



# PRIVATE ENFORCEMENT IN DIGITAL MARKETS

*Carlos Manuel Gonçalves de Melo Marinho*  
*Judge of the Competition Chamber of the Lisbon Court of Appeal*  
*Senior Expert in EU Law, Judicial Cooperation and e-Justice*

## **Abuse of dominance in digital markets**

The cases on the abuse of dominance in digital markets are every time more common, more focused and far-reaching. E.g.:

### **1. Self-preferencing**

(a). Google Shopping – General Court of the European Union – Case T-612/17;

(b). Amazon Logistics (IT, 2021) – Italian Competition Authority (ICA).

### **1. Preferential access to customer data**

(a). Amazon (EU, 2022);

(b). Facebook (EU).

### **3. Tying**

- (a). Google Android (EU, 2018);
- (b). Google AdSense (EU, 2019);
- (c). Microsoft Teams (EU, pending).

### **4. Platform envelopment/leveraging**

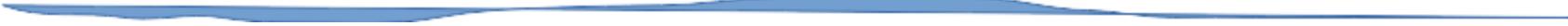
- Google v. ENEL X (IT, 2021).

### **5. Unfair trading conditions on customers/advertisers**

- (a). Google Ads (FR, 2019);
- (b). Google News (FR, 2021);
- (c). Apple Store (EU).

### **6. Exploitative use of personal data**

The “Facebook” decision of the German Federal Cartel Office – February 2019.



## **Ex-ante regulation**

The market failures revealed through these cases clearly justify ex-ante regulation as it do killer acquisitions such as Facebook/Instagram-WhatsApp or Google/FitBit.

## **Consequence of the specificities of the Digital markets**

The specificities of the Digital markets make antitrust appear slow and ineffective.

### **Efficiency is endangered by:**

1. Heavy burden of proof;
2. Strong procedural guarantees;
3. Exaggerated length of proceedings;
4. Amount of the fines, not really dissuasive.

---

## **The Digital Markets Act (DMA) was built over the need for:**

1. Ensuring EU uniformity;
2. Surpassing Europe lags behind China and the USA for
  - (a). Digital innovation;
  - (b). Asymmetric regulation; and
  - (c). Outdated legislative framework.

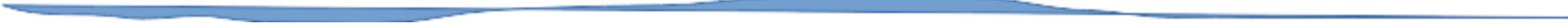
---

## **The «Gatekeeper» is an economic actor:**

1. Having a strong economic position and significant impact on the internal market;
2. Active in multiple EU countries;
3. With a strong intermediation position;
4. Having (or being about to have) an established and lasting position in the market.

## **Obligations**

Only gatekeepers are subject to DMA obligations.



## **Judicial remedies**

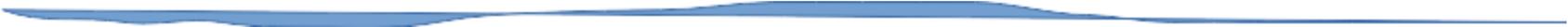
The remedies that can be provided by national courts always depend on the breach of these obligations.

**Access to courts – the application of the DMA involve the possibility of recourse to:**

- a. European Union Courts;
- b. National courts.

## **THE EU COURTS**

1. Decisions by which the Commission has imposed fines or periodic penalty payments – unlimited jurisdiction of the CJEU to review – Article 45 of the DMA, referring to Article 261 of the TFEU;



2. Legality of EU Commission decisions taken under DMA – Article 263 of the Treaty – jurisdiction of the CJEU to review, namely:

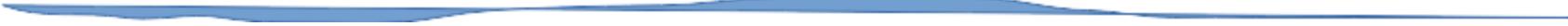
(a). Designation of a company as a gatekeeper after a market investigation – Articles 17; e.g., T-1077/23 Bytedance v Commission (“TikTok” case);

(b). Decision specifying, under Articles 8, the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7;

(c). Decisions taken under Articles 6 and 7;

(d). Suspension or exemption of gatekeeper obligation – Arts. 9 and 10;

(e). Adoption of remedies for non-compliance by the gatekeeper, including interim measures – Articles 24 to 31.

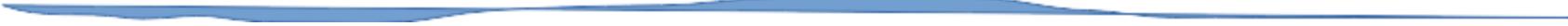


## **NATIONAL COURTS**

1. Public enforcement – appeal against NCA decisions imposing sanctions for DMA non-compliance by gatekeepers;
2. Private enforcement – civil claims emerging from the violation of DMA obligations by designated gatekeepers.

### **Private enforcement**

- The DMA has no specific reference to private enforcement and civil litigation.
- Since DMA rules have a direct horizontal effect and the Regulation doesn't expressly exclude or limit private enforcement, the national court's interventions in such a context have to be considered as widely admitted.

- 
- Private parties are allowed to enforce the DMA rules before the national courts as an automatic consequence of the Digital Markets Act taking the form of an EU Regulation.
  - According to Article 288 of the TFEU, the DMA Regulation is directly applicable in all Member States which bring the right to a judge.
  - Since EU Regulations confer rights and impose obligations on individuals, courts have to be able to enforce such rights and obligations, namely through tort liability claims.
  - It is open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition” – *Case C-453/99 – Courage and Crehan*.

---

- *Case C-253/00, Antonio Muñoz and C-403/98 Azienda Agricola Monte Arcosu Srl* – in order to allow the direct effect, that is, the full effectiveness of the rules, making possible to enforce an obligation, those rules must be:

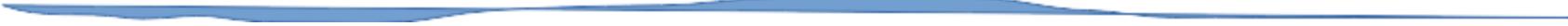
(a). Sufficiently clear;

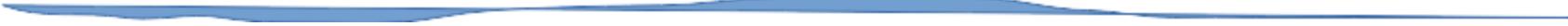
(b). Unconditional;

(c). Grant a right to individuals – in the DMA, that is the right to fair and contestable markets in the digital sector.

- The Commission is treated as a quasi-judicial institution – see *Cases C-344/98 – Masterfoods and HB and C-234/89 – Delimitis v Henninger Bräu*.

- In the DMA, suspensions of obligations (Article 9) or exemptions of gatekeepers, in whole, from a specific obligation laid down in Article 5, 6 or 7 (Article 10) preclude direct effect.

- 
- The DMA can have horizontal direct effect as to claims presented by end users and business users against a gatekeeper.
  - Recital (42) and number 6 of Article 5 of the DMA recognise the right to bring before the national courts concerns about unfair practices by gatekeepers.
  - National courts can complement the Commission's tasks when deciding stand-alone actions having as an object violation of the obligations that emerge from Articles 5, 6 and 7.
  - At the private litigation level, the application for interim measures can assume an important role because of its swiftness and effectiveness.
  - The private enforcement can have strong relevance in cases of obligations, remedies, limitations and behavioural duties of the designated gatekeeper specified or updated under Articles 8 and 12.
  - National follow-on actions – private enforcement can dramatically increase the effectiveness of the DMA.



## The DMA provisions and the private enforcement

- Not all provisions of the DMA seem to allow private enforcement.
- This enforcement is not permitted as to the legal rules that create exclusive competence for the European Commission or compliance reporting obligations for the gatekeepers.

### Are privately enforceable:

- (a). The self-executing obligations referred to in Article 5;
- (b). The obligations “susceptible of being further specified” by EU Commission Decision (Articles 6 and 7) – only after EU Commission Decision;
- (c). The anti-circumvention obligation of Article 13.



## **Can be Plaintiffs in DMA private enforcement actions:**

1. Direct beneficiaries of DMA obligations – have legitimacy;
2. Indirect beneficiaries of DMA – apparent lack of legal standing for their intervention as plaintiffs but eventually possible;
3. Collective redress solutions and representative actions – only available to end users;
4. Gatekeeper's competitors – some level of legitimacy.

## **DMA remedies at the private enforcement level:**

- Permanent or interim injunction – order to a gatekeeper to stop breaching DMA obligations.

## Damages' compensation actions

- Can appear on a stand-alone or follow-on level.

- The breach of DMA obligation imply the previous gatekeeper designation under the rules of Article 3.

- Any breach of a DMA obligation can only be claimed at least 6 months after gatekeeper designation.

- The stand-alone action starts with an application for damages compensation presented by end users or business users in a national civil court without any instrumental relation with any previous sanctioning decision.

- The follow-on action is based on the pre-existence of a decision by the European Commission or a national competition authority (NCA) sanctioning a gatekeeper for the violation of a DMA obligation.

Alphabet

Amazon

Apple

ByteDance

Meta

Microsoft

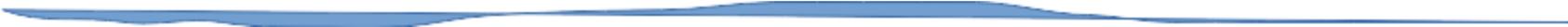
- 
- Only after the adoption of that decision, the harmed end user or business user brings a damages' compensation action before a national civil court.
  - Liability is granted after proof of the requisites of civil responsibility, with particular emphasis on questions of causation.

### **Damages' estimation**

- Profit losses for business users can also be included – see joined *Cases C-295/04 to C-298/04, Manfredi, C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame Total and C-397/98 and C-410/98 Metallgesellschaft and Others*.

## Legal framework of the private enforcement

- Directive 2014/104/EU (Damages Directive) – is not applicable to DMA private enforcement actions;
- DMA does not harmonize procedural rules applicable in DMA private enforcement actions – national procedural rules are applicable;
- The principles of effectiveness and equivalence (Member States cannot treat EU matters less favourably than purely domestic matters) limit procedural autonomy;
- It's applicable to the DMA private litigation the notion that procedural rules cannot impose “any absolute bar to” “an action being brought by a party to a contract which would be held to violate the competition rules” – *cases C-453/99, Courage v. Crehan and C-536/11, Donau Chemie.*



## Cooperation inside the system

1. National courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of this Regulation”;

2. *“Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of this Regulation”;*

3. The Commission, acting on its own initiative, may submit written observations to national courts and also make oral observations with the permission of the court in question;

4. *“For the purpose of the preparation of their observations only, the Commission may request the relevant national court to transmit or ensure the transmission to the Commission of any documents necessary for the assessment of the case”.*



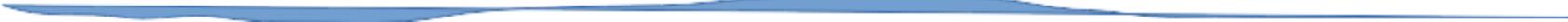
5. “National courts shall not give a decision which runs counter to a decision adopted by the Commission under this Regulation”.

6. “They shall also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation”.

7. “To that effect, the national court may assess whether it is necessary to stay its proceedings”.

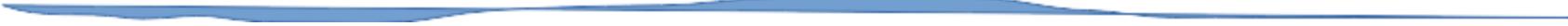
## **Preliminary ruling**

- The possibility of a referral for a preliminary ruling under Article 267 TFEU always hovers in the entire cooperation process.



## Articulation between Article 102 of the TFEU and the DMA

- Article 102 of the TFEU and the DMA function in parallel;
- None of them excludes the other;
- Their incidence is, nonetheless, different;
- Different are also the conditions of their application, namely in terms of effectiveness and time of action;
  - DMA has conditions to be more performant;
  - As to the time of action, the DMA was designed to function as a mechanism for prior intervention (ex-ante regulation) while article 102 of the TFEU constitutes a legal mechanism for subsequent action (ex-post regulation).



## Principle of the “ne bis in idem”

- It will always be necessary to bear in mind the prevalence of the principle of “ne bis in idem” – *ECJ judgements C-17/10 - Toshiba Corporation, C-617/17 - Powszechny, C-238/99 - Limburgse Vinyl (joined cases), C-204/00 - Aalborg Portland (joined cases) and C-289/04, Showa Denko.*