Article

Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act

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I. Private enforcement in competition law—apart from damages claims

Can private enforcement play a part in ensuring contestable and fair markets in the digital age? This question is answered in this contribution by looking at the experiences with private enforcement in some recent competition cases. The aim is to give a first indication for some features of success for cases brought to national law courts by private parties with the aim to stop an infringement.

Private enforcement in competition law has been around in EU Member States for a long time.[2] This is also acknowledged by the Commission. The Notice on the handling of complaints explicitly states:

> 'Depending on the nature of the complaint, a complainant may bring his complaint either to a national court or to a competition authority that acts as public enforcer'.[3]

So, the possibility to bring private lawsuits is used as an argument by the Commission to reject complaints.[4] Despite this reliance on private enforcement in rejection decisions, there is little official recognition and support of the power of private enforcement in stopping infringements. In recent years, private enforcement has largely been understood as a synonym for damages claims. However, private enforcement is not restricted to such follow-on compensation matters, but may also lead to the prohibition of anticompetitive behaviour through injunctions or full-fledged judgments given by regular courts. This pillar of enforcement—stopping anticompetitive behaviour in law courts without the involvement of a competition agency—is largely ignored in policy debates about effective enforcement and has found no support in legislative acts.[5] For instance, the draft Digital Markets Act (DMA) does not mention private enforcement at all. The EU Damages Directive deals exclusively with damages claims and does not mention private proceedings aiming at stopping the infringement.[6] The ECN plus-Directive streamlined

Key Points

- Private enforcement has been underrated as an enforcement pillar in achieving the aims of competition law.
- Recent cases show that private litigation in courts can contribute greatly to 'taming Big Tech'.
- Enforcement of the Digital Markets Act (DMA) should not rest with the European Commission alone. The DMA should state clearly how private parties can enforce obligations of companies designated as gatekeepers.
- To avoid problems with Article 6 enforcement, a special DMA complaints panel could supplement or replace traditional courts for private complaints.

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1 Cf. Wouter Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 World Competition 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865728 (last accessed 20 October 2021). According to Barry Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer, Köln 2014) 87, there were 146 private enforcement decisions in the EU in 2011, roughly a third dealt with damages.

2 Article 7 of Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [Köln 2004] C 101/05.

3 Cf. Stephan Kreifels, *Die Prioritätensetzung der Europäischen Kommission beim Aufgreifen kartellrechtlicher Fälle* (Nomos, Baden-Baden 2019) 50–51.

4 Hanns Ullrich, 'Private Enforcement of the EU Rules on Competition—Nullity Neglected' (2021) IIC 606.

5 Cf. Article 1 of Directive 2014/104/EU 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 [2004] OJ L 349/1. In recital 3 of the Directive, private enforcement is mentioned in a more general way, yet the concrete example directly steers towards damages claims—replicating the wording of recital 7 of Regulation 1/2003 of 16 December 2002 on the implementation of the

national public enforcement—it does not mention private litigation.[7]

For a balanced enforcement structure and for the unleashing of the full potential of competition law it is necessary to take all forms of enforcement into consideration: Enforcement by the agencies, but also by private parties in courts. Otherwise, the *effet utile* of competition law—as stipulated by the ECJ[8]—could not be achieved, since the resources of competition agencies are limited.

II. Confronting the digital gatekeepers in private lawsuits

The question may arise whether private enforcement is a viable tool to 'regulate' digital gatekeepers. Companies like Google, Amazon, or Facebook are among the most powerful in the world, and private litigants will think twice before taking on such undertakings—their resources guarantee them access to the best lawyers and a stamina to fight cases till the end. This prospect may disincentivize claimants, in particular if they are dependent on the gatekeeper. In addition, courts may be less inclined than competition agencies to approve of new theories of harm, in particular with relation to digital gatekeepers.

This common theme—private enforcement is ineffective since strong companies cannot be taken to court—is contradicted by the facts. Three cases from Germany (and the German example only serves as an illustration) show the power of private enforcement in competition cases that are close to digital regulation. They are analysed here to identify why conflict resolution worked well.

Section 33 (1) of the German competition act (*Gesetz gegen Wettbewerbsbeschränkungen*) provides the legal grounds for claims of private parties to stop the infringement of competition law:

> 'Whoever violates a provision of this Part or Article 101 or Article 102 of the Treaty on the Functioning of the European Union (infringer) or whoever violates a decision issued by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements'.

The risk of recurrence is presumed once a party violated competition law and did not declare prior to litigation to desist from the behaviour.[9]

Parties have the possibility to claim injunctive relief in summary proceedings under Sections 935, 936 of the German code of civil procedure (*Zivilprozessordnung*). Such proceedings usually are dealt with quickly. From the stage of injunctive relief, the case may move to main proceedings that may take longer due to gathering and hearing of evidence. Although there are no robust figures on the numbers of private lawsuits based on Section 33(1), it is fair to say that these are established proceedings in German competition law.

The cases referred to here were decided by competition law chambers, consisting of three judges, in district courts in Munich and Berlin (*Landgericht*). The district courts are the general entry courts for private lawsuits. Several district courts have special chambers for competition law cases and claim exclusive jurisdiction in the region where they are based.

A. Case: Netdoktor/Google and German Federal Ministry of Health

The first case concerns a cooperation agreement of Google with the German Federal Ministry of Health.[10] The plaintiff is a private health portal, Netdoktor, which applied for an injunction against Google and against the Ministry to stop the cooperation.

1. Facts

Google and the Ministry had agreed that Google places information from the Ministry prominently on its search page when users search for health-related information. The Ministry had started operating a 'National Health Portal' in September 2020 with information on diseases. This was partly motivated by the aim to curb fake news on health issues, e.g. in the pandemic. To make this portal a success, the Ministry agreed with Google to have a 'Knowledge Panel', a special information box, reserved for information from the National Health Portal including a link to the government-run portal. The agreement was made public on 10 November 2020.

rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

6 Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.

7 Particularly strong in Case C-453/99 *Courage v Crehan*, EU:C:2001:465.

8 Joachim Bornkamm and Jan Tolkmitt, '§ 33 GWB', in Eugen Langen and Hermann-Josef Bunte (eds), *Kartellrecht*, vol 1 (13th edn, Luchterhand, München 2018) para. 8.

9 LG München I, 10/02/2021–37 O 15721/20—*Kooperation Bundesgesundheitsministerium/Google*. The decision is available in German at: https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2021-N-1338?hl=true (last accessed 20 October 2021). For an English comment, see Johannes Persch, 'Is Taking Away User Traffic Anti-Competitive? Munich Court Stops Cooperation between Google and the German Federal Ministry of Health' (Oxford 2021) JECLAP, available at: https://doi.org/10.1093/jeclap/lpab043 (last accessed 20 October 2021).

In Germany, Google has a market share of at least 90 per cent as a search engine. Almost 90 per cent of the traffic of the plaintiff, a privately owned company providing health information, is generated via Google searches. Due to the privileged display of information from the state-run and tax-financed portal, the plaintiff feared a drop in its advertising revenue.

2. Court's reasoning

The court granted the injunction on 10 February 2021, based on Article 101 TFEU. It held that the Ministry was acting as an undertaking and not in its core area of sovereign state activities since the National Health Portal competed with private health portals. The court also saw a restriction of competition by effect in the exclusive reservation of a top spot in Google searches for the Ministry. The 'pole position' in Google search is, so the court argued, permanently withdrawn from competition by the arrangement of the two powerful actors. There were first indications of a drop in click-rates for Netdoktor.

The court looked at the possibility of an exemption under Article 101(3) TFEU, but did not find any efficiencies.

3. Analysis

The judgment was a huge success for Netdoktor. Neither Google, nor the Ministry filed for appeal to the Higher Regional Court of Munich, so the ruling is final. On substance (which is not the focus of analysis here),[11] the case establishes a duty for Google to present search results in an undistorted way. The company needs to stay loyal to its approach of displaying organic search results, and it may not privilege individual companies over others.

Turning to the procedural and institutional issues of the case, it first needs to be pointed out that a three-judges bench in a district court shows all the independence and grandeur courts can possibly have. It may be noteworthy these days that the judges turned against the government without hesitation. This is all the more remarkable since the official reasoning for the partnership with Google, presented by the Minister himself, went down well with public opinion (curbing fake news).[12] The ruling is free from political consideration.

Secondly, it should be noted that the case took less than three months from the complaint to the final decision. The case could have gone to the next level and thus could have taken longer, but since the parties refrained from appealing the behaviour was effectively stopped within three months.

Thirdly, the court decided without recourse to complex economic arguments. The court does not engage in economic discussions or calculations, neither when describing the restriction of competition, nor at the stage of assessing potential efficiencies.

Fourthly, it is worth looking at the standard of proof: The restriction of competition was established on the basis of screenshots and the general knowledge of user behaviour (looking and clicking at the first search results only). The judges did not ask for more specific proof regarding click-rates and a decline in turnover for the plaintiff. They let it suffice for the plaintiff to make a plausible case of potential future losses with some first findings on click behaviour after the start of the cooperation.

This rather 'relaxed' level of evidence required by the court was partly due to the urgency of the claim that the court acknowledged. The court had the impression that the new structure of the search results page could harm the competitive structure within a short period of time—taking user traffic away from Netdoktor (and other private health portals), endangering their financial position. The court did not make a fuss about things that it saw as obvious. The following quote is typical of that:

> 'The fact that users primarily take note of the top results on the search results page has been made sufficiently credible by the plaintiff in the injunction on the one hand through the explanations with reference to behavioural economic explanations of the European Commission in the proceedings 'Google Search (Shopping)'. On the other hand, it is general life experience that consumers are more inclined to go to the top results of a search query'.[13]

Although this sounds intuitively convincing, it still requires a certain boldness for judges not to question *everything*. Other courts could have required more evidence for the diversion of traffic, and it would probably have been difficult for the plaintiff to present evidence to the court, not least due to the information asymmetry vis-à-vis Google.

Finally, it may be noted, that the court opened a window to adjacent fields of the law, next to antitrust. In the decision, the court, without going into detail, makes it obvious how delicate the role is that Google takes when fiddling with search results. Google may have manoeuvred itself into the position of a media company curating content, and thus be liable to the rules for content providers. At the same time, the government is engaged

10 For a substantive analysis see Johannes Persch (n 9).

11 It may only be noted that it is a paradox that the Ministry of Health joined forces with Google at the same time when the Ministry of Economics was finalising the draft reform of the German competition act with tougher rules against the GAFA-companies. The amendment of the competition act entered into force in January 2021, during the court proceedings.

12 *Kooperation Bundesgesundheitsministerium* (n 9) para 91.

in reducing plurality of opinion. Both matters are not explored in detail in the decision, but the court seems to point at this for main or appeal proceedings. An integration of media law with competition law seems to be on the table.

B. Case: Amazon—termination of contract

The second case deals with Amazon, another of the GAFAs. It was dealt with by the same chamber of the Munich I District Court. The outcome is proof that this court is not an Anti-GAFA-court—Amazon won the case, if only at second stage. It was first decided against Amazon on 14 January 2021 in summary proceedings without an oral hearing, a possibility given in German law in matters of urgency.[14] The same court reversed its own decision on 12 May 2021 upon objection by Amazon.[15] The case even had an intermezzo with the German Constitutional Court, *Bundesverfassungsgericht*.[16]

1. Facts

In this case, the plaintiff is a Swiss producer and retailer of food additives and beauty products with a yearly turnover of 800,000€ on the Amazon marketplace platform. Amazon had deactivated and terminated the plaintiff's account, deleted its offers on Amazon, and frozen money on Amazon payment services. Amazon had taken these actions on 9 December 2020, claiming that the plaintiff was using fake reviews. Amazon acted without hearing the retailer first and asked for an encompassing remedy package regarding reviews. In the notice, Amazon had not specified which product reviews it regarded as manipulated.[17]

The retailer who had received similar notices regarding manipulated reviews in the past argued that the company was not able to fulfil Amazon's remedy package without further specification of the reviews that Amazon saw as problematic.

2. Court's reasoning

The Munich I District Court first sided with the retailer, but in the second ruling decided in favour of Amazon. The claim was based on abuse provisions in sections 19(2) and 20(3) of the German competition act[18] in connection with section 33(1). Fast-track proceedings were justified due to the urgency for the seller, losing a daily turnover of more than 2,000€ if delisted from the platform.

For demonstrating Amazon's market position, the plaintiff referred to proceedings of the *Bundeskartellamt* and the European Commission,[19] partly in press releases and similar studies. The agencies' cases had not been closed with injunctions against Amazon and market dominance had not formally been established. The court still saw the plaintiff's statements as sufficient prima facie evidence for assuming that Amazon was dominant for providing retail platform services in Germany.

In the first decision, the court stated that it was abusive to deactivate the account without giving substantial information. This violated the plaintiff's right to be heard properly by Amazon. The court referred to a *Bundeskartellamt's* case that had marked this practice as problematic.[20]

Amazon sought to overturn this injunction with a direct appeal to the Federal Constitutional Court, *Bundesverfassungsgericht*, without success.[21]

In the second decision, four months later, the District Court continued to see Amazon as dominant, in particular with a strong emphasis on network effects. Yet, it now held that there was no abuse in this particular case since the plaintiff was a repeat offender. The court referred to Article 4(5) of Regulation (EU) 2019/1150 (P2B-Regulation) to establish the standards that need to be respected in case that the provision of online services is terminated.

3. Analysis

On substance, the case provides a good example for the case of an individual small company that tries to defend

13 LG München I, 14/01/2021–37 O 32/21, *Amazon Kontosperrung*, available (in German) at https://www.lhr-law.de/wp-content/uploads/2021/01/LG-Muenchen-Amazon-Kontosperrung-Kartellrecht.pdf (last accessed 20 October 2021).

14 LG München I, 12/05/2021–37 O 32/21—*Amazon Kontosperrung II,* available (in German) at https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2021-N-10613?hl=true (last accessed 20 October 2021).

15 BVerfG, 16/03/2021–1 BvR 375/21, ECLI:DE:BVerfG:2021:rk20210316.1bvr037521, available (in German) at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rk20210316_1bvr037521.html (last accessed 20 October 2021).

16 On the issue of fake reviews in Germany see Bundeskartellamt 'Fake and manipulated user reviews for online purchases' (press release 6/10/2020), English-language information available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/06_10_2020_SU%20Nutzerbewertungen.html (last accessed 20 October 2021).

17 Section 19 is equivalent to Art. 102 TFEU. Section 20 extends the prohibition of abuse to situations of superior bargaining power and dependency.

18 The Bundeskartellamt had settled a case (with no formal decision being taken) regarding Amazon's terms and conditions with far-reaching changes, 17/07/2019, Case B2-88/18, cf. the case summary at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html?nn=3600108 (last accessed 20 October 2021); the European Commission had sent a Statement of Objections to Amazon on 10/11/2020 in case AT.40462, see press release https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (last accessed 20 October 2021).

19 Bundeskartellamt, Case B2-88/18 (n 18), see case summary p. 3.

20 BVerfG 1 BvR 375/21 (n 15). The court found the claim to be inadmissible since the injunction against Amazon—even if found to be void—would not cause irreparable harm to Amazon.

its rights against a GAFA-company. It is a perfect example for a matter that belongs to private enforcement—yet, the wider implications can be enormous if a court sets the standards that define Amazon's behaviour towards business users. Actually, in its pleadings with the Constitutional Court, Amazon had tried to put forward the argument that this case sets precedence and is therefore likely to cause irreparable harm to Amazon.

Several institutional aspects deserve particular attention:

> First, it needs to be pointed that this is a David fighting Goliath situation with a customer going against a GAFA-company. Although the asymmetry is obvious, the court system can still be played by a 'David' company. However, the plaintiff has to take risks and efforts, and needs to be prepared to fight the court case. In this case, the plaintiff, losing substantial revenues day by day, probably had no other chance—it was essentially cut off an important way of distribution by the termination. Even when the court decides very quickly, it takes several months in which the business needs to be sustained without the revenues from the Amazon marketplace.

The case also shows that the 'Goliath' Amazon does not spare any effort. Going to the German Constitutional Court in such a case is a very rare step. It is not standard practice to seek a Constitutional Court decision in a low-key business case. This illustrates Amazon's willingness and ability to mobilise resources.

Secondly, the institutional design of the summary proceedings stands out. Even though the outcome was not favourable for the applicant and each day was one day of sacrificing turnover, it still is a case that is impressive with regard to speed: The three-judges bench takes two decisions in short time. The second decision is full of references to precedence and literature on digital antitrust. So, courts are able to decide such matters quickly. The court system even offers a possibility of quick review of the first decision through the instrument of objection against the injunction. It is a quality of the judicial system to offer such protection to the parties—a 'rough and dirty' first ruling in a very short period of time, and the possibility to reconsider it upon objection after a few weeks.

Thirdly, the case lacks any reference to economics—apart from some quotes regarding multi-sided markets. The court reads the laws carefully but does not engage in economic debates and does not develop a theory of harm based on economic theory.

Fourthly, the standard of proof in this case is lowered in accordance with the requirements of a summary proceeding. It is still remarkable how the court deals with the question of establishing necessary facts. On the question of dominance of Amazon the judges write in the second decision:

> 'Further substantiations by the plaintiff are also not necessary with regard to the effectiveness of private enforcement of the prohibition provisions under competition law in the context of interim relief. The plaintiff has neither access to internal data on market shares of the defendant, nor is it possible and reasonable for it to conduct market investigations in summary proceedings. This disparity of information must be taken into account for the requirements regarding burden of proof and prima facie substantiation (. . .)'.[22]

So, the court explicitly refers to the information asymmetries of the parties that cannot be easily overcome. It adapts the standards according to the procedural situation and with regard to the effectiveness of private enforcement. The implicit reference to the *effet utile* makes it clear that the success in cases depends on what is possible in this specific legal forum that legislators have provided for. Evidence requirements may not be propelled to a degree that renders a forum ineffective for legal redress, when information asymmetries are at play.

Finally, the court seamlessly integrates another field of the law, the P2B-transparency regulation, into antitrust standards. The P2B-regulation becomes a defining tool in the interplay with the enforcement mechanisms of competition law. The toolkit of digital regulation is used skilfully in this case and put together in a coherent and effective form.

C. Case: Immoscout—tipping

The third case does not involve a GAFA company, but the leading German real estate platform Immoscout. The case is close to the issues that are regulated by the DMA even though the concrete undertaking will probably not be a provider of a core platform service in the sense of the DMA. This time, the Berlin District Court decided on 8 April 2021 on an application for injunction handed in on 20 February 2021 by a competitor.[23] The case deals with rebates.

1. Facts

Immoscout had offered two rebates to customers. One was aimed at real estate sellers or landlords that put 95 per cent of all their offers on this platform ('list-all-rebate'). The second rebate was granted when 95 per cent of the offers were exclusively listed on this platform for the first seven days ('list-first-rebate').[24]

21 *Amazon Kontosperrung II* (n 14).

22 LG Berlin, 08/04/21–16 O 73/21 Kart, *Tipping*—available (in German) at https://gesetze.berlin.de/bsbe/document/KORE521902021 (last accessed 20 October 2021).

23 Customers were still allowed to publish their offers in newsletters and on their own website, but not on competing platforms.

2. Court's reasoning

The Court prohibited the list-first-rebate while the list-all-rebate was seen as lawful. The decision, which is on appeal now, is based on a new provision in German abuse law, section 20(3a) of the competition act. According to this 'anti-tipping rule', undertakings with superior market power shall not hinder competitors to gain networks effects, thereby reducing competition on the merits. This rule does not have a direct equivalent in the draft DMA, yet it aims at keeping markets contestable. The court pointed out that the availability of 'fresh' offers will be reduced in the decisive first phase of bringing property to the market. The 'list-all-rebate' was seen as unproblematic since it does not lead to exclusivity: multi-homing is still possible.

3. Analysis

The case provides a good example of the blithe application of a new rule by a court. It is the first decision on the new provision. As in the other two cases the speed of resolution of the case is remarkable (with a decision within two months).

The court does not apply economic theory, and in particular it does not indulge in the complex assessment of rebates as is now typical of EU cases. Instead, it assumes that there is a sound commercial reasoning behind the decision of the platform to introduce these rebates. The analysis is very much down-to-earth: If rebates aim at making multi-homing within an important period of time impossible, this is excluding competitors and making competition of platforms on the merits impossible.

For proof, the court looks at the number of listings and finds a 'significant parallelism' in losses of the applicant and a rise in turnover of the defendant.

The case will probably be ruled upon in further stages, yet it is a pointer at the power of new legislation that is still loyal to competition law (addressing powerful companies, looking at exclusion and 'competition on the merits'), yet that curtails some of the excesses of a field of the law that went from basic commercial assumptions to sophisticated economic theory—for better and for worse.

III. The comparison with public enforcement

The three cases are a powerful manifestation of the effectiveness of private enforcement in competition law. This shall not imply that the cases necessarily were decided correctly on substance (which is not the concern of this contribution). Yet, the parties got the decisions relatively quickly with effects for the market.

A. A remarkable track record

If you take the Munich I District Court track record and compare it to the track record of the European Commission in dealing with companies like Google or Amazon, the Munich court may be seen as an actor with superpowers. The decisions are short and they were published quickly, thereby making the course of justice transparent and informing the general debate. Despite of taking quick action, there is no sign of fundamental unfairness towards one of the parties (as confirmed by the Constitutional Court in the Amazon case). The decisions take effect without trying elaborate remedies.

In comparison, the European Commission needed more than six years (from 2010 to 2017) before coming to a conclusion in the Google Search (Shopping) case.[25] The case is still pending in court. The remedies, as claimed by some, do not prove effective.[26] Even publication of the decisions can be a matter of years at the Commission, with Google AdSense being published more than two years after the decision was taken.[27] The Commission decisions are very lengthy (approximately 77,000 words in the case of Google Shopping), whereas the Munich District Court's Google case is a matter of 10,000 words.

The cases are comparable: The starting point of the Commission cases were individual complaints by companies that felt disadvantaged by Google[28]—just like the plaintiff in the Munich Google case. Did the complainants make a mistake in turning to the Commission for help instead of going for private enforcement?

Imagine the European Commission had looked at the cooperation of a national Health Ministry with Google. It is hard to imagine that the case would have been dealt with in a few months and a short decision, published right away. The hesitation of the Commission to adopt interim measures is well known. It is well conceivable

24 *Google Search (Shopping)* (Case AT.39740) Commission Decision 2018/C 9/08 [2017], OJ C 9/11, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (last accessed 20 October 2021).

25 Thomas Höppner, 'Google's (Non-) Compliance with the EU Shopping Decision' (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700748 (last accessed 20 October 2021); Philip Marsden, 'Google Shopping for the Empress's New Clothes—When a Remedy Isn't a Remedy (and How to Fix it)' (2020) JECLAP 553. On remedies more generally cf. Vanessa Turner, 'Regulation 2: Remedies in Antitrust Cases under EU Competition Law' (2020) JECLAP 430. But also, the Answer to a Parliamentary Question by Vestager, 10/02/2020, E-003869/2019, at https://www.europarl.europa.eu/doceo/document/E-9-2019-003869-ASW_EN.html (last accessed 20 October 2021).

26 The decision was published on 3 May 2021, whereas it was adopted on 20 March 2019, cf. *Google Search (AdSense)* (Case AT.40411) Commission Decision 2020/C 369/04 [2019] OJ C 369/6, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411 (last accessed 20 October 2021).

27 Cf. *Google Search (Shopping)* (n 24) paras 39 ff.

to imagine, in this counterfactual scenario, lengthy proceedings with elaborate remedies in the end and court proceedings coming. Similarly, the rebates question of the Berlin case could have turned into a lengthy operation involving many economic models.

The counterfactual for the Amazon case is a real one: the *Bundeskartellamt* dealt with the terms & conditions of Amazon.[29] In July 2019, the German competition watchdog reached an agreement with Amazon that led to far-reaching changes in the conditions. The case had started one year earlier. It was hailed as a quick matter with relatively clear commitments undertaken by Amazon. Yet, the case was not solved in a confrontational manner but with an informal settlement without any proper decision. Had Amazon not decided to cooperate with the agency, it may well have ended in a longer lasting battle. The *Bundeskartellamt's* Amazon case prompts the question whether informal procedures are the only way for agencies to have a quick impact on markets.

B. Public good and private rights

It is important to note that private enforcement has a different legitimacy than public enforcement. Public agencies primarily enforce the law in order to pursue the public good which, in the case of antitrust law, is the protection of competition as a mechanism that is seen as vital for reaching wider aims in the economy.[30] Private parties enforce competition law to protect their individual interests in this competitive process. And indeed, competition law has this dual nature: It protects the public good as well as private individual rights.[31] The Court has long held that the antitrust rules of the Treaty may confer individual, subjective rights to customers and competitors.[32]

Depending on the path of enforcement it can be conceived that one or the other aspect may be in the focus of the decision. Although the law is the same, the arguments and their factual base differ. In private enforcement cases, claimants argue with their experiences; the competitors in the Google and Immoscout cases present falling click-rates, the customer in the Amazon case refers to its own losses. The Commission, in Google Shopping, takes a broader perspective, looking into markets, market structures, and aggregated effects. Although mentioning individual firms and their visibility, the focus still is on Google's behaviour, citing internal memos and on the effects for all market participants, not just one claimant.[33] This effort is the price agencies have to pay for the general effect of their rulings and the intensity with which they can prescribe remedies. The Commission cites the potential effects of Google's behaviour for competitors, merchants, consumers, and innovation.[34] This list may reflect the public interest in the case. The courts are content with finding a violation of the rights of the claimants without further investigation into consumer harm or innovation effects. Strengthening private enforcement thus may lower the bar to find violations of competition law in general and may raise the role of individual harm of competitors and consumers.

C. Limits of private enforcement

Private enforcement has limits, too: Cases are strictly related to the parties and have no binding force beyond that. The court is, essentially, in the hands of the parties who may call off decisions right before they are handed down. Judges sometimes lack the expertise in competition law due to their career paths in the judiciary. If taken to extremes, cases in court may take a long time before they are finally decided.

Still, in the three cases analysed here, private enforcement delivered. In comparison, the confrontational, formal proceedings at courts look more effective and not less convincing than similar cases in public enforcement.

IV. Features of success for private enforcement

Three features of these cases stand out and provide a lesson for the design of effective private enforcement.

A. Attractive legal framework

The first important aspect is that the courts provide an attractive legal framework for claimants including clear rules, an inducive procedural structure, the resources to resolve the cases quickly, and few obstacles to bring a case.

1. Specific competition law basis

German law provides a clear rule in the competition act for bringing infringement proceedings. This gives legal certainty to claimants. Placing the substantive rule in the

28 Bundeskartellamt, Case B2-88/18 (n 18).

29 For an empirical analysis of these goals cf. Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law—A Comprehensive Empirical Investigation' (2020), available at SSRN: https://ssrn.com/abstract=3735795 (last accessed 20 October 2021).

30 Catherine Warin, *Individual Rights under European Union Law* (Nomos, Baden-Baden 2019) 98.

31 Case 127/73 *BRT & Société belge des auteurs, compositeurs et éditeurs*, EU:C:1974:25, para 16; Case C-453/99 *Courage and Crehan*, EU:C:2001:465, para 23; Cases C-295/04-C-298/04 *Manfredi*, EU:C:2006:461, para 39; Case C-557/12 *Kone*, EU:C:2014:1317, para 20. Cf. Catherine Warin (n 30) 279.

32 Cf. *Google Search (Shopping)* (n 24) paras 344 ff.

33 Cf. *Google Search (Shopping)* (n 24) paras 593 ff.

specific context of competition law means to take it out of the usual field of general tort law doctrine. This has the side-effect of enabling courts to set specific standards for competition law that do not set precedent for all sorts of cases and can be more apt for competition law proceedings. For the legislator, it is easier to give special rules in a narrowly-defined field (e.g. for easing such claims) than to reform tort law litigation in general. The plaintiffs have the certainty that they have a basis for their claim in substantive law.

2. Procedural framework

Importantly, there is a litigation architecture that allows for a speedy resolution of cases. It cannot be emphasised enough how important it is to have decisions within a short period of time: Markets are moving fast.

The procedural rules used by the courts are part of the established procedural framework in German law. Although there is a lot to criticise about judicial systems in many regards, it must be acknowledged here that it seems to function for injunctive relief in such cases.

The courts act quickly and take just weeks to decide the cases. That is a value in itself: Law coming too late does not serve the purpose. As philosopher Anselm von Feuerbach put it: 'A delayed gain of rights is often as bad, often more pernicious, than a timely loss of rights'.[35] The courts are bound to decide quickly in such cases, and they seem to have the necessary resources and also the judicial independence. This is in stark contrast with the Commission's hesitant approach towards interim measures.

In comparison to public enforcement, the number of people involved is small: It is only the panel of three with one judge as a rapporteur dealing with the case (as compared to case teams and different units and bodies at the Commission).

The price to be paid is that investigations and decisions will be less sophisticated. Yet, this is the typical conflict for any legal procedure: The institutional framework has to strike a balance between justice and full information on the hand with pragmatic and timely conflict resolution on the other.[36] Speedy decisions run the risk of overlooking things. Yet, the judicial system takes precautions against mistakes or deficits in fast-track proceedings: The decisions can be objected to or appealed against and reviewed in an effective manner. The Amazon case is a particularly strong example for this. The case was decided very quickly, but was reversed only months later upon objection by Amazon—even by the same court. The institutional path of the judiciary is built so as to resolve urgent matters at high speed without losing the principle of control. On the EU level, it may be worth to look at mechanisms to resolve cases faster and giving an easier mechanism for review than longish court proceedings of these days.[37]

3. Removing barriers to sue for private parties

The Achilles' heel of private enforcement, particularly in abuse cases, is that claimants need the incentives and resources to sue a dominant competitor or a business partner on which they depend.[38] Such claims need to be financed. When confronting GAFA companies, most parties will be in an asymmetric situation regarding resources and information.[39] The defendants will be able to play the court system (just see Amazon's appeal to the Constitutional Court), and to employ top law firms and economic consultancies. Undertakings may also face formal or informal business risks, e.g. being demoted in search results. It is with a reason that Article 5(d) draft DMA prohibits digital gatekeepers to restrain access to public authorities.

Few companies have these resources and incentives. In the Google case and in the Immoscout case, the plaintiffs were subsidiaries of strong German media houses that were fearless and able to finance court proceedings. In the Amazon case, termination of the relations with Amazon was an existential threat for the plaintiff. It had little choice but to sue or go out of business.

Barriers to sue need to be taken into account when designing access to court—and also access to competition agencies. The first requirement is for courts to take the asymmetry into account. This may play a role when setting costs for private lawsuits (e.g. when defining the value of a claim that may in turn determine fees) or requirements of costly expert opinions. Secondly, agencies need to have a clear eye for the asymmetry of parties. If it is highly unlikely for a party to go to court, agencies should be more open to take the case. It could be advisable to have clearer and more open gateways for complaints. Thirdly, access rules as provided for in a procedural framework

34 Anselm von Feuerbach, *Die hohe Würde des Richteramtes* (2nd edn, Klostermann, Frankfurt am Main 1948) 9.

35 For a matrix of different goals cf. Rupprecht Podszun, *Wirtschaftsordnung durch Zivilgerichte* (Mohr Siebeck, Tübingen 2014) 173 ff.

36 The ECJ reports an average length of proceedings of 15,4 months in Court of Justice of the European Union, *The year in review—Annual Report 2020* (2021) 24.

37 Cf. Alison Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' (2016) 15, available at http://ssrn.com/abstract=2715796 (last accessed 20 October 2021).

38 The German legislator therefore amended a provision on abusive practices of companies with superior bargaining power where standing had only been granted to small- and medium-sized enterprises, cf. section 20 (1) of the German competition act in its 2021 version and its previous version.

should be checked for formal or informal barriers to bring claims.

B. Interplay of public and private enforcement

The depiction of difficult public enforcement in comparison to effective private enforcement is unfair on two grounds:

> Firstly, there is arguably more at stake in public enforcement proceedings—fines may be handed out, remedies may end business models.

Secondly, the cases presented here partly built on the results established before by the European Commission and the *Bundeskartellamt*, e.g. in the question of market definition and dominance or the issue of users' attraction to the first search results. (The question of anticompetitive behaviour, however, was without clear precedence in all cases.)

The strength of enforcement can be derived from the interplay of the public and the private pillar: Competition agencies establish important elements that can be built upon by-law courts, e.g. market definition, dominance, the role of network effects and multi-homing, or the analysis of business models. All these aspects were dealt with in the court cases on the basis of what competition agencies had held earlier. The speedy resolution of individual cases, therefore, partly rests on the path-breaking work of agencies.

Yet, this is not a one-way road: The law courts, confronted with new cases, can contribute significantly, too. The Berlin court was the first to deal with the new anti-tipping rule in German competition law, its handling of the rule will influence future cases. The Munich court had to find its own assessment of Google's curating of content. It may well be that the decisions serve as precedent or at least inspiration for agencies and law courts in other European countries. To fully exploit this potential, it would be necessary to make national cases in private litigation better accessible, e.g. through an English-language database.[40]

C. Adjudicating standards

In private enforcement, the standards of adjudication differ from those set for public enforcement.

1. Standard of proof

The courts do not stretch the requirements of proof too far. Instead, the standard of proof is set with regard to the effectiveness of the proceedings. If requirements are set at a level that makes a successful claim practically impossible, this would be a denial of legal redress. Thus, courts accept a standard of proof that takes information asymmetries and the possibilities within the chosen forum into account. This is dealt with in an exemplary manner by the Munich court.

This rather low-key approach contrasts with the evidentiary requirements in Commission proceedings (as pre-determined by the Court of Justice). It may well be questioned whether truckloads of documents are necessary. It may be necessary for the European Court of Justice to scale back the requirements in this regard so as not to overburden the Commission, the affected parties and the complainants. Again: Enforcement needs to strike a balance between effectivity and scrutiny. This balance can only be struck within a given forum. It is adequate for the landmark cases of DG COMP to require more than just some screenshots and click-rates, yet evidence should not grow out of proportion. Otherwise, procedures become dysfunctional.

2. Use of economics

The courts in the three cases analysed here do not rely on economic models and do not require sophisticated economic evidence. The discussion of efficiencies happens without complex models. Instead, the requirements of the law are fulfilled in a traditional legal way by looking at the facts and arguing the case.

At the level of competition agencies, economic discussions gained ground in past years, adding to the evidentiary burden and making competition law ever more complex. It has been argued by scholars from the field of Law & Economics that economics should only enter the law at the policy stage, not in individual cases.[41] The court cases show that competition cases can be convincingly solved without elaborate economic expertise—just as in all other legal fields. It may be time to reconsider the role of economics in competition law.

3. Integration of antitrust law into the regulatory jigsaw

A final observation, regarding the standards for adjudication, is the interplay of competition law with other fields of the law. In particular, the Amazon case was solved with the help of the P2B-regulation. This is a strong illustration

39 Cf. Rupprecht Podszun, 'Adaptive Antitrust Enforcement' (2020) JECLAP 437.

40 Horst Eidenmüller, *Effizienz als Rechtsprinzip* (3rd edn, Mohr Siebeck, Tübingen 2005) 393, 438. Eidenmüller points out that the US legal tradition gives more policy weight to judges than the European style of application of legal rules.

of the evolving network of platform regulation in different areas.

Judges are often less specialised in competition law and have a broader legal perspective than members of competition authorities who sometimes tend to isolate antitrust from other areas. In the court cases, the integration of one legal regime with the other seems less problematic than in agency-driven competition cases. One may think of the difficulties to integrate the rules on privacy in a decision such as the German Facebook case where the violation of the GDPR was considered in the context of abuse of dominance.[42]

Possibly, the cases serve as reminders that different pieces of the law's jigsaw puzzle usually need to be integrated since they all represent the legislator's will. Antitrust may even profit from guidance from other fields. At least, there is no need to fend off regulation from other areas. For agencies, this would require greater openness towards other fields of the law that intersect with competition rules and broader coordination mechanisms with other agencies.

V. Private enforcement in the DMA

So far, the analysis shed light on the power of private enforcement. The role of private parties should also be strengthened in the DMA.

A. The case for private enforcement of the DMA

The DMA[43] needs a private enforcement pillar.[44] So far, private enforcement does not play any role in the Commission's DMA draft. It is not mentioned at all, and it is unclear whether the obligations for the gatekeepers may trigger private enforcement actions, be it for prohibition or compensation. It would be a missed opportunity not to include basic rules in the DMA. The institutional design of the DMA should be amended in this regard.

The Commission seems to believe in public enforcement and in automatic compliance by digital gatekeepers.[45] The designation of digital gatekeepers is certainly a legal act that requires the authority of the Commission. Yet, monitoring compliance and stopping infringements of DMA obligations could be supported by private parties. Otherwise, the Commission would be overburdened with the enforcement of the DMA, even if it is supported more strongly by agencies in the Member States (as has been advocated by governments).[46] At the present state of the draft, digital gatekeepers would need to honour 18 different obligations. If there are 5–10 digital gatekeepers, the Commission unit responsible for DMA enforcement would need to monitor whether 90–180 obligations are kept. This comes in addition to designating gatekeepers, updating DMA obligations, market investigations, sanctioning proceedings, or court cases on the DMA. It is hardly conceivable that this can be undertaken in a meaningful way by the Commission alone.

Of course, the Commission would rely on the help of private complainants—as in competition law cases. Their role, however, is not defined in the DMA. There is no provision on how to handle complaints, on rejection decisions, on formal participation in proceedings or for time limits for addressing their concerns. Supporting legislation that has evolved over time in the area of competition law is not applicable for the DMA (which is not seen as competition law), and is not currently available.

Centralising enforcement means that the level of enforcement depends on the resources, manpower and will of the central agency. This may change over time and can be subject to political influence. Making enforcement more independent from the Commission would mean a stronger commitment to the regulation of digital gatekeepers.

B. Private enforcement under the current framework of the draft DMA

Even without an additional provision, some rules in the DMA can be subject to private enforcement. If European market rules in a regulation are precise enough they confer individual rights to individuals and are directly applicable, Article 288 TFEU. As the Court of Justice held in *Van Gend & Loos*:

> 'Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer

41 Cf. Bundeskartellamt, 6/2/2019, Case B6–22/16; the case is available at https://www.d-kart.de/en/der-fall-facebook/ (last accessed 20 October 2021) including an update on the current state of the matter (at the time of writing, the case is pending with the European Court of Justice upon reference by the Higher Regional Court of Düsseldorf).

42 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)', COM (2020) 842 final.

43 Cf. Giorgio Monti, 'The Digital Markets Act—Institutional Design and Suggestions for Improvement' (2021) 004 TILEC Discussion Paper 11; Rupprecht Podszun, Philipp Bongartz, Sarah Langenstein, 'Proposals on how to improve the Digital Markets Act' (2021) Policy paper for IMCO 9, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571 (last accessed 20 October 2021).

44 For an early argument against private enforcement in competition law cf. Wouter P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 World Competition, available at SSRN: https://ssrn.com/abstract=1540006 (last accessed 20 October 2021).

45 Cf. the Non-paper of the Friends of an Effective Digital Markets Act (i.e. the Governments of France, Germany, the Netherlands), May 2021.

> upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community'.[47]

The DMA, a regulation that is intended to grow into the 'legal heritage' of European citizens, needs to be checked therefore for clearly defined obligations.

1. Enforcement of Article 5 obligations

In the DMA draft, Article 5 is designed to contain concrete and specific obligations for digital gatekeepers that are directly applicable. In turn, business users or private users may rely on the respect of these obligations by gatekeepers as rights they have. Violations of the obligations in Article 5 can therefore be enforced in private litigation. For instance, a business user could seek injunctive relief if a digital gatekeeper was sanctioning an offer of that business user made on a competing platform (Article 5(b)).

The status of gatekeeper and core platform service and the applicability of the Article 5-obligation could be relied on the basis of the Commission decision.

Possibly, Article 5 may still contain vague terms that make it harder to identify the exact duties of gatekeepers. That is not an argument against direct applicability in private enforcement, however. For this, the legal concept matters, not the factual difficulties in determining legal obligations—all words are subject to ambiguity, but that does not take them out of the *Van Gend & Loos* rule. This becomes evident when comparing the Article 5 rules with Article 102 TFEU, which is directly applicable even though it is most general in wording.

2. Enforcement of Article 6 obligations

For obligations under Article 6 of the draft DMA it is less clear whether private enforcement is possible. These obligations are 'susceptible of being further specified' according to the procedure laid down in Article 7, also upon request by the gatekeeper according to Article 7(7), 18. The current draft version does not foresee the Article 7-procedure as a general standard, but as a possibility. The rationale of this procedure is that the obligations under Article 6 are differing in character from those in Article 5 in that they are less specific and may need further consideration before being applicable in a concrete setting. It is not clear, however, what obligations need further specifications and which do not. From a legal perspective the direct applicability of the obligations in private enforcement is an open question. The problem is that the answer to this question, according to Article 7, can only be given by the Commission, not by a national court or the gatekeeper itself. The procedure in Article 7 is tailored to a potential involvement of the Commission. This role cannot be substituted by a national court.

It follows, first, that the obligations under Article 6 are directly applicable in private enforcement after the Commission has firmly established the concrete specifications with the gatekeeper.

Secondly, where this is not the case, a claimant may take a gatekeeper to court in an infringement procedure. Yet, if the gatekeeper claims that the rule is not specific enough or a court finds it to be not specific enough, the plaintiff must lose this case since there is no procedure under existing law to stay the proceedings and involve the Commission. The court may not decide on this issue since it is in the exclusive competence of the Commission.

Apart from that, Article 6 remains toothless for private enforcement. Only where a rule is self-executing and where the competence to assess this character of the rule lies with a national court, such a claim can be brought. This is also an argument against the further flexibilisation of Article 5. If the obligations lose their character as self-executing rules, third parties cannot rely on them in private enforcement.

3. Role of Articles 8, 9, 11(1), and 12

Further difficulties lie ahead for private enforcement with regard to Articles 8, 9, 11, and 12.

Article 8 provides for the suspension of obligations. If the Commission has suspended an obligation, it will not be enforceable in a court case. If this happens during an ongoing proceeding, this may cause severe difficulties for the plaintiff.

Article 9 gives the Commission the right to exempt gatekeepers from their obligations. This exemption is beyond the reach of a national court. There is no mechanism in place, however, to coordinate an ongoing court case and an out-of-court application for exemption by a gatekeeper.

Article 11(1) constitutes a rule to prevent the circumvention of obligations. While this may bring up difficult questions in practice, and while it is unclear how to distinguish a circumvention from a need for further specification in Article 6-cases, it is a rule that may be relied upon in enforcement in private litigation. There is no exclusive competence of the Commission attached to finding a circumvention according to Article 11(1).

The obligation to notify mergers according to Article 12 is not an obligation that directly confers rights upon third parties. It is a duty towards the Commission and

46 Case 26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1, para 3.

therefore not subject to private enforcement in case of an infringement. The same is true for the audit obligation in Article 13.

4. Damages

In a Q&A-document accompanying the draft DMA, the Commission stated that infringements of the DMA may lead to damages claims.[48] This follows the logic of conferring individual rights. Damages may be claimed for violations of Article 5 or after the Commission found a violation and sanctioned it according to the rules in Articles 22–27. It must be noted, however, that the Damages Directive and respective national rules are not applicable to such damages claims so that these claims do not necessarily profit from the facilitations foreseen in these acts.

C. Possible additions to strengthen private enforcement

If the draft DMA remains unchanged, private enforcement will be burdensome—in infringement proceedings as well as for damages claims. The stakeholders in the negotiations for the DMA should include further rules so as to strengthen private enforcement.

1. Clear legal basis for infringement and damages claims

The first important step would be to give private enforcement an unequivocal legal basis in the DMA so that there are no disputes about the possibility and the scope of private enforcement in the act itself. Such a clear legal basis would avoid the 'gradual and piecemeal' establishing of private enforcement as is known from the history of competition law.[49]

Such a rule should specify, firstly, that private plaintiffs may bring infringement procedures according to national law or based on EU law in courts for violations of self-executing rules (Article 5 obligations and obligations from Article 6 that were further specified by the Commission).

Secondly, there should be a clarification regarding Article 6. Several solutions seem possible: Plaintiffs could bring an infringement procedure, based on Article 6, under the reservation of a Commission decision regarding the specification of obligation. In such a case, the court would need to stay the proceedings to get a statement by the Commission on the matter. As an alternative, a potential plaintiff could be obliged to get such a statement from the Commission before bringing action to court. In both cases, time limits would be of the essence. It would also be feasible to oblige the gatekeeper to state its position: It could either accept that the rule is specific enough or be forced to invoke Article 7(7). Alternatively, courts could be empowered to specify the rules.

In all cases, the risk of losing the case due to inaction of the Commission would need to be taken from the plaintiff.

Thirdly, the rule should also find a similar solution for suspensions and exemptions (Articles 8 and 9)—in any case taking the risk from the plaintiff that after bringing the claim the Commission suspends the obligation or exempts the defendant.

Fourthly, it should be clarified that national laws need to provide a fast-track procedure for infringement claims so that injunctive relief can be sought.

Damages claims should find a clear legal basis, too. Such claims should be possible in cases of infringements of the provisions in Article 5 (and 6 as specified previously) or where there has been a decision by the Commission on finding an infringement. The latter could take the form of a follow-on claim. Ideally, the rules of the Damages Directive could be made applicable to DMA cases.

2. Coordination mechanism of courts and agencies

All these rules need to be accompanied by a coordination mechanism for courts and the Commission or national agencies (as far as they are involved in enforcement). Such a coordination mechanism could provide for *amicus curiae*-roles, information duties and binding mechanisms. Articles 15 and 16 of Regulation 1/2003 could be models for the kind of coordination and cooperation that is necessary.

3. Rights of third parties in Commission proceedings

The lack of accompanying rules that put flesh to the bones of the DMA is striking. This is not only true for the obligations under Articles 5 and 6 regarding private enforcement. Even the role of private parties in the DMA proceedings at agencies is not set out in any detail. The DMA does not make a reference to the involvement of third parties in the administrative proceedings. They do not have any status in the current DMA concept. That is a mistake since it will largely depend on their input to make the rules efficient. It is a basic right then to be heard in the

47 European Commission, Questions and answers: Digital Markets Act: Ensuring fair and open digital markets, 15.12.2020, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 (last accessed 20 October 2021).

48 Alison Jones (n 37) 12.

cases. The DMA should therefore contain specific rights for third parties, customers, and competitors, which may claim official status in proceedings so as to ensure the integration of their knowledge and a status that allows for court review upon initiative by those affected in markets. Again, it would be helpful to extend the applicability of rules from antitrust proceedings to DMA proceedings.

4. Further features of success

As has been pointed out, successful private enforcement depends on several other features: the interplay with public enforcement and certain adjudicating standards.

The interplay of public enforcement and private enforcement in regulating gatekeepers could be based on the specific role of the Commission (e.g. in designating gatekeepers and specifying obligations). Courts could help in defining the terms in Articles 5 and 6.

The standard of proof as taken in the cases analysed here should be maintained for private enforcement of the DMA. Economic questions will not play a major role: The obligations refrain from opening up this path. The integration of other fields of the law, including competition law, can be handled by courts. The relationship should, however, be clarified in Article 1 DMA.

5. The proposal for a Platform Complaints Panel

It has been pointed out above that Article 6-obligations will be difficult to adjudicate in court. Many of the obligations require deep insights into business models and an understanding of digital markets. Although the cases analysed in this contribution show that it is not impossible for courts to deliver on this, it may be worth to consider a different path of enforcement, particularly tailored at the DMA: Philip Marsden and I have suggested to institute independent Platform Complaints Panels that can be addressed by private parties in order to claim violations of obligations.[50] The Platform Complaints Panels would be a specific institutional set-up to quickly remedy infringements of obligations. The panels could work just like courts in private enforcement—yet with independent adjudicators who are not necessarily judges, but experts in digital markets. They should have the power to decide on claims of infringement by business users or consumers and to specify the obligations where this has not yet been done. Commission staff could be involved.

The gatekeepers would be obliged to cooperate with these panels. These panels would be very accessible (more so than the Commission as an institution with discretion or courts with their formal and costly ways of access). This would lower the barrier to claim rights for users in an asymmetric bargaining position. A more specialised body, such as the Platform Complaints Panel, could act as a neutral adjudicator with deep market knowledge that eases the monitoring burden for the Commission and is accessible for private claims.

VI. Conclusion: How to make private enforcement successful

The three cases analysed in this contribution indicate that private enforcement has an important role to play for regulating digital gatekeepers and other online companies: In the cases, the applicants got quick remedies and the courts even added substantially to the body of law by developing new 'theories of harm'. The decisions had very specific features: The plaintiffs found an attractive legal framework that had clear rules and offered the fast-track resolution of conflicts. The rights of the parties were respected without overly lengthy investigations. The courts made diligent use of findings from public enforcement. One of the important aspects was that standard of proof was aligned to the specific procedure (thereby honouring the *effet utile* doctrine). The use of economics was limited while other fields of the law were integrated into the analysis.

Three cases that went well do not yet make a compelling case for private enforcement in general. However, they indicate that private enforcement from time to time manages to solve cases effectively, and that potentially some institutional learnings may be drawn from this. Public enforcement needs to be quicker, adjudicating standards need to be revised. The more difficulties public enforcement faces (not least due to the requirements of the European courts) and the more political a matter is, the more important it is to open up alternative paths of enforcement. This is the case for private enforcement of the DMA obligations.

The three cases shed light on the necessary features of success for private enforcement in the DMA, where the David versus Goliath constellation—or: user versus GAFA—will be standard practice.

Under EU law, self-executing obligations that confer rights on third parties are directly applicable and can be enforced in national courts. Yet, many questions are left unanswered: What is the legal basis? What about obligations that are susceptible of being further specified? What if the Commission grants suspensions or exemptions? Can parties claim damages? The legislators should clarify the role of private enforcement by

49 Philip Marsden and Rupprecht Podszun, *Restoring Balance to Digital Competition—Sensible Rules, Effective Enforcement* (Konrad-Adenauer-Stiftung, Berlin 2020) 83–85.

granting a clear legal basis in the DMA and by instituting a coordination mechanism for courts and agencies.

In addition, the rights of third parties should be laid down in the DMA, also for proceedings at the Commission.

The biggest obstacle to private enforcement is the difficulty of plaintiffs to stand up to a powerful opponent in court. To remedy this problem and to ease the difficult problem that comes with the regulatory dialogue in Article 7, it may be worth to consider an alternative format for private enforcement, a Platform Complaints Panel. This would be a panel of independent experts that quickly decide on complaints by private parties, and that is easily accessible.

Public enforcement has driven competition policy and law ever since the start of the European competition law development.[51] This will remain unchanged for the time being, and it will extend to the regulation of digital gatekeepers. Yet, if lawmakers believe in the power of competition and private parties, they should open a forum so that private enforcement can enter the competition for enforcement. This requires another 'Courage'-moment in European law, giving real effect to the DMA by introducing legislation for private enforcement in the field. Otherwise, the European Commission turns into a gatekeeper for the regulation of digital markets.

https://doi.org/10.1093/jeclap/lpab076

50 David J. Gerber Speaks of 'Administrative Centrality', 'Private Enforcement of Competition Law: A Comparative Perspective' in: Thomas M.J. Möllers, Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge, Cambridge 2007) 431, 446.