

Collective Actions and the Digital Markets Act: A Bird Without Wings

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ABSTRACT

This paper comprehensively analyses collective actions for DMA violations. The paper first builds on the preliminary objectives for collective actions for DMA violations, including the overall role of private actors in DMA enforcement and the deficits of individual private enforcement. It will assess why the DMA is particularly prone to collective enforcement. Second, the paper assesses the legal landscape of the DMA for collective actions. On the one hand, the paper focuses on collective actions for consumers (in their capacity as end users) under the Representative Actions Directive and its transposal in the EU Member States. On the other hand, the paper will elaborate on other means of collective action, with a focus on collective actions for SMEs and other groups of business users under the DMA, including specific instruments, such as the UCP Directive, the P2B Regulation, or the GDPR, or options based on the *effet utile* principle, such as the assignment model.

KEYWORDS

Digital Markets Act; Collective Action; Representative Action; Assignment Model; P2B; UCP; Qualified Entities; Consumers; End Users; Business Users; Private Enforcement; Direct Effect

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I. Introduction

Once the European Commission introduced the new Digital Markets Act's (DMA)¹ first draft in December 2020,² Commission officials rushed to assert that the DMA would open the door for private enforcement.³ In a similar vein, scholars also rushed to analyse the DMA under the lens of private enforcement vested in its (possible) direct effect,⁴ by positing their own doubts about how it would be concretised in practice. For instance, some argued that a lack of formal rules enforcing contracts between end users and gatekeepers could complicate the procedural materialisation of private enforcement,⁵ whereas others boiled down their arguments in relation to the Commission's capacity to further specify the provisions set out in Article 6 DMA.⁶ Only a few interventions during

¹ 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 (Digital Markets Act) (hereinafter "Digital Markets Act") (2022) OJ L265/1.

² 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.

³ Guillaume Lorient, *EU Digital Markets Act and Gatekeeper Platforms* (2021); and Bethan John, *DG Comp official confirms likelihood of private DMA enforcement* (2023), <https://globalcompetitionreview.com/article/dg-comp-official-confirms-likelihood-of-private-dma-enforcement> accessed 29 July 2023. Additionally, the Commission responded in the affirmative to private enforcement of the DMA in European Commission, *Questions and Answers: Digital markets Act: Ensuring fair and open digital markets*, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 accessed 29 July 2023. Member States also reinforced the argument in favour of considering private enforcement within the DMA in the Non-Paper published by France, Germany and The Netherlands, *Strengthening the Digital Markets Act and Its Enforcement* (2021), <https://www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?blob=publicationFile&v=4> accessed 31 August 2023.

⁴ See, for an overall assessment, inter alia, ASSIMAKIS KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*. In N. CHARBIT AND S. GACHOT (eds.), *ELEANOR M. FOX ANTITRUST AMBASSADOR TO THE WORLD – LIBER AMICORUM*, Concurrences (2021), 425; Rupperecht Podszun, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*. 13 JECLAP (2022), 254; Björn Christian Becker, *Privatrechtliche Durchsetzung des Digital Markets Act*, ZEUP 403 (2023); Oles Andriychuk, *Do DMA obligations for gatekeepers create entitlements for business users?* 11 J. ANT. ENF. 130 (2023).

⁵ Giorgio Monti, *The Digital Markets Act – Institutional Design and Suggestions for Improvement*, TILEC Discussion Paper No. 2021-04 (2021), <https://dx.doi.org/10.2139/ssrn.3797730> accessed 16 August 2023. The argument translates from the general complexity in consumer actions when no direct contractual relationship is drawn between the claimant and the wrongdoer, see Katalin J. Cseres, *Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions*. 8 Y. OF ANT. REG. St. 45 (2015).

⁶ Podszun, *supra* note 4, 254; Andriychuk *supra* note 4, 130. At this stage of the analysis, Article 7 DMA mandating interoperability obligations on number-independent interpersonal communications services (NIICs) was not introduced into the first drafts of the regulatory instrument, despite the fact that the final version provides the possibility of specification under Article 8(3) DMA for the provisions set out under Articles 6 and 7 DMA.

the legislative process touched upon the issue of collective actions⁷ of the DMA.⁸ It was not until the European Parliament intervened in the legislative process that the possibility that representative actions could be brought forward by individuals through the means of the Representative Action Directive (RAD)⁹ was introduced.¹⁰ Yet, the discussion continued to focus on individual private enforcement actions in business-to-business litigation.¹¹

This paper aims to fill the gap in the literature and comprehensively analyses collective actions for DMA infringements, including its underlying rationale. The paper first builds on the preliminary objectives for private enforcement of the DMA's provisions, including the limited capacity of the European Commission regarding its priority setting in fostering the effective enforcement of its provisions via their deterrence effect.

Against the deficits of individual private enforcement, the paper delves into the specific potential of collective actions. In that sense, the paper stresses how collective actions generally play a vital role, particularly for consumers and small and medium enterprises (SMEs), but in the context of the DMA, also for business users, as a form of corrective justice and to overcome the rational disinterest that otherwise prevents them from becoming active on an individual basis.¹² Similar to private enforcement of competition law, particularly consumers and SMEs faced with DMA violations tend to

⁷ In this paper, we understand collective actions as an overarching term covering mass actions and other forms of collective private enforcement.

⁸ Body of European Regulators for Electronic Communications, *Digital Markets Act Proposal – Position Paper* (2021), https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-030_digital_markets_act_proposal.pdf accessed 12 November 2023.

⁹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ L409/1 (“RAD” hereinafter).

¹⁰ Amendments adopted by the European Parliament on 15 December 2021 on the 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)0842 – C9-0419/2020 – 2020/0374(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html, accessed 16 August 2023. Article 37b (Amendment 226) was introduced to include the possibility.

¹¹ See, exceptionally also touching on issues of collective actions, HENNER SCHLÄFKE & IMMO SCHULER, *Chapter 13: The DMA as the Subject Matter of Private Enforcement*. In: Schmidt/Hübener (eds.), *New Digital Markets Act* (2023); and Josef Drexler, Beatriz Conde Gallego, Begoña González Otero, Liza Herrmann, Jörg Hoffmann, Germán Oscar Johannsen, Lukas Kestler & Giulio Matarazzi, *Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)*. 72 GRUR INTERNATIONAL 875 (2023).

¹² See, inter alia on collective actions overall, Alexander Stöhr, *The Implementation of Collective Redress – A Comparative Approach*. 21 GER. LAW J. 1608-1609 (2020).

fear the costs and duration of private enforcement actions and, therefore, refrain from individual litigation.¹³

Second, the paper assesses the legal landscape of the DMA for collective actions. On the one hand, the paper focuses on collective actions *for consumers* (in their capacity as end users). It shows that Articles 42 and 52 DMA open the door for “representative actions brought against infringements by gatekeepers of provisions of [the DMA] that harm or may harm the collective interests of consumers” under the RAD. Against this background, the paper addresses the justification on the part of the Union legislator for introducing the consumer’s capacity to bring forward representative actions. Stemming from these findings, the paper delves into the problematisation of introducing the RAD into the regulatory framework presented by the DMA. It thoroughly addresses how representative actions for DMA violations may work and which obligations are even suitable for such actions. In that context, it shows which DMA obligations have direct effect and, therefore, may underpin representative actions. A particular focus lies on answering the question of how the DMA framework and RAD may collaborate and coincide in substance, particularly in how the European Commission will coordinate with the “qualified entities” under the RAD as well as national courts. In doing so, some implementation models of the RAD at the national level are presented in the context of the DMA. The paper shows the variety of approaches and accompanying potential for forum shopping.

On the other hand, the paper will elaborate on *other legal avenues for collective actions* with a focus on collective actions for SMEs and other groups of business users under the DMA.¹⁴ While some jurisdictions gold-plated the Union provisions of the RAD to include a certain group of SMEs in the scope of the transposing law,¹⁵ business users, including SMEs, do not meet the definition of “consumers” under the RAD. However, they may still be faced with the same rational disinterest.

Due to the silence of the DMA in that aspect, the paper takes recourse to (largely unavailable or limited) general means of collective actions in Union law, including those based on general principles of EU law but also under other specific instruments, such as

¹³ See, by analogy, Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, Advocate General Jääskinen, ECLI:EU:C:2014:2443, para. 29.

¹⁴ Coincidentally, the paper will also assess how these other means of collective actions might be available to consumers next to the RAD.

¹⁵ See below at Section III.B.3.a.i. and iii. on Germany and on the Netherlands.

the UCP Directive,¹⁶ the P2B Regulation,¹⁷ or the GDPR.¹⁸ Due to the absence of an overall harmonised regime for collective actions through EU secondary law, the paper also assesses a possible recourse to the so-called “assignment model” used in private enforcement of EU competition law from an EU law perspective.¹⁹ Under the assignment model, a large number of injured parties, usually companies harmed by the same infringement of competition law, contractually assign their respective claims for damages to a specialised commercial company or entity. The paper contemplates the applicability of this model – whose necessity from a perspective of effective enforcement of EU competition law is tested at the ECJ at the moment²⁰ – for the DMA’s collective enforcement.

Throughout the paper, broader challenges of collective actions in the context of the DMA are touched upon, such as parallel public enforcement, follow-on and stand-alone collective actions, remedies, and jurisdiction, as well as hybrid collective actions under Articles 101 and 102 TFEU and the DMA. The paper concludes with a sceptical outlook on collective actions for DMA infringements in the current legal environment, both for consumers but also for business users. Collective enforcement through private actions of the DMA lacks legal certainty, and its potential success will, thus, depend on the industry’s own initiative throughout a long and unnecessary trial-and-error period.

¹⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (2005) OJ L149/22.

¹⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (2019) OJ L186/57 (P2B Regulation).

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L119/1 (GDPR).

¹⁹ TILL SCHREIBER & MARTIN SEEGER, *Collective or Class Actions and Claims Aggregation in the EU: the Claimant’s Perspective*. In NICHOLAS HEATON & BENJAMIN HOLT (eds.), *GCR Private Litigation Guide* 41 (2021).

²⁰ See pending Case C-253/23, *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen* (2023) OJ C261/10.

II. The Role and Rationale for Collective Actions for DMA Infringements

The Commission has been adamant in defending that it is the sole enforcer of the DMA in terms of its monitoring and ensuring its compliance with its punitive framework.²¹ Despite that, the DMA's procedural toolkit establishes that the Commission is not alone in securing effective enforcement of the regulatory instrument. Far from it. National authorities have residual competence in monitoring the regulatory instrument's enforcement at the national level.²²

Most importantly, Article 39 DMA foresees that the Commission will not enforce the DMA in isolation away from the powers and influence of private parties in national courts. Due to this reason, a set of procedural rules for cooperation is set out to bring the DMA's enforcement in line with its potential application at the national level, both on the side of national courts and national authorities. Expanding on these cooperation rules, Articles 42 and 52 DMA underscore the relevance of collective actions with regards to their private application, since they both redirect the locus of the claims arising from harms based on infringements of the provisions of the DMA to the scope of the RAD.

Before turning to the question of how these provisions will work and interact with each other, the paper explains why private enforcement of the DMA is generally a sensible solution to complement public enforcement and what role collective actions play in the overall enforcement of the DMA's prohibitions and obligations.

A. The Overall Role of Private Parties in Enforcing the DMA

In a similar vein to the complementary nature that private enforcement bears in EU competition law,²³ it also has an important role to play in the context of the DMA. Private enforcement typically plays a role when the DMA's provisions are breached. There are two main reasons supporting the necessity of enforcing the DMA through private law:

²¹ See, Digital Markets Act *supra* note 1, Recital 91(2).

²² The presence of a sense of collaboration between the European Commission and national competition authorities (NCAs) derives from the DMA's inclusion of rules regarding cooperation and coordination between them under Article 38 DMA. See in more detail below at III.B.4.

²³ The complementary nature of private enforcement to public enforcement in competition law has been widely discussed, see Germain Gaudin and Franziska Weber, *Antitrust Damages, Consumer Harm, and Consumer Collective Redress*. 12 JECLAP 370 (2021).

guaranteeing the rights of parties affected by the DMA’s violations and ensuring strong enforcement vis-à-vis the illegal practices performed by the designated gatekeepers.²⁴

1. Guaranteeing the Rights of Parties Affected by the DMA’s Violations

Business and end users might be affected by the gatekeepers breaching the provisions of the DMA, so private enforcement provides a channel for corrective justice and compensation. Several provisions, most notably Articles 5, 6, and 7 DMA specify the beneficiaries of them directly by referring mostly to business users but sometimes also end users.²⁵ Article 5(3) DMA, for example, prohibits most-favoured-nation clauses and measures of equivalent effect that normally produce their effects to the detriment of business users. In cases of non-compliance by gatekeepers, business users are negatively affected by the violation since they cannot, for example, offer more favourable prices on their own online channels, thus missing out on the advantages that they cater to their users associated with favourable prices.²⁶ On the side of end users, for example, Article 6(9) DMA directly addresses conferring upon end users the portability of their data deriving from their use of the gatekeepers’ services in real-time and continuously. End users are directly protected, and their data portability rights are enhanced as opposed to the data portability right conferred under Article 20 GDPR, due to their condition as data subjects using the services of the designated gatekeepers.²⁷

In these two examples, end users and business users either want the DMA-violating behaviour to cease, or they even might want to be compensated for the associated effects deriving from the behaviour when the gatekeepers are in breach of the regulatory instrument. Under Article 27 DMA, private (third) parties,²⁸ including business

²⁴ See, generally, CATHERINE WARIN, *INDIVIDUAL RIGHTS UNDER EUROPEAN UNION LAW*, 98 (Nomos 2019). Both goals have been acknowledged in the EU jurisprudence on private enforcement of competition law, ECJ, Case C-882/19 *Sumal* ECLI:EU:C:2021:800, para. 37. At the moment of writing, 6 gatekeepers have been designated as gatekeepers (Alphabet, Amazon, Apple, ByteDance, Microsoft and Meta) for 22 of their core platform services, see *Commission designates six gatekeepers under the Digital Markets Act* (2023), https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06_en, accessed 30 October 2023.

²⁵ See for more detail below at II.B.3.

²⁶ See, Digital Markets Act *supra* note 1, Recital 39.

²⁷ This right conflicts with the DMA’s wish to apply “without” prejudice to the DMA as enshrined in Recital 12, see Konstantina Bania, *Fitting The Digital Markets Act In The Existing Legal Framework: The Myth Of The “Without Prejudice” Clause*. 19 EUR. COMP. J 116-149 (2023).

²⁸ The concept of third parties, although it remains undefined in the DMA under Article 2, is wider in scope of the concepts of business users and end users, which are fleshed out in Articles 2(20) and 2(21). Business users are defined considering their commercial or professional capacity when using CPs for the purpose of or while providing goods or services to end users, whereas end users are defined by exclusion to business

users and end users, can inform the Commission of behaviour in contravention of the DMA's provisions.²⁹ However, the DMA does not give them the same status as (formal) complainants as they do in the sense of competition law. Commission officials have reiterated the idea that the intervention of third parties will be more useful in testing out the solutions that are offered by gatekeepers in bringing their activities and business models into compliance with the regulatory instrument. For this same purpose, the Commission plans to open up the discussion of compliance via public consultation and testing performed on the part of third parties.³⁰ In principle, one could presume that the Commission is under no obligation to investigate the conduct brought forward by third parties in denouncing the gatekeepers' violations of the regulatory instrument. The DMA does not directly impose any obligation upon the Commission to this end. The DMA recognises that the Commission may have different enforcement priorities in monitoring the gatekeepers' compliance with the DMA.³¹ However, one cannot go as far as saying that the Notice on the handling of complaints³² applicable to sanctioning proceedings under Articles 101 and 102 TFEU would apply, in the same fashion, to those proceedings that can result in the sanctioning of the gatekeepers' violations of the DMA.

Moreover, the Template on the compliance reports under Article 11 DMA explicitly recognises that the Commission bears discretion in triggering the opening of proceedings when a national competition authority transmits its findings because of the monitoring of compliance at the national level.³³ Nothing stands in the way of upholding, thus, that the Commission may also have sufficient discretion in triggering a non-compliance procedure under Article 29 DMA based on reasons for the efficient allocation

users, and those using CPSs are included. The wider notions of consumers and third parties as well as their comparison to both definitions are later compared, in terms of their practical application to collective actions, in section 3.

²⁹ Björn Herbers, *Der Digital Markets Act (DMA) Kommt – Neue Dos And Don'ts Für Gatekeeper In Der Digitalwirtschaft*. RDI, 252, 258 (2022).

³⁰ Alberto Bacchiega, *Let's Talk Competition – Episode 3- Let's talk competition – It's soon time for DMA Compliance* (2023), <https://www.youtube.com/watch?v=BGqt-kTqxWE> accessed 31 October 2023; Nicholas Hirst, *Tech gatekeepers face enforcement action if not compliant with DMA by March, Koenig says* (2023), <https://mlexmarketinsight.com/news/insight/tech-gatekeepers-face-enforcement-action-if-not-compliant-with-dma-by-march-koenig-says>, accessed 31 October 2023.

³¹ The DMA recognises this feature with relation to its capacity to accept the specification request directed at interpreting the particular application of Articles 6 and 7. Digital Markets Act *supra* note 1, Recital 65.

³² Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004) OJ C101/65.

³³ European Commission, *Template form for reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act) (Compliance Report)* (2023), <https://digital-markets-act.ec.europa.eu/system/files/2023-10/Article%2011%20DMA%20-%20Compliance%20Report%20Template%20Form.pdf>, accessed 31 October 2023.

of resources.³⁴ Private enforcement remains the only way for private parties to stop the prohibited behaviours of gatekeepers without relying on the Commission’s goodwill in attending to their complaints.

Moreover, the DMA’s public enforcement instruments do not directly foresee any instrument to compensate business or end users for DMA violations. In theory, it would be possible for gatekeepers to voluntarily offer commitments to compensate affected business and end users and for the Commission to make them binding on the gatekeeper under Article 25(1) DMA.³⁵ Real compensation can, thus, also only be granted through means of private enforcement, either through stand-alone actions without a Commission decision supporting them or via follow-on actions after a Commission public enforcement action under the DMA.³⁶

2. Effective Enforcement of DMA Provisions Through Private Actions

Private parties might hold an important position in enforcing the DMA and, thus, fostering its effective enforcement and deterrent effect. As known from the public and private enforcement dichotomy of EU competition law,³⁷ the Commission generally tends to have limited budgetary and human resources.³⁸ In advance of the first decisions to trigger the

³⁴ Digital Markets Act *supra* note 1, Article 27(2). See in detail, Kati Cseres and Laurens de Korte, *The role of third parties in public enforcement proceedings pursuant to the Digital Markets Act*, (forthcoming).

³⁵ See, for competition law, Jacques Bourgeois and Stéphanie Strievi, *EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag*. 33 WOR. COMP 241, 246-250 (2010); Ariel Ezrachi & Maria Ioannidou, *Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation*. 3 JECLAP 536 (2012). See, for example on the Polish experience, Anna Piszcz, *Attempt of classification of the publicisation of civil matters based on recent examples from Poland*. 3 BRATISLAVA L. REV. 103, 108 (2019). For other ways on how to involve competition authorities in compensation, Lena Hornkohl, *Public Compensation for Private Harm: Fair Funds for Consumer Competition Law Redress*, (forthcoming) WOR. COMP.

³⁶ See, from competition law, Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, para. 26; Joined cases C-295/04 to C-298/04 *Manfredi and Others* ECLI:EU:C:2006:461, para. 61.

³⁷ Generally, DANIEL KELEMEN, *Adversarial Legalism and Administrative Law in the European Union*. In: Susan Rose-Ackerman & Peter L. Lindseth (eds), *COMPARATIVE ADMINISTRATIVE LAW*, 606, 610 (Elgar Publishing 2010).

³⁸ When drafting the regulatory instrument, the European Parliament proposed that 180 officials would be necessary to tackle the enforcement actions of the DMA, but the number was later on reduced to 150 officials, see Luca Bertuzzi, *Commissioner hints at enforcement details as EU Parliament adopts DSA and DMA* (2021), <https://www.euractiv.com/section/digital/news/commissioner-hints-at-enforcement-details-as-eu-parliament-adopts-dsa-and-dma/>, accessed 31 October 2023); and Julie Masson, *EU aims to create distinct teams to enforce DMA* (2021), <https://globalcompetitionreview.com/article/eu-aims-create-distinct-teams-enforce-dma>, accessed 31 October 2023). Those numbers have also been re-worked, setting out the internal re-organisation of both DG Comp and DG Connect to create the body for enforcing the regulation instrument, estimated to require approximately 80 staff, see *EU to introduce new units and internal re-organisation for effective DMA enforcement* (2022), <https://dig.watch/updates/eu-to-introduce-new-units-and-internal-re-organisation-for-effective-dma-enforcement> accessed 31 October 2023).

Commission's enforcement, the Commission will have to rely on its priority-setting capacity to enforce the regulatory instrument.³⁹ In general, efficient resource allocation, i.e., ensuring that resources are being used in the most effective manner possible and providing the greatest added value, likely demands that the public authority cannot act in every single field where actions are needed under the DMA, but implies a focus on the most problematic cases.⁴⁰

The Commission has designated six gatekeepers for 22 core platform services (CPS) must monitor that these comply with the DMA.⁴¹ Articles 5, 6, and 7 DMA alone comprise 30 paragraphs of prohibitions and obligations. Furthermore, the Commission can designate more gatekeepers over time as soon as they overcome the quantitative thresholds set out in Article 3(2) DMA, update the DMA's provisions if market conditions shift (Article 12 DMA), monitor anti-circumvention (Article 13 DMA), conduct market investigations, and litigate court cases on the DMA vis-à-vis the gatekeepers. Therefore, it is likely that the Commission will be overburdened with all of its enforcement tasks.⁴²

National authorities (that may not necessarily be national competition authorities) cannot alone remedy the limited enforcement capacities of the Commission either.⁴³

³⁹ Generally in the context of competition law, Or Brook & Kati Cseres, *Policy Report: Priority Setting in EU and National Competition Law Enforcement* (2021), <http://dx.doi.org/10.2139/ssrn.3930189> accessed 12 November 2023; STEPHAN KREIFELS, *DIE PRIORITÄTENSATZUNG DER EUROPÄISCHEN KOMMISSION BEIM AUFGREIFEN KARTELLRECHTLICHER FÄLLE* (Nomos 2019).

⁴⁰ For competition law, Brook & Cseres *supra* note 39; Ben van Rompuy, *The European Commission's Handling of Non-Priority Antitrust Complaints: An Empirical Assessment*. 45 *WOR. COMP.* 265, 268-269 (2022).

⁴¹ The Commission has published the full designation decisions for Alphabet, Apple, ByteDance and Microsoft's CPSs, see Commission Decision of 5.9.2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6101; Commission Decision of 5.9.2023 designating Amazon as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6104 final; Commission Decision of 5.9.2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6100 finL; Commission Decision of 5.9.2023 designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6102 final; Commission Decision of 5.9.2023 designating Microsoft as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6101 final; Commission Decision of 5.9.2023 designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6105 final.

⁴² Podszun *supra* note 4, 254, 263.

⁴³ In competition law, the decentralised enforcement system of Regulation 1/2003 is underpinned by this idea, see Wouter Wils, *Regulation 1/2003: An Assessment After Twenty Years*. 46 *WOR. COMP.* 3, 7-10 (2023). Private enforcement of competition law remains a necessary and integral part of the system of competition law enforcement, Case C-882/19 *supra* note 24, para. 37.

Besides having limited resources themselves, and although a more extensive involvement of national competition authorities was discussed during the legislative process, the final DMA ultimately only leaves little room for their direct involvement by monitoring the regulatory instrument's enforcement at the national level.⁴⁴ Besides being involved in the Commission's investigatory measures,⁴⁵ under Article 38(7) DMA, national competition authorities are granted the residual competence to investigate breaches of the provisions set out in Articles 5, 6, and 7 DMA that happen and are detected at the national level. After that investigation, as per Article 38(7) DMA, the national authorities are compelled to send their findings to support the Commission's role as a sole enforcer to the DMA. The Commission may then, following its own discretion, open proceedings under Article 20 DMA for the gatekeepers' non-compliance with the regulatory framework. Thus, the involvement of national authorities might help the Commission in investigating DMA violations, but their ultimate enforcement remains with the Commission and is, therefore, subject to the Commission's limited resources and their priority-setting capacity.⁴⁶

⁴⁴ The preliminary drafts proposed by some Member States such as The Netherlands and Germany in incorporating their powers to monitor the compliance of the DMA at the national level respond to the question in the affirmative, by establishing far-reaching powers upon them to enforce the regulation. The Dutch proposal may be found in Dutch in *Uitvoeringswet digitale marktenverordening (Digital Markets Act)* (2023), <https://www.internetconsultatie.nl/uitvoeringswetdma/b1#sectie-waarkuntuopreageren>, accessed 31 August 2023; and the German proposal available in German (2023), https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6, accessed 31 August 2023. For an analysis in English of both proposals see Alba Ribera Martínez, *The NCAs Piggyback on to the European Commission: Hungary and The Netherlands Trigger the Race for Monitoring National DMA Compliance* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/03/27/the-ncas-piggyback-on-to-the-european-commission-hungary-and-the-netherlands-trigger-the-race-for-monitoring-national-dma-compliance/>, accessed 31 August 2023; and Alba Ribera Martínez, *Another Tool for the Bundeskartellamt's Box: Sections 32(f) and 32(g) of the Draft GWB on Sector Inquiries and the DMA's Implementation* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/04/11/another-tool-for-the-bundeskartellamts-box-sections-32f-and-32g-of-the-draft-gwb-on-sector-inquiries-and-the-dmas-implementation/>, accessed 31 August 2023. See generally, Christophe Carugati, *The Role of National Authorities in the Digital Markets Act*, Jean Monnet Network on EU Law Enforcement Working Paper Series No. 34/22 (2022), <https://jmn-eulen.nl/wp-content/uploads/sites/575/2022/05/WP-Series-No.-34-22-The-Role-of-National-Authorities-in-the-Digital-Markets-Act-Carugati.pdf>, accessed 12 November 2023. Aside from their mentioned necessary cooperation with the European Commission under the DMA, NCAs have ample leeway to still enforce Articles 101 and 102 TFEU within their jurisdictions, with an obligation to cooperate through the European Competition Network (ECN), as established by Digital Markets Act *supra* note 1, Articles 1(5), 1(6) and 38(1).

⁴⁵ See, for example, Digital Markets Act *supra* note 1, Article 23(3) DMA on the involvement of national competition authorities during inspections.

⁴⁶ The general rule will not apply to all of the Member States in an equal footing, insofar as when passing national legislation to accommodate the provisions on cooperation and collaboration between the Commission, national authorities and national courts, both The Netherlands and Germany have legislated *contra legem* by conferring upon their competition authorities additional vested powers to those initially conferred under the DMA, see Alba Ribera Martínez *supra* note 45.

Yet, the overall decentralised enforcement structure of the EU competition law system generally allows private enforcement,⁴⁷ vested upon the principle of the direct effect of Union law provisions,⁴⁸ to address the institutional shortcomings and resource limitations faced by the Commission.⁴⁹ Private parties have often been described as “private attorneys generals” by providing their knowledge of the day-to-day functioning of those markets where the Commission’s powers did not reach due to capacity constraints.⁵⁰ In competition law, for example, private parties tend to file various forms of private enforcement actions, such as injunctions, damages, restitution, and nullity of contract. Primarily, private parties enforce competition law to protect their individual interests, whereas public authorities enforce the law to pursue a public good. By protecting their individual interests, they also protect the competitive process itself and the overall functioning of markets, which is a public good.

The same holds true for the DMA’s enforcement. Through various means of private enforcement, private parties affected by the DMA’s violations want to protect their individual interests. At the same time, private enforcement of the DMA, in line with Article 1(1) DMA, must also ensure⁵¹ contestable and fair markets in the digital sector, as well as the broader objective of harmonising the regulatory responses of these markets.

In that sense, private enforcement of the DMA might fulfil a similar deterrent function as private enforcement of competition law. The DMA itself is inspired by the antitrust experience in setting out its substantive and procedural provisions, whereas it is not an instrument of competition law; it complements competition enforcement.⁵² Two main elements⁵³ set it apart from EU competition law in the strict sense (but not from

⁴⁷ Although the DMA, as discussed below at III.B.4, follows a centralised enforcement model.

⁴⁸ See on the question of direct effect of the DMA provisions below at Section III.A.

⁴⁹ Private enforcement of competition law, for example, has been remarked as an alternative mechanism to the exercise of discretion of competition authorities when setting their enforcement priorities, see, inter alia, Cseres *supra* note 5, 37; and in the context of complaints, see Kreifels *supra* note 39, 50.

⁵⁰ Fundamentally, Paul Craig, *Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law*. 12 OXF. J. LEG. STUD. 453, 455 (1992); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*. 9 J. LEG. STUD. 105-127 (1980); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*. 68 GEO. L. J. 1075-1102 (1980); Wouter P. J. Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*. 32 WOR. COMP. 3-26 (2009) Cseres *supra* note 5, 41.

⁵¹ Although these goals are defined in Digital Markets Act *supra* note 1, Recitals 32 and 33, the meaning behind their protection is not entirely clear, see Alba Ribera Martínez, *The DMA’s Ithaca: Contestable and Fair Markets*. 64 WOR. COMP. 1-30 (2023); and Giuseppe Colangelo, *In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets* (forthcoming). ANT. BULL.

⁵² See, inter alia, Natalia Moreno Belloso and Nicolas Petit, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*. 48 EUR. L. REV. (2023).

⁵³ See, inter alia, Filomena Chirico, *Digital Markets Act: A Regulatory Perspective*. 12 JECLAP 494 (2021).

competition policy).⁵⁴ As opposed to competition law, the per se DMA's rules generally have a higher degree of specificity.⁵⁵ On top of that, they are not streamlined horizontally throughout all the sectors of the economy, but the regulatory instrument cherry-picks the economic operators to which its provisions will apply through the setting out of the quantitative and qualitative thresholds under Article 3 DMA that serve to designate the captured economic operators as gatekeepers. Yet, these two elements do not lead to a different result regarding the deterrence function of private enforcement. Quite the contrary, the higher degree of specificity and its undertaking-specific application might make it more suitable for private enforcement, which builds upon the idea of direct effect.⁵⁶

Under the DMA's complementary nature to competition law, private enforcement can fill the missing gaps in the Commission's enforcement through the secondary goal of ensuring and reinforcing the regulatory framework's deterrent effect.⁵⁷ In private enforcement of competition law, the European Court of Justice (ECJ) has stressed this deterrence effect.⁵⁸ Translating this aim to the regulatory sphere of the DMA, compliance efforts will be reinforced and enhanced on the side of gatekeepers, insofar as they will be subject to scrutiny not only from the public authority but also from private parties, notably affected business and end users. Different decisions arising from the Commission's enforcement will be published in the format of non-confidential summaries so that the public can provide their comments and opinions on the Commission's actions.⁵⁹

⁵⁴ Friso Bostoen, *Understanding the Digital Markets Act*. 68 ANT. BULL. 265 (2023) describes that competition law must be a reference point to the DMA, but not a touchstone.

⁵⁵ Digital Markets Act *supra* note 1, Recital 5.

⁵⁶ On direct effect see below at Section III.A.

⁵⁷ Also mentioned by Podszun *supra* note 4, 255.

⁵⁸ Case C-163/21 *PACCAR and Others* ECLI:EU:C:2022:863, para. 56; Case C-312/21 *Tráficos Manuel Ferrer* ECLI:EU:C:2023:99, para. 42.

⁵⁹ The possibility is recognised directly in Digital Markets Act *supra* note 1, Recital 68 and Article 11(2) with relation to the mandatory compliance reports that the gatekeepers must issue and those summaries are to be updated, at least, annually; in Digital Markets Act *supra* note 1, Recital 75 in relation to those cases where the Commission were to impose remedies due to non-compliance of the regulatory instrument's obligations; in Digital Markets Act *supra* note 1, Article 8(6) with relation to the specification decisions that it will issue at its own initiative or as a response to the gatekeeper's requests; in Digital Markets Act *supra* note 1, Article 14(2) in those instances where the gatekeeper is to notify its concentrations to the Commission; in Digital Markets Act *supra* note 1, Article 15(3) the regulatory instrument also notes that the gatekeeper shall make publicly available an overview of the audited description relating to its profiling of consumers; and in Digital Markets Act *supra* note 1, Article 18(5) were the Commission to trigger a market investigation into systematic non-compliance. In Section 4 of the *Template for Reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act)*, (2023) https://digital-markets-act.ec.europa.eu/document/download/904debbdf-2eb3-469a-8bbc-e62e5e356fb1_en?filename=Article%2011%20DMA%20-%20Compliance%20Report%20Template%20Form.pdf, accessed 11 November 2023, the obligation set

Overall, with private actions in their various forms, the DMA itself has the potential to be more widely applied and enforced, as it leads to the enforcement of additional violations in the case of stand-alone actions or an increase in negative consequences for follow-on actions.⁶⁰ Regarding the latter, the ECJ repeatedly held that private enforcement participates “in the financial penalisation of anti-competitive conduct”.⁶¹ With this in mind, the ECJ recognises economic theory, showing that private enforcement in the form of damages actions particularly has a fine-increasing or replacing function,⁶² which can also be transferred to the DMA’s underlying rationale in conferring the right to private parties to claim for harms produced by the gatekeepers in breaching the regulatory instrument’s provisions.

Lastly, private enforcement might mitigate the pressure on the Commission to enforce the DMA. In a system that combines public and private enforcement, regulators are not compelled to lean towards over-enforcement because parties who have been harmed by illegal conduct still have the ability to challenge it.⁶³ At the same time, private actions address a possible regulatory capture under the DMA.⁶⁴ Capture theory generally sees the possibility of regulators eventually becoming influenced by the entities they regulate.⁶⁵ This is particularly true under the DMA, as the Commission heavily relies on the information provided by the relevant corporations to monitor the regulatory framework’s compliance, for example, for gatekeeper designation decisions, compliance reports, the granting of exemptions or suspensions of some of the provisions, or the auditing of their consumer profiling techniques. Private enforcement helps to mitigate the social costs of possible regulatory inaction by the Commission by removing the enforcement of the DMA from the sole control of captured regulators.⁶⁶ However, as some

out under Article 11 of the DMA is developed further and in Section 6 of the *Template Relating to the Audited Description of Consumer Profiling Techniques Pursuant to Article 15 of Regulation (EU) 2022/1925 (Digital Markets Act) (2023)*, https://digital-markets-act.ec.europa.eu/consultations/consultation-template-relating-reporting-consumer-profiling-techniques_en, accessed 28 August 2023. At the time of writing, the second template is at the stage of public consultation and has not yet been officially amended and issued thereof by the Commission.

⁶⁰ Podszun *supra* note 4, 263.

⁶¹ Case C-163/21 *supra* note 58, para. 56; Case C-312/21 *supra* note 58, para. 42.

⁶² See, Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann & Jannika Schad, *The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence*. 39 JLEO 27, 28 (2021).

⁶³ See, by analogy for competition law, Alan Devlin & Michael Jacobs, *Antitrust Error*. 52 WM. & MARY L. REV. 75 (2010).

⁶⁴ Johann Laux, Sandra Wachter and Brent Mittelstadt, *Taming The Few: Platform Regulation, Independent Audits, And The Risks Of Capture Created By The DMA And DSA*. 43 COMP. L SEC. REV. 1-12 (2021).

⁶⁵ See, for example, David Thaw, *Enlightened Regulatory Capture*. 89 WASH. L. REV. 329 (2014).

⁶⁶ See, by analogy for competition law, Andre Fiebig, *The Reality of U.S. Class Actions*. GRUR INT. 313, 315 (2016).

national enforcers have particularly emphasised recently, a lack of regulatory capture in enforcing the DMA must not necessarily translate into regulatory bias against the gatekeepers by default.⁶⁷

B. Mitigating the Challenges of Individual Private Enforcement: Collective Actions

Despite the impending reasons supporting the need for a strong arm of private enforcement reinforcing the DMA's compliance, the path towards concretising it in practice will not be straightforward.

1. Lack of a Regulatory Framework for Private Enforcement in the DMA

On the EU level, the DMA does not offer much regulatory guidance for private enforcement when a gatekeeper commits an infringement. The provision available in the DMA in the context of private enforcement is Article 39 DMA, which warrants cooperation with national courts. Within this provision, the regulatory instrument translates some of the fundamental private enforcement provisions contained in Regulation 1/2003⁶⁸ to the content of the DMA.⁶⁹

Even though Article 39 DMA indicates that the regulatory instrument is, in principle, open for private enforcement,⁷⁰ the DMA itself does not foresee any procedural venue for it.⁷¹ It largely leaves private enforcement to the procedural autonomy of Member States.⁷² The DMA's complementarity with EU competition law pre-empts that

⁶⁷ Martijn Snoop, Follow-up to Panel 1: forward-looking remarks and insights (6 March 2023, DMA workshop – The DMA and app store related provisions, Brussels).

⁶⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003) (2003) OJ L1/1.

⁶⁹ As suggested by Alexandre de Streel, Richard Feasey, Jan Krämer & Giorgio Monti, *Making The Digital Markets Act More Resilient And Effective*. Centre on Regulation in Europe, Recommendations Paper (2021), 77, <https://cerre.eu/publications/european-parliament-digital-markets-act-dma-resilient-effective/>, accessed 13 November 2023.

⁷⁰ Ranjana Andrea Achleitner, *Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden*. NZKart 359 (2022); Lea Katharina Kumkar, *Der Digital Markets Act nach dem Trilog Verfahren*. RD, 347, 353 (2022); Gerhard Klumpe, „Think Twice“ – Die private Rechtsdurchsetzung des DMA nach dem Referentenentwurf zum Wettbewerbsdurchsetzungsgesetz. In Alexander Kirk, Philipp Offergeldm, Tristan Rohner (eds.) KARTELLRECHT IN DER ZEITENWENDE, 131, 134 (Nomos 2023).

⁷¹ Becker *supra* note 4, 403, 405; Drexl, Conde Gallego, González Otero, Herrmann, Hoffmann, Johannsen Kestler & Matarazzi *supra* note 11, 29.

⁷² Arguing for more extensive rules in the DMA on private enforcement, Podszun, *supra* note 4, 254, 265.

it is not, substantively, an instrument of competition law. The 2014 Damages Directive,⁷³ by virtue of its explicit scope in Article 1(1), only covers competition law violations, *i.e.*, an infringement of Articles 101 or 102 TFEU, or of national competition law rules.⁷⁴ For other means of private enforcement outside of damages actions, no uniform EU substantive or procedural law framework exists (for violations of competition law and the DMA). Those actions will fall under the procedural autonomy of the Member States subject to the principles of equivalence and effectiveness.⁷⁵

The lack of a procedural framework for private enforcement in the DMA can, on the other hand, increase the usefulness of collective actions and make the DMA prone to collective enforcement. Due to the novelty of the DMA's institutional design and the general uncertainty and complexity surrounding the interpretation of its concepts, private parties might rather want to join forces and collectively file for actions against the gatekeepers when an infringement of a provision causing harm may arise.

Articles 42 and 52 DMA aim at mitigating this lack of a procedural framework by including the DMA into the scope of the RAD. Given that the DMA largely codifies the previous case practice of Union and Member State competition law, this seems surprising: competition law does not fall in the scope of the RAD⁷⁶ and the Damages Directive does not include rules on collective actions.⁷⁷ The discussion on the general lack of collective actions for competition law violations can be mimicked for its application to the DMA.

⁷³ 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 (Damages Directive) (2014) OJ L349/1.

⁷⁴ Damages Directive *supra* note 73, Article 2(1), Drexl, Conde Gallego, González Otero, Herrmann, Hoffmann, Johannsen Kestler & Matarazzi *supra* note 11, 864, 874. See on the German solution of gold-plating the Damages Directive below at Section III.B.3.iii.

⁷⁵ See, per analogy, Case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204, para. 27.

⁷⁶ Critically, Lena Hornkohl, *Up and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers - Comments on Key Aspects*. 10 J. EUR. CONS. MKT L. 189, 191 (2021); see below at Section III.B.3.a.i. and iii on Netherlands and Germany gold-plating the RAD in that regard.

⁷⁷ In the Green Paper for the Damages Directive (Green Paper Damages actions for breach of the EC antitrust rules (2005) COM(2005) 672 final, the Commission had underlined the need for effective collective actions. Collective actions never made it into the final Damages Directive, see Christopher Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?* 37 J CONSUM POLICY, 67, 72 (2014). Instead, the Commission wanted to have a more comprehensive approach beyond competition law and first only introduced a non-binding Recommendation on collective redress (European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013) OJ L201/60, which remains the only instrument on EU level for collective actions in competition law, see Dimitrios-Panagiotis Tzakas, *Collective Redress in the Field of EU Competition Law: The Need for an EU Remedy and the Impact of the Recent Commission Recommendation* 41 LEG. ISS. ECON INT. 225 (2014).

The lack of binding EU rules on collective actions for competition law violations has often been criticised, especially in the case of consumer and SME actions.

2. Rational Disinterest, Procedural Economies, and the David vs. Goliath Problem

Collective actions are an adequate instrument to align, from the perspective of a cost-benefit or risk analysis, the incentives of a large number of injured parties, business users and end users, each sustaining a relatively small loss, i.e., particularly consumers and SMEs, so that they can retrieve full compensation for the harm suffered.⁷⁸ Those classes composed of small and fragmented claims by consumers individually lack the financial or technical resources to contest an economic operator's anti-competitive conduct before the national courts of the Member States.⁷⁹

Similar to private enforcement of competition law, consumers and SMEs faced with DMA violations tend to fear the costs and duration of private enforcement actions and, therefore, refrain from individual litigation.⁸⁰ For competition law violations, empirical evidence has already shown that business-to-business litigation concerning large volumes of damages has been on the rise, but consumers do not have access to justice. Most importantly, they have never yet been compensated at any national court in any meaningful number.⁸¹

Without adequate collective enforcement mechanisms tailored to the regulatory instrument's capacity and scope, a similar experience is expected under the DMA. Via collective actions, those individuals may gain access to sufficient expertise needed before the courts, both from a technical, legal, and economic perspective, to construe a case against the gatekeeper's defence. Individuals are more likely to overcome their rational apathy or rational disinterest to file actions, insofar as a higher number of claimants

⁷⁸ See, generally, Stöhr *supra* note 12, 1606-1624.

⁷⁹ See, inter alia, Case C-352/13 *supra* note 13, para. 29; Tzakas *supra* note 77, 225-242; Miguel Sousa Ferro, *Consumer Antitrust Private Enforcement in Europe*, 13 JECLAP, 578 (2022); Žygimantas Juška, *The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation*. IIC, 63, 69 (2018); Stöhr *supra* note 12, 1606, 1608-1609; Franziska Weber, *A Chain Reaction or the Necessity of Collective Actions for Consumers in Cartel Cases*. 25 MAAST. J. EU. COM. L. 208-230 (2018); Fiebig *supra* note 66, 313– 315; RICHARD WHISH & DAVID BAILEY, *Private enforcement of competition law: its role and development in the EU*. In: Barry Rodger, Miguel Sousa Ferro & Francisco Marcos (eds.) RESEARCH HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU. 2, 23 (Edward Elgar 2023).

⁸⁰ See, Case C-352/13 *supra* note 13, para. 29.

⁸¹ Sousa Ferro *supra* note 79, 578.

arguing jointly against the gatekeeper’s potential infringement of the DMA entails that the costs of litigation are shared between more individuals. Consequently, they are more prone to seek redress even if their gain will be minimal and even if individual aspects and defences have less room in collective actions.⁸²

Furthermore, what is true for collective actions in general also argues in favour of collective actions in the context of the DMA: mass litigation can lead to procedural economies for both the courts and all the parties involved.⁸³ Collective actions consolidate individual claims that share common legal and factual issues, allowing them to be resolved in a single court, thus preventing multiple lawsuits from being filed and simplifying the litigation process. By centralising the adjudication of these claims, collective actions achieve both cost savings and avoids potentially conflicting outcomes.

Next to the novelty and complexity of the DMA that make it prone in general to collective actions, including actions from a smaller group of larger business users, collective actions might overcome the asymmetry of individual private actions against gatekeepers under the DMA.⁸⁴ Undertakings that fulfil the digital gatekeeper status under the DMA can certainly be described as digital giants and represent unavoidable gateways in the digital economy.⁸⁵

The qualitative criteria and quantitative thresholds of Article 3 DMA placed for designating these undertakings under gatekeeper status demonstrate their power as defendants in terms of their financial background, expertise, and experience. Often, they have already been faced with a multitude of public enforcement cases⁸⁶ but also some private litigation⁸⁷ under the competition law framework, with conduct that might also constitute DMA violations under the new framework.

Compared to these gatekeepers, many individuals affected by a DMA violation have less power, bargaining power and experience. Thus, many individual private actions

⁸² See, generally, Preston R. McAfee, Hugo M. Mialon & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*. 92 J. PUB. EC. 1863-1875 (2008); Roger Van den Bergh & Louis Visscher, *The Preventive Function of Collective Actions for Damages in Consumer Law*. 1 ERASM. L. REV. 5-30 (2008).

⁸³ See, generally, Beate Gsell, *Europäische Verbandsklagen zum Schutz kollektiver Verbraucherinteressen – Königs- oder Holzweg?*, BKR 521, 529 (2021).

⁸⁴ See, generally, Fiebig *supra* note 66, 313, 314; Gsell *supra* note 83, 521, 529.

⁸⁵ The DMA defines gatekeepers in this sense in Article 3(1)(b), also in Bert Martens, *An economic perspective on data and platform market power*. JRC Digital Economy Working Paper (2020), <https://joint-research-centre.ec.europa.eu/system/files/2021-02/jrc122896.pdf>, accessed 31 October 2023.

⁸⁶ See for an overview of such public enforcement cases, Bostoen *supra* note 54, 265, 279-286.

⁸⁷ See, for example, Regional Court Amsterdam, 31 May 2023, Case C/13/722072 / HA ZA 22-674.

under the DMA are characterised by a fundamental asymmetry regarding socioeconomic power, expertise, and vulnerability. This will not always be the case, for example, when another large digital platform wants to enforce the prohibition of most-favoured nation clauses in Article 5(3) DMA via private actions to (re-)establish inter-platform competition.⁸⁸ However, it is quite conceivable that there will be cases under the DMA where even smaller groups of larger business users are also exposed to such an asymmetry. Consumers and SMEs will regularly face such an asymmetry, and at this point, the collective actions of claimants are particularly salient.

3. Large Classes and DMA Infringements

In the context of a digital economy, the risk that a large number of individuals will be harmed by the same or similar unlawful practice has increased. By virtue of its prohibitions and obligations, DMA enforcement is particularly prone to collective action. As mentioned above, Articles 5, 6, and 7 DMA directly specify their beneficiaries, whether business users or end users. Business and end users are explicitly defined in Articles 2(20) and 2(21) DMA. A business user is “any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users”. An end user is “any natural or legal person using core platform services other than as a business user”. Thus, the notion of end users is defined by the exclusion of those users that do not act in their commercial capacity with relation to the gatekeepers.

However, if one looks closer at the designation process and how the Commission has designated its first gatekeepers as addressees of the regulation, business users and end users are not necessarily defined on the basis of the same parameters for each and every one of the obligations set out in the regulatory instrument. The DMA does not apply a monolithic definition to business users and end users throughout its provisions because not every provision will apply directly to every gatekeeper. The gatekeepers will have to comply with a common ground of provisions that are not CPS-specific, but a range of the obligations imposed under Articles 5, 6, and 7 DMA mandate prescriptions and proscriptions that only apply to particular CPSs. For example, Alphabet has been

⁸⁸ See on inter-platform competition, Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*. 12 JECLAP 529, 536 (2021).

designated as a gatekeeper with reference to eight different CPSs: one online search engine (Google Search), one video-sharing platform service (YouTube), one operating system (Android), one web browser (Google Chrome), three online intermediation services (Google Play, Google Shopping, and Google Maps) and one online advertising service⁸⁹, whereas Amazon has been designated as a gatekeeper only with reference to one online intermediation service (Amazon Marketplace) and one online advertising service (Amazon’s advertising services).⁹⁰ In a similar vein, ByteDance – the parent company of TikTok – has only been designated as a gatekeeper for its online social networking service (TikTok).⁹¹ On top of the already asymmetric obligations that the DMA imposes on its addressees,⁹² an additional layer of complexity is added to the mix insofar as each of them will have to comply with the obligations regarding different services (and not with reference to their whole ecosystems).⁹³

Therefore, this means that a uniform definition of business users and end users cannot be applied throughout the DMA in metering its compliance. Instead, each provision should be separated in terms of whether it is CPS-specific or not, and depending on the answer, business and end users will be directly legitimised to direct claims before the national courts via individual or collective actions.

Breaches of these obligations typically affect a larger class of business or end users, either because one violation of one DMA obligation might harm multiple parties or multiple violations of one obligation might harm multiple parties, making a

⁸⁹ Commission decision of 5.9.2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, *supra* note 41, paras. 47, 69 87, 105, 124, 174, 187 and 244.

⁹⁰ At the moment of writing, the full designation decision of Amazon’s CPSs has not yet been published, see Summary of Commission Decision of 5 September 2023 relating to a decision pursuant to Article 3 of Regulation (EU) No 2022/1925 *supra* note 41, para. 13.

⁹¹ Commission decision of 5.9.2023 designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector *supra* note 41, para. 163.

⁹² Rupperecht Podszun, *From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act*. 17 ECO. 1-13 (2023).

⁹³ This element has been praised by some, see Alexandre de Streel, Marc Bourreau, Sally Broughton Micova, Richard Feasey, Amelia Fletcher, Jan Krämer, Giorgio Monti & Martin Peitz, *Effective and Proportionate Implementation of the DMA’ Centre on Regulation in Europe*. Centre on Regulation in Europe (2023), https://cerre.eu/wp-content/uploads/2023/01/DMA_Book-1.pdf, accessed 8 November 2023; Alexandre de Streel, Jacques Crémer, Paul Heidhues, Amelia Fletcher, Gene Kimmelman, Giorgio Monti, Rupperecht Podszun, Monika Schnitzer & Fiona M. Scott Morton, *The Effective Use of Economics in the EU Digital Markets Act*. Yale Tobin Center for Economic Policy Discussion Paper No. 8 (2023), <https://dx.doi.org/10.2139/ssrn.4526050>, accessed 8 November 2023. Others, however, disagree, see Carmelo Cennamo and Juan Santaló, *Value in Digital Platforms: The Choice of Tradeoffs in the Digital Markets Act*. (2022), <https://dx.doi.org/10.2139/ssrn.4152113>, accessed 8 November 2023

combination of individual claims in one single claim sensible. Also, the circumvention of these rules might affect a larger class of individuals.⁹⁴ Many of the provisions in the DMA define the relationship between gatekeepers and business users.⁹⁵ Article 5(4) DMA, for example, contains a prohibition on obstructing customer communication (anti-steering) of gatekeepers vis-à-vis business users. Such anti-steering clauses are typically included in standard contract clauses that are technically set up for the whole platform altogether.⁹⁶ Consequently, their corresponding violation of Article 5(4) DMA affects all or a large class of the business users of a gatekeeper’s core platform service. Alternatively, for end users, the provisions of the DMA defining the relationship between gatekeepers and business users protect end users as a by-product.⁹⁷ Furthermore, several provisions directly concern the gatekeeper-end-user relationship.⁹⁸ In these cases, often a large group of end users will be affected by a violation. Given that the DMA’s substantive provisions contained under Articles 5 through 7 DMA do not always apply in isolation to business users and end users, Table 1 below establishes the direct (and indirect) repercussion that the provisions will have on each type of user and signals those provisions that are particularly susceptible to affecting larger classes, either due to a large class of affected parties or due to the presence of multiple violations caused by only one conduct.

Table 1. Analysis of the DMA's provisions based on impact on business users and end users.

Provision	Type of user	Potential for violations surrounding larger classes	CPS
Article 5(2): prohibition to process, cross-use personal data across services.	Business users directly – level the playing field for data flows. End users indirectly – via the protection/lack of exploitation of their personal data.	Multiple violations suffered by both end users and/or business users – secondary use of personal data in breach of the provision projects a breach of all of the manifestations of the provision (and potentially, of the GDPR). Multiple parties (end users) – combination of personal data does not take place individually but in great troves of personal and non-personal data.	Not CPS-specific – wider in scope.

⁹⁴ See on circumvention, Digital Markets Act *supra* note 1, Article 13.

⁹⁵ See, critically, Rupperecht Podszun, *The Digital Markets Act: What’s in it for Consumers?* EUCML 1, 3 (2022); Anna Moskal, *Digital Markets Act (DMA): A Consumer Protection Perspective*. 7 EUROP. PAP. 1113, 1117 (2022).

⁹⁶ Friso Bostoën, *The ACM’s Apple decision: to boldly go where no enforcer has gone before*. 10 J. ANT. ENF. 583-595 (2022); Christian Rusche and Jeanne Mouton, *The anti-steering provision of Article 5(4) of the DMA: A law and economics assessment on the business model of gatekeepers and business users*. EUROP. J. LAW. ECO. 1-31 (2023).

⁹⁷ Podszun *supra* note 95, 1, 3.

⁹⁸ For an overview, see Podszun, *supra* note 95, 1, 3; and Moskal, *supra* note 95 1113, 1117.

		Individual end users via combined claim – not consenting effectively or freely under the premises of Articles 4 and 7 to exempt the prohibition.	
Article 5(3): prohibition to impose narrow and wide MFNs	<u>Business users directly</u> – can provide their offerings without price/offer constraints, regardless of the place of the offering (proprietary or third-party). <i>End users indirectly</i> – impose potential transaction costs through provision, ensuring free competition.	Multiple parties of business users catering – with at least one item listed on the gatekeepers’ platforms.	Specific to online intermediation services and potentially regarding online advertising services: 1. Business users: those with at least one item listed in the online intermediation service. 2. End users: engaging with the online intermediation service at least once a month (via log-in, query, click, or scrolling).
Article 5(4): anti-steering provisions relating to communication and promotion of offers.	<u>Business users directly</u> – can refer users to better offers through their proprietary means. <i>End users indirectly</i> – ensuring of free competition, by choosing venue where they contract with the business user.	Multiple parties of business users cater for different CPS – when the gatekeeper uses the same type of clause in all of its contracts (they are normally included in standard contract clauses).	Not CPS-specific – wider in scope (other types of channels not included under the CPS are contemplated).
Article 5(5): anti-steering provisions relating to services, content, subscriptions, features, or items.	<u>End users directly</u> – enabling cross-platform access to different types of content.	Multiple violations – breach taking place with relation to different manifestations of the prohibition, be that with respect to services, content, subscriptions, features, or items (even if they are not CPS). Multiple parties of business users catering for different CPS – when the gatekeeper uses the same type of clause in all of its contracts (they are normally included in standard contract clauses).	Not CPS-specific.
Article 5(6): enabling raising non-compliance issues.	<u>Business users directly</u> – mechanism for internal complaints directed at the gatekeeper. <u>End users directly</u> – mechanism for internal complaints directed at the gatekeeper.	Multiple violations and parties – impeding access to venues across particular geographical areas or related to particular products.	Not CPS-specific.
Article 5(7): prohibition of alternative payment services, sign-in services and default web browser.	<u>Business users directly</u> – cater for their services with sufficient choice (through the provision of alternative methods of payment, if they wish). <i>End users indirectly</i> – ensuring of free choice and are not forced to use services that have not been requested.	Multiple violations (business users) – when breaching identification services (via email accounts, for example, or accounts related to the gatekeeper’s services) related risk of infringement under Article 5(2) relating to the combining of personal data. Multiple parties – end users forced to use the proprietary services across business user’s services or authorisation method to implement them that makes it more burdensome.	Not CPS-specific.

<p>Article 5(8): prohibition of conditioning use, access, or sign-up to a service with a subscription</p>	<p><i>Business users indirectly</i> – captured set of end users, hindering multi-homing opportunities to a greater extent. <i>End users directly</i> – no need to subscribe to a service that is unrequested (unfair trading conditions).</p>	<p>Multiple parties – business users belonging to the same CPS as the gatekeeper due to a ‘compromised’ user base. Multiple violations (end users) – subscription entails agreeing to terms and conditions (to processing of personal data) and others, in conjunction with a breach of Article 5(2) and indirectly of 5(7).</p>	<p>Not CPS-specific.</p>
<p>Article 5(9): sharing with advertisers information on price and fees paid, remuneration received by publishers and metrics of calculation.</p>	<p><i>Business users indirectly</i> – transparency of metrics that determine the price and fee of the ad tech service (only directed at advertisers).</p>	<p>Multiple violations – breach of transparency obligations regarding Articles 5(9) and 5(10), where the gatekeeper does not provide any information.</p>	<p>Specific to online advertising services: business users 1. For sale of advertising space, regarding unique advertisers with at least one ad impression. 2. For advertising intermediation services, those who interacted via or were served by the ad intermediation service during the year.</p>
<p>Article 5(10): sharing with publisher information on price and fees paid, price paid by advertisers, and metrics of calculation.</p>	<p><i>Business users indirectly</i> – transparency of metrics that determine the price and fee of ad tech services (only directed at publishers).</p>	<p>Multiple violations – breach of transparency obligations regarding Articles 5(9) and 5(10), where the gatekeeper does not provide any information.</p>	<p>Specific to online advertising services: business users 1. For sale of advertising space, regarding publishers with at least one ad impression. 2. For advertising intermediation services, those who interacted via or were served by the ad intermediation service during the year</p>
<p>Article 6(2): data siloing of data generated by business users’ use of CPSs.</p>	<p><i>Business users indirectly</i> – avoid leveraging generated data.</p>	<p>Multiple violations – breach alongside Article 5(2) in case the gatekeeper continues combining business users’ data on other services and applies it transversally + Article 5(7) when sign-in services are not catered for, avoiding the siloing of data.</p>	<p>Not CPS-specific.</p>
<p>Article 6(3): un-installation and prompt default selection (tying practices)</p>	<p><i>Business users directly</i> – not captured base of users via gatekeeper OS. <i>End users indirectly</i> – increased choice of software applications, formerly restricted because gatekeepers must not steer to proprietary services.</p>	<p>Multiple violations (business users) – alongside the prohibition around Article 5(7) regarding default web browser; first step is to avoid tying defaults and, after that, prohibiting that only the gatekeeper’s proprietary is available. Multiple parties – business users catering for different CPSs affected by the same infringement of default settings.</p>	<p>Specific to online search engines, video-sharing platform services, NIICs, virtual assistants, web browsers, and cloud computing services → applicable definitions in Annex E of the DMA for each one of them.</p>
<p>Article 6(4): allowing the installation of third-party software applications or app stores interoperating with OS.</p>	<p><i>Business users directly</i> – developers of third-party software applications and app stores not prohibited, by default, from operating in closed ecosystems.</p>	<p>Multiple violations – alongside Article 6(2), when users are allowed to download third-party apps and app stores, not use data on third parties to gain a curb ahead of competitors at the ecosystem level + Article 5(3) when third-party software applications can be priced at a lower price in a third-party app store while being available on the gatekeeper app store, too + Article 5(4) on anti-steering provisions,</p>	<p>Specific to operating systems: 1. Business users: developers who published, updated, or offered at least one software application or software programme using programming language or any software development tools of, or running</p>

	<i>End users indirectly</i> – increased choice of third-party apps and app stores on the basis of parameters of competition.	–when third-party apps and app stores wish to advertise special offerings. Multiple parties (business users) – developers of across formerly closed ecosystems (e.g., Apple).	in any way on, the operating system during the year. 2. End users: who utilised the OS, which has been activated, updated, or used at least once in the month.
Article 6(5): prohibition of self-preferencing in ranking on CPSs and application of transparent, fair, and non-discriminatory conditions.	Business users directly – ranked on their own merits on gatekeepers’ CPSs. <i>End users indirectly</i> – purchasing decisions based on competitive rationale and not on the gatekeeper’s proprietary services.	Multiple violations (business users) – alongside Article 6(2) in using data about the business user’s services to disadvantage the ranking. Multiple parties – business users of different industries may be disadvantaged across a single CPS of the gatekeeper.	Specific to online search engines and online intermediation services: 1. Business users: business websites indexed by or part of the index of the online search engine during the year/who had at least one item listed in the online intermediation service during the whole year or concluded transactions enabled by the online intermediation service during the year. 2. End users: who engaged with online search engines at least once in the month/who engaged with online intermediation services at least once in the month.
Article 6(6): no restriction on switching regarding secondary services.	Business users directly – not captured base of users via secondary services of the gatekeeper. <i>End users indirectly</i> – switching costs decrease and multi-homing capacity expands.	Multiple violations (business users) – alongside Articles 6(3) or 6(4) to not raise technical barriers to switching, that may result, effectively in prompting the default selection (if it is too burdensome for the end user) or hindering the un-installation of proprietary gatekeeper services. Multiple parties – business users catering for the same type of software applications and services via the gatekeeper’s CPS.	Specific to online search engines, video-sharing platform services, NIICs, virtual assistants, web browsers, and cloud computing services → applicable definitions in Annex E of the DMA for each one of them.
Article 6(7): interoperability with hardware and software features accessed or controlled via OS or virtual assistant.	Business users directly – access to the functionality of the gatekeeper without friction on the side of the user, which hinders switching to an alternative service. <i>End users indirectly</i> – switching costs decrease.	Multiple violations (business users) – alongside of Article 6(5) when the degree of interoperability may be used to rank an alternative service lower on the gatekeeper’s CPS + Article 6(2) storing third-party data that is generated on proprietary hardware. Multiple parties – business users where functionality is hindered in enabling interoperability for particular hardware/software features that apply across industries.	Specific to virtual assistants and cloud computing service: 1. Business users: unique developers who offered at least one virtual assistant software application or functionality to make an existing software application accessible through virtual assistant during the year/who provided any cloud computing services hosted in the cloud infrastructure of the relevant provider of cloud computing. 2. End users: who engaged with the virtual assistant in any way at least once in the month/who engaged with cloud computing services from relevant providers at least once in the month in return for any type of remuneration.
Article 6(8): provision to	Business users directly – addressed to advertisers	Multiple violations (business users) – breach of no provision of information necessary (including	Specific to online advertising services

<p>access performance measuring tools and data necessary to carry out verification.</p>	<p>and publishers, measure, and tailor their advertising directly without the need for additional mandatory gatekeeper CPS. <i>End users indirectly</i> – ensuring free competition in the ad tech sector, especially in intermediary positions.</p>	<p>pricing and fees charged) related to measuring performance, whether disadvantaged when gatekeeper acts as intermediary in the ad tech sector with Articles 5(9) and 5(10). Multiple parties – publishers and advertisers being hindered from the functionality to the same extent.</p>	<p>1. Business users: for proprietary sale of advertising space - regarding unique advertisers with at least one ad impression and for advertising intermediation services – those who interacted via or were served by the ad intermediation service during the year. 2. End users: for proprietary sale of advertising space – who were exposed to an ad impression at least once in the month and for advertising intermediation services – who were exposed to an ad impression that triggered the ad intermediation service at least once in the month.</p>
<p>Article 6(9): provision to end users with enhanced data portability right.</p>	<p><i>Business users indirectly</i> – capacity to monetise user data in alternative business models based on ported data. <i>End users directly</i> – exercise their data portability right.</p>	<p>Multiple violations (end users) – metric for assessing compliance with Article 5(2) in determining whether data is combined and cross-used across different services and to report via Article 5(3). Multiple parties – end users of the CPSs of the gatekeeper with a right to data portability (even if they do not effectively exercise it or large troves of data are not available through the porting of data).</p>	<p>Not CPS-specific.</p>
<p>Article 6(10): provide business users access to self-generated data (with limitations to personal data in use).</p>	<p><i>Business users directly</i> – insight into their own performance within the CPS. <i>End users indirectly</i> – protected with regards to access to personal data from a business user perspective.</p>	<p>Multiple violations – metric to assess whether Article 6(2) is complied with – and reporting it via Article 5(3) for the case of business users + interplay with the effective consent clause contained under Article 5(2) for the case of end users.</p>	<p>Not CPS-specific.</p>
<p>Article 6(11): provide FRAND access to search data for third-party online search engines.</p>	<p><i>Business users directly</i> – addressed to third-party online search engines, in order to obtain data for improving their own product vis-à-vis the gatekeepers. <i>End users indirectly</i> – ensuring of free competition.</p>	<p>Multiple violations – metric to assess whether Article 6(5) is complied with. Multiple parties – third-party online search engine providers alongside business users of CPS in competition with gatekeeper CPS to rank their services.</p>	<p>Specific to online search engines: 1. Business users: those with business websites indexed by or part of the index of the online search engine during the year. 2. End users: those who engaged with the online search engine at least once in the month.</p>
<p>Article 6(12): provide FRAND access to app stores, search, and social networking service.</p>	<p><i>Business users directly</i> – access to app stores, online search engines, and social networking, not based on discriminatory reasons. <i>End users indirectly</i> – ensuring free competition.</p>	<p>Multiple violations (business users) – alongside Article 6(11) when third-party online search engines are concerned + breach of Article 6(5) when not provided FRAND access and rationale used in ranking + Article 5(3) when alternative dispute settlement mechanisms do not hinder directing complaints to the gatekeeper.</p>	<p>Specific to online search engines, operating systems, and online social networking services → applicable definitions in Annex E of the DMA for each one of them.</p>

		Multiple parties – business users operating in app stores, online search engines and social networking suffering the same discriminatory treatment.	
Article 6(13): proportionate CPS termination terms.	<u>Business users directly</u> – dependent on the provision of CPS are not completely discontinued from catering the service and can search for alternatives before going out of business.	Multiple parties – all of the business users belonging to different industries are dependent on the same CPS.	Not CPS-specific.
Article 7: interoperability of NIICS.	<u>Business users directly</u> – no technical barriers to interoperating with the NIICS gatekeeper. <u>End users directly</u> – no need to switch from one service to another for interoperability purposes.	Multiple parties – alternative NIICS that are not provided the opportunity to interoperate with CPSs.	Specific to NIICSs: 1. Business users: those who used a business account or otherwise initiated or participated in any way in a communication through the NIICSs to communicate directly with an end user at least once during the year. 2. End users: those who initiated or participated in any way in a communication through the NIICS at least once in the month.

As Table 1 shows, each one of the provisions set out in Articles 5 to 7 DMA affects business users and end users either directly or indirectly. Most of the provisions are directed at improving the competitive conditions in which business users operate in those settings where they compete directly against the gatekeeper’s CPSs, whereas a few of the provisions (such as Articles 5(6) and 6(9) DMA) also protect end users directly by enhancing the exercise and protection of the trove of rights that they have already recognised via EU data protection regulation.

a. DMA Obligations Typically Affecting a Large Class of Business Users

The diverse impact on business users and end users, as shown above in Table 1, makes sense insofar as the procedural design of the regulatory instrument is built upon the nuclear notion of supporting business users. In fact, one of the elements that characterises gatekeepers is that they are gateways catering for CPSs for business users that reach end users.⁹⁹ End users are, hence, relegated to a secondary role starting with the designation process that converts economic operators into the addressees of the regulation.

⁹⁹ Digital Markets Act *supra* note 1, Article 3(1)(b) DMA.

Most of the provisions established in the regulatory instrument are driven by the interests of business users in trying to address contestability issues by lowering barriers to access to the neighbouring markets of the gatekeepers. For instance, the set of provisions contained under Articles 6(3), 6(4), 6(6), 6(7), 6(11) and 6(12) DMA are particularly relevant amid the discussion around collective actions for business users, insofar as they directly fall into the types of scenarios where the gatekeepers' compliance with them may well automatically entail the potential entrance of other competitors into the concerned markets by the CPSs. Thus, there is not only scope for the existing business users to claim for the losses they may have incurred, but there is also scope for those start-ups and nascent competitors that are progressively being introduced into the market to claim for the breach of any (or all) of the provisions above due to the fact that their application pre-existed to their introduction into the market.

However, these “alternative” and nascent competitors may also be embodied by the same gatekeepers entering markets regarding those CPSs that have not been directly designated under Article 3 DMA. For example, the gatekeeper's enabling of the installation of third-party software applications and app stores interoperating with their operating system under Article 6(4) DMA is gaining traction within the designated gatekeepers, such as Meta and Microsoft, which have no application stores within their trove of CPSs designated by the Commission¹⁰⁰. Therefore, collective actions also open the door for alliances of businesses (which may be led and integrated by some of the gatekeepers) to claim for breaches of compliance with the DMA, which might, in turn, advantage the less popular CPSs catered by the same gatekeepers.

Furthermore, Table 1 clearly shows that there is a wide gap for collective actions born into the DMA, since some provisions are intricately linked to others as pre-requisites to their actual exercise with regards to their impact on the activities of business users. For example, one cannot expect that Article 6(12) DMA imposing the provision of FRAND access conditions to the gatekeeper's app stores, search engines, and social networking services will be complied with in isolation if the undertaking does not demonstrate, first, that it does not self-preference its proprietary services when ranking them among those

¹⁰⁰ Alex Heath, *Meta is planning to let people in the EU download apps through Facebook* (2023), <https://www.theverge.com/2023/6/29/23778928/meta-eu-facebook-plans-app-install-android-ads>, accessed 1 November 2023; Tom Warren, *Microsoft launches new web app store for Windows* (2023), <https://www.theverge.com/2023/10/6/23906082/microsoft-windows-app-store-web-version-launch>, accessed 1 November 2023.

of its software applications under Article 6(5) DMA. In the case of search engines, compliance with Article 6(11) DMA is also intrinsically bound with Article 6(12) DMA, since FRAND access to a search engine will also be conferred upon the provision of FRAND access to search data to third-party online search engines competing against the gatekeeper's CPS.

b. DMA Obligations Typically Affecting a Large Class of End Users

Only three provisions of the whole list contained in Articles 5 to 7 DMA protect end users directly in isolation: the enhanced data portability right in Article 6(9), the anti-steering provision under Article 5(5) DMA, and the prohibition of conditioning the end user's access or use of a core platform service via subscription in Article 5(8) DMA. Article 5(6) DMA enables the end user to raise non-compliance issues directly with the gatekeeper, but it also recognises the same right in favour of the business users. The lack of compliance with these provisions may directly form the basis of collective actions for end users.

Following the rationale for collective actions as a whole, the rational disinterest that normally prevails amongst consumers when they face their individual access to restorative justice would be overcome if they formulated collective claims in the context of the DMA's violation. For instance, if one takes the example of Article 6(9) DMA, one can see clearly that the fact that only one end user cannot port her data across other services and platforms may cause minimal impact on the market as a whole, especially if the consumer did not store much data within the platform or if it disallowed all of the functionality that enabled the gatekeeper to cross-use and combine personal data across its services. However, if end users collectively claim that the same right has been violated, the impact of the claim may not only be projected at the individual level (each end user would be conferred that right directly) but also at the collective level (all of the end users may be compensated for the monetisation options they may have had for processing their own personal data via a personal management information system start-up that feeds on ported data from the gatekeepers).

A large number of small claims are, for example, to be expected for violations of the obligation to provide for data portability in Article 6(9) DMA, which widens the scope of data portability from that originally provided under Article 20 of the GDPR. Instead of the narrow notion under Article 20 GDPR, Article 6(9) DMA mandates that end users

must be provided effective portability of their data at their own request and free of charge via dedicated tools providing continuous and real-time access to such data. The requirements of continuous and real-time are added to Article 6(9) DMA expanding on the notion of portability under EU data protection regulation. Therefore, should a gatekeeper, for example, only provide data portability under the conditions set out by Article 6(9) DMA against a small fee, one could safely say that the gatekeeper's compliance with the provision would infringe one of its conditions. Within this scenario, a large number of end users might want to stop such practice and demand compensation for it (in a similar fashion to the Commission's application of its anti-circumvention clause), whereas, in isolation, those same users would not be incentivised to claim those small fees before the courts without the support of the representative figure.

Even though end users are only indirectly impacted by most of the provisions enshrined under Articles 5, 6, and 7 DMA, the question arises if collective actions by end users may also be the ideal instrument to capture all those situations where the business user-driven provisions protect end users indirectly. While a claim for end users might not be excluded from the outset by virtue of the law, their collective actions, particularly in the form of collective damages actions, might be difficult to succeed due to the difficulties when it comes to quantifying harm. However, it may well be the case that business users may file a single claim to protect their own interests alongside those interests that are indirectly affected by the end users.

In these situations, harm to consumers will also be more complex to demonstrate in the context of collective actions. Two separate work streams may be identified in this regard: i) the capacity of claimants to invoke multiple violations of the DMA, both that impact directly and indirectly business users and end users, and; ii) the capacity of claimants to instrumentalise certain provisions as the key touchstone of the allegation in sustaining the main existence of harm alongside smaller harms that originate in the violations from other provisions.

First, building on the fact that most of the provisions are directly addressed to business users and only indirectly impact end users, the configuration of collective claims will necessarily be contingent on the aggregation of different alleged infringements into one single claim that amalgamates the interests of end users alongside those of business users. Although alleging the lack of compliance with the end user-related provisions in isolation will certainly give rise to collective harm, those same provisions may also be

considered with additional claims relating to provisions that only protect end users indirectly. For example, Article 6(9) DMA recognises an enhanced right to data portability directly to the end user and can sustain a basis for their collective actions in isolation. However, it can also be instrumentalised to sustain a claim where other types of harms are alleged, such as the fact that the end user's control over her personal data is preserved under the premises of Article 5(2) DMA, which only protects those harms of exploitation in an indirect fashion.

Second, multiple breaches of different provisions of the DMA may also take the form of a cascade as far as the interplay of Articles 5(2) and 6(2) DMA with the rest of the provisions is concerned, insofar as they can be the main indicators for demonstrating the presence of consumer harm, which may be invoked via collective actions. By this token, multiple violations may also be presented before national courts via the degree of compliance with these two key provisions as multiple violations that are based on their instrumentality. Article 5(2) DMA prohibits the combining, processing, and cross-using of personal data across core platform services as well as across the gatekeepers' proprietary services and data from third-party services. Article 6(2) DMA is the translation of Article 5(2) DMA into the business user viewpoint: the gatekeeper must refrain from using data that is produced because of the business user's use of the gatekeeper's CPS. Therefore, when assessing compliance with the enhanced data portability right under Article 6(9) DMA, the gatekeepers' degree of compliance (and reporting) is based on the instrumental role performed in compliance with Article 5(2) DMA. When the end user decides to port her data, the gatekeeper's output in applying the portability right under Article 6(9) will demonstrate whether data are combined across services. Article 6(9).

For example, a piece of data that was provided via a particular CPS was stored in the file of the end user's using of a different CPS, or data was collected and contained within the ported data despite the end user's refusal of consent under the exemption clause contained under Article 5(2) DMA. The same type of metering compliance of one provision through another may be given in the relationships between Article 6(10) and 6(2) DMA. Under Article 6(10) DMA, the gatekeeper must provide access to the business user to the self-generated data that has been produced as a consequence of its own performance within the CPS. Thus, when that data is transmitted to the business user, the latter has a chance to tell whether the gatekeeper has complied with Article 6(2) DMA

according to its data-siloing obligation. For instance, if the self-generated data reflects only their performance and provides no indication of the gatekeeper's own performance regarding the catering of the core platform service, this circumstance may serve as an indicator to establish compliance with Article 6(2) DMA.

In a similar vein, if one looks at the proscriptive obligation set out in Article 5(7) DMA, a similar phenomenon in the same scenario may be observed. The provision prohibits gatekeepers from requiring their end users to use an identification service, a web browser engine, or a payment service in the context of services provided by a business user using the gatekeeper's core platform service. These types of practices have been traditionally coined, from a competition law perspective, as the anti-steering provisions imposed by digital platforms.¹⁰¹ Say that the gatekeeper abides by the provision only cosmetically by eliminating the need to use those proprietary services of the gatekeeper but hindering the overall functioning of the business user's service through the catering of alternative means of payment service. SMEs that have been bound by these anti-steering provisions will be hindered from charging their services to their end users via alternative means of payment, despite the fact that the alternative operators may provide them with more favourable conditions. The difference between relying on the alternative operator and the gatekeeper's provision of their proprietary payment services might be minimal if considered per transaction (or even per SME). However, under the rationale for collective actions, claiming those same quantities will make sense if done jointly alongside other SMEs suffering the same breach of Article 5(7) DMA. In fact, the collective action regime at the Member State level has been used in the field of competition law to claim for these types of infringements.¹⁰²

c. Taxonomy of Collective Relief for the DMA

Bearing in mind that both business users and end users may be ideally placed to take recourse to collective actions under the DMA, two main types of claims may crystallise therein: i) claims relating to injunctive relief (so that the gatekeeper refrains from

¹⁰¹ Inge Graef, *What the Dutch Apple case can teach us about future challenges for competition enforcement*. 10 J. ANT. ENF. 570-582 (2022); Oscar Borgogno & Giuseppe Colangelo, *Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores?* 67 ANT. BULL. 451-494 (2022); Frédéric Marty & Jeanne Mouton, *Ecosystems as Quasi-essential Facilities: Should We Impose Platform Neutrality?* 1 J. LAW. MARKT. INN. 108-134 (2022).

¹⁰² Jannik Otto, Patrick Hauser & Simon VandeWalle, *Private enforcement of competition law in Germany and the Netherlands* (2022), <https://dx.doi.org/10.2139/ssrn.4066102>, accessed 31 October 2023.

performing the injury to the plaintiffs that have aligned their interests collectively or is compelled to act in the market under certain conditions set out by the national court) and ii) claims for damages (that may seek compensation for lost profits or overcharge whilst the harmful conduct prevailed).

In a similar vein to the impacts of the provisions on business users and end users, which were demonstrated to be asymmetrical and CPS-specific, the potential reliefs that can be realistically established per provision are also idiosyncratic and merit a separate analysis. Table 2 performs this differentiation based on the two main ways to seek relief via collective actions, despite the fact that there are other types of collective relief possible, which the paper will assess in the context of the RAD's scope.¹⁰³ Furthermore, Table 2 also highlights the practical chances of success in terms of the preferable type of relief, which is exemplary in nature and not to be seen as a comprehensive analysis of even all types of injunctive relief or collective damages.

Table 2. Taxonomy of potential relief per provision.

Provision	Modularity of likely relief (examples)
Article 5(2): prohibition to process, cross-use personal data across services.	<i>Filed by business users, end users or third parties (given that the provision is wider in scope as opposed to those concepts) –</i> Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision/ Requirements of the provision in line with GDPR conditions.
Article 5(3): prohibition to impose narrow and wide MFNs	<i>Filed by business users within the online intermediation service -</i> Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision/prohibition of one type of MFN and not another one, i.e., wide vs. narrow (full compliance of the provision), Damages: difference of the most favourable conditions that were struck down by the gatekeeper's conduct (difference in higher prices or difference in number of clients due to lower prices) + excess charges of higher prices in gatekeeper's proprietary services.
Article 5(4): anti-steering provisions relating to communication and promotion of offers.	<i>Filed by business users, end users and/or third parties (given that the provision is wider in scope as opposed to those concepts) –</i> Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision. Damages: lost profits caused by offers that should lure consumers to business users' products (investment in the promotion/marketing strategy directed at attracting consumers), <i>only for business users.</i>
Article 5(5): anti-steering provisions relating to services, content, subscriptions, features or items.	<i>Filed by business users and/or end users –</i> Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision. Damages: lost profits caused by the anti-steering provisions – <i>only for business users.</i>
Article 5(6): enabling raising non-compliance issues.	<i>Filed by business users and/or end users –</i> Injunction: ordering that non-compliance issues should be permitted via internal mechanism – following the terms of the provision.

¹⁰³ See below at Section III.B.

Article 5(7): prohibition of alternative payment services, sign-in services, and default web browser.	<p><i>Filed by business users and/or end users –</i></p> <p>Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision.</p> <p>Damages: fee structure difference if alternative payment service is not allowed and charged directly to the business user from gatekeeper’s proprietary service – <i>only for business users.</i></p>
Article 5(8): prohibition of conditioning use, access, or sign-up to a service with a subscription.	<p><i>Filed by business users and/or end users –</i></p> <p>Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision.</p>
Article 5(9): sharing with advertisers’ information on price and fees paid, remuneration received by publishers, and metrics of calculation.	<p><i>Filed by business users operating in online advertising services (via sales of advertising space or via advertising intermediation services) -</i></p> <p>Injunction: imposition of sharing information on elements of the provision.</p> <p>Damages: lost profits caused by competing on the basis of unfair advantage and a non-transparent advertising value chain + excess charges within the market due to reduced competitive pressure as a consequence of a lack of transparency.</p>
Article 5(10): sharing with publishers information on price and fees paid, price paid by advertisers, and metrics of calculation.	<p><i>Filed by business users operating in online advertising services (via sales of advertising space or via advertising intermediation services) -</i></p> <p>Injunction: imposition of sharing information on elements of the provision.</p> <p>Damages: lost profits caused by competing on the basis of unfair advantage and a non-transparent advertising value chain + excess charges within the market due to reduced competitive pressure as a consequence of a lack of transparency.</p>
Article 6(2): data siloing of data generated by business users’ use of CPSs.	<p><i>Filed by business users -</i></p> <p>Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision.</p>
Article 6(3): un-installation and prompt default selection (tying practices)	<p><i>Filed by business users and/or end users of online search engines, video-sharing platform services, NIICS, virtual assistants, web browsers and cloud computing services -</i></p> <p>Injunction: ordering the un-installation and elimination of default settings.</p> <p>Damages: lost profits caused by technical barriers to access the ecosystem – <i>only business users – + excess charges of higher prices/lower quality on the gatekeeper’s proprietary ecosystem – business users and/or end users.</i></p>
Article 6(4): allowing the installation of third-party software applications or app stores interoperating with OS.	<p><i>Filed by business users and/or end users of operating systems -</i></p> <p>Injunction: refraining from disallowing third-party installations.</p> <p>Damages: lost profits caused by technical barriers to access a whole ecosystem – <i>only business users.</i></p>
Article 6(5): prohibition of self-preferencing in ranking on CPSs and application of transparent, fair, and non-discriminatory conditions.	<p><i>Filed by business users and/or end users of online search engines and online intermediation services -</i></p> <p>Injunction: prohibition of the conduct – obligation to comply with the requirements of the provision.</p> <p>Damages: lost profits caused by being demoted by the gatekeeper’s CPS + excess profits due to the gatekeeper’s capacity in downstream markets to cater for services in less ‘contestable’ conditions (e.g. Google Shopping) – <i>only business users.</i></p>
Article 6(6): no restriction on switching regarding secondary services.	<p><i>Filed by business users and/or end users of online search engines, video-sharing platform services, NIICS, virtual assistants, web browsers and cloud computing services -</i></p> <p>Injunction: refrain from restricting the end user’s switching potential.</p> <p>Damages: lost profits caused by technical barriers to access a whole ecosystem at the downstream level – <i>only business users.</i></p>
Article 6(7): interoperability with hardware and software features accessed or controlled via OS or virtual assistant.	<p><i>Filed by business users and/or end users of virtual assistants and cloud computing services -</i></p> <p>Injunction: allowing access to related services via OS or virtual assistants.</p>

Article 6(8): provision to access performance measuring tools and data necessary to carry out verification.	<i>Filed by business users and/or end users of online advertising services –</i> Injunction: allowing access to tools and data. Damages: lost profits caused by a lack of verification and performance ability for advertising purposes – <i>only business users</i> – + excess profits caused by not disclosing information to level the playing field – higher bidding prices or lower quality of ad exchange – <i>business users and/or end users</i> .
Article 6(9): provision to end users with enhanced data portability right.	<i>Filed by business users and/or end users -</i> Injunction: enabling enhanced data portability.
Article 6(10): provide business users access to self-generated data (with limitations to personal data in use).	<i>Filed by business users and/or end users -</i> Injunction: not hindering access to self-generated data. Damages: lost profits on insights triggering product development and research derived from the use of self-generated data – <i>only business users</i> .
Article 6(11): provide FRAND access to search data for third-party online search engines.	<i>Filed by business users and/or end users of online search engines -</i> Injunction: adjusting variables in requirements of FRAND. Damages: lost profits in accessing in a discriminatory way gatekeeper services – <i>only business users</i> .
Article 6(12): provide FRAND access to app stores, search, and social networking service.	<i>Filed by business users and/or end users of online search engines -</i> Injunction: adjusting variables in the requirements of FRAND. Damages: lost profits in accessing in a discriminatory way gatekeeper services - <i>only business users</i> .
Article 6(13): proportionate CPS termination terms.	<i>Filed by business users –</i> Injunction: termination abiding by the provision. Damages: harm suffered by disproportionate termination (discontinuation of gateway to access end users).
Article 7: interoperability of NIICS.	<i>Filed by business users and end users of NIICS -</i> Injunction: not hindering the application of interoperability standards.

The nature and object of the different provisions under Articles 5, 6, and 7 DMA pre-empt that not every obligation will be subject to the same type of relief.

All the data-related obligations that mandate the gatekeeper to silo data from the CPSs with respect to data of third parties and/or data of their business users can theoretically be subject to relief via damages. However, any such relief might be very burdensome to obtain in practice, despite the possibility that the claimants can sustain these types of actions. Realistically, claims for damages will not be successful if they are sought under the alleged violations of Article 5(2), 6(2), 6(9), or 6(10) DMA, since data (and especially personal data) are not assets that can be easily classified and quantified.

On one side, data are context-dependent as an input in a business model. For instance, siloing data generated via Amazon’s Marketplace¹⁰⁴ by its business users from

¹⁰⁴ Even though Amazon caters for a range of products within its online intermediation service and several marketplaces can be identified, the online intermediation service is termed as Amazon Marketplace in the Commission’s designation decision.

Amazon's proprietary and generated data as a consequence of its own sales on its platform might advantage business users in the sense that Amazon will not have a curb ahead of them because of that advantage. However, in the context of a lack of compliance with the data siloing obligation under Article 6(2) DMA, it is very complex and burdensome to analyse what Amazon's extracted value is from the data that are kept separate. Amazon's range of services and grip over data cannot be compared with that of its business users (which will normally be third-party sellers), so the value that the latter can extract from that data via Article 6(10) DMA is not the same as opposed to the value that Amazon cannot extract because of the mandate imposed in Article 6(2) DMA. Moreover, the subject of damages with relation to data is further complexified since both Articles 5(2) and 6(9) DMA concern the prohibition of combining, cross-using, and processing and the porting of personal data directly (and not data in general, which is normally composed of non-personal and personal data amalgamated into vast datasets). Even if data could be quantified according to a single metric, the assessment of personal data necessarily must follow a completely different path, insofar as not only the economic value of deriving insights from highly personalised data must be factored into account but also the fundamental rights-based essence of personal data, stemming from its protection under the Charter of Fundamental Rights of the European Union.¹⁰⁵

Aside from the generalised metrics that have been proposed on the question of the valuation of data, two different metrics have been proposed by economists to address the particular problem of quantifying data: a consumer's willingness to pay (WTP) and willingness to accept (WTA)¹⁰⁶. In other words, personal data are measured against the benchmark of the individualised assessment that an individual makes before the possibility that his data may be disclosed to third parties. In this regard, the WTP metric measures the consumer's willingness to pay for monetary exchanges so that his personal data remains protected. For example, this is exactly the case that Meta has recently

¹⁰⁵ On the difficulties to quantify damages in that context and the current jurisprudence of the ECJ, see: Lena Hornkohl, *Zum immateriellen Schadenersatz nach Art. 82 DSGVO und mehr – Zugleich eine Anmerkung zum Urteil des EuGH in Österreichische Post II*. VBR, 120 (2023); Lena Hornkohl, *A Guide on Civil Liability for Data Protection Violations: Non-Material Damages (and More)*. EU Law Live Weekend Edition 120 (2022), <https://eulawlive.com/weekend-edition/weekend-edition-no120/>, accessed 14 November 2023.

¹⁰⁶ Alessandro Acquisiti, Curtis Taylor & Liad Wagman, *The Economics of Privacy*. 54 J. ECO. LIT. 447-477 (2016); Janice Tsai, Serge Egelman, Lorrie Cranor & Alessandro Acquisiti, *The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study*. 22 INF. SYST. RES. 254-268 (2011); Avi Goldfarb & Catherine Tucker, *Shifts in Privacy Concerns*. 102 AM. ECO. REV. 349-353 (2012).

proposed with its new subscription tier: it has offered Instagram and Facebook users to pay EUR 10 to protect their personal data when browsing through their services, especially so that the data are not subjected to the tasks of personalised and behavioural advertising. In the particular case of Meta’s services, EUR 10 would be the consumer’s WTP if they accepted the bargain¹⁰⁷.

However, one cannot say that the same valuation will apply in every context, since the individual and idiosyncratic expectations of different types of consumers might change depending on the gatekeeper concerned¹⁰⁸, due to the fact that some gatekeepers have a well-recognised practice of deploying third-party cookies and advertising networks for the purposes of advertising, whereas others sustain a less data-intensive business model based on security and confidentiality¹⁰⁹. Regarding WTA, this amount is associated with the monetary exchange that a user would accept to disclose her personal data. The rationale underlying the rationale is different insofar as this second scenario pre-emptively remarks that protection of personal data is conferred by default to the user and disclosure will apply, but by exception.

Aside from those provisions that do not rely as heavily on the configuration of data throughout the gatekeeper’s CPS, the DMA’s violations are mainly concerned with imposing obligations on gatekeepers in compelling them to refrain from particular conduct, which is normally related to accessing their ecosystems and proprietary services for the purposes of facilitating the role of business users within them to reach end users. This is the particular case of Articles 5(4), 5(5), 5(7), 5(8), 6(3), 6(4), 6(6), 6(7), 6(11), 6(12), and 7 DMA. Coincidentally, these provisions are the same set of obligations that directly impact the functioning of the services of business users directly, as shown in Table 1 above. They pursue the objective that the formerly captive mass of end users that were bound to use the gatekeeper’s services can choose to use other types of services. Therefore, it is quite self-explanatory that in case of their violation, damages may be

¹⁰⁷ Morgan Meaker, *Facebook Finally Puts a Price on Privacy: It’s \$10 a Month* (2023), <https://www.wired.com/story/meta-facebook-pay-for-privacy-europe/>, accessed 13 November 2023. For an analysis on the change operated by Meta, see Alba Ribera Martínez, *Op-Ed: “The Ambivalence of Rejecting and Granting Consent: Ad-F(r)ee Digital Services*, <https://eulawlive.com/op-ed-the-ambivalence-of-rejecting-and-granting-consent-ad-free-digital-services-by-alba-ribera-martinez/>, accessed 13 November 2023.

¹⁰⁸ Acquisiti, Taylor & Wagman *supra* note 106, 447.

¹⁰⁹ For example, Meta has a long-standing experience in breaching individual’s rights in data protection, whereas Apple is well known for its privacy and security-enhancing marketing strategy, see Tom Ryan, *Will Apple’s privacy positioning remake digital marketing?* (2022), <https://retailwire.com/discussion/will-apples-privacy-positioning-remake-digital-marketing/>, accessed 13 November 2023.

sought via the lost profits of the business users in those scenarios where the gatekeepers leave them outside of their ecosystems or they have been technically hindered from catering their services successfully. In turn, overcharges could also be claimed by end users (even if they are only indirectly impacted by the provisions) in the sense that the formerly anti-competitive conditions pushed prices upwards and the rest of the parameters of competition suffered as a consequence of reduced competitive pressure upon the gatekeeper's catering of their service.

Notwithstanding, the problem in digital markets is that quantifying these harms may be more intricate than initially expected, insofar as the catering of most of those services is not necessarily deemed profitable for the gatekeepers. For example, a lack of compliance with Article 7 DMA will mean that business users catering for number-independent interpersonal communication services (NIICS) cannot interoperate with the messaging services of the gatekeepers. However, if the breach disappears, that does not automatically imply that profits will be made because of the mandated interoperability standards, since those types of services normally do not deliver great profits to the gatekeepers themselves. Therefore, depending on the provision, claiming for damages might be nonsensical in the context of CPSs, which may be entirely subsidised by other CPSs (or even other non-CPSs that are not currently captured by the DMA) and do not deliver any immediate gains for the gatekeepers themselves.

Furthermore, the outcome of an injunctive relief collective action filed by end users and/or business basically requires complying with the mandated behaviour of the breached provision. For instance, in the event of a violation of the prohibition of wide and narrow parity clauses under Article 5(3) DMA, injunctive relief will follow the same blueprint as originally set out by the provision: the claimants will be limited to binding the gatekeepers to compliance with the regulatory obligation. In that sense, on the side of the claimants, there is less of a creative capacity conferred upon them to address idiosyncratic remedies via injunctions seeking behaviours from the gatekeepers, insofar as obligations that go well beyond the substantive content of the mandates will be rarely admitted.

III. Collective Actions and the DMA *de lege lata*

The current legal landscape of the DMA offers two paths for collective actions. On one side, the DMA explicitly refers to the RAD. In the understanding of the DMA, the RAD

is the suitable and expressly mentioned instrument for collective actions. In the following sections, the paper will show the workings of the RAD in the context of the DMA and demonstrate the shortcomings of such an approach. On the other side, the paper addresses other legal avenues against the shortcomings of the RAD model. It will show that overall, a lot of issues arise when it comes to collective actions in the context of the DMA, which will cause hiccups in the practical application. However, before assessing the procedural pathways for collective actions, the overarching question of the direct effect of the DMA obligation as a basis for any type of collective action is discussed.

A. Direct Effect as an Overarching Issue

The horizontal direct effect of a provision builds the basis of any collective action.¹¹⁰ In the context of the DMA, the question of direct effect has already been discussed in depth in the literature.¹¹¹

As with any other EU regulation, Article 288(2) TFEU generally opens the door for direct applicability and effect for the DMA.¹¹² The requirements for horizontal direct effect have been clearly set out by the ECJ in its fundamental judgment in *Van Gend en Loos* in 1963.¹¹³ To be coined as directly applicable, the DMA's provisions must be complete and legally perfect. According to the Court's case law, an EU provision has direct effect if it is clear, precise, and unconditional in its wording and, at least in principle, requires no further national implementing measures, either on the part of the Member States or on the part of the Union's institutions.¹¹⁴ Although the *per se* nature and higher specificity of Articles 5 to 7 DMA were aimed at overcoming the traditional deficits of

¹¹⁰ The paper only addresses horizontal direct effect, whereas vertical direct effect is deliberately omitted, although some of the provisions under the DMA may fulfil their requirement, such as the monitoring of the gatekeepers' notifications on every transaction they realise in the market (Article 14) or their obligation to perform independent audits with regards to their consumer profiling (Article 15).

¹¹¹ See, inter alia, Podszun *supra* note 4, 264; Petit *supra* note 88, 539; Marcel Zober, *Durchsetzung des DMA-E und dessen Verhältnis zum Kartellrecht*. NZKart, 611, 614 (2011); Becker *supra* note 4, 403, 419; Andriychuk *supra* note 4, 130.

¹¹² See, by analogy, Case 43-71 *Politi s.a.s. v Ministry for Finance of the Italian Republic* ECLI:EU:C:1971:122.

¹¹³ Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1962:42.

¹¹⁴ In that sense, see Case 44/84 *Derrick Guy Edmund Hurd v Kenneth Jones (Her Majesty's Inspector of Taxes)* ECLI:EU:C:1986:2; Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia and others* ECLI:EU:C:1994:60; and Case 41-74 *Yvonne van Duyn v Home Office*, Opinion of AG Mayras ECLI:EU:C:1974:123; Case C-253/00, *Antonio Muñoz y Cia SA and Superior Frutticola SA v Frumar Limited and Redbridge Produce Marketing Limited*, Opinion of AG Geelhoed, ECLI:EU:C:2001:697, para. 47. Fundamentally, Craig *supra* note 50, 453, 455.

the competition enforcement regime,¹¹⁵ the horizontal direct effect of the DMA is not as straightforward in every case. Several of the DMA’s obligations only relate to procedural rules for their application by the Commission.¹¹⁶

1. The Self-executing Nature of the Obligations Under Article 5 DMA

The obligations and prohibitions of Article 5 DMA have direct effect.¹¹⁷ The obligations and prohibitions under this provision are generally perceived as self-executing.¹¹⁸ First of all, the self-executing character of some obligations can be questioned. For instance, compliance with the rule enshrined in Article 5(2) DMA entails a whole reversal of the business models that these economic operators currently rely on and not a mere translation of conduct into their daily operations.¹¹⁹

Furthermore, the nuance between the provisions’ self-executing and directly effective nature is narrow but substantive. Self-executing as a concept is seldom used by the Court of Justice, but it normally renders homonymic to direct applicability. A provision is said to be self-executing when the measure in question does not need legislative development to be properly enforced or applied by the court. A self-executing norm is legally perfect enough to be applied by a national court but also to achieve its aim. The self-executing condition is, thus, a pre-condition but distinct from direct effect. Therefore, a rule can be sufficiently detailed to be applied by a national court, but that

¹¹⁵ Digital Markets Act *supra* note 1, Recital 5.

¹¹⁶ Komninos *supra* note 4.

¹¹⁷ See, also, Becker *supra* note 4, 403, 424; Podszun *supra* note 4, 264; Zober *supra* note 111, 614; Schläfke & Schuler *supra* note 11, paras 7 and 8.

¹¹⁸ See, inter alia, Philipp Bongartz, Sarah Langenstein & Rupprecht Podszun, *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers*. 10 EUCML, 60, 64 (2021); Chirico *supra* note 53, 493, 497.

¹¹⁹ The problems around the application of the provision in practice are reviewed in Alba Ribera Martínez, *The Circularity of Consent in the DMA: A Close Look into the Prejudiced Substance of Articles 5(2) and 6(10)*. RIV. CON’ZA M’TO (forthcoming); Marco Botta and Danielle Da Costa Leite Borges, *User’s consent under Art. 5(2) Digital Markets Act (DMA): Exploring the Complex Relationship Between the DMA and the GDPR*. Robert Schuman Centre Working Paper (forthcoming, in file with authors). Meta’s legal representative questioned before the Commission in one of its workshops that the obligations set out in Article 5 could not be as “self-executing as expected, after all”, see European Commission, *DMA Workshop – The DMA and data-related obligations* (2023), <https://webcast.ec.europa.eu/dma-workshop-2023-05-05>, accessed 28 August 2023. For a full review of the workshop, Alba Ribera Martínez, *Fourth Workshop on the DMA – This is not a Blueprint for the DMA: The Unknown Knowns of Data-Reliant Business Models* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/05/08/fourth-workshop-on-the-dma-this-is-not-a-blueprint-for-the-dma-the-unknown-knowns-of-data-reliant-business-models/>, accessed 28 August 2023.

same circumstance does not necessarily entail that it confers rights on individuals as a legitimate basis to intervene before that same national court.¹²⁰

Nevertheless, the obligations and prohibitions of Article 5 DMA fulfil the conditions of horizontal direct effect, insofar as they are sufficiently precise and unconditional. They contain concrete and specific obligations or prohibitions.¹²¹ Even the usage of vague legal terms that require further interpretation, such as the reading of the exemption clause under Article 5(2) DMA requiring to present the user “with the specific choice and (...) consent within the meaning of Article 4(11) and 7 of the GDPR” and how it should translate into choice screens displayed into the gatekeeper’s catered user experience, does not completely impair the rule’s completeness.

When comparing Article 5 DMA with Articles 101 and 102 TFEU, the latter leave large room for legal interpretation but have horizontal direct effect in accordance with the ECJ’s case law.¹²² The rules contained in the DMA also determine the addressees of the claims, as they cover the gatekeepers providing core platform services as listed via the Commission’s designation decisions. Stemming from the moment of designation, Article 3(10) DMA establishes that the obligations under Articles 5, 6, and 7 DMA will apply within the next six months with respect to the CPSs that have been included under the decision.

For those operators that have been designated in September 2023, that will mean that they will have to comply with the obligations by March 2024, and they will have to demonstrate compliance via the obligation to issue compliance reports under Article 11 DMA by the same date. In a similar vein, the claims enforceable via collective actions will be restricted to this same objective scope: to those CPSs that fall within the designation decisions of the European Commission.¹²³

¹²⁰ Alicia Hinarejos, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?* 14 *EUROP. L. J.* 620, 625-627 (2008); following Case C-253/00 *supra* note 114, para. 47.

¹²¹ Podszun *supra* note 4, 254, 264; Komninos *supra* note 4, 425.

¹²² Case 127-73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* ECLI:EU:C:1974:6. See also Becker *supra* note 4, 403, 424; Podszun *supra* note 4, 254, 264.

¹²³ At the moment of writing, several CPSs of the already designated gatekeepers (Apple and Microsoft) are still being reviewed by the Commission via the market investigation established under Article 17(3) DMA on whether they should be included or not under the scope of the DMA. The Commission has a maximum of 5 months to decide on this subject. If those CPSs are finally designated in January 2024, the 6 month-gap conferred upon the gatekeeper to trigger compliance with Article 3(10) will start to apply at that moment until July 2024. A similar circumstance applies to those gatekeepers (namely, Apple with regard to its iPadOS) that are subject to the Commission’s qualitative designation under Article 3(8), which follows the path of Article 17(1) and the Commission will resolve within 12 months of the triggering of the

Notwithstanding, the designation of the gatekeepers and their CPSs is not static in three fundamental ways. First, the Commission is bound by Article 4 DMA to review the status of the gatekeepers to check whether it should drop the designation of any of the addressees or of any of the CPSs from their inclusion within the DMA. Second, the designation process is not stagnant in time, since those operators that have not been designated yet that meet the quantitative thresholds established under Article 3(2) DMA will be immediately captured by the DMA and subject to an equivalent decision to those initially issued to the six gatekeepers that currently remain under the scope of the regulatory instrument¹²⁴. Third, the Commission may also exercise its discretion in monitoring the trends in contestability and fairness to assess whether new services should be added to the list of core platform services contained in Article 2(1) DMA via the market investigation mechanism established in Article 19 DMA. For instance, the latest developments in generative Artificial Intelligence (AI) have triggered the debate over whether the Commission should at least consider adding this service to the list of CPSs.¹²⁵

Therefore, realistically, claims filed in collective actions will be based on the gatekeeper's degree of compliance with the provisions starting from March 2024, since that is the same date that the addressees of the regulation are also expected to comply with the obligation to submit compliance reports under Article 11 DMA (that have to be published shortly after in a non-confidential summarised version). The information asymmetries that small claimants normally bear in this type of litigation might be narrowed down due to this circumstance.

However, the DMA established an additional layer of complexity with relation to timing and the applicability of the RAD to those representative actions brought against infringements by gatekeepers of the provisions of the DMA that harm or can harm the collective interests of consumers. Recital 104 DMA establishes that the applicability of

market investigation mechanism. This will mean that if iPadOS finally falls under designation, the 6-month period will start on September 2024, and compliance with the provisions under Articles 5, 6 and 7 will be enforceable in March 2025.

¹²⁴ At the time of writing, it is expected, for example, that Booking.com will notify its potential designation to the Commission and it could remain under the scope of the DMA, see *Booking.com Updates Expected Timing for European Commission DMA Notification* (2023), <https://www.prnewswire.com/news-releases/bookingcom-updates-expected-timing-for-european-commission-dma-notification-301869334.html>, accessed 30 October 2023. Thus, the 6-month gap for compliance under Article 3(10) will apply from that moment on for the CPSs it caters in the market.

¹²⁵ The Commission's officials have been enquired in informal settings for the expansion of the list of the CPSs and, in principle, have not discarded that the change may happen in the near future, see Bethan John, *DMA can tackle AI concerns, Bacchiega says* (2023), <https://globalcompetitionreview.com/article/dma-can-tackle-ai-concerns-bacchiega-says>, accessed 7 November 2023.

the RAD should start from the date of application of the Member States' laws, regulations, and administrative provisions necessary to transpose that Directive, or from the date of application of the DMA, whichever is later.

If one takes the date of application of the DMA as the date when the provisions of the regulatory instrument will be applicable, then that date of application will change depending on the designation of the different economic operators of the market. For instance, the first designations would place the date of application for the DMA in March 2024. An alternative interpretation regarding the date of application could place it when the DMA's designation process was enforceable as a generally applicable rule to all those economic operators that exceeded the thresholds under Article 3(2) DMA: that is, on May 5, 2023.

In any of both cases, Recital 104 establishes that the date of applicability of the RAD will be referred to as the date that is the latest (the date of application of the DMA, might that be in May 2023 or March 2024) or the date in which the Member States transpose the modification of the regime of the RAD into their own national regimes. This circumstance might hinder the effectiveness of the application of Articles 42 and 52 DMA, especially in those Member States that plan to transpose the provision into their national civil regimes but have not yet completed those legislative developments¹²⁶.

2. Articles 6 and 7 DMA and the Specification Procedure under Article 8 DMA

On the contrary, Articles 6 and 7 DMA can be subject to further specification by the Commission per Articles 8(2) and 20(1) DMA if the gatekeepers request it or the Commission triggers that same procedure on its own initiative. This circumstance makes some authors question their general suitability for fulfilling the requirements of horizontal direct effect.¹²⁷

Despite the fact that the potential for satisfying these requirements is accomplished in relation to Article 6 DMA, Article 7 is not equivalent in terms of the

¹²⁶ At the time of writing, to the best of our knowledge, only Germany has passed amendments to their legal systems transposing those provisions. Germany has done so via its competition law regime in 11th Amendment of the German Act Against Restraints of Competition (11. GWB-Novelle, BGBl. 2023 I Nr. 294 of 06.11.2023), see below at III.B.3.a.iii.

¹²⁷ Podszun *supra* note 4, 254, 264.

specificity of the measures that have to be implemented by the gatekeepers as opposed to the former provision, and thus, the same conclusion cannot be reached in terms of their analysis under the principle of horizontal direct effect.

In the case of the provisions under Article 6, two situations must be distinguished with respect to their potential direct effect. First, those cases where the Commission has already adopted an implementing act specifying the measures that the gatekeeper is to implement to effectively comply with the obligations and prohibitions set out in Article 6 DMA. In this scenario, the obligations and prohibitions have horizontal direct effect and can be relied upon in conjunction with the Commission’s implementing act.¹²⁸

Second, in those cases where the Commission has not specified the rules of Article 6 DMA, the situation is more nuanced, but the conditions of horizontal direct effect are ultimately fulfilled.¹²⁹ It is true that the possibility of further specification is at odds with the requirement of direct effect to be unconditional, especially vis-à-vis the Commission’s wide discretion in monitoring the regulatory instrument’s compliance.¹³⁰ However, as per Articles 8(2) to (9) and 20(1) DMA, the power to trigger further specification procedures lies solely with the Commission, not private parties, representative organisations, or national courts.¹³¹ Thus, the procedure to further specify the rules of Article 6 DMA is a possibility, not a standard. Both the decision on the necessity and the scope of possible specification lie with the Commission; a gatekeeper cannot oblige the Commission to further specify the rules,¹³² but must fulfil the obligations in Article 6 DMA by virtue of Article 8(1) DMA.¹³³

¹²⁸ Podszun *supra* note 4, 254, 264; Becker *supra* note 4, 403, 424; Assimakis Komninos, *Op-Ed: “DMA specification decisions – an interesting feature of public enforcement and its interaction with private enforcement”* (2023), <https://eulawlive.com/competition-corner/op-ed-dma-specification-decisions-an-interesting-feature-of-public-enforcement-and-its-interaction-with-private-enforcement-by-assimakis-komninos/>, accessed 14 November 2023. The specification procedure has been recently developed and regulated by the European Commission, *Template relating to the reasoned request for a specification process pursuant to Article 8(3) of Regulation (EU) 2022/1925 (Digital Markets Act)* (2023) https://digital-markets-act.ec.europa.eu/system/files/2023-10/Article%208%283%29%20DMA%20Template%20%28request%20for%20specification%20dialogue%29_1.pdf, accessed 2 October 2023.

¹²⁹ See, in detail, Becker, *supra* note 4, 403, 419-424; Oles Andriychuk, *The Digital Markets Act Proposal: Key Elements & Smart Features*. 43 ECLR 112, 117 (2022); Florian Bien, *Regulierung von Online-Plattformen*. JZ, 830 (838) (2022). For a review of Article 6, see Schläfke & Schuler *supra* note 11, paras 9 and 10.

¹³⁰ Andriychuk *supra* note 4, 130-131.

¹³¹ Podszun *supra* note 4, 254, 264.

¹³² See, Petit *supra* note 88, 529, 539.

¹³³ Becker, *supra* note 4, 403, 419-420.

Under this lens, Article 8(3) DMA establishes that the gatekeeper can do nothing else than request the Commission to engage in the specification procedure, and for that, it must put forward the set of measures it tends to implement in relation to Article 6. Even in cases where the Commission accepts the request, the need to demonstrate the necessity and scope of the specification procedure lies with the gatekeeper, and at most, has a right to receive a decision from the EC free of discretionary errors.¹³⁴

Finally, the objective of the Commission’s specification procedure argues in favour of a horizontal direct effect of the provision. Even though Article 6 DMA seems less specific than Article 5 DMA, the reduced specificity concerns the (technical) implementation and not the obligations and prohibitions of Article 6 DMA themselves. The obligations and prohibitions are specifically spelled out in both provisions, and the further specification per Article 8 DMA relates to their implementation in terms of their effective compliance measures, not the nature of the obligations themselves.¹³⁵ The wording of Article 8(2) DMA, for example, explicitly states that the Commission can specify “the measures that the gatekeeper concerned is to *implement* in order to effectively comply with the obligations laid down in Article 6” (emphasis added). Via the request of Article 8(3) DMA, for example, the gatekeeper can ask the Commission for a review of the implementing measures taken or planned in order to comply with Article 6 DMA for the specific circumstances of the gatekeeper. The Commission can then react with the necessary implementing measures in cases of deviations.¹³⁶ Any further specification in terms of implementing measures does not question the completeness of the rules in Article 6 DMA themselves, as the Commission is not allowed to change the content of the corresponding obligations and prohibitions of Article 6 DMA even within the specification procedure set out under Article 8 DMA.¹³⁷

Although Article 7 DMA also lies within the scope of the specification procedure, the same conclusions do not apply to it, as opposed to those obligations under Article 6 DMA, due to the technical complexity ingrained in implementing interoperability across the gatekeeper’s messaging services.¹³⁸

¹³⁴ *Ibid.*, 403, 421.

¹³⁵ Schläfke & Schuler *supra* note 11, para 10; Komninos *supra* note 4, 425, 430.

¹³⁶ Schläfke & Schuler *supra* note 11, para 10.

¹³⁷ Becker, *supra* note 4, 403, 421; Komninos *supra* note 4, 425.

¹³⁸ Schläfke & Schuler *supra* note 11.

The specification of Article 7 deviates from that of Article 6 in a fundamental way, insofar as on top of the deadline established via Article 3(10), the provision already enshrines two additional deadlines that may have to be pursued in its implementation. Aside from the obligation to publish a reference offer laying down the technical details and general terms and conditions of interoperability, which falls within the period set out in Article 3(10) that is enshrined under Article 7(4), interoperability for messaging services as well as for the sharing of images, voice messages, and videos will be expected to be complied with within the period of the next 2 years (Article 7(2)(b) DMA), whereas interoperability for the NIICS' video calls will have to be complied with in the period of the next 4 years (Article 7(2)(c) DMA). This delay hints at the idea that the specification procedures with the Commission are not optional, as they are regarded with relation to Article 6, but rather a pre-condition to attaining effective enforcement of Article 7.

Specification in the case of Article 7 has an entirely different meaning because it refers to the substance of interoperability. Gatekeepers cannot simply comply with the provision in isolation by changing and tweaking some of the characters of their business models. End-to-end interoperability entails that, at least, two NIICS (be they under the scope of gatekeeper designation or not) must agree on a particular technical standard to enable interoperability with sufficient security safeguards regarding encryption. A clear example of the solution that is pursued via Article 7, which has already been elucidated via the designation procedure,¹³⁹ is designing the technical functionality of NIICS mirroring email services, where every user from a particular service provider can message any other address from any other service provider. In this regard, the Commission is legitimised, for the implementation of this particular provision, to request European standardisation bodies to develop technical standards (Recital 96).¹⁴⁰

¹³⁹ Both Outlook.com and Gmail were notified by Microsoft and Alphabet as potential gatekeepers in July 2023, but they were not designated as CPSs for the gatekeepers since they did not fulfil the requirements of Article 3(1), according to the European Commission, precisely because they did not pose problems in terms of contestability as NIICS.

¹⁴⁰ In fact, when the Commission confronted the issue of compliance before third parties in their second workshop, one of the main points of contention revolved around the particular standardisation model that will be used and what fora will be chosen to funnel through the different proposals, relating to open standards' settings or not, see a comment of the workshop in Alba Ribera Martínez, *Second Workshop on the DMA - This is not a Blueprint for the DMA: Reconciling the Technical with the Legal* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/03/01/second-workshop-on-the-dma-this-is-not-a-blueprint-for-the-dma-reconciling-the-technical-with-the-legal/>, accessed 7 November 2023.

B. Application of the Representative Action Directive in the Context of the DMA

The DMA offers an explicit pathway for collective actions. According to Article 42 DMA, representative actions can be brought against DMA infringements by gatekeepers that harm or may harm the collective interests of consumers. Article 52 DMA amends Annex I of the RAD so that the DMA is included in the scope of the RAD per its Article 2(1).

The DMA does not include any further explicit rules for collective actions but fully integrates collective actions for violations of the DMA into the system of the RAD.¹⁴¹ The RAD does not envisage an overall framework for collective consumer actions but only regulates certain minimum procedural standards. It only applies to representative actions brought against unlawful conduct as provided in the EU rules listed in Annex I. It foresees a system of representative actions against traders brought by domestic or cross-border qualified entities, preferably consumer organisations, on behalf of groups of consumers before national courts or administrative authorities to seek injunctive or redress measures or both. In that sense, the RAD follows a paternalistic approach to consumer rights enforcement, given that it does not foresee that individual consumers will join in enforcing their rights collectively. It remains to be seen if consumer organisations are equipped to also enforce the DMA in representative actions. Moreover, the RAD has been generally criticised in terms of whether effective collective actions for consumers will be possible, *inter alia*, due to the lack of a mandatory opt-out system as well as the limited available remedies and possibilities for litigation funding.¹⁴²

In the context of the DMA, the application of the RAD has several caveats, primarily the limited personal scope, the large dependence of the (largely differing) Member State approaches, as well as the general difficulty of integrating the RAD system *vis-à-vis* the Commission's public enforcement endeavours.

1. Limited Personal Scope by Virtue of EU Law

The combination of the DMA and the RAD offers limited personal scope for collective actions for DMA violations by virtue of EU law. On the one hand, the terminology of

¹⁴¹ See, *inter alia*, Hornkohl *supra* note 76, 189.

¹⁴² See, *inter alia*, Alexandre Biard and Xandra Kramer, *The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?* ZEuP, 249 (2019).

both regulations is not aligned. On the other hand, the group of particularly affected persons is excluded from the scope by virtue of EU law: business users.

Articles 42 and 52 DMA do not confer the right to seek collective actions under the RAD upon business users or end users (which are concepts defined and used through the DMA) but on consumers. Consumers are not defined in the DMA itself and are not the main addressees of the regulatory instrument, either. Rather, Article 3(1) RAD defines a consumer as “any natural person who acts for purposes which are outside that person’s trade, business, craft or profession”. There is also no reference in the DMA to the definition of consumer under Article 3(1) RAD.¹⁴³ Thus, the concepts of end users under the DMA and of consumers under the RAD do not fully align.

Both concepts provide their definitions by exclusion: they lie outside of the realm of the individual’s professional capacity in the wider sense, with the concept of end user under the DMA excluding a person’s “commercial or professional capacity” and the concept of consumer under the RAD excluding a person’s “trade, business, craft or profession”. However, the understanding of the end user under the DMA is narrower than the understanding of the consumer under the RAD in relation to an activity specification only the former requires. End users in the understanding of the DMA must use core platform services, while such a requirement is not necessary for consumers in the understanding of the RAD¹⁴⁴. Moreover, the definition under Article 3(1) RAD only comprises natural persons, whereas end users encompass both natural and legal persons that use CPSs outside of their commercial capacity, bearing in mind that their concretisation may differ depending on the applicable provision.¹⁴⁵

¹⁴³ The absence is particularly poignant since the definitions of the DMA are quite explicit in mentioning other pieces of Union law. The definitions set out in the same article relating to information society service -Article 2(3)-, online intermediation services -Article 2(5)-, online search engine -Article 2(6)-, video-sharing platform service -Article 2(8)-, number-independent interpersonal communications service -Article 2(9)-, cloud computing service -Article 2(13)-, payment service -Article 2(16)-, technical service supporting payment service -Article 2(17)-, personal data -Article 2(25)-, control -Article 2(28)-, turnover -Article 2(30)-, profiling -Article 2(31)-, consent -Article 2(32)- and national court -Article 2(33) refer back to other pieces of regulation within the *corpus* of Union law.

¹⁴⁴ In line with the definitions provided in Section E of the Annex to the DMA, the user must not necessarily be logged-in to be considered as such. End users may be considered as such under the definition of the DMA even if they are logged-out and not identified directly via the CPS, see Commission Decision of 5.9.2023 designating Microsoft as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector *supra* note 41, para. 153.

¹⁴⁵ Similarly to the exercise performed in Table 1, end users may be defined in a range of different ways depending on the CPS concerned, stemming from their different definitions under Digital Markets Act *supra* note 1, Annex, Section E (‘Specific definitions’) of the regulatory instrument.

Including the DMA in Annex I of the RAD implies, in theory, recognising a right to seek representative actions from consumers who do not necessarily use the core platform services of the gatekeepers and, therefore, do not fulfil the end user definition of the DMA. However, since this right ultimately runs dry as simple consumers are not beneficiaries of the relevant DMA-provisions,¹⁴⁶ the interaction of the DMA and the RAD implies that consumers, in their capacity as end users, are covered in the personal scope.¹⁴⁷

This further excludes some groups of persons from the scope of application of the explicit collective action mechanism under the DMA in the form of representative actions according to the RAD. Particularly business users as a general class, i.e., large companies, SMUs or alliances of smaller companies, but also special cases of business users,¹⁴⁸ for example, publishers and advertisers¹⁴⁹, providers of search engines, or other providers of hardware, are not covered by virtue of EU law,¹⁵⁰ i.e., the interaction between the narrow notion of consumers under Article 42 DMA and the scope of the RAD. The other legal options at their disposal for bringing collective actions for DMA violations will be discussed further below.

2. Civil Injunction or Redress Claims for Consumers in Their Capacity as End Users

Even in those scenarios lying within the scope of application of the RAD, uncertainties remain regarding which of the gatekeepers' obligations are actionable for qualified entities to bring representative actions for the protection of the collective interests of

¹⁴⁶ See on this below at III.B.1.

¹⁴⁷ See, similarly, Schläfke & Schuler *supra* note 11, para. 140.

¹⁴⁸ See Digital Markets Act *supra* note 1, Articles 5(9), 5(1), 6(7), 6(8), 6 (11) DMA mentioning these specific types of business users as beneficiaries.

¹⁴⁹ Stemming from the provisions that directly recognise transparency rights in favour of advertisers and publishers with respect to their performance in the online advertising services of the gatekeepers, i.e., Digital Markets Act *supra* note 1, Articles 5(9) and 5(10), the collective actions that could be filed by these types of business users would not be directly based on the idea of infringement of the DMA (since they deviate from their main objectives of pursuing contestable and fair markets), but on the infringement of a transparency obligation. Although they could, in theory, be filed at the national level, those same claims could be redirected by alleging compliance with the DSA, see Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (2022) OJ L277/1.

¹⁵⁰ See for gold-plating provisions on national level, in particular, Germany and Netherlands below. Sections III.B.3.a.i. and iii.

consumers.¹⁵¹ As the following sections will demonstrate, the combination of the DMA and the RAD only offers limited opportunities to collectively enforce the DMA.

Under the RAD, the Member States must foresee two types of measures in their national systems: injunction and redress (including compensation, repair, replacement, price reduction, contract termination, or reimbursement¹⁵²).¹⁵³ The RAD contains some mandatory provisions to ensure minimum standards for injunction and redress across the EU but does not contain substantive rights in terms of civil law claims.¹⁵⁴ The RAD particularly lays down minimum procedural measures and rules to be implemented by the Member States to guarantee effective representative actions for the protection of the collective interests of consumers. It also covers the scope of consumer law, which includes the DMA by virtue of Articles 42 and 52 DMA, but not any civil law claims upon which a consumer law violation can be subject to proceedings. Consequently, the existence of a substantive right depends either on national or Union law.¹⁵⁵ Therefore, for representative actions against DMA infringements that harm consumers in their capacity as end users, either the DMA itself or Member State law must provide for such substantive rights.

a. Rights and Obligations Specifically Established for Consumers in Their Capacity as End Users

As a foundation for the claims to be enforced through representative actions, the need for specificity in terms of direct effect must ultimately lead to the inference that rights or obligations need to be specifically established for consumers in their capacity as end users.¹⁵⁶ As mentioned above, the rules in Articles 5, 6, and 7 DMA specify their beneficiaries, whether business users or end users, in a direct or indirect fashion. Out of these provisions, only Articles 5 and 6 DMA are theoretically suitable as a basis for consumer claims by virtue of their direct effect.¹⁵⁷ Coming back to the differentiation

¹⁵¹ Under the RAD, so-called qualified entities launch actions on behalf and in the representation of consumers, see more on this mechanism below at III.B.1 and 2.

¹⁵² RAD *supra* note 9, Article 9(1).

¹⁵³ *Ibid*, Article 7(4).

¹⁵⁴ RAD *supra* note 9, Recital 42 RAD. In further detail, Hornkohl, *supra* note 76, 189, 194.

¹⁵⁵ RAD *supra* note 9, Article 9(1) and Recital 42.

¹⁵⁶ See, also, Schläfke & Schuler *supra* note 11, para 6; Drexl, Conde Gallego, González Otero, Herrmann, Hoffmann, Johannsen Kestler & Matarazzi *supra* note 11, 864, 875.

¹⁵⁷ See on direct effect below at III.A.

provided in Table 1, two scenarios must be distinguished in the limited scope of representative actions for consumers in their capacity as end users: those that address them directly and those where their impact will reach them indirectly, but they are not explicitly addressed in the particular provision.

On the one hand, the DMA contains many provisions with direct effect that explicitly and directly aim at benefiting end users, notably Articles 5(5), 5(6), 5(8), and Article 6(9) DMA, as set out in Table 1. Those provisions are specifically established for consumers in their capacity as end users, so they can sustain the basis of any claim enforceable through the means of representative actions.

On the other side, as mentioned above in Table 1, many of the DMA's rules focus on business users as their direct beneficiaries. Concerning these DMA provisions, consumers in their capacity as end users can indirectly benefit by having further choice presented to them due to the increased contestability triggered by adequate compliance with those DMA provisions that aim to protect consumers as a by-product or the reflex impact resulting from the improvement of gatekeeper-business user relationships¹⁵⁸ For example, Article 6(4) DMA increases the competitive pressure on gatekeepers and aims to create contestability by directly benefiting business users by enabling the installation of third-party software applications or app stores interoperating with the gatekeeper's own operating system. Consumers in their capacities as end users can indirectly benefit since their choice to select third-party software applications and app stores will be increased when using the gatekeeper's operating system. Even an indirect benefit could, in principle, "harm the collective interests of consumers" by virtue of Article 42 DMA.¹⁵⁹ While representative injunctions for a violation of these indirectly benefiting provisions might be easier to sustain, proving harm for representative redress actions might be very difficult to establish.¹⁶⁰

¹⁵⁸ Podszun *supra* note 95, 1, 3-4.

¹⁵⁹ Critically excluding representative actions altogether in these cases, Drexl, Conde Gallego, González Otero, Herrmann, Hoffmann, Johannsen, Kestler & Matarazzi *supra* note 11, 864, 875.

¹⁶⁰ The following analysis of the RAD will therefore concentrate on representative actions for violations of directly benefiting provisions.

b. Civil Claims Stemming Directly From the DMA

Insofar as the DMA offers rights or obligations specifically advantaging consumers in their capacity as end users, this does not equal substantive rights in terms of civil law claims. In the DMA itself, the claims are very limited.¹⁶¹ Out of the provisions specifically advantaging consumers in their capacity as end users, only Article 6(9) DMA directly enshrines an actionable right in the DMA. A gatekeeper must provide end users, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service. Should a gatekeeper not allow such data portability, the end user can directly rely on Article 6(9) DMA to ask for such portability.

c. Secondary Claims on the Member State Level

Mainly, however, representative actions in the interest of consumers under the DMA will be relevant when a gatekeeper infringes the DMA's obligations and prohibitions. Those situations warrant secondary claims of damages or an injunction. Contrary, for example, to Article 82 GDPR, the DMA does not itself contain such secondary claims.

In EU competition law, the ECJ has ruled that the effective enforcement of Union competition law provisions with horizontal direct effect mandates that individuals must be able to sue for damages (and injunctive relief) in those scenarios where competition law has been infringed as a matter of EU law.¹⁶² EU law itself does not provide for such secondary claims for damages or injunctions. In a system of decentralised competition law enforcement, the Member States must ensure that claims for damages and injunctive relief exist, which must, however, comply with the principles of equivalence and effectiveness.¹⁶³ Also outside of competition law, the ECJ held that the Member States are under a duty to protect the rights of EU citizens deriving from EU regulations, warranting that they must provide a basis for claims enforceable in the Member States' courts subject to the principles of equivalence and effectiveness.¹⁶⁴

¹⁶¹ Critically, albeit from a viewpoint of business users, Rolf Albrecht, *Digital Markets Act kommt – Regulierung von Plattformen und Auswirkungen auf Unternehmen*. GWR, 181, 182 (2022); Schläfke & Schuler *supra* note 11, para. 6.

¹⁶² See, from competition law, Case C-453/99 *supra* note 36; Joined cases C-295/04 to C-298/04 *supra* note 36.

¹⁶³ Joined cases C-295/04 to C-298/04 *supra* note 36; Case C-724/17 *supra* note 75, para. 27.

¹⁶⁴ Case C-253/00 *supra* note 114, para. 27.

A similar argument can be made for the DMA.¹⁶⁵ While the DMA does not foresee a similar decentralised enforcement environment as competition law, Article 39(5) DMA clearly demonstrates that the regulatory instrument confers a relevant role on play to national courts and national legislation.¹⁶⁶ As mentioned above,¹⁶⁷ secondary claims for damages and injunctions for the DMA's violations will ensure the full effectiveness of its enforcement and work as an instrument of corrective justice. The DMA does not itself contain secondary claims for damages or injunction.¹⁶⁸ It is, therefore, a matter of EU law that the Member States provide for a right to damage and an injunction in their legal systems, subject to the principles of equivalence and effectiveness.

In the laws of the different Member States, consumers are entitled to certain claims for breaches of the DMA, both in terms of injunctions and redress requested by the RAD. Concerning redress, an infringement of the DMA constitutes a tort in most of the Member States, also to the benefit of consumers in their capacity as end users. In Italy, for example, a failure to fulfil a DMA obligation could give rise to a claim for damages as extracontractual liability under Article 2043 of the Italian Civil Code.¹⁶⁹ Comparably, in the Netherlands, Article 6:162 Dutch Civil Code is a general tort provision that, in principle, covers breaches of directly applicable Union law,¹⁷⁰ such as the DMA. Also, Article 1240 French Civil Code provides for a general tort provision, which can include the DMA. The same holds true for Portugal under Article 483(1) Portuguese Civil Code.¹⁷¹ Similarly, in Austria, the provisions of the DMA could give rise to tort claims according to Section 1311 of the Austrian Civil Code, as at least Articles 5, 6, and 7 DMA have the purpose of protecting individual rights.¹⁷² In Ireland, for example, infringements of the DMA might give rise to tort claims based on a breach of statutory duty.¹⁷³

¹⁶⁵ Komninos *supra* note 4, 425, 432-434.

¹⁶⁶ See in detail below at III.B.4.

¹⁶⁷ See above at III.B.2.

¹⁶⁸ See Zober *supra* note 111, 611, 614.

¹⁶⁹ See Schläfke & Schuler *supra* note 11, para. 184.

¹⁷⁰ Gerrit Betlem & Andre Nollkaemper, *Giving effect to public international law and European Community law before domestic courts. A comparative analysis of the practice of consistent interpretation*. 14 E.J.I.L. 569, 580 (2003).

¹⁷¹ See generally on Portuguese tort law, Margarida Lima Rego, *Compensatio Lucri Cum Damno in Portugal*. 28 EUROP. REV. PRIV. L., 749 (2020).

¹⁷² Ranjana Andrea Achleitner, *Das Durchsetzungsregime im Digital Markets Act: Private Enforcement unerwünscht?*. 78 ZOR 287, 291 (2023).

¹⁷³ See on statutory duty in Ireland generally, EOIN QUILL, *TORTS IN IRELAND*, 124 (Gill 2014); for the DMA see Schläfke & Schuler *supra* note 11, paras. 161 et eq.

In German law, following the recent 11th Amendment of the German Competition Act, an infringement of Articles 5, 6, and 7 DMA can give rise to a specific type of damages claim, usually only applicable in the context of competition law violations.¹⁷⁴ Germany has made the competition tort regime also applicable to an infringement of Articles 5, 6, and 7 DMA. Consequently, in Germany, the special (substantive and procedural) provisions that apply to private enforcement of competition law will apply to DMA infringements.¹⁷⁵ This includes a majority of the rules Germany introduced in transposing the Damages Directive. Furthermore, next to the *lex specialis* rules in the German Competition Act, other bases for damages claims are available for consumers according to general German tort law, specifically Section 832(2) German Civil Code, which might have a residual application for instances not covered by the rules of the German Competition Act.¹⁷⁶

In many of the Member States, infringements of the DMA can give rise to claims for injunctive relief. In Dutch law, for example, Article 3:296 Dutch Civil Code provides an injunction in cases of tortious actions.¹⁷⁷ Under the new German 11th Amendment of the Competition Act, for example, an infringement of Articles 5, 6, and 7 DMA can also be enforced via injunctions of the *lex specialis* rules in the German Competition Act.¹⁷⁸ Moreover, Section 1004 of the German Civil Code can have residual application.¹⁷⁹

Moreover, in some of the Member States, consumers are entitled to other claims for breaches of the DMA. The Netherlands, for example, has claims for unjust enrichment in Article 6:212 Dutch Civil Code or claims for declaratory relief in Article 3:302 Dutch Civil Code, which could be available for DMA violations.¹⁸⁰ In Italy, for example, should the DMA directly impede contractual arrangements between the gatekeeper and an end user, a judge can supplement and modify the respective contract in order to achieve DMA-compliant behaviour by the gatekeeper.¹⁸¹ Furthermore, where provisions of the DMA become part of the contractual content by virtue of Articles 1374 or 1367 of the Italian

¹⁷⁴ Sections 33(1), 33a German Competition Act.

¹⁷⁵ See, in detail, Nada Ina Pauer, *The 11th Amendment of the German Act Against Restraints of Competition—A ‘New Competition Tool’ - Facilitated Disgorgement and the DMA’s Enforcement*. 14 JECLAP, 354, 358-359 (2023).

¹⁷⁶ Becker *supra* note 4, 403, 409-410.

¹⁷⁷ Schläpke & Schuler *supra* note 11, para. 218.

¹⁷⁸ Section 33(1) German Competition Act.

¹⁷⁹ Becker *supra* note 4, 403, 409-410.

¹⁸⁰ Schläpke & Schuler *supra* note 11, paras. 217 – 222.

¹⁸¹ Art. 1374 Italian Civil Code.

Civil Code and the gatekeeper is not upholding that obligation, the other party, including an end user, can terminate that contract.

Generally, several of the Member States know rules that where a provision is in irredeemable conflict with a binding law, such as the DMA, a contract can be declared null and void, such as in Germany according to Section 134 of the German Civil Code or in Italy according to Article 1418(1) of the Italian Civil Code. Moreover, in some states unfair competition law might be used as a basis for consumer claims.¹⁸² However, unfair competition law solely applies to consumers directly¹⁸³ In Germany, for example, a claim under Sections 3(2), 8(1), and 9(2) German Unfair Competition Act for consumers in their capacity as end users might be possible. Similarly, for example, in Portugal, the unfair commercial practices law seems to cover DMA infringements as unfair commercial practices.¹⁸⁴ Furthermore, in Spain, Article 15 of the Unfair Competition Act covers the lack of compliance with legal rules, which could therefore include DMA violations.

While the Member States, therefore, provide a vast amount of varying claims for DMA violations, the lack of guidance from the EU legislator for their enforcement in representative actions is problematic.¹⁸⁵ Providing, for example, for a tort claim for violations of the DMA is not sufficient in itself to guarantee successful claims. Especially when it comes to representative damages actions for consumers in their capacity as end users, Table 2 has shown the limited theoretical potential for such actions.

One cannot draw a clear line between infringement and the presence of harm derived from a breach of one of the DMA provisions. Similar to the discussion that has evolved and ignited in the realm of private enforcement in the context of competition law, an infringement of a rule does not necessarily entail that direct harm has been inflicted on consumers by those same actions.¹⁸⁶ Without any further alleviating measures in terms of substance but mostly of procedural law, representative actions will not be a viable option for DMA enforcement.

¹⁸² See generally on the suitability for DMA violations as a basis for unfair commercial practice, albeit from the perspective of business users below at III.C.1.

¹⁸³ On recent changes regarding individual consumer claims, Christian Alexander, *Unfair Commercial Practices and Individual Consumer Claims for Damages – The Transposition of Art. 11a UCP Directive in Germany and Austria*. 72 GRUR INTER'AL, 327 (2023).

¹⁸⁴ Schläfke & Schuler *supra* note 11, para. 264.

¹⁸⁵ The same holds true for individual private enforcement, see above at II.A.

¹⁸⁶ On the difficulties surrounding quantification of harm in competition law Lena Hornkohl, *The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overenforcement*. ECLIC, 29 (2021).

3. Member States' Pivotal Role in the Procedural Adaptation of Representative Actions

The substantive claims based on the DMA's violations enforceable via the mechanism of representative actions under the RAD model already largely depend on their configuration in national law (outside of the one instance where the DMA directly provides a basis for a claim). Nevertheless, the Member States' legal systems, particularly their transposition of the RAD in terms of procedural law, have a further impact on such representative actions for DMA violations.¹⁸⁷

Article 52 DMA explicitly requires the Member States to include the DMA in the scope of their national laws when transposing the RAD. Article 1(2) RAD leaves it to the Member States to either integrate the procedural mechanism for representative actions required by the RAD as part of an existing tool or as part of a new procedural mechanism for collective injunctive measures or redress measures, or as a distinct procedural mechanism. The national implementing laws of the RAD, also considering the gaps that the RAD leaves for the Member States' specificities, are, therefore, decisive for metering the success of the DMA's representative actions. Most Member States have taken an approach that is not focused on the DMA, particularly when it comes to procedural rules specifically targeted at the complexity of digital markets.

a. Diverging Approaches: Implementation of the Representative Actions Directive in Relation to the DMA

Given the typical leeway in terms of how and where a directive's objectives and provisions should be integrated into national law, it comes as no surprise that the Member States have taken very different approaches to implementing the RAD in general and in relation to the DMA. Several of the Member States have yet to fully transpose the RAD into national law, such as Austria.¹⁸⁸ Those that have done so already have incorporated different systems of the representative action model into their national procedural

¹⁸⁷ Focusing on the role of national law Drexler, Conde Gallego, González Otero, Herrmann, Hoffmann, Johannsen, Kestler & Matarazzi *supra* note 11, 864, 875.

¹⁸⁸ See overview of national transposition here, European Union, *National transposition measures communicated by the Member States concerning: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance)* (2022), <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32020L1828>, accessed 14 November 2023.

regimes.¹⁸⁹ Differences largely relate to crucial topics, such as the approaches towards opt-in or opt-out actions, personal scope, litigation funding, and the relationship of the transposition of the RAD to existing class action regimes.

Focusing on the implementation in relation to the DMA alone, there is some potential for different legal protections at the Member State level as an underpinning factor for the exercise of forum shopping. The following examples demonstrate the diverging approaches of the Member States when it comes to representative actions against infringements of the DMA. This section will give notable examples but cannot provide an in-depth analysis of all the Member States' systems transposing the RAD in connection to the DMA.

i. The Netherlands

The Netherlands already had an extensive collective action regime stemming from the Dutch Act on Damages Claims in a Collective Action (Wet Afwikkeling Massaschade in Collectieve Actie, WAMCA) before it transposed the RAD.¹⁹⁰ Under the WAMCA, claim organisations can seek monetary damages on behalf of and in favour of a group of injured persons in a representative action.¹⁹¹ The WAMCA is all-encompassing in terms of claims that can be enforced via this procedural instrument. It does not specify which damages claims can be brought representatively, as long as the interests of the injured persons represented in the action are sufficiently similar.¹⁹² Therefore, as an infringement of the DMA might constitute a tort in Dutch law or give rise to injunctive relief,¹⁹³ DMA violations can be subject to WAMCA representative actions.¹⁹⁴ Consequently, and going

¹⁸⁹ See, for example, Antonia Hotter & Florian Scholz-Berger, *Organisation and Design of Collective Redress in Europe* (2023), <https://denhollander.info/artikel/17765>, accessed 14 November 2023. On the different forms of class actions in Europe pre-RAD, see LINDA MULLENIX, *For the Defense: 28 Shades of European Class Actions*. In: Alan Uzelac & Stefaan Voet (eds.), *CLASS ACTIONS IN EUROPE*, 43 (Springer 2021). However, a common denominator is that the representative actions can be brought in national courts and not at administrative authorities. The following discussion will therefore focus on representative actions in national courts.

¹⁹⁰ See for example, IANIKÁ TZANKOVA & XANDRA KRAMER, *From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands*. In: Alan Uzelac and Stefaan Voet (eds.) *CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL?* 97 (Springer 2021); CHRISTOPH VAN DER ELST & W.C.T. WETERINGS, *The Dutch Mechanisms for Collective Redress: Solid and Excellent within Reach*. In: Brian Fitzpatrick & Randall Thomas (eds.), *THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY* 271 (Cambridge University Press 2021).

¹⁹¹ Article 3:305a(1) Dutch Civil Code.

¹⁹² Article 3:305a(1) Dutch Civil Code.

¹⁹³ See above at III.B.2.c.

¹⁹⁴ See also Schläpke & Schuler *supra* note 11, 228 – 232.

beyond the scope of the RAD,¹⁹⁵ also competition law violations can be subject to those actions.¹⁹⁶ This offers the theoretical possibility for hybrid representative actions covering both DMA and competition law violations.

Moreover, since the WAMCA is not limited to consumers, collective actions are available both to business and end users. The WAMCA substantially goes beyond the described RAD's limited personal scope.¹⁹⁷ Consequently, business users can also file WAMCA actions. With those actions, a much broader range of claims and, therefore, DMA violations can be enforceable than those under the RAD's prerequisites, which only cover the enforcement of consumer claims directly benefiting consumers in their capacity as end users.¹⁹⁸

The WACMA consists of detailed rules on the admissibility of the claims' organisation and the procedure to be followed.¹⁹⁹ Interestingly, the WACMA contains an opt-out mechanism for Dutch-domiciled class members and generally an opt-in mechanism for foreign-domiciled class members.²⁰⁰ For foreign-domiciled class members, the possibility generally exists to adopt an opt-out mechanism as well.²⁰¹ However, in the transposition of the RAD,²⁰² this possibility was limited with regard to consumers.²⁰³ Consequently, for consumers in their capacity as end users who do not have their habitual residence in The Netherlands, the opt-in system is mandatory for DMA representative actions in The Netherlands. Consumers with a habitual residence in The Netherlands benefit from the opt-out mechanism for DMA representative actions under the WACMA system. With the RAD Implementation Act, the Netherlands only introduced a few further amendments to transpose the RAD. Those mainly relate to the

¹⁹⁵ See above at III.B.1.

¹⁹⁶ Rein Wesseling & Roos Elemans, *Cartel damages cases in the Netherlands*. 4 CLPD, 23 (2018); ROGIER MEIJER & ERIK-JAN ZIPPRO, *Chapter 5: Private Enforcement in the Netherlands*. In: Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds.), *PRIVATE ENFORCEMENT OF EUROPEAN COMPETITION AND STATE AID LAW: CURRENT CHALLENGES AND THE WAY FORWARD* 159 (Kluwer Law International 2020).

¹⁹⁷ See above at III.B.1.

¹⁹⁸ See above at III.B.1.

¹⁹⁹ This cannot be discussed in detail but see van der Elst & Weterings *supra* note 190, 271.

²⁰⁰ See, in detail, *ibid.*, 271, 298.

²⁰¹ Article 1018f(5) Dutch Civil Procedure Code.

²⁰² Act of 2 November 2022 amending Book 3 of the Civil Code and the Code of Civil Procedure in relating to the transposition of Directive (EU) 2020/1828 of the European Parliament and Council of 25 November 2020 on representative actions for the protection the collective interests of consumers and repealing Directive 2009/22/EC (OJEU 2020, L 409) (Implementation Act for Directive representative actions for consumers).

²⁰³ Article 1018f(6) Dutch Civil Procedure Code.

designation of qualified entities from foreign jurisdictions that will be allowed to bring cases before Dutch courts and to litigation funding.²⁰⁴

ii. Portugal

Similar to the Netherlands, Portugal already has a far-reaching class action system, the famous *Ação Popular*, guaranteed by the Portuguese Constitution²⁰⁵ and further laid down in the Popular Action Act.²⁰⁶ Contrary to the Dutch system, class action is limited to specified breaches of substantive law, as noted in Article 52 of the Portuguese Constitution. While this enumeration in Article 52 of the Portuguese Constitution contains mere examples of protected interests,²⁰⁷ further implementation in specific provisions throughout Portuguese statutory law is needed to provide for a legal basis, such as in consumer protection law²⁰⁸ or competition law²⁰⁹.

Portugal has not yet transposed the RAD, including its activation vis-à-vis DMA infringements in Article 52 DMA explicitly. Yet, a violation of the DMA can constitute unfair commercial practices under Portuguese unfair commercial practices law.²¹⁰ Article 16 of Decree-Law 57/2008 provides for the option to bring collective injunction proceedings for citizens and associations or foundations.²¹¹ Consequently, to date, the *Ação Popular* is applicable to enforce DMA obligations collectively via damages actions. In the transposition of the RAD and Article 52 DMA, Portugal would need to introduce either a special regime for the DMA or extend the rules on competition class actions and their dedicated procedural rules towards the DMA. Should the *Ação Popular* be made available for DMA violations, consumers in their capacity as end users would gain access to an elaborate opt-out class action system, where any consumer can represent the whole class, but actions could also be brought by associations and foundations whose statutory goal it is to protect the interests in questions and a claimant-friendly cost system.²¹²

²⁰⁴ C.H. VAN RHEE, *Mechanisms for the enforcement of collective consumer interests in the Netherlands*. In: Philipp Anzenberger, Alexander Klauser & Bettina Nunner-Krautgasser (eds.). *KOLLEKTIVER RECHTSSCHUTZ IM EUROPÄISCHEN RECHTSRAUM*, 57 (Verlag Österreich 2022).

²⁰⁵ Article 52 of the Portuguese Constitution.

²⁰⁶ Law no. 83/95, of 31 August, as amended by Decree-law no. 214-G/2015, of 2 October.

²⁰⁷ Miguel Sousa Ferro, *Class Actions in Portugal: The Little Regime That Could*. 2 *MASS CLAIMS*, 115, 116 (2021).

²⁰⁸ Articles 10 to 13, 17 and 18(1)(1) of the Consumer Protection Act (Law 24/96 of 31 July).

²⁰⁹ Article 19 of the Private Enforcement Act, Law 23/2018 of 5 June.

²¹⁰ See above at III.B.2.c.

²¹¹ See, comprehensively, Sousa Ferro *supra* note 207, 115.

²¹² See, comprehensively, Sousa Ferro *supra* note 207, 115.

iii. Germany

Germany offers a unique new model for representative actions in the interest of consumers, particularly when it comes to DMA infringements, amending the previous approach towards class actions in Germany substantively. In Germany, the RAD has been transposed by creating a new Consumer Rights Enforcement Act and by changing the rules of the Injunctions Act as well as the Unfair Competition Act.

The Consumer Rights Enforcement Act covers representative compensatory or model declaratory actions.²¹³ For those actions, the scope of the Consumer Rights Enforcement Act covers all civil law disputes involving claims for compensation by a wide range of consumers against a trader,²¹⁴ which must be materially similar²¹⁵ and representative redress actions must be made in a consumer quorum, where the qualified entity has to plausibly demonstrate that claims of 50 consumers might be affected.²¹⁶ As discussed above, under German law, consumers are entitled to certain damages claims in the context of DMA infringements, including the special damages claims for breaches of the DMA under Sections 33 and 33a of the German Competition Act.²¹⁷

Having such a dedicated claim might give DMA enforcement, through representative actions, further legitimisation. Since competition law violations are also covered by the scope, the issue of hybrid representative actions covering both DMA and competition law violations could arise. Furthermore, a parallel national DMA-like instrument has been made law at the national level with Section 19a of the German Competition Act.²¹⁸ In practice, this may result in further duplication (and potential confusion) between private (collective) enforcement of both regulatory regimes in national courts²¹⁹.

When it comes to the personal scope of representative redress or model declaratory actions under the new Consumer Rights Enforcement Act, Germany went for

²¹³ Section 1 (1) Consumer Rights Enforcement Act.

²¹⁴ Section 1(1) Consumer Rights Enforcement Act.

²¹⁵ Section 15(1) Consumer Rights Enforcement Act.

²¹⁶ Section 4(1) Consumer Rights Enforcement Act.

²¹⁷ See above at III.B.2.c.

²¹⁸ See, inter alia, Tabea Bauermeister, *The German “Lex GAFA” – lighthouse project or superfluous national solo run?* 2 YARS, 75 (2022).

²¹⁹ Those problems relating to the prohibition of double jeopardy are reviewed in Alba Ribera Martínez, *An Inverse Analysis of the Digital Markets Act: Applying the Ne Bis in Idem Principle to Enforcement*. 19 EUROP. COMP. J. 86-115 (2023); and Marco Cappai & Giuseppe Colangelo, *Applying Ne Bis In Idem In The Aftermath Of Bpost And Nordzucker: The Case Of EU Competition Policy In Digital Markets*. 60 CMLR 431-456 (2023).

a double overriding transposition of the RAD and the DMA, overcoming the above-mentioned limited personal scope of Article 42 DMA for consumers in their capacity as end users. According to Section 1(2) of the Consumer Rights Enforcement Act, a certain type of SME, namely companies with fewer than ten employees and an annual turnover or an annual balance of not more than EUR 2 million, is considered equivalent to consumers for the purpose of redress or model declaratory actions. Therefore, business users affected by a DMA violation who fulfil the criteria for SMEs according to the Consumer Rights Enforcement Act are eligible to participate in representative actions for violations of the DMA in Germany. This substantially broadens the scope of available collective action mechanisms for business users, albeit not as excessively as in the Netherlands.

For representative redress actions, the new Consumer Rights Enforcement Act foresees detailed procedural rules.²²⁰ It entails an opt-in model for redress actions, but opt-in is still granted at a late stage.²²¹ Redress actions under the new Consumer Rights Enforcement Act are characterised by limited possibilities for litigation funding.²²² Generally, it remains unclear how the dedicated (procedural) rules Germany introduced in transposing the Damages Directive that apply *mutatis mutandis* to DMA infringements and the procedural rules of the Consumer Rights Enforcement Act should interact with one another, for example, when it comes to disclosure rules where both the Consumer Rights Enforcement Act²²³ and the German Competition Act²²⁴ overlap.

Outside of redress, the German transposing law also covers other means of representative action, albeit they are not as all-encompassing. Representative injunctions are covered by both the Injunctions Act²²⁵ as well as the Unfair Competition Act²²⁶. The latter also covers a representative action for the skimming of profits, but the excess profit is not distributed to potentially harmed market participants but surrendered to the Federal budget.²²⁷ For injunctions or skimming of profits, the Injunctions Act²²⁸ and the Unfair

²²⁰ These cannot be discussed in detail at this stage.

²²¹ Section 46 Consumer Rights Enforcement Act.

²²² Section 4(2) and (3) Consumer Rights Enforcement Act.

²²³ Section 6 Consumer Rights Enforcement Act mainly referring to Section 142 German Civil Procedure Code.

²²⁴ Sections 33g, 89b German Competition Act.

²²⁵ Section 2(2)No. 56 Injunctions Act.

²²⁶ Section 8 Unfair Competition Act.

²²⁷ Section 10 Unfair Competition Act.

²²⁸ Section 2(2)No. 56 and 3 Injunctions Act

Competition Act²²⁹ themselves foresee claims available directly for eligible consumer associations on the basis of associational standing. Furthermore, the new 11th Amendment of the German Competition Act also provides a dedicated claim on the basis of associational standing for qualified entities in case of infringements of Articles 5, 6, and 7 DMA.²³⁰ The relationship between representative injunction actions under the Injunctions Act and the Unfair Competition Act is again unclear. While the rules under the Injunctions Act and the Unfair Competition Act do not cover SMEs or other business users, the new representative injunction in the 11th Amendment of the German Competition Act also covers injunctions for “associations with legal capacity for the promotion of commercial or independent professional interests”. Business users could be represented by the latter.

iv. Italy

Examples from other Member States also demonstrate the different approaches that have been adopted, particularly compared to the existing class action regimes. In Italy, the Decree transposing the RAD inserted twelve new articles²³¹ into the Italian Consumer Code.²³² Via this new type of representative action, certain qualified entities – national or cross-border consumer associations and national independent public bodies – can bring representative actions against traders for infringements of the 68 provisions listed in Annex II-septies, that affect or are likely to affect the collective interests of consumers.²³³ Annex II-septies includes the DMA, so violations of the DMA are enforceable through the Italian transposition of the RAD.²³⁴

This new type of general representative action is added to the much broader class action system provided for by Articles 840-bis et seq. of the Italian Code of Civil Procedure. The general class action, for example, does not mandate qualified entities to bring the class action but allows each member of the class to bring such action and is not

²²⁹ Section 8, 10 Unfair Competition Act.

²³⁰ Section 33(4) No. 2 German Competition Act.

²³¹ 140-ter to 140-quaterdecies Italian Consumer Code.

²³² Legislative Decree No. 28/2023.

²³³ Article 140-ter(2), 140-septies(1) Italian Consumer Code.

²³⁴ No 67 Annex II-septies Italian Consumer Code.

limited to consumers.²³⁵ Both procedures are mutually exclusive in the Italian procedural landscape. In the event of a breach of the provisions set forth in Annex II-septies, only a representative action under the Italian Consumer Code will be possible.²³⁶ Therefore, for DMA violations, the general class action system is not available. Many procedural provisions of the new type of representative action refer to the regime for class actions in Articles 840-bis et seq. of the Italian Code of Civil Procedure.²³⁷ In some instances, the new type of representative action goes beyond the class action regime of Articles 840-bis et seq. of the Italian Code of Civil Procedure. Most prominently, the new type of representative action allows to bring and grant both injunction and redress in the same proceedings, which is not allowed in the general class action regime in Italy.²³⁸

v. Ireland

Some of the Member States have decided to include entirely new regimes. In Ireland, the new Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 includes actions for representative redress or injunction provided for in a relevant enactment, which consists, inter alia, of all the acts named in Annex I of the RAD, i.e., including the DMA.²³⁹

Under the new Irish regime, opt-in is required for redress measures, while opt-in is not required for injunctions.²⁴⁰ For injunctions alone, the Irish Act mandates that the qualified entity must demonstrate efforts to engage in prior consultation to resolve the alleged infringement outside of court proceedings.²⁴¹ Consumers are bound by the outcome of the action and cannot ask for individual redress.²⁴² Similarly, any consumer who has missed the opportunity to opt-in cannot benefit from the representative action.²⁴³ It will not be necessary for the impacted consumers who joined a representative action

²³⁵ See on the general Italian Class Action regime by Articles 840-bis et seq. of the Italian Code of Civil Procedure, Giacomo Pailli, *The 'New' Italian Class Action: Another Step Forward*. 2 MASS CLAIMS 26 (2022).

²³⁶ Art. 140-ter(2) Italian Consumer Code.

²³⁷ See, e.g., Art. 140-octies(3) Italian Consumer Code.

²³⁸ Art. 140-septies(1) Italian Consumer Code.

²³⁹ Section 2 Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴⁰ Section 24 Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴¹ Section 21 Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴² Section 25(2) Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴³ Section 25(3) Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

for redress to bring separate actions to benefit from any of the redress measures,²⁴⁴ it is up to the qualified entity to inform the consumers how they can benefit from those redress measures.

The new Irish Act, subject to further conditions, seems to allow litigation funding “in accordance with the law”.²⁴⁵ However, interpreting the latter, litigation funding, save for limited exceptions, is not permitted in Ireland,²⁴⁶ which is heavily debated at the moment²⁴⁷. Subject to a cap, a qualified entity can charge a modest fee to a consumer who requests to be represented in a representative action for redress, not for injunctions.²⁴⁸

b. Basis for Forum Shopping: Unsolved Issue of International Jurisdiction in the Context of the DMA

As the previous sections demonstrated, the Member States picked vastly diverging approaches when it came to the transposition of the RAD in general, but also in relation to the DMA. At the moment, there is not a harmonised collective action model in the EU even after the transposition of the RAD. Rather, we see a heterogenic landscape consisting of 27 different approaches. Consequently, it matters considerably where an action is brought and what law applies to determine its potential success. In the following, we are concentrating on international jurisdiction alone.

In the process of evolving collective actions in Europe in general, the issue of international jurisdiction has been discussed tediously.²⁴⁹ In the context of the RAD, the

²⁴⁴ Section 26(6) Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴⁵ Section 27(1) Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴⁶ Maintenance and Embrace Act (Ireland) 1634; see *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise & other* [2017] IESC 27. For exceptions involving a legitimate interest in the case in the example of shareholders or creditors of a company involved in proceedings, see *Thema International Fund v HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 I.R. 654.

²⁴⁷ See Law Reform Commission, *Consultation Paper Third-Party Litigation Funding* (2023), <https://www.lawreform.ie/fileupload/Reports/LRC%20CP%2069%20-%202023%20Third-Party%20Funding%20-%20Full%20Text.pdf>, accessed 14 November 2023.

²⁴⁸ Section 29(1) Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023.

²⁴⁹ See throughout the years, for example, Paul Oberhammer, *Collective Redress and Jurisdiction in Europe: Opinion Piece*. MASS CLAIMS, 27 (2021); CINZIA PERARO, *Cross-border Collective Redress and the Jurisdictional Regime: Horizontal vs Sectoral Approach*. In: Burkhard Hess & Koen Lenaerts (eds.). THE 50TH ANNIVERSARY OF THE EUROPEAN LAW OF CIVIL PROCEDURE, (Nomos 2020); Stephanie Law, *Your Place? Mine? Or Theirs? A Legal and Policy-orientated Analysis of Jurisdiction in Cross-Border Collective Redress*. In: Burkhard Hess & Koen Lenaerts (eds.). THE 50TH ANNIVERSARY OF THE EUROPEAN LAW OF CIVIL PROCEDURE, 349 (Nomos 2020); MICHAEL STÜRNER, *Grenzüberschreitender kollektiver Rechtsschutz in der EU: internationalverfahrenrechtliche und kollisionsrechtliche Probleme*. In: Christoph

discussion has flared up again,²⁵⁰ since it did not include dedicated rules on international jurisdiction. According to Article 2(3) RAD, existing rules on private international law, including international jurisdiction, apply. The general EU regime for international jurisdiction, the Brussels Ibis Regulation²⁵¹, does not contain any dedicated rules on international jurisdiction for (cross-border) collective actions,²⁵² which have been criticised since the beginning,²⁵³ most notably in its on-going revision process²⁵⁴. However, the general rules of the Brussels Ibis Regulation apply to collective actions.²⁵⁵ Those rules do not necessarily and sufficiently consider the specificities of collective

Brdmelmeyer (ed.), *Die EU-Sammelklage*, 109 (Nomos, 2013); EVA LEIN, *Jurisdiction and Applicable Law in Cross-Border Mass Litigation*. In: Fausto Pocar, Illaria Viarengo & Francesca Clara Villata (eds.), *RECASTING BRUSSELS I*, 159 (CEDAM 2012); ASTRID STADLER, *Cross-border mass litigation: a particular challenge for European law*. In: Jenny Steele & Willem H. van Boom (eds.) *MASS JUSTICE: CHALLENGES OF REPRESENTATION AND DISTRIBUTION*, 73 (Edward Elgar 2011).

²⁵⁰ See, for an overview, Oberhammer *supra* note 249, 27; and also, Frederick Rielaender, *Aligning the Brussels regime with the representative actions directive*. 71 *INTER'AL COMP. L. QUART.*, 108 (2022).

²⁵¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) OJ L351/1.

²⁵² See for an overview of collective actions and the Brussels Ibis Regulation, TOMAS ARONS, *Cross-border dimension of collective proceedings in the Brussels Ibis regime: jurisdiction, lis pendens and related actions*. In: Peter Mankowski (ed.), *RESEARCH HANDBOOK ON THE BRUSSELS IBIS REGULATION*, 1 (Edward Elgar 2020); and ALEXIA PATO, *PRIVATE INTERNATIONAL LAW ANALYSIS', JURISDICTION AND CROSS-BORDER COLLECTIVE REDRESS: A EUROPEAN PRIVATE INTERNATIONAL LAW PERSPECTIVE*, 145 (Hart Publishing 2019).

²⁵³ See, for example, Beatriz Anoveros Terradas, *Consumer Collective Redress under The Brussels I Regulation Recast in the Light of the Commission's Common Principles*. *JPIL*, 143 (2015); BURKHARD HESS, *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*. In: Arnaud Nuyts & Nikitas E. Hatzimihail (eds), *CROSS-BORDER CLASS ACTIONS. THE EUROPEAN WAY*, 59 (Sellier 2014); CHRISTINA GONZALEZ BEILFUSS & BEATRIZ ANOVEROS TERRADAS, *Compensatory Consumer Collective Redress and the Brussels I Regulation (Recast)*, In: Arnaud Nuyts & Nikitas E. Hatzimihail (eds.), *CROSS-BORDER CLASS ACTIONS. THE EUROPEAN WAY*, 241 (Sellier 2014); Burkhard Hess, *Cross-border Collective Litigation and the Regulation Brussels I*. *IPRAX* 116 (2010).

²⁵⁴ Burkhard Hess, David Althoff, Tess Bens, Niels Elsner, & Inga Järvekülg, *The Reform of the Brussels Ibis Regulation*. *MPILux Working Paper 2022* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4278741, accessed 14 November. Also see, Directorate-General for Justice and Consumers, *Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation)*, (2023) <https://op.europa.eu/en/publication-detail/-/publication/4e4370d0-cead-11ed-a05c-01aa75ed71a1>, accessed 14 November 2023.

²⁵⁵ See Case 21-76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166; Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61; Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel*, ECLI:EU:C:2002:555; Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, ECLI:EU:C:2015:335; Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37; Case C-343/19 *Verein für Konsumenteninformation v Volkswagen AG*, ECLI:EU:C:2020:534.

actions, as the Brussels Ibis system is built on a mere individual conception of litigation.²⁵⁶

Unsurprisingly, with the limited rules of the DMA on private enforcement, the DMA also does not contain rules on international jurisdiction (or applicable law). In the context of the DMA's consumer representative actions, this issue of international jurisdiction is particularly problematic. So far, the designated gatekeepers are non-EU companies with their main establishment lying outside of the EU. Since the rules of the Brussels Ibis Regulation apply to defendants domiciled in the EU,²⁵⁷ claimants might face the necessity of initiating legal proceedings in non-European Union countries where they might be subject to a foreign legal system or might not have access to an effective mechanism for collective action altogether.²⁵⁸

Even if DMA consumer representative actions can be brought against gatekeepers' subsidiaries based in the EU, such actions present specific problems. Typically, violations of the DMA will occur in the digital sphere and can easily affect consumers in their capacity as end users in several different locations all across the EU (and beyond) who want to bring cross-border representative actions. Similar problems compared to GDPR (collective) actions might arise. However, the DMA is missing a provision such as Article 79(2) GDPR, which at least tackles the issue of international jurisdiction for GDPR claims.²⁵⁹

As violations of the DMA might particularly give rise to tort claims or injunctive relief, Article 7(2) of the Brussels Ibis Regulation and the corresponding jurisprudence²⁶⁰ for collective actions on the place where the damage occurred and the place of the event giving rise to that damage will be applicable. Correspondingly, the place of the event giving rise to that damage likely relates to the place of establishment of the gatekeeper, where claimants could seek full compensation.²⁶¹ The same avenue is offered by the

²⁵⁶ Rafael Amaro, Maria José Azar-Baud, Sabine Corneloup, Bénédicte Fauvarque-Cosson & Fabienne Jault-Seseke, *Collective redress in the Member States of the European Union* European Parliament, 93 (2018).

²⁵⁷ See, in the context of collective actions Rielaender *supra* note 250, 127.

²⁵⁸ Directorate-General for Justice and Consumers *supra* note 254, 230.

²⁵⁹ See, comprehensively, Eduardo Silva de Freitas, *The interplay of digital and legal frontiers: analyzing jurisdictional rules in GDPR collective actions and the Brussels I-bis Regulation*. NIPR, 227 (2023); Alexia Pato & Elena Rodríguez-Pineau, *Cross-Border Data Protection Through Collective Litigation: A EU Legal Maze?* EDPL, 550 (2021).

²⁶⁰ Case C-167/00 *supra* note 255; Case C-352/13 *supra* note 255; Case C-709/19 *supra* note 255; Case C-343/19 *supra* note 255.

²⁶¹ See, for example, by analogy, the standard case law Case C-68/93 *Shevill and Others v. Presse Alliance* *supra* note 255.

forum rei in Articles 4 and 64 of the Brussels Ibis Regulation. While this allows a certain centralisation of collective claims at the forum of establishment of the gatekeeper – should this be in the EU at all – this might not be beneficial for consumers affected all over the EU (and beyond).

Concerning the place where the damage occurred, consumers in their capacity as end users located in several different locations across the EU will be affected and might suffer loss through an infringement of the DMA. Such a scattering of individual claims leads to courts in multiple of the Member States or in different districts in one Member State²⁶² having jurisdiction over the same set of facts and cases.²⁶³ The fact that a representative organisation files for the representative actions in the collective interest of consumers does not change the location of the place where the damage occurred for the harmed individuals.²⁶⁴ Jurisdiction under Article 7(2) Brussels Ibis Regulation (nor under any other provision of the Brussels Ibis Regulation) is not centralised at the seat of the qualified entity.²⁶⁵ Given the jurisprudence of the CJEU in *Schrems*,²⁶⁶ the consumer forum of Article 18 of the Brussels Ibis Regulation will also not be applicable to representative actions.²⁶⁷ Even Article 18 of the Brussels Ibis Regulation would not overcome the difficulties when consumers of a cross-border representative action are domiciled in different Member States.

Overall, it might be very likely that several courts in multiple of the Member States will have international jurisdiction where several consumers, in their capacity as end users, are affected by the same DMA-violating act. This opens the door for forum shopping. Ironically, one of the main objectives under the DMA, which was to harmonise the regulation of digital markets under the regulatory instrument away from divergence by setting the regulation's legal basis under Article 114 TFEU, seems to be in conflict with the patchwork of models that will arise as a consequence of the application of Articles 42 and 52 DMA. Harmonisation in the internal market can be imperilled not only

²⁶² See, for example, Case C-343/19 *supra* note 255, where 16 group actions were filed before 16 different Austrian district courts, see Petra Leupold, *Private International Law and Cross-Border Collective Redress. A Legal Analysis of Jurisdiction, Applicable Law, Pendency, Recognition and Enforcement under the Representative Actions Directive 1828/2020*, BEUC, 24 (2022).

²⁶³ Hess, Althoff, Bens, Elsner & Järvekülg *supra* note 254, 12, 13.

²⁶⁴ Similarly, Case C-352/13 *supra* note 255, para. 35; see also Oberhammer *supra* note 249, 27, 29.

²⁶⁵ Hess, Althoff, Bens, Elsner & Järvekülg *supra* note 254, 12, 13.

²⁶⁶ Case C-498/16 *supra* note 255.

²⁶⁷ Rielaender *supra* note 250.

from the perspective of public enforcement but also through the gap between the Member States in their configuration of different systems of representative actions.

4. The Interplay of Representative Actions with Other Types of DMA Enforcement

Given the wide variety of Member States' systems when it comes to the enforcement of the DMA by virtue of representative actions, the question arises if and to what extent guidance can be given by the European Commission to forego fragmentation of the internal market when a national court considers the private application of the regulatory instrument.

Under Article 39 DMA, the Union legislator mimicked the substantive regulation set out in Articles 15 and 16 of the Regulation 1/2003 to set out the cooperation rules that bound the national courts' power to apply the DMA vis-à-vis the Commission's enforcement of the same rules. Bearing in mind that the European Commission remains the sole enforcer of the DMA from a public enforcement perspective, according to Recital 91 DMA, the Commission is conferred a prominent role when the national courts apply the DMA.

National courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the DMA (Article 39(1) DMA) and the Commission may intervene before the national court as an *amicus curiae* via written and oral observations in its own discretion (Article 39(3) DMA). Once the national court has decided on the particular case involving the application of the DMA, it must forward to the Commission a copy of any written judgement produced thereunder (Article 39(2) DMA). In the context of both individual private enforcement actions and representative actions, those provisions aim at guaranteeing the leading role of the Commission in interpreting and enforcing the DMA on the one hand and, on the other hand, a coherent and cohesive application of the DMA.

However, the most salient provision regarding the cooperation rules that are introduced in the relationship between the Commission and the national courts that apply the DMA is that of Article 39(5) DMA, that also applies in the context of representative actions. Article 39(5) DMA imposes the obligation of national courts to not issue a

decision which runs counter to a decision adopted by the Commission under the DMA.²⁶⁸ Furthermore, according to Article 39(5) DMA, national courts must also refrain from interpreting the DMA in those cases where their own ruling would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. In both scenarios, the national courts must stay their proceedings if they deem that it is necessary to ensure the consistent application of the regulatory instrument throughout the Member States.

The decisions covered by Article 39(5) DMA are not explicitly defined in the DMA. The limits that the national courts are under with regard to the Commission's application of the DMA in terms of consistency are less well-defined and open to interpretation. In terms of form, Article 39(5) DMA resembles –to the point that one would question whether the terms were directly extracted from the competition law rule system – the obligations imposed on national courts under Article 16(1) Regulation 1/2003.²⁶⁹ This legal transplant itself can be questioned²⁷⁰. The general enforcement systems of Regulation 1/2003 and the DMA are completely opposite. The former tends to ensure that a decentralised system of competition may be coordinated throughout the Member States, although the Commission bears some clout to intervene predominantly in particular scenarios. The DMA is based on a centralised system of enforcement, where the Commission is the only authority that can directly enforce the DMA, whereas NCAs are only relegated to a secondary role.²⁷¹ By virtue of the decentralisation approach of the DMA, the regulatory instrument intends to harmonise the regulatory approaches on digital markets across the Member States²⁷².

A transfer of interpretation from Article 16 Regulation 1/2003 to the DMA is also not straightforward, given the distinct institutional design and the nature of the competence of the Commission under both acts.²⁷³ In the case of Regulation 1/2003, it is quite clear that the necessity of uniformity in applying competition law follows the Commission's capacity to trigger sanctioning proceedings against a particular

²⁶⁸ On the binding effect see also Becker *supra* note 4, 403, 410-419.

²⁶⁹ See, de Streel, Feasey, Krämer & Monti *supra* note 69, 77.

²⁷⁰ On the risk of legal transplants, Silvia Ferreri & Larry A. DiMatteo, *Terminology Matters: Dangers of Superficial Transplantation*. 37 B.U. INT'L L.J. 35-87 (2019).

²⁷¹ See hereto above at II.A.2.

²⁷² Digital Markets Act *supra* note 1, Article 1(1).

²⁷³ On the issue of comparability regarding competition law and the DMA, see Moreno Belloso & Petit *supra* note 52; Pablo Ibáñez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*. 12 JECLAP 561-575 (2021).

undertaking for the uncovering of anti-competitive conduct. The decisions that the Commission may issue under Regulation 1/2003 are punitive in nature. The same does not hold true about the range of decisions that the Commission may adopt within the competences it has been vested upon via the regulatory mandate of the DMA.²⁷⁴ By this token, one would say that there are two groups of decisions: those related to the lack of compliance with the DMA *erga omnes*²⁷⁵ (interim measures, commitment decisions, and non-compliance decisions) and those not directly related to non-compliance²⁷⁶ but that operate in favour of achieving compliance in the fashion of regulatory dialogue (designation decisions, specification decisions, or suspension and exemption decisions).

The uniformity clause contained under Article 39(5) DMA itself does not differentiate between these two groups of decisions, despite their distinct nature and the myriad of procedures that lead to the initiation of a formal proceeding involving the Commission's intervention. Nevertheless, the argument can be made that only those decisions explicitly listed under Article 29 DMA are covered. Despite the questionable theoretical underpinnings of the legal transplant, such an interpretation would be closest to the understanding of Article 16(1) of the Regulation 1/2003. Under this proposed analysis, the Commission's enforcement actions under Article 29 DMA resemble to a large extent, those contained in Article 16 Regulation 1/2003. From the perspective of Article 29 DMA, only a narrow set of decisions would be subject to the obligation mandated under Article 39(5) DMA. For those decisions, the Commission monitors enforcement in the fashion of a punitive framework, similar to the sanctioning proceedings that the Commission may trigger in competition law investigations. The decisions under Article 29 DMA can also all result in fines subject to the fine ceiling exceeding 10% of its total worldwide turnover (and up to 20% in cases of systematic non-compliance) under Article 30 DMA. Thus, it is reasonable to establish the link between these decisions and the national court's obligation to, at least, consider whether it should stay its proceedings if one of those decisions is in the making.

²⁷⁴ The punitive character of the DMA has been contested, by Andriychuk *supra* note 4, 126-130. Other authors uphold that it relies on previous regulatory experience such as Pierre Larouche and Alexandre de Strel, *The European Digital Markets Act: A Revolution Grounded on Traditions*. 12(7) JECLAP 2021, 542-560.

²⁷⁵ Komninos *supra* note 4, 433.

²⁷⁶ Notwithstanding Komninos *supra* note 4, 432 proposes that specification decisions may justify the staying of proceedings of national courts by applying the cooperation rules mandated by the DMA.

Distanced from the all-encompassing nature of considering every single enforcement action on the side of the European Commission, interpreting the uniformity clause in light of Article 29 DMA would also mean that national courts should stay their proceedings in case they had notice of the Commission having issued (or being near to issuing) five sets of different decisions relating to non-compliance. In these cases, the national court will have a clear indication of whether the Commission intends to issue a decision in line with any of the decisions of Article 29 DMA, since every one of them is to be preceded by a decision (even if it is a summarised version) stating that it opens a proceeding according to the terms set out in Article 20 DMA.

These five non-compliance decisions of the Commission under Article 29 DMA can be separated into two main groups: those that address “ordinary” infringements of the provisions of the DMA (those contained under Articles 29(1)(a), (b), and (d) DMA) and those that cover situations of an aggravated form of non-compliance, i.e., systematic non-compliance (those enshrined in Articles 29(1)(c) and (e) DMA). Within the first group, we can identify those decisions finding a violation of any of the obligations laid down in Articles 5, 6, or 7 (Article 29(1)(a) DMA). The decisions finding a deviation on the side of the gatekeeper relating to measures further specified by the Commission in a decision adopted pursuant to Article 8(2) DMA (Article 29(1)(b) DMA) also belong to the first group. Since representative actions seeking compensatory or injunctive relief are also built on violations of the DMA, these two are the most salient instances where representative actions will be directly impacted.

A breach of interim measures ordered pursuant to the procedure in Article 24 DMA (Article 29(1)(d) DMA) is less relevant in connection to representative actions under the RAD model. The interim measures may be adopted by the Commission in light of a *prima facie* finding of an infringement of Articles 5, 6, or 7 DMA in cases of urgency. The interim measures go hand in hand with the procedure triggered by the Commission in issuing non-compliance decisions under Article 29(1) DMA to avoid causing irreversible damages. The subjective scope of the interim measures directly protects the interests of business users or end users of the gatekeeper.

Hence, it may well be the case that the interim measures issued by the Commission only relate to the interests of business users *vis-à-vis* the national court’s application of the DMA during collective actions. In that particular case, the national court would not be necessarily bound by the interim measures’ pronouncement, insofar as there would not

be any conflicting interests at stake, and insofar as business users fall outside of the scope of the definition of consumers in the RAD. This is precisely one of the scenarios where the national courts will have to exercise their discretion in assessing, under the lens of the principle of necessity, whether they should stay their proceedings. Given the intrinsic link between a violation of an interim measure issued by Article 24 (and contained under Article 21(4) DMA as a non-compliance decision) and those decisions *stricto sensu* finding a direct infringement of Articles 5, 6, or 7 (Article 21(1) DMA), the national court will have to balance out the interests at play. For example, before a claim via collective action addressed at the national court where breaches of Article 5(2) and 6(9) DMA are alleged by the claimants, the Commission may well have declared to issue interim measures only to the extent of addressing the harm inferred by the gatekeeper's lack of compliance with Article 5(2) DMA, i.e., to protect the business users' interests in preliminarily ordering the siloing of the core platform services' processing, combining and cross-using of personal data- whereas the indirect and direct effects of end users remain unaddressed at this stage of the proceeding, but will be considered in the near future when the Commission decides on the main non-compliance proceedings. In these types of cases, the national courts will have to balance out the interests at hand in their interplay with the non-compliance decision that the Commission may derive from Article 29(1).

In the second group of decisions under Article 29(1) DMA, we can also find those decisions that are issued in the foreground of systematic non-compliance. First, Article 29(1)(c) DMA attaches the nature of non-compliance decisions to those decisions that relate to the lack of compliance with the remedies imposed pursuant to Article 18(1) DMA. Before the Commission's issuing of at least three non-compliance decisions under Article 29(1) DMA against a gatekeeper in relation to any of its CPSs within a period of 8 years, the Commission may conduct a market investigation to examine whether the gatekeeper has engaged in systematic compliance. Following the market investigation and if it results in demonstrating that the gatekeeper systematically infringed one or more of the obligations laid down in Article 5, 6, or 7 DMA and has maintained, strengthened, or extended its gatekeeper position in relation to the requirements set out in Article 3(1) DMA, the Commission may adopt an implement act imposing any behavioural or structural remedies to ensure effective compliance with the DMA.

Therefore, as opposed to the two previous decisions where national courts may be compelled to stay their proceedings that relate to the isolated breach of a particular provision, the decisions resulting from Article 29(1) DMA are particularly aggravated in the sense that there must be a record of infringements for which the gatekeeper may be held accountable. The effects of these decisions via the uniformity clause under Article 39(5) will only permeate to the national courts in representative actions where the Commission has applied intensive enforcement in finding several infringements of the regulatory framework's provisions throughout the years. In this regard, the binding effect of the systematic non-compliance decisions will not be immediate but is expected further down the line.

Second, Article 29(1)(e) DMA also refers back to those decisions that breach the commitments offered by the gatekeeper to the Commission that had been made legally binding pursuant to Article 25 DMA and terms them as non-compliance decisions, too. The commitments that can be issued as a result of the procedure of Article 25 DMA are also inherently linked to the finding of systematic non-compliance. In fact, it is one of the pathways that the regulatory instrument provides to the gatekeeper to avoid imposing the behavioural and structural remedies that may derive from the finding of systematic non-compliance. During the market investigation performed under Article 18 DMA, the gatekeeper may offer commitments to ensure compliance with the obligations laid down in Articles 5, 6, and 7. Upon that request, the Commission can exercise its discretion in making them binding by considering where they ensure effective compliance with those decisions.

The fact that only the non-compliance decisions under Article 29 DMA are included in the reach of Article 39(5) DMA does not necessarily imply that the national court should be blind to any other decision issued by the Commission. National courts should at least consider the rest of the Commission's enforcement actions, for example, their designation decisions, in fine-tuning the subjective scope and reach of the claims that can be directed to it when claimants seek to apply the DMA via collective actions. The instrument established in Article 39(1) DMA enabling the national courts to ask for information from the Commission or its opinion on questions concerning the application of the DMA may demonstrate usefulness in this regard.

C. Other Legal Avenues for Collective Actions for DMA Infringements in EU Law

Outside of the explicit reference to a collective action mechanism via the RAD in Articles 42 and 52 DMA, the question arises if other means for collective action are available. This is particularly crucial given the overall deficits and limits of the RAD system. Other options for collective actions are particularly necessary for business users, who are excluded from the personal scope of the RAD outside of those Member States that gold-plated the RAD Directive by including (a certain group of) business users in their transposing laws. As shown above, the majority of DMA provisions affect business and not end users. The following discussion will therefore focus on other legal avenues for collective actions for DMA violations, with a focus on business users collective actions.

The UCP Directive, P2B Regulation, and GDPR offer residual options for collective actions for DMA infringements in EU law where their rules overlap or interact with the DMA. All three approaches are equally generally flawed from a harmonisation standpoint, as they align with the common model found in EU legislation for collective enforcement described in this paper. Ultimately, it is up to the Member States to implement a system of collective enforcement within their procedural framework. In a limited amount of cases from a DMA perspective, the three instruments mandate the installation of a system of collective action but leave huge discretion to the Member States regarding the system of collective enforcement. The assignment model can help provide for a broader approach to collective actions outside of the limited instances covered by the UCP Directive, P2B Regulation, and GDPR. However, the exact arrangement and organization is not specified by virtue of the *effet utile* of EU law and will again be left to the Member States procedural autonomy. Without further instruments at the EU level, collective action for DMA violations is largely left to the Member States. As indicated above,²⁷⁷ some Member States already have very far-reaching collective action systems in their national law, such as the Netherlands, which could also be available for business users' collective enforcement of DMA violations. Even without analyzing these systems in more detail, the legal landscape in the EU for collective actions at the Member State level can best be described as a patchwork.

²⁷⁷ Section III.B.3.

1. The UCP Directive

While the DMA does not refer to business-user collective enforcement, it contains rules on the delimitation and applicability of other existing Union law provisions that may become relevant for collective enforcement of the DMA. In that context, the DMA states that it applies without prejudice to the UCP Directive.²⁷⁸ The UCP Directive deals with unfair commercial practices.²⁷⁹ The UCP Directive mainly contains provisions on substantive law but has residual rules on their procedural enforcement, most importantly Article 11 of the UCP Directive.²⁸⁰ Article 11(1) read together with the Recital 21 UCP Directive, mandates the Member States to “include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors”. This does not mandatorily include collective enforcement. Rather, the UCP Directive leaves it to the discretion of the Member States to organise such procedures according to their national law.

Collective enforcement, particularly for business users, against DMA violations is possible under this system, provided that a violation of the DMA constitutes an unfair commercial practice and the Member States’ transposition of the UCP Directive includes collective enforcement measures. It is clear from the outset that the application of the transposed provisions of the UCP Directive will, in any case, not lead to uniform collective enforcement of DMA violations for business users under EU law, but it will - again - depend largely on the implementation of the Member States. The UCP Directive leaves Member States considerable room for manoeuvre when it comes to collective enforcement. Divergent Member State approaches also exist here, which leads to the problems in terms of forum shopping already mentioned above, particularly in the context of the DMA's harmonisation efforts. The following examples will furthermore show that collective enforcement of DMA violations of unfair commercial practices is quite limited.

Generally, practices regulated by the DMA could constitute unfair commercial practices prohibited by the UCP Directive.²⁸¹ This is also reflected in the national

²⁷⁸ Digital Markets Act *supra* note 1, Recital 12.

²⁷⁹ See, comprehensively on the UCP Directive’s system, WILLEM VAN BOOM, AMANDINE GARDE & ORKUN AKSELI, *THE EUROPEAN UNFAIR COMMERCIAL PRACTICES DIRECTIVE* (Routledge 2014).

²⁸⁰ See HANS-WOLFGANG MICKLITZ, *A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms*. In: Willem van Boom, Amandine Garde and Orkun Akselithe (eds.). *THE EUROPEAN UNFAIR COMMERCIAL PRACTICES DIRECTIVE*, 173 (Routledge 2014).

²⁸¹ See, comprehensively, Bania *supra* note 27, 124-126.

transposing provisions in the interpretation of the UCP Directive.²⁸² In Member State law, a quite wide-spread approach exists towards understanding infringements of the DMA as unfair commercial practices under the category of a breach of law. In Germany, for example, literature has classified infringement of those provisions of the DMA with direct effect that aim to protect the interests of other participants in this market as unfair conduct per Section 3 and 3a of the German Unfair Competition Act.²⁸³

Business users, as perceived by the DMA, constitute market participants by virtue of Sections 3 and 3a of the German Unfair Competition Act.²⁸⁴ Consequently, those DMA infringements that aim to benefit business users, as described above in Table 2, can constitute unfair conduct in Germany.²⁸⁵ A corresponding situation holds true for Austria. A comparison with the case law on other directly applicable Union acts also allows an infringement of the DMA to be categorised as a breach of law, which constitutes an unfair commercial practice vis-à-vis business users.²⁸⁶ Similarly, as mentioned above, in Portugal and Spain, violations of the DMA are covered as unfair commercial practices.²⁸⁷

Many of these Member States systems also foresee a collective instrument available to business users to enforce unfair commercial practices, but the systems are considerably different and quite limited. Germany, for example, foresees only representative actions for injunctions when it comes to business users. The claims for injunctions via Section 8(3) No. 2, 8b German Unfair Competition Act are available directly for qualified trade associations on the basis of associational standing as long as their members interests are affected by market participants, i.e., business users.²⁸⁸ A collective enforcement claim for damages is not available altogether. A representative action for the skimming of profits can be filed by qualified trade associations, but the excess profit is not distributed to potentially harmed market participants but surrendered to the Federal budget.²⁸⁹

²⁸² See on unfair competition law above at III.B.2.b.

²⁸³ Klumpe *supra* note 70, 131, 137; Albrecht *supra* note 161, 181, 183; Florian C. Haus & Sarah Steinseifer, *Digital Markets Act (DMA) – Verhältnis zu § 19a GWB und private Rechtsdurchsetzung*. ZWER 105, 121 (2023).

²⁸⁴ Albrecht *supra* note 161, 181, 183.

²⁸⁵ See above at III.B.2.c. on limited claims for end users.

²⁸⁶ Achleitner *supra* note 173, 287, 291.

²⁸⁷ See above at III.B.2.b.

²⁸⁸ See above at III.B.3.a.iii. for qualified consumer entities.

²⁸⁹ See above at III.B.3.a.iii.

Surprisingly, even those Member States with otherwise quite vast collective enforcement systems do not cover the collective enforcement of DMA infringements as unfair practices for business users, such as Portugal. Under Portugal’s transposition of the UCP Directive, only citizens and associations or foundations can file collective actions for unfair commercial practices under the Collective Action Act.²⁹⁰ Trade associations are not included in this understanding of associations by comparison with the Private Enforcement Act in competition law, which explicitly allows an *Ação Popular* to be filed by associations of undertakings or trade associations.²⁹¹

2. The P2B Regulation

As with the UCP Directive, the DMA states that it applies without prejudice to the P2B Regulation.²⁹² The application of the P2B Regulation in connection with the DMA offers very limited access to collective enforcement, which additionally again largely depends on the Member States’ legislative systems.

The P2B Regulation deals with the promotion of fairness and transparency for business users of online intermediation services.²⁹³ Most obligations in the P2B Regulation relate to transparency²⁹⁴ and some of them directly or indirectly overlap or interrelate with the obligations of the DMA to the extent that fairness is also pursued as a main objective in the latter.²⁹⁵ In several instances, the two instruments regulate the same issue, albeit providing different obligations. According to the P2B Regulation, for example, a gatekeeper platform is required to provide information about whether it gives preferential treatment to its own services in terms of ranking.²⁹⁶ This provision overlaps with the prohibition against gatekeepers for self-preferencing in ranking under Article

²⁹⁰ Art. 16 Law 57/2008; see also above at III.B.3.a.ii.

²⁹¹ Art. 19(2)(b) Private Enforcement Act, Law 23/2018 of 5 June, see Sousa Ferro *supra* note 207, 115, 117.

²⁹² Digital Markets Act *supra* note 1, Recital 12.

²⁹³ See Christoph Busch, *The P2B Regulation (EU) 2019/1150: Towards a “procedural turn” in EU platform regulation?* EUMCL, 133 (2020); Konstantina Bania, *The platform-to-business regulation: Taming the “big tech” beast?* 2-2020, CONCURRENCES, 52 (2020).

²⁹⁴ Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*. 38 Y. EUROP. L., 448, 494 (2019).

²⁹⁵ See, comprehensively, Bania *supra* note 27, 116, 119-121, providing multiple examples.

²⁹⁶ P2B Regulation *supra* note 17, Article 7(3)(b); see Romina Polley, Tobias Pesch & Hans Tönnies, *Die P2B-Verordnung und ihre Bedeutung für das Kartellrecht*. WUW, 495, 498 (2019).

6(5) DMA.²⁹⁷ Should a gatekeeper violate the transparency obligation of Article 7(3)(b) P2B Regulation, it would simultaneously breach Article 6(5) DMA.

Article 14 of the P2B Regulation explicitly requires that Member States establish a mechanism for collective enforcement, including representative actions for business users, to stop or prohibit any non-compliance by providers of online intermediation services or by providers of online search engines with the relevant requirements laid down in the P2B Regulation.²⁹⁸ Article 14 of the P2B Regulation also lays down minimum conditions for such representative actions, including requirements for representative organisations.

Consequently, Article 14 P2B Regulation generally offers the possibility of representative actions for business users subject to transposition on the Member State level. Representative actions should then be able to enforce the respective transparency obligations of the P2B Regulation directly and, with that, certain prohibitions of the DMA indirectly.²⁹⁹ Many of the Member States introduced a violation of a P2B Regulation obligation, inter alia, as unfair commercial practices in their national Unfair Commercial Practices acts. Correspondingly, the above-mentioned collective enforcement mechanism from the transposition of the UCP Directive applies *mutatis mutandis*. In Germany, for example, Section 8a of the German Unfair Competition Act expressly clarifies that associations, organisations, and public bodies that meet the conditions for representative bodies under Articles 14 (3) and (4) P2B Regulation can file for representative injunctions.

Lastly, because the P2B Regulation promotes transparency connecting to behaviour also prohibited by the DMA, business users might become aware of problematic behaviour in the first place and file for collective enforcement of the DMA, even under other legal avenues described in this paper. Therefore, through enhanced awareness, the P2B Regulation might generally enhance the enforcement of corresponding or interrelating DMA provisions.

²⁹⁷ On the question if the P2B Regulation has any residual application in that instance critically Bania *supra* note 27, 116, 122.

²⁹⁸ Jens-Uwe Franck, *Individual Private Rights of Action under the Platform-to-Business Regulation*. 34 *EUROP. BUS. L. REV.*, 525, 545 (2023).

²⁹⁹ Similarly, Schläpke & Schuler *supra* note 11, para. 138.

3. The GDPR

Another indirect possibility of (indirectly) enforcing the obligations collectively under the DMA is offered by the GDPR. According to Article 8(1) DMA, gatekeepers should ensure that the implementation of those measures they take to fulfil their obligations under the DMA complies with applicable law, in particular, the GDPR. Consequently, the DMA applies without prejudice to the GDPR as well.³⁰⁰

Similar to the P2B Regulation, overlaps between the rules of the GDPR and the DMA exist.³⁰¹ For example, the prohibition to process, cross-use, and combine personal data across the gatekeeper’s core platform services in Article 5(2) DMA overlaps with the notions introduced by the GDPR, insofar as the end user may exempt the gatekeeper from the prohibition if she provides her effective consent in the sense of Articles 4(11) and 7 of the GDPR. This interplay between both fields of law brings forward a conundrum, given that when one observes the rationale underlying Articles 4(11) and 7, the GDPR prompts the existence of imbalances in bargaining power between the data subject (the end user) and the data controller (the gatekeeper) as a reason to forego that consent has been granted effectively and freely³⁰². This same line of reasoning has been adopted in the field of competition law by the German competition authority when it decided to silo Meta’s processing activities over personal data against the benchmark of the GDPR³⁰³ as well as in its recent (and first) decision applying the provisions under Section 19a of the German Competition Act³⁰⁴. Even though the scope of Article 5(2)

³⁰⁰ Digital Markets Act *supra* note 1, Recital 12.

³⁰¹ Rupprecht Podszun, *Should Gatekeepers Be Allowed to Combine Data? Ideas for Art. 5(a) of the Draft Digital Markets Act*. 71 GRUR Int’al, 197 (2022); Damien Geradin, Konstatina Bania & Theano Karanikioti, *The interplay between the Digital Markets Act and the General Data Protection Regulation* (2022), <http://dx.doi.org/10.2139/ssrn.4203907>, accessed 14 November 2023.

³⁰² Ribera Martínez *supra* note 119.

³⁰³ Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html, accessed 13 November 2023.

³⁰⁴ B7-70/21 *Decision pursuant to Section 19a(2)sentence 4 in conjunction with Section 32b(1) GWB* (2023),

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.pdf;jsessionid=DC08025705067C0BD2C4C637F2622E0F.2_cid508?_blob=publicationFile&v=2

accessed 13 November 2023. For a comment on the recent case, Alba Ribera Martínez, *The Appropriation of Article 5(2) DMA: Google’s Commitments under Section 19a of the German Competition Act* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/10/09/the-appropriation-of-article-52-dma-googles-commitments-under-section-19a-of-the-german-competition-act/>, accessed 13 November 2023.

An up-to-date analysis of the interplay of competition law and privacy, see Giuseppe Colangelo, *The Privacy/Antitrust Curse: Insights From GDPR Application in Competition Law Proceedings*. ICLE White Paper 2023-10-12 (2023), <https://dx.doi.org/10.2139/ssrn.4599974>, accessed 13 November 2023.

DMA seems prohibitive, in principle, with regards to the processing activities of the gatekeeper, the regulatory instrument still recognises that the legal bases set out in Articles 6(1)(c) to (e) can still be used by the data controller to continue processing personal data of the end users³⁰⁵. Further overlap might exist between GDPR obligations and Articles 6(9) and 6(10) DMA.³⁰⁶

When it comes to private enforcement, the GDPR contains a much more elaborated and detailed system compared to the DMA. In the event of breaches of data-related obligations in the DMA that also constitute breaches of the GDPR, the following mechanisms can be used to indirectly enforce the DMA.³⁰⁷ Article 79 GDPR, for example, mandates an effective judicial remedy against a controller or a processor, which includes injunctions for GDPR infringements.³⁰⁸ Article 82 GDPR, for example, foresees a direct Union law damages claim for GDPR violations.³⁰⁹ Article 80 GDPR then requires Member States to introduce representative actions in their procedural legal order.³¹⁰

Regarding the available representative action models under the GDPR, one must distinguish between both paragraphs of Article 80 GDPR.³¹¹ Under Article 80(1) GDPR representative entities fulfilling certain criteria can, on behalf of data subjects, inter alia, exercise the right to pursue an effective judicial remedy against a controller or a processor under Article 79 GDPR or, where provided by national law, the right to compensation under Article 82 GDPR. Consequently, Article 80(1) GDPR includes, on the one hand, an

³⁰⁵ MUHAMMED DEMIRCAN, *The DMA and the GDPR: Making Sense of Data Accumulation, Cross-Use and Data Sharing Provision*. In F. Bieker, J. Meyer, S. Pape, I. Schiering & A. Weich (eds.), *PRIVACY AND IDENTITY MANAGEMENT: PRIVACY AND IDENTITY 2022*, 148-164 (Springer 2023); Inge Graef, *Why End-User Consent Cannot Keep Markets Contestable* (2021), <https://verfassungsblog.de/power-dsa-dma-08/>, accessed 28 October 2023.

³⁰⁶ Ribera Martínez *supra* note 119; see also Jan Krämer, *Data Access Provisions in the DMA*. Centre on Regulation in Europe Issue Paper (2022), https://cerre.eu/wp-content/uploads/2022/11/DMA_DataAccessProvisions-2.pdf, accessed 13 November 2023.

³⁰⁷ See, Rupperecht Podszun, Philipp Bongartz and Alexander Kirk, *Digital Markets Act – Neue Regeln für Fairness in der Plattformökonomie*, NJW 2022, 3249.

³⁰⁸ Alexander Hellgardt, *Die Schadensersatzhaftung für Datenschutzverstöße im System des unionalen Haftungsrechts*, ZEuP 2022, 7, 35; see also Christian Heinze and Caro Warmuth, *Das Sonderprozessrecht der Datenschutz-Grundverordnung*, ZZPInt 21 (2016), 175, 178.

³⁰⁹ See, for example, Hornkohl *supra* note 105a, 120; Hornkohl, *supra* note 105b; Lena Hornkohl and Charlotte Wern, *Schadensersatz gegen Schuldnermehrheiten nach der DSGVO*. EUZW, 994 (2022).

³¹⁰ See, for an overview Laima Jančiūtė, *Data protection and the construction of collective redress in Europe: exploring challenges and opportunities*, *International Data Privacy Law*, Volume 9, Issue 1, February 2019, 2; Alexia Pato, 'The collective private enforcement of data protection rights in the EU' in L Cadiet, B Hess and M Requejo Isidro (eds), *Privatizing Dispute Resolution* (Nomos, 2019) 131; G González Fuster, 'Article 80. Representation of data subjects' in C Kuner, LA Bygrave and C Docksey (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press, 2020) 1149.

³¹¹ See, in detail, Alexia Pato, 'The collective private enforcement of data protection rights in the EU' in L Cadiet, B Hess and M Requejo Isidro (eds), *Privatizing Dispute Resolution* (Nomos, 2019) 131, 135 – 136.

opt-in system upon mandate of the data subject for the rights included in Articles 77 – 79 GDPR, and, on the other hand, upon the discretion of the national legislator, an opt-in representative exercise on the right to compensation under Article 82 GDPR. Article 80(2) GDPR allows opt-in actions to exercise the rights listed in Articles 77 to 79 GDPR – not Article 82 GDPR for compensation – that commence without a data subject mandate, where Member States’ law provides it.

The overall view of Article 80 GDPR demonstrates that although the GDPR provides for some mandatory collective enforcement, especially for injunctions, the implementation is generally left to the Member States, who enjoy procedural autonomy subject to the principles of equivalence and effectiveness. There is, in any case, a lot of room for manoeuvre for the Member States in representative damages actions. Article 80 GDPR seems to follow a typical model in EU legislation when it comes to collective enforcement, as described throughout this paper. EU law generally leaves it ultimately to the Member States to install a system of collective enforcement into their procedural landscape. Thus, Article 80 GDPR “fosters collective redress but at the cost of making its implementation dependent on Member States’ intervention”.³¹² Without going into detail on the national transposition of Article 80 GDPR here, Member States chose very differing approaches when it came to collective enforcement of GDPR rights.³¹³

Recently, another level of complexity was added, since the GDPR was also included in the scope of the RAD.³¹⁴ The foreseen mechanisms for representative actions at the Member State level mandated by the RAD and Article 80 GDPR form two intersecting and overlapping systems.³¹⁵ Both require representative actions, but differences exist with regard to standards for qualified entities, opt-in and opt-out mechanisms, as well as procedural rules (which are much more detailed under the RAD,

³¹² Alexia Pato and Elena Rodríguez-Pineau, *Cross-Border Data Protection Through Collective Litigation: A EU Legal Maze?* EDPL 2021, 550, 551.

³¹³ ALEXIA PATO, *The National Adaptation of Article 80 GDPR. Towards the Effective Private Enforcement of Collective Data Protection Rights*. In: K McCullag, O Tambou and S Bourton (eds), *NATIONAL ADAPTATIONS OF THE GDPR*, 98 (Open Access Book Blogdroiteuropéen, 2018); see on the (former) German approach, Case C-319/20 *Meta Platforms Ireland v. Bundesverband eV* ECLI:EU:C:2022:322. See, inter alia, Florence D’Ath, *Arrêt «Meta Platforms Ireland»: la qualité pour agir des associations à but non lucratif en cas de violation du RGPD*. 6 *JOURNAL DE DROIT EUROPÉEN*, 273 (2022).

³¹⁴ Annex I No. 56 RAD; on the workings of the RAD see above at III.B.

³¹⁵ See, Pato & *supra* note 312, 550; Marina Federico, *European Collective Redress and Data Protection Challenges and Opportunities*. Jean Monnet Network on EU Law Enforcement WP Series No. 04-23 (2023), <https://www.medialaws.eu/rivista/european-collective-redress-and-data-protection-challenges-and-opportunities/>, accessed 19 November 2023; Tobias Lühmann, Pascal Schumacher & Lea Stegemann, *Gegenwart und Zukunft kollektiver Rechtsdurchsetzung im Datenschutzrecht*. ZD, 131 (2023).

for example, when it comes to disclosure). It is up to the Member States to reconcile both either in one representative action scheme at the Member State level or, to create further confusion, foresee two distinct representative actions. In most Member States that had already implemented the RAD, the GDPR was added to the general transposed representative action system, as described above.³¹⁶ No distinct representative action for GDPR violations exists. The ECJ will have to determine whether the implementation mechanisms in question satisfy both the requirements of the RAD and Article 80 GDPR.

When it comes to the collective indirect enforcement of the data-related obligations in the DMA that also constitute breaches of the GDPR, the above-mentioned limitations for the transposed RAD mechanisms apply here as well. Those representative actions via the GDPR avenue are even subject to further restrictions, especially for business users. They do not constitute data subjects according to the GDPR.³¹⁷ As a result, the representative actions for infringements of the data-related obligations in the DMA that also constitute breaches of the GDPR are only relevant for end users.

4. The Assignment Model

In the absence of a uniform, all-encompassing, harmonised collective action instrument in the EU and due to the lack or limitation of collective actions in the procedural systems at the Member State level, a creative solution is warranted. One of the most popular solutions used in practice is the so-called assignment model. Under this model, a (large) number of victims contractually assign their respective claims to a specialised commercial company or entity (claims vehicle), which bundles the claims assigned and act as a commercial plaintiff. The assignment model is usually used to bundle damages claims but would, in theory, also be possible to bundle injunctive claims. In many areas of law today, for example, consumer law³¹⁸, competition law,³¹⁹ or data protection law³²⁰, affected parties take recourse to this model. This model is not only popular in Member

³¹⁶ See above at III.B.3.

³¹⁷ GDPR *supra* note 18, Articles 1, 4(1).

³¹⁸ Petra Leupold, *Enforcing Consumer Rights: Collective Redress in Austria and the European Union*. EUCML, 121 (2019).

³¹⁹ Schreiber & Seegers *supra* note 19, 41.

³²⁰ Lühmann, Schumacher & Stegemann *supra* note 315, 131, 135 – 136.

States such as Austria,³²¹ Croatia,³²² or Germany,³²³ whose legal systems only provide very limited access to collective actions. It is even used in Member States with quite extensive procedural rules on collective actions, such as France,³²⁴ Italy,³²⁵ or the Netherlands.³²⁶

The assignment model has the potential to be utilized effectively for the collective enforcement of the DMA by both businesses and end users. As mentioned above, Articles 5 and 6 DMA have vertical direct effect, and the effective enforcement of the DMA warrants injunctions and damages claims at the Member State level.³²⁷ As also analysed above, Member States actually provide for injunction and damages claims for DMA violations, which are not only available to consumers in their capacity as end users under the RAD but also to business users.³²⁸ Applying the assignment model for the DMA would mean that a multitude of victims assign their damages or injunction claims for a DMA infringement to a (commercial) plaintiff, who brings a damages action as a bundle. For competition law private enforcement, over the years, several claim vehicles, such as Cartel Damages Claims and specialised law firms, have successfully litigated under the assignment models.³²⁹ Hence, corresponding expertise in the legal market would be available for collective enforcement of the competition-adjacent DMA via the assignment model.

The model would be particularly suitable for business user collective enforcement, which is otherwise limited as described throughout this paper. Companies frequently monitor market developments closely and are able to maintain a heightened awareness of

³²¹ See, inter alia, Leupold *supra* note 318, 121; Alexander von der Klausner, “*Sammelklage nach österreichischem Recht*” zur echten Gruppenklage. 16 ECOLEX, 744 (2005).

³²² See, inter alia, Vlatka Butorac Malnar, *Assignment and bundling of antitrust claims as an alternative to collective consumer compensatory redress in Croatia* (forthcoming) WOR. COMP.

³²³ See, inter alia, Carsten Kruger & Andreas Weitbrecht, *Bundling of Claims by Way of Assignment in Germany*. MASS CLAIMS, 107 (2021); AXEL HALFMEIER, *Collective Litigation in German Civil Procedure*. In Fitzpatrick B, Thomas RS, Hrsg., THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY, 233, 244-245 (Cambridge University Press 2021).

³²⁴ See, on France and others, Hans Bousie, Marc Barennes, Tessel Bossen, Giovanni Scoccini, & Konstantin Seifert, *The bundling of claims in cartel damages litigation in Germany, the Netherlands, the United Kingdom, Italy and France*. 21 COMP. L. J. 2022, 15 (2022).

³²⁵ See, inter alia, Giorgio Afferni, *Bundling of Claims by Way of Assignment in Italy*. MASS CLAIMS, 30 (2022).

³²⁶ See, on the Netherlands and others, Bousie, Barennes, Bossen, Scoccini & Seifert *supra* note 324, 15.

³²⁷ See above at III.A.

³²⁸ See above at III.B.3.a.

³²⁹ See, for example, Blanka Szupera, László Bánk Varga, Angéla Gábris & Bálint Gábor Kovács, *Towards a harmonised collective redress mechanism for the private enforcement of EU competition law*. 21 ERA FORUM, 267, 271 (2020).

vehicles that seek to pool claims. On the contrary, consumers (in their capacity as end users) generally lack information on such assignment models.³³⁰ However, even for consumers in their capacity as end users, legal tech options might be a solution to achieve easier assignments in the future.³³¹

The assignment model in competition law has been critically assessed by Member States courts, for example in Croatia,³³² Germany,³³³ or Italy,³³⁴ under rules on legal services as a regulated industry. While the admissibility of the assignment model in the Member States cannot be analysed in depth here, the question arises as to whether an assignment model is necessary by virtue of EU law. At the moment, the necessity of effective enforcement of EU competition law is tested at the ECJ due to a preliminary reference from the Regional Court Dortmund.³³⁵ Although the matter has not been decided by the ECJ yet, many reasons argue in favour of the necessity and admissibility of the assignment model for competition law under the EU principle of effectiveness. As the referring court also points out, without a uniform collective action system for competition private enforcement, the assignment model is a necessary alternative to guarantee the effective enforcement of competition law and, thus, maintain the deterrence and compensation functions of competition law.³³⁶

A similar argument can be made for DMA as well. As pointed out in Section 2 above, collective action for DMA violations is essential for the effective enforcement of

³³⁰ Generally critically, Stratmann *supra* note 330, 473 (2023).

³³¹ See, JULIUS OTT, *Legal-Tech-Inkasso – Keine Aktivlegitimation im Kartellschadensersatzrecht?* In: Eva Fischer & Lena Hornkohl (eds.), *KARTELLRECHT UND ZUKUNFTSTECHNOLOGIEN (Nomos)* (forthcoming); see also KATHARINA ENGLER, *DIE BEDEUTUNG DER UNECHTEN LEGAL TECH-SAMMELKLAGEN FÜR DEN KOLLEKTIVEN RECHTSSCHUTZ* (Baden-Baden 2022).

³³² See, *inter alia*, Malnar *supra* note 322.

³³³ See, Gerhard Klumpe, *You'll never walk alone?* NZKART, 405 (2019); Tilmann Makatsch & Babette Kacholdt, *Kartellschadensersatz und Bündelungsmodelle im Lichte von Prozessökonomie, Grundrechten und effektivem Rechtsschutz*. NZKART, 486 (2021); Kruger & Weitbrecht *supra* 323, 107; Christian Heinze, *Kartellrechtliches Sammelklagen-Inkasso nach Airdeal und RDG- Reformgesetz*. NZKART, 193 (2022); Alex Petrasincu & Christopher Unseld, *Das Sammelklagen-Inkasso im Lichte der BGH-Rechtsprechung und der RDG- Reform*. NJW, 1200 (2022); René Kremer, *Vereinbarkeit von Sammelklagemodellen mit dem RDG: Bestandsaufnahme und Bewertung aus der Praxis*. NZKART, 684 (2022).

³³⁴ See, *inter alia*, Afferni *supra* note 325, 30.

³³⁵ See pending Case C-253/23 *supra* note 20; Stratmann *supra* note 330, 473.

³³⁶ Landgericht Dortmund, *Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court* (2023), <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=274898&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1362963>, accessed 19 November 2023; Ott *supra* note 331; Martin Seegers & Carsten Krüger, *Effective Enforcement of Cartel Damage Claims Through the Assignment Model: The Preliminary Ruling Procedure Before the CJEU in Case C-253/23 (ASG) – A Comment* (2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/08/25/effective-enforcement-of-cartel-damage-claims-through-the-assignment-model-the-preliminary-ruling-procedure-before-the-cjeu-in-case-c-253-23-asg-a-comment/>, accessed 19 November 2023.

the DMA; in other words, enforcement of the DMA would be excessively difficult without collective enforcement.³³⁷ While the DMA was included in the scope of the RAD, this paper has shown the deficits and limits of the RAD model, particularly for business users. Consequently, the argument can be made that the assignment model should be available by virtue of EU law and the effective enforcement of the DMA.

Naturally, such a creative model, not laid down in law without further-reaching procedural rules harmonised at the EU level, comes with its own problems. While the assignment model per se might be required by EU law, the exact arrangement and organisation are not specified and will again be left to the Member States procedural autonomy. In that context, for cross-border actions under the assignment model, the mentioned issue of international jurisdiction and forum shopping is also not fully resolved.³³⁸

IV. Conclusions

The paper has demonstrated that *theoretically*, collective actions for DMA infringements could play an important role in guaranteeing the rights of affected parties and the overall effective enforcement of the DMA against the deficits of individual private enforcement. In the context of a digital economy, the risk that a large number of individuals will be affected by the same or similar unlawful practice has increased. By virtue of its prohibitions and obligations, DMA enforcement is particularly prone to collective actions, either because one violation of one DMA obligation might harm multiple parties or because multiple violations of one obligation might harm multiple parties, making a combination of individual claims in one single claim sensible. Yet, the paper has demonstrated certain idiosyncrasies are palpable. Depending on the gatekeeper and CPS it operates as well as the infringement of DMA provisions concerned, business and end users can be very differently affected by such an infringement, which is also reflected in the type of available relief.

Looking at the *explicit approach* taken by the DMA by integrating its collective enforcement into the system of the RAD, the paper has assessed the deficits accompanying this choice. By virtue of EU law, the RAD model is limited to consumers

³³⁷ See above at II.B.1. and 2.

³³⁸ Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, ECLI:EU:C:2015:335.

in their capacity as end users. Business users do not have the possibility to go for representative actions outside of those Member States that have gold-plated the RAD or DMA. Generally, the RAD model does not necessarily take into account the specificities of collective enforcement of the DMA when it comes to available procedural rules or the overall system. By applying the RAD model, Articles 42 and 52 DMA transpose the deficits of the RAD model to DMA representative actions. Much leeway is given to the Member States, which have all taken vastly differing approaches when it comes to personal scope, opt-in or opt-out systems, litigation funding, or integrating the RAD model in existing, further reaching collective action systems. Given the lack of sufficient rules on international jurisdiction (or applicable law), the RAD model will lead to increased forum shopping. This runs exactly contrary to the harmonizing approach aimed at by the DMA. On digital markets, where DMA violations will typically affect consumers in their capacity as end users across the continent, the missing rules on collective actions and jurisdiction are particularly tangible. Luckily, Article 39 DMA offers limited guidance by the Commission to forego fragmentation of the internal digital market.

By analysing *other legal possibilities* for collective action for DMA infringements, an overarching theme is repeated: The DMA is not a standalone piece of regulation, but it interacts with many other pieces of EU law, such as the UCP Directive, the P2B Regulation, or the GDPR. In several areas of overlap with the DMA or application to the DMA, collective actions provided for by those regulatory instruments are applicable directly – when it comes to the UCP Directive and a violation of the DMA as an unfair commercial practice – or indirectly – when it comes to the P2B Regulation, and the GDPR, and corresponding obligations with the DMA. All three approaches are equally generally flawed, as they seem to follow the typical model in EU legislation when it comes to collective enforcement described throughout this paper: EU law generally leaves it ultimately to the Member States to install a system of collective enforcement into their procedural landscape. The assignment model, by virtue of the effective enforcement of EU law, might fill this gap temporarily. However, due to the fact that there is neither a generally transposable jurisprudence of the ECJ on this matter just yet, nor does this offer any harmonised approaches when it comes to procedural law or international jurisdiction, this approach can only be used as a temporary solution.

Throughout this paper, a discrepancy becomes clear: although there is significant potential and demand for a more unified procedural framework at the EU level for

collective actions regarding DMA violations (and beyond), the availabilities *de lege lata* for collective actions are restricted, leaving ample room for improvement.