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The Added Value of the DMA's Enforcement Framework

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On 18 July 2022 the Council gave its final approval on the Digital Markets Act (hereafter: DMA). The DMA imposes a series of obligations and prohibitions on so-called gatekeepers in order to keep markets where gatekeepers are present contestable and fair to the benefit of business and end users. Formally speaking, the DMA is not part of the framework of 'traditional' competition law. Yet, the DMA shows some remarkable similarities with competition law. The objectives of both frameworks for example overlap – at least partially. On top of this, the substantive and enforcement provisions of the DMA clearly draw inspiration from competition law. This begs the question how the different frameworks relate to each other and what the added value of the DMA exactly entails. On top of this, the ultimate success of the DMA will largely depend on the effective enforcement of the substantive provisions. Therefore, we aim to assess to what extent the DMA's enforcement provisions are drafted in an effective fashion. In order to make this analysis, this paper addresses the conceptual relationship between the DMA and competition law, the enforcement tools and sanctioning mechanisms of the DMA and their competition law counterparts, and the lessons that can be learned from past enforcement experience.

1. INTRODUCTION

Over the past few decades, digital markets have gained increasing importance. Various studies, including empirical reports, highlight the potential benefits of such developments.[1] Despite ample (economic) opportunities, digital markets bring about significant challenges too. The characteristics of digital markets, including economies of scope, network effects, multi-sidedness of platforms and the importance of access to (personal) data tend to render digital markets highly concentrated. Moreover, such markets are prone to tipping. This results in a so-called 'winner-takes-it-all' dynamic,

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[1] L. Zingales et al, 'Stigler Committee on Digital Platforms – Final Report', (Stigler Center for the Study of the Economy and the State, September 2019), available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf, accessed 19 May 2022; J. Furman et al, 'Unlocking Digital Competition – Report of the Digital Competition Expert Panel (Digital Competition Expert Panel, March 20219), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, accessed 19 May 2022; Competition & Markets Authority, 'Online Platforms and Digital Advertising' (July 2020), available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf, accessed 19 May 2022.

meaning that undertakings compete *for* the market rather than *on* the market.[2] If an undertaking 'wins' the market, it may further cement its position by creating so-called ecosystems.[3] Controllers of such ecosystems arguably control 'competitive bottlenecks' thus assuming gatekeeping positions, and neither customers nor business users can avoid having to deal with such platforms.[4]

The framework of 'traditional' competition law, and Article 102 TFEU in particular, may partially solve these issues. However, it can be questioned whether these rules, mostly adopted before the rise of large digital platforms, are apt to be applied effectively in this context. Specifically, the lack of speed and the limited scope of competition law are considered problematic.[5] Against this backdrop, the European Commission initiated a Proposal for a 'Digital Markets Act' in December 2020.[6] On 11 May 2022 the Political Agreement between the Parliament and the Council was published.[7] On 12 September 2022 the final version of the DMA was published in the Official Journal. Unless otherwise indicated, this article refers to the DMA's final version.[8]

The DMA aims to contribute to the functioning of the internal market by facilitating contestable and fair markets in the digital sector where gatekeepers are present, to the benefit of business users and end users.[9] To this end, the DMA contains pre-defined obligations and prohibitions for undertakings that qualify as gatekeepers.[10] Apart from this substantive framework, the DMA also establishes an enforcement and institutional framework, including investigation and sanctioning mechanisms. Interestingly, this

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[2] R.B. Beems, J.W. van de Gronden, C.S. Rusu, 'Gatekeepers and EU Competition Law: Exploring New Enforcement Avenues', in P.T.J. Wolters, R.M. Hermans, A.U. Janssen, P. Ortolani (eds), *Digitalisering en Conflictoplossing* (Wolters Kluwer, 2021), p. 259.

[3] J. Crémer, Y. De Montjoye and H. Schweitzer, 'Competition Policy for the Digital Era' (Publications Office of the European Commission 2019), available at: https://ec.europa.eu/competition/publications/reports /kd0419345enn.pdf, accessed 19 May 2022, p. 4.

[4] Ministry of Economic Affairs and Climate Policy, Letter to The Speaker of the House of Representatives, 17 May 2019, Future-proofing of competition policy in regard to online platforms, CE-MC/19129028; in this light, the *Google Shopping* case, for example, already continues for over 10 years and is still not ultimately decided. See: Case AT.39740 – Google Shopping – decision of 27 June 2017; Case T-612/17 *Google Shopping*, ECLI:EU:T:2021:763.

[5] Considerations of France and the Netherlands regarding intervention on platforms with a gatekeeper position, 15 October 2020, https://www.government.nl/binaries/government/documents/publications/2020/ 10/15/considerations-of-france-and-the-netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position/Non-paper+FRA-NL+ex+ante+regulation+platforms_final_1410.pdf, accessed 18 May 2022.

[6] 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 (hereafter DMA Proposal).

[7] Political Agreement on Regulation 2022/… of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020/0374(COD) (hereafter DMA).

[8] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L265/11.

[9] DMA, Article 1(1).

[10] DMA, Articles 5, 6 and 7; An undertaking shall be designated as gatekeeper if (a) it has a significant impact on the internal market (b) provides a core platform services which is an important gateway for business users to reach end users and (c) it enjoys an entrenched and durable position (Article 3 DMA). Article 3 DMA also list quantitative criteria which result in a presumption of a gatekeeper position.

enforcement system seems modelled after Regulation 1/2003,[11] which contains the enforcement framework for competition law. The proximity of the DMA's and competition law's frameworks begs the question how these frameworks relate to each other, not only from a substantive law point of view,[12] but also with regard to the enforcement and institutional setup of the DMA and 'traditional' competition law. Our contribution focusses on the latter issues. The reason for this is that the success of the DMA largely depends on the enforcement of the provisions of the rules laid down in this regulation. Can swift and effective action be taken, if gatekeepers cause competition problems on the markets?

This paper, therefore, assesses to what extent the DMA's *enforcement provisions* are drafted in an effective fashion. We aim to assess to what extent the enforcement framework of the DMA has the *potential* to be effective. An assessment of the actual or *de facto* effectiveness is – at this point – not feasible since the DMA has entered into force very recently. On top of this, the present article merely relies on a doctrinal legal methodology. In order to analyse effectiveness, we will assess to what extent the enforcement framework may contribute to the realization of the aims of the DMA. In this light, potential obstacles may be identified. We will – amongst others – assess to what extent the DMA enforcement framework may facilitate speedy intervention, whether the responsible authorities have adequate investigation and sanctioning tools and to what extent cooperation between different authorities can be fostered. In essence, we discuss whether the DMA's enforcement provisions are clearly and transparently formulated, and whether they take due account of the accumulated experience of existing legal frameworks designed to tackle market behaviour of large players. To this end, we (i) identify the conceptual relationship between the DMA and competition law, (ii) discuss and compare the DMA's enforcement tools and sanctioning mechanisms with their competition law counterparts, (iii) analyse which lessons can be learned from previous competition law (public and private law) enforcement experience, and (iv) make suggestions for the way forward.

2. The Relationship Between the DMA and Competition Law[13]

First, it is important to highlight that the DMA's application does not pre-empt the application of EU and national competition law. The DMA is 'without prejudice' to the

[11] Regulation 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1.

[12] See the interesting debates brought up by e.g. P. Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561; N. Petit, 'The Proposed Digital Markets Act (DMA)' (2021) 12 Journal of Competition Law & Practice 529; B. Lundqvist, 'The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?' (2021) 51 International Review of Intellectual Property and Comppetition Law 239; P. Bongartz, S. Langenstein and R. Podszun, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (2021) 10 Journal of European Consumer and Market Law 2, 60.

[13] This paragraph is partially based on B. Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective', Working Paper presented during the ASCOLA Conference, 30 June – 2 July 2022, Porto.

application of 'traditional' competition law.[14] This means that both instruments can be applied in tandem. Given this parallel application, defining the DMA – competition law relationship is important. This section will discuss and analyse this relationship.

The Commission, often through the voice of Executive Vice-President Vestager, consistently stressed that the DMA is a novel legal instrument which is not part of EU competition law.[15] This approach is also reflected in the DMA's legal basis. Rather than relying on Article 103 TFEU, the competition law legal basis, the Commission used Article 114 TFEU, the general legal basis regulating the functioning of the internal market.[16] On top of this, the DMA's preamble stresses that it "pursues an objective that is complementary to, but different from" that of competition law.[17] It is also particularly highlighted that the DMA aims to 'protect a different legal interest' than competition law.[18]

However, and despite this explicit distinction between these areas of law, a more detailed inspection of the DMA reveals that it may be closer related to competition law than depicted in the official documents.[19] There are significant similarities between the DMA and competition law, in terms of objectives, substantive provisions and the enforcement framework. In the following sub-section, the DMA's objectives are assessed against the background of the objectives of competition law. This allows an assessment of the proximity of these legal instruments. Further, brief parallels between the substantive provisions of the DMA and competition law are addressed, to identify whether a similar closeness of relationship between the areas of law may be drawn. The DMA's and competition law's enforcement frameworks, the core of this paper, are addressed in section 3.

2.1. The objectives of the DMA and competition law

The DMA's objectives are laid down in Article 1(1), which stresses that the purpose of the DMA is "to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users." The DMA thus endorses multiple purposes. In the next paragraphs,

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[14] DMA, Article 1(6).

[15] See the essence of DMA Proposal, Recital 10. See also Speech of Executive Vice-President Vestager, 'Competition in a digital age', European Internet Forum 17 March 2021.

[16] According to the Commission's Proposal, 'regulatory fragmentation [regarding dependency relationships of gatekeepers] will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large'. Therefore, harmonization is necessary and Article 114 TFEU is the relevant legal basis (see: DMA Proposal, p. 4).

[17] DMA, Recital 11.

[18] DMA, Recital 10.

[19] This is also argued by Schweitzer, who states that '[…] the new regime of European platform regulation protects the same legal interest as EU competition law, namely open market and a fair and undistorted competitive process'. Against this backdrop, she argues for a 'clear cut competition policy approach, including a fairness conception driven by competition policy goals'. See, H. Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion on the Digital Markets Act Proposal' SSRN 2021, available at: https://paperssrncom/sol3/paperscfm?abstract_id=3837341, p. 12 and 34

we address (i) the dual objectives of contestability and fairness, (ii) the explicit reference to the 'benefit of both business users and end users', which is a novelty in comparison with the Commission DMA Proposal, added in the final stage of the legislative procedure, and (iii) the proper functioning of the internal market, in turn.

The dual objectives of contestability and fairness have been included in the DMA from the beginning of the legislative process.[20] Both contestability and fairness entail broad notions and are not uniformly interpreted in policy and literature. Yet, both concepts are not further specified in the DMA. This results in uncertainty as to the exact scope and meaning of both concepts.

The concept of *contestability* can be understood broadly or narrowly. A narrow reading links contestability to competition *on* the market by focusing on short-term entry.[21] A broader interpretation extends this focus to competition *for* the market and competition on *other* markets.[22] In light of the obligations listed in Articles 5-7 DMA, contestability seems to be understood rather broadly. For example, the prohibition of self-preferencing (Article 6(5) DMA) entails the leveraging of market power to other adjacent markets. This goes beyond the protection of contestability *on* a market and covers the impact of a gatekeeper position on *other* markets too. Despite this broad approach, in the DMA, contestability seems to be interpreted in a particular context. The DMA only applies to markets where gatekeepers are present. In this light, it aims to decrease entry barriers on digital markets.[23] Contestability thus seems to be interpreted broadly, albeit in a specific context. Arguably, contestability constitutes "a proxy for the goal to ensure and promote competition […] in all its relevant aspects".[24] In sum, the DMA seems to endorse a broad notion of contestability, but its exact meaning in the context of the DMA remains opaque.

Although the notion of contestability is not fully crystalized in the DMA, parallels may be drawn with competition law. The concept of contestability is arguably embedded in competition law. Keeping markets open and contestable may be considered one of the objectives of competition law. The ECN+ Directive's preamble, for example, stresses that the "effective enforcement of Articles 101 and 102 TFEU is necessary to ensure […] more open competitive markets in the Union, in which undertakings compete more on their merits and without company-erected barriers to market entry".[25]

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[20] DMA Proposal, Article 1(1).

[21] H. Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion on the Digital Markets Act Proposal' SSRN 2021, available at: https://paperssrncom/sol3/paperscfm?abstract_id=3837341, p. 17.

[22] O. Budzinski and J. Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation?' (2021) 27 Ilmenau Economics Discussion Paper, p. 17.

[23] DMA, Recital 32; ibid, p. 17.

[24] H. Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion on the Digital Markets Act Proposal' SSRN 2021, available at: https://paperssrncom /sol3/paperscfm?abstract_id=3837341, p. 7-9.

[25] Directive (EU) 2019/1 of the European Parliament and of the Council 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, OJ L11/3, 2019, Recital 1 (hereafter ECN+ Directive).

The concept of *fairness*, the second objective of the DMA, possibly results in even more ambiguities. Fairness is an immensely wide concept. This concept's meaning is context-dependent, and fairness means different things to different people. In the DMA, the meaning of fairness is not explicitly clarified. This makes this notion a 'black box'.[26]

Similar to the concept of contestability, the notion of fairness is reflected in 'traditional' competition law too. Article 101(3) TFEU mentions 'a fair share for consumers' and Article 102(a) TFEU qualifies *unfair* trading conditions as a form of abusive behaviour. Also, secondary instruments of competition law endorse the notion of fairness. The ECN+ Directive links competition law enforcement to "fairer markets".[27] On top of this, fairness seems to have gained increasing importance in competition law. Executive Vice-President Vestager mentions the concept on various occasions.[28] Against this backdrop, it is stated that her "fairness mantra rattles through competition law".[29]

Where the initial Commission DMA Proposal merely referred to contestability and fairness, the most final version of the DMA seems to provide some more insights in the meaning and reach of these concepts. In this version, it is clarified that the DMA aims to facilitate contestability and fairness *to the benefit of business users and end users* (Article 1(1) DMA).[30] This addition provides supplementary clarity as *to whom* an outcome should be fair. Where the initial Proposal shed very little light on which types of relations should be covered, throughout the legislative process it became apparent that not only competitors, but also business and end users of gatekeepers, may benefit from the application of the DMA. Thus, the DMA does not only aim to facilitate fairness in horizontal relations, i.e. between gatekeepers and their competitors, but also in vertical relations.

In our opinion, this addition further increases the proximity of competition law and the DMA. In *GlaxoSmithKline*, for example, the CJEU held that EU competition law aims to protect the interests of competitors and consumers as well as the structure of the market and competition as such.[31] In the final version of the DMA, it is clear that this instrument also aims to reinforce the position of the end user. Although the final text, unlike the Parliament's version in First Reading, does not refer to consumer welfare as such, Article 1(1) DMA does explicitly mention that the DMA's objectives are pursued to the benefit

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[26] H. Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion on the Digital Markets Act Proposal' SSRN 2021, available at: https://papersssrncom/sol3/paperscfm?abstract_id=3837341, p. 8.

[27] ECN+ Directive, Recital 1.

[28] For example, Speech of Executive Vice-President Vestager, 'Remarks by Executive Vice-President Vestager on Communication on a competition policy fit for new challenges', 18 November 2019.

[29] L. Crofts, 'Vestager's 'fairness' mantra rattles through EU competition law' (*MLex Blog*, 15 November 2016) https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/vestagers-fairness-mantra-rattles-through-eu-competition-law, accessed 28 April 2022.

[30] However, and despite this reference to the end user, the Preamble of the DMA seems to emphasise the relationship between the business user and the gatekeeper. This causes further unclarity on the exact meaning of the fairness principle in the context of the DMA. See: DMA, Recital 33.

[31] See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline*, ECLI:EU:C:2009:610, par. 63.

of the *end user*. The position of the end user is thus still a relevant objective for the DMA. In other words, the DMA aims to positively impact the position of end users and thus of consumers. Consequently, and despite the fact that consumer welfare is not stressed as such, this objective (partially) overlaps with one of the main objectives of EU competition law, i.e. consumer welfare.[32]

Furthermore, the DMA's overarching objective, namely contributing to the functioning of the internal market – which is reflected in the legal basis for the instrument – is also present in EU competition law. Where the DMA aims to facilitate the functioning of the internal market by laying down harmonised rules for gatekeepers, EU competition law contributes to the integration of the internal market by facilitating a system of undistorted competition.[33] Although the means and methodologies through which market integration is achieved admittedly differ (see also 2.2), both frameworks add to an overarching objective of market integration.

In sum, it can be concluded that the objectives of the DMA (at least partially) overlap with the objectives of competition law, despite the fact that despite the fact that the Preamble of the DMA stresses that the DMA and competition law have different, but complementary, objectives.[34] Yet, when the objectives of the DMA are compared with the objectives of competition law, it becomes apparent that the objectives are much more similar in reality.

2.2. The substantive obligations

The DMA's substantive obligations and provisions too are to a large extent similar to competition law. Various prohibited practices as listed in Articles 5-7 DMA 'echo' final and ongoing antitrust cases on digital markets.[35] The prohibition for gatekeepers to treat the products/services they themselves offer more favourably than similar services offered by third-parties (Article 6(5) DMA), for example, closely resembles the *Google Shopping* case. In this case the General Court recently confirmed that Google – by displaying its own comparison shopping service in a more eye-catching manner on the general search result page – abused its dominant position.[36] Similarly, the prohibition to use non-publicly available data (Article 6(2) DMA) coincides with the *Amazon*

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32 It goes beyond the scope of this paper to address the consumer welfare standard in competition law elaborately. See for an interesting elaboration for example, R. Claassen and A. Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12 Utrecht Law Review; K. Cseres, 'The Controversies of the Consumer Welfare Standard' (2006) 3 The Competition Law Review 121; H. Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) 10 Journal of Corporate Law 101.

33 Case C-56/64 *Consten and Grundig,* ECLI:EU:C:1966:41; Article 3(3) TFEU; Consolidated version of the Treaty on the European Union, Protocol nr. 27 of 9 May 2005 on the internal market and competition, O.J. 115, p. 0309; J.W. van de Gronden, C.S. Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar, 2021), p. 11.

34 DMA, Recital 11.

35 D. Geradin, 'The EU Digital Markets Act in 10 Points' (*The Platform Blog*, 16 December 2020), accessed 1 July 2022.

36 Case AT.39740 – Google Shopping – decision of 27 June 2017; Case T-612/17 *Google Shopping,* ECLI:EU:T:2021:763.

investigations, in which the Commission assesses Amazon's use of non-publicly available independent seller data.[37] Furthermore, the Commission recently sent a Statement of Objections to Apple regarding practices relating to Apple's App Store and Apple Pay. According to the Commission, Apple abuses its dominant position by preventing mobile wallet app developers from accessing necessary hard- and software on Apple devices. This approach benefits Apple's own payment solution, Apple Pay.[38] On top of this, Apple also received a Statement of Objections for their policy regarding the mandatory use of Apple's own in-app purchase mechanism to distribute digital content.[39] Arguably, these practices could also be caught by Article 5(5) and (7) DMA.

Admittedly, there are significant differences between the application of the DMA and of Article 102 TFEU: the DMA obligations and prohibitions apply ex-ante, on gatekeepers identified without defining the relevant market; next, the impact on competition in a particular market does not need a case-by-case assessment.[40] This approach differs significantly from the methodology traditionally used in competition law cases. Despite such methodological differences, the actual conduct targeted by the DMA is largely similar to competition law cases. The practices outlined in Articles 5 and 6 DMA may also give rise to issues under Article 102 TFEU. This statement is confirmed by Article 19 DMA, according to which, the Commission, after performing a market investigation, may extend the DMA's scope by adding new services to the list of core platforms services. To this end, the Commission may explicitly take 'proceedings under Articles 101 and 102 TFEU concerning digital markets' into account. Thus, Article 19 DMA establishes a clear link between the DMA and competition law.

The DMA and competition law are thus once again closely related. Yet, the Commission strikingly considers these instruments as separate frameworks, despite the DMA clearly building on the principles of Article 102 TFEU. Ignoring this matter can be problematic, since similar concepts are used in competition law and the DMA, respectively. This unclear relationship between these frameworks may be problematic for the uniform interpretation of such concepts. On top of this, as we further elaborate below, *ne bis in idem* issues may arise.

3. THE ENFORCEMENT FRAMEWORKS OF EU COMPETITION LAW AND OF THE DMA

Understanding if the DMA's enforcement framework is drafted in an effective fashion requires an incursion in the enforcement mechanisms of the EU competition rules and

[37] European Commission, Press Release, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, IP/19/4291; European Commission, Press Release, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, IP/20/2077.

[38] European Commission, Press Release, Antitrust: Commission sends Statement of Objection to Apple over practices regarding Apple Pay, IP/22/2764.

[39] European Commission, Press Release, Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers, IP/21/2061.

[40] P. Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561, p. 568.

an assessment, in that light, of the DMA's proposed enforcement tools. We therefore focus in the following sub-sections on drawing parallels between the EU competition law and DMA enforcement frameworks, particularly in light of enforcement tools and sanctioning mechanisms, involvement of and relationship with national authorities, and practical matters concerning private enforcement.

3.1. Defining features of the competition law enforcement system

Over the past two decades, the enforcement of EU competition law has been based on several pillars and has developed certain defining features. First, since the late 1990s – early 2000s, the undertakings' practices were scrutinized increasingly in light of the effects their behaviour creates. This also means that competition authorities dedicated keener focus on economic methods and evidence.[41] Second, competition authorities intervene ex-post when enforcing the TFEU competition provisions. This approach comes hand-in-hand with the availability of enforcement resources and the competition authorities' right to prioritize enforcement action.[42] Connected to this, third, the entry into force of Regulation 1/2003 overhauled the workload division related to public enforcement of EU competition law, by decentralizing the enforcement action. Obliging national competition authorities (hereafter NCAs) to apply Articles 101 and 102 TFEU when trade between the Member States is impacted was meant to make better use of enforcement resources, by capitalizing on the specific knowledge of national and regional markets that NCAs possess and by spreading the enforcement costs onto the shoulders of multiple authorities. Simultaneously, this decentralization created ample room for the Commission to focus on key cases with an internal market relevance. Over the years, NCAs accumulated vast experience with EU competition law enforcement, at times even acting more thoroughly and innovatively than the Commission.[43] Importantly, the success of this enforcement recipe is owed also to the smooth functioning of the European Competition Network (hereafter ECN).[44]

A second pillar of EU competition law enforcement relates to private enforcement, which relies heavily on national procedures unfolded in front of domestic courts. The

[41] See e.g. J. Bourgeois, D. Waelbroek (eds), *Ten Years of Effects-based Approach in EU Competition Law. State of Play and Perspectives* (Bruylant, 2013); A. Jones, B. Sufrin, N. Dunne, *EU Competition Law. Text, Cases, and Materials* (Oxford University Press, 2019), p. 54-57; I. Lianos, V. Korah, P. Siciliani, *Competition Law. Analysis, Cases & Materials* (Oxford University Press, 2019), p. 58 et seq.

[42] See also B. Van Rompuy, 'The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45 World Competition 2; C.S. Rusu, 'Case Comment: Workload Division after the *Si.mobil* and *easyJet* Rulings of the General Court' (2015) 11 The Competition law Review 1, p. 165 et seq.

[43] See Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM/2014/0453 final, par. 5, 23-26. For a discussion of these matters, see e.g. C.S. Rusu, 'The Commission Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003 – Prospective Priorities and Challenges', in A. Almasan, P. Whelan (eds), *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Springer, 2017). See further e.g. the German Facebook saga, discussed in more detail in R. Van den Bergh, F. Weber, 'The German Facebook Saga: Abuse of Dominance of Abuse of Competition Law? (2021) 44 World Competition 1.

[44] See Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM/2014/0453 final, par. 5.

main principles of private enforcement were developed in landmark judgments of the CJEU, such as *Courage*[45] and *Manfredi,*[46] and then further shaped in cases such as *Kone*[47] and *Otis*.[48] Importantly, Directive 2014/104[49] on private damages harmonizes a great deal of the national procedures applicable in competition damages cases. This has however not stopped the CJEU from further developing this area of law, as outlined below in section 3.8.

3.2. Competition law public enforcement toolbox and powers

Regulation 1/2003 provides the Commission (and to a certain extent, also the NCAs) with enforcement and sanctioning tools. The ECN+ Directive further solidifies the NCAs' enforcement frameworks. A brief incursion in the Commission's and NCAs' enforcement toolboxes highlights the extensiveness of their powers.

Investigation powers

First, Article 17 Regulation 1/2003 allows the Commission to perform sector inquires. Recent inquires connected to digital ambits have been performed in the e-commerce and internet of things sectors.[50] Such inquiries are time-consuming and resource-intensive endeavours, but are nevertheless valuable tools, since they may uncover systemic issues in economic sectors, which may trigger targeted enforcement action.[51] Second, the Commission (based on Article 19 Regulation 1/2003) and the NCAs (based on Article 9 ECN+ Directive) may perform interviews with natural persons and representatives of legal persons. Third, and probably more importantly, these authorities may request diverse information from undertakings based on Articles 18 Regulation 1/2003 and 8 ECN+ Directive, respectively. A well-balanced set of rules has been developed in the case-law of the EU courts in this respect,[52] rendering this fact-finding tool of competition authorities an important piece of the enforcement puzzle. Next, the Commission (often with the help of NCAs) and the NCAs perform fairly often so-called 'dawn raids' (Articles 20 Regulation 1/2003 and 6 ECN+ Directive) to uncover evidence of anti-competitive behaviour. Lastly, inspections of other premises (Articles 21 Regulation 1/2003 and 7 ECN+ Directive) are used less often given the strict safeguards in place. They are also more difficult to complete in practice, since reasonable suspicion of

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[45] Case C-453/99 *Courage*, ECLI:EU:C:2001:465.

[46] Joined cases C-295 to C-298/04 *Manfredi*, ECLI:EU:C:2006:461.

[47] Case C-557/12 *Kone*, ECLI:EU:C:2014:1317.

[48] Case C-199/11 *Otis*, ECLI:EU:C:2012:684.

[49] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 2014.

[50] See https://ec.europa.eu/competition-policy/sectors/ict/sector-inquiry-e-commerce_en and https://ec.europa.eu/competition/antitrust/sector_inquiries_internet_of_things.html, respectively, accessed 17 June 2022.

[51] See J.W. van de Gronden, C.S. Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar, 2021), p. 191.

[52] See e.g. cases 374/87 *Orkem*, ECLI:EU:C:1989:387; C-94/00 *Roquette Frères*, ECLI:EU:C:2002:603; C-301/04 *SGL Carbon*, ECLI:EU:C:2006:432.

documents being located in such premises must be asserted and the violation of Articles 101 or 102 TFEU must be serious, to warrant such inspections.

Decision-making powers

The Commission and NCAs are endowed with broad decision-making powers too. Settlements[53] and commitments (Articles 9 Regulation 1/2003 and 12 ECN+ Directive) are tools which allow for procedural efficiency. Authorities use them to respond swiftly to competition problems while also alleviating their administrative burden. Both instruments have proven quite effective especially in the recent past.[54] Similarly, interim measures (Articles 8 Regulation 1/2003 and 11 ECN+ Directive) are highly relevant for preventing immediate harm to competition, yet these tools are very rarely used,[55] due to the very high intervention threshold: in cases of urgency due to the risk of serious and irreparable damage to competition, on the basis of a *prima facie* finding of an infringement. Nevertheless, if digital markets require speed of intervention, interim measures (and commitments, for that matter) are *the* enforcement tools worth revisiting. Next, infringement decisions (Articles 7 Regulation 1/2003 and 10 ECN+ Directive) come in most cases with fining sanctions attached. Importantly, structural and behavioural remedies may also be attached to infringement decisions, with a preference for the latter, unless behavioural remedies are too burdensome. Structural remedies have proven close to impossible to be applied in EU antitrust law, although the Commission has imposed structural remedies through commitment decisions.[56]

Sanctions

Sanctions take the form of fines and periodic penalty payments (Articles 23-24 Regulation 1/2003 and 13-16 ECN+ Directive). Fines are imposed for procedural and substantive infringements, based on a percentage of undertakings' turnover. Thresholds of fines vary from 1% to 10% of undertakings' turnover, targets which are rarely achieved in practice.[57] Effectiveness of fining based on EU antitrust infringements may thus be subject to criticism. Periodic penalties, on the other hand, might prove somewhat more

[53] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2008.

[54] See e.g. cases T-456/10 *Timab*, ECLI:EU:T:2015:296; T-799/17 *Scania*, ECLI:EU:T:2002:48 on settlements and C-547/16 *Gasorba*, ECLI:EU:C:2017:891; AT.40608 *Broadcom*, Commission decision of 7 October 2020, C(2020) 6765 final; T-616/18 *Polskie Górnictwo Naftowe i Gazownictwo v Commission (Commitments by Gazprom)*, ECLI:EU:T:2022:43.

[55] Most recently, see Commission decision of 10 October 2019, case AT.40608, *Broadcom*.

[56] See Commission, Staff Working Document: Ten Years of Antitrust Enforcement under Regulation 1/2003, (2014) SWD/2014/230/2, par. 188, referring to cases such as: COMP/39.388 - German Electricity Wholesale Market, decision of 26 November 2008, COMP/39.389 - German Electricity Balancing Market, decision of 26 November 2008, COMP/39.317 - E.ON Gas, decision of 4 May 2010, COMP/39.315 - ENI, decision of 29 September 2010, COMP/39.727 - CEZ, decision of 10 April 2013.

[57] See for more on this matter M. Veenbrink, *Criminal Law Principles and the Enforcement of EU and National Competition Law: A Silent Takeover?* (Wolters Kluwer, 2019).

effective in guaranteeing compliance, especially when undertakings consistently refuse to comply with competition provisions.[58]

3.3. Main features of the DMA's enforcement framework

Regarding the DMA's setup, we argue it has an equally keen focus on economic theories as competition law, if one glances at, for example, the obligations embedded in Articles 5-7 DMA. Yet, as signalled above, the mechanisms the DMA applies differ. For example, designation of gatekeepers (Article 3 DMA) is performed on different terms, without reliance on clear relevant market definition, as in Article 102 TFEU cases, for the purpose of establishing dominance. This makes sense if viewed in light of Recital 10 DMA, which stresses that the DMA differs from the rules tackling "unilateral conduct that are based on individualized assessment of market position and behaviour, including its actual or likely effects […]". The DMA, according to Recital 11, is about ensuring contestability and fairness in markets, independently from the competition effects of the gatekeepers' behaviour. The DMA thus addresses the problem of tipping markets, and connected to this, the ex-ante rather than ex-post approach it adopts, again makes sense. The experience of competition law shows that ex-post enforcement is time-consuming[59] and swift action is necessary to address the tipping problems connected to gatekeeper cases. Reliance solely on competition law tools, especially in digital markets, carries the risks of such markets having substantially changed before the CJEU hands down a final judgment. It may be thus argued that only ex-ante rules may remedy this matter. Actually, ex-ante enforcement is not necessarily an exotic or isolated occurrence in EU competition law: the prior notification of concentrations and the prohibition of gun-jumping in EU merger control,[60] and the standstill obligation in EU state aid law,[61] are examples in this respect.

3.4. The DMA's enforcement toolbox and powers

Investigation powers

The DMA's enforcement toolbox design is undoubtedly modelled on competition law. The powers to request information, take statements, and conduct inspections (Articles 21-23 DMA) are drafted very similarly with the powers of Regulation 1/2003, especially when looking at: the types of acts the Commission may adopt (i.e. simple requests, written authorizations, decisions), the prerequisites such acts must contain (i.e. legal basis, purpose of request/inspection, time-limits, penalties, etc.), the possibility of judicial

[58] See the recent case of Apple in the Netherlands: https://www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps, accessed 17 June 2022.

[59] E.g. the *Microsoft* case, which from beginning till end took over 12 years to complete. See ec.europa.eu/competition/elojade/isef/case_details. cfm?proc_code=1_37792, accessed 17 June 2022. See also 'World Competition's Editor, José Rivas, Interviews Mr Andreas Schwab, Rapporteur of the Digital Markets Act in the European Parliament' (2021) 44 World Competition 3, p. 250.

[60] See Articles 4 and 7 Regulation 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 2004.

[61] See Article 108(3) TFEU and Article 3 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L248/9, 2015.

review by the Court of Justice, the involvement of and powers allotted to NCAs during inspections, the precise role the national courts must serve (when issuing prior judicial authorizations for performing 'dawn raids').[62] As expected, the DMA's nature calls for some elaboration of certain investigative powers: for example, Articles 21 and 23 allow the Commission to access any data, algorithms, information about testing, IT systems, etc. This is an important development. However, much will depend on the Commission's technical capacity and appropriate staffing to effectively use these powers.[63] Moving on, some powers specific to competition law enforcement are (expectedly) missing from the DMA: inspections of other premises, such as homes of managers and directors, do not feature among the Commission's DMA powers. Next, sector inquires could be viewed as 'rebranded' as market investigations, which have a considerably broader scope in handling market problems than the Regulation 1/2003 inquires do. According to Articles 16-19 DMA, market investigations may be performed for designating gatekeepers, to assess systematic non-compliance with DMA obligations,[64] to designate new services as core platform services, or identify practices which limit contestability or are unfair, yet not sufficiently addressed by the DMA.

Decision-making powers

Regarding decision-making powers, some interesting findings should be pointed out. First, we stated above that in competition law enforcement, hardly any interim measures have been adopted on the basis of Article 8 Regulation 1/2003,[65] due to the high legal threshold for adopting such decisions. In digital markets however, swift action is key especially in cases concerning gatekeepers. For that reason, lowering the threshold for adopting interim measures would be highly important. The experience with Regulation 1/2003 shows that the effectiveness of this mechanism is highly dependent on the drafting of the legal threshold. We find that the language proposed by the European Parliament in its DMA proposed amendments, referring to the risk of serious and *immediate* (not irreparable) damage *for business users or end users of gatekeepers* (not to competition), was pointing in the right direction, by lowering the threshold for adopting interim measures. Recital 84 and Article 24 of the final DMA version has finally opted for another solution: based on a *prima facie* finding of an infringement of the obligations in Articles 5-7 DMA, in case of urgency due to the risk of serious and irreparable damage to business or end users of gatekeepers, interim measures may be ordered through implementing acts adopted by the Commission. The concept of damage to users is indeed less abstract (and likely easier to prove in practice) than damage to competition which is

[62] Some of these aspects will be further elaborated on below, in Section 3.6. dealing with the role of NCAs in the application of the DMA.

[63] See also A. de Streel et al, 'The European Proposal for a Digital Markets Act. A First Assessment, (Centre on Regulation in Europe, January 2021), p. 27, available at: https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf, accessed 21 June 2022.

[64] According to Article 18(3) DMA, systematic non-compliance is deemed to be established when at least three Article 29 non-compliance decisions in relation to any of the gatekeepers' core platform services within 8 years have been issued by the Commission.

[65] Commission 3 July 2001, case COMP.D3/38044 - IMS Health and 10 October 2019, case AT.40608 - Broadcom.

the test used in Regulation 1/2003; proving the irreparable nature of such damage remains nevertheless a high bar to clear. We find that Article 32a of the German Act against Restraints of Competition proposes a more workable alternative for deploying interim measures: "… if an infringement […] is more likely than not to exist and the interim measure is necessary in order to protect competition or due to an imminent threat of serious harm to another undertaking…".[66] In our view, it is a missed opportunity that no lessons are learned from the experience with Regulation 1/2003 and that the difficult practical hurdle of 'irreparable damage' is included also in the DMA.

Further, as signalled above, commitments are tools which allow timely and flexible solutions in competition proceedings. This would be particularly relevant in digital markets where gatekeepers are present, markets which are subject to rapid changes. It is thus striking why the Parliament proposed to fully eliminate commitments from the text of the Commission's DMA Proposal.[67] The final version of the DMA has partly reintroduced the instrument of commitment: according to Recital 76 and Articles 25 and 18(6), commitments proposed by gatekeepers may be rendered binding by the Commission, however *only* in proceeding relating to *market investigations into systematic non-compliance*. The 'regular' non-compliance proceedings do not feature the possibility to use commitments. In such proceedings, on one hand, the assumption is that the regulatory dialogue should have facilitated the compliance by gatekeepers with the DMA substantive obligations, serving somehow a similar function and following a similar pattern as commitments would do otherwise (i.e. the dialogue is initiated by gatekeepers, the Commission has discretion whether to engage with the process). The gatekeeper's failure to observe the obligations may eventually result in a non-compliance decision. For establishing systematic non-compliance, on the other hand, the assumption would be that the commitments tool would alleviate the need to continue the market investigation meant to establish systematic non-compliance. According to Recital 76 and Article 25 DMA, the Commission commitments decision would then also conclude that there are no longer grounds for action as regards the systematic non-compliance under investigation. In our opinion, the regulatory dialogue (Article 8 DMA) and the commitments proceedings (Article 25 DMA) serve different practical purposes: facilitating compliance with DMA obligations and addressing concerns related to non-compliance, respectively. Once again, no lessons are learned from the enforcement experience of Regulation 1/2003, as commitments proceedings, known as effective enforcement tools, are available only in the DMA's systematic non-compliance procedure, but not in its 'regular' non-compliance procedure.

The 'regular' non-compliance proceedings relate to the Commission adopting decisions establishing infringements of the DMA obligations, of remedies imposed, of interim measures adopted, or of binding commitments, based on Article 29 DMA. These resemble in essence competition law infringement decisions in Article 7 Regulation

[66] See also R.B. Beems, J.W. van de Gronden, C.S. Rusu, 'Gatekeepers and EU Competition Law: Exploring New Enforcement Avenues', in P.T.J. Wolters, R.M. Hermans, A.U. Janssen, P. Ortolani (eds), *Digitalisering en Conflictoplossing* (Wolters Kluwer, 2021), p. 272.

[67] See also G. Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (TILEC Discussion Paper 2021-004, 22 February 2021), p. 9-10.

1/2003. The competition law mechanism of Statement of Objections is also echoed in the communication of the Commission's preliminary findings to the gatekeepers (Article 29(3)). Furthermore, cease-and-desist orders may also be imposed (Article 29(4)). According to Article 29(7) DMA, where the Commission decides not to adopt a non-compliance decision, it shall close the proceedings by decision. Interestingly, this provision resembles more what is expected of the NCAs under Regulation 1/2003 (Article 5, last sentence) and under the ECN+ Directive (Article 10(2)), than what the Commission can do based on Article 10 Regulation 1/2003. Specifically, when non-compliance may not be established, the Commission seems to lean more towards arguing that there are 'no grounds for action', rather than adopt negative decisions.[68] This is understandable, given the ex-ante nature of the DMA obligations and the potential consequences negative decisions might have on subsequent application and development of competition law. What is remarkable and disconcerting, however, about adopting non-compliance decisions under the DMA, is the significant burden that Article 29(2) places on the Commission, the expectation being that it will adopt non-compliance decisions within one year from the moment that the investigation was opened. Given the ex-ante nature of the DMA obligations, speed of appraisal seems a reasonable demand. However, the enforcement experience of Regulation 1/2003 suggests that adopting infringement decisions that fast is virtually impossible. For example, in *Google Android* proceedings were opened on 15 April 2015 and the prohibition decision was adopted on 18 July 2018. "In competition law proceedings, there is no legal deadline for bringing an investigation to an end." This template statement is included in literally all press releases the Commission issues at the start of a competition law investigation.[69] The duration of such investigations depends on many factors, including the complexity of the case, how cooperating undertakings are, etc. When the DMA suggests a stringent deadline of twelve months to adopt non-compliance decisions, it is unfortunate that the Commission has no means to 'stop the clock' when it is in the midst of such investigations. Admittedly, DMA decisions do not require a market definition and the Commission does not have to prove effects on competition in individual cases; nevertheless, assessing complicated matters surrounding the practices of gatekeepers will likely be resource-demanding and time-consuming, despite the 80 FTE size of the team which the Commission is envisioning for the DMA-related work.[70] All in all, the likelihood of the Commission adopting non-compliance decisions so speedily is small. However, put bluntly, the language of Article 29(2) DMA is far from imposing on the Commission an unambiguous obligation to finish the proceeding with 12 months, as this provision does not contain any sanction for the event of not observing this deadline. In other words, it is unclear which consequences will be attached to not observing Article 29(2) DMA. This matter will be handled by the Union courts, which have a wide array of possibilities ranging from annulling the decision

[68] On the difference between these two approaches, see case C-375/09 *Tele2 Polska*, ECLI:EU:C:2011:270.

[69] See e.g. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073, accessed 17 June 2022.

[70] DMA Explanatory Memorandum, p. 11. See also D. Geradin, 'The leaked "final" version of the Digital Markets Act: A summary in ten points' (*The Platform Law Blog*, 19 April 2022), accessed 20 June 2022. The author speaks of a "strong legal apparatus to investigate and sanction breaches" of the DMA.

of the Commission to lowering the fine imposed. The opaque obligation of Article 29(2) DMA is not helpful for the effective enforcement of the DMA.

Moving to the possibility to impose structural or behavioural remedies attached to infringement decisions relating to Articles 101 or 102 TFEU, the preference in competition law scenarios is given to the latter type of remedies.[71] The DMA does not tie the possibility to impose such remedies to non-compliance decisions (Article 29), but instead raises the threshold. Article 18(1)[72] speaks of imposing proportionate structural or behavioural remedies to ensure effective compliance with the DMA, when a market investigation shows *systematic non-compliance* with the obligations of Articles 5-7. Under the DMA, such remedies may thus be imposed *only* on so-called 'repeat offenders'. This may seem counter-intuitive at first, given that the Articles 5-7 DMA obligations are worked out ex-ante, and since proper safeguards to prevent such repeat offences should be in place (e.g. the compliance function in Article 28).[73] We will come back to this reasoning when discussing sanctions, below. What is nevertheless remarkable is that, despite the Commission DMA Proposal having preferred behavioural remedies, much like Regulation 1/2003, the Parliament's amendments and the final DMA version toned down this preference.[74] This might open the possibility for structural remedies to be viewed (almost) on equal footing with behavioural remedies.[75] This would arguably stimulate that structural measures will be adopted in practice, thus potentially reinforcing the DMA's effective enforcement. Some authors even argue that "remedies should be far-reaching and, where needed, introduce a restorative element reinjecting competition in the relevant markets."[76] A taste of such measures with structural dimensions is already provided in Article 18(2) DMA, namely the so-called temporary merger ban, through which the Commission may temporarily restrict gatekeepers from entering into

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71 Regulation 1/2003, Article 7(1) and Recital 12.

72 See also DMA, Recital 75.

73 See also G. Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (TILEC Discussion Paper 2021-004, 22 February 2021), p. 9. The author argues that "[t]he big stick of behavioural or structural remedies however may only be levelled after a market investigation has been undertaken and it looks like a decision which is far down the line given all the options for compliance that the gatekeepers are offered."

74 Such suggestions were put forward from an early stage in the drafting process of the DMA. See e.g. R. Podszun, P. Bongartz, S. Langenstein, 'Proposals on how to improve the Digital Markets Act', Policy paper in preparation of the information session on the Digital Markets Act in the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) on 19 February 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571, accessed 21 June 2022.

75 Admittedly, the language used in Recital 75 of the DMA suggests that the threshold for structural remedies is still slightly higher than that for behavioural remedies: "The Commission should investigate and assess whether additional behavioural or*, where appropriate,* structural remedies are justified…". Nevertheless, the threshold for structural remedies is definitely more relaxed than under Article 7(1) Regulation 1/2003: "Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy."

76 P. Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561, p. 561. See also J-U. Frank, M. Peitz, 'How to Challenge Big Tech' (*Verfassungsblog*, 6 September 2021), available at: https://verfassungsblog.de/dsa-dma-power-12/, accessed 21 June 2022.

concentrations within the meaning of the Merger Control Regulation,[77] in areas relevant to the DMA. Such restrictions must nevertheless be proportionate and necessary to maintain or restore fairness and contestability as affected by the systematic non-compliance. Essentially, this prohibition would temporarily prevent the structural expansion of 'repeat offender' gatekeepers. This is far-reaching, since M&A activities are generally regarded as legitimate business moves. They are normally perceived as 'block-able' only if a significant impediment to effective competition is proven by the Commission in accordance with Articles 2(3) and 8(3) Regulation 139/2004. It will be interesting to see how the courts will handle arguments of undertakings on which such merger bans are applied, relating to e.g. freedom to contract, stifling innovation and barring efficiency, principle of legality, conflict of norms (particularly in relation to Article 2(2) Regulation 139/2004), etc.

Sanctions

Regarding sanctions, the general take-aways from the DMA are not ground-breaking in most respects. Articles 30 and 31 DMA provide for fines and periodic penalties, in relation to substantive and procedural infringements, similar to Regulation 1/2003. The financial thresholds are also not impressive: fines range from 1% to 10% of the gatekeepers' total worldwide turnover in the previous financial year; periodic penalty payments are capped at 5% of the daily worldwide turnover in the previous financial year. We argue that the sanctioning thresholds should be increased for problematic behaviour of undertakings, meaning here both competition law and DMA infringements. This is important for increasing deterrence and credibility of the enforcement system as a whole.[78] We see a trend in this respect, which we appreciate, in Article 15(1) ECN+ Directive, for example: this provision sets the minimum level of the maximum amount of the fine NCAs may impose for EU competition law infringements at *no less than* 10 % of the total worldwide turnover in the previous business year. We consider it a missed opportunity that the Parliament's DMA proposed amendment was not (fully) taken onboard: this amendment suggested that fines should not be less than 4% and not higher than 20% of the worldwide turnover in the previous financial year. Nevertheless, the Parliament's view seems to have influenced the co-legislators' approach to fines: Article 30(2) of the final DMA version keeps the 20% fining maximum threshold, but only in cases dealing with 'repeat offenders'. Viewing this finding next to the discussion above relating to (structural) remedies potentially imposed on 'repeat offender' gatekeepers, one may observe that the consequences for such infringers may be quite far-reaching. To our minds, the main take-away here is that given the novel regime, with far-reaching obligations, the DMA creates for gatekeepers, the sanctioning system will not differ much from what undertakings are already used to in competition law. However, when gatekeepers systematically infringe the DMA obligations, one could say that "all bets are off", since the DMA gives the Commission ample room for more severe sanctioning (and other structural measures).

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77 Regulation 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 2004.

78 See C.S. Rusu, 'The Commission's 2017 EU Antitrust Draft Directive: Addressing the Public Enforcement Fragmentation' (*Radboud Economic Law Blog*, 6/2017), accessed 17 June 2022.

3.5. NCAs (and national courts) and EU competition law enforcement

The decentralization of EU competition law enforcement through Regulation 1/2003 necessitated endowing NCAs with appropriate enforcement powers, for the purpose of achieving effective enforcement.[79] Article 5 Regulation 1/2003 attributed to the NCAs powers to bring infringements to an end, order interim measures, accept commitments and impose sanctions when they enforce Articles 101 and 102 TFEU. National courts too, pursuant to Article 6, have the powers to apply these EU competition provisions, and this is because they serve an important role in EU competition law enforcement, complementing the functions NCAs fulfil.[80] To achieve meaningful and effective enforcement, in the context of the multi-level enforcement system created by Regulation 1/2003, the cooperation relationship between the Commission and the national authorities was built on several pillars.[81]

First, the Commission's 'Network Notice'[82] created the ECN, a forum for discussion and cooperation, where the Commission and the NCAs share information, allocate cases, and consult and assist each other in day-to-day enforcement work, in order to consistently and effectively apply the competition law rules. The ECN is one of the success stories of EU law, especially when referring to multi-level governance models. Best practices regarding cooperation have been developed through the years within the ECN, which modelled the functioning of other networks at EU level.[83]

Second, Chapter IV of Regulation 1/2003 contains strict and clear rules which model the cooperation between the Commission and the national authorities. For example, the exchange of information between the Commission and NCAs (Article 12) relates to all sorts of information (including information of confidential nature), which may however only be used for the purpose of applying Articles 101 and 102 TFEU. Another example relates to the Commission and the NCAs keeping each other appraised of the investigations they have respectively commenced and the decisions they are about to adopt (Article 11). However, this relationship between the Commission and NCAs and national courts is also built on clear hierarchies, necessary for the uniform application of EU competition law. Article 11(6) provides the Commission with a very powerful tool, to our knowledge never 'officially' used to date: the initiation by the Commission of proceedings relieves the NCAs of their competence to apply Articles 101 and 102 TFEU.

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79 Regulation 1/2003, Recital 8.

80 Regulation 1/2003, Recital 7. See also 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, OJ C 101, 2004.

81 See Article 103(2)(e) TFEU and Regulation 1/2003, Recitals 8, 15 and 21.

82 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 2004.

83 See e.g. C. Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) 35 Journal of Consumer Policy 2. This contribution studies the effectiveness of the ECN and the Consumer Protection Cooperation Network, as examples of networks composed of the Commission and national authorities that enforce EU law, while also looking into the possibilities of transposing these examples to other fields of EU Law. See also ECN, 'Joint paper of the heads of the national competition authorities of the European Union. How national competition agencies can strengthen the DMA', 22 June 2021, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/DMA%20-%20Joint%20EU%20NCAs%20paper.pdf, accessed 17 June 2022.

Next, according to Article 16, which codifies prior case-law,[84] when NCAs and national courts rule on practices which are the subject of a Commission decision, they cannot take decisions running counter to the decision adopted (or contemplated) by the Commission. Courts which find themselves in such a scenario may decide to stay proceedings. These hierarchies show nevertheless flexibility, when it comes to, for example, prioritization of cases, in the context of which the Commission may reject complaints, if NCAs have already dealt or are dealing with that same case (Article 13).[85]

Third, the assistance NCAs give the Commission, during the latter's investigations into potential infringements of Articles 101 and 102 TFEU must be mentioned. Articles 20(5) and 21(4) Regulation 1/2003 call on NCAs in whose territories Commission inspections take place to assist the Commission in performing its tasks. This is a very valuable tool, since national authorities' knowledge of national laws and customs undoubtedly facilitates the smoother completion of Commission inspections. Importantly, in such settings, NCAs' officials assisting the Commission will enjoy the investigative powers provided by the Regulation itself. Moving on, based on Article 22(2) at the request of the Commission, the NCAs shall undertake the inspections which the Commission considers necessary under Article 20. Importantly again, the NCAs officials conducting these inspections now exercise their powers in accordance with their national law.

This brings us to the last point to be addressed in this context. Regulation 1/2003 endowed NCAs with decision-making powers,[86] but was silent regarding investigative powers of NCAs, powers which continued to be based on national laws. The ECN+ Directive harmonizes the diverse national procedural frameworks and considerably boosts the institutional status and investigative (and also decision-making and sanctioning) powers of NCAs. For example, NCAs are now given guarantees regarding their independence and resources (Chapter III), they are provided with strongly formulated leniency rules and a mutual assistance framework (Chapter VII) which is meant to further cement their cooperation already established in Article 22 Regulation 1/2003, and within the ECN.[87] Overall, concerning the cooperation between NCAs and between NCAs and the Commission, plenty of experience has been accumulated over the years and it is expected that this cooperation will only intensify in the years to come.

3.6. Role of NCAs in the application of the DMA

According to the final version of the DMA, the Commission has the leading role and will take the DMA decisions. Given the size of gatekeepers, this approach makes sense, as

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[84] Case C-344/98 *Masterfoods,* ECLI:EU:C:2000:689.

[85] See B. Van Rompuy, 'The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45 World Competition 2; C.S. Rusu, 'Case Comment: Workload Division after the *Si.mobil* and *easyJet* Rulings of the General Court' (2015) 11 The Competition law Review 1.

[86] Regulation 1/2003, Article 5.

[87] For more discussion on such matters see N. Dzino, 'Independence requirements in Directive 2019/1 and the case of the Netherlands', in C.S. Rusu, A. Looijestijn-Clearie, J.M. Veenbrink, S. Tans (eds), *New Directions in Competition Law Enforcement* (Wolf Legal Publishers, 2020); N. Dzino, C.S. Rusu, 'Public Enforcement of EU Antitrust Law: A Circle of Trust?' (2019) 12 Review of European Administrative Law 1.

the DMA targets a limited number of enterprises operating across the EU.[88] However, the point is that, as already stated, the DMA does not acknowledge that this piece of EU legislation pursues the same goals as EU competition law. This leads to the following problem regarding the role of NCAs.

Article 1(6) DMA provides that the enforcement of the DMA rules will not prejudice the application of Articles 101 and 102 TFEU. On top of that, Article 1(7) DMA stipulates that national authorities are precluded from taking competition law decisions running counter to the DMA Commission decisions. In our view, it is not possible to reconcile these two provisions. How should one assess a case where a NCA applies Article 101 or Article 102 TFEU but also derogates from a DMA Commission decision? Should it be argued that pursuant to Article 1(6) DMA the NCA decision dealing with Article 101 or Article 102 TFEU takes precedence as it is concerned with the application of the Treaty provisions on competition? An alternative line of reasoning is that according to Article 1(7) DMA, which mirrors Article 16 Regulation 1/2003, the Commission decision based on the DMA has priority. In our view, it is not clear from the drafting of Articles 1 (6) and (7) DMA which position should be taken. This may have an adverse effect on the effective enforcement of the DMA. If it was accepted that the DMA was part of EU competition law, Article 1(6) DMA could have been left out and the clashes between NCA and Commission decisions would have to be dealt with only under the mechanism provided by Article 1(7) DMA. This mechanism is derived from Article 16 Regulation 1/2003, which is on its turn rooted in the *Masterfoods* doctrine.[89] The clear point of departure of this doctrine is that national authorities must fully respect the decisions taken by the Commission in competition law.

In our view, a welcomed development is that the DMA allows for the involvement of NCAs in the investigation stage.[90] According to Article 37 and Recitals 86 and 90 DMA, the Commission and the NCAs should coordinate their enforcement efforts based on the principle of Union loyalty, enshrined in Article 4(3) TEU. The Commission has the right to consult these national authorities on any matter concerning the DMA. According to Article 38(7) and Recital 91 DMA it should be possible for the Member States to empower their NCAs to conduct investigations into possible infringements of the DMA obligations.[91] Such investigations may be cost-intensive for a NCA but will also put some pressure on the Commission to take action against practices that the NCA and the Member State concerned consider to be harmful. In other words, this competence may allow Member States to influence the agenda setting of the Commission. The power of Article 38(7) DMA thus potentially enables national authorities to exercise influence on

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[88] See In this respect, speech of Vestager of 16 June 2022, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_3786.

[89] Case C-344/98 *Masterfoods*, ECLI:EU:C:2000:689.

[90] Cf. also the Letter and Proposal 'Strengthening the Digital Markets Act and its Enforcement' of the Ministries of Economic Affairs of France, Germany and the Netherlands, https://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2021/09/9/strengthening-the-digital-markets-act-and-its-enforcement/210907+Letter+and+Proposal+-+Strengthening+the+Digital+Markets+Act+and+Its+Enforcement_final.pdf.

[91] On this matter, see also Geradin (n 70).

the Commission enforcement policy. However, at this point it is not possible to know whether the NCAs will actually use this avenue in practice. When it comes to the national investigations carried out under the DMA information must be exchanged between the Commission and the NCAs in the framework of the ECN.[92] For example, a NCA, when starting proceedings against a gatekeeper based on national competition rules, is obliged the inform the Commission.[93] Moreover, pursuant to Article 21(5) DMA, the competent authorities of the Member States must provide the Commission with all necessary information, if the Commission requests so. If an interview is conducted at the premises of an undertaking, the NCA concerned is informed and given the opportunity to assist the Commission officials when conducting this interview.[94] In this regard, it should be noted that the DMA information mechanisms do not apply to the application of the national merger rules. Furthermore, Article 16 DMA provides that the Commission may ask one or more NCAs for assistance when carrying out market investigations. Also, if compliance with the obligations imposed on gatekeepers is monitored, the NCAs may play a role, as Article 26(2) DMA provides that officials of these authorities could be tasked with assisting the Commission in its monitoring efforts. Furthermore, information obtained by the NCAs alleging that DMA obligations are violated could be transferred by these authorities to the Commission.[95] Also of interest is Article 41 DMA, which provides that Member States may request the Commission to open a market investigation. A helping hand that may be of great significance could be offered by whistle-blowers. NCAs could receive very valuable information from such persons and, accordingly, their position must be protected according to the DMA.[96]

A very important provision is Article 23 DMA, which confers upon the Commission the power to conduct inspections of undertakings or associations of undertakings. Section 3 of this provision specifically sets out that the Commission may request assistance from the NCA concerned. If an undertaking or association of undertakings opposes an inspection, the national authorities of the Member State concerned are obliged to afford the necessary assistance including, if needed, the assistance of the police or similar enforcement authorities.[97] If national law requires that such assistance from the competent authorities should be based on prior judicial authorization, the Commission or the competent authority of the Member State concerned has to apply for this according to Article 23(9) DMA. When reviewing such a request the national competent court is entitled to assess the proportionality of the measures envisaged and the authenticity of the Commission decision concerned. However, this court is precluded

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[92] See DMA, Article 38(1).

[93] See DMA, Article 38(2) and (3) and Recital 91. The draft decision of the NCA being communicated to the Commission also serves as a notification under Article 11 Regulation 1/2003. According to this provision, the Commission must be informed in the event that a NCA consider adopting a decision based on Articles 101 and 102 TFEU.

[94] See DMA, Article 22(2).

[95] See DMA, Article 27(3).

[96] See DMA, Recitals 101 and 102 and Article 43.

[97] See DMA, Article 23(8).

from questioning the necessity of the inspection and from demanding that it will be provided with the information in the file in the Commission's possession.

Article 23 DMA enables the Commission to make use of the powers, expertise and experience of national authorities when business premises are inspected. The provisions dealing with the involvement of NCAs in these inspections greatly mirror those of Article 20 Regulation 1/2003. Consequently, it could be argued that lessons are learned from the experience with the enforcement of Article 101 and 102 TFEU. An important question is left open though. Does the case-law on Article 20 Regulation 1/2003 also apply to Article 23 DMA? Important judgements, which are handed down not only by the CJEU[98] but also by the ECtHR,[99] have shed light on the interpretation of core elements of Article 20 Regulation 1/2003. On one hand, it may be expected that these judgements are also relevant for the interpretation of similar issues arising under Article 23 DMA. On the other hand, it cannot be excluded that different approaches are adopted in case-law. This uncertainty could have been avoided, if a cross-reference was made in Article 23 DMA to Article 20 Regulation 1/2003. This would have been a more obvious choice, if it was acknowledged that the DMA was part of competition law.

Of particular interest is also the Article 14 DMA mechanism, regarding the merger control rules. In this provision attention is paid also to the role of NCAs. According to Article 14(1), a gatekeeper is obliged to inform the Commission about its merger plans. On its turn, the Commission must forward this information to the NCAs. Some of the merger plans will not fall within the scope of Regulation 139/2004,[100] but must be notified under national competition law. It can even not be excluded that some plans fall outside the ambit of national competition law too. According to Article 22 Regulation 139/2004, one or more Member States are entitled to request the Commission to examine a concentration that does have an EU dimension but, nevertheless, influences the trade between Member States and threatens to significantly affect competition on the market(s) of the Member State(s) concerned.[101] Under this provision even referrals of merger plans not falling within the scope of national merger control may be made.[102] The Commission has published guidelines stimulating Member States to make referrals in the event of so-called killer acquisitions.[103] Article 14(5) DMA specifically stipulates that the information on the merger plans of gatekeepers sent by the Commission to the NCAs may be used by these NCAs for the purpose of Article 22 Regulation 139/2004. In other

[98] See, for instance, cases C-94/00 *Roquette Frères*, ECLI:EU:C:2002:603 and C-583/13 *Deutsche Bahn*, ECLI:EU:C:2015:404.

[99] See e.g. cases 37971/97 *Colas Est,* ECtHR, 16 April 2002 and 97/11 *Delta Pekárny v Czech Republic*, 2 October 2014.

[100] Regulation 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 2004.

[101] On this matter see A. Looijestijn-Clearie, C.S. Rusu, J.M. Veenbrink, 'In Search of the Holy Grail? EU Commission's New Approach to Article 22 of the EU Merger Regulation', (2022) 29 Maastricht Journal of European and Comparative Law 4.

[102] See case T-227/21 *Illumina/GRAIL*, 13 July 2022, ECLI:EU:T:2022:447 and the press release of the Commission of 22 July 2021, 'Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina', IP/21/3844.

[103] See Commission Guidance of 26 March 2021 on the application of the referral mechanism set out in Article 22 of the Merger Control Regulation to certain categories of cases, C(2021) 1959 final.

words, the Commission may send information on a merger plan to an NCA, which can be 'recycled' by this authority in order to send back a referral dealing with the same merger plan. In our view this cross-link with Regulation 139/2004 can extend the merger control rules to specific killer acquisitions undertaken by gatekeepers. A saliant detail is that these gatekeepers are forced to be the source of this extension: it all starts with information given by them to the Commission. Article 14(4) DMA clearly demonstrates that the matters being governed by the DMA are closely related to those at issue in EU and national competition law.

All in all, the final version of the DMA contains many mechanisms geared towards involving the NCAs in the enforcement of the DMA rules. The adoption of decisions, including sanctions, is in the hands of the Commission. However, the NCAs have an important part to play in the investigation phase. By starting investigations NCAs can influence the enforcement policy of the Commission. This clearly signals that the NCAs' duties, specialized in enforcing the 'classic' competition rules, have a lot in common with the tasks assigned by the DMA to the Commission. The experience with Regulation 1/2003 shows that the involvement of the NCAs is a great asset. For that reason, it may be expected that the enforcement of the DMA rules will also benefit from the NCAs' involvement in this process.

3.7. DMA, competition law, and the *ne bis in idem* principle

When it comes to sanctioning anti-competitive behaviour through competition law means or addressing non-compliance via the DMA's provisions, *ne bis in idem* concerns may be raised if competition law proceedings are initiated in parallel, or after DMA proceedings are unfolding. This discussion is important also in light of the relationship between the Commission and the NCAs and between the DMA and (national) competition law as discussed just above. Katsifis[104] and Monti[105] envision different scenarios in which this may occur: first, the Commission might bring different proceedings under the DMA and under competition law. This is unlikely to happen in practice, because "[i]t would make no sense for the Commission to waste resources pursuing an antitrust case when it could achieve the same result via the DMA."[106] Second, an undertaking might be subject to different enforcement proceedings brought by different authorities (Commission and NCAs), based on the DMA and competition law, respectively.

The recent *bpost* and *Nordzucker* preliminary rulings handed down by the CJEU[107] may shed light in connection with applying the *ne bis in idem* principle, in the context of sector specific regulation and competition law. Contrary to previous case-law,[108] the CJEU

[104] See also D. Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II' (*The Platform Law Blog*, 29 March 2022), accessed 17 June 2022.

[105] G. Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (TILEC Discussion Paper 2021-004, 22 February 2021).

[106] D. Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II' (*The Platform Law Blog*, 29 March 2022), accessed 17 June 2022.

[107] Cases C-117/20 *bpost*, ECLI:EU:C:2022:202 and C-151/20 *Nordzucker & Others,* ECLI:EU:C:2022:203.

[108] See, for example, case C-17/10 *Toshiba,* ECLI:EU:C:2012:72, par. 72.

aligned the application of the *ne bis in idem* principle in EU law by applying a two-fold test. To rely on this principle successfully, proceedings and penalties must (i) concern the same person, and (ii) the same facts. In previous case-law in the field of competition law, the CJEU applied an extra third factor, namely assessing the identity of the protected legal interest.[109] In *bpost* and *Nordzucker,* the CJEU shifts away from this approach and thereby creates uniformity in the application of the *ne bis in idem* principle in EU law.[110] This does not mean that an analysis of the protected legal interest becomes entirely obsolete. However, the CJEU only addresses this issue in the context of potential justifications of a *ne bis in idem* violation (Article 52(1) Charter of Fundamental Rights of the EU). The CJEU clarifies that – in order to successfully invoke a justification – the applied legal frameworks must 'pursue different legal objectives.'[111] On top of this, the violation must be provided for by the law, respect the essence of the rights at hand, and should be proportionate.[112]

If we apply this approach to the potential concurrent application of the DMA and competition law, various interesting questions arise. First, it is questionable whether prosecuting or sanctioning under the DMA and competition law concerns the same facts. Only insofar this criterion is met, the principle of *ne bis in idem* can successfully be invoked. In the *Nordzucker* case, the CJEU clarifies – albeit in the context of competition law – that two sets of proceedings entail the same facts if they (amongst others) concern conduct in the same market.[113] It will be interesting to see how this criterion will be applied in DMA cases, which do not require the delineation of relevant markets in order to prove a DMA infringement.

If one presumes that the criterion of the same facts is met, even more difficult questions arise. For example, is it necessary to determine whether the DMA and competition law pursue different objectives? Only if this would be the case, a violation of *ne bis in idem* could be justified. As explained above, strictly speaking the objectives of the DMA and competition law are set apart. However, in our opinion, in reality the aims of the respective fields are much closer related than portrayed by the EU legislator. This begs the question whether the DMA and competition law indeed pursue different objectives. It would be interesting to see how the CJEU will approach this question in the future.

On top of this, the application of the proportionality requirement in the context of a *ne bis in idem* analysis is very relevant. The CJEU highlights that complementary approaches can be applied through 'different procedures forming a coherent whole so as to address the societal problem involved'.[114] In order to guarantee such coherence, it is necessary to (i) provide clear and precise rules to predict which acts may lead to duplications of

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[109] In the *Slovak Telekom* judgment of 2019, the CJEU still hinted towards the application of a three-fold test in competition law. See case C-165/19P *Slovak Telekom,* ECLI:EU:C:2021:239.

[110] A similar (yet slightly different) approach has also been suggested by M. Veenbrink, 'Bringing Back Unity: Modernizing the Application of the *Non Bis In Idem* principle' (2019) 41 World Competition 1, 67.

[111] Case C-117/20 *bpost*, ECLI:EU:C:2022:202, par. 44.

[112] ibid, par. 41.

[113] Case C-151/20 *Nordzucker & Others,* ECLI:EU:C:2022:203, par. 41-42.

[114] C-117/20 *bpost*, ECLI:EU:C:2022:202, par. 49.

proceedings, (ii) there must be coordination between different authorities and (iii) two sets of proceedings must have been conducted within a sufficiently coordinated manner with a proximate timeframe.[115] Again, it is questionable whether the DMA meets these requirements. Although Article 1(6) DMA seems to establish that dual proceedings are possible, Article 1(7) DMA may cause confusion. Regarding the coordination mechanisms between different authorities, the initial Commission Proposal did not address the issue of coordination between the Commission and NCAs. However, the final version of the DMA tackles this issue by establishing that coordination should take place in the context of the ECN pursuant to Article 38 of this piece of EU legislation. It is likely that this development is (amongst others) sparked by these recent developments relating to *ne bis in idem*.

In short, the CJEU may ultimately conclude that the DMA and EU competition rules have the same objectives and, in that event, double sanctioning could give rise to serious issues under the *ne bis in idem* principle. From the perspective of legal protection, the question dealing with the objectives of the DMA and EU antitrust law is thus of a fundamental nature. Moreover, the *ne bis in idem* principle is capable of putting under pressure the effective enforcement of the DMA, if the CJEU finds that the DMA and EU competition law pursue the same objectives.

3.9. Private enforcement of competition law

We stated above that enforcement of the EU competition law rules is built on two pillars: public and private enforcement. These systems are meant to work together, in balance, to ensure effective enforcement.[116] Private enforcement serves purposes additional to the deterrence goal that the enforcement system, as a whole, aims for. Specifically, private law actions initiated by entities that suffered harm due to (EU) competition law infringements seek to rely on those provisions to obtain compensation for the harm suffered. Since public enforcement mechanisms do not contain such compensation function,[117] private enforcement adds an important layer to the public enforcement framework discussed above.

The development of the EU competition law framework of private enforcement took considerably more time than in the case of public enforcement and relied heavily on the CJEU's work. The starting point is the direct effect of Articles 101 and 102 TFEU,[118] which allows victims of infringements of these provisions to invoke them in front of national courts. Further, acknowledging the existence of an EU right to bring damages proceedings, right which flows directly from the TFEU competition law provisions, and which pertains to every individual that suffered harm due to an infringement of these provisions,[119] significantly bolstered private law enforcement. However, victims of such

[115] ibid, par. 58.

[116] Case C-724/17 *Skanska*, Opinion of Advocate General Wahl, ECLI:EU:C:2019:100, par. 76.

[117] J.W. van de Gronden, C.S. Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar, 2021), p. 182-183.

[118] Case C-127/73 *BRT v SABAM*, ECLI:EU:C:1974:25.

[119] Case C-453/99 *Courage*, ECLI:EU:C:2001:465, par. 24.

infringements had to rely on domestic private law procedures to fulfil their claims, in absence of a procedural framework at EU level. The CJEU methodically modelled the domestic national procedural frameworks,[120] thus giving more substance to the EU right to claim damages: for example, the role the effectiveness and equivalence principles play, the type of damages that may be sought (i.e. punitive or not), the extent that compensation should cover (i.e. actual loss, loss of profit and interest), the length of limitation periods, etc. are important aspects of private enforcement the CJEU has clarified over time. Importantly, the EU case-law clarified that private law actions for damages must comply with at least three cumulative requirements: infringement of EU competition law, harm and a causal link between the two. Certain domestic private law systems add extra elements to this three-prong recipe: e.g. establishing the infringer's fault, or other conditions regarding attribution of liability.[121]

The Private Damages Directive 2014/104 furthered the CJEU's work by harmonizing the relevant national rules. It puts forward detailed rules on reasonable and proportionate disclosure of evidence, meant to support the victims' plausible claims for damages (Articles 5-8); it also puts the spotlight on liability matters (Article 11), allowing victims to claim damages from any infringer (likely starting with the most 'solvent' one), regardless if the infringer and the victim had no direct contractual relationships, and even in scenarios involving indirect purchasers to whom the harm might have been passed-on (Articles 12-14). Finally, the Directive coordinates public and private enforcement tools by recognizing the effect NCAs' enforcement decisions have in private law actions (Article 9), and also by protecting the infringers' incentives to use the competition authorities' leniency programs for the purpose of uncovering cartels (Articles 6(6) and 11(4)).

The Directive is however not a complete solution for all competition law related private enforcement issues (e.g. collective redress on competition law matters is still not subject to EU legislative action). The CJEU therefore continues to elaborate on important issues of private enforcement even after the entry into force of the Directive. For example, in *Skanska* the Court ruled that economic successors may be held liable for the damage caused by companies that have in the meantime been dissolved, when the latter's commercial activities were continued by the former. Otherwise, undertakings responsible for damage caused by infringement of the EU competition rules could escape liability by simply restructuring.[122] The Court thus kept the concept of undertaking at the heart of its reasoning, a sensible approach to our minds, given that competition law is eminently addressed to undertakings. The same focus stems from the *Sumal* judgment, in which the Court clarified that victims of anti-competitive practices of undertakings may bring claims, either against the infringing parent company or against the subsidiary, where those

[120] Joined cases C-295 to C-298/04 *Manfredi*, ECLI:EU:C:2006:461.

[121] J.W. van de Gronden, C.S. Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar, 2021), p. 259.

[122] Case C-724/17 *Skanska*, ECLI:EU:C:2019:204, par. 46-51.

companies together constitute an undertaking, provided that the parent's behaviour concerns the same products as those marketed by the subsidiary.[123]

3.10. Private enforcement and the DMA

Having briefly delved into the features of the EU competition law private enforcement framework, the question is whether the DMA could also be made subject to private law litigation. To start with, the DMA rules are laid down in a Regulation. According to Article 288 TFEU regulations have general application; they are binding in their entirety and directly applicable in the Member States' legal orders. This entails that, as a rule, the DMA's provisions are self-executing and can be invoked before national courts. Importantly, in competition law it is very common that provisions of regulations are applied by domestic courts. For example, block exemptions contained in regulations are interpreted by these courts in national case-law. As a result, domestic courts are called upon to review in national proceedings whether distribution agreements fulfil the conditions set out by Regulation 2022/720 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices.[124]

Accordingly, we argue that the obligations imposed on gatekeepers may be subject to private law litigation. Once an online platform has been designated as gatekeeper, it is clear that this platform has to observe the obligations set out in the relevant DMA provisions. The Commission's designation decision will specify to which core platform services this decision applies.[125] Admittedly, the obligations of Article 6 may be worked out according to Article 8(2) DMA, but this does not mean that Article 6 is not directly applicable. Moreover, the Commission decisions that further specify the obligations imposed on the gatekeeper, will shed more light on particular issues and, by doing so, facilitate the private enforcement of the obligations concerned. In our view, a customer or business partner can take an online platform designated as gatekeeper to court and claim damages, if this platform is engaged in, for example, self-preferencing (prohibited by Article 6(5) DMA). In principle, such action would not be contrary to the dynamics of EU law. Nevertheless, the next question to be answered is which (procedural) framework would apply to damages claims based on the DMA.

The point is that the DMA does not contain any provisions aimed at harmonizing private enforcement[126] save for one exception. Article 42 of the DMA refers to the EU Directive on representative actions for the protection of the collective interests of consumers,[127] when it comes to such actions brought against DMA infringements by gatekeepers, harming the collective interests of consumers. Consequently this Directive applies to

[123] Case C-882/19 *Sumal,* ECLI:EU:C:2021:800, par. 52 et seq.

[124] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Articles 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L134/3, 2022.

[125] See Article 5(1), Article 6(1) and 7(1) DMA.

[126] Cf M. Eifert, A. Metzger, H. Schweitzer and G. Wagner, Taming the Giants: The DMA/DSA Package, (2021) 58(4) Common Market Law Review, p. 1024.

[127] Directive 2020/1828 on representative actions for the protection of the collective interests of consumers, OJ L 409/1, 2020.

cases involving the DMA and representative actions filed in the interests of consumers. This piece of EU legislation is framed in terms of consumer protection, improving consumer's access to justice, and providing appropriate safeguards to avoid abusive litigation. It approximates certain national laws and regulations concerning *representative actions*. It should be pointed out, however, that the only matter of private enforcement being harmonized by the DMA is not subject to harmonization, when it comes to the private enforcement of Articles 101 and 102 TFEU. It follows from Article 2(1) the Directive on representative actions for the protection of the collective interests of consumers that this harmonisation measure does - strikingly[128] - not apply to such actions involving Articles 101 and 102 TFEU.[129]

All in all, this means that the private enforcement of the DMA is (almost completely) governed by national (procedural) law, subject to the principles of equivalence, effectiveness and effective judicial protection.[130] Consequently, in private law cases involving the DMA a domestic court might be called upon to assess whether the relevant procedural rules are in line with these principles. As in EU competition law, starting with the famous *Courage* judgment, this may result in the creation of a legal framework, developed on a case-by-case basis. Important doctrines and approaches might then be fleshed out in an incremental fashion.

To our minds, a very important disadvantage of not acknowledging that the DMA is part of competition law is related to this incremental development of private law enforcement. The problem is that all CJEU judgements dealing with private law enforcement of competition law, as well as the Private Damages Directive, which came into being after a very intense and time-consuming political process, do not apply to the DMA. Therefore, fundamental issues must be settled all over again. The first question to be addressed is whether an individual or company having suffered harm from an infringement of a DMA rule is entitled to compensation. This question was also at stake in *Courage* in relation to Article 101 TFEU. Given the general approach of the CJEU in this case, which took the principle of effectiveness as point of departure, the chance is high that in this Court's view it must also be possible to claim damages from gatekeepers if particular DMA obligations are infringed.

The experience with civil enforcement of Articles 101 and 102 TFEU and the equivalent provisions of national competition laws shows, however, that apart from the fundamental issue of the right to claim damages, a wide range of other (complicated) matters must be settled. For instance, are agreements or other acts of private law void, if they are in violation of the obligations mentioned in Articles 5-7 DMA? Article 101(2)

[128] It should be pointed out that in the EU context the discussion on representative actions started in competition law. See A. Burri and C. Marco Solas, Third-party funding under the EU's New Representative Actions Directive, Global Competition Litigation Review 2022, p. 32.

[129] Article 2(1) refers to Annex I of Directive 2020/1828 which lists the EU rules that fall within the scope of the representative actions provisions of this directive. Articles 101 and 102 TFEU are not mentioned in this annex.

[130] See e.g. cases 33/76 *Rewe*, ECLI:EU:C:1976:188; 45/76 *Comet*, ECLI:EU:C:1976:191 and 222/84 *Johnston*, ECLI:EU:C:1986:205. See in this respect also Article 47 of the Charter of the Fundamental Rights of the EU. On the role of the principles of equivalence, effectiveness and effective judicial protection see J.J. Jans, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (second edition, Groningen, 2015), p. 43-70.

TFEU contains the sanction of nullity for anti-competitive agreements and decisions of associations of undertakings. Such a provision is absent in the DMA. The fair chance exists that in a concrete case, a national court must decide on this matter. Another example is the passing-on defence. This matter has given rise to diverging national case-law,[131] but is now solved in the Private Damages Directive. The problem is that this directive does not apply to the DMA. It should be awaited to see how the CJEU will deal with the passing-on defence in DMA cases. Meanwhile, it cannot be excluded that diverging national case-law will occur in such cases at the domestic level.

In sum, many complicated matters that have been solved in competition law case-law of the CJEU and in the Private Damages Directive, now need to be addressed again with regard to the DMA. As the Private Damages Directive harmonizes only competition law matters, its approaches, doctrines and mechanism cannot be recycled in relation to the DMA. The reason for this is, simply, that the DMA is officially not considered to be part of competition law. This is a missed opportunity: settling issues of private enforcement will take up a lot of time, while problems arising on digital markets requires swift action. Moreover, parties being harmed by anti-competitive practices of gatekeepers are better off in the event a competition law decision is taken by the Commission or by the NCA than in the event that the Commission has taken action under the DMA. Furthermore, approaches which will be developed in the future based on the Private Damages Directive will not be available for the DMA either. Accordingly, many problems related to private enforcement must be solved in parallel, i.e. for cases involving competition law and cases involving the DMA. This is an outcome which is far from efficient.

It is clear that national courts will face a daunting task when they are called upon to interpret and apply DMA rules in private damages cases. Strikingly, this point is acknowledged by the DMA. Article 39(1) provides that national courts may ask the Commission to transfer information in its possession or to give its opinion in matters concerning the application of the DMA. This exchange of information takes place at the domestic court's initiative. In contrast, the Commission is also entitled to take initiative and intervene in proceedings, by submitting written observations to the national court concerned, if the coherent application of the DMA is at issue.[132] With the consent of this court, the Commission may even make oral observations. This mechanism clearly mirrors Article 15 Regulation 1/2003. There is however one striking difference: under the DMA, the NCAs are not entitled to make observations, while this possibility is given to them under the cooperation mechanism of Regulation 1/2003. It is a missed opportunity that NCAs cannot express their views on DMA matters in national proceedings, as the issues at play in competition law are closely related to those concerning the DMA.

Above we outlined that Article 1(7) DMA precludes national authorities from taking decisions running counter to the DMA. This mechanism was modelled after Article 16 Regulation 1/2003 and the *Masterfoods* doctrine. It goes without saying that such a mechanism is also needed to prevent clashes between DMA Commission decisions and

[131] See e.g. J.W. van de Gronden, C.S. Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar, 2021), p. 285-286.

[132] See DMA, Article 39(3).

national court rulings. For that reason, Article 39(5) DMA provides that national courts are not permitted to hand down judgments that are incompatible with the DMA Commission decisions. On top of that, if the Commission is still handling a DMA proceeding without having taken a formal decision yet, the national court must either stay the proceeding dealing with the same case or ask preliminary questions.[133] Once again, the influence of Article 16 Regulation 1/2003 and the *Masterfoods* judgment on Article 39(5) DMA is more than evident.

In sum, although the DMA does not harmonize important aspects of private law enforcement of the DMA, it does lay down mechanisms for cooperation between the Commission and national (private law) courts. These mechanisms are evidently inspired by and modelled on the experience with the EU competition rules.

4. CONCLUSIONS

The DMA's adoption is undoubtedly a landmark in the current legal environment concerning the digital sector. Addressing novel legal problems arising in this sector requires modern rules, adapted to the needs of various stakeholders. The DMA's architecture is unquestionably built on the Commission's vast experience with enforcing the TFEU competition law provisions, particularly Article 102. In this article we observe the proximity between the DMA and competition law, in terms of objectives pursue and substantive content of their norms. The enforcement frameworks of the DMA and competition law are, despite some differences, also very similar. Against the backdrop of the longstanding and positive experience with Regulation 1/2003,[134] it is to be welcomed that the DMA clearly builds upon this existing (enforcement) framework. It may be assumed that the enforcement of the DMA will benefit from this experience.

It is however disappointing that the relationship between the DMA and competition law is still rather vague. The EU decision-makers' reluctance to acknowledge that the DMA forms part of competition law and policy, even if as a special (sub-)branch containing rules for gatekeepers,[135] creates certain problems and sheds light on some missed opportunities. We argue that remedying the problems discussed in this contribution, and better capitalizing on the opportunities we identify as currently missed, could render more effective enforcement of the DMA substantive obligations.

For example, it remains questionable whether similar notions embedded in the DMA and in competition law instruments can, or should, be interpreted similarly. This prevents the DMA from benefitting from years of experience and developments in the context of (public and private law) enforcement of competition law. Moving on, the DMA seems

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[133] This is also set out in Article 39(5) DMA.

[134] See e.g. Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453; M. Botta, 'Testing the decentralization of competition law enforcement: comment on Toshiba' (2013) 381 European Law Review 107, p. 108; currently, Regulation 1/2003 is – again – under review, see: https://ec.europa.eu/competition-policy/antitrust/legislation/regulation-12003_en.

[135] See R.B. Beems, J.W. van de Gronden, C.S. Rusu, 'Gatekeepers and EU Competition Law: Exploring New Enforcement Avenues', in P.T.J. Wolters, R.M. Hermans, A.U. Janssen, P. Ortolani (eds), *Digitalisering en Conflictoplossing* (Wolters Kluwer, 2021), p. 277.

less daring in certain respects than it could have been: not lowering the threshold for adopting interim measures and not using commitments and structural and behavioural remedies also in regular (but only in systematic) non-compliance proceedings are certainly missed opportunities. Furthermore, the current setup may also result in *ne bis in idem* problems. If proceedings or sanctions under the DMA entail the same facts as proceedings under competition law, the objectives of the two frameworks must be divergent to successfully invoke a justification of a *ne bis in idem* violation. It will be therefore interesting to see whether the CJEU will conclude that the DMA and competition law indeed pursue different objectives.

Executive Vice-President Vestager stated in a recent speech that "[t]he DMA does not signal an end to competition enforcement. On the contrary, we are continuing to enforce competition rules in digital markets, using all of our traditional instruments [...]".[136] Taking the Commissioner's words at face value, we argue that it is not only the DMA that could have drawn better lessons from competition law, but the vice versa is equally valid. Competition law could also be informed by the novelties of the DMA's enforcement framework, which is more recent and probably better equipped to target the digital economy. For example, endowing the Commission with investigative powers to access data, algorithms, IT systems, etc. could also be translated in competition law enforcement. Similarly, the Commission's ability to fine DMA repeat offenders up to 20% of their worldwide turnover could be transposed to sanctioning (severe or repeated) competition law infringements too. An evaluation of Regulation 1/2003 has recently started; one of the goals of this process is to ensure that the competition law public enforcement framework is "truly fit for the digital age."[137] The timing is thus perfect for a genuine cross-fertilization process between competition law and the DMA enforcement frameworks to commence.

[136] Speech of Executive Vice-President Vestager at the Conference of the Data Protection Supervisor. Data Protection and Competition: enforcement synergies and challenges, 16 June 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_3786, accessed 21 June 2022.

[137] Speech of Executive Vice-President Vestager, Competition and Regulation in Disrupted Times, 31 March 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2203, accessed 21 June 2022. See also European Commission, Press Release, Antitrust: Commission seeks feedback on performance of EU antitrust enforcement framework, IP/22/4194.