COMPETITION FORUM
LAW & ECONOMICS

December, 5th 2022

Weaving Penelope's Shroud…

Some Comments on the Private Enforcement of the DMA

Rafael AMARO

Professeur de droit privé à l'Université Caen Normandie

To quote this paper: R. AMARO, "Weaving Penelope's Shroud… ***Some Comments on the Private Enforcement of the DMA*****", *Competition Forum,* 2022, n° 0042, https://competition-forum.com.**

When talking about the private enforcement of the DMA, the Penelope's shroud metaphor comes to mind. It is as if the European Commission was unraveling at night what it had woven during the day.

Why?

For a reason that have not escaped to some observers: the final version of the Regulation devotes very few provisions to the subject (and the 2020 draft was even completely silent!). Only one recital (92)[1] and one article (39 – mentioned below) deal with it. This laconism is surprising when considering the developments of the private enforcement of competition law from the *Courage* judgment[2] to the latest "Trucks" judgments[3], including of course the "Damages" Directive (2014/104). It is safe to predict that this omission will require further legislative action or/and numerous references for preliminary rulings to weave the shroud again…

At early stages, it was even questioned whether private enforcement of the DMA would be possible. And to this crucial question, the Commission gave an ambiguous answer in the Q&A section of its website:

> ***Who will enforce the Digital Markets Act?***
>
> *Given the cross-border nature of gatekeepers and the complementarity of the Digital Markets Act with the Digital Service Act and other internal market rules and competition law in particular, the enforcement of the tool will remain in the hands of the Commission. Member States may always request the Commission to open*

[1] "*In order to safeguard the harmonised application and enforcement of this Regulation, it is important to ensure that national authorities, including national courts, have all necessary information to ensure that their decisions do not run counter to a decision adopted by the Commission under this Regulation. National courts should be allowed to ask the Commission to send them information or opinions on questions concerning the application of this Regulation. At the same time, the Commission should be able to submit oral or written observations to national courts. This is without prejudice to the ability of national courts to request a preliminary ruling under Article 267 TFEU.*"

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

[3] E.g. Case C-163/21, *Paccar,* ECLI:EU:C:2022:863.

a market investigation for the purpose of designating a new gatekeeper.

Will private damages be available to those harmed by gatekeeper conduct?

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

In a nutshell, "*the enforcement of the tool will remain in the hands of the Commission",* but it "*can be enforced directly in national courts"*. We have seen clearer answers.

However, Article 39 should allow to assume that private enforcement is possible. By reproducing and updating the content of Articles 15 and 16 of Regulation 1/2003, it lays down the principles of seamless cooperation between national courts and the Commission. This implicitly suggests that national courts should be empowered to apply the DMA's provisions and to award civil remedies to the victims of gatekeepers' infringements. Scholars, Member States and even the European Parliament seem to support this conclusion[4].

But let's try to see it more clearly.

I will begin with an assumption: the development of private litigation is more than likely (I). I will then examine the legal framework in the current state of play, regarding the absence of dedicated provisions in the final version of the DMA (II) and I will conclude with some thoughts on the different models of private enforcement that can be considered (III).

I - The reasons for the future development of private litigation

The first reason has to do with the very text of the Regulation and its purpose. While the general interest and the protection of the market are obviously the backdrop of the Regulation, the wording of the rules protects first the interests of the gatekeepers' victims. This is particularly striking when reading the main obligations laid down by articles 5, 6 and 7. There is therefore little doubt that companies and their advisors will quickly consider invoking its provisions before

[4] A joint letter of May 27, 2021, signed by the ministers of the economy of France, Germany, and the Netherlands, which specifically emphasizes the role of private enforcement but also mentions the need to include rules framing this enforcement in the DMA's provisions: "Strengthening the Digital Markets Act and Its Enforcement". Available at : https://www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=6.

national courts as they did with Article 102 TFEU in some Member States.

Second reason: twenty years of debate about the private enforcement of competition law have eventually developed the legal market. Attorneys, in-house counsels, economic experts, and courts are now much more skilled than they were twenty years ago to deal with this new segment of litigation. It is therefore quite likely that a range of high-quality legal services will be delivered to victims of non-complying gatekeepers to bring private actions.

Thirdly, but I could be wrong, national courts may feel more comfortable with the *per se* prohibitions of the DMA than with the effects-based prohibitions of Article 102. Of course, there will still be "economic" challenges, such as those relating to the quantification of damages. But these challenges differ only slightly from those we have experienced in competition litigation.

Finally, it is likely that in the long term the Court of Justice, faithful to its *Courage* doctrine, will see private litigation as the second pillar of the DMA's effectiveness[5]. This philosophy would be even more convincing since, unlike competition law, the DMA will be applied solely by the European Commission. The workload will soon be overwhelming for the Commission if it must manage all the litigation generated by the application of the DMA. This centralized model of public enforcement could herald the indispensable development of a decentralized model of stand-alone private actions.

For these reasons, I believe, along with others, that not only will private enforcement of the DMA develop, but that things will perhaps go much more quickly than for the private enforcement of competition law.

II - The legal framework of private enforcement in the current state of play

The DMA's omissions do not mean that we face a legal loophole but, as it was wisely noticed[6], it is doubtful that the procedural rules of competition law can be applied. The DMA is a sectoral regulation text that would require its own set of rules.

So how are we going to fill the blanks?

Most likely in the same way as we did in competition law before Regulation 1/2003 and Directive 2014/104.

[5] G. Monti, "The Digital Markets Act – Institutional Design and Suggestions for Improvement", *TILEC Discussion Paper 2021-004*, 2021, p. 11.

[6] R. Podszun, "Private enforcement and the Digital Markets Act", *Verfassungsblog*, (Sept. 2021). Available at: https://verfassungsblog.de/power-dsa-dma-05/

Two sets of rules will be applicable then:

- EU law - the Treaty, the Court of Justice's case law, and the DMA;
- national law in application of the principle of procedural autonomy, subject to the usual limits set out by the principles of effectiveness and equivalence.

Obviously, the DMA will have horizontal direct effect and as the substantive provisions that are of great interest for victims of non-complying gatekeepers (especially articles 3, 5, 6 and 7) seem sufficiently precise and unconditional to create rights, they may therefore be invoked before national courts.

It also seems that the Court's case law in the field of competition law can provide useful lessons. I mentioned the *Courage* judgment, but the *Manfredi* judgment[7] and possibly the *Kone*[8], *Gasorba*[9], *Skanska*[10], *Otis*[11] or *Sumal*[12] judgments on substantive matters and even the *CDC*[13], *flyLAL II*[14], *Tibor-Trans*[15] and *Volvo*[16] judgments on international jurisdiction may provide much needed answers.

Moreover, the DMA also contains several rules modeling the exclusive competence of the European Commission (Articles 3, 8 and 29 to 33 - see also Recital 91: *"The Commission is the sole authority empowered to enforce this Regulation")*. When, read *a contrario*, these rules can also tell us about the competence of national courts: they would not be empowered to classify a company as a gatekeeper under article 3, to apply the suspension system under article 9, and even to rule on violations to articles 5, 6 and 7. If this interpretation is correct[17], it would make private litigation a minimalist form of litigation: exclusively follow-on damages actions. Is that what we want?

III - Which model of private enforcement?

Regardless of the vague indications given by the DMA, the question arises as to the ideal model of private enforcement that should be encouraged.

If private enforcement is viewed with circumspection - and it is not excluded that the European Commission is wary of it as it

[7] Case C-295/04, ECLI:EU:C:2006:461.
[8] Case C-557/12, ECLI:EU:C:2014:1317.
[9] Case C-547/16, ECLI:EU:C:2017:891.
[10] Case C-724/17, ECLI:EU:C:2019:204.
[11] Case C-435/18, ECLI:EU:C:2019:1069.
[12] Case C-882/19, ECLI:EU:C:2021:800.
[13] Case C-352/13, ECLI:EU:C:2015:335.
[14] Case C-27/17, ECLI:EU:C:2018:533.
[15] Case C-451/18, ECLI:EU:C:2019:635.
[16] Case C-30/20, ECLI:EU:C:2021:604.
[17] *Contra* A. Komninos, "The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement", *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World*, Concurrences, 2021, pp. 425-444, at pp. 429-430.

is beginning to be wary of private litigation in competition law - then the minimalist model should be adopted. Private enforcement could be like what it was under Regulation 17/62. This would undoubtedly lead to greater consistency by avoiding a fragmented enforcement by national courts. But - and this is obvious - we will lose effectiveness from every point of view. Less detection, less private actions, less civil remedies, less deterrent effect…

Another option would be to adopt a decentralized system of private enforcement analogous to the post-Regulation 1/2003 era in competition law. This system would rely on two patterns of private actions: follow-on and stand-alone[18]. However, for the latter, this would imply that national courts are allowed to apply Articles 5 to 7 without a prior decision of the Commission. And as I said, it's far from certain. But let's assume that stand-alone actions are possible as the Regulation stands or that they would be possible one day thank to a forthcoming reform. In this decentralized model, national courts would be empowered to award damages, but also to issue injunctions and to declare terms that violate the DMA void. Injunctions, especially when sought in summary proceedings, will undoubtedly be of vital importance to claimants. To those who worry about the risk of inconsistency, it could be said that the preliminary ruling mechanism is intended to avoid it.

Finally, there is one last way to be conceived: designing a new model for private litigation. It has been suggested to draw inspiration from the dispute resolution methods of the P2B regulation[19] or to empower representative organizations to bring collective actions[20]. A scholar also proposed to create an independent Platform Complaints Panels with independent adjudicators with the power to decide on claims of infringement by business users or consumers[21].

I would find it difficult to agree with the vision of restricting private litigation to follow-on actions. The lessons of competition law argue for a mixed system that combines follow-on and stand-alone litigations but also individual and collective actions.

---

[18] A. de Streel, R. Feasey, J. Krämer, G. Monti, "Making the Digital Markets Act more resilient and effective", *CERRE Recommendations Paper*, (May 2021), at p. 78. Available at: https://cerre.eu/wp-content/uploads/2021/05/CERRE_-DMA_European-Parliament-Council-recommendations_FULL-PAPER_May-2021.pdf

[19] A. de Streel, R. Feasey, J. Krämer, G. Monti, *supra* note 16, at pp. 94-96.

[20] BEUC, *Digital Markets Act Proposal*, Position Paper (Apr. 2021), at p. 17. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf; Article 42 of the final version of the DMA states that Directive (EU) 2020/1828 applies to DMA's infringements.

[21] R. Podszun, "Private Enforcement and Platform Regulation: Two GAFA-cases – and What They Tell Us About the Digital Markets Act", (June 2021). Available at: https://ssrn.com/abstract=3862497 or http://dx.doi.org/10.2139/ssrn.3862497

That said, whatever private enforcement model is preferred, let's just hope that the experience gained in competition law will save a few decades, even though the shroud is undoubtedly not complete.

Rafael AMARO