the CJEU is highly relevant.\(^{70}\) It relates to a private action in Germany brought against a subsidiary of Deutsche Bahn (DB), a railway infrastructure undertaking which maintains 5,400 stations (traffic hubs), by a rail transport undertaking that uses the defendant’s traffic hubs for passenger railway services. The civil action alleged that the charges levied for that purpose were excessive and thus constituted an abuse of a dominant position. The complication here was, however, that the Federal Network Agency, acting as the competent regulatory body, declared the DB price system to be invalid, albeit with effect from a later date than their adoption. The referring court, influenced by CTL Logistics, entertained doubts as to whether national civil courts are entitled and obliged to review the charges

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\(^{64}\) Notwithstanding the fact that the Directive excludes private enforcement, it includes certain provisions of relevance to private enforcement based on national environmental laws (see, e.g., Article 9 on rights of contribution in accordance with national law).


\(^{69}\) CTL Logistics, supra note 67, ¶¶ 74–75.

\(^{70}\) Case C–721/20, DB Station & Service AG v. ODEG Ostdeutsche Eisenbahn GmbH, pending.
levied based on Article 102 TFEU and national competition law, independently of the monitoring carried out by the regulatory authority.

The currently pending case focuses on whether the existence of EU secondary regulation should impose a rule of precedence in favor of the sectoral regulator (the Federal Network Agency), thus resulting in limiting private enforcement of EU/national competition law. If such limitations were recognized by the CJEU, they would a fortiori be appropriate in the DMA scenario, where the regulator would not be a national authority but rather the Commission itself. Indeed, the question of whether national courts applying the DMA provisions should accord precedence to the EU regulator can be legitimately posed.

Finally, we can again use EU competition law as a guide. CJEU case law allows for some limitations on private enforcement, when there is a need to safeguard the effectiveness of public enforcement. This is notably the case in limiting the discoverability of leniency statements. The Damages Directive has, indeed, introduced a rule excluding discovery of leniency statements. It is also interesting that the Damages Directive has gone even further and limits the joint and several liability of immunity recipients under the leniency programs. Such a limitation is not seen as interfering with the EU law-based right to damages but rather as a necessary and proportionate measure, in order to safeguard the effectiveness of the leniency programs and of public enforcement.

In any event, the solution we advocate does not result in the total exclusion of private enforcement. Instead, we advocate the introduction of a limitation: a rule of precedence of public enforcement and the exclusion of private enforcement only in its stand-alone form, i.e. before the Commission has had the chance to take a decision in certain specific proceedings whereby the Commission (i) specifies compliance measures per Article 6 (Article 7(2)), (ii) adopts non-compliance decisions (Article 25(1)), (iii) imposes behavioral or structural remedies in cases of systematic infringements (Article 16(1)), and (iv) imposes interim measures (Article 22). From the point of view of EU law, such a solution

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71 The critical question referred to the CJEU is the following: “Is it compatible with Directive 2001/14/EC … for national civil courts to review the charges levied based on the criteria laid down in Article 102 TFEU and/or in national competition law on a case-by-case basis independently of the monitoring carried out by the regulatory body? If Question 1 is answered in the affirmative: Are the national civil courts permitted and required to conduct an assessment of abusive practices in the light of the criteria laid down in Article 102 TFEU and/or in national competition law, even where the rail transport undertakings have the possibility to request the competent regulatory body to review the fairness of the charges paid? Must the national civil courts wait for a decision in the matter by the regulatory body and, where applicable, if it is contested before the courts, for that decision to become enforceable?”


73 Article 6(6)(a).

74 Article 11(4).

would be fully appropriate and proportionate. It would ensure the effective and consistent enforcement of the DMA in the EU while avoiding fragmentation, and would also further the undertakings’ legal certainty. It could also be reexamined by the EU legislator at an appropriate time, when the DMA is sufficiently mature.

VI. The Need of Coordination and Cooperation Mechanisms

The DMA Proposal should be completed with the introduction of mechanisms of coordination and cooperation between the European Commission (acting as DMA enforcer) and national courts, following the example of Articles 15 and 16 of Regulation 1/2003.

First, the future DMA Regulation should introduce a supremacy rule modeled on Article 16 of Regulation 1/2003. If no rule of precedence is adopted, as is proposed, a national court may be called to apply the DMA provisions at the same time as the Commission or even before the Commission has ever initiated proceedings. This will raise issues relating to the consistent application of the DMA in the EU. In that case, the introduction of a supremacy rule is indispensable; a supremacy rule would also be welcome even if the DMA Regulation allows only for follow-on private enforcement.

In the EU competition law area, these issues were dealt with in detail by the CJEU in its seminal ruling in Masterfoods and this case law was subsequently codified verbatim by Article 16 of Regulation 1/2003. A similar provision should be included in the future DMA Regulation. Article 1(7) of the current DMA Proposal, which provides that “national authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation,” is unfortunate in that it does not specifically mention national courts. Although courts could be considered “judicial authorities” and, in any event, the above provision is a lex specialis to the lex generalis of Article 4(3) TEU, a specific reference to the duty of national courts to respect the Commission’s decisions seems warranted.

Thus, where the national litigation takes place before the Commission has adopted a decision (if stand-alone private enforcement is allowed), there should be a rule providing that the national court must avoid adopting a decision that would conflict with a decision contemplated by the Commission. To that effect, the

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76 See, CERRE, DMA Recommendations, supra note 3, at 74.
77 Masterfoods, supra note 23, ¶¶ 51–52.
78 Indeed, this is a gap that has been noticed by the European Parliament. The IMCO Draft Report (supra note 11) includes Amendment 32 which adds “national courts” to Article 1(7).
national court should be allowed to ask the Commission whether it has initiated proceedings regarding the same conduct and, if so, about the progress of proceedings and the likelihood of a decision.\textsuperscript{79} The rule should also provide that the national court may, for reasons of legal certainty, consider staying its proceedings until the Commission has reached a decision.\textsuperscript{80}

If, on the other hand, there is a follow-on litigation and the Commission has already reached a decision, the DMA Regulation should make sure 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 CJEU for a preliminary ruling under Article 267 TFEU.\textsuperscript{81} The CJEU will then decide on the compatibility of the Commission’s decision with EU law.\textsuperscript{82}

The future DMA Regulation could decide to go even further than Article 16 of Regulation 1/2003 and introduce a rule conveying a “binding effect” on Commission decisions finding an infringement of the DMA rules, following the model of Article 9 of the Damages Directive. Such a far-reaching rule would enhance follow-on litigation and would facilitate claims by victims of conduct that is found to have infringed the DMA rules.

Second, like Regulation 1/2003, the future DMA Regulation should establish a number of mechanisms of cooperation between the national courts and the Commission. This should be particularly so, if our proposal to exclude stand-alone private enforcement is not followed. Such mechanisms should be built on the principle of loyal cooperation contained in Article 4(3) TEU and should aim at promoting the coherent application of the DMA rules. Again, Article 15 of Regulation 1/2003 can be used as a model. These rules could include the right of the national courts to seek the Commission’s opinion on the application of the DMA Regulation. That possibility should be without prejudice to the possibility or the obligation for a national court to refer questions to the CJEU for a preliminary ruling regarding the interpretation or the validity of the DMA Regulation in accordance with Article 267 TFEU. Another possibility is to adopt a mechanism for the Commission to intervene before the national court as amicus curiae in cases that have important policy implications for the application of the


\textsuperscript{80} \textit{Masterfoods}, \textit{supra} note 23, ¶ 51.


\textsuperscript{82} 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. \textit{See Masterfoods, supra} note 23, ¶¶ 52–59, as codified by Article 16(1) of Regulation 1/2003.
DMA.\textsuperscript{83} This mechanism is particularly necessary in the early stages of DMA enforcement, when there is no sufficient body of precedent.

Such coordination and cooperation mechanisms are necessary and, indeed, it is surprising that they are conspicuously absent in the DMA Proposal; and yet the Commission officials seem so keen on allowing the private enforcement of the DMA rules.\textsuperscript{84}

\textsuperscript{83} Compare Article 15(3) of Regulation 1/2003.

\textsuperscript{84} The IMCO Draft Report (\textit{supra} note 11) includes Amendment 28 which proposes the introduction of a new Recital 77a: “National courts will have an important role in applying this Regulation and 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 courts of the Member States.”
Pioneer, avant-garde, transformationalist - Eleanor M. Fox is regularly described in these terms by the manifold antitrust practitioners who have been influenced by her industry-shaping scholarly work. Over the course of an extraordinary career, she has helped establish a coherent set of competition law and policy principles designed to promote markets that work in favor of inclusivity, and to ensure economic development that reduces unequal access to markets. Her mold-breaking contributions to the tailored development of competition law in developing economies are acknowledged today across international forums that she helped create. This book honours Professor Fox’s indelible mark on antitrust law and policy with contributions from her friends and colleagues around the world. The articles explore subjects such as the role of competition policy, its intersection with social policies, external pressures, and challenges for developing economies amongst others.