

Juan Ignacio Ruiz Peris
Carmen Estevan de Quesada
Directors

Compensation of Damages in Digital Markets

COMPENSATION OF DAMAGES IN DIGITAL MARKETS

CONSEJO EDITORIAL

MIGUEL ÁNGEL COLLADO YURRITA

JOAN EGEA FERNÁNDEZ

ISABEL FERNÁNDEZ TORRES

JOSÉ IGNACIO GARCÍA NINET

JAVIER LOPÉZ GARCÍA DE LA SERRANA

BELÉN NOGUERA DE LA MUELA

LUIS PRIETO SANCHÍS

FRANCISCO RAMOS MÉNDEZ

RICARDO ROBLES PLANAS

SIXTO SÁNCHEZ LORENZO

JESÚS-MARÍA SILVA SÁNCHEZ

JOAN MANUEL TRAYTER JIMÉNEZ

JUAN JOSÉ TRIGÁS RODRÍGUEZ

Director de publicaciones

COMPENSATION OF DAMAGES IN DIGITAL MARKETS

Prof. Dr. Juan Ignacio Ruiz Peris

Prof. Dr. Carmen Estevan de Quesada

Directors

Contributors

Miquel Aznar Company

Marco Botta

Niklas Brueggemann

Jens-Uwe Franck

Niccolò Galli

Carlos Gómez Asensio

María Gómez Santos

Carmen Herrero Suárez

Jiří Kindl

Eugenio Olmedo Peralta

Juan Ignacio Ruiz Peris

Julia Suderow Rodríguez

Richard Wish

Colección: Derecho mercantil

Directora:

Isabel Fernández Torres

Profesora titular de Derecho mercantil

Universidad Complutense de Madrid



Research Project: «Concentration, Harm,
Abuse and Cooperation in Digital Markets».
PID2021-128111OB-I00



Research Project: «Competition
Power Control».
CIAICO/2021/202

Reservados todos los derechos. De conformidad con lo dispuesto en los arts. 270, 271 y 272 del Código Penal vigente, podrá ser castigado con pena de multa y privación de libertad quien reproducere, plagiar, distribuyere o comunicare públicamente, en todo o en parte, una obra literaria, artística o científica, fijada en cualquier tipo de soporte, sin la autorización de los titulares de los correspondientes derechos de propiedad intelectual o de sus cesionarios.

Este libro ha sido sometido a un riguroso proceso de revisión por pares.

© 2025 Los autores

© 2025 Atelier

Santa Dorotea 8, 08004 Barcelona

e-mail: editorial@atelierlibros.es

www.atelierlibrosjuridicos.com

Tel.: 93 295 45 60

ISBN: 979-13-87867-92-8

Depósito legal: B 21828-2025

Diseño y composición: Addenda, Pau Claris 92, 08010 Barcelona

www.addenda.es

Impresión: WINIHARD

ÍNDICE

KEYS FOR EFFECTIVE PRIVATE ENFORCEMENT OF COMPETITION LAW IN DIGITAL MARKETS IN THE EUROPEAN UNION	13
<i>Prof. Dr. Juan Ignacio Ruiz Peris</i>	
THE ROLE OF PRIVATE LITIGATION IN THE ENFORCEMENT OF THE DIGITAL MARKETS ACT	37
<i>Prof. Dr. Richard Whish</i>	
FUNDAMENTAL PRINCIPLES OF PRIVATE DMA ENFORCEMENT	63
<i>Dr. Niklas Brueggeman</i>	
DAMAGES ACTIONS AGAINST DIGITAL GATEKEEPERS FOR BREACHES OF EU ANTITRUST LAW AND THE DMA: A GERMAN PERSPECTIVE	79
<i>Prof. Dr. Jens-Uwe Franck</i>	
DAMAGES ACTIONS IN THE DIGITAL SECTOR - CZECH EXPERIENCES WITH THE EU LEVEL IMPACT	117
<i>JUDr. Jiří Kindl, M.Jur., Ph.D.</i>	
BIG TECH AND PRIVATE ANTITRUST LITIGATION IN ITALY	129
<i>Dr. Niccolò Galli / Prof. Dr. Marco Botta</i>	
THE PROBLEM OF ACCESS TO JUSTICE IN DIGITAL MARKETS: COLLECTIVE REDRESS SOLUTIONS	155
<i>Prof. Dr. Carmen Herrero Suárez</i>	

PRIVATE ENFORCEMENT AND COMPENSATION FOR THE DAMAGES CAUSED BY APP STORES IN VIOLATION OF THE DMA	175
<i>Prof. Dr. Eugenio Olmedo Peralta</i>	
UNLAWFUL STATE AIDS TO STARTUPS IN DIGITAL AND TECHNOLOGICAL MARKETS	211
<i>Prof. Dr. Carlos Gómez Asensio</i>	
PRIVATE ANTITRUST ENFORCEMENT FOR CONSUMERS AND DIGITAL PLATFORMS. WHERE IS THE COMPENSATION?	233
<i>Dr. Julia Suderow</i>	
THE APPLICATION OF THE DIRECTIVE (EU) 2020/1828 ON REPRESENTATIVE ACTIONS IN THE CONTEXT OF THE DIGITAL MARKETS ACT	253
<i>Prof. Dr. María Gómez Santos</i>	
COMPETITION RISKS AND DAMAGE ACTIONS IN STREAMING PLATFORMS: NFL SUNDAY TICKET LAWSUIT AND MORE	275
<i>Miquel Aznar Company</i>	

FOREWORD

In recent years, multiple class actions have been filed in the United Kingdom to protect the interests of consumers and professionals against large digital platforms such as Google, Microsoft, Apple, and Meta (GAMAM) for billions of pounds.

In the European Union, follow-on actions are beginning to be brought, particularly by entrepreneurs, as a result of the various Booking decisions adopted by the German, French, and Spanish competition authorities, or as a consequence of the Google Play and Google Search decisions.

The issue of actions derived from the DMA is also opening up.

The transposition of the directive on collective or representative actions in the various member states allows for the exercise of collective actions to protect consumers.

Many member states have gone further in their legislation.

This book brings together most of the papers presented at the IV Valencia International Meeting on Competition Law dedicated to private enforcement in digital markets.

Juan Ignacio Ruiz Peris writes about the fact that the relevance of private enforcement of competition law in the European Union is growing fast due to the current moderation of public enforcement by the European Commission, both in the application of Articles 101 and 102 TFEU and Articles 5, 6, and 7 of the Digital Markets Act.

His paper explores several ways to improve public and private deterrence in digital markets in relation to collective redress, the financing of claims, and public-private cooperation in the enforcement of Articles 101 and 102 TFEU and the DMA.

Richard Whish considers the availability of damages to firms that suffer as a result of infringements of the Digital Markets Act by ‘designated gatekeepers’. He considers the development of the jurisprudence of the Court of Justice on the availability of damages for infringement of the competition rules of the TFEU and the impact of the Damages Directive of 2014.

The direct effect of the provisions of the Digital Markets Act is considered and the ‘pros and cons’ of litigation under competition law and/or the Digital Markets Act are considered.

He concludes that it can be expected that private litigation under the Digital Markets Act will develop rapidly.

Niklas Brueggeman argues that obligations laid down in Articles 5, 6 and 7 as well as in Article 13(4), (5) and (6) DMA are sufficiently precise and, following adoption of the respective designation decision, also unconditional. They therefore meet the first prong of the legal test for private enforcement as they can, in principle, give rise to unconditional and sufficiently precise direct rights between individuals. This leads us to the second prong of the legal test for private enforcement.

Jens-Uwe Franck examines actions for damages against digital gatekeepers for breach of EU antitrust law or the Digital Markets Act (DMA) from a German perspective. His paper provides insights into private antitrust litigation against digital gatekeepers before German courts. While the pending damages actions are still at an early stage, a number of injunction actions have been decided, providing some insight into the effectiveness of private antitrust enforcement against digital gatekeepers.

The paper deals also with the role of damages actions as an instrument of corrective justice and of enforcement in the context of DMA infringements is discussed. The conceptual choice to include DMA infringements in the German antitrust damages law is considered in the light of the EU principles of effectiveness and equivalence.

Jiří Kindl examines the evolving landscape of private competition litigation in the Czech Republic, with a particular focus on damages actions in the digital sector and their broader implications for the EU.

Despite the limited prevalence of private enforcement in Czechia, where public enforcement by the Office for Protection of Competition dominates, some notable cases such as the Heureka Group v. Google and Seznam.cz v. Google show a potential for EU-level impact.

The paper delves in particular into the Heureka case, where a preliminary reference to the CJEU clarified previously unaddressed issues surrounding limitation periods, reinforcing the principle of effectiveness in EU competition law.

It concludes by assessing the potential future trajectory of these cases and their broader significance for private damages claims within the EU.

Niccolò Galli and Marco Botta examine private enforcement in Italy, where the competition authority (ICA) has been an active public enforcer, but private litigation against BigTech remains limited.

The analysis focuses on three cases before the Milan Court, which illustrate both the potential and challenges of private enforcement. The private actions did not yield the desired remedies for the three small plaintiffs—two lost on the merits, while the successful one entered liquidation before the litigation concluded. Nevertheless, the Italian cases provide valuable insights for future private litigation, not only under Article 102 TFEU but also in the context of the emerging EU digital regulations.

Carmen Herrero Suárez examines the collective or representative action, the assignment of credits or claims to a litigation vehicle, assessing their admissibility and implementation in practice in the European framework and the role they are playing or may play in the future to solve the problems of access to justice for victims of anti-competitive practices or other illegalities in digital markets.

Eugenio Olmedo Peralta's paper examines the competitive constraints inherent in the current configuration of digital mobile ecosystems, with a focus on practices that restrict developers from directly distributing their applications.

It explores how dominant app distribution platforms -Apple's App Store and Alphabet's Google Play- have established gatekeeping positions that enable them to control developer access to end-users.

These practices are assessed through the lens of competition law enforcement, highlighting the limitations of traditional antitrust tools in addressing structural and behavioural barriers within these markets. In response to these regulatory shortcomings, the European Union has adopted a proactive ex ante framework through the Digital Markets Act (DMA), which imposes binding obligations on designated gatekeepers. The conduct of Apple and Alphabet, particularly in relation to app distribution and user access, has informed the inclusion of targeted prohibitions within this new regulatory regime. Despite the formal entry into force of the DMA and the submission of initial compliance reports, both firms continue to engage in strategic behaviours central to the entrenchment of their market power.

He concludes that the effectiveness of the DMA will ultimately depend on the availability of robust enforcement mechanisms. In this regard, the development of efficient private enforcement pathways is essential to ensure compliance and to enable effective redress for affected market participants. Particular emphasis is placed on the need to safeguard the right of developers to directly distribute their apps, free from gatekeepers' undue restrictions.

Julia Suderow examines the evolving landscape of private enforcement in abuse of dominance cases within digital markets, focusing on the challenges faced by consumers and businesses in seeking redress from dominant digital platforms. Her paper explores how the rise of Big Tech has intensified bargaining asymmetries and introduced new competition risks, prompting regulatory responses such as the EU's Digital Markets Act and Digital Services Act.

Through an initial analysis of two cases, including *Idealo v. Google* in Germany and collective actions against Apple in the UK, the article highlights the procedural and evidentiary hurdles in quantifying harm, particularly for consumers.

The paper discusses the limitations of current legal and economic methodologies, such as the lack of methods for the lack of choice for consumers in Europe. Despite a consensus on the need for effective private enforcement, significant barriers remain—particularly for consumers—due to the fragmentation of collective redress mechanisms and the complexity of proving harm in digital markets. This asymmetry undermines both consumer welfare and the effectiveness of EU competition law, underscoring the urgent need for more accessible and robust enforcement tools.

María Gómez Santos explores the connections and applications of Directive 2020/1828 within the context of the Digital Markets Act (DMA), particularly emphasizing their weaknesses. Two main conclusions are reached. First, small and medium-sized enterprises (SMEs) fall outside the scope of Directive 2020/1828. Consequently, these operators are unable to pursue representative actions in cases of potential violations of the DMA. However, they still have the option to engage in individual litigation or combine their actions, though this approach carries certain disadvantages for the plaintiffs. The second conclusion addresses the potential issues that may arise from using third-party funds to finance representative actions, particularly concerning public enforcement. Lastly, the paper reviews the status of the transposition of Directive 2020/1828 into the Spanish legal system and identifies some areas for improvement.

Miquel Aznar Company, analyses streaming platforms that have become a reality that has transformed the way audiovisual content is consumed. These platforms, through the application of Over-The-Top technology, offer the user different functionalities to access audiovisual content with just an internet connection. Due to their digital nature, they present a series of competition risks typical of this sector, such as vertical integration or tying. In his paper, these risks will be analysed, as well as different judicial procedures that are being developed in the United States on the subject, which offer us an insight into the private enforcement of competition law to this type of platforms.

We hope you enjoy the lecture.

Juan Ignacio Ruiz Peris
Carmen Estevan de Quesada

KEYS FOR EFFECTIVE PRIVATE ENFORCEMENT OF COMPETITION LAW IN DIGITAL MARKETS IN THE EUROPEAN UNION

Prof. Dr. Juan Ignacio Ruiz Peris
University of Valencia

ABSTRACT: The relevance of private enforcement of competition law in the European Union is growing fast due to the current moderation of public enforcement by the European Commission, both in the application of Articles 101 and 102 TFEU and Articles 5, 6, and 7 of the Digital Markets Act. This paper explores several ways to improve public and private deterrence in digital markets in relation to collective redress, the financing of claims, and public-private cooperation in the enforcement of Articles 101 and 102 TFEU and the DMA.

Keywords: Digital Markets Act, Public and private enforcement, Digital platforms. Collective redress. Third party litigation funding. Assignment. Public and private cooperation in deterrence.

SUMMARY: I. PUBLIC AND PRIVATE ENFORCEMENT IN THE EU. II. INDIVIDUAL AND COLLECTIVE CLAIMS. III. THE RELEVANCE OF TPLF AND ASSIGNMENT IN THIS CONTEXT. IV. PUBLIC-PRIVATE COOPERATION IN DETERRENCE. V. KEY FINDINGS. VI. BIBLIOGRAPHY.

I. PUBLIC AND PRIVATE ENFORCEMENT IN THE EU

The relevance of private enforcement of competition law in the European Union is growing fast due to the current moderation of public enforcement by the

European Commission, both in the application of Articles 101 and 102 TFEU and Articles 5, 6, and 7 of the Digital Markets Act¹.

The European Commission finds itself isolated in the global context following the inauguration of the new Trump administration in the US, which has put an end to the promising transatlantic cooperation developed with the Federal Trade Commission and the Antitrust Division during the Biden administration.

This makes it more than reasonable to think that the Commission's action is and will continue to be guided, in the near future, by a sense of prudence, given that arguments against regulating the activities of digital giants are prevalent on the other side of the Atlantic.

Although Europe is maintaining its regulation, in particular the DMA² and the DSA, it is clear that there is a certain degree of self-censorship in the public enforcement of competition law or the DMA, and when they are applied to gatekeepers, this is done in a moderately constructive manner.

Only Germany seems to have embarked on a decisive regulatory path to strengthen public enforcement in digital markets with the introduction of paragraph 19a GWB, which establishes prohibitions for companies of particular cross-sectional relevance, regardless of the existence of a dominant position or a situation of dependence on the market, and paragraph 32f GWB, which allows the *Bundeskartellamt* to apply remedies to companies responsible for prolonged stagnation of competition in a market, following a market study, without the need to prove the existence of collusion or abuse of a dominant or dependent position³, subsequently, by successive 10. and 11. GWB Novelle.

Both provisions differ in many respects, but fundamentally in that 19a GWB is an instrument for controlling abuse of market power beyond dominance and dependency, while 32f GWB is more oriented towards controlling tacit collusion.

In this regard, it should be noted that paragraph 19a GWB is applied with the aim of protecting the competitive process with respect to markets that are not yet dominated and avoiding potentially irreversible effects on competition, in accordance with the explanatory memorandum to the *Digitalization Act*.

It should be noted that Article 19a GWB has so far been applied exclusively, as we shall see, to companies operating in digital markets and in particular to some of those declared Gatekeepers by the Commission, and that the work on the 12th GWB Novelle includes the idea of reforming Paragraph 19a GWB to make it a special rule for digital markets.

The seven prohibitions imposed by paragraph 19a GWB on companies designated as *Undertakings of Paramount Significance for Competition Across*

1. Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265, 12.10.2022, pp. 1-66.

2. See FRANCK, J.U. "Abuse proceedings against digital gatekeepers under section 19a of the German competition act: taking stock of early results," in RUIZ PERIS, J.I. – ESTEVAN DE QUESADA, C. *New Competition Trends in digital markets*, Atelir 2024, pp. 23-52.

3. See also RUIZ PERIS, J.I. "The new § 32f GWB and the German sektoruntersuchung," in *New Competition Trends...*, cit. pp. 53-69.

Markets are: self-preferencing, blocking, tying, denial of access to data, denial of interoperability, concealment of information, and excessive advantages.

The *Bundeskartellamt*⁴ has issued relevant decisions in the field of digital markets, in particular in application of paragraph 19a GWB.⁵

In the rest of the member states' legal systems, only a few isolated cosmetic changes are worth noting.

When competition authorities are active in the field of digital markets, they act in application of Articles 101 and 102 TFEU.

This is the case for the *Autorité de la concurrence*⁶, the *Autorità Garante della Concorrenza ed il Mercato*⁷, and the *Comisión Nacional de los Mercados y de la Competencia*⁸, among others.

However, most of the 27 competition authorities of the European Union member states remain inactive in digital markets.

The European Commission, although in a moderate and dialoguing tone, is clearly active in both the application of Articles 101 and 102 TFEU and the DMA in digital markets and has recently imposed fines on Apple and Meta for infringing the DMA, with three other infringement proceedings against Alphabet and Apple still pending.

4. In particular, the Facebook/Meta saga, which concluded in 2024 with META's withdrawal of its appeal against the Bundeskartellamt's 2023 decision before the OLG Düsseldorf and its assumption of various commitments, or its decision in the Google News Showcase case.

5. On the one hand, Alphabet, Amazon, Apple, Meta, and Microsoft have been classified as undertakings of "paramount significance for competition across markets" in accordance with paragraph 19a GWB. In the case of Amazon and Apple, the designation was confirmed by the Bundesgerichtshof in March 2025. On the other hand, apart from the aforementioned decisions, according to the German authority's 2024-25 annual report, proceedings against Google Automotive Services and Google Maps Platform have been concluded in this period, with commitments, in the first case, on the separation of licenses for applications included in Google Automotive Services (Google Play, Google Maps, and Google Assistant) and the creation of the necessary conditions for interoperability with the services of other providers, and in the second case, that Google Maps content may also be displayed on maps from other providers, such as OpenStreetMap, and to remove contractual restrictions on the combined use of its map services with those of third-party providers such as HERE, Mapbox, or TomTom. This will allow vehicle manufacturers to combine individual Google Maps services in their infotainment systems with offerings from other providers or with their own developments.

6. Decisions of the Competition Authority No. 22-D-13 of June 21, 2022, and No. 24-D-03 of March 15, 2024, relating to practices implemented by Google in the press sector. The Google saga in France has its roots in Decision No. 10-MC-01 of June 30, 2010, relating to the request for interim measures submitted by the company Navx. The 2024 decision, like Decision No. 21-D-17 of July 12, 2021, imposes penalties on Google for failing to respect the commitments made

in decisions No. 22-D 13 of June 21, 2022, and No. 20-MC-01 of April 9, 2020, and impose penalties for non-compliance on the company. This demonstrates, once again, the relative effectiveness of behavioral remedies, which are frequently breached and ultimately result, in the best case scenario, in a financial penalty that seems to be taken for granted by the offender.

7. For example, A529 - GOOGLE/COMPATIBILITÀ APP ENEL X ITALIA CON SISTEMA ANDROID AUTO Provvedimento n. 29645, which recently led to the Court of Justice ruling in case C-233/23 of February 25, 2025 Alphabet et al. v. Autorità Garante della Concorrenza.

8. Resolution of the National Commission for Markets and Competition of July 29, 2024 in the case BOOKING S/0005/21.

These first infringement decisions with fines against Apple and Meta were adopted by the European Commission on April 23, 2025⁹, imposing penalties on the two companies of €500 million and €200 million, respectively.

New penalties may be imposed periodically if the companies continue to be in breach.

The conduct for which both companies were sanctioned is different. In the case of APPLE, the Commission considered that the company had failed to comply with its obligation to allow app developers who distribute their apps through the Apple App Store to inform customers, free of charge, of alternative offers outside the App Store, direct them to those offers, and allow them to make purchases.

The Commission has also ordered Apple to remove the technical and commercial restrictions on redirection and to refrain from continuing the non-compliant conduct in the future, including adopting conduct with an equivalent object or effect.

In the case of META, the Commission found that the “pay or accept” system implemented by that company in November 2023 and maintained from March 2024, when the obligations of the DMA became legally binding, and November 2024, violated the duty to provide Facebook and/or Instagram users who do not consent to the processing of their data with access to a less personalized but equivalent alternative.

On the latter date, Meta introduced a third alternative, which the Commission is currently examining.

Alongside public enforcement, private enforcement in digital markets is gaining momentum in the United Kingdom and is beginning to grow in European Union member states.

We can see the existence of private litigation in several member states such as Germany, the Netherlands, Portugal, and Spain, claiming compensation for damages suffered as a result of competition infringements by digital platforms, favored by the growing interest of Third Party Litigation Funders, especially following the PACCAR ruling¹⁰ in the United Kingdom, which declared that financing agreements based on a percentage of damages were subject to the strict regime of contingency fee funding, which prohibits or limits the financing of litigation by legal representatives, effectively rendering them inapplicable not only in the context of class actions, but in all commercial claims.

The Civil Justice Council (CJC)¹¹ recently issued a statement on this matter at the request of the government, recommending that the effect of the Supreme Court’s decision be reversed by legislation, which should be both retrospective and prospective in effect.

9. https://digital-markets-act.ec.europa.eu/commission-finds-apple-and-meta-breach-digital-markets-act-2025-04-23_en

10. United Kingdom Supreme Court Judgment R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) of July 6, 2023, [2023] UKSC 28.

11. *Review of Litigation Funding Final Report* of June 2, 2025.

It should make clear that there is a categorical difference between contingency fee funding, i.e., funding provided to a party to a dispute by their legal representative (through a CFA or DBA) and litigation funding, i.e., funding provided by an individual or a business who is not a party's legal representative (litigation funders) for the purposes of dispute resolution. The two are separate and should be subject to separate regulatory regimes.

Currently, according to data provided by *Chambers and Partners legal professionals' lists*, a large number of funds operate in the different Member States of the European Union, with jurisdictions such as the Netherlands and Germany leading the list, with 46 and 43 active funds in their respective jurisdictions, followed by Spain with 18 active funds.

However, the number of lawsuits and the amounts claimed are far from the figures we see in the United Kingdom¹², both in terms of individual and collective actions in competition matters, brought in this case under the opt-out system by both end users and professionals.

Within the European Union, claims for damages in the field of digital markets are made in accordance with national rules derived from the transposition of the Damages Directive¹³ in each member state.

However, the Directive is designed to protect leniency programs rather than to facilitate compensation actions for damages in competition matters, taking into account primarily the case of cartels and seeking to resolve the confidentiality issues surrounding the statements of leniency applicants in order to ensure the effectiveness of public enforcement in these types of cases, which are the most harmful to competition.

However, most actions relating to digital markets concern infringements of Article 102 TFEU and/or equivalent national provisions, and it is to be expected that in the future actions will be brought for infringements of Articles 5, 6, 7, and 13 DMA, an opinion held by most of the authors participating in this work¹⁴.

Therefore, the Directive's regulation is not fully adapted to this type of case, which has led to some legislative choices in Germany.

12. According to a study conducted by the law firm Simmons and Simmons on July 21, there are currently 35 cases of compensation for damages for infringement of competition rules in digital markets registered with the CAT <https://www.simmons-simmons.com/en/publications/clhkhkaalg000uuao03fozem4r/collective-proceedings-issued-in-the-uk-s-competition-appeal-tribunal>.

13. Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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 L 349/1

14. However, PODSZUN R. disagrees in "Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act", *Journal of European Competition Law and Practice*, vol. 13(4), 2022, pp. 254-267, who considers that in the case of the obligations established by Article 6 DMA, it would not be possible to bring actions for damages or for an injunction without a prior decision of specification by the Commission.

Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

Thus, by extending the regulation provided for compensation for damages for infringements of Articles 101 and 102 TFEU and equivalent German provisions to cases of infringement of the DMA and paragraph 19a GWB, the German legislator has had to make a kind of selection of provisions applicable to this type of case.

The 11th GWB Novelle amended paragraph 33(1) GWB in this regard, extending the possibility of bringing actions for damages to cases of infringement of Articles 5, 6, and 7 DMA.

The reform made certain issues relating to the regime for compensation for damages for infringement of competition rules applicable to these cases.

Thus, in accordance with paragraph 33b(a) GWB, the binding effect on the courts of final decisions of the European Commission regarding the determination of an infringement of Articles 101 and 102 TFEU will in future also apply to decisions on possible infringements of Articles 5, 6, and 7 of Regulation (EU) 2022/1925.

In addition, the binding effect, in accordance with letter b) of the aforementioned paragraph, also extends to the decision to designate an access guardian by the European Commission in accordance with Article 3 of Regulation (EU) 2022/1925, so that the designation of access guardians is not subject to independent review by the German national court.

Similarly, the five-year limitation period provided for in paragraph 33h GWB for competition-related damage claims also extends to these cases.

On the other hand, as in the latter case, there is a concentration of material jurisdiction in the courts of appeal, *Landgerichte*, so that only the courts competent to decide on compensation for damages in competition matters will be also competent for disputes relating to Regulation (EU) 2022/1925 (sections 87 and 89 GWB).

The provisions on cooperation between national courts and the European Commission are also adapted to include this type of case.

In order to make expert opinions on damages caused by cartels available for proceedings for infringement of Articles 5, 6, or 7 of Regulation (EU) 2022/1925, paragraph 95 (2) of the Judiciary Act (*Gerichtsverfassungsgesetzes*) establishes a parallel with private enforcement civil proceedings in competition matters.

This selection of rules whose application is extended is consistent. Thus, many of the provisions contained in the Directive and its national transposition rules, such as the protection of the confidentiality of the leniency applicant's statement, are irrelevant from the perspective of the infringement of Articles 5, 6, and 7 DMA¹⁵.

The presumption of damage in the case of a cartel is also excluded. However, it might make sense to establish a presumption of damage in cases where the

15. An excellent analysis of the provisions introduced in the GWbB in the transposition of the directive on damages applicable to compensation for damages for infringement of the DMA can be found below in FRANCK, J.U. "Damages Actions against Digital Gatekeepers for Breaches of EU Antitrust Law and the DMA: A German Perspective," in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025, at VI.B.2.

infringement has been recognized by a final decision of the European Commission in a sanctioning procedure, when this has not been concluded by voluntary acceptance of the infringement, which, in addition to facilitating the exercise of actions for damages, would promote public and private deterrence and add an incentive to reach settlement agreements within the framework of the administrative procedure.

In other EU Member States that have not made legislative changes, it is possible to bring actions for damages for infringement of the DMA, since, although it does not establish rules relating to compensation for damages caused by infringement of its rules, it does not exclude it either.

In fact, as we pointed out a few years ago¹⁶, Article 39 of Regulation (EU) 2022/1925, which regulates the European Commission's cooperation with national courts in this area, presupposes the possibility of private enforcement.

Furthermore, as BREUGMANN points out, Article 42 of the DMA provides for the inclusion of the DMA in Annex I of the Representative Actions Directive (RAD),¹⁷ unlike the case with the Damages Directive.

“Directive (EU) 2020/1828 shall apply to representative actions brought against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers.”

On the other hand, most of the authors who contributed to this book agree that it is clear that the logic of the doctrine developed by the Court of Justice in its judgments in Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465 and Cases C-295/04 etc *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* EU:C:2006:461, is applicable in this case.

Granting individuals the right to claim compensation for damages caused by the infringement of a European rule, as repeatedly stated in judgments handed down by the Court of Justice, reinforces the functioning of the infringed rule¹⁸.

16. RUIZ PERIS, J.I. “The new Digital Market Act, a hybrid response by the European Union to GAFA gatekeepers,” *Aranzadi Journal of Law and New Technologies*, ISSN 1696-0351, No. 57, 2021

17. Directive (EU) 2020/1828.

18. See in this regard judgments in Cases C-199/11 *Europese Gemeenschap v Otis NV* EU:C:2012:684, paragraphs 40-43; C-557/12 *Kone AG v ÖBB-Infrastruktur* EU:C:2014:1317; C-360/09, *Pfleiderer*, EU:C:2011:389; C-724/17, *Vaantaan kaupunki v Skanska Industrial Solutions Oy*, EU:C:2019:204, paragraphs 23 to 51; C-637/17, *Cogeco Communications Inc v Sport TV Portugal SA*, EU:C:2019:263, paragraphs 35 to 55; C-435/18, *Otis Gesellschaft mbH and Others v Land Oberösterreich and Others* EU:C:2019:1069, paragraphs 20-34; C-312/21 *Tráficos Manuel Ferrer v Daimler AG* EU:C:2023:99, paragraphs 34-35; C-882/19 *Sumal* EU:C:2021:800, paragraphs 32-34 and C-605/21 *Heureka Group s.a. v Google LLC* EU:C:2025:324, paragraph 54.

On this issue at length, establishing the possibility of bringing actions for damages in the direct effect of regulatory provisions, in accordance with the case law of the Court of Justice and extending the possibility of private enforcement to the anti-circumvention rules of Article 13 DMA, see the excellent analysis carried out in this work by BREUGMANN, N., “Fundamental principles of private DMA enforcement.” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.

Articles 101 and 102 TFEU pursue different objectives, the preservation of sufficient competition in the first case and the preservation of contestable and equitable markets in the second. Therefore, the application of the DMA is without prejudice to possible actions for infringement of Articles 101 and 102 TFEU or their national equivalents.

However, it should be borne in mind that the infringements covered by the DMA are often based on cases of abuse of a dominant position in breach of Article 102 TFEU, which have given rise to well-known case law of the Court of Justice¹⁹.

This means that in many cases it is possible to choose between bringing an action for infringement of Article 102 TFEU or for infringement of Articles 5, 6, or 7 DMA, or even to bring both in a coordinated manner.

An excellent analysis of the advantages and disadvantages of the two options can be found in the following chapter written by Professor RICHARD WHISH²⁰.

It would also make no sense for the same substantive infringement to give rise to or not give rise to actions for compensation for damages for infringement of rules depending on whether the rule was contained in the TFEU or in the DMA.

In Member States such as Spain, where the legislature has not adopted measures on this issue, the rules transposing the Damages Directive will not apply to claims for compensation for damages for infringement of the rules in Articles 5, 6, and 7 of the DMA, but rather the general rules on non-contractual damages for unlawful acts will apply and, to the extent possible, the case law developed by our Supreme Court with respect to Article 1902 of the Civil Code in cases which, in accordance with the transitional provisions of Royal Decree-Law 9/2017 of May 26, which, among other matters, amended the Competition Law and the Civil Procedure Law to incorporate the provisions of Directive 2014/104/EU, the transposed substantive rules do not apply.

II. INDIVIDUAL AND COLLECTIVE CLAIMS

Individual claims for damages for infringement of Articles 101 and 102 TFEU in digital markets and national correspondent prohibitions are already taking place in the United Kingdom and in various Member States, such as the Czech

19. On this same topic, see RUIZ PERIS, J.I., "The EU Digital Markets Act, a European answer to application's problems of classical competition law to Gatekeepers" in *Competencia, compensación de daños y mercados digitales*, Juan Ignacio Ruiz Peris (ed.), Tirant lo Blanch 2022, pp. 17-53.

20. WHISH, R. "The Role of Private Litigation in the Enforcement of the Digital Markets Act" in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025, at III.

Republic, with the well-known cases of *Heureka Group v. Google*²¹ and *Seznam.cz v. Google*²².

Alongside these, as we have seen some Member States have recently amended their legislation to adapt it to the specific problems of digital markets, such as Germany with the introduction of paragraph 19a GWB or Italy with the new wording of Article 9(1) of Law No. 192/1998, as amended in 2022, may also see the emergence of actions for cessation, nullity, retraction or compensation for damages based on the infringement of these provisions.

In Italy, there are precedents for the use of national rules to pursue the same objectives currently protected by the DMA, dating back to at least 2016, when the specialized business section of the Court of First Instance of Milan ordered Google to compensate Attrack for abuse of a position of dependence—anticipating Google Shopping—in its ruling in the case *Attrakt vs. Google*²³.

Along with the possibility of bringing individual claims, all member states recognize the possibility of bringing class actions with certain requirements²⁴.

With regard to class actions, there are very different solutions in the United Kingdom and in the member states of the European Union. In the former, opt-out class actions for damages are possible in competition matters, both in cases where the injured parties are consumers and in cases where the injured parties are entrepreneurs or professionals. Consumers and entrepreneurs or professionals from European Union member states may join these actions by opting in.

21. Judgment of the Court (Grand Chamber), April 18, 2024, Case C-605/21 *Heureka Group a.s. v. Google*, ECLI:EU:C:2024:324. The national case that gave rise to this judgment is a follow-on action arising from the Commission Decision of June 27, 2017, Case AT.39740 *Google Search (Shopping)*, in which Heureka, an operator of a Czech shopping comparison website, sued Google for CZK 394,857,000 (approximately €15.6 million). Along the same lines, GALLI – BOTTA. “Big Tech and Private Antitrust Litigation in Italy” in RUIZ PERIS – ESTEVAN DE QUESADA (Eds). *Compensation of damages in digital markets*, Atelier, 2025, report on the start of a series of individual follow-on actions following the *Google Shopping* decision in Italy, led by Italian price comparison websites.

22. Judgment of the General Court, Case T-604/18 *Google and Alphabet v Commission (Google Android)* (ECLI:EU:T:2022:541), appealed before the Court of Justice Case C-738/22 P. *Opinion of Advocate General KOKOTT* delivered on June 19, 2025, ECLI:EU:C:2025:463. The case giving rise to the judgment of the General Court concerns a follow-on action arising from the Commission Decision of July 18, 2018, Case AT.40099 *Google Android*, in which a Czech internet operator sued Google and Alphabet for an amount of CZK 10,238,732,000CZK (approximately €405.1 million). For both cases, see in this volume KINDL, J. “Damages Actions in the Digital Sector - Czech Experiences with the EU Level Impact,” in RUIZ PERIS – ESTEVAN DE QUESADA (Eds.). *Compensation of damages in digital markets*, Atelier, 2025.

23. Tribunale Milano, Sez. spec. in materia di imprese, Sent., 17/06/2016, n. 7638. See GALLI – BOTTA. “Big Tech and...” op. cit. at

24. Regarding the joinder of actions in the field of private enforcement of competition law in Spain, see. VILATA, S., “Acumulación de acciones” (Joinder of actions), *Daños y competencia. Revisión de cuestiones candentes (Damages and competition. Review of hot topics)*, Tirant lo Blanch, 2021, pp. 136-146; MARTÍN PASTOR, J., “Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia” in *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE (Compensation for damages for infringement of competition rules following Directive 2014/104/UE)*, Aranzadi, 2016, pp. 191-202.

This is the case, for example, in the lawsuit *Elisabetta Sciallis v Korg (UK) Limited and Korg Inc*, June 2, 2023.

The significant development of class actions by consumers, app developers, advertisers, and other small and medium-sized businesses in the United Kingdom is favored by four important factors: Collective actions can be brought by both consumers and businesses, standing to sue is open, opt-out actions are authorized in competition matters in all cases, and litigation funding has not faced serious obstacles to its operation until the PACCAR²⁵ ruling.

Despite this, opt-out class actions continue to be filed and certified, such as the one recently filed by Mr. Roger Kaye KC against Alphabet Inc., Google LLC, Google Ireland Limited, and Google UK Limited on behalf of UK advertisers who used Google's search advertising services to publish ads between January 1, 2011, and May 27, 2025.

The claim accuses Google of abusing its dominant position in the search advertising market, resulting in inflated costs and reduced competition. The claim alleges that Google's agreements with phone manufacturers and network operators to make Google's search engine the default option on their products restricted competition and allowed it to maintain its dominant position in the market.

The value of the claim is estimated at £15 billion²⁶.

The situation of collective redress in the European Union was far from ideal before Directive (EU) 2020/1828.

There are major asymmetries between Member States where such actions simply do not exist and States such as the Netherlands or Portugal, which account for a significant number of them.

As highlighted in the report requested by the European Parliament's Committee on Justice in 2018, *Collective redress in the Member States of the European Union*,²⁷ only a few Member States at that time had a proper alternative dispute mechanism focused on mass harm situations, or at least containing specific rules on ADR in the context of mass harm situations.

The limitation of the study to 12 member states also highlights the unfamiliarity of the issue in many jurisdictions.

Furthermore, in the different Member States, the scope of the collective redress instruments also differs, being confined either to consumer law, adopted with regard to a larger sectoral approach, or to a horizontal framework.

25. JUDGMENT R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) 26 July 2023 [2023] UKSC 28. https://supremecourt.uk/uploads/uksc_2021_0078_judgment_ea84838f1b.pdf

26. Source SIMMONS + SIMMONS Collective Proceedings in the UK's Competition Appeal Tribunal (CAT) Last updated: June 24, 2025.

27. [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU\(2018\)608829_EN.pdf#:~:text=This%20study%2C%20commissioned%20by%20the%20European%20Parliament%E2%80%99s%20Policy,and%20provide%20the%20European%20Parliament%20with%20concrete%20recommendations.](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf#:~:text=This%20study%2C%20commissioned%20by%20the%20European%20Parliament%E2%80%99s%20Policy,and%20provide%20the%20European%20Parliament%20with%20concrete%20recommendations.)

The core question of the opt-in or opt-out model reveals very problematic discrepancies. Whereas some legislations impose either the former or the latter, two Member States currently provide for a mixed system.

The standing to bring forth an action is granted only to designated entities, organizations, and/or to affected class members, and the criteria to give standing to qualified entities are not the same.

In the years since the report, the situation had changed little by the time the Directive on collective or representative actions was due to be transposed²⁸.

Two and a half years after the end of the transposition period, there are still Member States such as France and Spain that have not yet transposed the directive.

Despite this, *Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020, on representative actions for the protection of the collective interests of consumers*²⁹, following an initial *soft law* instrument that received little attention, *the Commission Recommendation of June 11, 2013, on common principles for collective redress mechanisms for cessation and compensation in Member States in the event of violation of rights conferred by Union law*³⁰ opens up the possibility of significant regulatory improvement and greater harmonization, although it leaves fundamental issues such as the choice between the *opt-in* or *opt-out* system in the hands of the member states.

In the case of Spain, in accordance with current law (Article 42 DMA) and planned law (Final Provision 1 of Draft Law 121/000048 on collective actions for the protection and defense of the rights and interests of consumers and users), only actions for infringement of Articles 5, 6, 7, and 13 of the DMA and unfair competition law injuries to consumers, would be admissible, in the first case, despite not being provided for in the draft transposition of the directive, as the right to compensation for directly affected consumers derives directly from Article 42 of the DMA.

According to Article 42 DMA:

“Directive (EU) 2020/1828 shall apply to representative actions brought against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers.”

By virtue of the first final provision of draft law 121/000048³¹, number 3 of articles 32 and 33 and article 35 of the Unfair Competition Law are worded as follows:

Art. 32.3 LCD:

28. As highlighted by SOUSA FERRERO, M., “Consumer antitrust private enforcement in Europe,” *Journal of European Competition Law & Practice*, Vol. 13, No. 8, 2022, pp. 578-593.

29. OJEU-L 409 of 4.12.2020, pp. 1-27.

30. OJEU- L 201 of 26.7.2013, pp. 60-65.

31. Draft Law on collective actions for the protection and defense of the rights and interests of consumers and users of March 14, 2025. https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-48-1.PDF#page=1. The bill is still undergoing amendments in the Justice Committee of the Congress of Deputies.

“Collective actions may also be brought in defense of the rights and interests of consumers and users, in accordance with the provisions of Title IV of Book IV of the Civil Procedure Act. However, compensation for damages caused to consumers and users may only be claimed if there has been intent or fault on the part of the agent.”³²

Art. 33.3 LCD:

“The entities authorized under Article 54 of the revised text of the General Law for the Protection of Consumers and Users and other complementary laws, approved by Royal Legislative Decree 1/2007 of November 16, shall be entitled to bring the corresponding collective actions. These entities shall also be entitled to bring the actions provided for in Article 32.1, 1, 3, and 4 when they are brought in defense of the collective interests of consumers and users.”³³

The bill also aims to reform Article 35 LCD, reducing the limitation period to one year and the expiry period to three years to the actions provided for in Article 32.1 LCD. These periods are not applicable to the collective actions provided for in Article 32.3 LCD.

Given that the bill project does not include a general limitation period for representative actions for cessation and compensation for damages, although it does so for collective actions and retraction actions arising from unfair general terms and conditions, the issue remains somewhat undefined and should be resolved during the legislative process.

The bill does, however, regulate the suspension of the statute of limitations for individual actions by affected consumers in the event of a class action being filed in Article 832, according to which:

As well as the transitional regime for this issue

“The exercise of a collective action shall suspend the limitation periods for individual actions brought by affected consumers and users to obtain compensation for the damages suffered.”

The limitation period shall resume from the moment the intention to withdraw from the action and the outcome of the proceedings is expressed, under the terms established in Article 848.”³⁴

As well as the transitional regime for this issue in its second transitional provision, according to which:

“The exercise of a collective action shall suspend the limitation period for individual actions for compensation that may be brought by consumers or users

32. Translation by the author.

33. Translation by the author.

34. Translation by the author.

against infringements by businesses or professionals committed on or after June 25, 2023.”³⁵

The transposition of the Directive may also give a significant boost to private enforcement, both in relation to collective actions by consumers affected by infringements of Articles 5, 6, 7, and 13 of the DMA and by infringements of the Unfair Competition Law³⁶.

However, the Spanish legislator does not seem to want to take advantage of the transposition of the directive to go further at the national level than what it establishes the Directive, particularly with regard to the extension of the collective action regime to the area of actions arising from infringements of competition rules—101 and 102 TFEU and national equivalent prohibitions—involving damage to consumers., what seems curious due that consumers welfare protection is the main purpose of competition law.

It makes no sense that collective actions can be brought for infringement of Articles 5, 6, 7, and 13 of the DMA and not for infringement of Article 102 TFEU, when the prohibitions contained in those provisions are based on judgments handed down by the Court of Justice in cases of infringement of Article 102 TFEU.

The only explanation, which is not a possible justification, is the negative combination of the European Commission’s zeal to maintain the hegemony of public enforcement on this side of the Atlantic and the fear of business lobbies of being forced to comply with competition rules as a result of collective actions for damages amounting to millions of euros that really intimidate them.

There is no other explanation for the fact that, when Directive 2014/104/EU on compensation for damages was drafted, the elimination of the part relating to collective actions was justified from the perspective of achieving a unified regime for collective actions, and that when Directive (EU) 2020/1828 on representative actions, the directive on compensation for damages was not included among the rules whose violation allows collective actions to be brought, leaving Member States complete freedom to regulate the matter.

It also makes no sense, in the context of digital markets, to limit the exercise of collective actions to consumers when the asymmetry of information, economic power, and bargaining power that justifies it also occurs in the case of small and medium-sized entrepreneurs and, in general, any end user of digital platforms³⁷.

Furthermore, this asymmetry also extends to a greater or lesser extent in digital markets to professional users, especially when it comes to small and medium-sized enterprises, regardless of whether they are digital operators themselves, such as app developers, or not, such as advertisers.

35. Translation by the author.

36. Directive (EU) 2020/1828.

37. Regarding the distinction between consumer and end user, see GÓMEZ SANTOS, M. “The Application of Directive (EU) 2020/1828 on Representative Actions in the Context of the Digital Markets Act” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.

In my opinion, the option of collective action should be extended, in this case, not only to all end users, but also to professional users of the platform, as is the case in the United Kingdom, where the protection of financial system regulations was extended to all investors, policyholders, and bank customers.

Individual or collective action should be an option, regardless of whether an affected end user or professional is a large company or a medium-sized company in the digital sector, which will generally take individual action.

On the other hand, it seems appropriate to extend standing beyond that established by Article 4.3 of the Collective Actions Directive (Article 853 of the Spanish draft), which limits it to persons designated as qualified entities designated by the Member States and, in the case of cross-border actions, to persons resident in another Member State of the European Union who meet the following requirements:

- it is a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation;
- its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests as provided for in the provisions of Union law referred to in Annex I of the Directive.
- it has a non-profit-making character;
- it is not the subject of insolvency proceedings and is not declared insolvent;
- it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers;
- it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria listed in points (a) to (e) and information about the sources of its funding in general, its organizational, management, and membership structure, its statutory purpose, and its activities.³⁸

Nothing prevents Member States, when transposing the Directive, which is neither maximum nor fully harmonized, from extending standing to business or professional associations for the DMA injuries to professionals or entrepreneurs and in the case 101 and 102 TFEU injury and unfair competition claims, and even to ad hoc groups of end users or professionals.

³⁸ Regarding standing to sue “secundum directive,” see the interesting analysis by GÓMEZ SANTOS, M. “The Application of...” op. cit.

Such an extension does not pose any problems with regard to non-consumer end users or professional users.

If it were considered that extending standing in the consumer sphere would be contrary to the objectives pursued by the Directive and standing were limited to generally less active, in the private legal sphere, consumer associations that meet the requirements of Article 4.3 of the Collective Actions Directive and Article 853 of the Spanish draft, following the Directive, this could reduce the effectivity of the reform.

The exercise of collective actions, opt-in and specially opt-out, is presented as the most effective instrument for consumers and small and medium-sized entrepreneurs to obtain compensation for damages suffered as a result of anti-competitive conduct or infringement of the DMA by digital companies.

The future effectiveness of the regime that is finally approved remains to be seen, as it will depend greatly on factors such as the scope of standing and the mandatory nature of the provisions³⁹. Broad standing that includes not only the most relevant consumer associations, which are generally fearful of possible costs and unfamiliar with civil tort and competition litigation, but also extends to professional and business associations, would favor, as is the case in the United Kingdom or Portugal with the use of *actio popularis*, greater compensation for damages suffered, as well as *deterrence*, to the benefit of the market, consumers, and small and medium-sized enterprises.

III. THE RELEVANCE OF TPLF AND ASSIGNMENT IN THIS CONTEXT

The possibility of bringing individual or collective actions for competition or regulatory infringements in digital markets, through judicial or alternative resolution ways proceedings, depends fundamentally on their financing by third parties – Third Party Litigation Funding (TPLF).

Only large companies and international groups are able to financing their own individual or collective actions—on behalf of various affected subsidiaries—or third parties, as in the case of Deutsche Bahn, which has become an assignment vehicle financed by its own funds.

In this way, litigation funding ensures the financing of both individual and collective actions, as well as portfolios of actions from companies that have grouped together the rights of those affected through the assignment system, such as Cartel Damages Claim (CDC).

This system generally involves the assignment of the affected parties interest and possible credit to the entity that groups them together in order to achieve a critical mass that makes it feasible to bear the costs generated by this type of

39. Faced with the risks of circumventing legal provisions through contractual means, as pointed out by NOWAG – TARKKILA “How much effectiveness for the EU Damages Directive? Contractual clauses and antitrust damages actions,” *Common Market Law Review*, Vol. 57, 2020, pp. 469-471.

litigation, which is often complex, lengthy, and expensive, and in which the defendants usually have deep pockets and a vested interest in increasing the complexity, duration, and cost of the litigation as a way of discouraging the plaintiff from continuing or forcing them to settle on terms favourable to the defendant and refrain other potential plaintiffs from bringing actions.

In contrast to the class action model, in which the plaintiffs act as a group under a single legal representative or coordinated legal representatives, in one or more jurisdictions, with a single financier or several, via sub-financing agreements that allow for risk diversification, the assignment model brings together in a single entity—the vehicle company, the assignee of the rights—the ownership of those rights, which it exercises under its own technical direction, in a single proceeding, before a single court, in a single jurisdiction, and under the procedural rules of a single legal system.

The assignment is made in exchange for remuneration—generally a percentage of any future compensation obtained—without the assignor having to pay for the proceedings, which are covered by the special purpose vehicle's own funds or by financing obtained from a litigation financing fund.

The model of assignment is recognized by Article 2 of Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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*.

Despite this, the model is subject to legal obstacles in Germany, which have given rise to the recent Judgment of the Court (Grand Chamber) 28 January 2025 in case C-253/23 *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen* (ASG2), regarding whether the fact that a national law limits or prohibits the allocation system can be considered a violation of the principle of effectiveness, according to the decisive part of which

“Article 101 TFEU, read in conjunction with point 4 of Article 2, Article 3(1) and Article 4 of Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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, and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding an interpretation of national legislation which has the effect of preventing persons allegedly harmed by an infringement of competition law from assigning their rights to compensation to a provider of legal services so that it may assert them, collectively, in an action for damages that does not follow the decision of a competition authority finding such an infringement that is final and binding, in particular with regard to the establishment of the facts, provided that

— national law does not provide for any other possibility of grouping together the individual claims of those injured persons that would ensure the effectiveness of the exercise of those rights to compensation, and

— the bringing of an individual action for damages is, having regard to all the circumstances of the case, impossible or excessively difficult for those persons, with the result that they are deprived of their right to effective judicial protection.

Should it not be possible to interpret that national legislation in a way that complies with the requirements of EU law, those provisions of EU law require the national court to disapply that national legislation.”

It remains to be seen how German courts will apply the doctrine established by the Court of Justice, particularly the first condition. The issue may give rise to different solutions depending on how it is interpreted, for example, in Spain, where collective actions in the truck cartel case have been brought collectively through the instrument of objective joinder of actions, with serious difficulties.

In any case, if Germany blocks the model, this will lead to actions of this type being concentrated, as is already the case, in the Dutch courts⁴⁰.

In any case, the ruling recognizes the allocation model as a lawful alternative in line with the principle of effectiveness.

The allocation model has its own characteristics that limit it and make it more effective in actions brought by small and medium-sized enterprises than in those brought collectively by consumers.

The small amount of compensation that can generally be obtained in the latter type of actions, as well as the indeterminacy of those affected, as opposed to their possible determination, with greater or lesser difficulty, in the case of actions brought by small and medium-sized enterprises, makes the allocation system an effective alternative in actions for B2B conduct but, in general, not for B2C conduct.

There are currently a large number of TPLFs operating in Europe. Within the European Union, most TPLFunders are concentrated in Germany (43) and the Netherlands (46). For different reasons, they have limited activity in France (5), Italy (3), and Portugal (2). Among European Latin countries, Spain is the Member State with the highest number of TPLFunders (18) and the third in Europe⁴¹.

Most TPLFs tend to be generalists, i.e., they finance a wide variety of actions. In many cases, TPLFs are part of large investment funds that not only finance litigation but also other types of investments and seek to diversify their portfolio.

This means that litigation financing competes with the financing of other types of investments, that the financing of competition litigation competes with the financing of other damage litigation, and that the financing of damages for infringement of the DMA or competition in digital markets competes with the

40. Regarding the extension of the allocation model in the different member states of the European Union, see HERRERO SUÁREZ, C. “The Problem of Access to Justice in Digital Markets: Collective Redress Solutions,” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.

41. European Commission DG Justice and Consumers *Mapping Third Party Litigation Funding in the European Union* 2025.

financing of other types of competition actions, such as the envelope or automobile cartels.

It is therefore important to know what criteria litigation funding funds use to make their decisions.

The issues generally taken into consideration by litigation funds are the following: The nature, complexity, and amount of the dispute; the solvency of the defendant; the probability of winning the claim, in addition to adequate legal grounds; the estimated costs and the ratio between the value of the claim and the costs; the experience of the legal team; the jurisdiction of the dispute; the feasibility of enforcement; the timetable for the proceedings; and whether the main interest of the plaintiffs is to seek monetary compensation.

The issue of third-party funding of litigation, and in particular of consumer class actions, is currently the subject of special attention by national and European legislators as well as regulatory agencies.

Within the European Union, the European Parliament resolution of September 13, 2022, entitled “⁴², with recommendations to the Commission on responsible private funding of litigation,” took a similar stance, advocating for strong regulation, while Article 10 of *Directive (EU) 2020/1828 on Representative Actions in the Context of the Digital Markets Act* establishes the beginnings of regulation in relation to consumer collective actions.

For their part, the *Principles Governing the Third Party Funding of Litigation*, drawn up by the *European Law Institute* (ELI) ⁴³, propose lighter regulation. Finally, the *CJC Review of Litigation Funding Final Report* of June 2, 2025, also proposes light regulation of third-party litigation funding.

Directive (EU) 2020/1828 on Representative Actions in the Context of the Digital Markets Act.

To a greater or lesser extent, with greater or lesser intensity, it is clear that the winds are blowing in favour of regulating the intervention of TPLFs.

IV. PUBLIC-PRIVATE COOPERATION IN DETERRENCE

As the Court of Justice has established in its case law, and most recently in its judgment in *Heureka Group s.a. v Google LLC Heureka Group s.a. v Google LLC* C-605/21 EU:C:2025:324, paragraphs 54 and 61, on the subject of limitation periods, private enforcement has not only a compensatory function but also a deterrent function: the estimated costs;

54. The full effectiveness of Article 102 TFEU and, in particular, the effectiveness of the prohibition laid down in that article would be called into question, especially if, on account of the national legislation fixing the date on

42. (2020/2130(INL), OJ C 125/2.

43. See: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf

which the limitation period starts to run, and the duration of that period and the detailed rules for its suspension or interruption, it would be practically impossible or excessively difficult for a party to claim compensation for the harm caused to it by abusive conduct on the part of a dominant undertaking that is liable to restrict or distort competition. The right of any individual to claim compensation for such a loss actually strengthens the working of the EU competition rules and discourages abuses of a dominant position which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (see, to that effect, judgment of March 28, 2019, Cogeco Communications, C-637/17, EU:C:2019:263, paragraphs 39 and 41 and the case law cited).

...

61. In the second place, it should be recalled that, just as is the case for the implementation of the EU competition rules by public authorities (public enforcement), actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behavior on the part of undertakings and to deter them from engaging in such behavior (judgment of October 6, 2021, Sumal, C-882/19, EU:C:2021:800, paragraph 37 and the case law cited).

In fact, the threat of a billion-euro damages claim seems much more effective than the penalty imposed by the competition authorities.

The Damages Directive, however, attempted, in vain, to reduce the role of private enforcement exclusively to compensation for damages caused.

This was because the directive was primarily designed for cartel cases in which it was and continues to be common for the action of the competition authority to be facilitated by the statement of a cartel member seeking leniency.

The protection of the leniency program justified the attempt in the eyes of the European Commission.

However, unlike in the case of cartels, there are no reasons to prevent loyal cooperation between competition authorities and private litigants seeking compensation for damages suffered in cases involving the application of Article 102 TFEU or infringement of Articles 5, 6, and 7 DMA.

On the other hand, the British experience shows us that most actions in this field are stand-alone and do not interfere with ongoing investigations by competition authorities.

The competition promotion policy of national competition authorities should therefore include systems for transferring information to end users and professionals on the decisions taken by them for competition infringements in digital markets, promoting the transfer of information and knowledge regarding this type of case.

Germany and the other Member States of the European Union appear to have adopted different positions. While the former has added provisions such as paragraph 19a GWB or 32f GWB to its arsenal, which are general in nature but

primarily intended to be applied in digital markets, the others have chosen not to introduce relevant legislative changes and to apply Article 102 TFEU and its equivalent national rule to possible infringements.

Germany has thus succeeded, as has the European Commission with the DMA, avoid relying on the definition of the relevant market when sanctioning digital platforms for abusive conduct, the other competition authorities always face this problem when applying Article 102 TFEU, although the case law of the Court of Justice has gradually diluted the need to define the product or service market and the geographic market, at least with regard to hypothetical related markets in the digital market, as can be seen in the case of the Court of Justice's judgment in Case C-233/23 of February 25, 2025 *Alphabet and others v. Autorità Garante della Concorrenza ed il Mercato*⁴⁴, according to which the competition authority may limit itself to identifying the market, even if it is potential or hypothetical, without defining it.

An active policy of transferring information to end users or professionals in these cases would significantly improve deterrence.

The same as we have stated above could be said with regard to the European Commission when it acts in application of Article 102 TFEU. The issue may be more sensitive in cases of application of Articles 5, 6, and 7 DMA due to the regulatory dialogue that may discourage the Commission from providing information to professional or end users.

The gatekeepers' compliance hearings are public and can be accessed via the European Commission's website, but it is true that, at least so far, the documents prepared for these sessions by the gatekeepers tend to be brief and inane.

V. KEY FINDINGS

We are at a point where public enforcement in Europe is tending towards moderation. More effective enforcement of competition law in digital markets would seem to require the European Commission to gain confidence in the application of the DMA and competition law in digital markets and to limit conventional terminations for fear that a prohibition decision will be appealed and overturned by the Court of Justice.

A conventional termination leaves those who have suffered harm from the conduct without precedent and, if necessary, they can only bring a stand-alone action.

It would be advisable to consider introducing new instruments at the national level similar to paragraphs 19 a and 32 f GWB.

Collective actions for infringement of the DMA should be included in the Spanish draft transposition of the Directive on representative actions, as required by Article 42 DMA.

44. ECLI:EU:C:2025:110.

It should also be clearly established which rules govern damages claims arising from infringements of the DMA, based on the German paragraph 33(1) GWB example, by reforming Spanish competition law.

It would be advisable to include in the Spanish draft the possibility of bringing collective or representative actions for infringement of Articles 101 and 102 TFEU, at least in the field of digital markets.

It is necessary to strengthen the weight of private enforcement in digital markets and, to this end, extend the regulation of collective actions to the B2B sphere, favouring the opt-out model as the preferred option, also in this type of action, following the UK model, with the possibility of establishing the opt-in model for large companies above a certain turnover threshold, and extending standing to go beyond consumer associations or designated business or professional associations, where applicable.

From a financing perspective, it is advisable to facilitate access to financing for those who have suffered damage as a result of infringements of the DMA or Articles 101 and 102 TFEU in the field of digital markets.

Given that the experience of the United Kingdom shows us the small number of claims that have been made in relation to the Code of Conduct for litigation funding funds, it would be advisable to reflect on the real need to regulate the litigation funding sector beyond the provisions of the Directive on representative actions and, where appropriate, to clearly justify the need for the proposed rules.

We are at a turning point, at the beginning of a process of normalizing private enforcement in the European Union. The coming years promise to be fascinating.

Unlike what happens in the area of cartels, the protection of leniency programs does not introduce a diversification of interests between competition authorities and claimants seeking compensation for damage suffered by digital platforms, as most of these cases involve infringements of Article 102 TFEU and equivalent national rules or Articles 5, 6, and 7 DMA.

That is why the competition promotion policy of national competition authorities should favor this type of action and include systems for transferring information to end users and professionals about the decisions taken by them for competition infringements in digital markets, creating channels for the transfer of information and knowledge regarding this type of case.

Conversely, stand-alone cases can bring possible infringements to the attention of the competition authorities.

VI. BIBLIOGRAPHY

BREUGMAAN, N. "Fundamental principles of private DMA enforcement." in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.

FRANCK, J.U. "Abuse proceedings against digital gatekeepers under section 19a of the German competition act: taking stock of early results," in RUIZ PERIS,

- J.I. – ESTEVAN DE QUESADA, C. New Competition Trends in digital markets, Atelier 2024, pp. 23-52.
- FRANCK, J.U. “Damages Actions against Digital Gatekeepers for Breaches of EU Antitrust Law and the DMA: A German Perspective,” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.
- GALLI – BOTTA. “Big Tech and Private Antitrust Litigation in Italy” in RUIZ PERIS – ESTEVAN DE QUESADA (Eds). *Compensation of damages in digital markets*, Atelier, 2025.
- GÓMEZ SANTOS, M. “The Application of Directive (EU) 2020/1828 on Representative Actions in the Context of the Digital Markets Act” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.
- HERRERO SUÁREZ, C. “The Problem of Access to Justice in Digital Markets: Collective Redress Solutions,” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.
- KINDL, J. “Damages Actions in the Digital Sector - Czech Experiences with the EU Level Impact,” in RUIZ PERIS – ESTEVAN DE QUESADA (Eds.). *Compensation of damages in digital markets*, Atelier, 2025.
- MARTÍN PASTOR, J., “Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia” in *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE (Compensation for damages for infringement of competition rules following Directive 2014/104/EU)*, Aranzadi, 2016, pp. 191-202.
- NOWAG – TARKKILA “How much effectiveness for the EU Damages Directive? Contractual clauses and antitrust damages actions,” *Common Market Law Review*, Vol. 57, 2020, pp. 469-471.
- PODSZUN R. “Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act”, *Journal of European Competition Law and Practice*, vol. 13(4), 2022, pp. 254-267.
- RUIZ PERIS, J.I. “The new Digital Market Act, a hybrid response by the European Union to GAFA gatekeepers,” *Aranzadi Journal of Law and New Technologies*, ISSN 1696-0351, No. 57, 2021.
- RUIZ PERIS, J.I., “The EU Digital Markets Act, a European answer to application’s problems of classical competition law to Gatekeepers” in *Competencia, compensación de daños y mercados digitales*, Juan Ignacio Ruiz Peris (ed.), Tirant lo Blanch 2022, pp. 17-53.
- RUIZ PERIS, J.I. “The new § 32f GWB and the German sektoruntersuchung,” in RUIZ PERIS, J.I. – ESTEVAN DE QUESADA, C. New Competition Trends in digital markets, Atelier 2024, pp. 53-69.
- SOUSA FERRERO, M., “Consumer antitrust private enforcement in Europe,” *Journal of European Competition Law & Practice*, Vol. 13, No. 8, 2022, pp. 578-593.

- VILATA, S., “Acumulación de acciones” (Joinder of actions), *Daños y competencia. Revisión de cuestiones candentes (Damages and competition. Review of hot topics)*, Tirant lo Blanch, 2021, pp. 136-146.
- WHISH, R. “The Role of Private Litigation in the Enforcement of the Digital Markets Act” in RUIZ PERIS – ESTEVAN DE QUESADA (eds) *Compensation of damages in digital markets*, Atelier, 2025.

THE ROLE OF PRIVATE LITIGATION IN THE ENFORCEMENT OF THE DIGITAL MARKETS ACT

Prof. Dr. Richard Whish

Emeritus Professor of Law, King's College London

ABSTRACT: This chapter considers the availability of damages to firms that suffer as a result of infringements of the Digital Markets Act by 'designated gatekeepers'. It considers the development of the jurisprudence of the Court of Justice on the availability of damages for infringement of the competition rules of the TFEU and the impact of the Damages Directive of 2014. The direct effect of the provisions of the Digital Markets Act is considered and the 'pros and cons' of litigation under competition law and/or the Digital Markets Act are considered. It can be expected that private litigation under the Digital Markets Act will develop rapidly.

Keywords: Digital Markets Act, Public and private enforcement, Direct effect, effet utile, non-discrimination, Digital platforms.

SUMMARY: I. INTRODUCTION. II. BRIEF OUTLINE OF THE DMA. III. DAMAGES FOR INFRINGEMENTS OF EU COMPETITION LAW. A. Jurisprudence of the Court of Justice on the private enforcement of competition law. B. The Damages Directive. 1. A right to full compensation. 2. Quantum. 3. Passing on. 4. Disclosure of Evidence. 5. Effect of national decisions, limitation periods and joint and several liability. C. Injunctions. D. The private enforcement of EU competition law against digital platforms in the UK IV. PRIVATE ENFORCEMENT UNDER THE DMA. A. The DMA does not explicitly confer a right to damages. B. The DMA implicitly recognises a right to damages. V. PROS AND CONS: THE DMA OR COMPETITION LAW? A. The advantages of proceeding under the DMA. 1. Establishing the substantive infringement. a. Standalone Claims. b. Follow- on Claims. 2. Interim Relief. 3. Cooperation with the Commission. 4. Representative Actions under the DMA. 5. Combining a DMA and a Competition Law Claim. B. The disadvantages of proceeding under the DMA 1. Conduct on the part of designated gatekeepers that is not covered by the DMA. 2. Does the DMA protect a narrower interest? 3. Non-availability of Damages Directive. VI. CONCLUSION. VII. BIBLIOGRAPHY.

I. INTRODUCTION

The Digital Markets Act ('the DMA') was adopted on 14 September 2022 and has applied from 2 May 2023¹. On 6 September 2023 the European Commission identified six undertakings as 'designated gatekeepers' in relation to 22 core platform services². They became subject to the obligations set out in Articles 5, 6 and 7 of the DMA on 7 March 2024, and the Commission initiated enforcement action against three of them for possible infringements on 25 March 2024. Fines were imposed on Meta and Apple on ...³, and the Commission sent preliminary findings to Alphabet on 19 March 2025. The Commission clearly wishes to demonstrate that the Act can be speedily enforced, contrary to the position under competition law, where a case may take many years from the receipt of a complaint to the final disposition by the Court of Justice: this is amply demonstrated by the well-known *Google Shopping* case, which originated in a complaint by Infederation Ltd (Foundem) to the Commission on 3 November 2009; several other complaints followed. The Commission initiated proceedings against Google on 30 November 2010 and adopted a decision finding an abuse of a dominant position on Google's part on 27 June 2017. The appeal process ended with the Court of Justice's judgment of 6 September 2024⁴, fifteen years after the original complaint.

A reading of the DMA reveals clearly the central role that has been given to the European Commission in its enforcement. The DMA does not provide explicitly for a right to damages for persons harmed by an infringement of the obligations set out in Articles 5, 6 and 7; however it is clear from various provisions in the DMA that the legislature did intend that private enforcement in the courts should be possible, as will be explained below. This chapter will examine the scope for private enforcement of the DMA. When contemplating the future of private litigation under the DMA, it is interesting to consider the history of damages claims under Articles 101 and 102 TFEU, the competition law provisions of the Treaty. As in the case of the DMA, the Rome Treaty (and its successors) were silent on the availability of compensation for the victims of anti-competitive behaviour. The only provision in the TFEU suggesting a role for national courts in the system of enforcement is Article 101(2), which simply provides that

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, in OJEU [2022] L 265/1.

2. Commission Press Release IP/23/4328 of 6 September 2023; these designations have led to various appeals: for example Case T-1077/23 *Bytedance v Commission*, EU:T:2024:94, in which the General Court upheld the Commission's decision: the case is on further appeal to the Court of Justice, Case C-627/24, not yet decided; Case T-1080/23 *Apple v Commission*, not yet decided; and Case T-1078/23 *Meta Platforms Ireland v Commission*, not yet decided.

3. Apple's anti-steering provisions were also found to have infringed Article 102 TFEU in Commission decision of 4 March 2024, on appeal Case T-260/24 *Apple v Commission*, not yet decided.

4. Case C-48/22 *Google LLC v Commission* EU:C:2024:726.

agreements that violate Article 101 ‘shall be automatically void’⁵. It was the jurisprudence of the Court of Justice, supplemented by the Damages Directive of 2014⁶, that established the right to damages for victims of infringements of Articles 101 and 102, and today litigation plays a hugely important role in the enforcement of competition law. Indeed for many firms the risk of damages claims may now have a greater deterrent effect on anti-competitive behaviour than the fines that competition authorities can impose: the quantum of damages may be considerably greater than the fines in some case. An understanding of how the current position has been reached in competition law provides useful indicators as to how private enforcement of the DMA may develop. It is noticeable that many digital platforms are now the subject-matter of private litigation under competition law throughout the EU and in the UK: indeed all of the undertakings designated under the DMA by the Commission as gatekeepers on 6 September 2023, with the exception of Bytedance, are currently being sued for infringements of competition law in the Member States of the EU or the UK.

Section II of this chapter will provide a brief outline of the DMA. Section III will discuss the rise of damages actions under the competition provisions of the TFEU before considering the legal landscape today. It will take as an example litigation in the United Kingdom, where a large number of cases have been brought against digital platforms, both in business-to-business actions and in collective claims under the Consumer Rights Act 2015. Section IV of this chapter will discuss the scope for private claims under the DMA, and Section V will consider the ‘pros and cons’ for a firm claiming to have been harmed by the behaviour of a digital platform of proceeding on the basis of competition law on the one hand or the DMA on the other. Section VI will set out the conclusions that can be drawn from this chapter.

II. BRIEF OUTLINE OF THE DMA

Readers of this chapter will no doubt be familiar with the provisions of the DMA. However it may be useful, in order to place the rest of this chapter in context, briefly to recall some principle features of this piece of legislation. The Recitals of the DMA rehearse the reasons for the introduction of a system of *ex ante* regulation. Certain ‘core platform services’ provided by digital platforms exhibit extreme scale economies, strong network and lock-in effects, a lack of multi-homing on the part of users and data-driven advantages (Recital 2). Recital 3 states that a small number of large undertakings providing core platform

5. On the possibility of severing unlawful terms from the rest of the agreement see Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38 and Case 319/82 *Société de Vente de Ciments et Bétons de l’Est v Kerpen and Kerpen GmbH* EU:C:1983:374.

6. Directive 2014/14/EU of the European Parliament and of the Council 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, OJEU [2014] L 349/1.

services have emerged with considerable economic power, sometimes controlling an entire ecosystem; the markets in which they operate may become non-contestable, in particular due to very high barriers to entry or exit. Recital 5 explains that competition law involves an *ex post* analysis of very complex facts on a case-by-case basis; furthermore there may be markets that do not function effectively and yet where no one firm is dominant in the sense of Article 102, so that its unilateral behaviour cannot be investigated under competition law. Recital 11 says that the competition rules ‘have as their objective the protection of undistorted competition on the market’; the DMA pursues a complementary objective, which is ‘to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper ... on competition on a given market’.

The DMA gives power to the European Commission to designate as ‘gatekeepers’ certain providers of core platform services such as search, social networking, video-sharing, app stores, online intermediation, cloud computing, virtual assistants and online advertising. Gatekeepers are defined by reference to their size, the role they play as an important gateway for business users towards final consumers and their entrenched and durable position in the market⁷.

Gatekeepers are subject to a number of obligations, some positive and some negative. The obligations are listed in Articles 5, 6 and 7 of the DMA and relate to a range of practices, including the aggregation and use of data, the use of parity clauses, anti-steering obligations, self-preferencing, tying and bundling, the prevention of switching and impeding interoperability. Importantly for the purposes of this chapter, the Commission is given the central role in enforcing the DMA. There is no equivalent under the DMA to Regulation 1/2003⁸ whereby the national competition authorities (‘NCAs’) share with the Commission the power to enforce Articles 101 and 102. As a matter of public enforcement, only the Commission can take decisions under the DMA; in competition law, 2896 (85 per cent) of the infringement decisions to have been adopted between 1 May 2004 and the end of 2024 were taken by NCAs and 524 (15 per cent) by the Commission⁹.

Under the DMA the Commission has broad powers of investigation and enforcement¹⁰, including the ability to make ‘non-compliance decisions’¹¹ and to impose fines of up to 10 per cent of a company’s total worldwide annual turnover in the event of non-compliance with these obligations¹², and up to 20 per cent in

7. DMA, Article 3(1).

8. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down by Articles [101 and 102] of the Treaty, OJEU [2003] L 1/1, as amended by Regulation 411/2004, OJEU [2004] L 68/1 and Regulation 1419/2006, OJEU [2006] L 269/1.

9. These statistics are available at https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en.

10. DMA, Articles 20-26.

11. Ibid, Article 29.

12. Ibid, Article 30(1).

the case of repeated infringements¹³. Systematic infringements of the DMA could lead to additional remedies being imposed on gatekeepers, including, as a last resort, structural remedies¹⁴.

Within DG COMP, Directorate J has responsibility for conducting investigations of digital platforms. Directorate J has a staff of about 40 people, including lawyers, economists and data scientists; there are a similar number of people in Directorate F3 of the Directorate General for Communications Networks, Content and Technology (DG CONNECT). Some members of the Legal Service of the Commission are also available in the enforcement of the DMA.

Given the scale of the DMA's ambition in controlling some of the most powerful undertakings ever to have existed in history, and the relatively limited resources of the Commission devoted to enforcement of the DMA, and given that the NCAs are not able to adopt enforcement decisions as they are in competition law, it is important to consider how much private enforcement may be able to contribute to an effective application of the legislation. This is where useful insights may be provided by the private enforcement of EU competition law, to which we now turn.

III. DAMAGES FOR INFRINGEMENTS OF EU COMPETITION LAW

A. Jurisprudence of the Court of Justice on the private enforcement of competition law

The TFEU says nothing about the availability of a right to damages for the victims of anti-competitive behaviour that infringes Articles 101 and 102. Historically the enforcement of EU competition law was very much the preserve of the European Commission and, since 2004, as a result of Regulation 1/2003, the NCAs; private enforcement was relatively rare, although not unknown. The position has changed dramatically in recent years¹⁵. Public enforcement of competition law remains extremely important, but there is much more private enforcement than used to be the case. Law firms and economic consultancies now employ large teams of professionals dedicated to competition damages litigation, sometimes larger than the groups defending clients in investigations by the public authorities and making merger filings. The private enforcement of competition law has increased, in part, because law firms that specialise in assisting claimants in other areas of law have established themselves in the competition litigation

13. Ibid, Article 30(2).

14. Ibid, Article 18(2); the Commission may conduct a market investigation for the purpose of examining whether a gatekeeper has engaged in systematic non-compliance: *ibid*, Article 18(1).

15. See Whish and Bailey 'Private enforcement of competition law: its role and development in the EU' in Rodger, Sousa Ferro and Marcos (eds), *Private Enforcement of Competition Law in the EU* (Edward Elgar, 2023), *ch* 1.

marketplace. Furthermore there is now a flourishing market for funding arrangements in competition law cases that may mitigate the financial risk involved in bringing a claim before a court¹⁶. Whereas damages claims may once have been seen as an adjunct of or a supplement to the activities of the public authorities, they are clearly now an essential part of the system for the enforcement of the competition rules.

Articles 101 and 102 are directly applicable and produce direct effects: they give rise to rights and obligations which national courts have a duty to safeguard and enforce¹⁷. Until 2001 there had not been a judgment of the Court of Justice dealing specifically with the question of whether Member States have an obligation, as a matter of EU law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of the competition rules¹⁸, although the courts in the UK had assumed, in several cases, that such an action was available¹⁹. However, in 2001 the Court of Justice's judgment in *Courage Ltd v Crehan*²⁰ clarified the position, emphatically establishing a right to damages. At paragraphs 26 and 27 of its judgment, the Court held:

The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU]²¹.

Subsequently in *Manfredi*²² the Court repeated what it had said in *Crehan*, adding that the full effectiveness of Article 101(1) required that:

any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]²³.

16. See Solas 'Third Party Funding and the EU's Competition Law Damage Claims: Main Legal Issues' (2020) 12 GCLR 28; Peyer 'Competition litigation funding' in *Rodger, Sousa Ferro and Marcos*, n 15 above.

17. Case 127/73 *BRT v SABAM* EU:C:1974:25, para 16; Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465, para 23.

18. Despite the lack of jurisprudence explicitly recognising a right to damages, the principles of non-discrimination and full effectiveness ('*effet utile*'), the judgment of the Court of Justice in Cases C-6/90 and 9/90 *Franco v Italy* EU:C:1991:428, and the opinion of AG Van Gerven in Case C-128/92 *HJ Banks v British Coal Corp* EU:C:1993:860 all pointed towards the possibility of an action for damages.

19. See for example *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

20. Case C-453/99 EU:C:2001:465.

21. *Ibid*, paras 26-27.

22. Cases C-295/04 etc *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* EU:C:2006:461.

23. *Ibid*, para 61.

The importance of the availability of damages was repeated by the Court of Justice in two cases arising out of cartels in the *Elevators and Escalators* sector. The first was *Europese Gemeenschap v Otis NV*²⁴, where the EU itself brought a follow-on action for damages pursuant to the Commission's infringement decision: the Court held that the EU was just as entitled to bring an action for damages as anyone else harmed by an infringement of the competition rules²⁵. In *Kone AG v ÖBB-Infrastruktur*²⁶ the Court held that members of an *Elevators and Escalators* cartel could be liable for damage caused by companies which were *not* members of the cartel but which were able to charge higher prices than they would otherwise have done as a result of increased prices charged by the cartel (so-called umbrella pricing). The Court has repeated the importance of damages claims on numerous subsequent occasions²⁷. The most recent expression of this is to be found in *Heureka Group s.a. v Google LLC*²⁸:

The right of any individual to claim compensation for such a loss actually strengthens the working of the EU competition rules and discourages abuses of a dominant position which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (see, to that effect, judgment of 28 March 2019, Cogeco Communications, C-637/17, EU:C:2019:263, paragraphs 39 and 41 and the case-law cited).

Competition authorities have limited resources and cannot be expected to investigate every possible infringement of competition law. Deterrence requires there to be visible enforcement of the law, and of the consequences of such infringement. If the number of public enforcement decisions—and the imposition of fines—is necessarily limited, effect private enforcement—including the award of damages—must have a role to play in alerting recalcitrant firms to the financial risks of acting anti-competitively. The same is true of the Digital Markets Act.

B. The Damages Directive

The Commission often expressed its opinion that it would welcome more private enforcement of the competition rules²⁹. Following a Green Paper on

24. Case C-199/11 EU:C:2012:684, paras 40–43.

25. Ibid, para 44.

26. Case C-557/12 EU:C:2014:1317.

27. See for example Case C-360/09 *Pfleiderer* EU:C:2011:389; Case C-724/17 *Vaantaa kaupunki v Skanska Industrial Solutions Oy* EU:C:2019:204, paras 23–51; Case C-637/17 *Cogeco Communications Inc v Sport TV Portugal SA* EU:C:2019:263, paras 35–55; Case C-435/18 *Otis Gesellschaft mbH e.a. v Land Oberösterreich e.a* EU:C:2019:1069, paras 20–34; Case C-312/21 *Tráficos Manuel Ferrer v Daimler AG* EU:C:2023:99, paras 34–35; Case C-882/19 *Sumal* EU:C:2021:800, paras 32–34.

28. Case C-605/21 EU:C:2025:324, para 54.

29. An early statement to this effect can be found in the Commission's XIIIth Report on Competition Policy (1983), para 217; see also speech by former Commissioner Monti 'Effective Private

*Damages actions for breach of the EC antitrust rules*³⁰ in 2005, and a White Paper on the same subject in 2008³¹, the Damages Directive was adopted on 26 November 2014 and has been adopted in all the Member States³². The Commission has also adopted a Recommendation to Member States on common principles for collective redress concerning violations of EU law rights³³. The Commission submitted a report to the Parliament and Council on 14 December 2020 which concluded that the Directive has had a positive effect across the EU; it appears that the rights of victims of antitrust infringements have been substantially strengthened in all Member States³⁴. The Commission will continue to monitor developments in the Member States with a view to reviewing the Directive in due course.

The main provisions of the Directive are as follows:

1. A right to full compensation

The recitals of the Directive are helpful to understanding its purpose and scope. Recital 6 stresses the importance both of private enforcement actions under civil law and of effective public enforcement by competition authorities, and the need for these two forms of enforcement to be coherently coordinated.

Chapter I of the Directive deals with its subject-matter, scope and definitions. Article 1 explains that the Directive contains rules to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm. Article 2 provides definitions of the terms used in the Directive. The key principles of the Directive, which give expression to the prior case-law of the Court of Justice in judgments such as *Crehan*, are contained in Articles 3 and 4 of the Directive.

Article 3 reads as follows:

Enforcement of EC Antitrust Law', Sixth EU Competition Law and Policy Workshop, Florence, 1 June 2001.

30. COM(2005) 672 final, 19 December 2005, available at <https://commission.europa.eu>; see also the accompanying Staff Working Paper which contains a rich source of research material and the study produced for the Commission in 2004 ('the *Ashurst Report*') *Study on the conditions of claims for damages in case of infringement of EC competition rules*, August 2004, available at <https://competition-policy.ec.europa.eu>.

31. COM(2008) 154 final, 2 April 2008.

32. See Rodger, Sousa Ferro and Marcos (eds) *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018).

33. Note that Directive 2020/1828 on *Representative actions for the protection of the collective interests of consumers*, OJ [2020] L 409/1, does not apply to competition claims; however Article 42 of the DMA specifically provides that the *Representative actions* Directive does apply to representative actions brought against infringements by gatekeepers of provisions of the DMA that harm the collective interests of consumers.

34. SWD(2020) 338 final; see also Commission Press Release IP/20/2413, 14 December 2020, both available at <https://commission.europa.eu>; for discussion about the impact of the Directive see Rodger et al 'The Antitrust Damages Directive: Facilitating Private Damages Actions in the EU?' (2019) 10(3) JECLAP 129.

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Article 4 of the Directive gives effect to the well-established jurisprudence of the Court of Justice that Member States must respect the principles of effectiveness and equivalence in the enforcement of Articles 101 and 102. The principle of effectiveness (also known as *effet utile*) has been highly influential in the development of damages actions, notably for the availability of damages beyond what could be recovered under national law³⁵ and when time should run for the purpose of limitation periods³⁶.

The principle in Article 3 of the Directive is delightfully simple: the victims of anti-competitive behaviour should be compensated, but not over-compensated. In practice, however, establishing the correct amount of compensation—‘quantum’—is far from simple. The position is complicated by the fact that a purchaser from a cartel may have ‘passed on’ at least some of the cartelised price to its own customers. We will deal with each of these topics in turn.

2. Quantum

Article 3(2) of the Directive should be read in conjunction with recital 12. Full compensation should put a person who has suffered harm in the position that that person would have been in had the infringement of competition law not taken place. To put the point another way, the claimant must establish the ‘counterfactual’: how much would it have paid, or what profit would it have made, but for the infringement? The claimant will be awarded the difference between the counterfactual and the position in which it finds itself in ‘the real world’. Article 3(2) goes on to specify that a claimant should be able to recover the full value of actual loss suffered—known in Roman law as *damnum emergens*—as a result of an infringement of competition law; it should also be able to claim compensation for loss of profit—*lucrum cessans*—as well as interest from the time the damage was incurred. Recital 12 emphasises that interest is an essential

35. Case C-557/12 *Kone AG v ÖBB-Infrastruktur* EU:C:2014:1317, para 34.

36. Case C-637/17 *Cogeco Communications Inc v Sport TV Portugal SA* EU:C:2019:263, paras 35-55; Case C-605/21 *Heureka Group a.s. v Google LLC* EU:C:2024:324, paras 51-54 and 79-82.

component of compensation since a considerable amount of time may have passed between the infringement and the award of damages.

The Commission has issued a *Communication on quantifying harm in damages cases*³⁷ together with a *Practical Guide* on the same topic. The *Practical Guide* is purely informative and does not bind national courts or parties³⁸. It is 68 pages in length and provides extensive analysis of methods and techniques that can be applied to damages claims before discussing the quantification of harm caused, first, by price increases and, secondly, by exclusionary practices. In 2019 the Commission published guidelines on passing on³⁹.

Recital 45 of the Directive points out that establishing quantum in competition law cases is very fact-intensive and may require the application of complex economic models. This can be costly for claimants who may have difficulties in obtaining the data they require. Article 17(1) of the Directive, which should be read in conjunction with recitals 46 and 47, requires Member States to ensure that courts are empowered to estimate the amount of harm suffered by a claimant if it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available⁴⁰. Article 17(2) establishes a rebuttable presumption that cartel infringements cause harm⁴¹. Article 17(3) requires Member States to ensure that NCAs, if so requested, can assist national courts with respect to the determination of quantum where an NCA considers such assistance to be appropriate.

3. Passing on

Chapter IV of the Directive deals with ‘The passing-on of overcharges’⁴². Put simply, where the customers of a cartel are overcharged, they may pass on some or all of that overcharge to their customers. In these circumstances (at least) two

37. *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* OJEU [2013] C 167/19; for further reading on quantum see Oxera *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts* (2009), available at <https://commission.europa.eu>; Davis, Lianos and Nebbia *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press, 2015); Lombardi *Causation in Competition Law Damages Actions* (Cambridge University Press, 2020); Veljanowski *Cartel Damages: Principles, Measurement and Economics* (Oxford University Press, 2020); Langer, Lindén, Lunde, Nielsen and Sohkanen ‘The economics of private enforcement of competition law’ in Rodger, Sousa Ferro and Marcos, n 15 above; Ashton *Competition Damages Actions in the EU and the UK: Law and Practice* (Edward Elgar, 3rd ed, 2023).

38. *Communication*, para 12.

39. See below.

40. Article 17(1) of the Directive was considered by the Court of Justice in Case C-312/21 *Tráficos Manuel Ferrer SL, Ignacio v Daimler AG* EU:C:2023:99 and in Case C-267/20 *Volvo AB (publ.) v RM* EU:C:2022:494.

41. Article 17(2) of the Directive was also considered *Volvo v RM* (n ? above).

42. See Martín-Laborda ‘Indirect purchasers and passing-on’ in Rodger, Sousa Ferro and Marcos, n 15 above; Caro de Sousa ‘EU and National Approaches to Passing on and Causation in Competition Damages Cases: A Doctrine in Search of Balance’ (2018) 56(6) CML Rev 1751.

questions arise. First, when a purchaser from the cartel claims damages but has passed the overcharge on to an indirect purchaser, can the defendant raise a ‘passing-on defence’? If the answer to this question is no, the immediate purchaser would be over-compensated, as it would be able to recover for harm that it has not actually suffered. The second question is whether, if there has been a pass-on to an indirect purchaser, that indirect purchaser has a right of action against the members of the cartel. If the answer to this question is no, the indirect purchaser would be under-compensated⁴³. The Directive provides answers to each of these questions.

Article 12(1) of the Directive provides that anyone who has suffered harm should be able to claim compensation, whether they are a direct or an indirect purchaser. Article 12(2) acknowledges the risk of over-compensation of claimants, and therefore requires that Member States shall lay down procedural rules to avoid this risk. Article 13 deals with the passing-on defence. It requires Member States to ensure that defendants can invoke passing-on as a defence; the burden of proof that there has been a pass-on must be placed on the defendant, who may reasonably require disclosure from the claimant or from third parties. Article 14 discusses the position of indirect purchasers. Article 14(1) provides that Member States must ensure that the burden of proof is on indirect purchasers to show that higher prices have been passed on to them; however, Article 14(2) provides a presumption in the indirect purchaser’s favour where it has been overcharged for products that were the subject of an infringement of competition law, or products derived from such products. Article 15 requires Member States to take measures to ensure that national courts have sufficient information to enable them to understand whether damages actions have been brought by claimants from different levels of the supply chain.

Article 16 provides that the Commission will issue guidelines for national courts on how to estimate the share of any overcharge that has been passed on to an indirect purchaser. A report was prepared for the Commission on the *Passing on of Overcharges*⁴⁴, which led to the publication of the Commission’s *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* in August 2019⁴⁵. The *Passing-on Guidelines* explain the economics of passing on and how, for example, the nature of costs and the intensity of competition can affect the degree of passing on. They also describe the methodologies that are commonly used to estimate passing on. For example, comparator-based methods use prices in markets or time periods

43. In the US the Supreme Court rejected the passing-on defence in *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968); as a natural corollary the Supreme Court held that sub-purchasers could not sue in *Illinois Brick Co v Illinois* 431 US 720 (1977). Several individual states in the US do allow sub-purchasers to sue: see *California v ARC America Corp* 490 US 93 at 105-106 (1989).

44. The report was prepared by Cuatrecasas, Gonçalves Pereira and RBB Economics and is available at <https://commission.europa.eu>.

45. OJEU [2019] C 267/4; the CAT cited the *Guidelines* in Cases 1291/5/7/18 (T) etc *Ryder Ltd v MAN SE* [2020] CAT 3, para 38.

that were not affected by the cartel to shed light on what prices in the relevant market and time periods would have been, but for the cartel⁴⁶. Another method is the so-called simulation approach, which involves building a mathematical model of competition in the relevant market and simulates how rational firms would be likely to behave in a market with those features if there were an overcharge⁴⁷. These methodologies are undoubtedly helpful, but the *Passing-on Guidelines* also provide a salutary reminder of national courts' power to estimate the level of passing on, and rely on assumptions, subject to the point that the award must follow the compensatory principle⁴⁸.

4. Disclosure of evidence

Recitals 14 to 29 and Chapter II of the Directive deal with the disclosure of evidence in competition cases⁴⁹. The recitals explain that claimants need information to be able to pursue their claims, but that information may be in the possession of the defendant or third parties (including public authorities). National courts should be able to order disclosure in favour of a claimant, but this process should be under the courts' control, especially as regards the necessity and proportionality of disclosure measures; it is important that business secrets and confidential information should be protected. Information in the possession of a competition authority may be of importance to a claimant; however, there should be limits to the documents that can be handed to a claimant, in particular where this might jeopardise a competition investigation. More specifically, it is important that nothing is done that could undermine the efficacy of leniency regimes.

The detailed rules on disclosure are contained in Articles 5 to 8 of the Directive.

a. Article 5: disclosure of evidence

Article 5 requires that Member States shall ensure that national courts are able to order the defendant or a third party to disclose evidence that lies in their control, subject to the provisions of the Directive⁵⁰. Article 5(3) limits disclosure to what is proportionate, and Article 5(4) provides that the order for disclosure can extend to confidential information, subject to there being effective measures in place to protect its confidentiality.

46. *Passing-on Guidelines*, section 5.1.

47. *Ibid*, section 5.2.2.

48. *Ibid*, paras 30-35, a point reiterated by the UK Supreme Court in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24, paras 219-226.

49. See Marcos 'Access to evidence: the "disclosure scheme" of the Damages Directive' in *Rodger, Sousa Ferro and Marcos*, n 15 above.

50. Article 5 of the Directive was considered by the Court of Justice in Case C-163/21 *AD v PACCAR* EU:C:2023:863, paras 37-69: it noted the asymmetry of information as between a claimant and defendants in damages cases and interpreted Article 5 in a way that was beneficial to the claimant.

b. Article 6: disclosure of evidence in the file of a competition authority

Article 6 is concerned specifically with the disclosure of information in the file of a competition authority⁵¹. Article 6(2) provides that Article 6 is without prejudice to the rules on public access to Parliament, Council and Commission documents under Regulation 1049/2001⁵². Third parties frequently invoke Regulation 1049/2001 in order to try to obtain access to the Commission's file, as in *CDC Hydrogene Peroxide v Commission*⁵³, where the General Court annulled the Commission's decision refusing to disclose an index of the case file in the *Hydrogen peroxide* cartel. Article 6(3) of the Directive provides that Article 6 is without prejudice to EU or national rules that prevent access to the internal documents of competition authorities or of correspondence between them. As a separate matter, there are frequent disputes between claimants and the Commission as to how much information should be redacted from the public version of a cartel decision published by the Commission: the claimant will want the public version to contain as much detail about the cartel as possible, whereas the Commission might err on the side of generous redactions in the defendant's favour⁵⁴. It is also unfortunate that sometimes years can elapse before a public version of the Commission's decision becomes available at all⁵⁵.

Article 6(5) provides that certain information can be disclosed only after the competition authority has closed its proceedings. Article 6(6) is of particular importance. It provides that national courts must not at any time order disclosure of leniency statements or settlement submissions. Recital 26 explains the anxiety that disclosure might discourage undertakings that wish to cooperate with competition authorities from doing so for fear that they will be treated more harshly than other firms that are not cooperative⁵⁶.

A claimant in a damages action in the US might seek discovery of documents in the European Commission's possession, including leniency applications; however, such claims have been denied on several occasions where the US court

51. Note that the right of access to the Commission's file in EU competition law is available only to undertakings to which it has sent a statement of objections, and not to third parties such as claimants for damages: see Article 27(1) and (2) of Regulation 1/2003, OJEU [2003] L 1/1 and Article 15(1) of Regulation 773/2004, OJEU [2004] L 123/18.

52. OJ [2001] L 145/43.

53. Case T-437/08 EU:T:2011:752; see also Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg* EU:C:2014:112.

54. See eg Case C-162/15 P *Evonik Degussa GmbH v Commission* EU:C:2017:205; Case C-517/15 P *AGC Glass Europe SA v Commission* EU:C:2017:598.

55. This was a particular problem in the case of the Commission's decision in *Airfreight*, decision of 9 November 2010: see Case T-534/11 *Schenker AG v Commission* EU:T:2014:854 and the comments of Peter Smith J in *Emerald Supplies Ltd v British Airways plc* [2014] EWHC 3513 (Ch).

56. In Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, prior to the adoption of the Directive, the Court of Justice had held that it should be left to national courts to decide on a case-by-case basis, according to national law, whether to order disclosure of leniency material, taking into account all the relevant factors in the case; see also Case C-536/11 *Bundeswettbewerbbehörde v Donau Chemie AG* EU:C:2013:366.

considered that it was appropriate to maintain the confidentiality of the materials sought⁵⁷.

(c) Articles 7 and 8: limits on the use of evidence and penalties

Article 7 of the Directive imposes restrictions on the use of evidence acquired through access to the file of a competition authority; Article 8 requires there to be penalties for failing to comply with the disclosure requirements imposed by the Directive.

5. Effect of national decisions, limitation periods and joint and several liability

Chapter III of the Directive deals with the effect in private litigation of national decisions by NCAs, with limitation periods and with joint and several liability.

a. Article 9: effect of national decisions

Recital 34 of the Directive explains that consistent and effective enforcement of the competition rules requires that final decisions of an NCA or review court should not be relitigated in subsequent actions for damages. Article 9(1) therefore provides that decisions by the public authorities of a Member State that there has been an infringement of competition law shall be binding on the courts of that country in a claim for damages. Article 9(2) adds that decisions in another Member State will constitute *prima facie* evidence that an infringement of competition law has occurred⁵⁸. If the decision of an NCA predates the Directive it is *prima facie* binding on a court in the same Member State unless the contrary can be proved⁵⁹.

b. Article 10: limitation rules

Article 10 of the Directive requires that Member States must establish clear limitation rules⁶⁰. Limitation periods must not begin before the infringement of competition law ceased and they cannot start before the claimant knew or reasonably could be expected to know that it had a claim against the infringer.

57. See eg *In re: Farm-Raised Salmon and Salmon Products Litigation* where the European Commission submitted an amicus brief resisting discovery of responses to its requests for information; the class action settled in May 2022.

58. See Sousa Ferro 'Binding effect of public enforcement decisions' in *Rodger, Sousa Ferro and Marcos*, n ? above.

59. Case C-25/21 *ZA etc. v Repsol* EU:C:2023:298.

60. See Kirst 'The application *ratione temporis* of the Directive's provisions and conflicting limitation periods under national laws' in *Rodger, Sousa Ferro and Marcos*, n 15 above.

The limitation period must not be less than five years. This provision has been considered by the Court of Justice in numerous cases⁶¹.

c. Article 11: joint and several liability

Article 11(1) provides that undertakings that act jointly to infringe competition law shall be subject to joint and several liability for the harm caused. However, Article 11 goes on to establish limitations to the joint and several liability of small and medium-sized undertakings and of leniency applicants. The reason for the latter is to avoid, as far as possible, disincentivising whistleblowers from approaching the competition authorities⁶².

C. Injunctions

Actions for damages for infringements of competition law are now well-established in the EU and the UK. However in many commercial disputes a litigant may be just as interested (or more interested) in injunctive relief as an award of damages: for example, an app developer that cannot obtain, or which has been deprived of, access to a digital platform⁶³. The European Commission has power under Article 8 of Regulation 1/2003 to adopt interim measures; NCAs have similar powers⁶⁴. However the competition authorities, acting in the public interest, are sparing in their adoption of interim measures; a claimant in need of injunctive (including interim) relief may find that an application to a national court is a more effective way to proceed, the function of the court being to achieve justice between the parties. The Damages Directive is silent on the issue of injunctive relief. However in his Opinion in *AOK Bundesverband*⁶⁵ Advocate General Jacobs considered that the *Crehan* principle that damages should be available to protect the *effet utile* of Article 101 applied equally to applications for interim relief⁶⁶. There have been numerous occasions on which courts in the UK have granted interim relief⁶⁷.

61. Case C-637/17 *Cogeco Communications* EU:C:2019:263; Case C-267/20 *Volvo AB and Daf Trucks Ltd v RM* EU:C:2022:494; Case C-57/21 *RegioJet a.s.* EU:C:2023:6; Case C-605/21 *Heureka a.s. v Google LLC* EU:C:2024:324.

62. In the US, section 213 of the Antitrust Criminal Penalty Enforcement and Reform Act 2004 provided that a whistleblower was subject to single, not treble, damages between 22 June 2004 and 21 June 2020; a sunset clause meant that the detrebling provision lapsed on 22 June 2020.

63. See Strand 'Alternative remedies in the private enforcement of Articles 101 and 102 TFEU' in Rodger, Sousa Ferro and Marcos, n 15 above.

64. See Whish and Bailey, *Competition Law* (OUP, 11th ed, 2023), ch 7 pp 275-276.

65. Case C-264/01 EU:C:2004:304.

66. *Ibid*, para 104 of the Opinion.

67. See Whish and Bailey, n 64 above, ch 8, pp 357-358.

D. The private enforcement of EU competition law against digital platforms in the UK

We live in a very litigious world, and there has been a veritable explosion of private enforcement of competition law throughout the EU and the UK. In the UK the Competition Appeal Tribunal (the ‘CAT’, that might better be called the Competition Damages Tribunal in view of its current workload!) can hear both ‘standalone’ and ‘follow-on claims’, including collective claims on both an opt-in and opt-out basis⁶⁸. The CAT’s website⁶⁹ reveals the huge number of damages claims currently pending before it. The rise of claimant law firms, the growth of litigation funding and the advent of collective claims under the Consumer Rights Act 2015 have given a significant stimulus to private litigation in the UK. The High Court can also hear competition claims, although it is less easy to track cases there as it does not have a comprehensive website providing details of pending actions in the way that the CAT does.

Of particular note for the purposes of this chapter is the number of cases before the CAT that involve digital platforms. These include both conventional ‘business to business’ claims and also numerous collective claims under the Consumer Rights Act 2015, where it is possible for a class representative to bring a claim both on behalf of businesses and on behalf of consumers, in the sense of ‘the person in the street’; examples of current cases are provided below.

Many of the pending cases have been brought against undertakings that have been designated as gatekeepers under the DMA in relation to one or more core platform service, although it should be stressed that these cases concern alleged infringements of competition law rather than the DMA. It remains to be seen whether the DMA might be invoked in the future in proceedings in the High Court, which in principle can proceed on the basis of a foreign tort, that is to say infringement of the DMA, subject of course to the jurisdictional and substantive rules of private international law. At the moment the CAT does not have jurisdiction in relation to the DMA, but this might change in the future.

The following competition law cases in the CAT (none of which has yet resulted in a final judgment) involve behaviour on the part of designated gatekeepers that would appear now to also amount to a violation of the DMA; the substance of the claimants’ claims can be found on the CAT’s website:

- a. Business-to-business standalone claims.
*Epic Games Inc v Apple Inc*⁷⁰; *Epic Games Inc v Alphabet Inc and Google*⁷¹.
- b. Business-to-business follow-on claims.
*Whitewater Capital Ltd v Google LLC*⁷².

68. Ibid, ch 8, pp 340-362.

69. <https://catribunal.org.uk>.

70. Case 1377/5/7/20.

71. Case 1378/5/7/20.

72. Case 1596/5/7/23.

- c. Standalone collective claims on behalf of consumers.
*Dr Rachel Kent v Apple Inc and Apple Distribution International Ltd*⁷³; *Elizabeth Helen Coll v Alphabet and Google*⁷⁴; *Dr Liza Lovdahl Gormsen v Meta Platforms Inc*⁷⁵; *Hammond v Amazon*⁷⁶; *Gutmann v Apple Inc*⁷⁷; *Stopford v Alphabet*⁷⁸.
- d. Collective claims on behalf of businesses.
*Sean Ennis v Apple Inc*⁷⁹; *Rodger v Google LLC*⁸⁰; *Claudio Pollack and Charles Arthur v Alphabet Inc*⁸¹; *Stephan v Amazon.com*⁸².

Some of these claims relate for the most part to the same alleged breach of competition law: for example *Epic v Apple*, *Kent v Apple* and *Ennis v Apple* all relate to the way in which the Apple App Store works, and *Epic v Alphabet*, *Coll v Alphabet* and *Rodger v Google* all relate to the Google Play Store. In the *Apple* cases Kent is bringing a claim on behalf of consumers and Ennis on behalf of app developers; in the *Alphabet/Google* cases Coll is representing consumers and Rodger app developers.

IV. PRIVATE ENFORCEMENT UNDER THE DMA

A. The DMA does not explicitly confer a right to damages

The DMA does not explicitly confer a right to damages upon persons harmed by an infringement on any of its provisions; in this respect it differs from the Digital Services Act⁸³, Article 54 of which specifically provides for compensation to be made available to the recipients of intermediary services where providers of those services infringe their obligations under that legislation. As in the case of competition law, therefore, it will be for the Court of Justice to develop jurisprudence on the right to damages under the DMA. This is where the discussion in Section III of this chapter on the right to damages under competition law is illuminating: the doctrines of direct effect, *effet utile* and non-discrimination

73. Case 1403/7/7/21.

74. Case 1408/7/7/21.

75. Case 1433/7/7/22.

76. Case 1595/7/7/23.

77. Case 1468/7/7/22.

78. Case 1606/7/7/23.

79. Case 1601/7/7/23.

80. Case 1673/7/7/24.

81. Cases 1572/7/7/22 and 1582/7/7/23.

82. Case 1644/7/7/24.

83. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 19 October 2022 on a single market for Digital Services, in OJEU [2022] L 277/1; see similarly Article 82 of the General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, in OJEU [2016] L 119/1.

will each be influential in the future jurisprudence on private litigation under the DMA.

Only the Commission can designate gatekeepers under Article 3 of the DMA, and clearly this provision does not give rise to direct effect. In this sense the Commission itself is a 'gatekeeper', for private litigation is not available under the legislation without prior intervention by the Commission: designation 'opens the gate' to the possibility of a damages claim. However it is uncontroversial that there are provisions in the DMA, such as Article 5, that are sufficiently precise and unconditional to be directly effective, although there will no doubt be cases in which the Court of Justice will be asked by a national court under the Article 267 procedure whether this is true of a particular obligation: for example it might be argued that, where the 'specification of measures' is required under Article 8 of the DMA in relation to the obligations set out in Articles 6 and 7 thereof, this means that there is no direct effect, at least until the Commission has made its decision. Academic literature supports the idea that the DMA is capable of producing direct effects⁸⁴, and Commission officials and legislators also assumed and/or supported the prospect of private enforcement at the time of its adoption⁸⁵. In the Commission's 'Questions and Answers'⁸⁶ published on 6 September 2023, when it designated the first set of gatekeepers under the DMA, one of the questions, with its answer, was as follows:

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

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

It is easy to understand why the Commission would be supportive of private enforcement. It has already been noted that its resources for enforcing the DMA are limited, and that NCAs are not themselves empowered to enforce the legislation in the way that they can enforce Articles 101 and 102. Private enforcement can be seen as an additional resource for ensuring compliance with the Act. Furthermore the Commission will be able to find out more about what is happening in the 'real world' by observing what cases are being litigated and

84. See eg Podszun 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13 *Journal of Competition Law & Practice* 254; Komninos 'Private Enforcement of the DMA Rules before the National Courts', available at <https://papers.ssrn.com>; Strand 'Private Enforcement Under the Digital Markets Act: Rights and Remedies Revisited' (2024) 7 *Nordic Journal of European Law* 120, available at <https://doi.org>; Kindl 'Prospects for Concurrent Private Enforcement of the DMA and Article 102 TFEU' (2024) 12 *Journal of Antitrust Enforcement* 241; Cseres and de Korte 'Participation of third parties in the public enforcement of the Digital Markets Act: between democracy and technocracy', (2022) *Journal of Antitrust Enforcement* 1.

85. See eg Komninos, n 84 above.

86. Available at <https://ec.europa.eu>.

where. A different point is that third parties (including complainants about the behaviour of gatekeepers) have a fairly limited role in the public enforcement of the DMA⁸⁷, making private enforcement all the more important for firms claiming to have been harmed by an infringement of the obligations in Articles 5, 6 and 7.

B. The DMA implicitly recognises a right to damages

Notwithstanding the absence of a specific reference to damages in the DMA, various of its provisions clearly anticipate private enforcement and make sense only if national courts are to have a role in the enforcement of the legislation. For example Recital 92 says that:

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

Article 1(7) says that:

National authorities shall not take decisions which run counter to a decision adopted by the Commission under this Regulation.

This idea is picked up in Article 39(5), which provides that:

National courts shall not give a decision which runs counter to a decision adopted by the Commission under this Regulation. They shall also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. To that effect, the national court may assess whether it is necessary to stay its proceedings. This is without prejudice to the possibility for national courts to request a preliminary ruling under Article 267 TFEU.

Further evidence that private actions are possible under the DMA is provided by Article 42:

Directive (EU) 2020/1828 [the Representative Actions Directive] shall apply to the representative actions brought against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers

⁸⁷. See *Cseres and de Korte*, n ? above.

Clearly therefore the EU legislature was content that private litigation should be possible under the DMA. Unfortunately, however, the Damages Directive does not (as a matter of EU law) apply to damages claims under the DMA, a matter which is discussed in the following section.

V. 'PROS AND CONS': THE DMA OR COMPETITION LAW?

The discussion so far establishes that private litigation is possible under the DMA, and that it is likely that the future jurisprudence on the subject will be influenced by the history of damages actions in the sphere of competition law. It is clear that some behaviours—for example self-preferencing and the imposition of anti-steering provisions—are capable of infringing both Article 102 and the DMA; Article 1(6) of the DMA specifically provides that it is without prejudice to the application of Articles 101 and 102. It is of interest to consider what the advantages—and disadvantages—are likely to be for a firm that considers that it is the victim of behaviour that infringes the DMA of proceeding on the basis of that legislation rather than Article 102.

A. The advantages of proceeding under the DMA

1. Establishing the substantive infringement

In principle proceeding on the basis of the DMA should be easier and quicker than relying on competition law. It is helpful to think in turn first of standalone cases, where the claimant has to establish an infringement, and then follow-on cases, where liability has already been determined by the Commission.

a. Standalone claims

Establishing, on a standalone basis, that a defendant has infringed Article 102 (or a domestic equivalent of it) is a difficult task for a claimant, particularly in the case of digital platforms developing new services in a rapidly-changing market where there are no or few relevant precedents. Defining the relevant market(s) and establishing dominance is, in itself, hugely complex and invariably involves considerable disagreement between the parties. In a DMA case the fact that the defendant has been designated as a gatekeeper in relation to a core platform service obviates the need to establish dominance: the fact of designation by the Commission answers the jurisdictional question: is this defendant subject to the legislation? There is no requirement under the DMA to prove that the gatekeeper is dominant in a market or markets. It is noticeable that Recital 23 of the DMA specifically states that market definition is not relevant to designation as a gatekeeper.

Once it is established that the defendant is a designated gatekeeper in relation to a core platform service, the substantive question will be whether any of the obligations in Articles 5, 6 or 7 has been infringed; under Article 8 the gatekeeper has an obligation to ensure and demonstrate compliance with these obligations, which will influence the burden and standard of proof in DMA cases. Of course there will be disagreements between the parties, for example as to whether the defendant's conduct relates to a core service, whether it has infringed one of the obligations, what effect any specification by the Commission under Article 8 has on the defendant's liability and so forth. However none of this is likely to be as complex or contentious as an abuse of dominance case where, quite apart from defining the relevant market and establishing dominance, theories of harm have to be identified, counterfactuals considered, effects established, objective justifications and efficiencies assessed, all within the framework of the complex and confusing jurisprudence to date. The current debate over the Commission's draft *Guidelines on Article 102* amply demonstrates how controversial Article 102 is⁸⁸. The General Court's judgment in *Bytedance v Commission*⁸⁹, in which it rejected Bytedance's appeal against its designation by the Commission as a gatekeeper, stresses that the DMA has its own sphere of operation and is not an alternative form of competition law. Paragraph 19 of the Court's judgment in *Bytedance* is of particular interest:

'In that regard, the EU legislature observed that market processes were often incapable of ensuring fair economic outcomes with regard to [core platform services ('CPSSs')] and that existing EU law did not satisfactorily address the potential negative effects associated with some of the characteristics of CPSSs. In particular, although Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, the fact remains that the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and anticompetitive behaviour, enforcement of those provisions occurs only *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis. Moreover, the EU legislature found that existing EU law did not address, or did not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms (see, to that effect, recital 5 of the DMA). It also noted that the DMA pursued an objective that is complementary to, but different from, that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by the DMA on competition on a given market (see, to that effect, recital 11 of the DMA).'

88. Draft *Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exploitative conduct by dominant undertakings*, published 1 August 2024; this workstream can be followed on <https://ec.europa.com>.

89. Case T-1077/2023 EU:T:2024:478, on appeal Case C-627/24 *Bytedance v Commission*, not yet decided.

b. Follow-on claims

Article 29 of the DMA enables the Commission to adopt a ‘non-compliance decision’, finding that a gatekeeper has infringed the obligations imposed by Articles 5, 6 and 7, or measures, remedies or commitments to which it is subject. Article 30 provides for fines to be imposed for non-compliance, and systematic non-compliance can trigger the procedure set out in Article 18 of the DMA which could, as a last resort, result in the imposition of structural remedies.

A non-compliance decision could also trigger a claim for damages on a follow-on basis, and Article 1(7) and Article 39(5) of the DMA would greatly benefit the claimant, as the national court would be bound by the Commission’s decision: the matter would proceed in the same way as a follow-on action in competition law, pursuant to Article 16(1) of Regulation 1/2003, which is to the same effect as Article 39(5) of the DMA.

2. Interim relief

As noted earlier, it is often the case in commercial disputes that interim relief is as important as, if not more important than, damages: an app developer that cannot gain access to an app store is likely to need a meaningful remedy—access—now, rather than compensation many years later after prolonged litigation. The Commission does have power to order interim measures under Article 24 of the DMA. However, as noted earlier, the corresponding tool in competition law has rarely been deployed and the scarcity of resources in Directorate F3 of DG COMP would suggest that the same is likely to be the case under the DMA. It can be anticipated therefore that claimants will seek access to the courts for interim relief: obviously this will be on a standalone basis unless and until the Commission adopts non-compliance decisions. The benefits outlined above of proceeding on the basis of the DMA rather than competition law would apply equally in the case of applications for interim relief. It is understood that there have already been some actions in national courts seeking interim relief under the DMA, although there is nothing in the public domain about these cases to date.

3. Cooperation with the Commission

Article 39 of the DMA provides machinery for national courts to cooperate with the Commission: these provisions correspond with Article 15 of Regulation 1/2003. Obviously this does not mean that there is a *benefit* to proceeding under the DMA rather than competition law, but it does mean that claimants are in the same position whichever route they choose to follow.

4. Representative actions under the DMA

It is interesting to note that Article 42 of the DMA provides that the Representative Actions Directive does apply to representative actions where

designated gatekeepers harm the collective interests of consumers: EU law does not provide for class actions in competition law cases. It is too early to know to what extent use will be made of this possibility, although it has been pointed out earlier that, in the UK, the advent of opt-out actions in competition law cases as a result of the Consumer Rights Act 2015 has led to a considerable amount of litigation.

5. Combining a DMA and a competition law claim

One possibility for a claimant that considers that it has been harmed by action that contravenes the DMA would be to combine claims under that legislation with claims under EU or national competition law. This is a matter that has been helpfully discussed by Kindl⁹⁰, who notes some of the divergences that exist between the two systems, including in particular the non-application of the Damages Directive in DMA claims, which is discussed below.

B. The disadvantages of proceeding under the DMA

1. Conduct on the part of designated gatekeepers that is not covered by the DMA

The DMA is a regulatory tool that imposes specific obligations on designated gatekeepers in relation to the provision of core platform services. The range of obligations, and the list of core services, are extensive. However it is inevitable that there will be disputes where the conduct complained of clearly, or at least arguably, does not fall within the scope of the DMA. There are provisions both for the list of core platform services to be extended and for new obligations to be added: Article 19 enables the Commission to conduct a market investigation for this purpose. However in the case of a ‘regulatory gap’, the claimant will be able to proceed under the DMA only if the Commission chooses to act and if the market investigation leads it to change the scope of the Regulation. An obvious advantage of proceeding under competition law is that Article 102 is capable of being—and has been—adapted to apply to novel situations that could not have been contemplated when the Treaty was originally drafted. Two cases that demonstrate the ability of Article 102 to address novel problems presented by digital platforms are *Google Shopping*, where the self-preferencing of Google’s shopping tool was found, on the facts of that case, to be abusive⁹¹; and *Alphabet v AGCM*, where the possibility that Google’s refusal to enable ENEL’s app to be

90. See n 84 above.

91. See n ? above.

displayed within the ‘infotainment’ screen of cars in Italy using the Android system might infringe Article 102 was recognised⁹².

2. Does the DMA protect a narrower interest?

A claimant for damages under the DMA will have to show that it falls within the class of persons whose interests the Regulation is intended to protect. The Court of Justice has said, in the case of competition law, that the *effet utile* of Article 101:

‘would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition’⁹³. (emphasis added)

It is clearly arguable that the DMA protects a narrower class than ‘any individual’ that may have suffered harm. For example Recital 4 of the DMA refers to features of gatekeepers that lead to serious imbalances of bargaining power which can lead to unfair practices and conditions ‘for business users, as well as for end users of core platform services’, suggesting that it is their interests that are to be protected rather than ‘any individual’. It can be anticipated that future Article 267 references to the Court of Justice from national courts will seek to determine whose interests the DMA is intended to protect. The Court of Justice was asked to conduct precisely this enquiry under the Framework Directive on type approval of motor cars⁹⁴ in *QB v Mercedes-Benz Group AG*⁹⁵.

3. Non-availability of Damages Directive

An obvious disadvantage to seeking damages under the DMA rather than competition law is that the Damages Directive does not apply to claims under the DMA. The main features of the Damages Directive were described above, and include important rules on quantum, passing on, the disclosure of evidence, limitation periods and joint and several liability. National laws have been amended to bring them into line with the requirements of the Directive, and there is undoubtedly more competition litigation today than ever before, partly as a result of these changes. In principle it would appear to be desirable to extend the Damages Directive to claims brought under the DMA. In the meantime it is open to Member States themselves to make explicit provision for damages actions under the DMA

92. Case C-240/22 P EU:C:2024; 915; it remains for the Italian courts to decide on the facts of the case whether there was, in fact, an abuse.

93. Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465, para 26.

94. Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1)

95. Case C-100/21 EU:C:2023:229, para 85.

and to apply the Damages Directive to such claims, as has been done in Germany as a result of the 11th Amendment to the Act against Restraints of Competition

VI. CONCLUSION

This chapter has explained the history of damages actions under competition law, and demonstrated that a combination of the jurisprudence of the Court of Justice and the Damages Directive of 2014 has led to an enormous increase in litigation. Although the DMA ascribes the central role in its enforcement to the Commission, there is no doubt that some of its provisions can be directly effective, and it can be anticipated that there will be actions by claimants, both for interim relief and for damages. Given the lack of resources available to the Commission for the enforcement of the DMA, and the fact that the NCAs themselves cannot enforce that legislation, damages claims can play an important role, as well as providing valuable information for the Commission of how the legislation is working throughout the EU. In principle actions under the DMA should be simpler and quicker competition law claims, although it is regrettable that the Damages Directive is inapplicable. It seems reasonable to expect that private litigation will play an important role in the future of the DMA.

VII. BIBLIOGRAPHY

Monographs

- RODGER B., SOUSA FERRO M., MARCOS F., *The EU Antitrust Damages Directive*, OUP, 2018
WHISH R. AND BAILEY D., *Competition law*, 11th edition, OUP, 2021
RODGER B., SOUSA FERRO M., MARCOS F., *Private Enforcement of Competition Law in the EU*, Edward Elgar, 2023

Journal articles

- PODSZUN “Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act” (2022) 13 *Journal of Competition Law & Practice* 254
KOMNINOS “Private Enforcement of the DMA Rules before the National Courts”, available at <https://papers.ssrn.com>
STRAND “Private Enforcement Under the Digital Markets Act: Rights and Remedies Revisited” (2024) 7 *Nordic Journal of European Law* 120, available at <https://doi.org>

- KINDL “Prospects for Concurrent Private Enforcement of the DMA and Article 102 TFEU” (2024) 12 Journal of Antitrust Enforcement 241
- CSERES K. and De KORTE L., “Participation of third parties in the public enforcement of the Digital Markets Act: between democracy and technocracy”, (2022) Journal of Antitrust Enforcement 1.

Jurisprudence and administrative decisions

CJEU

- Case T-1077/23 *Bytedance v Commission*, EU:T:2024:94
- Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465
- Cases C-295/04 etc *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* EU:C:2006:461
- Case C-48/22 *Google LLC v Commission* EU:C:2024:726
- Case C-605/21 *Heureka Group s.a. v Google LLC* EU:C:2025:324
- Case C-240/22 P *Alphabet v AGCM* EU:C:2024

Commission Decision

- Apple*, Commission decision of 4 March 2024, on appeal Case T-260/24 *Apple v Commission*, not yet decided

Legislation

National

UK Consumer Rights Act 2015

European Union

- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down by Articles [101 and 102] of the Treaty, OJEU [2003] L 1/1
- Directive 2014/14/EU of the European Parliament and of the Council 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, OJEU [2014] L 349/1
- Directive 2020/1828 on *Representative actions for the protection of the collective interests of consumers*, OJ [2020] L 409/1
- 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, in OJEU [2022] L 265/1

FUNDAMENTAL PRINCIPLES OF PRIVATE DMA ENFORCEMENT

*Dr. Niklas Brueggeman**

European Commission's Directorate-General for Competition

I. THE DIGITAL MARKETS ACT

The emergence of the Digital Markets Act (DMA) has so far been the defining feature of EU competition enforcement in the tech sector in the 2020's. A core element of the two *von der Leyen* Commissions' quest for a Digital Single Market,¹ the purpose of the DMA is to ensure "*contestability and fairness for the markets in the digital sector*". The DMA constitutes an instrument of *ex ante* regulation based on the internal market clause in Article 114 TFEU. The term *ex ante* refers to the fact that the DMA imposes certain abstract behavioral obligations on gatekeepers that apply irrespective of the actual, potential or presumed effects of the conduct in question. This constitutes a notable difference vis-à-vis traditional

* The author is a case handler in Directorate J (Digital Platforms/DMA Enforcement) of the European Commission's Directorate-General for Competition (DG COMP). This paper reproduces the author's remarks at the IV Valencia International Meeting on Competition Law, hosted by the University of Valencia on 21 and 22 November 2024. For a more detailed analysis of private DMA enforcement and a discussion of the relevant literature, see also the author's two-part article Brüggenmann, Die private Durchsetzung des DMA, *Wirtschaft und Wettbewerb*, 4/2025 and 5/2025. The views expressed in this paper are the author's own and must not be attributed in any way to the European Commission or its Directorate-General for Competition.

1. Ursula von der Leyen, Mission Letter Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, 10/09/2019, https://www.purple-eu.org/uploads/ROBUST/EU%20Framework%20Strategy/mission-letter-margrethe-vestager_2019_en.pdf (last accessed on 22 May 2025); Ursula von der Leyen, Mission Letter Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition, 17/09/2024, https://commission.europa.eu/document/download/5b1aace5-681f-470b-9fd5-ace14e106196_en?filename=Mission%20letter%20-%20RIBERA.pdf (last accessed on 22 May 2025)

antitrust enforcement which aims at ensuring undistorted competition in specific markets and imposes remedies only in light of concrete actual conduct and its (presumed) effects. DMA and antitrust enforcement therefore pursue different legal interests but complement each other.² The DMA is, by consequence, without prejudice to the application of Articles 101 and 102 TFEU or their national equivalents and merger control law.³

The DMA essentially has two conditions for application that are laid down in Articles 2 and 3 DMA. First, the DMA currently covers ten so-called *core platform services* (CPSs), which are defined in Article 2 DMA.⁴ Second, the DMA covers only undertakings providing core platform services that are the addressee of a Commission designation decision pursuant to Article 3. Accordingly, the designation decisions, and therefore the DMA's scope of application, always refer to (i) a particular gatekeeper and (ii) certain core platform services provided by it, which are listed in the respective designation decision. To date, the Commission has designated seven companies (Alphabet, Amazon, Apple, Booking, ByteDance, Meta and Microsoft) as gatekeepers in relation to 23 CPSs. Apple, Meta and ByteDance have (partly) challenged their respective designation decisions.⁵ An overview of the gatekeepers and their designated CPSs can be found on the Commission's website.⁶

The DMA's enforcement architecture can be summarized as follows: Six months after the designation decision, the designated gatekeepers have to comply with the catalogue of obligations in Articles 5, 6 and 7 DMA in relation to the designated CPSs. In the event of an infringement, the Commission as the sole enforcer of the DMA may, in particular, open non-compliance proceedings against the gatekeeper concerned and issue non-compliance (i.e. cease-and-desist) decisions with or without fines. To this end, the Commission has certain investigative powers which are largely similar to those in Regulation 1/2003. In order to enforce the DMA, the Commission may cooperate with national authorities, in particular national competition authorities,⁷ which have certain investigative powers under the DMA⁸ as well as in some specific cases when

2. Recital 11 DMA: *"This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application."*

3. Pursuant to Article 1(6)(b) DMA, this also applies to so-called "stricter" national laws concerning unilateral conduct, in so far as such laws apply to undertakings other than gatekeepers or imposes "further obligations" on gatekeepers than the ones contained in the DMA.

4. These are: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) certain online advertising services.

5. For the pending appeals by Apple see Case T-1080/23 and by Meta see Case T-1078/23. On ByteDance, see judgment of the GCEU in case T-1077/23, ECLI:EU:T:2024:478, *ByteDance*, appeal pending.

6. See https://digital-markets-act.ec.europa.eu/gatekeepers_en (last accessed on 22 May 2025).

7. See Article 38 DMA.

8. See, for instance, Article 27 DMA on the collection of information from third parties or Article 23(7) DMA on assistance in the context of inspections.

granted under national law.⁹ However, national authorities may not issue any decisions under the DMA which is the Commission's exclusive prerogative. The Commission issued the first two non-compliance decisions with fines against Meta and Apple on 23 April 2025.¹⁰

The DMA's substantive obligations are contained primarily in Articles 5, 6 and 7 DMA. These provisions are directly applicable (self-executing) to gatekeepers in relation to their designated core platform services. The DMA makes, however, one important distinction: The list of obligations in Article 5 DMA is considered sufficiently clear for gatekeepers so that there is no room for any further specification by the Commission.¹¹ Article 5 covers, for example, narrow and broad MFNs, processing of user data without due choice and consent of the user, so-called anti-steering clauses, certain cases of tying, etc. By contrast, the list of obligations in Articles 6 and 7 DMA is also directly applicable to designated gatekeepers. However, Article 8(3) DMA provides for the possibility of a specification procedure, which may be initiated by the Commission at its own initiative or upon the gatekeeper's request.¹² The purpose of the specification procedure is to provide certainty as to the measures to be adopted by the gatekeeper in order to comply with any of the obligations set out in Articles 6 or 7 DMA. The behavioral obligations in Article 6 DMA include, for example, sideloading, self-preferencing in ranking, switching between services accessed through the designated core platform service, etc. Article 7 contains interoperability obligations in relation to messages as well as voice and video calls.

What's missing of course from this overview of the DMA's administrative or public enforcement architecture is any reference to private DMA enforcement, that is the enforcement of the DMA through litigation between private parties before national courts. Unlike, for instance, Article 82 GDPR, Article 54 DSA or Article 3 of the Damages Directive,¹³ the DMA does not contain any explicit legal basis for private enforcement. The remainder of this paper will try to fill this void and to explore the fundamental principles of private DMA enforcement.

9. See in particular the power of national competition authorities to conduct investigations into potential DMA infringements under Article 38(7) DMA.

10. See the Commission's press release here: https://digital-markets-act.ec.europa.eu/commission-finds-apple-and-meta-breach-digital-markets-act-2025-04-23_en (last accessed on 22 May 2025).

11. A notable exception is the case of circumvention of the obligations in Article 5 under Article 13, which is susceptible to the specification procedure in Article 8(2) DMA.

12. The Commission has so far issued two specification decisions under Article 8(2) DMA on 19 March 2025 to Apple in relation to hardware interoperability under Article 6(7) DMA with Apple's operating system iOS, see the Commission's press release: https://digital-markets-act.ec.europa.eu/commission-provides-guidance-under-digital-markets-act-facilitate-development-innovative-products-2025-03-19_en (last accessed on 22 May 2025).

13. The Damages Directive (Directive 2014/104/EU) does not apply directly to private DMA enforcement. The Damages Directive is based on Articles 103 and 114 TFEU, whereas the DMA is based only on Article 114 TFEU and not on Article 103 TFEU. But Member States can of course extend the national implementing measures of the Damages Directive to the DMA, as Germany has done, for instance.

II. THE LEGAL FRAMEWORK OF PRIVATE DMA ENFORCEMENT

Even though the DMA lacks an explicit written legal basis for it, private DMA enforcement is clearly enshrined in Articles 39 and 42. From a more technical legal perspective, private DMA enforcement is rooted in the direct effect of the provisions of the DMA between individuals. However, not all DMA provisions can have direct effect between individuals.

A. Private enforcement is enshrined in the DMA

The private enforcement of the DMA is clearly enshrined in Articles 39 and 42 DMA. Article 39 essentially constitutes a combination of Articles 15 and 16 of Regulation No 1/2003 on the cooperation between the Commission and national courts in the context of antitrust enforcement. While the scope of Article 39 DMA is not restricted to private enforcement actions before national courts as such,¹⁴ it was introduced by the Parliament in the legislative process precisely to facilitate private DMA enforcement.

According to recital 92 DMA, the aim of Article 39 DMA is to ensure the uniform application and enforcement of the DMA by the Commission and national courts. To this end, Article 39(1) provides that national courts may ask the Commission for information or opinions. This allows national courts to coordinate with the Commission on any DMA-related factual or legal questions that may become relevant in the context of any litigation before national courts. Article 39(3) and (4) provides that the Commission may intervene as *amicus curiae* in national proceedings. And Article 39(5) DMA provides that national courts are not to issue decisions that run counter to either a Commission decision that has already been adopted under the DMA or to a decision which the Commission envisages to adopt under the DMA. In case of parallel Commission proceedings, national courts may assess whether to stay proceedings. Article 39 DMA thus provides a comprehensive framework for cooperation and coordination between the Commission and national courts in the context of DMA enforcement.

In addition to Article 39, Article 42 DMA provides for the inclusion of the DMA in Annex I to the Representative Actions Directive (RAD).¹⁵ This is a notable difference vis-à-vis the Damages Directive, which is not listed in Annex I of the RAD. Recital 104 DMA clarifies that the inclusion of the DMA in Annex I of the RAD is meant to ensure that representative actions may be brought before national court in relation to DMA infringements “*that harm or can harm the collective interests of consumers*”. By consequence, Member States must transpose

14. It applies for instance also in cases in which national courts need to decide on the interpretation of the DMA's conflict of laws provisions in Article 1(5) and (6) DMA, e.g., in case of an appeal against a decisions of a national competition or consumer protection authority.

15. Directive (EU) 2020/1828.

the RAD also for representative actions based on the DMA, be it claims for damages or for injunctions. The possibility of DMA collective actions for damages implicitly acknowledges the existence of individual actions for damages under the DMA.

It is against this background that the Commission's Q&A on DMA enforcement underlines the importance of private DMA enforcement: "*The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers.*"¹⁶

B. The direct effect of DMA provisions between individuals

Absent any national provisions governing the matter, the pertinent legal basis for private DMA enforcement is the direct effect of (some of) the provisions of the DMA between individuals. Private enforcement of the DMA fits seamlessly into the EU law tradition emanating from *Van Gend & Loos*.¹⁷ According to this tradition, which was further developed in *von Colson*¹⁸ and later significantly expanded in *Courage v Crehan* in the context of Article 101 and 102 TFEU,¹⁹ private individuals contribute directly to the effective enforcement of EU law. Notably, EU law may give rise to direct subjective rights and obligations of individuals. In such a case, it is for the Member States to ensure that the corresponding rights of individuals are fully effective in practice (principle of full effectiveness, *effet utile*) by means of adequate remedies. Those remedies must be assessed in the light of the principles of effectiveness and equivalence.²⁰ In particular, the principle of effectiveness limits the procedural autonomy of the Member States and their freedom of choice as regards the remedy, often requiring a specific remedy (e.g. a claim for damages or an injunction) to be provided for under national law in case of an infringement of EU law. Since the CJEU's seminal *Courage v Crehan* judgment, the Court has consistently come to the conclusion that the individuals affected must have a specific right to compensation or to an injunction in the case of infringements of those provisions of EU law that create direct legal rights and obligations.²¹

When it comes to the private enforcement of EU regulations forming part of internal market law, the *Courage* doctrine was explicitly referred to in *Antonio Muñoz* where the Court held in the context of a private litigation that "*national courts, whose task it is to apply the provisions of Community law in areas within*

16. See https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349 (last accessed on 22 May 2025).

17. Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1.

18. Case 14/83, *von Colson and Kamann*, ECLI:EU:C:1984:153, paragraph 23.

19. Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465.

20. Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, paragraph 29.

21. See, for instance, Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461; Case C-253/00, *Antonio Muñoz*, ECLI:EU:C:2002:497; Case C-100/21, *Mercedes Benz Group AG*, ECLI:EU:C:2023:229.

*their jurisdiction, must ensure that they take full effect*²² and that “*the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of both Regulation No 1035/72 and Regulation No 2200/96 imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor.*” It thus follows that not only the private enforcement of Articles 101 and 102 but also the private enforcement of EU law regulations is based on the direct application of the relevant rules between individuals and the Union law principle of full effectiveness.

From a more technical perspective, the decisive question remains which provisions of EU law may have direct effect between individuals. To answer this question, the Court has established a two-pronged legal test. As regards the first prong, the CJEU referred in *Donau Chemie* to both, *Courage* and *Francovich*, and held that “*just as it imposes burdens on individuals, European Union law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaties but also by virtue of obligations which they impose in a clearly defined manner both on individuals and on the Member States and the EU institutions [...]*.”²³ In *Francovich*, in turn, the CJEU had stated that the relevant provisions “*must be unconditional and sufficiently precise*.”²⁴ In other words: in order to be able to have direct effect between individuals and to give rise to individual rights, the legal provisions of primary or secondary EU law in question must be unconditional and sufficiently precise (first prong).

The second prong is arguably more complex: In order to determine whether a provision of EU law that is unconditional and sufficiently precise can have direct effect between the individuals involved in the dispute in question, the CJEU established in *Mercedes Benz Group AG* that this needs to be determined with respect to the specific provisions in question as well as in relation to each individual claimant separately on the basis of the precise nature and purpose of respective provisions. It notably held that the corresponding rules “*must be interpreted as protecting, in addition to public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle*.”²⁵ In other words: the CJEU relied explicitly on the protective purpose of the legal provision in question in order to establish whether it has direct effect between individuals. From a subjective point of view, that direct effect must exist specifically between the groups of persons to which the parties to the judicial proceedings of the Member State belong and, more specifically, that it must be aimed at protecting the individual claimant’s interest vis-à-vis the defendant infringing the right in question.

22. Case C-253/00, *Antonio Muñoz*, ECLI:EU:C:2002:497, paragraph 28.

23. Case C-536/11, *Donau Chemie*, ECLI:EU:C:2013:366, Paragraph 20.

24. Joined Cases C-6/90 and C-9/90, *Francovich*, ECLI:EU:C:1991:428, paragraphs 11 and 17.

25. Case C-100/21, *Mercedes-Benz Group AG*, ECLI:EU:C:2023:229, paragraph 85.

This second prong, the requirement to assess the protective purpose of the provision of EU law in question, marks a notable difference vis-à-vis private competition law enforcement where the protective purpose of Articles 101 and 102 does not play any relevant role in addition to the requirement of a causal link between the harm inflicted and the infringement.²⁶ This difference is justified by taking into account the different nature of antitrust and regulatory law: whereas antitrust law protects competition in the marketplace and thus “*anyone*” active in the markets and thus affected by a distortion of competition, regulatory law may be more selective as regards the companies and consumers it aims to protect. This needs to be assessed on a case-by-case basis.

Where does all this leave us? In so far as they are unconditional and sufficiently precise, the provisions of the DMA and notably Articles 5, 6 and 7 of the DMA are capable of creating individual rights which national courts must protect. In a second step, it then needs to be analyzed whether this is also specifically the case between the individuals in question. If both steps of the test are met, a parallel can be drawn in principle with *Courage* and the ensuing case-law of the EU Courts on private antitrust enforcement. This includes in particular the principles of equivalence and effectiveness – and the latter, in turn, includes the right to bring actions for damages or injunctions before national courts.

C. Assessment of the direct effect of specific DMA provisions

In determining the direct effect of the DMA between individuals, which is the basis for private enforcement of DMA, its purpose, structure and enforcement mechanism are of decisive importance.

1. General observations

The DMA is divided into six chapters. Articles 1 and 2 of Chapter I govern the subject-matter and scope of the DMA and contain a number of definitions. Articles 3 and 4 of Chapter II set out the substantive and procedural requirements for the designation of gatekeepers. Chapter III contains in Articles 5 to 15 the actual behavioral obligations for gatekeepers, as well as other rules, such as reporting obligations or rules on circumvention, which further specify and accompany the implementation of the behavioral obligations. Chapter IV lays down, in Articles 16 to 19, rules on market investigations. Finally, Chapter V contains, in Articles 20 to 43, provisions on the Commission’s powers of investigation, enforcement and supervision, including coordination and cooperation with national authorities,

26. Case C-435/18, *Land Oberösterreich*, ECLI:EU:C:2019:1069 paragraph 27. See also AG Kokott’s Opinion in the same case, ECLI:EU:C:2019:651, paragraph 84: “*the protective purpose of Article 101 TFEU is to ensure that all harm is eligible for compensation where there is a causal link between the harm and the infringement of that provision.*”

and Articles 39 and 42, concerning cooperation with national courts. Finally, Articles 44 to 54 provide for a number of final provisions.

This structure already shows that private enforcement of the DMA can relate only to Articles 5 to 15 of Chapter III. It is clear that Chapter I, which contains subject matter, scope and definitions, and Chapter VI, which contains the final provisions, cannot produce any material effects between individuals. The same applies to the procedural rules laid down in Chapter IV on administrative market investigations and in Chapter V on the Commission's investigative and sanctioning powers. These are procedural powers which, according to the DMA's regulatory approach, are reserved exclusively to the Commission.

The substantive and procedural requirements for the designation of gatekeepers set out in Chapter II likewise constitute procedural powers which, according to the DMA's regulatory approach, are reserved exclusively to the Commission. The designation of gatekeepers can take place only in the administrative procedure pursuant to Article 3 DMA. The definitive attribution to the Commission of the power to designate gatekeepers excludes any designation by national courts. This necessarily follows from the DMA's objective of providing for uniform rules for gatekeepers across the Union and not to allow for fragmentation by national designation decisions, whether administrative or judicial.

By contrast, Chapter III, which contains the provisions of Articles 5 to 15 of the DMA, provides for the actual behavioral obligations for gatekeepers as well as other provisions which are intended to further specify the implementation of the behavioral obligations.

2. Designation as a pre-condition for direct effects between vis-à-vis private individuals

As already mentioned, condition for the application of the behavioral obligations in Articles 5 to 15 DMA is, first of all, the designation of the undertaking concerned in relation to one or more core platform services as a gatekeeper under Article 3 of the DMA. Pending the adoption of such a designation decision by the Commission, the behavioral obligations relating to the undertaking concerned and the relevant core platform service are thus not unconditional, but merely conditional obligations. Any direct effect of Articles 5 to 15 DMA, and therefore the possibility of private enforcement, can therefore arise only from the date of the respective designation decision.

If a designation decision has been issued, it has to be determined whether the obligation in question is sufficiently precise. In that regard, it is necessary to distinguish between the obligations of conduct laid down in Articles 5 to 15.

3. Direct effect of the obligations in Articles 5, 6 and 7 of the DMA vis-à-vis private individuals

Articles 5, 6 and 7 DMA clearly lay down substantive behavioral obligations on gatekeepers vis-à-vis business users and end users. Except in the case of a suspension under Article 9 or an exemption under Article 10 DMA, those behavioral obligations are directly applicable (*self executing*) and do not require any further application order or any other form or specification other than the designation of the gatekeeper by the Commission pursuant to Article 3(4) and (9) of the DMA and the expiry of the six-month transposition period under Article 3(10) of the DMA. The instructions to the gatekeeper are therefore clear, unambiguous and unconditional once the relevant designation decision has been issued. In particular, according to Article 8(1) of the DMA, the specification procedure provided for in Article 8(2) is not a condition for the direct application of Articles 6 and 7. Rather, it is an optional²⁷ instrument to create (additional) legal certainty through which the Commission can conclude that a given measure complies with one of the obligations contained in Articles 6 or 7 DMA. The possibility of specifying the obligations laid down in Articles 6 and 7 of the DMA has no effect on the direct application of those obligations. It follows that both Article 5 and Articles 6 and 7 of the DMA *may* create individual rights and obligations between private individuals in so far as they are intended to protect the individual interests of certain undertakings or individuals (see below).

4. Direct effect of the obligations in Articles 8-12, 14 and 15 DMA vis-à-vis private individuals

By contrast, unlike Articles 5, 6 and 7 DMA, Articles 8-12, 14 and 15 DMA do not impose any sufficiently precise substantive obligations on designated gatekeepers vis-à-vis their business users and end users.

Article 8(1) essentially contains two provisions. First, it requires gatekeepers to ensure compliance with Articles 5, 6 and 7 of the DMA. In that regard, it does not add anything to Articles 5, 6 and 7 DMA, since the obligation to comply with these provisions stems directly from them (see above). Second, however, Article 8(1) DMA also lays down the obligation on the gatekeeper to demonstrate compliance with the behavioral obligations laid down in Articles 5, 6 and 7 DMA. It is true that this could be understood as meaning that Article 8(1) in conjunction with the respective behavioral obligation contains a substantive obligation on the gatekeeper to prove compliance with that obligation and could therefore be susceptible not only to public but also to private enforcement. However, such a burden of proof would create a substantively enforceable obligation to provide information, which would in fact amount to a reversal of the burden of proof—not only in judicial but also in quasi-criminal administrative proceedings brought

27. See the word “may” in Article 8(2) and (3) DMA.

by the Commission—and would at the same time require the gatekeeper to engage in a *probatio diabolica* (i.e. to prove that there is no infringement). It does not seem plausible that the EU legislature had intended to introduce such a substantive obligation to provide information and to reverse the burden of proof in relation to DMA infringements. Article 8(1) DMA must therefore be read as a programmatic norm, calling on the gatekeeper to proactively comply with the DMA and to communicate such compliance to the Commission and third parties. This programmatic norm is then further specified, in particular, in the compliance reporting obligation in Article 11 DMA as well as by way of the compliance function under Article 28 DMA.

Article 8(2) contains the aforementioned power of the Commission to carry out a specification procedure. Articles 9 and 10 allow the Commission to repeal, in whole or in part, the application of Articles 5, 6 and 7 DMA in respect of a particular gatekeeper throughout the Union where, due to exceptional circumstances, compliance with any of these obligations would jeopardize the viability of the gatekeeper's business (the so-called suspension under Article 9 DMA) or is necessary for reasons of public health or public security (so-called exemption under Article 10 DMA). Articles 11 and 15 DMA, in turn, lay down reporting obligations for gatekeepers. Under Article 11 DMA, the gatekeeper is to submit to the Commission, within six months of its designation, a report describing the implementation measures it has taken to comply with the obligations laid down in Articles 5, 6 and 7 of the DMA. This report shall then be updated at least once a year. Furthermore, pursuant to Article 15 of the DMA, a gatekeeper must, within six months of its designation, provide the Commission with an independently audited description of all consumer profiling techniques that it uses for any or all of its core platform services identified in the designation decision.²⁸ This report shall also be updated once a year. Furthermore, Article 12 of the DMA empowers the Commission to supplement the behavioral obligations laid down in Articles 5, 6 and 7 of the DMA by means of delegated acts following a market investigation and in accordance with the procedure set out in Article 49 of the DMA. Article 14 requires designated gatekeepers to notify the Commission of planned mergers.

In common, the rules in Articles 8-12, 14 and 15 DMA either impose specific obligations on the gatekeeper only vis-à-vis the Commission²⁹ or confer certain procedural and decision-making powers upon the Commission in relation to the enforcement of the substantive behavioral obligations laid down in Articles 5, 6 and 7 DMA.³⁰ Neither their wording, nor their *ratio*, are such as to focus on the relationship between individuals in substantive terms. Rather, they are rules governing the relationship between the Commission and the respective gatekeepers.

28. The non-confidential versions of the profiling reports are available at <https://digital-markets-act-cases.ec.europa.eu/reports/consumer-profiling-reports> (last accessed on 22 May 2025).

29. Notably the reporting or information obligations under Articles 11, 14 and 15 DMA.

30. In particular, the possibility of specifications under Article 8(2) DMA or the possibilities of suspensions and exemptions under Articles 9 and 10 DMA.

5. Direct effect of Article 13 DMA vis-à-vis individuals

Under Article 13(1) of the DMA, an undertaking may not structure its core platform services in such a way as to circumvent the quantitative thresholds laid down in Article 3(2) of the DMA. Such circumvention does not prevent the Commission from adopting a corresponding designation decision under Article 3 DMA. In addition, pursuant to Article 13(4) DMA, a gatekeeper may: *“not engage in any behaviour that undermines effective compliance with the obligations of Articles 5, 6 and 7 regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design.”* Article 13(5) and (6) of the DMA then contain two specific instances of such circumvention.³¹ Finally, Article 13(7) of the DMA provides for the legal consequence of circumvention of the obligations to conduct laid down in Articles 5, 6 and 7 of the DMA: *“Where the gatekeeper circumvents or attempts to circumvent any of the obligations in Article 5, 6, or 7 in a manner described in paragraphs 4, 5 and 6 of this Article, the Commission may open proceedings pursuant to Article 20 and adopt an implementing act referred to in Article 8(2) in order to specify the measures that the gatekeeper is to implement.”*

In addition, the Commission may also adopt a non-compliance decision under Article 29(1)(a) DMA or a decision imposing a fine under Article 30(1)(a) DMA, since cases of circumvention under Article 13(4), (5) and (6) DMA do not, according to Article 13(3) of the DMA, constitute effective compliance with the obligations in Articles 5, 6 and 7 DMA and may therefore constitute an infringement of those obligations.³² Article 13 DMA therefore does not constitute an independent behavioral obligation that is enforceable in isolation. Rather, the provision applies in conjunction with Articles 5, 6 and 7 DMA and thus supplements their scope.

For the private enforcement of Article 13 of the DMA, it follows that one needs to differentiate. First of all, it can be concluded that Article 13(1) DMA is inextricably linked to the designation of gatekeepers under Articles 3 and 4 of the DMA. As explained above, designation falls within the exclusive competence of the Commission; private designation by national courts is not provided for and would be contrary to the wording and scheme of the DMA.

However, that is not the case with regard to the circumvention of the obligations of conduct laid down in Articles 5, 6 and 7 of the DMA. It is true that Article 13(7) DMA provides for the possibility for the Commission, in the event of circumvention, to initiate a non-compliance procedure under Article 20 or a specification procedure under Article 8(2) DMA. However, it does not appear that sanctioning the circumvention of the obligations laid down in Articles 5, 6 and 7

31. Article 13(5) DMA provides for a prohibition of circumvention in relation to obligations relating to personal data; Article 13(6) DMA provides that gatekeepers may not sanction business users or end users if they make use of the rights and possibilities set out in Articles 5, 6 and 7.

32. This also follows from Article 13(8) DMA, whose reference to Article 13(6) of the DMA is an editorial error; the legislature rightly intended to refer to Article 13(7) DMA.

of the DMA should be reserved exclusively to the Commission. On the one hand, it is systematically consistent to treat the behavioral obligations and the obligation not to circumvent them in the same way in the context of both public and private enforcement. This is because, from a systematic point of view, the prohibition on circumvention in Article 13(4) DMA extends the obligations in Articles 5, 6 and 7 DMA to conduct which, although formally not covered by those obligations, nevertheless “*undermines*” effective compliance with those obligations. It thus constitutes an “extension” of the behavioral obligations in Articles 5, 6 and 7 DMA, which, moreover, is addressed directly to the gatekeeper and does not require further action by the Commission. On the other hand, Article 13(4) of the DMA provides for a general substantive prohibition of conduct which undermines compliance with the behavioral obligations laid down in Articles 5, 6 and 7. That prohibition is therefore an abstract extension of the obligations laid down in Articles 5, 6 and 7 DMA and relates not only to the relationship between gatekeepers and the Commission, but more specifically to the gatekeeper’s conduct vis-à-vis the respective end users and business users. Therefore, in so far as the conduct obligations in Articles 5, 6 and 7 of the DMA may be subject to private enforcement, the same must apply to the prohibition of circumvention of the respective obligations. The same applies to the specific prohibitions on circumvention laid down in Article 13(5) and (6) of the DMA, which regulate specific sub-cases of the general prohibition on circumvention in Article 13(4) of the DMA.

6. Conclusion

It follows from the foregoing analysis that the obligations laid down in Articles 5, 6 and 7 as well as in Article 13(4), (5) and (6) DMA are sufficiently precise and, following adoption of the respective designation decision, also unconditional. They therefore meet the first prong of the legal test for private enforcement as they can, in principle, give rise to unconditional and sufficiently precise direct rights between individuals. This leads us to the second prong of the legal test for private enforcement.

D. Protection of specific interests

In addition to the first prong of the legal test (unconditional and sufficiently precise direct rights between individuals), private DMA enforcement requires that the relevant behavioral obligations under Articles 5, 6, or 13 DMA also have direct effect, *in casu*, between the categories of persons to whom the claimant and the respondent in question belong. The decisive question in this context is whether the provision at issue provides for sufficiently specific protection of the individual interests of the category of persons to which the claimant belongs, in relation to the category of persons to which the respondent belongs. This question must be examined in each case in relation to the specific obligation at issue.

The starting point of this analysis is, first of all, the finding that the core platform services which are the subject of a Commission designation decision constitute, by definition, an “*important gateway*” between end users and business users in accordance with Article 3(1)(b) DMA. Under the DMA’s design, the designated gatekeepers therefore have an important function thus a particular responsibility towards their end users and business users.³³ On the basis of that responsibility, it can generally be considered that, as a rule, the behavioral obligations in Articles 5, 6 and 7 as well as 13 DMA are intended to protect either business users or end users, and often both types of users, in accordance with their wording and purpose, and that they give rise to subjective rights for those two categories of users.³⁴ However, that rule requires a specific review of the obligation in question and the objective which the legislature has attached to it. By contrast, market participants other than the gatekeeper’s business users or end users do not benefit from such a rule (see below).

When assessing the protective purpose of a behavioral obligation under the DMA, one will have to take into account whether the duty of conduct in question is primarily aimed at “*contestability*”³⁵ or rather at “*fairness*”, although often both objectives are pursued at the same time.³⁶ Conduct obligations intended to ensure the contestability of markets are usually aimed at preventing distortions of competition and market foreclosure effects known from abuses of a dominant position under Article 102 TFEU.³⁷ Their protective purpose is therefore likely to cover both the foreclosed business users and the harmed end users of the core platform services concerned. This corresponds to the legal situation under Article 102 TFEU and is underlined by Article 12(5)(a) DMA, which links the concept of contestability to the protection of business users *and* end users.

By contrast, the obligations in the DMA that seek to ensure fairness are primarily intended to protect the parties to the unfair relationship in question. This may be either end-users or business users, or both types of users at the same time, especially in two-sided markets. However, as a general rule, the protective purpose is likely to be aimed at business users. This is also underlined by both Recital 33 and Article 12(5)(b) DMA.³⁸ What matters, however, is the specific protective purpose of the obligation in question, as set forth in the relevant provision of the DMA as well as the DMA’s recitals. For the sake of completeness, it should be noted that when referring to end users the DMA does not necessarily

33. See Recital 13 DMA.

34. See Recital 31 DMA.

35. On the notion of contestability, see Recital 32 DMA.

36. On the notion of fairness, see Recital 33 DMA.

37. See in particular Commission Staff Working Document, Impact Assessment Report, DMA Proposal, SWD(2020) 363 final, Table 2, p. 53 et seq. for a comparison between the behavioral obligations laid down in the DMA proposal and the corresponding cartel cases.

38. Recital 33 DMA refers to “*an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage*”.

mean consumers but can also refer to undertakings acting as end users in relation to a specific core platform service.³⁹

By contrast, there is no general rule for the protection of competitors of gatekeepers, which are not at the same time their end users or their business users. It is true that the DMA is expressly intended to promote competition between core platform services and even between gatekeepers.⁴⁰ However, it does so primarily through behavioral obligations aimed at protecting business users, end users or business users and end users of the designated core platform services. This is also illustrated by Article 12(5) DMA which refers to the protection of end users and business users when describing restrictions of contestability and fairness. However, the protection of the individual interests of such competitors is not excluded, but the corresponding legal threshold for showing such specific protection will be higher.

In sum, it will be for the courts of the Member States and ultimately the Court of Justice to identify the respective protective purposes of the individual behavioral obligations in Articles 5, 6 and 7 as well as Article 13 DMA in relation to the individual interests of the various categories of persons concerned. When doing so, national courts may wish to coordinate with the Commission under the framework provided by Article 39 DMA.

III. CONSEQUENCES & OUTLOOK

The aforementioned considerations lead to a simple result: the obligations laid down in Article 5, 6 and 7 DMA as well as in Article 13 DMA can have direct effect between private individuals. By consequence, they can create rights and obligations between private individuals that can in turn be enforced before national courts by way of private enforcement actions. It will be one of the defining tasks of scholarship and jurisprudence in the coming years to analyze more closely, and to establish, which obligations precisely in Articles 5, 6 and 7 as well as Article 13 DMA may be enforced between which groups of private individuals, whether that may be end users, business users, competitors or other gatekeepers implicated by the DMA infringement in question.

To the extent that the obligations in Articles 5, 6 and 7 as well as Article 13 DMA are susceptible to private enforcement, the question arises as to its precise modalities. As explained above, the legal framework for private DMA enforcement is essentially rooted in the principles established by the CJEU in *Courage v Crehan*, notably the principles of effectiveness and equivalence of EU law. One can take inspiration—*mutatis mutandis*—from the line of case law since 2001 that has further fleshed out these principles in the context of private antitrust

39. See Recital 14 DMA.

40. See Recital 32 DMA.

enforcement, for instance in relation to the types of remedies available,⁴¹ claims for disclosure of information,⁴² limitation periods,⁴³ causality,⁴⁴ quantification of harm,⁴⁵ etc. When assessing the meaning of notably the principle of effectiveness in the context of private DMA enforcement, similar results as the ones arrived at in the context of the private enforcement of Article 101 and 102 TFEU are therefore likely. But there will also be a number of important differences in detail, owed to the fact that private DMA and private antitrust enforcement concern different legal instruments that pursue different legal interests.

41. Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461, paragraph 72; AG Jacobs, Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, ECLI:EU:C:2003:304, paragraph 105.

42. Case C-360/09, *Pfleiderer*, ECLI:EU:C:2011:389, paragraph 32; Case C-536/11, *Donau Chemie*, ECLI:EU:C:2013:366, paragraph 49, Case C-57/21, *Regiojet*, ECLI:EU:C:2023:6.

43. Case C-637/17, *Cogeco*, ECLI:EU:C:2019:263; Case C-267/20, *Volvo and DAF Trucks*, ECLI:EU:C:2022:494.

44. Case C-557/12, *Kone*, ECLI:EU:C:2014:1317; Case C-435/18, *Land Oberösterreich*, ECLI:EU:C:2019:1069.

45. Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:C:2023:99.

DAMAGES ACTIONS AGAINST DIGITAL GATEKEEPERS FOR BREACHES OF EU ANTITRUST LAW AND THE DMA: A GERMAN PERSPECTIVE

Prof. Dr. Jens-Uwe Franck
University of Mannheim¹

ABSTRACT: This chapter examines actions for damages against digital gatekeepers for breach of EU antitrust law or the Digital Markets Act (DMA) from a German perspective. It provides insights into private antitrust litigation against digital gatekeepers before German courts. While the pending damages actions are still at an early stage, a number of injunction actions have been decided, providing some insight into the effectiveness of private antitrust enforcement against digital gatekeepers. The role of damages actions as an instrument of corrective justice and of enforcement in the context of DMA infringements is discussed. The conceptual choice to include DMA infringements in the German antitrust damages law is considered in the light of the EU principles of effectiveness and equivalence.

Keywords: damages actions, injunction actions, antitrust law, digital gatekeepers, digital platforms, DMA.

SUMMARY: I. INTRODUCTION. II. PRIVATE ANTITRUST ENFORCEMENT AGAINST DIGITAL GATEKEEPERS BEFORE GERMAN COURTS. A. Damages Actions Before the German Courts. 1. A “Google Search (Shopping) follow-on action: Idealo v. Google. 2. The fallout from Booking.com’s “Dutch Torpedo”: hotels claim damages for the platform’s use of best price clauses. 3. Damages claims on behalf of publishers against Google. B. Damages Actions before UK’s

1. University of Mannheim, Department of Law, and Mannheim Centre for Competition and Innovation (MaCCI), franck@uni-mannheim.de. The paper on which this chapter is based was presented at the IV Valencia International Meeting on Competition Law: ‘Compensation of Damages in Digital Markets’ on 21 and 22 November 2024. For insightful comments and suggestions, I am grateful to the participants of that seminar. The support of the Deutsche Forschungsgemeinschaft (CRC TR 224, Project B05) is gratefully acknowledged.

Competition Appeal Tribunal and in Amsterdam Appear to Be Leading the War. C. Actions for Injunctions before the German Courts. 1. Overview of Court Cases. 2. A few preliminary observations. A. Exploiting private incentives and information infringements. B. Business users are not (necessarily) afraid to take big tech companies to court. C. The law protects business users as weaker parties. III. FUNDAMENTAL CONCEPTUAL CHOICE: ALIGNING RULES ON DMA INFRINGEMENTS WITH ANTITRUST DAMAGES LAW. A. The Importance of the Availability of Damages Claims alongside Public Enforcement: Corrective Justice and Deterrence. 1. Pursuit of corrective justice. 2. Effective and efficient deterrence of breaches of the DMA. a. Damages actions' potential for added value in deterrence. b. Stand-alone DMA actions: why the DB Station restrictions are not significant. c. DMA-specific risks of public underenforcement: political restraint as a major concern. B. Damages Actions for DMA infringements: Implementation under German Law. 1. Why were DMA infringements included in the private antitrust enforcement regime? a. Principle of effectiveness. b. Principle of equivalence. 2. Which provisions of the German private antitrust enforcement regime apply to DMA violations (and which do not). a. How is the integration of DMA infringement technically implemented? b. Which provisions of the antitrust damages law apply to DMA infringements. c. Which provisions of the antitrust damages law do not apply to DMA infringements and why?. IV. CONCLUDING REMARKS. V. BIBLIOGRAPHY.

I. INTRODUCTION

Private rights of action are meant to play a crucial role in ensuring the effectiveness of EU law. These rights of action encompass claims for damages awarded to injured parties, serving the purpose of both enforcement—understood essentially as the deterrence of infringements—and the restoration of corrective justice. This is well established in relation to EU antitrust law (Articles 101 and 102 TFEU) and does not seem to be controversial, at least as a matter in principle, in relation to the Digital Markets Act (DMA).²

In this chapter, taking a German perspective, I look at damages actions against digital gatekeepers for infringement of EU antitrust law or the DMA. What I have in mind here as 'digital gatekeepers' are the operators of (digital) platforms that are essential for business users to reach end users and have therefore been designated under the DMA and/or section 19a of the German Competition Act³ (the '19a tool'), which can be seen as the regulatory equivalent of the DMA under German law.⁴ Taking a 'German perspective' means that I will focus on lawsuits that are pending or prepared to being filed before the courts in Germany. I will

2. 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).

3. Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition). An English version of the Competition Act is available at https://www.gesetze-im-internet.de/englisch_gwb/index.html.

4. See Franck, J.-U., 'Abuse Proceedings against Digital Gatekeepers under Section 19a of the German Competition Act: Taking Stock of Early Results', in J. I. Ruiz Peris and C. Estevan de Quesada (eds), *New European Competition Trends in Digital Markets*, Atelier, Barcelona, 2024, 23, 25-32.

also focus on legislative activities in Germany that relate to the topic. International observers may be particularly interested in the fact that DMA violations have been incorporated into the private antitrust enforcement regime under the German Competition Act.

This chapter has two main parts. The first main part (Section II) provides insights into private antitrust litigation against digital gatekeepers before German courts. As we shall see, all antitrust damages actions are at an early stage, so that only cautious observations can be made. It is noteworthy that there are different categories of pending or prepared cases: individual and bundled claims; claims for damages based on abuse of dominance and vertical anticompetitive agreements; classic follow-on actions; and those that do not follow a binding decision but still benefit from prior public enforcement. In addition, several actions for injunctions have been brought and decided. It is useful to also analyse these cases with a view to actual or potential damages claims, as they provide some insights into how and why private antitrust enforcement against digital gatekeepers can be effective.

The second main part (Section III) deals with damages actions for breaches of DMA obligations. It is organised as follows. First, it explains how, in the context of the DMA, damages actions can be relevant as instruments for restoring corrective justice on the one hand and for effective and efficient enforcement on the other. With regard to the latter, it explores their potential added value in terms of deterrence. Furthermore, I will argue that the ECJ's *DB Station* judgment⁵ does not provide a sound basis for limiting stand-alone actions for breach of the DMA. Finally, possible reasons for public underenforcement are identified, including political considerations in the transatlantic relationship. Second, I will discuss the implementation of damages claims for DMA infringements under German law. I will argue that the inclusion of DMA infringements in the antitrust damages regime should be regarded as a wise step to do justice to the principles of effectiveness and equivalence, even though it may not be crystal clear how far the arm of these EU principles reaches into national law. Finally, I will explain in detail which provisions of the German (and, indirectly, the EU) law on antitrust damages are applicable to infringements of the DMA and which are not.

Section IV concludes this chapter by highlighting three sensitive issues in German antitrust damages law: access to evidence; the bundling of claims and financing of litigation; and the availability of spirited judges with practical experience in handling antitrust damages actions. It is argued that these weaknesses may prove to be particularly problematic in the context of legal action against digital gatekeepers.

5. ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832.

II. PRIVATE ANTITRUST ENFORCEMENT AGAINST DIGITAL GATEKEEPERS BEFORE GERMAN COURTS

In October 2024, the Tribunal de Commerce de Paris ordered Google to pay EUR 26.5 million in damages to Equativ, its French online advertising competitor.⁶ The claim followed a 2021 decision by the Autorité de la Concurrence, the French Competition Authority ('Google AdX'), which found Google guilty of an antitrust infringement and fined the company EUR 220 million.⁷ In the lawsuit filed in 2022, Equativ had sought EUR 369.1 million in damages from Google. The court's decision limited the damages to the losses incurred in France. Unfortunately, the judgment has not yet been published, so we can only speculate as to the reasons given. It is possible that the court held that an infringement had not been proven regarding the damage outside France. In this respect, the plaintiffs could not benefit from the binding effect of the decision of the Autorité de la Concurrence. Owing to its limited jurisdiction, the French Competition Authority could not rule on antitrust infringements outside France.

This look at the Paris Commercial Court illustrates what I cannot report from Germany: as far as I can tell, the German courts have not yet handed down a single judgment in an antitrust damages case against a digital gatekeeper. However, according to media reports and announcements by law firms, economic consultants and 'special purpose vehicles' (SPVs) set up to pool damages claims, several cases are pending before the regional courts (the Landgerichte), and others are being prepared.

A. Damages Actions before the German Courts.

The following three examples provide an insight into the antitrust damages actions against digital gatekeepers that are pending or in preparation before German courts.

1. 'Google Search (Shopping)' follow-on action: Idealo v Google

A prime example of an individual damages action is the case of the German price comparison site Idealo against Google, which has been pending before the

6. The judgment has been reported in the media. See <https://www.capital.fr/entreprises-marches/google-condamne-une-entreprise-francaise-va-toucher-26-millions-deuros-1504601> and <https://www.pymnts.com/cpi-posts/paris-court-orders-google-to-pay-e26-5-million-to-equativ-in-advertising-dispute/>. However, it does not appear to have been published in any database.

7. Autorité de la concurrence, 7.7.2021, 21-D-11, *Google AdX/Google DoubleClick for Publishers*, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-06/21d11_0.pdf. See Höppner, T., Volmar, M., and Westerhoff, P., 'The French Competition Authority fines a Big Tech company €220 million for abuse of a dominant position through self-preferencing in the ad tech industry (Google AdX / Google DoubleClick for Publishers)', *Concurrences, e-Competition News Issue June 2021*, N°102324.

Berlin Regional Court since 2019.⁸ This is an action for damages following the European Commission's decision to fine Google for abusing its dominant position in the online search market by engaging in self-preferential behaviour that foreclosed competitors to Google Shopping such as Idealo.⁹ The damages claimed by Idealo were originally estimated at around half a billion euros (including interest).¹⁰ In February 2025, the firm announced that it had expanded its claim for damages to EUR 3.3 billion.¹¹ The proceedings before the Berlin Regional Court were stayed while the appeal against the Commission's decision was pending before the European courts. Since the ECJ's final decision,¹² the case has been resumed, but a hearing will presumably not take place before the end of 2025.

2. The fallout from Booking.com's 'Dutch Torpedo': hotels claim damages for the platform's use of best price clauses

In March 2021, the German Hotel Association reported¹³ that around 2,000 hotels had filed antitrust damages claims with the Berlin Regional Court against Booking.com. The lawsuits follow a December 2015 decision by the Bundeskartellamt,¹⁴ which found Booking.com's use of best price clauses to be illegal and which was ultimately upheld by the Bundesgerichtshof, the German Federal Court of Justice, in May 2021.¹⁵ The hotels maintain that competitive pressure from competing online travel agencies and from the hotels' direct sales channel on Booking.com has been significantly weakened by the imposition of best price clauses, allowing the platform to charge excessive fees. According to its press release,¹⁶ the German Hotel Association has bundled the interests of the hotels and has concluded agreements with litigation funds, ensuring that the hotels do not bear any cost risks.

8. The case number is 16 O 195/19.

9. European Commission, 27.6.2017, Case AT.39740, *Google Search (Shopping)*.

10. See Idealo's press release from 12.4.2019 <https://www.ideal.de/unternehmen/pressemitteilungen/ideal-verklagt-google-auf-schadensersatz-wegen-missbrauchs-seiner-marktbeherrschenden-stellung>.

11. Press release of 19.2.2025, 'Idealo expands its claim for damages against Google before the Berlin District Court to 3.3. billion euros', <https://www.ideal.de/unternehmen/pressemitteilungen/ideal-is-expanding-its-claim-for-damages-against-google>.

12. ECJ, 10.9.2024, Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:C:2024:726

13. Deutscher Hotelverband (IHA), Press Release, 31.3.2021, 'IHA unterstützt Sammelklage von rund 2.000 Hotels gegen Booking.com beim Landgericht Berlin', https://www.hotellerie.de/fileadmin/user_upload/PM_2021-03-31_Schadensersatz_fuer_kartellrechtswidrige_Bestpreisklauseln_IHA_unterstuetzt_Sammelklage_von_2.000_Hotels_gegen_Booking_beim_Landgericht_Berlin.pdf.

14. Bundeskartellamt, 22.12.2015, B9-121/13, *Booking.com*.

15. The Bundeskartellamt's decision was initially successfully challenged by Booking before the Düsseldorf Higher Regional Court (4.6.2018, Kart 2/16(V), Juris) but was ultimately upheld by the Bundesgerichtshof, the Federal Court of Justice (19.5.2021, KVR 54/20, Juris).

16. Deutscher Hotelverband (IHA) (n 12).

These actions before the Berlin Regional Court were preceded¹⁷ by a ‘Dutch torpedo’ launched by Booking.com: the platform operator had filed negative declaratory actions against 66 German hotels¹⁸ before the Rechtbank (District Court) Amsterdam in October 2020 – apparently during ongoing settlement negotiations. It has been reported that some (German) hotels have joined the Amsterdam proceedings and filed counterclaims for damages.¹⁹ Booking.com’s aim appeared to be to persuade the Rechtbank Amsterdam to make a preliminary reference to the ECJ, thereby potentially undermining the decision of the Bundesgerichtshof,²⁰ which had upheld the Bundeskartellamt’s finding of an infringement of Article 101 TFEU without referring the matter to the ECJ. If the ECJ had now decided, on referral by the Amsterdam court, that the Bundesgerichtshof had based its judgment on an incorrect interpretation of Article 101 TFEU, the German courts would also have been bound by these findings, in particular by Article 4(3) TFEU, and the binding effect of the Bundesgerichtshof’s final judgment establishing the infringement would have been invalidated.²¹

Booking.com’s manoeuvre, as far as it can be said at this stage, has only been half successful: the Amsterdam court did refer the matter to Luxembourg, but the ECJ rejected the ‘ancillary restraints’ argument put forward by Booking.com. The ECJ was certain that best price clauses could not be considered objectively necessary for the offering online intermediation services by Booking.com. While the Court acknowledged that the parity clauses may help to avoid free-riding, it noted that this was merely a question of the profitability of the services offered or possibly also a question of efficiencies within the meaning of Article 101(3) TFEU. However, these effects did not justify the application of the ancillary restraints doctrine under Article 101(1) TFEU.²²

17. According to the press release from the German Hotel Association. The ECJ judgment states that the German Hotel Association filed a lawsuit with the Berlin Regional Court ‘in 2020’ and that Booking.com filed a lawsuit with the Rechtbank Amsterdam on 23 October 2020. The sequence of the statements in the judgment suggests (probably incorrectly) that the German Hotel Association filed the lawsuit first. ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 21 and 23.

18. See Deutscher Hotelverband (n 12).

19. Heinz, S., ‘Dutch Torpedo at Work – AG Collins’ Opinion in the Booking Case’, *Kluwer Competition Law Blog* 27.6.2024, p. 2.

20. See Article 9(3) of the 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 (in the following referred to as ‘Competition Damages Directive’). OJ L 349, 5.12.2014, pp. 1-19.

21. In any case, as far as the identical facts and the identical final decision of a competition authority or court are concerned, this is an *acte clair*. Therefore, a national court before which an action for damages is brought is bound by an ECJ judgment without the need for a separate preliminary reference to the ECJ.

22. ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 72-75.

Booking.com can still invoke the (then applicable) Vertical Block Exemption Regulation 330/2010²³ and Article 101(3) TFEU to justify its price parity policy. It remains to be seen whether the Rechtbank Amsterdam will indeed come to a different conclusion from the Bundesgerichtshof on this point. This is not inconceivable²⁴ but it would be surprising, because the Dutch court would then have to directly challenge the findings and assessments on which the Bundesgerichtshof based its decision.

3. Damages claims on behalf of publishers against Google

German legal services provider adClaim, set up as an SPV in conjunction with a well-known plaintiffs' law firm, has been procured to pool claims for damages from online publishers that have generated revenues from the sale of online advertising space between 2014 and 2022 and who may have been harmed by Google's abusive conduct in online advertising.²⁵ This procurement of antitrust damages claims follows the standard scenario of pooling claims on the basis of the 'assignment model',²⁶ which is the best available functional equivalent of a class action for business plaintiffs under German law.²⁷ AdClaim has stipulated that, if no out-of-court settlement can be reached with Google, a lawsuit for damages will be filed. Statements made by adClaim indicate that litigation is planned in German courts, with potential plaintiffs apparently having been

23. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (no longer in force). In this regard, the ECJ merely reiterated that 'the definition of the relevant market for the purposes of the application of the market share thresholds provided for in [the Regulation] requires a concrete examination of the substitutability, from a supply and demand point of view, between online intermediation services and other sales channels.' ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, para. 91.

24. Pursuant to Article 9(2) of the Competition Damages Directive, Dutch law must (at least) give prima facie weight to the finding of an infringement of Article 101 TFEU by the final decision of the Bundesgerichtshof in the *Booking.com* case. As far as can be seen, although this is not explicitly stated in Dutch law, it is recognised that final decisions of other Member States' competition authorities can be submitted as rebuttable evidence of an infringement. See MEIJER, R., and ZIPPRO, E.-J., 'Private Enforcement in the Netherlands', in F. Wollenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 143, 153.

25. See AdClaim, 'AdTech and Google's Abuse of Dominance – Damage Recovery for European Publishers' <https://www.ad-claim.eu/en/home>.

26. See AdClaim, FAQ, <https://www.ad-claim.eu/en/faq>. In particular, it explains the commissions charged ('success fees'): 'Participating in our assignment model will leave you without any cost risk. We bear all costs, for example for the economic expert opinion, the lawyers and the court. After we have successfully enforced your damage claims, you will receive the recovered amount minus a success fee, which will be as follows: 17.5 % (or 15 % for members of media associations) if a settlement is reached before the action is filed; 27.5 % (or 25 % for members of media associations) if the proceedings are concluded within 3 years of the filing of the action; 30 % (or 27.5 % for members of media associations) if the proceedings continue for more than 3 years after the action has been filed.'

27. See below sub IV and ECJ, Case C-253/23, *ASG 2*, ECLI:EU:C:2025:40.

recruited from across the EEA.²⁸ So far, there has been no public disclosure of the size of the claims that have been captured.

The alleged abuse of a dominant position through self-preferencing in the ad tech industry is primarily based on the aforementioned decision of the French Competition Authority in *Google AdX/Google DoubleClick for Publishers*, dated 7 June 2021.²⁹ Moreover, in a Statement of Objections issued on 14 June 2023, which essentially concerns the same activities of Google, the European Commission maintains that Google continues to infringe Article 102 TFEU.³⁰ On 5 September 2025, the Commission fined Google EUR 2.95 billion for breaching EU antitrust law in this case.

4. A few preliminary observations

The proceedings described are all at such an early stage that it is not yet possible—at least for uninvolved observers—to draw any trends or even reliable conclusions about the effectiveness and possible practical challenges of damages actions against digital gatekeepers. Some observations can at least be made about possible scenarios for such lawsuits.

The alleged antitrust violations by big tech companies are often abuses of market dominance – *Google Search (Shopping)* is probably the archetypal case here, but the *Booking.com* case shows that antitrust damages claims against digital gatekeepers can in practice also be based on alleged (vertical) anticompetitive agreements.

These actions for damages against Google and Booking.com are classic follow-on actions: they follow a decision by an antitrust authority—namely the European Commission (*Google Search (Shopping)*) and the German Bundeskartellamt (*Booking.com*)—that has become final after an unsuccessful appeal, and the plaintiffs are seeking damages within the jurisdiction of the respective authority, thus relying on binding findings by the competition authority (and/or the courts that had to hear appeals) to establish the infringement.

The situation is different with regard to the lawsuits that appear to be in preparation and that will be based on an antitrust infringement by Google in the area of online advertising to the detriment of online publishers in particular: although there is a final finding of infringement in the form of the decision of the Autorité de la Concurrence in the *Google AdX/Google DoubleClick for Publishers* case, these findings relate only to France. However, claims for damages are pooled across the European Economic Area, so the findings of the French Competition

28. See AdClaim (n 24) ('Hausfeld's lawyers will prepare a "class action" for European online publishers by way of an assignment model which has recently been declared permissible by the German Federal Court of Justice. Publishers that have suffered damages may pursue their claims against Google in German civil courts without any cost risk').

29. Autorité de la concurrence (n 6).

30. European Commission, Press release of 14.6.2023, 'Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology' https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

[30a] European Commission, Case AT.40670 - Google - Adtech and Data-related practices.

Authority are not binding as far as Google's conduct with effects outside France³¹ is concerned. Therefore, to the extent that the conduct is de facto identical, the French decision may have a certain indicative effect, but a different assessment by the German courts is possible.

While Idealo, as a competitor of Google Shopping, is suing on its own for damages caused by Google's abuse, the other two examples illustrate cases where claims are bundled. In the Booking.com case, the initiative appears to have come from the hotel association IHA, which bundled the claims of hotel operators. In the cases against Google for abusive behaviour in the online advertising markets, the bundling is carried out by a SPV, apparently initiated by a well-established plaintiffs' law firm. In both cases, litigation funders are involved.

Finally, despite the fact that all three cases are at an early or incipient stage, it is unlikely that they will be settled or decided quickly. It is possible that several years will elapse between the preparation of the claims and a judgment at first instance. Without going into detail on the reasons for this—which may also vary from case to case—it is clear that it takes deep pockets and patience to be a successful plaintiff in such cases.

B. Damages Actions before the UK's Competition Appeal Tribunal and in Amsterdam Appear to Be Leading the Way

Looking at the rather modest (publicly known) activity in damages actions, one gets the impression that developments in Germany are somewhat lagging. In the UK, the Competition Appeal Tribunal (CAT) already has a double-digit number of class actions pending against big tech companies. According to a review provided by a law firm,³² there are four cases pending against each of Alphabet (Google),³³ Amazon³⁴

31. If a plaintiff brings an action for damages before a German court and the plaintiff bases its claim on conduct by the defendant that the French Competition Authority has found to be in breach of Article 101 or 102 TFEU (because it had effects in France), then these findings are binding. This is because in this respect section 33b of the German Competition Act goes beyond Article 9(2) of the Competition Damages Directive 2014/104/EU, which requires that these findings can 'be presented before ... national courts as at least prima facie evidence that an infringement of competition law has occurred'. See Franck, J.-U., 'Vorb §§ 33-34a' to '§ 33h GWB' [German Antitrust Damages Law], in T. Körber, H. Schweitzer and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2, 7th ed., C.H. Beck, Munich, 2024, § 33b GWB para. 6 (at p. 1502).

32. See Simmons Simmons LLP, Tracking Collective Proceedings in the UK (as at 4.11.2024), <https://www.simmons-simmons.com/en/publications/clhhaalg000uuao03fozem4r/collective-proceedings-issued-in-the-uk-s-competition-appeal-tribunal>.

33. Case no. 1673/777/24, *Professor Barry Rodger v (1) Alphabet Inc.; (2) Google LLC; (3) Google Ireland Ltd; (4) Google Asia Pacific Pte Ltd; (5) Google Commerce Ltd; (6) Google Payment Limited; and (7) Google UK Limited* (registered on 23.8.2024); 1606/7/723, *Nikki Stopford v Google* (7.9.2023); 1572/7/7/22 and 1582/7/7/23, *Ad Tech Collective Action LLP v Alphabet Inc. and Others* (30.11.2022/29.3.2023); 1408/7/7/21, *Elizabeth Helen Coll v Alphabet Inc. and Others* (29.7.2021).

34. Case no. 1644/7/7/24, *Professor Andreas Stephan v (1) Amazon.com, Inc., (2) Amazon Europe Core S.À.R.L., (3) Amazon Services Europe S.À.R.L., (4) Amazon EU S.À.R.L., (5) Amazon U.K. Services Ltd, and (6) Amazon Payments U.K. Limited* (registered on 28 June 2024); 1641/7/7/24, *BIRA*

and Apple,³⁵ and one case pending against Meta.³⁶ For example, as a counterpart to the aforementioned Google AdTech lawsuit, which is being prepared in Germany, a collective action against Google on behalf of all UK-based publishers was registered with the CAT on 30 November 2022 for alleged abuse in its activities in the online advertising market.³⁷

Within the EU, it appears that the Dutch courts could establish themselves as an important forum for (collective) antitrust damages actions against digital gatekeepers. For instance, regarding Google's alleged abusive conduct in online advertising, a lawsuit was filed on 28 February 2024 with the District Court of Amsterdam on behalf of more than 30 European media organisations from 17 countries, seeking damages of approximately EUR 2.1 billion.³⁸ From a German perspective, it is particularly noteworthy that Axel Springer³⁹ and Hubert Burda Media, two of the country's largest publishing houses, have joined the action. It is not entirely clear from the publicly available information whether the claimed damages could also have been sued for before the German courts. However, it seems quite possible. In this case, the fact that the claim was brought before the Amsterdam court can be seen as an indication that the legal and institutional framework in the Netherlands was considered preferable.

C. Actions for Injunctions before the German Courts

Looking beyond damages claims, a significant number of actions for injunctive relief have been filed. This shows that this aspect of private antitrust enforcement against digital gatekeepers is indeed of considerable practical importance in Germany.

Trading Limited v (1) Amazon.com, Inc., (2) Amazon Europe Core S.À.R.L., (3) Amazon EU S.À.R.L., (4) Amazon Services Europe S.À.R.L., (5) Amazon U.K. Services Ltd., and (6) Amazon Payments U.K. Limited; 1595/7/7/23, *Robert Hammond v Amazon Inc., and others* (7.6.2023); 1568/7/7/22, *Julie Hunter v Amazon.com, Inc. and others* (15.11.2022).

35. Case no. 1602/7/7/23, *Christine Riefa Class Representative Limited v Apple Inc. & Others* (registered on 1.8.2023); 1601/7/7/23, *Dr Sean Ennis v Apple Inc and Others* (25.7.2023); 1468/7/7/22, *Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited* (17.6.2022); 1403/7/7/21, *Dr. Racheal Kent v Apple Inc. and Apple Distribution International Ltd* (11.5.2021).

36. Case no. 1433/7/7/22, *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. & Others* (14.2.2022).

37. Case no. 1572/7/7/22 and 1582/7/7/23, *Ad Tech Collective Action LLP against (1) Alphabet Inc; (2) Google LLC; (3) Google Ireland limited; and (4) Google UK Limited*. On 5 June 2024 the Tribunal issued its judgment granting the class representative's application for a collective proceedings order ([2024] CAT 38). See <https://www.catribunal.org.uk/cases/15727722-15827723-ad-tech-collective-action-llp>.

38. See 'European news media file €2.2 billion ad tech claim against Google'. See <https://adtechclaim.eu/press-release/>.

39. Note that Axel Springer is also the majority shareholder of Idealo. See <https://www.br.de/nachrichten/wirtschaft/darum-will-sich-der-springer-konzern-aufspalten,UOp7xcU>.

1. Overview of court cases

Of particular note are a number of preliminary injunction proceedings before German courts in which digital gatekeepers have been involved:

- The Frankfurt District Court has issued a preliminary injunction against Amazon for banning a retailer's products from Amazon Marketplace, in fulfilment of its so-called 'brand-gating' agreement with Apple.⁴⁰
- The operator of a health portal has obtained an injunction against Google from the Munich Regional Court I because of the preferential treatment of a health portal of the German Federal Ministry of Health in Google's search results list.⁴¹
- The Regional Court of Hamburg has rejected an application to include a sports app in the Google Play Store. The latter had refused access because the app had contained advertising for betting providers.⁴²
- There have been three successful applications for injunctions in relation to Google Ads, challenging the suspension of accounts and the suspension or rejection of certain ad campaigns.⁴³ In another case, the application for interim measures was rejected because the court considered that the urgency of the matter had not been sufficiently demonstrated.⁴⁴
- We may note five lawsuits for interim injunctive relief resulting from the suspension of accounts on Amazon Marketplace for alleged violations of Amazon's terms of service.⁴⁵ The courts granted an interim injunction in only one case⁴⁶ and denied four requests.⁴⁷
- An application by the operator of an app (the 'Bliq app') that enables transport service drivers to manage requests from various ride-hailing platforms, such as Uber and FreeNow, was unsuccessful. The application was based on an alleged antitrust right to access the application programming interfaces of the ride-hailing platforms.⁴⁸

In addition to these proceedings for interim relief, there are judgments in main proceedings relating to injunctions against digital gatekeepers:

40. LG Frankfurt, 12.2.2019, 3-06 O 94/18, Juris.

41. LG München I 10.2.2021, 37 O 15721/20, Juris – *netdoctor / Google*.

42. LG Hamburg, 5.7.2016, 408 HKO 54/16, Juris.

43. LG Hamburg, 27.12.2022, 415 HKO 84/22, Juris; OLG Hamburg, 21.8.23, 15 U 18/23 Kart, Juris; LG Frankfurt a. M., 5.5.2022, 2-03 O 58/22, Juris.

44. LG Hamburg, 29.4.2024, 315 O 300/23, Juris.

45. See Franck, J.-U., 'Individual Private Rights of Action under the Platform-to-Business Regulation', *European Business Law Review* 34 (2023), 525, 530-537.

46. LG Hannover, 22.7.2021, 25 O 221/21, Juris.

47. OLG Brandenburg, 16.7.2020, 6 W 66/20, Juris; LG Stuttgart, 22.4.2021, 11 O 10/21, Juris; LG München I, 12.5.2021, 37 O 32/21 – *Amazon Kontensperrung II*, Juris; LG München I, 30.9.2021, 37 O 9343/21, Juris.

48. LG Berlin, 7.9.2023, 16 O 49/23 Kart – *Ride Hailing Apps*, Juris.

- In a case decided by the Berlin Regional Court, German press publishers tried unsuccessfully to challenge Google’s contractual requirement to make snippets and thumbnails available to the public free of charge.⁴⁹
- In a recent ruling, the Düsseldorf Regional Court ordered Meta to stop blocking the Facebook page of a filmmakers’ association that regularly organises events, without giving specific reasons and without giving the association the opportunity to comment.⁵⁰

2. A few preliminary observations

The above-mentioned court cases give us some insights into how and why private enforcement can be effective against digital gatekeepers.

a. Exploiting private incentives and information about infringements

Business users of digital platforms, such as sellers on online marketplaces and app developers seeking distribution in app stores, will often be the first to know or suspect that the platform operator is infringing competition law. In many cases, through their long-term relationship with the platform, business users will develop a good understanding of the platform’s incentives and strategies – including deliberate or accepted infringements. If their own economic interests are threatened by this behaviour, they have an incentive to use this private information. The most direct way to do this is to use private rights of action for injunctive relief. Seeking an injunction in an interlocutory procedure is the swiftest way for business users or other market participants to avoid being harmed by the anticompetitive behaviour of digital platforms.

b. Business users are not (necessarily) afraid to take big tech companies to court

Private antitrust enforcement against digital gatekeepers with their superior resources and overwhelming bargaining power can be seen as an uphill battle: aggrieved parties that go to court may expect to be outgunned in litigation and fear retaliation. However, the above court cases show that individual private rights of action can still play an important role in enforcing competition law against big tech companies. What are the reasons for this?

Certainly, when a digital gatekeeper’s monetisation model is challenged through litigation, fierce resistance is to be expected. However, this is not necessarily the case with private antitrust litigation, such as when individual users invoke antitrust law to regain access to their Amazon Marketplace, Google Ads or Facebook accounts, and the platforms refuse, arguing that the users

49. LG Berlin 19.2.2016, 92 O 5/14 Kart, Juris.

50. LG Düsseldorf 18 April 2024, 14d O 1/23 – *Filmwerkstatt Düsseldorf*, Juris.

have, for example, sold counterfeit products, used inappropriate advertising slogans and so on.

Admittedly, the situation is different if, for example, an Apple retailer banned from Amazon Marketplace successfully sued its way back onto the platform by claiming that the branding agreement between Amazon and Apple violates antitrust law.⁵¹ At that point, Amazon would certainly have to worry about the legal validity of a key business strategy and would therefore have an incentive to play hardball. For its part, the business user may have little to lose and will take every opportunity to challenge the platform ban. Moreover, when it comes to access to its essential distribution channel, the business user may have an incentive to exhaust its (limited) financial resources in order to obtain legal protection.⁵²

Moreover, while the big tech companies may be able to afford a take-it-or-leave-it attitude towards (almost) all their business users, there are also users who generate revenue on such a scale that it would be unwise to lose them, and who therefore have at least some countervailing power including pockets deep enough not to shy away from litigation because of the costs involved. Nevertheless, it should not be underestimated that, for fear of retaliation, even relatively big companies, such as large publishing houses, are wary of suing big tech firms for breach of competition law or the DMA.

c. The law protects business users as weaker parties

The law provides some protection for weaker parties, including to some extent in relationships between businesses and platform operators, thereby facilitating the ability of business users to contribute to private enforcement. For example, following the Bundeskartellamt's intervention, Amazon agreed to amend the terms and conditions for its European marketplaces and to abandon the exclusivity of Luxembourg as the place of jurisdiction for Europe.⁵³ This was a key factor⁵⁴ in allowing Amazon's German-based business users to bring private antitrust claims against Amazon in German courts in the above cases, even though the platform operator is based in Luxembourg and Amazon had included

51. See above note 39 and accompanying text.

52. See Franck (n 44), 552.

53. Bundeskartellamt, 17.07.2019, Case B2 – 88/18, *Online Sales ('Amazon Marketplace')*, Case Summary, p. 2. See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilung_en/2019/17_07_2019_Amazon.html. In principle, however, exclusive choice-of-court clauses are effective in B2B contracts. See Article 25 of the Brussels I Regulation (recast). ECJ, 24.10.2018, Case C-595/17, *Apple Sales International and Others*, ECLI:EU:C:2018:854. For more on the need and how EU legislation could do more to protect dependent business users against exclusive forum provisions, see Franck (n 44), EBLR 34 (2023), 525, 553-556.

54. Another decisive factor is the ECJ's ruling that jurisdiction in 'matters relating to tort, delict or quasi-delict' under Article 7(2) of the Brussels I Regulation (recast) also applies where a private antitrust action based on an alleged abuse of a dominant position is directed against conduct occurring in the context of a contractual relationship. See ECJ, 24.11.2020, Case C-59/19, *Wikingerbhof*, ECLI:EU:C:2020:950.

an exclusive forum clause in its contractual terms designating the court of Luxembourg City.

The Spanish competition authority's decision in July 2024 to fine Booking.com could have a parallel effect by allowing hotels based in Spain to bring private antitrust actions in Spanish courts. The authority considered it an exploitative abuse for the platform to impose a clause on Spanish hotels giving the courts in Amsterdam exclusive jurisdiction over disputes.⁵⁵

Given that German sellers on Amazon's marketplace and Spanish hotels using Booking.com's intermediary service are mostly small or medium-sized enterprises, the cost savings of not having to sue these platform operators in Luxembourg City or Amsterdam but instead in German or Spanish courts must be seen as a significant lowering of the barriers to the exercise of private rights of action.

III. FUNDAMENTAL CONCEPTUAL CHOICE: ALIGNING RULES ON DMA INFRINGEMENTS WITH ANTITRUST DAMAGES LAW

The obligations set out in Articles 5, 6 and 7 of the DMA, including the related anticircumvention provisions in Article 13(4) and (6) of the DMA,⁵⁶ confer implicit rights on those affected by a breach. This is because these obligations satisfy the general requirements of direct effect. Moreover, the availability of private rights of action is inherent in the regulatory concept of the DMA.⁵⁷ As I have argued this in detail elsewhere,⁵⁸ and as it does not appear to be disputed in essence and is recognised in particular by the European Commission,⁵⁹ I will take it as my starting point here.

Member States are obliged to protect these (implicit) individual rights under the general principle of sincere cooperation set out in Article 4(3) TEU. They must provide the necessary instruments under national law to enable parties affected by an infringement to bring actions for injunctive relief and damages. In doing so, Member States must observe the principles of equivalence and effectiveness. At this point, we can refer, for example, to well-known statements of the ECJ in *Courage v Crehan* related to private rights of action implicit in Article 101 TFEU:

55. Comisión Nacional de los Mercados y la Competencia, 29.07.2024, S/0005/21 *Booking*, para. 277 ('Any disputes arising out of or relating to this Agreement shall be exclusively referred to the competent courts in Amsterdam, the Netherlands'), paras 556-566 and 584-598.

56. See Franck, J.-U., and Peitz, M., 'The Digital Markets Act and the Whack-A-Mole Challenge', *Common Market Law Review* 61 (2024), 299, 305-306.

57. See in particular Article 13(6) ('rights ... laid down in Article 5, 6 and 7 [DMA]'). See also Articles 39 and 42 DMA.

58. See Franck (n 30), Vorb §§ 33-34a GWB paras 36-47 (at pp 1404-1409).

59. See European Commission, 6.9.2023, Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets ('The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers').

[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).⁶⁰

Thus, *equivalence* requires that the national rules governing private rights of action for breach of the directly effective DMA obligations are no less favourable than those governing similar domestic actions and *effectiveness* requires that the exercise of the rights implicitly conferred by the DMA is not rendered impossible or excessively difficult. While in the above passage the Court referred to national ‘procedural rules’ that must comply with the principles of equivalence and effectiveness, this does not only refer to rules on jurisdiction, time limits, burden of proof and so on. As is clear from the case law of the ECJ, the same standard applies, for example, to the concept of ‘causality’ between the breach of the law and the damage suffered,⁶¹ and therefore to any substantive conditions for damages claims, such as the requirement of fault or the concepts of foreseeability or remoteness of the damage.

Remarkably, to comply with these requirements of EU law, the German legislator opted to extend the scope of the provisions on private antitrust enforcement to infringements of the DMA. Before examining this concept in more detail, it is worth pointing out the possible practical significance of damages actions as a complement to, or substitute for, public enforcement of the DMA by the European Commission.

A. The Importance of the Availability of Damages Claims alongside Public Enforcement: Corrective Justice and Deterrence

There is good reason to believe that damages actions for breach of the DMA may have important potential both in terms of the pursuit of corrective justice and as a reinforcing or stand-alone mechanism for sanctioning, thus deterring, breaches of the DMA.

60. ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Creban and Bernard Creban v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 29.

61. ECJ, 13.7.2006, Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461, para. 64 (‘In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of “causal relationship”, provided that the principles of equivalence and effectiveness are observed’).

1. Pursuit of corrective justice

Damages actions can remedy the harmful effects of a breach of the DMA by putting the victims, ideally, in an economic position that they would have been in but for the breach. The award of damages can thus be said to serve the pursuit of corrective justice: ‘the idea that liability rectifies the injustice inflicted by one person on another’.⁶² In this respect it complements the Commission’s enforcement activities. This is because the latter does not have any powers to confiscate the illegal proceeds from the infringers and to return them to the injured parties. In this context, the ‘fairness’ objective⁶³ underlying the DMA deserves particular emphasis: it justifies the need to grant damages, on the basis of a corrective justice rationale, not only to the platform operator’s consumer users but also to its business users.

The DMA responds to concerns about distributive justice: its obligations on digital gatekeepers are intended to bring about a ‘fairer’ distribution of the economic rents generated throughout the digital value chain.⁶⁴ In recital 33 to the DMA, this is stressed with regard to the business partners who depend on the provision of core platform services:

Market participants, including business users of core platform services and alternative providers of services provided together with, or in support of, such core platform services, should have the ability to adequately capture the benefits resulting from their innovative or other efforts. Due to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services or services provided together with, or in support of, their core platform services.

The protection of the economic interests of the business users, in fact a ‘fairer’ distribution of the gains from trade in their favour, is described in this passage as an essential objective of the DMA. This is an important difference from (general) antitrust enforcement practice. The latter is usually⁶⁵ indifferent to the distribution of economic rents across the value chain – if consumer welfare is not affected. It

62. Weinrib, E. J., ‘Corrective Justice in a Nutshell’, *Toronto Law Journal* 52 (2002), 349. See also Coleman, J., *Risks and Wrongs*, Oxford, Oxford University Press, 1992, reprinted 2003, 191 (‘liability ... rectifies a wrong done, and does not right it’).

63. See recital 7 to the DMA (‘[T]he purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular’).

64. Franck and Peitz (n 55), 310.

65. This is not to deny that, in some cases, antitrust law has been deliberately used to the advantage of individual producer groups, such as farmers or newspaper publishers, for specific political reasons. See Franck, J.-U., and Peitz, M., ‘Digital Platforms and the New 19a Tool in the German Competition Act’, *Journal of European Competition Law & Practice* 12 (2021), 513, 524.

is therefore difficult to derive from the notion of corrective justice which market participants (other than consumers⁶⁶) affected by an antitrust infringement should be compensated and, in particular, to decide where to draw the line between damages for which compensation is mandatory in terms of corrective justice and damages for which compensation may be excluded under legal doctrines such as remoteness, proximate causation, directness of harm, and the like.⁶⁷ In the case of compound products, for example, the only argument that can be made from a corrective justice perspective for suppliers who have suffered losses as a result of the reduction in volume imposed by a downstream cartel is a coherence argument: if the direct customers (that generate the compound product) are compensated as this is viewed as being just and fair, the same should apply to suppliers and separate sellers of complements.⁶⁸

The situation is obviously different with the DMA, because, as we have seen, a primary objective of the DMA is to protect the economic interests of the business users of the core platform services through the obligations imposed on digital gatekeepers, and to do so by redistributing economic rents. The DMA therefore contains clear value judgments in this respect, on the basis of which the pursuit of corrective justice through damages actions necessarily requires that not only consumers but also the said business users be compensated for the damages they suffer as a result of DMA violations.

2. Effective and efficient deterrence of breaches of the DMA

Under EU law, there is a well-established tradition of private rights of action being created with a mission that goes beyond their role as an instrument of corrective justice. They are understood and conceptualised as a tool for the effective enforcement of obligations imposed by EU law. In other words, private rights of action are derived and established precisely to ensure the implementation of EU law.⁶⁹ Indeed, liability for damages has a deterrent effect: the prospect of being held liable for the damage caused will help to prevent breaches of the law, including the obligations enshrined in the DMA. This deterrent function can be substitutive ('stand-alone') or complementary ('follow-on') to the Commission's enforcement activities. When they follow a mere cease-and-desist order, damages

66. At its core, it is arguably undisputed that the essential objective of antitrust law is to protect consumers (including intermediate buyers) from harm. What remains controversial is the operationalisation of this goal.

67. See Franck, J.-U, and Peitz, M., 'Suppliers as Forgotten Cartel Victims', *NYU Journal of Law and Business* 15 (2018), 17, 46-49; Franck, J.-U, and Peitz, M., 'Cartel Effects and Component Makers' Right to Damages', *World Competition* 43 (2020), 209, 237-238.

68. Franck and Peitz, 'Suppliers as Forgotten Cartel Victims' (n 66), 48-49; Franck and Peitz, 'Cartel Effects and Component Makers' Right to Damages' (n 66), 238.

69. This is the quintessence of a long line of case law that goes back to the ECJ's seminal judgment in *Van Gend en Loos*. See ECJ, 5.2.1963, Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1, 12.

actions can ensure that there is a deterrent effect. If they follow a decision to impose a fine, they reinforce the deterrent effect of the latter.

a. Damages actions' potential for added value in deterrence

Several factors need to be taken into account when assessing the effectiveness and efficiency of the threat of liability in deterring infringement. These include, in particular, the relevance of private information about infringements, the incentives for injured parties to sue, the social costs of litigation, and the amount of damages an infringer must expect to pay if caught. These factors can be operationalised to flesh out and assess the details of liability for damages from a deterrence perspective.⁷⁰ This is not our concern here. However, these factors are also important to better recognise and more generally acknowledge the potential added value of the availability of damages actions as a deterrent mechanism in the context of the DMA.

As already mentioned in relation to the right to injunctive relief, market participants and in particular the business partners of platform operators may often have private information about DMA infringements or at least be aware of suspicious facts. Granting them a right to damages thus creates a mechanism for exploiting this information.⁷¹ The resulting indirect strengthening effect of public enforcement should not be underestimated: if aggrieved parties have a right to damages, this may incentivise them to provide private information about possible infringements to public authorities in the expectation of benefiting from their subsequent enforcement action, as damages may ultimately be more easily obtained based on a finding of infringement by the public authority.⁷²

A glance at the ongoing antitrust damages actions against digital gatekeepers shows that these can reach enormous sums. Even if a gatekeeper has already been fined by the European Commission, it may be that only the threat of (additional) damages claims will have a sufficient deterrent effect.

In addition, it is likely that damages claims for breach of the DMA will also be brought as stand-alone actions, thereby substituting for possible fines in their deterrent function. Unlike cartels, DMA infringements, although often not obvious or easy to prove, are by their nature not clandestine. It is therefore quite possible that they may be sufficiently substantiated in civil proceedings without prior public enforcement, although the legal systems of EU Member States do not typically provide for effective pre-trial discovery procedures.

70. See Franck and Peitz, 'Suppliers as Forgotten Cartel Victims' (n 66), 38-45.

71. Franck, J.-U., 'Private Enforcement versus Public Enforcement', in F. Hofmann and F. Kurz (eds), *Law of Remedies. A European Perspective*, Intersentia, Cambridge, 2019, 107, 122-123.

72. Franck (n 44), 552; Franck and Peitz, 'Suppliers as Forgotten Cartel Victims' (n 66), 38-39.

b. Stand-alone DMA actions: why the DB Station restrictions are not significant

With regard to stand-alone actions for damages for an (alleged) breach of the DMA, it is being considered⁷³ whether national civil courts could be bound by the restrictions or similar requirements for a first intervention by the European Commission as developed by the ECJ in the *DB Station* ruling. They are not, as will be briefly explained here.

To put it in a nutshell, the *DB Station* judgment was based on the following scenario: railway undertakings using Deutsche Bahn's rail infrastructure brought an action before a civil court claiming that charges paid in the past had been in breach of Article 102 TFEU and should therefore be reimbursed to the extent that they were abusively excessive.

The ECJ ruled that this action is not precluded by the fact that a railway regulatory body supervising the Deutsche Bahn is responsible for assessing the fairness of charges; this may be done *ex officio* or following a complaint by a railway undertaking. In the latter case, the Court found, the 'railway undertakings may [also] invoke, before the regulatory body, an infringement of Article 102 TFEU'.⁷⁴

However, the Court imposed two restrictions on the civil courts in dealing with these actions: a prior decision by the regulatory body and cooperation in good faith between the regulatory body and the civil court. The regulatory body must therefore be consulted first and be able to decide on the legality of the fees before the court can decide on the action. The court is not bound by that decision and does not have to wait until any appeal against the regulator's decision has been decided (for example, in parallel proceedings before the administrative courts). However, the court must take into account the decision of the regulatory body and the findings and legal considerations on which it is based when deciding whether there has been an infringement of Article 102 TFEU.⁷⁵

The scenario decided by the ECJ in *DB Station* differs in crucial respects from the situation where a court is seized with a DMA infringement without the European Commission having ruled on the matter beforehand. In *DB Station*, the legality of the charges is assessed on the basis of two different regulatory regimes: on the one hand, the sector-specific provisions of railway regulatory law and, on the other hand, Article 102 TFEU. By imposing restrictive conditions on direct recourse to the civil courts for review on the basis of Article 102 TFEU, the ECJ wanted to ensure that the yardstick of sector-specific regulation was not simply

73. See the blogpost by Elkerbout, R., and Merenlahti, S., 'Looking Ahead at Private Enforcement of the DMA and Why the DB Station Judgment Does Not Hinder Standalone Damages Claims', 31.1.2025, where this position is attributed to A. Komninos. See <https://theplatformlaw.blog/2025/01/31/looking-ahead-at-private-enforcement-of-the-dma-and-why-the-db-station-judgment-does-not-hinder-standalone-damages-claims/>.

74. ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 68.

75. ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, paras 81 to 85.

overlooked.⁷⁶ To use the Court's own words, it wanted to ensure that, 'when a claim based on Article 102 TFEU is brought before the national courts', 'the task of the regulatory body and, hence, the practical effect of Article 30 of Directive 2001/14'⁷⁷ are not 'called into question'.⁷⁸

The Court's reference to the 'task of the regulatory body' also implicitly points to something else: because of its involvement in the enforcement of railway regulation, the authority has particular expertise in cost structures, necessary investments, return on equity, and so on, which is helpful in assessing charges. The ECJ appears to avoid this expertise remaining completely unused due to the direct involvement of the civil courts under Article 102 TFEU.

Regardless of whether one believes that the judgment of *DB Station* was correct or not,⁷⁹ the reasoning behind it obviously does not apply to DMA stand-alone actions. There is only one regulatory regime at stake here: that of the DMA. The judgment in *DB Station* was based on a different scenario, which was crucial to the approach developed there. There is no reason to consider applying these restrictions to stand-alone DMA actions.

It may be that the direct involvement of courts in DMA infringements carries the risk of inconsistent interpretation across the EU. It may also be that the expertise acquired by the Commission through DMA enforcement remains unused. However, this is the natural consequence of the direct effect of the DMA obligations. In this respect, the enforcement of the DMA is not fundamentally different from, for example, the enforcement of Articles 101 and 102 TFEU. Ultimately, it is the ECJ that can and must ensure consistent interpretation in both cases.

c. DMA-specific risks of public underenforcement: political restraint as a major concern

Several reasons come to mind underlining why there may be a need for deterrence in the form of damages claims to reinforce or even replace public enforcement. There are the well-known general factors that can limit effective public enforcement: limited human resources (lawyers, economists, IT staff etc.) and technical equipment, and imperfect incentives on the part of the bureaucrats responsible for law enforcement, which can lead to inefficient use of available resources and insufficient commitment to adapting enforcement strategies and integrating innovative methods and technologies. This should not lead to

76. ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 83 ('in particular, concerning the application to case at issue of the relevant sectoral rules').

77. Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (no longer in force).

78. ECJ 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 84.

79. For a critical account, see Monti, G., 'Mismanaging the Relationship between Railway Regulation and EU Competition Law: *DB Station*', Working Paper, 30.1.2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342530.

premature judgements about the inferiority of public versus private enforcement.⁸⁰ However, there are certainly starting points for recognising the benefits of private enforcement in parallel with public enforcement.

In addition to these general limitations of public enforcement, there also appear to be DMA-specific risks of underenforcement that need to be considered. On the one hand, there may be certain DMA obligations that, for technical, procedural or other institutional reasons, are not in the focus of the European Commission, which, however, has a monopoly on public enforcement of the DMA.⁸¹ For example, (competition) authorities tend to avoid making statements about what prices should be considered 'fair' (or not). The necessary procedures are resource-intensive, methodologically demanding, vulnerable to attack and therefore sensitive. This is one reason why exploitative abuse proceedings are rare. As Article 6(12) of the DMA requires access to app stores on FRAND terms, this raises the question of the fairness of the fees. If the Commission does not engage in proceedings to assess the fairness of these prices, business users may step in and seek clarification directly from the courts based on claims for damages.

On the other hand, it may be that the future will show that political considerations will lead to a reluctance to enforce the DMA in general. Former Commissioner Margrethe Vestager saw the enforcement of antitrust rules and the DMA against digital gatekeepers as her legacy. Effective enforcement of the DMA was a clear policy priority in the last years of her mandate. Whether this will remain the case under the new commissioner, Teresa Ribera, remains to be seen. In responding to the EP's questionnaire in November 2024, the then commissioner-designate stated that it would be one of her priorities 'to make sure that new tools like the Digital Markets Act ... are effectively enforced and deliver real added value for EU consumers and businesses'⁸² and that she was committed to ensure an 'effective antitrust enforcement ... hand in hand with the vigorous enforcement of the Digital Markets Act, to ensure that European tech start-ups have a real shot at success on these markets'.⁸³

However, it is in the nature of things (and politics) that new developments require new policy priorities. Remarkably, in the mission letter from Commission President von der Leyen to the new commissioner of 1 December 2024, the enforcement of the DMA appears only as the penultimate of 12 tasks in competition

80. See Franck (n 70), 121-128.

81. See Article 38(7) of the DMA ('to support the Commission in its role as sole enforcer of this Regulation'); see also recital 91 to the DMA ('The Commission is the sole authority empowered to enforce this Regulation'). It is true that national authorities are given a supporting role in various contexts, for example in dawn raids and interviews (Article 22 of the DMA) or in the conduct of market investigations (Article 38(6) of the DMA). However, supportive involvement of national authorities in these contexts requires a request from the Commission. They are not allowed to act on their own initiative.

82. Questionnaire to Commissioner-Designate Teresa Ribera, executive vice-president for the Clean, Just and Competitive Transition, https://commission.europa.eu/document/download/b936d64a-6bdd-4fab-8440-ce3b365c599b_en?filename=Ribera-EP-questionnaire.pdf, Question 13, at p. 13.

83. Questionnaire (n 81), Question 10, at p. 11.

policy.⁸⁴ Moreover, with Donald Trump as the new US president and the influential role of big tech tycoons such as Elon Musk, Mark Zuckerberg, Tim Cook and Jeff Bezos, it is foreseeable that the Commission's enforcement of EU regulation of digital gatekeepers will come under political pressure from Washington. During the election campaign, Trump generally spoke in favour of deregulation. US tech giants will be happy to seize on this as the antithesis of the EU's regulatory approach. It was therefore not surprising to see press reports in January 2025 that the European Commission was re-evaluating DMA enforcement in this new light. The report made it sound as if DMA infringement proceedings were now being handled at a 'technical level', but that a 'political level' was being added to this, in which final decisions would be taken on rulings and, in particular, the imposition of fines.⁸⁵ While the European Commission was quick to dismiss these reports,⁸⁶ MEPs who negotiated the DMA, as well as industry and NGO stakeholders, still seem genuinely concerned.⁸⁷ According to media reports from 22 February 2025, US President Trump has threatened to respond with tariff retaliation to EU digital gatekeeper regulation that restricts US firms.⁸⁸ This will certainly have been the subject of internal discussions within the Commission.

Only time will tell whether and to what extent US pressure will have a dampening effect on DMA enforcement. But the current debate is a reminder that, one way or another, the stringency of government enforcement is always dependent on political backing, be it through the provision of resources, guidance or other means of more direct influence. So, where public enforcement shirks, private enforcement can step in and fill enforcement gaps.⁸⁹

84. European Commission, 1.12.2024, Mission Letter, Ursula von der Leyen, President of the European Commission, https://commission.europa.eu/document/download/33d74e86-3a17-472c-ba93-59d1606bbc20_en?filename=mission-letter-ribera_0.pdf&prefLang=de.

85. See Espinoza, J., and Foy, H., 'EU Reassesses Tech Probes into Apple, Google and Meta', Financial Times, 14.1.2025, <https://www.ft.com/content/2c1b6bfd-ce73-451d-8123-0df964266ae8>.

86. See John, B., 'EU Denies Slowing DMA Enforcement', Global Competition Review, 14.1.2025, <https://globalcompetitionreview.com/article/eu-denies-slowing-dma-enforcement>.

87. See Datta, A., 'Widespread Alarm over Commission's Hesitant DMA Enforcement', Euractiv, 30.1.2025, <https://www.euractiv.com/section/tech/news/widespread-alarm-over-commissions-hesitant-dma-enforcement/>.

88. See Datta, A., 'Trump Threatens to Launch Tariff Attack on EU Tech Regulation', Euractiv, 22.2.2025, <https://www.euractiv.com/section/tech/news/trump-threatens-to-launch-tariff-attack-on-eu-tech-regulation/>.

89. However, Article 39(5), second and third sentences, of the DMA may preclude or delay private enforcement as long as a Commission infringement procedure is pending.

B. Damages Actions for DMA Infringements: Implementation under German Law⁹⁰

With the 11th amendment to the German Competition Act, which entered into force on 7 November 2023, the German legislature introduced private law claims for breach of obligations under the DMA. The key conceptual decision taken was to integrate these rights into the existing private antitrust enforcement regime. However, this regime under sections 33 to 34a of the Competition Act has not been declared applicable en bloc.

This regulatory approach raises two fundamental questions which I will address below: what reasons led the legislature to adopt this regulatory approach and what role did EU law considerations play in it? Which provisions of antitrust damages law have been declared applicable to DMA violations (and which have not)?

1. Why were DMA infringements included in the private antitrust enforcement regime?

The German government's explanatory memorandum states that the inclusion of DMA infringements in the established legal regime of private antitrust enforcement will strengthen the private enforcement of DMA obligations and ensure the 'practical effectiveness' of the DMA 'in terms of the European principle of effectiveness'.⁹¹ More specifically, it was stipulated that:

Convergence with the competences under antitrust law lends itself ... to concentrate expertise in this complex and technical area, which is at least very similar to antitrust law in its basic considerations.⁹²

Indeed, in seeking to promote the 'contestability' of digital markets, the DMA wants to enable:

undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.⁹³

90. I was invited as an expert to the public hearing of the Economic Committee of the Deutsche Bundestag on the 11th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen) on 11 June 2023. In my written submission to this hearing, which is available at <https://www.bundestag.de/dokumente/textarchiv/2023/kw24-pa-wirtschaft-11-gwb-novelle-951258>, I essentially supported the government's approach to the implementation of private remedies for DMA violations under German law.

91. Deutscher Bundestag, Drucksache 20/6824, 16.5.2023, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze ('Regierungsbegründung'), 17 and 44.

92. Regierungsbegründung (n 90), 44.

93. Recital 32, 1st sentence, to the DMA.

In this respect,⁹⁴ the DMA pursues a regulatory objective that is consistent with antitrust law and can be understood as procompetitive (ex ante) regulation for the digital sector: the DMA and antitrust law overlap and complement each other in that they share the same goal of keeping markets open, but they use different regulatory approaches and techniques.

Against this background, the inclusion of DMA violations in the private antitrust enforcement regime allowed the German legislature to ensure compliance with its obligation to provide effective and equivalent protection of the (implicit) private rights enshrined in the DMA obligations.

To avoid any misunderstandings: I do not want to claim that this approach was the only option in order to meet the requirements of the principles of 'effectiveness' and 'equivalence'. However, from the point of view of the German legislature, it was certainly a sensible approach to ensure compliance with these principles of EU law and to avoid ongoing debates about possible conflicts with them.

a. Principle of effectiveness

The standard of effectiveness against which national rules on liability for DMA infringements and the procedural law applicable are to be measured is derived from the ECJ's judgments in *Rewe* and *San Giorgio*. In the former judgment, the Court stipulated that national limitation periods for bringing actions must not render it 'impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed.'⁹⁵ Subsequently, in *San Giorgio*, a case concerning the burden of proof applicable to the repayment of charges levied in breach of Community law, the Court added that national provisions that make it 'excessively difficult' to enforce rights deriving from Community law are also contrary to the principle of effectiveness.⁹⁶ Since then, the Court has combined the two statements.⁹⁷

The uncertainty surrounding this standard is a major challenge for national legislators and courts. The inclusion of DMA infringements in national antitrust damages regimes helps to address this challenge: national antitrust damages provisions have repeatedly had to prove their worth before the ECJ. Since the landmark judgment in *Courage*, in which the Court of Justice put an end to the

94. Insofar as it is (also) one of the main objectives of the DMA to ensure a 'fairer' distribution of economic rents between operators of core platform services and their business partners, the DMA differs from (general) antitrust enforcement practice. See above notes 63 and 64 and accompanying text.

95. ECJ, 16.12.1976, Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para. 5.

96. ECJ, 9.11.1983, Case C-199/82, *Amministrazione delle finanze dello Stato v San Giorgio*, ECLI:EU:C:1983:318, para. 14.

97. See, eg, ECJ, 11.11.2015, Case C-505/14, *Klausner Holz Niedersachsen*, ECLI:EU:C:2015:742, para. 40.

strict application of the English common law defence of ‘unclean hands’ against damages claims for breach of Article 101 TFEU,⁹⁸ there has been a growing body of case law testing various elements of national antitrust damages law against the EU effectiveness principle: on rules on limitation periods,⁹⁹ on the bearing of costs for unsuccessful actions,¹⁰⁰ and on the evidential value of final decisions of national competition authorities.¹⁰¹

First, this certainly does not mean that national antitrust damages law always meets the standard of effectiveness set by EU law. However, even leaving aside the ECJ’s specific pronouncements on a particular national legal system on the basis of a preliminary reference from a national court, there are usually lively debates about what adjustments need to be made when interpreting national law on the basis of the principle of effectiveness, taking into account the Court’s jurisprudence.

In addition, Member States must have implemented the EU Competition Damages Directive (which does not apply to DMA infringements¹⁰²) in their antitrust damages laws. As a secondary EU law measure, the Competition Damages Directive must satisfy the requirements of the ECJ’s principle of effectiveness, at least as far as infringements of Articles 101 and 102 TFEU are concerned.¹⁰³ Admittedly, it is not always clear whether this is the case. In Germany, for example, there is a debate as to whether primary law does not require a limitation of the passing-on defence if—for example in the case of dispersed damage—it is not to be expected that indirect purchasers will claim damages.¹⁰⁴ In essence, however, it can be assumed that, where national law correctly transposes the Directive,¹⁰⁵ it also meets the effectiveness requirements of EU law.

Second, the standard of effectiveness for a breach of DMA obligations need not necessarily be the same as for a breach of Articles 101 and 102 TFEU. To give an example, the fact that the main objective of the DMA is (also) fairness in commercial relations between core platform service providers and their business users suggests that the guiding principle of seeking corrective justice through the

98. ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Creban and Bernard Creban v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 28.

99. See, e.g., ECJ, 28.3.2019, Case C-637/17, *Cogeco Communications*, ECLI:EU:C:2019:263, para. 53; ECJ, 12.7.2022, Case C-267/20, *Volvo and DAF Trucks*, ECLI:EU:2022:494, paras 50-57.

100. ECJ, 16.2.2023, Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:2023:99, paras 39-48.

101. ECJ, 20.4.2023, Case C-25/21, *Repsol Comercial de Productos Petrolíferos*, ECLI:EU:C:2023:298, paras 59-64.

102. See Article 1 in conjunction with Article 2(1), (2) and (3) of the Competition Damages Directive.

103. Franck, J.-U., ‘Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm’, *European Law Review* 43 (2018), 837, 846-849 and 851-853. For a contrasting view, see Roth, W.-H., ‘*Courage* and Directive 2014/104/EU’, *Common Market Law Review* 59 SI (2022), 61, 66-73.

104. See Franck (n 30), § 33c GWB para. 14c (at p. 1531).

105. Note the growing body of ECJ case law on the Competition Damages Directive, eg ECJ, 12.1.2023, Case C-57/21, *RegioJet*, ECLI:EU:C:2023:6.

right to damages argues in favour of compensating business users for the harm caused by a breach of the DMA. As explained above,¹⁰⁶ the argument cannot be made in the same way for infringements of Articles 101 and 102 TFEU. In practice, however, this does not make any difference, at least in the example given, because since *Courage* the ECJ has granted ‘any individual’ the right ‘to claim damages for loss ... by conduct liable to restrict competition’¹⁰⁷ and, on this basis, has also considered indirectly caused damage to be compensable, i.e. categories of damage that are often considered as too remote under national law.¹⁰⁸

We can therefore conclude that, although the application of national antitrust damages law to DMA infringements does not guarantee compliance with the effectiveness principle, such an approach serves the effectiveness principle well, in the vast majority of cases certainly better than leaving it to the application of general (national) tort law.

b. Principle of equivalence

Does the EU principle of equivalence require that national rules on damages claims and actions for DMA infringements be at least as favourable to claimants as those for antitrust infringements? The ECJ has so far been reluctant to develop detailed (general) criteria for determining whether certain national rules and the sanctions, including claims for damages, resulting from their breach can indeed be considered as a reference system under the principle of equivalence. For example, in the field of antitrust damages law, the ECJ has stated in *Manfredi* that:

in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to *similar* actions founded on domestic law.¹⁰⁹

We are familiar with this kind of focus on ‘similarity’ from other judgments.¹¹⁰ With regard to the sanctioning of breaches of EU law required by national law, the ECJ stipulated that:

106. See above notes 62 to 64 and accompanying text.

107. ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Creban and Bernard Creban v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 26.

108. See ECJ, 5.6.2014, Case C-557/12, *Kone*, ECLI:EU:C:2014:1317, paras 31-34 (on so-called ‘umbrella pricing’); ECJ, 12.12.2019, Case C-435/18, *Otis*, ECLI:EU:C:2019:1069, paras 33-34 (inflated subsidies as a result of cartelisation).

109. ECJ, 13.7.2006, Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461, para. 93 (emphasis added).

110. ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Creban and Bernard Creban v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 29 (‘provided that such rules are not less favourable than those governing similar domestic actions’); ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, ECLI:EU:C:1997:351, para. 32 (‘similar domestic claims’).

[T]he national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing *corresponding* national laws.¹¹¹

As the Court bases its decision on ‘similarity’ and ‘correspondence’, this may not be particularly precise, but it does make it clear that there is a certain margin of deviation, that is, that the reference materials under national law do not have to be (approximately) identical in terms of the factors relevant to the comparison. These relevant factors can be deduced from the case law: the ‘objective’ pursued¹¹² and the ‘essential characteristics’¹¹³ of the obligations the breach of which entails certain legal consequences under national law.¹¹⁴

The *Draehmpaehl* judgment is an illustration of the ECJ’s willingness to have a broad view of similarity. The Court held that:

It follows ... that provisions of domestic law which, unlike other provisions of domestic civil law and labour law, prescribe an upper limit of three months’ salary for the compensation which may be obtained in the event of discrimination on grounds of sex in the making of an appointment do not fulfil those requirements.¹¹⁵

Thus, the ECJ assumed that there was no objective reason to treat a job applicant’s claim for damages for breach of the prohibition of discrimination less favourably than claims for damages for other breaches of labour and civil law. In particular, the Court did not limit this consideration of equivalence to a comparison with liability for other breaches of the prohibition of discrimination under national law.

With regard to damages claims based on breaches of the DMA, the question therefore arises: are the obligations imposed by the DMA so similar to antitrust law in terms of their ‘objectives’ and ‘essential characteristics’ that domestic antitrust damages law¹¹⁶ must also apply to DMA violations? As we have seen, the

111. ECJ, 21.9.1989, Case C-68/88, *Commission v Greece*, ECLI:EU:C:1989:339, para. 25 (emphasis added).

112. ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, paras 34 and 36.

113. ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, para. 38.

114. With regard to the sanctioning of EU law in general, the Court stated that ‘whilst the choice of penalties remains within [the Member States’] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.’ ECJ 21.9.1989, Case C-68/88, *Commission v Greece*, ECLI:EU:C:1989:339, para. 24.

115. ECJ, 22.4.1997, Case C-180/95, *Draehmpaehl v Urania Immobilienservice*, ECLI:EU:C:1997:208, para. 30.

116. In view of the objective underlying the principle of equivalence and the limited regulatory powers of the EU, provisions of national law that are entirely determined by EU law should arguably not be regarded as adequate reference material. This may be the case, for example, with national law on antitrust damages to the extent that it transposes (fully harmonising) provisions of the Competition Damages Directive.

objectives of the DMA—in short, the contestability and fairness of digital markets—and antitrust law are not identical but overlap.¹¹⁷ Moreover, while both sets of rules address forms of economic power that permit anticompetitive behaviour that restricts competition and exploits other market participants, they differ in the way they identify their addressees and in the way they specify and impose resulting obligations.

Whether the ECJ would indeed find a sufficient degree of ‘similarity’ in this respect for the principle of equivalence to apply seems uncertain, but it is certainly conceivable: a national government would find it difficult to explain to the Court in Luxembourg what differences there are between the DMA and Article 102 TFEU (or corresponding provisions of national competition law) that could justify national rules on damages claims or actions for damages in the case of (alleged) violations of the DMA being less favourable to injured parties than in the case of (alleged) abuse of a dominant position. This is particularly the case because the core of the obligations set out in Articles 5 and 6 of the DMA can be seen as the crystallised or desired outcome of completed or pending¹¹⁸ but also of only anticipated or planned abuse proceedings against digital gatekeepers by the European Commission or Member State competition authorities.

On the other hand, owing to the clandestine nature of cartels, it can reasonably be argued that information asymmetries regarding an infringement are typically less pronounced in the case of DMA violations (and also in the case of abuse of a dominant market position) than in the case of cartels, which may justify more favourable provisions in favour of parties allegedly harmed by cartelisation.¹¹⁹ It is therefore reasonable to conclude that equivalence does not require that provisions of national antitrust damages law that apply only to cartels (and not to all types of antitrust infringements) must also apply to DMA infringements.

There is also a special feature of German antitrust law that makes equal treatment of DMA violations and antitrust violations with regard to damages particularly urgent from the point of view of equivalence: the abuse proceedings under section 19a of the German Competition Act (the so-called ‘19a tool’), which apply specifically to digital gatekeepers. If the Bundeskartellamt has imposed an obligation on a designated digital gatekeeper pursuant to section 19a of the Competition Act, the general provisions on private enforcement, including antitrust damages pursuant to sections 33 et seq. of the German Competition Act, apply in the event of a breach.¹²⁰ This is a strong argument for applying the same to breaches of DMA obligations, as the ‘objectives’ and ‘essential characteristics’

117. See above notes 91 to 93 and accompanying text.

118. See the overview provided by Crémer, J., et al., ‘Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust’, *Journal of Antitrust Enforcement* 11 (2023), 315, 331, Table 1.

119. See Recital 47 to the Competition Damages Directive 2014/104/EU and Article 17(2) of the Directive. As regards the relevance of the determination of national law by EU law and the application of the principle of equivalence, see note 115 above.

120. Franck, J.-U., and Peitz, M. (n 64), 514; Schweitzer, H., ‘§ 19a GWB’ [Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets], in T. Körber, H. Schweitzer

of obligations under section 19a of the Competition Act are particularly close to the DMA's approach, in the following ways.¹²¹

First, this instrument applies only after a designation decision by the Bundeskartellamt, deciding that a platform operator qualifies as an undertaking of 'paramount significance for competition across markets'. In essence, section 19a of the Competition Act is aimed at firms that provide key intermediation services and thus control an interface between markets. While the actual criteria used in the provision do not limit the scope of the instrument to digital business models (however precisely defined), the '19a tool' is clearly aimed at the digital gatekeepers. So far, the Bundeskartellamt has designated Amazon,¹²² Meta,¹²³ Alphabet,¹²⁴ Apple¹²⁵ and Microsoft¹²⁶ as '19a firms'. Amazon and Apple have appealed against their designation. Both appeals were rejected.¹²⁷ The German '19a tool' therefore applies—at least for the time being—only to companies that have also been designated by the European Commission as DMA gatekeepers.¹²⁸

Second, the Bundeskartellamt can prohibit the designated undertaking from engaging in conduct falling within any of seven categories listed in the provision (ranging from self-preferencing by vertically integrated firms to charging disproportionate compensation to business customers). If a certain conduct of a firm designated under section 19a of the Competition Act falls into one of these categories, it is presumed to be abusive. While this is a notable tightening of the law compared to traditional abuse proceedings, there remain significant differences from the DMA's approach. The imposition of obligations on '19a firms' is not automatic. The latter may invoke objective justification and, even if they do not provide convincing evidence in this respect, the authority must exercise its discretion in making an abuse decision, which requires an assessment of the economic and legal context of each individual case.¹²⁹ Nevertheless, section 19a of the Competition Act shares some of the basic principles of the DMA in which it differs from traditional abuse proceedings. In view of the special features of digital markets, the Bundeskartellamt must give special weight to the long-term objectives associated with the new instrument—limiting economic power, keeping markets open and protecting the competitive process—as opposed to short-term efficiency gains for the benefit of the users of the platform operators. In particular,

and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2, 7th ed., C.H. Beck, Munich, 2024, § 19a GWB para. 249 (at p 829).

121. For an overview of the key features of the '19a tool' see Franck, J.-U. (n 3), 25-32.

122. Bundeskartellamt, 5.7.2022, B2-55/21.

123. Bundeskartellamt, 2.5.2022, B6-27/21.

124. Bundeskartellamt, 30.12.2021, B7-61/21.

125. Bundeskartellamt, 3.4.2023, B9-67/21.

126. Bundeskartellamt, 27.9.2024, B6-26/33.

127. BGH, 23.4.2024, KVB 56/22 – *Amazon*; BGH, 18.3.2025, KVB 61/23 (-) *Apple*.

128. See the Commission's designation decisions of 5.9.2023 on Alphabet (Cases DMA.100011 and others), Amazon (Cases DMA.100018 and DMA.100016), Apple (Cases DMA.100013, DMA.100025, and DMA.100027), Meta (Cases DMA.100020 and others), and Microsoft (Cases DMA.100017, DMA.100023, and DMA.100026).

129. Franck (n 3), 28-31.

attention must be paid to lowering market entry barriers and increasing (potential) competitive pressure in markets dominated by digital gatekeepers, even if this results in some short-term welfare losses.¹³⁰ Consequently, the intervention threshold under section 19a of the Competition Act is significantly lower than in traditional abuse control.

Third, although ‘fairness’ is not a prime guiding principle of the German ‘19a tool’ in the same way as it is of the DMA, clear shifts in this direction can be observed. This is particularly evident from the fact that pursuant to section 19a(2) of the Competition Act the Bundeskartellamt may intervene where a ‘19a firm’ is ‘demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand’.¹³¹ The rule is inspired by a specific antitrust provision in German law, which is designed to address the abuse of buyer power by dominant firms—particularly retailers in the agri-food supply chain—who demand ‘unjustified advantages from suppliers’.¹³² Like the latter provision, it should therefore be understood as based on a hybrid theory of harm:¹³³ on the one hand, it is true that it serves ‘contestability’ by protecting the interests of platform operators, who, owing to their weaker economic power, are not in a position to impose as favourable conditions on their business users as the digital gatekeepers can. On the other hand, the economic interests of the business users of the digital gatekeepers should be protected from exploitation based on the imbalance of economic power in favour of the digital gatekeepers. The aim here, therefore, is to achieve a fair distribution of economic rents between gatekeepers and their business users – in line with the DMA and in contrast to the standard approach¹³⁴ in antitrust law.

In summary, the ‘19a instrument’ departs in its procedure and content from traditional abuse control and approaches the role of a regulatory instrument aimed at the digital platform industry. It can be seen as the functional equivalent of the DMA under German law. The fact that the ‘19a instrument’ is thus even closer to the DMA than standard antitrust law in terms of its objectives and regulatory approach argues all the more for the application of the principle of equivalence and the imposition of the same consequences under private law in the event of an infringement.

Against this background, even if it is not crystal clear how far the arm of the EU equivalence principle reaches, it appears to be a wise step on the part of the German legislature to include DMA infringements in the regime of antitrust damages law. It clarifies the status quo under German law and avoids ongoing debates before the courts on the scope of the EU equivalence principle in cases of DMA infringements.

130. Franck (n 3), 31-32.

131. Section 19a(2), 1st sentence, no 7 of the Competition Act.

132. Section 19(2) no 5 of the Competition Act (addressing market-dominant firms). The provision is also applicable to ‘undertakings in relation to [other] undertakings which depend on them’. Section 20(2) of the Competition Act.

133. Franck, J.-U., and Peitz, M. (n 64), 520; Schweitzer (n 119), paras 218-224 (at pp 821-823).

134. See above note 64 and accompanying text.

2. Which provisions of the German private antitrust enforcement regime apply to DMA violations (and which do not)?

Claims for injunctive relief or damages for antitrust infringements are governed by sections 33 to 33h of the Competition Act. These provisions have not been declared applicable en bloc to DMA infringements. However, most—but not all—of them will apply by direct or indirect reference to DMA infringements.

a. How is the integration of DMA infringements technically implemented?

DMA violations were integrated into section 33(1) of the Competition Act, which now reads (emphasis added):

Section 33. Claim for Injunction and Rectification. (1) Whoever violates a provision of this Part [of the Competition Act, scil. sections 1 to 47l] or Article 101 or Article 102 [TFEU] or *Article 5, 6 or 7 of Regulation (EU) 2022/1925* (infringer) or whoever violates a decision issued by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.

Subsequently, section 33a(1) of the Competition Act provides the legal basis for damages and follows on from this, stating that '[w]hoever intentionally or negligently commits an infringement pursuant to Section 33(1) shall be liable to pay damages for any harm arising from the infringement'. In fact, most of the provisions on antitrust damages law are declared applicable to DMA infringements, either directly by including them in the provision or—as in the case of section 33a(1) of the Competition Act—indirectly by declaring the respective provision applicable to an 'infringement pursuant to section 33(1)' of the Competition Act.

b. Which provisions of the antitrust damages law apply to DMA infringements?

The following rules of antitrust law on damages therefore apply to infringements of the DMA:

Pursuant to section 33a(3) of the Competition Act, the lower ***standard of proof*** under Section 287 of the Code of Civil Procedure applies to the ***quantification of the damages*** to be compensated.

The provision on ***interest*** pursuant to section 33a(4) of the Competition Act applies.

The ***binding effect*** of the European Commission decisions on national courts under section 33b of the Competition Act (which transposes Article 9 of the Competition Damages Directive) has been extended to cover both decisions to designate DMA gatekeepers under Article 3 of the DMA and decisions to find a

breach of DMA obligations.¹³⁵ However, as Article 39(5) of the DMA provides that national courts may not take decisions that conflict with Commission decisions, and, as this already has a binding effect in the context of follow-on damages,¹³⁶ this provision is arguably only declaratory in nature.¹³⁷

Such a declaratory transposition of a provision laid down in an EU regulation into national law is challengeable under EU law (Article 4(3) TEU) because it may obscure the Union law character of the underlying rule and undermine the ECJ's role of its ultimate interpreter.¹³⁸ However, the Court has recognised that the reproduction of an EU provision that is already directly applicable cannot be considered a violation of EU law where, for example, the effectiveness of the EU provisions depends on the interaction and combination of national and EU provisions and the repetition of certain elements of an EU regulation is useful 'for the sake of coherence and in order to make them comprehensible to the persons to whom they apply'.¹³⁹ In our context, the German provision can be considered reasonable because Article 39(5) DMA does not explicitly provide for a binding effect for follow-on actions and its interpretation is not free from doubt owing to the lack of relevant ECJ case law. The inclusion of DMA infringements in section 33b of the Competition Act thus avoids uncertainty or speculation that the German legislator intended no binding effect or only a weaker binding effect than for antitrust infringements.¹⁴⁰ However, German courts should not overlook the fact that Article 39(5) of the DMA applies alongside section 33b of the Competition Act and may have a broader binding effect in various scenarios (e.g. non-final Commission decisions, actions for injunctions or for the nullity of a contract based on a violation of the DMA, or findings going beyond the violation itself).¹⁴¹

The **passing-on defence** under section 33c(1) of the Competition Act (which implements Article 13 of the Competition Damages Directive), including the lower standard of proof for quantifying the passing-on effect under section 33c(5) of the Competition Act, also applies to DMA infringements.

In principle, the **joint and several liability** provisions of section 33d(1) and (2) of the Competition Act¹⁴² are also applicable, as this provision applies to all 'infringements within the meaning of Section 33a(1)' of the Competition Act,

135. Franck (n 30), § 33b para. 12b.

136. In the context of Article 16(1) of Regulation 1/2003, on which Article 39(5) of the DMA is modelled, this is clear from ECJ, 6.11.2012, Case C-199/11, *Otis and others*, ECLI:EU:C:2012:684, para. 51.

137. Franck (n 30), § 33b para. 8a.

138. ECJ, 10.10.1973, Case C-34/73, *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, ECLI:EU:C:1973:101, para. 11 ('Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it').

139. ECJ, 28.3.1985, Case C-272/83, *Commission v Italy*, ECLI:EU:C:1985:147. para. 27.

140. Franck (n 30), § 33b para. 8a.

141. Franck (n 30), § 33b para. 8b.

142. Transposing Article 11(1) and (5) of the Competition Damages Directive.

which in turn refers to section 33(1) of the Competition Act, which includes DMA infringements. However, given the essentially unilateral nature of DMA infringements, it is not clear what practical relevance this could have. The same can be said for the provision on the '**effect of consensual settlements**' pursuant to section 33f of the Competition Act, which transposes Article 19(1) to (3) of the Competition Damages Directive.

The **rights of disclosure** and provision of information under sections 33g, 89b and 89c of the Competition Act also apply to (possible) DMA infringements.

The rules on **limitation periods** under section 33h of the Competition Act apply to claims for damages arising from violations of the DMA in the same way as to claims for damages under competition law. In particular, section 33h(6) no. 3 of the Competition Act provides that the limitation period is suspended if the European Commission or an authority of a Member State within the meaning of Article 38(7) of the DMA takes investigative measures in respect of a DMA infringement.

DMA infringement actions are subject to the same **jurisdictional rules** as antitrust actions under sections 87 and 89 of the Competition Act. This means that the advantages of a concentration of jurisdiction in certain regional courts and a certain specialisation of judges also apply to actions based on DMA infringements.

Finally, under section 90 of the Competition Act the **Bundeskartellamt** may also participate as **amicus curiae** in DMA civil litigation, and under section 90a of the Competition Act the authority has the same function as a hinge for the flow of information between national courts and the Commission as in antitrust proceedings.

c. Which provisions of the antitrust damages law do not apply to DMA infringements and why?

Provisions of antitrust damages law that specifically refer to 'cartels' do not apply to DMA infringements. For example, Article 17(2) of the Competition Damages Directive provides that '[i]t shall be presumed that cartel infringements cause harm'. This (rebuttable) presumption, including the definition of a 'cartel',¹⁴³ has been transposed into German law by section 33a(2) of the Competition Act, which, however, will not apply to DMA infringements. The reason for this is that infringements of the DMA are in fact to be regarded as conduct corresponding to the (unilateral) abuse of market power. It was therefore considered inappropriate to apply to DMA infringements provisions that are specifically related to the prohibition of cartels or other forms of illegal coordination.

¹⁴³. Article 2 no. 14 of the Competition Damages Directive defines which infringements are to be considered 'cartels'.

Similarly, the privileges granted to immunity recipients and to small and medium-sized enterprises (SMEs) in the case of joint and several liability¹⁴⁴ do not apply to DMA infringements, as they seem pointless from the outset: DMA infringers cannot benefit from leniency rules and, by definition, are not SMEs.

The situation is different with regard to section 33c(2) and (3) of the Competition Act, which implements Article 14(2) and (3) of the Competition Damages Directive, according to which, under certain conditions, indirect purchasers claiming pass-on (as a ‘sword’) are entitled to a presumption that the direct purchasers have passed on to them the damage caused by an antitrust infringement. While this presumption also applies in abuse of dominance cases, it does not apply to infringements of the DMA. It appears, thus, that the German legislature considered the presumption to be rather far-reaching—in particular as it applies to indirect customers or suppliers at all market levels¹⁴⁵—and therefore wanted to limit its scope to what is required by the Competition Damages Directive.

IV. CONCLUDING REMARKS

The seeds of antitrust damages actions against digital gatekeepers seem to have been sown. But will the seedlings be able to grow? Looking at the relevant institutional framework in Germany, it is very much in the eye of the beholder whether the proverbial glass is half full or half empty: while there is certainly considerable room for improvement, the conditions are for the most part neither specifically obstructive nor conducive to antitrust damages actions.¹⁴⁶ Three sensitive issues should be highlighted: access to evidence; the bundling of claims and financing of litigation; and the availability of spirited judges with expertise in antitrust damages cases.

First, German procedural law does not provide for pre-trial discovery, as is typical in US-style civil litigation. Whether and to what extent the rights to disclosure of evidence as they result from Article 5 of the Competition Damages Directive and its transposition into national law¹⁴⁷ constitute an effective equivalent seem uncertain. In any event, as far as can be seen, competition damages actions are either follow-on actions or actions based to a significant extent on the results of investigations by the Commission or a national antitrust authority.

144. See Article 11 of the Competition Damages Directive, as transposed in section 33d(3) to (5) and in section 33e of the Competition Act.

145. Franck (n 30), § 33c paras 33 to 37.

146. That was my observation five years ago and I think it is still true today. See Franck, J.-U., ‘Private Enforcement in Germany’, in F. Wollenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 77, 99.

147. Section 33g of the Competition Act.

Second, German procedural law does not provide for class actions. The Consumer Rights Enforcement Act (*Verbraucherrechtsetzungsgesetz*), which came into force in October 2023, provides for a possibility of legal action that has some features of an opt-out class action. The Act applies (only) to claims by (end) consumers and small businesses. In principle, it applies to all private law disputes and therefore also to claims for damages for breach of competition law¹⁴⁸ or breach of the DMA.¹⁴⁹ Whether this form of collective action will be effective in practice for antitrust damages actions or DMA damages actions remains to be seen. In particular, the restrictions on third-party funding give cause for scepticism: third parties may only be promised a maximum of 10 per cent of the damages recovered.¹⁵⁰

Given the lack of a class action instrument, the so-called ‘assignment model’ has been established in Germany for several years:¹⁵¹ antitrust claims are assigned to SPVs that have been set up for the sole purpose of pooling claims. The assignees do not then bear the costs of the litigation but must agree to a fee, which is known to be between 20 and 50 per cent of the amount of damages ultimately obtained from the infringer.¹⁵² While, thus, the risk of default remains essentially with the assignor, it is established case law that the assignee is entitled to bring an action against the infringer. Without going into detail at this point, it can be assumed that antitrust (or DMA) damages claims can be bundled via the assignment model, so that there is also a stable basis for the involvement of litigation funds. However, so far there has been no precedent-setting ruling by the *Bundesgerichtshof* specifically on antitrust damages claims, so there remains a degree of uncertainty. Moreover, the bundling of claims through the assignment model is in any case cumbersome and costly. It is not a viable option for the bundling of scattered and low-value claims, as is typical in the case of antitrust damages suffered by end consumers.

Third, the German law on the organisation of the courts allows for a certain degree of specialisation of the judges dealing with antitrust cases at trial court level.¹⁵³ Although there are nowadays specialised chambers for antitrust cases before the regional courts throughout Germany, the potential for developing expertise is often not fully exploited. One of the reasons for this may be the fact that the judges in the (specialised) chambers in charge of the case are apparently subject to frequent changes. Moreover, both empirical evidence gathered by

148. Note that the 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, does not apply to infringements of competition law. In this respect, there has been a widening of the scope of the Directive by the German legislator in the transposition of its provisions.

149. See Article 42 of the DMA.

150. Section 4(2) no. 3 of the Act.

151. See Franck (n 145), 115-116.

152. See, e.g., above n 25.

153. See Franck (n 145), 101.

academics¹⁵⁴ and anecdotal evidence from lawyers suggests that the expertise and enthusiasm with which courts handle antitrust damages cases varies considerably. In response, plaintiffs strategically seek to exploit the procedural leeway afforded by local jurisdiction and bring antitrust damages claims in courts where they expect to find an experienced judge with a hands-on approach.¹⁵⁵ However, this only seems to go part way towards overcoming the major obstacle that judges have no incentive to bring antitrust damages cases before their chambers; on the contrary, avoiding such cases can be good for their careers. The reason for this is the system used to measure the performance of judges. A key parameter is the number of cases completed within a given time frame. As antitrust damages cases tend to be exceptionally large and complex, their handling should be highly rewarded. However, this is not the case.¹⁵⁶ This could be changed by the *Länder*, the German states, which are responsible for the rules governing the administration of justice, but there does not seem to be any significant interest in attracting antitrust damages litigation.¹⁵⁷

These three issues are certainly relevant to all types of antitrust damages claims. However, plaintiffs in actions against digital gatekeepers may be particularly sensitive in this respect. The relevant antitrust violations may be complex and require a willingness on part of the courts to familiarise themselves with the technological and economic particularities of the business models of two-sided (digital) platforms. This may be particularly important because—in contrast to standard damages actions following on fined hardcore cartels—there is considerable potential for stand-alone actions or actions based (only) in part on an authority's findings but without a binding finding of an infringement. Moreover, effective access to evidence is key to the success of such actions. In addition, digital gatekeepers have deep pockets and can therefore use all available mechanisms to make litigation burdensome, lengthy and expensive. This type of litigation therefore requires a large up-front investment, especially when it comes to stand-alone actions and the bundling of a large number of claims.

What is generally true of antitrust damages actions is therefore even more true of actions against digital gatekeepers: There is a great sensitivity to the institutional framework. There is a strong need for clear procedural and substantive rules and for independent and competent judges with a pragmatic approach who are committed to getting this complex litigation off the ground and bringing it to a speedy and efficient conclusion. Uncertainty about these institutional factors is a major cost. Against this background, it remains to be seen how the German courts will develop as a venue for antitrust (and possibly DMA) damages claims against digital gatekeepers.

154. See Bechtold, S., Frankenreiter, J., and Klerman, D., 'Forum Selling Abroad', *Southern California Law Review* 92 (2019), 487, 538-544.

155. Bechtold, Frankenreiter and Klerman (n 153), 538.

156. Bechtold, Frankenreiter and Klerman (n 153), 542-543.

157. Bechtold, Frankenreiter and Klerman (n 153), 543-544.

V. BIBLIOGRAPHY

- BECHTOLD, S., FRANKENREITER, J., and KLERMAN, D., 'Forum Selling Abroad', *Southern California Law Review* 92 (2019), 487-556.
- COLEMAN, J., *Risks and Wrongs*, Oxford, Oxford University Press, 1992.
- CRÉMER, J., et al., 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust', *Journal of Antitrust Enforcement* 11 (2023), 315-349.
- DATTA, A., 'Widespread Alarm over Commission's Hesitant DMA Enforcement', Euractiv, 30.1.2025.
- DATTA, A., 'Trump Threatens to Launch Tariff Attack on EU Tech Regulation', Euractiv, 22.2.2025.
- ELKERBOUT, R., and MERENLAHTI, S., 'Looking Ahead at Private Enforcement of the DMA and Why the DB Station Judgment Does Not Hinder Standalone Damages Claims', The Platform Law Blog, 31.1.2025.
- ESPINOZA, J., and FOY, H., 'EU Reassesses Tech Probes into Apple, Google and Meta', Financial Times, 14.1.2025.
- FRANCK, J.-U., 'Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm', *European Law Review* 43 (2018), 837-857.
- FRANCK, J.-U., 'Private Enforcement versus Public Enforcement', in F. Hofmann and F. Kurz (eds), *Law of Remedies. A European Perspective*, Intersentia, Cambridge, 2019, 107-131.
- FRANCK, J.-U., 'Private Enforcement in Germany', in F. Wollenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 77-116.
- FRANCK, J.-U., 'Individual Private Rights of Action under the Platform-to-Business Regulation', *European Business Law Review* 34 (2023), 525-562.
- FRANCK, J.-U., 'Abuse Proceedings against Digital Gatekeepers under Section 19a of the German Competition Act: Taking Stock of Early Results', in J. I. Ruiz Peris and C. Estevan de Quesada (eds), *New European Competition Trends in Digital Markets*, Atelier, Barcelona, 2024, 23-51.
- FRANCK, J.-U., 'Vorb §§ 33-34a' to '§ 33h GWB' [German Antitrust Damages Law], in T. Körber, H. Schweitzer and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2, 7th ed., C.H. Beck, Munich, 2024, 1382-1648.
- FRANCK, J.-U., and PEITZ, M., 'Suppliers as Forgotten Cartel Victims', *NYU Journal of Law and Business* 15 (2018), 17-59.
- FRANCK, J.-U., and PEITZ, M., 'Cartel Effects and Component Makers' Right to Damages', *World Competition* 43 (2020), 209-240.
- FRANCK, J.-U., and PEITZ, M., 'Digital Platforms and the New 19a Tool in the German Competition Act', *Journal of European Competition Law & Practice* 12 (2021), 513-528.
- FRANCK, J.-U., and PEITZ, M., 'The Digital Markets Act and the Whack-A-Mole Challenge', *Common Market Law Review* 61 (2024), 299-344.
- HEINZ, S., 'Dutch Torpedo at Work – AG Collins' Opinion in the Booking Case', *Kluwer Competition Law Blog* 27.6.2024.

- HÖPPNER, T., VOLMAR, M., and WESTERHOFF, P., 'The French Competition Authority Fines a Big Tech Company €220 Million for Abuse of a Dominant Position through Self-Preferencing in the Ad Tech Industry (Google Adx / Google DoubleClick for Publishers)', *Concurrences, E-Competition News Issue June 2021*, N°102324.
- JOHN, B., 'EU Denies Slowing DMA Enforcement', *Global Competition Review*, 14.1.2025.
- MEIJER, R., and ZIPPRO, E.-J., 'Private Enforcement in the Netherlands', in F. Wol-lenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 143.
- MONTI, G., 'Mismanaging the Relationship between Railway Regulation and EU Competition Law: *DB Station*', Working Paper, 30.1.2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342530.
- ROTH, W.-H., 'Courage and Directive 2014/104/EU', *Common Market Law Review* 59 SI (2022), 61-74.
- SCHWEITZER, H., '§ 19a GWB' [Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets], in T. Körber, H. Schweitzer and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2 (7th ed., C.H. Beck, 2024), 750-831.
- WEINRIB, E. J., 'Corrective Justice in a Nutshell', *Toronto Law Journal* 52 (2002), 349-356.

DAMAGES ACTIONS IN THE DIGITAL SECTOR - CZECH EXPERIENCES WITH THE EU LEVEL IMPACT

JUDr. Jiří Kindl, M.Jur., Ph.D.

Attorney-at-law and partner, Skils s.r.o. advokátní kancelář

Lecturer, Faculty of Law, Charles University in Prague

ABSTRACT: The article examines briefly the evolving landscape of private competition litigation in the Czech Republic, with a particular focus on damages actions in the digital sector and their broader implications for the EU. Despite the limited prevalence of private enforcement in Czechia, where public enforcement by the Office for Protection of Competition dominates, some notable cases such as the *Heureka Group v. Google* and *Seznam.cz v. Google* show a potential for EU-level impact. The article delves in particular into the *Heureka* case, where a preliminary reference to the CJEU clarified previously unaddressed issues surrounding limitation periods, reinforcing the principle of effectiveness in EU competition law. It concludes by assessing the potential future trajectory of these cases and their broader significance for private damages claims within the EU.

Keywords: Competition Law, Private Enforcement, Damages Actions, Digital Sector, Czech Republic, Limitation Periods, Damages Directive (2014/104/EU), Article 102 TFEU, Principle of Effectiveness

SUMMARY: I. INTRODUCTION. II. BACKGROUND AND LIMITED PROSPECTS FOR DAMAGES ACTIONS IN THE DIGITAL SECTOR IN CZECHIA. III. CASES AGAINST GOOGLE HEUREKA GROUP V. GOOGLE AND SEZNAM.CZ V. GOOGLE AND ALPHABET. IV. HEUREKA CASE IN MORE DETAIL – CONTEXT AND EU LEVEL IMPACT. A. Facts of The Case and Its Procedural Development. B. Preliminary Questions Asked. The Lawsuit and Parties' Arguments. C. Answers Given by the Court of Justice. V. CONCLUSION AND IMPACT BEYOND – WHAT HAPPENS NEXT. VI. BIBLIOGRAPHY.

I. INTRODUCTION

Private competition litigation complements the public enforcement of competition law. That holds true also in the Czech Republic. However, the current experiences with private competition litigation in the Czech Republic are quite limited. Nevertheless, when some cases progressed, they brought about lessons that are transferrable to other jurisdictions within the European Union. This followed from the fact that those cases got through a preliminary reference to the Court of Justice of the EU which then addressed legal issues relevant for the private enforcement of competition law across the whole EU. Also, experiences with the enforcement of competition law in digital markets are not significant and yet there are two significant private damages claims lodged by Czech companies against Google which show that it is worthy to have a better look on the Czech experiences with the damages actions in the digital sector.

This paper is structured as follows. In the subsequent part (II.), I will briefly describe the current status and background of private litigation in the Czech Republic and I will show that such a general background seems to point to only limited prospects for damages actions in the digital sector in Czechia. In Part III., I will describe briefly the two important damages actions that were lodged against Google in Czechia. Part IV., would focus on explaining the so-called *Heureka* case¹ and how it was decided by CJEU. In Part V., I will conclude also considering what we could expect in the said cases and more broadly going forward.

II. BACKGROUND AND LIMITED PROSPECTS FOR DAMAGES ACTIONS IN THE DIGITAL SECTOR IN CZECHIA

In general, competition law (both national and the EU one) is enforced in the Czech Republic primarily through the public enforcement which is vested in the Office for Protection of Competition (hereinafter the “Office”).² However, competition law can and is also enforced through private litigation which is entrusted to (non-specialized) civil courts. The main legal basis for private actions based on competition law infringements follows, at present, from Section 2990 of the Czech Civil Code³ which sets out the main types of legal claims one can make against competition law infringements, including cease-and-desist claims, restitution claims and damages claims (also including compensation for non-pecuniary harm).⁴ More details and enhancements to the private competition

1. Judgment of the Court, Case C-605/21 *Heureka Group a.s. v. Google LLC* (ECLI:EU:C:2024:324).

2. See, e.g., its website <https://uohs.gov.cz/en/homepage.html> (15 March 2025).

3. Act No. 89/2012 Coll., the Civil Code, as amended.

4. For a commentary to the respective provision see, in general, KINDL, J. “[§ 2990]“ In Melzer, F., Tégl, P. et al, *Občanský zákoník – velký komentář*. Vol. IX. § 2894-3081, Leges, Prague, 2018, pp. 1228-1236.

litigation were introduced by Act No. 262/2017 Coll., On Damages in the Area of Competition, which implemented the EU directive 2014/104/EU (hereinafter also as the “Damages Directive”).⁵ The said Act entered into force on 1 September 2017.⁶ Despite these legislative efforts the private litigation based on competition law enforcements in the Czech Republic is not common and this holds true not just for the digital sector but also for other parts of the economy as well.⁷ Follow-on actions based on Article 101 and/or Article 102 TFEU infringements have been quite rare⁸ and one could find primarily stand-alone actions in disputes between sophisticated parties e.g. in connection with alleged abuses of dominant position or in connection with vertical restraints which were, moreover, also connected with the so-called unfair competition.⁹ When those cases progress they in some cases end up in front of the Court of Justice of the EU. This was the case of the already mentioned *Heureka* case and also of the so-called *RegioJet* case¹⁰ which involved questions relating to disclosure of evidence under the EU directive 2014/104/EU and the Czech Act implementing it. Accordingly, even relatively rare cases bring about lessons applicable across the EU.¹¹

5. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. OJ L 349, 5.12.2014, p. 1-19.

6. For a commentary to the said Act, see e.g. KINDL, J., PAVELKA, T., HUBKOVÁ, P. *Zákon o náhradě škody v oblasti hospodářské soutěže. Komentář*. 1st edn, C.H. Beck, Prague, 2019.

7. For a general overview concerning the status of private competition litigation in the Czech Republic, see e.g. KINDL, J. “Soukromé vymáhání soutěžního práva” In Kindl, J. et al. *Soutěžní právo*. 3rd edn, C.H. Beck, Prague, 2021, pp. 831-856, or MIKULÍKOVÁ, L. “Soukromé vymáhání soutěžního práva” In Kupčík, J. et al. *Moderní soutěžní právo*. C.H. Beck, Prague, 2024, pp. 625-727. For a more historical account, see, e.g., KINDL, J., PETR, M. “Czech Republic” In Blanke, G., Nazzini, R. (ed) *International Competition Litigation. A Multi-jurisdictional Handbook*. Kluwer Law International, 2012, pp. 73-122.

8. There was, however, recently a success in a follow-on damages action based on the predatory pricing infringement by a dominant bus operator which was sanctioned by the Czech Office for Protection of Competition. See the judgment of the Regional Court in Brno of 13 December 2022, Ref.No. (17) 25 Cm 141/2011-1466 (*ASIANA Transport, s.r.o. v. STUDENT AGENCY k.s.*) and the judgment of the High Court in Olomouc of 31 January 2024, Ref.No. 4 Cmo 31/2023-1531. The two cases initiated in Czechia against Google which will be discussed below are also of the follow-on nature.

9. These include, for instance, the so-called Prague-Ostrava saga where new railway entrants RegioJet and LEO Express alleged that the railway incumbent České dráhy, a.s. (Czech Railways) abused their dominant position on the long-distance line Prague-Ostrava and lodged damages claims against the incumbent. However, despite one of those cases being still pending most were terminated (settled with no damages payments) after the European Commission closed its proceedings against Czech Railways with a no infringement finding. See, e.g., the resolution of the Municipal Court in Prague of 23 June 2023, Ref.No. 21 Cm 14/2014- 1433 (*LEO Mobility s.r.o. v. České dráhy, a.s.*) or the resolution of the Municipal Court in Prague of 17 April 2024, Ref.No. 32 Cm 23/2015- 857 (*RegioJet a.s. v. České dráhy, a.s.*).

10. Judgment of the Court, Case C-57/21 *RegioJet a.s. v. České dráhy, a.s.* (ECLI:EU:C:2023:6).

11. For the discussion of the RegioJet case see, e.g., Kindl, J. “Case C-57/21 RegioJet as v Ceske drahy as – Key Facts and Main Takeaways For Evidence Disclosure Procedures In Private Competition Litigation in the EU” In Marti C.R., Ruiz Peris, J.I. (eds) *In-depth training on current issues in competition damages claims*, University of Valencia, 2023.

The situation of competition law enforcement in the digital sector in the Czech Republic is also quite limited and that applies also as regards the public enforcement by the Office. There have been so far just a few cases where the Office enforced competition law rules in the digital sector. One can mention *Booking.com B.V.* case¹² decided in November 2019, where the fining decision of the Office was later confirmed by judicial review courts, or *CHAPS spol. s r.o.* case¹³ decided first in January 2018 (cancelled in judicial review), newly decided in January 2023 (now pending in judicial review). In neither of those cases, however, private litigation followed. There might be some other cases in the “pipeline” but information is scarce.¹⁴ And, despite all that, there still are two significant private litigation cases pending in Czechia which both involve the digital sector. We will discuss those briefly in turn.

III. CASES AGAINST GOOGLE – HEUREKA GROUP V. GOOGLE AND SEZNAM.CZ V. GOOGLE AND ALPHABET

Those two cases were both lodged against Google in the wake of the previous Commission’s decisions finding infringements of Article 102 TFEU by Google. The first one is the already mentioned *Heureka* case¹⁵ where the damages claim was lodged in 2020 as a follow-on case subsequent to *Google shopping* decision of the Commission.¹⁶ The claimant in that case (who is a comparison search shopping Czech website operator) sued Google for CZK 394.857.000,- (approx. EUR 15,6 million) and the case is still pending. Given the importance of that case which ensued from its referral to the Court of Justice, it will be discussed below in a more detail separately. The second case is a damages claim lodged by *Seznam.cz* who is one of the most successful Czech-owned internet companies active in many areas (internet search, advertising, media etc.). It sued Google and its parent company Alphabet in 2021 for damages in the amount of CZK 10.238.732.000,- (approx. EUR 405,1 million).¹⁷ It is a follow-on claim based on the *Google Android* decision of the Commission.¹⁸ However, the case has not yet progressed much because the Municipal Court in Prague suspended in 2022 its proceedings until the end of judicial review proceedings before the Court of

12. Ref.No. S0664/2015/KD.

13. Ref.No. S669/2013/DP.

14. The Office initiated formal proceedings against Seznam.cz, a.s. in August 2024 for an alleged abuse of dominant position in connection with an on-line portal intermediating selling of real estate (Ref.No. S0629/2024/DP). The Office also investigated Google but closed the investigation in the pre-proceedings stage due to voluntary commitments by Google – see Office’s press release of 8 January 2025: <https://uohs.gov.cz/en/information-centre/press-releases/competition/4088-google-made-changes-to-one-of-its-services-in-reaction-to-the-investigation-of-the-office.html> (15 March 2025).

15. The case is pending before the Municipal Court in Prague under Ref.No. 1 Cm 22/2020.

16. Commission’s decision of 27 June 2017, Case AT.39740 *Google Search (Shopping)*.

17. The case is pending before the Municipal Court in Prague under Ref.No. 2 Cm 31/2021.

18. Commission’s decision of 18 July 2018, Case AT.40099 *Google Android*.

Justice.¹⁹ The proceedings in front of the CJEU are still pending as the General Court's judgment²⁰ partly annulling and partly confirming the Commission's decision was appealed to the Court of Justice.²¹

IV. HEUREKA CASE IN MORE DETAIL – CONTEXT AND EU LEVEL IMPACT

A. Facts of The Case and Its Procedural Development

As mentioned above, *Heureka* is a Czech comparison search shopping website and likely the most successful one in the Czech Republic. It is not surprising that it felt harmed by Google's conduct described in the Commission's in *Google Shopping*. After it lodged the claim, Google defended itself, *inter alia*, via invoking statutes of limitation to a part of the claimed damages. In other words, Google claimed that Heureka's claim was time barred (at least in part) due to the expiry of limitation periods. The Municipal Court in Prague submitted a preliminary reference to the CJEU in September 2021 that mostly related to the issues of limitation periods.²² The case came in front of the CJEU and was ultimately assigned to the Grand Chamber. Advocate General Kokott issued her opinion in September 2023²³ and CJEU then delivered its judgment in April 2024.²⁴

As the case focuses on the interpretation of the temporal aspects of the law applicable to compensation for harm caused by competition law infringements, it is important to establish the dates of the relevant events. Pursuant to the Commission's decision, Google infringed Art. 102 TFEU from February 2013 to June 2017. During that period, there was no specific law in the Czech Republic concerning compensation for harm in the field of competition. However, on 27 December 2016, the deadline for transposing the Damages Directive expired. The Czech Act No. 262/2017 Coll., which transposed the Damages Directive, entered into force, as mentioned above, on 1 September 2017, i.e., only after the infringement as declared in the *Google Shopping* decision had terminated.

19. Resolution of the Municipal Court in Prague of 20 January 2022, Ref.No. 2 Cm 31/2021- 103.

20. Judgment of the General Court, Case T-604/18 *Google and Alphabet v Commission (Google Android)* (ECLI:EU:T:2022:541).

21. The case is pending under Case C-738/22 P. The oral hearing took place on 28 January 2025.

22. Resolution of the Municipal Court in Prague of 29 September 2021, Ref.No. 1 Cm 22/2020-231.

23. Advocate General's opinion, Case C-605/21 *Heureka Group a.s. v Google LLC* (ECLI:EU:C:2023:695). For a discussion about the AG's opinion see, e.g., KINDL, J., HOLÁSEK, M. "AG's Opinion in Heureka – On The Temporal Application of EU Damages Directive and Why Does it (Not) Matter", Kluwer Competition Law Blog, 11 October 2023, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/10/11/ags-opinion-in-heureka-on-the-temporal-application-of-eu-damages-directive-and-why-does-it-not-matter/> (15 March 2025). This paper was used for a description on facts relating to *Heureka* case below.

24. Judgment of the Court, Case C-605/21 *Heureka Group a.s. v Google LLC* (ECLI:EU:C:2024:324).

Before the said Act entered into force, the Czech Civil Code applied, in general, a 3-year ‘subjective’ limitation period to claims for compensation for harm caused by competition law infringements (potentially a 4-year period under the old Commercial Code²⁵ could have applied for events predating the entry into force of the Civil Code). The start of that period depended on the claimant’s subjective knowledge of the harm and the identity of the person liable for it. According to the established case law of the Supreme Court at that time, each new occurrence of harm (e.g., each new display of results favouring Google’s price comparison service) would have triggered a new limitation period (and could have been claimed separately). In other words, the limitation period started, ran, and ended not at once in case of lasting infringements but consecutively or gradually in respect of the separate partial harms as the time had passed. Given that Google argued that Heureka’s claim was time-barred (at least partially), as the infringement began in February 2013 and Heureka was allegedly aware of its harm and Google’s identity from the outset. Heureka lodged its claim with the Prague Municipal Court on 26 June 2020.

B. Preliminary Questions Asked

In light of the foregoing, the Municipal Court in Prague asked the CJEU questions about (i) the temporal applicability of the Damages Directive between February 2013 and June 2017, (ii) the compatibility of the previous national rules on limitation periods with Article 10(2) of the Damages Directive and, if applicable, with Article 102 TFEU and with the principle of effectiveness, according to which the rules governing actions for protecting rights derived from EU competition law must not make it practically impossible or excessively difficult to exercise those rights.

The referring court considered that this principle was undermined by the potentially applicable national rules, mainly because (i) they did not include any cessation requirement (i.e., that the limitation period could not start before the infringement ceased), (ii) the subjective element related to the existence of harm and the perpetrator and did not specifically required knowledge about the infringement of competition laws, (iii) they did not suspend the limitation period during the investigation of the infringement by a competition authority and (iv) they could expire before the final decision on the infringement by a competition authority was issued.

Two questions that related to temporal aspects of Article 10 of the Damages Directive were, later on, taken back by the Municipal Court in Prague in light of the CJEU’s judgment in *Volvo and DAF Trucks*.²⁶ Accordingly, those questions were not addressed in the CJEU’s final judgment. They were, however, previously

25. Act No. 513/1991 Coll., the Commercial Code, as amended. The Commercial Code is no longer valid it was replaced by the new Civil Code as of 1 January 2014.

26. Judgment of the Court, C-267/20 *Volvo and DAF Trucks* (ECLI:EU:C:2022:494).

analysed in the opinion of the Advocate General.²⁷ Anyway, the answers the Court finally provided on the limitation periods in light of the Article 102 TFEU and the principle of effectiveness were imperative for the case and can be seen as a support for private competition litigation within the EU from the Court of Justice.

C. Answers given by the Court of Justice

The Court of Justice sitting in the Grand Chamber held that Article 10 of the Damages Directive and Article 102 TFEU, as well as the principle of effectiveness must be interpreted as precluding national legislation, as interpreted by the relevant national courts, which lays down a three-year limitation period applicable to actions for damages in respect of continuing infringements of EU competition law rules and which (i) starts to run, independently and separately for each partial occurrence of harm resulting from such an infringement, from the moment when the injured party knew, or could reasonably be expected to have known, of the fact that it had suffered that partial harm and the identity of the party liable to pay compensation for that harm, without the injured party having had knowledge of the fact that the behaviour concerned constituted an infringement of the competition rules and without that infringement having come to an end, and (ii) may not be suspended or interrupted during the Commission's investigation into such an infringement.²⁸

Furthermore, pursuant to the Court, Article 10 of the Damages Directive also precludes such rules in so far as they do not provide for the limitation period to be suspended, at the very least, until one year after the date on which the decision finding that infringement has become final.²⁹

The ruling of the Court in *Heureka* case effectively means that similar rules on limitation as the ones provided for in the Damages Directive apply also in respect of periods prior to the validity of the Damages Directive on the basis of

27. AG was of the view, based on *Volvo* judgment, that the rules in the Damages Directive concerning limitation periods in Article 10 of the Damages Directive are of a substantive nature (and, hence, cannot be applied retroactively according to Article 22 of the Damages Directive). Furthermore, she concluded that the part of the infringement that happened after the deadline for transposing the Damages Directive generally falls under Article 10 of the Damages Directive. If the Damages Directive was not transposed by then, the national law should be interpreted in line with the Damages Directive, without going against the national provisions (*contra legem*). The AG opined that it should be feasible to interpret the Czech law in accordance with the Directive (and contrary to the Supreme Court's interpretation) but left the verification of that to the national court. In any case, in her view, as regards the period after the deadline for transposing the Damages Directive, the limitation period could not have started to run before the end of the infringement as a whole. For the period before the deadline for transposing the Damages Directive, the AG stated that the starting point of the limitation period is set by the then effective national law.

28. Judgment of the Court, Case C-605/21 *Heureka Group a.s. v Google LLC* (ECLI:EU:C:2024:324), operative part.

29. *Ibid.*

the principle of effectiveness of EU competition rules. From a practical point of view, a defence based on the expiry of (national) limitation periods might be hard to sustain in light of such an approach.

V. CONCLUSION AND IMPACT BEYOND – WHAT HAPPENS NEXT?

The foregoing shows that even in a relatively limited private litigation which is generated in Czechia it can bring about significant cases with an EU level impact, such as the *Heureka* case discussed above. One can then consider what would happen next in light of the Court of Justice's ruling. This question has two levels. One relates to what is going to happen in the specific cases (*Heureka* case and *Seznam.cz* case) in front of the Czech civil courts. The second is what is the impact more broadly. As regards the case-specific level, as mentioned above, *Heureka* case is still pending before the Municipal Court in Prague. It follows from the CJEU's decision that Google's defence based on the expiry of limitation periods is not to be successful. Accordingly, the court will have to deal with the merits. The question might be whether the partial annulment of the Commission's decision in *Google shopping* case³⁰ could have any significant effects on the damages claim. Likely not much, as the annulment concerned just effects in the general search market whereas *Heureka* is a comparison search shopping website operator. Accordingly, the case will probably move into damages quantum stage and economic experts would be involved. Given what is at stake one might expect quite a heavy judicial battle. Of course, unless the case is settled.

Seznam.cz case is also still pending and it remains suspended until the Court of Justice decides about the appeal against the General Court's judgment. In light of the *Heureka* case, it seems obvious that a similar defence of Google based on the alleged expiry of limitation periods is not to be successful. The court will most likely follow *Heureka* case. The further course of action will, hence, primarily depend on the CJEU ruling about the appeal. In this respect, it will be interesting to observe whether there will be a need to 'reconstruct' the damages claim (its quantum) in case the partial annulment by the General Court were to be confirmed and, if so, how. This brings about uncertainty as to the further progress of the case.

Apart from the impact on the two pending cases, one can at the general level, ask what is the importance of the *Heureka* case more broadly for the private competition litigation in the Czech Republic (and potentially elsewhere in the EU). One can conclude that the discussion concerning the temporal application of

30. The General Court partially annulled the Commission's decision in November 2021. See the judgment of the General Court, Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* (ECLI:EU:T:2021:763). The General Court's judgment was confirmed by the Court of Justice in September 2024. See the judgment of the Court, Case C-48/22 P *Google Inc. and Alphabet, Inc. v European Commission* (ECLI:EU:C:2024:726).

the rules stemming from the Damages Directive, which was addressed in *Heureka* case (esp. in AG's opinion) and in some other cases (esp. *Volvo* case) is effectively diminished by Court's interpretation of the requirements of Article 102 TFEU and the principle of effectiveness that were applicable long before the Damages Directive. Such an interpretation allows longer limitation periods (even for the situations prior to the Damages Directive and the Czech Act No 262/2017 Coll. or other national legislative analogues) than the ones that were thought to exist under the Czech civil law prior to the Damages Directive and its implementation. Potential claimants could, hence, submit claims in respect of harm caused by competition law infringements that could have been thought time barred previously. However, the Czech Act No 262/2017 Coll., which transposed the Damages Directive, has been in force for over 7 years now, which quite reduces the practical impact of these findings for damages claims in the Czech Republic as the more pro-claimant provisions concerning limitation periods apply under the said Act anyway. Similar situation should be also elsewhere in the EU. However, given the length of proceedings before the Commission and the age of some infringements which it deals with (which can predate implementation of the Damages Directive) the respective saga may be seen as yet another reinforcement of the private litigation at the EU level because it severely limits circumstances when a defence based on the expiry of limitation periods could be successful.

VI. BIBLIOGRAPHY

Books and Monographs

- BLANKE, G., NAZZINI, R. (ed) *International Competition Litigation. A Multi-jurisdictional Handbook*. Kluwer Law International, 2012
- KINDL, J., PAVELKA, T., HUBKOVÁ, P. *Zákon o náhradě škody v oblasti hospodářské soutěže. Komentář*. 1st edn, C.H. Beck, Prague, 2019
- KINDL, J. et al. *Soutěžní právo*. 3rd edn, C.H. Beck, Prague, 2021
- KUPČÍK, J. et al. *Moderní soutěžní právo*. C.H. Beck, Prague, 2024
- MARTI C.R., RUIZ PERIS, J.I. (eds) *In-depth training on current issues in competition damages claims*, University of Valencia, 2023
- MELZER, F., Tégl, P. et al, *Občanský zákoník – velký komentář*. Vol. IX. § 2894-3081, Leges, Prague, 2018

Journal Articles and contributions to collective works

- KINDL, J. “[§ 2990]“ In Melzer, F., Tégl, P. et al, *Občanský zákoník – velký komentář*. Vol. IX. § 2894-3081, Leges, Prague, 2018, pp. 1228-1236
- KINDL, J. “Soukromé vymáhání soutěžního práva“ In Kindl, J. et al. *Soutěžní právo*. 3rd edn, C.H. Beck, Prague, 2021, pp. 831-856

- KINDL, J. “Case C-57/21 RegioJet as v Ceske drahy as – Key Facts and Main Takeaways For Evidence Disclosure Procedures In Private Competition Litigation in the EU” In Marti C.R., Ruiz Peris, J.I. (eds) *In-depth training on current issues in competition damages claims*, University of Valencia, 2023
- KINDL, J., HOLÁSEK, M. “AG’s Opinion in Heureka – On The Temporal Application of EU Damages Directive and Why Does it (Not) Matter”, Kluwer Competition Law Blog, 11 October 2023, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/10/11/ags-opinion-in-heureka-on-the-temporal-application-of-eu-damages-directive-and-why-does-it-not-matter/> (15 March 2025)
- KINDL, J., PETR, M. “Czech Republic” In Blanke, G., Nazzini, R. (ed) *International Competition Litigation. A Multi-jurisdictional Handbook*. Kluwer Law International, 2012, pp. 73-122
- MIKULÍKOVÁ, L. “Soukromé vymáhání soutěžního práva“ In Kupčík, J. et al. *Moderní soutěžní právo*. C.H. Beck, Prague, 2024, pp. 625-727

Jurisprudence and administrative decisions

National level

- Resolution of the Municipal Court in Prague of 29 September 2021, Ref.No. 1 Cm 22/2020-231
- Resolution of the Municipal Court in Prague of 20 January 2022, Ref.No. 2 Cm 31/2021- 103
- Judgment of the Regional Court in Brno of 13 December 2022, Ref.No. (17) 25 Cm 141/2011-1466
- Resolution of the Municipal Court in Prague of 23 June 2023, Ref.No. 21 Cm 14/2014- 1433
- Judgment of the High Court in Olomouc of 31 January 2024, Ref.No. 4 Cmo 31/2023-1531
- Resolution of the Municipal Court in Prague of 17 April 2024, Ref.No. 32 Cm 23/2015- 857

CJEU

- Judgment of the General Court, Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* (ECLI:EU:T:2021:763)
- Judgment of the General Court, Case T-604/18 *Google and Alphabet v Commission (Google Android)* (ECLI:EU:T:2022:541)
- Judgment of the Court, C-267/20 *Volvo and DAF Trucks* (ECLI:EU:C:2022:494)
- Judgment of the Court, Case C-57/21 *RegioJet a.s. v. České dráhy, a.s.* (ECLI:EU:C:2023:6)
- Advocate General’s opinion, Case C-605/21 *Heureka Group a.s. v Google LLC* (ECLI:EU:C:2023:695)

Judgment of the Court, Case C-605/21 *Heureka Group a.s. v Google LLC* (ECLI:EU:C:2024:324)

Judgment of the Court, Case C-48/22 P *Google Inc. and Alphabet, Inc. v European Commission* (ECLI:EU:C:2024:726)

Commission's Decisions

Commission's decision of 27 June 2017, Case AT.39740 *Google Search (Shopping)*

Commission's decision of 18 July 2018, Case AT.40099 *Google Android*

Legislation

National

Act No. 513/1991 Coll., the Commercial Code, as amended (repealed)

Act No. 89/2012 Coll., the Civil Code, as amended

EU

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. OJ L 349, 5.12.2014, p. 1-19

BIG TECH AND PRIVATE ANTITRUST LITIGATION IN ITALY

Dr. Niccolò Galli

European University Institute

Prof. Dr. Marco Botta

European University Institute

ABSTRACT Private enforcement of antitrust law has gained traction in Europe, with an increasing number of damages actions, particularly following competition authority decisions. The *Trucks Cartel* case and lawsuits following the 2017 *Google Shopping* decision exemplify this trend. In parallel, BigTech firms face regulatory scrutiny under the Digital Markets Act (DMA), which imposes obligations on designated gatekeepers. While the DMA lacks explicit private enforcement provisions, breaches of clear and unconditional obligations can still trigger litigation. Similarly, under the Digital Services Act (DSA), Very Large Online Platforms (VLOPs) and Search Engines (VLOSEs) must comply with enhanced due diligence obligations against unlawful online conduct, whose breaches may lead to damages claims. Since the DMA and DSA only recently came into effect, private enforcement cases are expected to rise in the coming years, raising questions about the nature of claims (follow-on vs. stand-alone), available remedies, and the role of businesses versus consumer groups in litigation. The paper examines private enforcement in Italy, where the competition authority (ICA) has been an active public enforcer, but private litigation against BigTech remains limited. The analysis focuses on three cases before the Milan Court, which illustrate both the potential and challenges of private enforcement. The private actions did not yield the desired remedies for the three small plaintiffs—two lost on the merits, while the successful one entered liquidation before the litigation concluded. Nevertheless, the Italian cases provide valuable insights for future private litigation, not only under Article 102 TFEU but also in the context of the emerging EU digital regulations.

Keywords: Digital markets, abuse of dominance, exploitation, refusal to deal, self-preferencing.

SUMMARY: I. INTRODUCTION. II. ATTRAK VERSUS GOOGLE. A. The Facts. B. The Lawsuit and Parties' Arguments. C. The Court's Reasoning. D. Analysis and Policy Developments. III. VAPORART VERSUS FACEBOOK. A. The Facts. B. The Lawsuit and Parties' Arguments. C. The Court's Reasoning. D. Analysis and Policy Developments. IV. 7PIXELS VERSUS GOOGLE. A. The

Facts. B. The Lawsuit and Parties' Arguments. C. The Court's Reasoning. D. Analysis and Policy Developments V. CONCLUSION.VI. BIBLIOGRAPHY.

I. INTRODUCTION

Private enforcement of antitrust law has slowly taken pace in Europe: during the past decade, the number and size of both follow-on and stand-alone actions has rapidly increased in some European countries.¹ The well-known Trucks Cartel saga is a good example of the growing relevance of damages actions started by harmed business users following a decision of a competition authority.² In parallel to the rise of damages actions, some competition authorities in Europe have been particularly active in sanctioning the anti-competitive behaviours by BigTech firms. Once confirmed on appeal, these administrative decisions might also generate follow-on damages actions. For instance, following the European Commission decision in the Google Shopping case,³ fully upheld by the EU Court of Justice in September 2024⁴, several comparison-shopping-service (CSSs) websites harmed by Google discriminatory conduct have started damages compensation actions in the national courts of the EU Member States.⁵

BigTech firms are now also subject to the obligations of the Digital Markets Act (DMA).⁶ Designated gatekeepers have to comply with the obligations under Art. 5 and 6 DMA; obligations that mostly reflect previous antitrust cases decided either by the European Commission or by National Competition Authorities (NCAs). Although the DMA does not include a specific legal basis concerning its private enforcement, the legislation is a Regulation, directly applicable in the national courts of the EU Member States. According to well-established case law

1. <https://www.noerr.com/en/insights/competition-outlook-2025-antitrust-damages-further-boost-to-private-enforcement-of-antitrust-law> (last access 30.1.2025).

2. <https://www.claimsfundingurope.eu/projects/european-truck-cartel/> (last access 30.1.2025).

3. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11.

4. Judgment of the Court, Case C-48/22 P *Google and Alphabet v Commission (Google Shopping)* (ECLI:EU:C:2024:726).

5. A good example of this trend is represented by the proceedings started by the Czech CSS Eureka against Google, following the European Commission decision in *Google Shopping*. The national court referred a preliminary ruling request to the EU Court of Justice concerning the statute of limitation of the Damages Directive. The Luxembourg Court ruled on the case in April 2024; the case is now pending before Prague City Court. See Judgement of the Court, Case C-605/21 *Heureka Group v. Google* (ECLI:EU:C:2024:324). For a review of the follow-on actions after the Google Shopping decision, see: MOUTON J., REED L., 'Following the Google Shopping Judgment, Should We Expect a Private Enforcement Action?', *Journal of European Competition Law and Practice*, vol. 13(2), 2022, pp. 154-163.

6. 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) [2022] OJ L 265/1

of the EU Court of Justice, a breach of a Regulation can trigger a private enforcement case when the legislation is “clear”, “unconditional” and “grants a right to individuals”.⁷ Authors agree that a breach of Art. 5 DMA obligations may trigger private enforcement actions since these obligations are ‘self-executing’, and thus per se clear and unconditional.⁸ On the other hand, different views in the literature have emerged on Art. 6 obligations, which are “susceptible of being further specified by EU Commission Decision”: according to Komninos, Art. 6 obligations would have direct effect in a dispute in a national court even in the lack of a Commission specification Decision,⁹ which Podszun has excluded that such obligations may trigger a private enforcement action vis-à-vis a digital gatekeeper in the lack of a Commission specification decision.¹⁰

Most of the BigTechs have also been designated either as Very Large Online Platforms (VLOPs) or Very Large Online Search Engines (VLOSEs) under the Digital Services Act (DSA).¹¹ Similarly to the definition of digital gatekeepers under the DMA, VLOPs and VLOSEs are defined as the platforms that have at least 45 million regular users in the EU.¹² In addition, some DSA obligations are also borderline with competition law prohibitions and with DMA obligations: in particular, VLOPs and VLOSEs are required to have user-friendly terms and conditions and being transparent as regards advertising, recommender systems or content moderation decisions.¹³ Under Art. 54 DSA, the service recipient may start a damages compensation action against VLOPs and VLOSEs that breach such transparency obligations.

The DMA and DSA obligations are applicable from the moment the digital gatekeeper/VLOP-VLOSE is designated. Since the DMA obligations entered into force only in March 2024 for the first six designated gatekeepers,¹⁴ while the DSA obligations are applicable only since February 2023,¹⁵ we must wait some years before witnessing DMA/DSA private enforcement actions. Nevertheless, the trend is clear: the coming years are likely to witness an increasing number of private enforcement cases involving BigTechs, either in the field of antitrust rules or in relation to the violation of the DMA obligations. Since the EU competition rules

7. Judgement of the Court, Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*. (ECLI:EU:C:2002:497).

8. KOMNINOS A., ‘The Digital Markets Act and private enforcement: Proposals for an optimal system.’ In Charbit N., Gachot S. (eds.), *Eleanor M. Fox Liber Amicorum*. Concurrences Books, 2021.

9. *Ibid*.

10. PODSZUN R., ‘Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act.’, *Journal of European Competition Law and Practice*, vol. 13(4), 2022, pp. 254-267.

11. 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).

12. *Ibid*, Art. 33.

13. *Ibid*, Art. 33-42.

14. https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en (last access 31.1.2025).

15. <https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops> (last access 31.1.2025).

and the DMA/DSA pursue different objectives, plaintiffs are likely to rely on both legal regimes ‘in parallel’.¹⁶ While the trend is clear, a lot of questions remain open. First of all, it remains to be seen whether private enforcement vis-à-vis BigTechs will mostly include follow-on, rather than stand-alone actions. Secondly, what types of remedies will be mostly awarded by national courts, in terms of damages and/or injunction remains an open question. Finally, the question is whether business, rather than groups of end users, will lead private enforcement actions vis-à-vis BigTechs in European courts.

The present paper aims at answering to these questions, and at forecasting possible trends in private litigation vis-à-vis BigTechs, by analysing the case of Italy. The Autorità Garante della Concorrenza e del Mercato (hereinafter, Italian Competition Authority or ‘ICA’), with its twin competencies for competition law and consumer protection against unfair commercial practices, has been a very active as public enforcer in digital markets.¹⁷ In contrast, private antitrust enforcement litigation against BigTech before Italian courts is still limited, even after the almost prompt implementation of the Damages Directive by the Legislative Decree No. 3/2017.¹⁸ The paper analyses the three known cases where private plaintiffs have challenged BigTech firms under Italian competition law: the 2016 *Attrakt vs Google* judgment on the merits,¹⁹ the 2017 *Vaporart vs Facebook* summary judgment²⁰ and the 2021 *Pixel vs Google* interim order.²¹ All were brought before the Specialised Chamber for Businesses of the Milan Court of First Instance. This court shares the exclusive subject matter jurisdiction on private antitrust litigation with equivalent chambers of the courts of first instance of Rome and Naples based on geographic jurisdiction criteria.²² In practice, the Milan Court was constantly chosen based on the defendant’s domicile, since the

16. While EU competition law aims at safeguarding ‘undistorted competition’ within the EU internal market, the DMA aims at fostering ‘fairness’ and ‘contestability’ in digital markets. Finally, the DSA aims at establishing a ‘safe, predictable and trustworthy online environment.’ See *Supra*, Recital 7 DMA Preamble and Recital 12 DSA Preamble.

17. For a detailed overview of the ICA’s activities in digital markets since 2017, see CALINI C., IOSSA E., ‘Multiplicity of Tools For Antitrust and Consumer Protection in Digital Markets: The Italian Experience and the Road Ahead’, *European Competition Journal*, vol. 20, 2024, p. 274.

18. 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 Text with EEA relevance (2014) OJ L 349/1 (hereinafter, the Damages Directive). Art. 21(1) Damages Directive required transposition by 27 December 2016. Italy fully transposed the directive on 3 February 2017, when the Legislative Decree No. 3 of 19 January 2017 entered into force. See Caiazzo R., ‘The Legislative Decree of Implementation of Directive 2014/104/EU on Antitrust Damages Actions’, *Italian Antitrust Review*, vol. 2, 2016, p. 104.

19. Case R.G. No. 86198/2013 Milan Court of First Instance, *Attrakt s.r.l. vs Google Ireland Ltd.*, Judgement No. 7638/2016 of 17 July 2016 (hereinafter “*Attrakt vs Google*”).

20. Case R.G. No. 14634/2017 Milan Court of First Instance, *Vaporart s.r.l. vs Facebook Ireland Ltd.*, Summary Judgment of 19 June 2019 (hereinafter “*Vaporart vs Facebook*”).

21. Case R.G. No. 59172/2019 Milan Court of First Instance, *7Pixel vs Google*, Interim Order of 4 January 2021 (hereinafter “*7Pixel vs Google*”).

22. See Art. 4 of Legislative Decree No. 168 of 2003.

city is the economic and financial capital of Italy where most BigTech firms have their Italian subsidiary.²³ The Italian examples show the power and limitations of private enforcement in competition cases in complex markets. Additionally, although the decisions did not meet the plaintiffs' concrete needs, they are worthy precedents for other businesses that might use them in their relations with any BigTech platform. Finally, the cases can be compared with the intervened public enforcement cases and superseded European digital acquis, chiefly the Digital Markets Act, which have addressed the same practices challenged before the Italian courts.

II. ATTRAKT VERSUS GOOGLE

The case is a standalone action concerning Google's advertisement contracts with Attrakt.²⁴ The plaintiff was a search engine start-up founded in Florence in April 2011, which sued Google in 2013 claiming the nullity of certain contractual clauses plus damages.²⁵ As a legal basis it invoked alternatively breach of contract under the Italian Civil Code, exclusionary abuse of dominance under EU competition law and abuse of economic dependence under Italian law.²⁶ Ultimately, the Court established Google's liability for abuse of economic dependence, which absorbed the abuse of dominance claim. However, the effect of the judgment was limited. In fact, during the three years of trial, Attrakt went into liquidation and exited the search engine market.

A. The Facts

Born as a spin-off of Dada, a domain registrar and hosting provider, Attrakt had developed a proprietary web-crawling and indexing software called 'Electro'.²⁷ It launched its general search engine service in September 2011.²⁸ Such a service, besides searching throughout the web, allowed users to create "boxes" of websites

23. Interestingly, Google now imposes the exclusive jurisdiction of the UK High Court in London.

24. To access what was Attrakt's search engine, visit <<https://web.archive.org/web/20120924082359/http://www.attrakt.com/>>.

25. D'ALESSANDRO J., 'Attrakt, la startup Fiorentina che ha battuto Google' (14 October 2016, La Repubblica) <https://www.repubblica.it/tecnologia/2016/10/14/news/schiaffo_a_google_risarcisca_la_startup_che_ha_fatto_fallire_-149751895/>; LARDARA M., 'Vinto da "Attrakt" Il Primo Round Contro Google' (Il Tirreno 12 Ottobre 2016) <<https://www.iltirreno.it/prato/cronaca/2016/10/12/news/vinto-da-attrakt-il-primo-round-contro-google-1.14234227>>.

26. FAMILIARI S., 'Google vs Attrakt: La Sentenza Sull'Abuso di Dipendenza Economica Tra Imprese On-Line' (Altalex, 27 January 2017) <https://www.altalex.com/documents/2017/01/27/google-vs-attrakt-la-sentenza-sull-abuso-di-dipendenza-economica-tra-imprese-on-line>.

27. CARLOS S., 'New Search Engine Attrakt Focuses on Curated Content' (24 April 2012, Search Engine Land) <<https://searchengineland.com/new-search-engine-attrakt-focuses-on-curated-content-117920>>.

28. See <<https://web.archive.org/web/20121016160308/http://www.attrakt.com/about-us.html>>.

based on their interests and run search queries just inside the boxes. Users could also limit their searches to specific countries or languages of interest. Furthermore, users could decide to make their search boxes public for the benefit of the entire user community, which could run searches through their curated boxes and possibly expand them saving more relevant websites. Think of a competition law professor, who creates a search box of relevant competition law blogs and publications and allows its students to use its box. Students would not only likely get accurate competition law information, but the professor would also transfer its legacy to future generations, realising the scientific principle of “standing on the should of giants”. By December 2012, Attrakt had about 15.000 registered users and an average of 1.7 million daily users from all over the world.²⁹

Like most other website publishers that need to buy and sell online ads, Attrakt had in place two advertisement contracts with Google. With the AdSense contract of July 2011, Attrakt sold advertisement space on its webpages through Google’s intermediation services. With the AdWords contract of September 2011, Attrakt purchased certain keywords, such as ‘attrakt’ to appear on top of Google search results and get visibility online.³⁰ In essence, Attrakt was paying Google to get visibility and was paid by Google for the third-party ads sold on its webpages, which constituted its only source of revenue. Such contracts granted Google unlimited rights of withdrawal and termination, limited its contractual liability to a maximum of 125% of the net revenue of the client paid by Google in the last twelve months of the contract and granted substantial control powers over all ads displayed by Attrakt.³¹ Furthermore, the contracts set the advertisement compensation based on Google’s discretion and ensured Google’s exclusivity on the sale of Attrakt’s advertisement space.³²

Because of its early success and following Google’s advertisement instructions, Attrakt’s monthly AdWords expenditure increased from about €40.000 at the start of the contract to about €160.000 by early 2012, receiving Google’s recognition as “Top Google AdWords Partner” in September 2012.³³ In parallel, the AdSense monthly earnings rose from about €76.000 in September 2011 to about €320.000 in November ’12. On average, Attrakt spent about 70 to 80% of its revenue on AdWords investments.³⁴

The contractual dispute started on 11 January 2013, when Google sent Attrakt a vague notice informing of an AdSense policy violation consisting of a link to an adult website displayed on Attrakt’s search result webpage, without specific web addresses.³⁵ By 13 January, Attrakt adopted countermeasures and remedied the

29. *Attrakt vs Google*, 3.

30. *Attrakt vs Google*, 3.

31. *Attrakt vs Google*, 2.

32. *Attrakt vs Google*, 7.

33. On the advertisement performance, spend and certification requirements to become Google Ads partner see <https://ads.google.com/intl/en_uk/home/partners/become-a-partner/> and <<https://support.google.com/google-ads/answer/9702452>>.

34. *Attrakt vs Google*, 3.

35. *Attrakt vs Google*, 5.

violation, deleting links to an allegedly Indonesian sex doll website. Despite Attrakt's timely compliance with the remedy notice received, on 16 January, Google withdrew from the AdSense contract. It also deactivated Attrakt's AdSense account and withheld over €500.000 of ad revenue generated between December 2012 and January 2013 without further motivation.³⁶ Lacking access to its account, Attrakt could not monitor its ads performance data and financials.

Google refused further information even after several requests. In February 2013, it also rejected Attrakt's complaint through its internal complaint handling mechanism. Once Attrakt realised that it could not re-establish the pre-existing fruitful relationship with Google, it withdrew from the AdWords contract stopping to pay the keywords in July 2013.³⁷ Such a decision was difficult, as it also meant shutting down its entire search engine business.³⁸ Arguably, if Google had been more explicit about the shutdown of the business relationship, Attrakt could have focused its resources on finding alternative advertising partners instead of wasting resources trying to recover the one with Google.

B. The Lawsuit and the Parties' Arguments

In November 2013, Attrakt sued Google seeking, through ordinary proceedings on the merits, damages for at least €9 million based on an estimate of Attrakt's value at the time of Google's withdrawal. The plaintiff alleged both contractual and competition law liability.³⁹ First, the plaintiffs claimed breach of contract due to the abusive exercise of the right of withdrawal against good faith obligations under Arts. 1175, 1366 and 1375 of the Italian Civil Code.⁴⁰ Allegedly, Google would have caused an unjustified disproportion between the protection of its contractual interest (i.e., compliance with the AdSense website policies) and the sacrifice of the counterparty's interest (i.e., Attrakt's need to sell advertisement space through AdSense).⁴¹ Second, Google abused its dominance in the online advertising market to foreclose a potential competitor in the search engine market based on unsubstantiated advertising policy violations. Finally, Google would have abused Attrakt's economic dependence under Art. 9 of Law No. 192 of

36. *Attrakt vs Google*, 4.

37. *Attrakt vs Google*, 4.

38. See Search Engine Law, 'An Italian Start-up Under Google's Abuse of Economic Dependence' <<https://searchenginelaw.net/antitrust/67-an-italian-start-up-defeats-google-s-abuse-of-economic-dependence>>

39. *Attrakt vs Google*, 2; see also FABBIO P., 'Nota a Trib. Milano, Sez. Impresa, sent. 17 giugno 2016 - Attrakt c. Google', *Annali Italiani del Diritto d'Autore*, 2017, pp. 996-1009.

40. Art. 1175 Italian Civil Code reads: "The debtor and the creditor must behave according to the rules of fairness." Art. 1366 Italian Civil Code reads: "The contract must be interpreted in good faith." Art. 1375 Italian Civil Code reads: "The contract must be performed in good faith."

41. Although the misuse of right is not codified in the Italian legal system, it is commonly recalled by the case law as the prohibition to act with the sole intention to harm the counterparty, as well provided about real property by Art. 833 of the Civil Code that prohibits the owner to behave with the only purpose of harming and annoying others.

1998,⁴² representing a stricter national prohibition on unilateral conduct as foreseen by Art. 3(2) Regulation 1/2003. The then applicable Art. 9, par. 1 defined the status of economic dependence as the relative power to impose an excessive imbalance of rights and obligations on clients or suppliers in light of the dependent firm's realistic alternative business partners. Once the dependence is ascertained, the imposition of unfair or discriminatory trading conditions, such as in the case at hand, is actually one of the exemplary abuses listed by Art. 9, par. 2, along with the refusal to deal and the abusive termination of existing business relations. Such abuse then determines civil liability plus the nullity of the underlying contract pursuant to Art. 9, par. 3. Although economic dependence usually arises after several years of exclusive business relationship, as is often the case between large-scale retailers and economically dependent small suppliers, Attrakt alleged its complete economic dependence on Google based on the imbalance of rights and obligations in the advertisement contracts and in the contractual exclusivity.⁴³

Google, through the competition litigation powerhouse of Cleary Gottlieb, contested any economic dependence and justified its contractual withdrawal based on the AdSense policy violation, namely the link to adult websites, as contested in early 2013.⁴⁴ It also contested the lawfulness of Attrakt's self-reinforcing system of acquiring more visibility through cheap keywords on AdWords and selling more advertising through AdSense as an illicit clickbait activity.⁴⁵ Further, it counterclaimed the payment of outstanding compensation for the AdWords contract until its termination.⁴⁶

C. The Court's Reasoning

The interim judgment of 5 May 2016 sided with the plaintiff. It recognised the contractual imbalance in favour of Google and Attrakt's good faith in the contractual performance.⁴⁷ Google set all terms and conditions, monitored the evolution of Attrakt's business and even approved, required or suggested any changes to Attrakt's display of ads. Accordingly, the alleged contractual unlawfulness of Attrakt's business model was deemed as a self-serving excuse.

First, the Court acknowledged that both parties had the right to withdraw and terminate the contract. However, Google abused its right by exercising it in breach of the general fairness and good faith obligations applicable all along the

42. On the abuse of economic dependence by platforms, see FABBIO P., 'Il Contributo della Comparazione Giuridica Nello Studio dell'Abuso di Dipendenza Economica' in G. Colangelo, V. Minervini (eds), *La Nuova Stagione dell'Abuso di Dipendenza Economica*, Il Mulino, 2023; SCALZINI S., 'Economic Dependence in Digital Markets: EU Remedies and Tools', *Market and Competition Law Review*, vol. 5, 2021, p. 81.

43. *Attrakt vs Google*, 11.

44. *Attrakt vs Google*, 2.

45. *Attrakt vs Google*, 4.

46. *Attrakt vs Google*, 2.

47. *Attrakt vs Google*, 7.

contractual relationship, from its negotiation to the performance and termination pursuant to Arts. 1175, 1366 and 1375 Italian Civil Code.⁴⁸ Google's withdrawal was abrupt, ungrounded and without notice. Therefore, Attrakt could neither remedy any temporary contractual failure nor have the time to find alternative providers of online ad services. Furthermore, Google unlawfully withheld ad compensation, which is not allowed as contractual self-help. Such compensation was indispensable for Attrakt's survival, so its withholding, de facto, shut down Attrakt. Among several possible ways of exercising its withdrawal right, Google chose the most damaging one for Attrakt's interests. The alleged AdSense policy violations justifying the withdrawal were unsupported since Attrakt removed on-time the linking to adult websites and Google was completely supportive of Attrakt's business model until the abrupt withdrawal.⁴⁹

The court went on to qualify Google's conduct as a textbook example of abuse of economic dependence.⁵⁰ Despite the not-so-long-term agreements, Attrakt was fully economically dependent on Google, as evidenced by the imbalance of rights and obligations in the two contracts, all communications between Attrakt and Google's account managers, and the exclusivity granted by Attrakt to Google. Indeed, once Google withdrew, Attrakt's turnover went to zero. Then, Google abused such economic dependence through unfair trading conditions, arbitrary contract withdrawal and unlawful withholding of substantial ad compensation that was essential for Attrakt's survival. The exercise of Google's right of withdrawal de facto shut down Attrakt, preventing it from finding alternative market partners in due time.⁵¹

Given the applicability of the abuse of economic dependence, the court did not examine the abuse of dominance claim.⁵² Finally, it ordered the defendant to pay the AdSense fees unlawfully withheld, plus interest for late payment and awarded damages in favour of the plaintiff to be quantified by a court expert in follow-on proceedings.⁵³ Such damages were not limited to the amount set by the limitation clause in favour of Google, given its vexatious nature and lack of specific approval in the adhesion contract.⁵⁴ Indeed, Arts. 1341-1342 Italian Civil Code respectively require separate signatures for unilaterally formulated clauses weakening the assenting party's position and standard contracts concluded through signing forms.⁵⁵ However, the Court allowed Google's counterclaim regarding the AdWords compensation to the extent that Attrakt kept enforcing the AdWords agreements until July 2013, so that Google had a credit of about US\$

48. *Attrakt vs Google*, 7.

49. *Attrakt vs Google*, 10.

50. *Attrakt vs Google*, 11.

51. *Attrakt vs Google*, 11.

52. *Attrakt vs Google*, 11.

53. *Attrakt vs Google*, 11.

54. *Attrakt vs Google*, 12.

55. This voidness of the contractual liability limitation clause is beneficial for other business users in the same position of Attrakt.

20.000 plus interest for late payment.⁵⁶ Finally, it postponed the award of legal costs at the end of the quantification proceedings.⁵⁷ The defendant announced to challenge the judgment before the Milan Appeal Court,⁵⁸ but the parties likely settled since there is no evidence of either the damages quantification proceeds or the appeal.

D. Analysis and Policy Developments

The Italian law no. 118 of 2022, amended the prohibition of abuse of economic dependence to address fairness and contestability issues of digital markets. Since November 2022, Art. 9(1) Law no. 192/1998 sets a rebuttable presumption of economic dependence from intermediation services of digital platforms with a decisive role in connecting to end users or suppliers, also considering network effects or data availability. Further, Art. 9(2) indicates exemplary abuses by digital platforms such as providing insufficient data on the scope or features of the service provided, making undue requests unrelated to the activity at issue, imposing unjustifiably onerous contractual conditions, impairing multi-homing or the use of alternative suppliers. By introducing a specific presumption for digital platforms, the legislator tries to protect the condition of weakness and subordination of those business users, whose survival depends largely, if not completely, on the continuous supply of the platforms' services.

The *Attrakt* case anticipated the 2019 abuse of dominance decision by the European Commission in the Google AdSense case by about three years.⁵⁹ There, Google was found to be dominant in the online search ads and online search ads intermediation markets⁶⁰ and to have abused its position with exclusionary contractual obligations on website publishers within the AdSense contracts.⁶¹ Similarly to the Italian precedent, the clauses at issue created exclusivity in favour of Google, such as by requiring sourcing all or most search ads from Google.⁶² Moreover, they set the obligation to grant preferential treatment to search ads

56. *Attrakt vs Google*, 13.

57. *Attrakt vs Google*, 13.

58. See D'ALESSANDRO J., 'Attrakt, La Startup Fiorentina Che Ha Battuto Google' (14 October 2016 *La Repubblica*) <https://www.repubblica.it/tecnologia/2016/10/14/news/schiaffo_a_google_risarcisca_la_startup_che_ha_fatto_fallire_-149751895/>.

59. Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6.

60. For the relevant market assessment, see Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6, paras 111ff. For the dominance assessment, see Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6, paras 222ff.

61. For the analysis of the exclusionary contractual clauses, see Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6, paras 329-336.

62. See Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ [2019] C 369/6, paras 337ff.

intermediated by Google (so-called “Premium Placement and Minimum Google Ads Clause”).⁶³ Finally, the “Authorising Equivalent Ads” clause gave Google control over the display also of non-Google search ads.⁶⁴ On 18 September 2024, the General Court annulled in full the infringement decision.⁶⁵ It concluded that the Commission erred in calculating the cumulative duration of the AdSense contracts,⁶⁶ which actually were time-limited and subject to renewal and withdrawal rights.⁶⁷ Also, the Commission ignored that despite the de facto contractual exclusivity, website publishers could source ads from Google’s competitors either while negotiating contract renewals or extensions or exercising the right of withdrawal.⁶⁸ The Commission appealed the annulment on 3 December 2024.⁶⁹

Besides the antitrust scrutiny, online ad services are now a core platform service under Art. 2(2)(j) DMA,⁷⁰ and Google has been designated as a gatekeeper for them during the first designation wave on 5 September 2023.⁷¹ As a result, several DMA provisions now limit Google’s contractual freedom with business users in its AdWords and AdSense contracts, such as online ads transparency obligations of Arts. 5(9) and 5(10), online ads performance tools under Art. 6(8), the prohibition of disproportionate termination conditions of Art. 6(13).

III. VAPORART VERSUS FACEBOOK

The case is a standalone action against an alleged dominance abuse in the pre-contractual relationship between Facebook and Vaporart.⁷² The claimant is a producer and distributor of electronic cigarettes based near Milan,⁷³ which sought

63. Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6, paras 458ff.

64. Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6, paras 566ff.

65. Judgment of the General Court, Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* (ECLI:EU:T:2024:634).

66. Judgment of the General Court, Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* (ECLI:EU:T:2024:634), paras 698-715.

67. Judgment of the General Court, Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* (ECLI:EU:T:2024:634), paras 982-991.

68. Judgment of the General Court, Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* (ECLI:EU:T:2024:634), paras 992-1002.

69. See Appeal Application in Case C-826/24 P *Commission v Google and Alphabet* [2024].

70. Online ads services are actually a ‘secondary’ core platform service that can become subject to the digital market act if provided by firms that also provide any of the other ‘primary’ core platform services.

71. Alphabet – Online advertising services Case DMA.100010 Commission Decision C(2023) 6101 final [2023] published as summary in OJ C/2023/549.

72. Also reported in (2017) 140(9) *Il Foro Italiano* 2857.

73. See <<https://www.vaporart.it/>>.

interim relief on 23 March 2017 against Facebook's refusal to deal.⁷⁴ In particular, Facebook refused to publish on its social network Vaporart's ads about nicotine-free refill liquids for e-cigarettes. Ultimately, the Court dismissed the summary application since, even assuming the defendant's dominance, the refusal was objectively justified by advertisement regulations that limit the promotion of products directly or indirectly related to tobacco products.

A. The Facts

Vaporart operates an e-commerce website where it sells, only to users declaring to be over 18 years old, e-cigarettes and related products, including nicotine-free refill liquids that contain edible aromas to be vaped just like ordinary e-cigarettes. In 2013, Vaporart created its Facebook page. Several years later, in early 2017, it first tried to purchase advertisement space on Facebook for its nicotine-free refill liquids including pictures evocative of smoking with hyperlinks to Vaporart's e-commerce.⁷⁵ Facebook refused the ads because they did not comply with its tobacco ads policies. In particular, Facebook ads policy for tobacco and related products applicable at that time prohibited ads of tobacco products and related accessories for their consumption, including vaping devices and e-cigarettes, but not explicitly nicotine-free refill liquids for e-cigarettes.⁷⁶ Actually, the policy provided exemplary images of prohibited ads very similar to the requested ones.⁷⁷

B. The Lawsuit and the Parties' Arguments

According to the claimant, Facebook was dominant in the relevant national and global market of ads on social media. Its refusal would have qualified as abusive since it limited production to the prejudice of consumers. Vaporart purported that nicotine-free liquid ads would have helped to reduce tobacco consumption and improved consumer health. In addition, the refusal would have been discriminatory too, since it treated different ads alike, prohibiting ads of both harmful tobacco products and beneficial nicotine-free products. Accordingly, Vaporart sought an interim measure to order Facebook to publish the refused ads.⁷⁸

74. The choice of pursuing summary proceedings is unusual for antitrust proceedings where complex questions of law and economic issues are disputed.

75. *Vaporart v Facebook*, para. 1.

76. *Vaporart v Facebook*, para. 1.

77. Consider that the current ads policy explicitly prohibits also ads "promoting the sale or use of products that simulate smoking, such as vaping, including products that do not contain tobacco or nicotine (e.g., vitamin vaping, wellness vaping)."

78. *Vaporart v Facebook*, para. 1.

Facebook justified its refusal to deal based on non-compliance with its ads policy and violation of Art. 21, par. 10 of Legislative Decree No. 6 of 2016.⁷⁹ This provision implementing Art. 20(5), letter A) Directive 2014/40 (the Tobacco Products Directive),⁸⁰ forbids advertisement with the direct or indirect aim or effect of promoting electronic cigarettes and refill liquid containers, except for tobacco trade publications or publications destined to foreign markets. The EU restrictive approach to advertising electronic cigarettes and refill containers stems from the consideration that electronic cigarettes ‘can develop into a gateway to nicotine addiction and ultimately traditional tobacco consumption, as they mimic and normalise the action of smoking’ (Recital 43, Tobacco Products Directive).⁸¹ For Facebook, Vaporart’s ads on Facebook were evocative of smoking and linked to Vaporart’s e-commerce, where both nicotine and nicotine-free products were sold. Accordingly, they would have had the direct or at least indirect effect of unlawfully promoting electronic cigarettes and refill containers.⁸²

Furthermore, the defendant excluded any discrimination since its tobacco ads policies are applied to any business user, not just to Vaporart. Finally, the application should have been dismissed due to lack of urgency. In fact, the four years time lag between the creation of Vaporart’s Facebook page and Facebook’s refusal to deal would exclude any risk of serious and irreparable injury to the claimant, which, together with evidence of a *prima facie* case, are the requirements of interim relief under Art. 700 of the Italian Code of Civil Procedure.⁸³

79. *Vaporart v Facebook*, para. 2.

80. Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127/1.

81. The CJEU recognised the proportionality of the EU policy disfavour toward e-cigarettes and their accessories due to the scientific doubts on the effect of e-cigarettes as an intermediate step in quitting smoking or in creating an addition to smoking, in Judgement of the Court, Case C-477/14 *Pillbox 38* (ECLI:EU:C:2016:324); Judgment of the Court, Case C-157/14 *Neptune Distribution* (ECLI:EU:C:2015:823). The validity of Article 20 of Directive 2014/40/EU had been called into question by the London High Court of Justice, which asked the Court of Justice to examine whether the obligations imposed on e-cigarette manufacturers and/or retailers violated the principles of proportionality (read in conjunction with the principle of legal certainty), equality and subsidiarity, led to unlawful distortions of competition or conflicted with Articles 16 and 17 of the Charter of Fundamental Rights. The judges in Luxembourg, at the outcome of the judgment, pointed out that no factor capable of affecting the validity of the aforementioned Article 20 had emerged; see Judgement of the Court, Case C-477/14 *Pillbox 38* (ECLI:EU:C:2016:324), operative part.

82. *Vaporart v Facebook*, para. 3.

83. Art. 700 of the Italian Code of Civil Procedure reads: “Outside the cases governed by the preceding sections of this Chapter (i.e., the other specific interim proceedings), a person who has well-founded reasons to fear that during the time needed to assert his right through ordinary proceedings, it will risk an imminent and irreparable harm, may apply to the court for emergency measures as appear, according to the circumstances, to be the most appropriate to ensure provisionally the effects of the judgment on the merits.”

C. The Court's Reasoning

Despite the summary proceedings, the court analysed the merits of Facebook's allegedly abusive refusal. Even assuming for the sake of reasoning that the relevant market is the one indicated by the claimant and that the defendant is dominant there, the court excluded any abusiveness due to objective justifications.⁸⁴ The court started by recalling the EU case law, which narrows down the abusiveness of dominant firms' refusals to deal to exceptional circumstances only, balancing the fundamental freedom to conduct a business and right to property of Arts. 16 and 17 of the EU Charter of Fundamental Rights.⁸⁵ It also acknowledged that duties to deal could diminish innovation incentives due to the possibility of third parties free-riding on the dominant firm investments. Under the Oscar Bronner test,⁸⁶ a refusal to deal is abusive under four cumulative conditions: i) the refusal concerns a product objectively indispensable to compete with the dominant company that lacks actual alternatives and cannot be duplicated effectively in the short term; ii) the refusal likely eliminates downstream competition, foreclosing the appearance innovative products or services with prejudice for consumers; iii) the refusal lacks objective justifications.⁸⁷

Then, the Milan Court focused on the existence of objective justifications, although the other two requirements of the indispensability of Facebook ads services and elimination of downstream competition are also unlikely met in the specific case.⁸⁸ It concluded that the refusal was not abusive because it was justified by the applicable advertisement laws, which limit advertising of products that directly or indirectly promote tobacco products.⁸⁹

Specifically, Vaporart's images were evocative of smoking and objectively linked to its e-commerce offering products with and without nicotine. Furthermore, the refusal is not discriminatory since the applicant did not prove that Facebook applied its openly available and accepted ad policies to different business users differently.⁹⁰ Finally, the Court excluded any consumer harm since the contested

84. *Vaporart v Facebook*, para. 4.

85. Charter of Fundamental Rights of the European Union [2012] OJ C 326/391; Judgement of the Court, Joined cases C-241/91 and C-242/91 P *RTE and ITP v Commission (Magill)* (ECLI:EU:C:1995:98); Judgement of the Court, Case C-7/97 *Bronner v Mediaprint* (ECLI:EU:C:1997:264); Judgement of the Court, Case C-418/01 *IMS Health v NDS Health* (ECLI:EU:C:2004:257); Judgment of the Court, Case T-201/04 *Microsoft v Commission* (ECLI:EU:T:2007:289).

86. *Vaporart v Facebook*, para. 6 quoting Judgement of the Court, Case C-7/97 *Bronner v Mediaprint* (ECLI:EU:C:1997:264), para 41.

87. See Communication from the Commission 2009/C 45/02 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 as amended by Communication from the Commission 2023/C 116/01 [2023] OJ C 116/1, paras 75-89; cfr with the draft Art. 102 guidance on enforcement priorities: Communication from the Commission (2024) draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, paras 96-106.

88. *Vaporart v Facebook*, para. 7.

89. *Vaporart v Facebook*, para. 5.

90. *Vaporart v Facebook*, para. 8.

practice actually was in line with the EU policy disfavour toward the direct or indirect promotion of nicotine products.⁹¹ The reference to indirect promotion means that the prohibition may also extend to advertising initiatives that have as their immediate reference nicotine-free refill liquids, where it appears that the relevant advertisements promote access to messages advertising similar products that contain the substance deemed harmful to health and are marketed by the same advertiser. In this sense, nicotine-free liquids are an accessory of e-cigarettes that could not be advertised. In light of the objective justification and lack of consumer harm, the court rejected the applications and ordered Vaporart to pay Facebook's legal costs for about €8,500,00.⁹²

D. Analysis and Policy Developments

Since 25 April 2023, Facebook's parent company Meta Platforms has been designated as a Very Large Online Platform (VLOP) under Art. 33 DSA since its social network reaches more than 10% of the EU's population (i.e., over 45 million average monthly users).⁹³ As a hosting provider, online platform and VLOP, Facebook assumed specific due diligence, transparency and reporting obligations that might be relevant in cases similar to the Vaporart one.⁹⁴

Besides the need for a transparent explanation for the refusal pursuant to Art. 17 DSA, Facebook's decision not to display ads such as Vaporart's ones could be subject first to a free internal complaint-handling system and then to an out-of-court dispute settlement by a certified body, respectively under Arts. 20 and 21 DSA. Through such non-binding extra-judicial procedures, Facebook users could retrieve more information on the grounds of the refusals and use it to assess whether or not to challenge such decisions before national courts, either saving resources or building a stronger case.

At the same time, Meta Platform, which is also a gatekeeper under Art. 3(3) DMA for its Facebook and Meta Ads,⁹⁵ could not preclude business users like Vaporart from communicating and selling their products to users acquired via such core platform services, such as followers of a Facebook page, pursuant to Art. 5(4) DMA. This raises the question of whether Vaporart's Facebook page

91. *Vaporart v Facebook*, para. 7.1.

92. *Vaporart v Facebook*, operative part.

93. Meta Platforms Ireland Limited, Commission decision designating Facebook as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council C(2023) 2756 final of 25 April 2023.

94. The Digital Services Act establishes obligations that are proportional to the role, size and impact of the different players in the online ecosystem so that the most stringent rules apply to the largest platforms only.

95. Meta – online social networking services (DMA.100020) Commission Decision of 5 September 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.

constitutes at least an indirect advertisement of tobacco products that should be prohibited since it can redirect to its e-commerce website selling both tobacco and nicotine-free products.

IV. 7PIXELS VERSUS GOOGLE

The case is a follow-on action to the European Commission's 2017 Google Search (Shopping) infringement decision, which fined Google for leveraging its dominance in the market for general search into the market for comparison shopping services between 2011 and 2017.⁹⁶ As background information, comparison shopping services allow consumers to compare products and prices online and find deals from any type of online retailers. The claimant is a subsidiary of Moltiply Group, then Gruppo MutuiOnline, the listed holding company of a group operating some prominent online comparison and intermediation services in Europe such as "trovaprezzi.it", "rastreator.com", "Pricewise.nl" or "LeLynx.fr".⁹⁷ Relying on the liability established in the Commission decision, 7Pixel applied to the Court of Milan for a settlement-like procedure under Art. 696bis Code of Civil Procedure called 'preliminary technical assessment'.⁹⁸ Through such an interim application, 7Pixel asked the judge to order an expert's report quantifying upfront the damages suffered due to Google's abuse of dominance. Ultimately, the Court rejected the application as both procedurally inadmissible and unfounded on the merits.

A. The Facts

The Commission Google Shopping decision of 27 June 2017 sets the background of the follow-on dispute. After a seven-year investigation, the Commission fined Google €2.42 billion for abusing its dominance in the relevant European Economic Area-wide market for general internet search through a practice that has since been known as self-preferencing.⁹⁹ This conduct consists of promoting the dominant company's secondary products or services on the dominated primary market, while demoting those of downstream competitors. Accordingly, it is feasible only for vertically integrated, multi-product or

96. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11.

97. See <<https://www.gruppomol.it/>>.

98. Art. 696-bis, paragraph 1 of the Italian Code of Civil Procedure reads: "*The preliminary technical assessment, as a precautionary measure, may also be requested outside the conditions of Art. 696 (i.e., preliminary evidentiary assessment and judicial inspection) for the purpose of assessing and determining claims arising out of contractual or tort liabilities. The judge follows Art. 696, paragraph 3. The technical expert, before filing its report, attempts to conciliate the parties.*"

99. DEUTSCHER E., 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU', *European Papers*, Vol. 6, 2021, p. 1345.

conglomerate companies, such as Google, with its rich ecosystem of online services, that can leverage their dominance from a given market to other non-dominated ones.¹⁰⁰

Establishing without much hassle Google's super-dominance in the general internet search market,¹⁰¹ where it had market shares over 90% in most Member States,¹⁰² the Commission identified two complementary practices that together constituted the abuse. On the one hand, the Commission determined that Google Search systematically placed Google Shopping prominently, at or near the top of the search results.¹⁰³ On the other hand, it found that Google Search demoted rival comparison shopping services in the search result, showing them on average only on page four or higher.¹⁰⁴ This differential treatment resulted from the application of certain detrimental criteria in Google's search algorithms only to rival comparison shopping services and not to Google Shopping. As a result, Google unlawfully deviated traffic and user clicks from competing services to Google Shopping, increasing this latter visibility and per-click revenue and incentivising retailers to list their products on said services instead of competitors' ones.¹⁰⁵

Timing-wise, Google started the unlawful practice in 2008 in certain countries and extended it to Italy in May 2011.¹⁰⁶ In terms of anti-competitive effects, the Commission found evidence of increased traffic of Google's own services and decreases of rival services that could not be explained by factors other than the abusive practice.¹⁰⁷ Potentially, Google's conduct may have foreclosed rival services and allowed it to raise prices and diminish innovation to the prejudice of consumers. Besides the fine, the decision required Google to end its abusive practice and refrain from circumventing this prohibition, therefore giving equal treatment to rival comparison shopping services and its own service within Google Search subject to fines for non-compliance of up to 5% of the average daily group turnover.¹⁰⁸

100. PADILLA J., PERKINS J., PICCOLO S., 'Self-Preferencing in Markets With Vertically Integrated Gatekeeper Platforms' *Journal of Industrial Economics*, vol. 70, 2022, p. 371.

101. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 271-272.

102. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 273-284.

103. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 378ff.

104. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 345ff.

105. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 539ff.

106. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, para 686.

107. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 589ff.

108. Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11, paras 697ff.

B. The Lawsuit and the Parties' Arguments

7Pixel did not pursue ordinary proceedings on the merits of Google's liability. It assumed that the existence of the dominance abuse and the causation link between the alleged harm and the unlawful practice was already established by Commission.¹⁰⁹ Accordingly, it applied for interim proceedings under Art. 696-bis Italian Code of Civil Procedure and asked only for the preliminary assessment of the damage actually suffered. This damage was self-estimated between €811 and €906 million as decreased visibility of 'trovaprezzi.it' during the entire time of the infringement.¹¹⁰ As a result of the preliminary assessment, the parties should have likely settled their dispute and avoided a lengthy trial in line with the rationale of Art. 696-bis of diminishing courts' backlog.

Google, this time through Hogan Lovell's lawyers, contested the procedural admissibility and substantive merits of the interim application.¹¹¹ On procedure, the defendant cited case law of the Milan Court, which rejected applications for preliminary assessment reports in antitrust matters, even those following definitive authority decisions and cartels benefitting from the presumption of harm. The application would have also been inadmissible since the preliminary assessment of damages could not most likely lead to a settlement given the disagreement on the existence of liability.¹¹²

On the merits, the defendant excluded that the infringement decision established the existence of a causal link between the conduct and the alleged damage suffered by 7Pixel or any other undertaking. In fact, the Commission would have only established the capability of the conduct to harm. Second, the decision could not establish any liability yet since it had been challenged before the General Court. Third, Google argued that 7Pixel's traffic generated through Google Search during the alleged infringement period actually increased. Finally, the applicant had departed from the Commission's findings by seeking damages beyond the decision timeframe (i.e., 2011-2017) until the date of lodging the application simply alleging that Google had not ceased the abuse.¹¹³

C. The Court's Reasoning

The judge dismissed the application primarily on procedural grounds. It followed the local case law that the special summary procedure of Art. 696-bis Italian code of civil procedure is not applicable for antitrust disputes posing complex legal questions and factual enquiries that go beyond technical matters

109. *7Pixel v Google*, 1.

110. *7Pixel v Google*, 2.

111. *7Pixel v Google*, 3.

112. *7Pixel v Google*, 4.

113. *7Pixel v Google*, 3.

and need a full trial on the merits respecting the right of confrontation.¹¹⁴ The requested summary procedure would only be available if the parties would likely settle the entirety of their dispute as a result of the preliminary assessment, without leaving open or debated issues.¹¹⁵ Furthermore, the Court concluded that the Commission's decision was not final, given Google's then pending appeal to the General Court, and so it would have had to suspend the proceedings in any case under Art. 16(1) Reg. 1/2003.¹¹⁶ Citing the Italian Supreme Court case law preceding the Damages Directive, the Court endorsed the principle of precaution so to avoid even the mere possibility of interfering with an EU legal act by the Commission or the EU courts.¹¹⁷

The Court, while envisaging the possibility of staying the proceedings, also stressed that the non-final nature of the Decision and Google's action for annulment before the General Court directly affected the potential finding of antitrust liability as well the causal link between the conduct and the damage. Due to the need for an adversarial proceeding on the merits, for the Court, the preliminary assessment of the damages would not facilitate a settlement but would only complicate the litigation.¹¹⁸

Finally, the Court added that dominance abuses do not bear any presumption of damage unlike cartels, and that the non-final Commission decision cannot be relied on to establish liability for anticompetitive conduct that took place after the timeframe considered by the Commission. The Court concluded that the application should be characterised as a stand-alone action and therefore the applicant should discharge the burden of proof and establish the continuation of the infringement and their harmful consequences. Dismissing the application, the Court awarded legal costs in favour of the defendant for about €8.000,00.¹¹⁹

D. Analysis and Policy Developments

The decision can be criticised for dismissing the action as a fully standalone one. In fact, part of the conduct at issue related to the findings of fact contained in the 2017 Commission decision. For this part, 7Pixel's interim application could be characterised as a follow-on one related to the period of the infringement (i.e., 2011-2017) and should have stayed under Art. 16(1) of Regulation 1/2003 given the non-final nature of the Commission decision.¹²⁰ The rest of the conduct

114. Case R.G. No. 11120/2019 Milan Court of First Instance Interim Order of 10 May 2019.

115. *7Pixel v Google*, 4.

116. Judgement of the Court, Case C-344/98 *Masterfoods v HB Ice Cream* (ECLI:EU:C:2000:689), paras 51 and 60; Milan Court 18 April 2018.

117. Italian Supreme Court Order No. 10880/2016.

118. *7Pixel v Google*, 5.

119. *7Pixel v Google*, 6.

120. SOUSA FERRO M., 'Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions' *Market and Competition Law Review*, vol. 3, 2019, p. 51, 52-53; CAROVANO G., 'Art. 16(1), Regolamento n. 1/2003: Un Revirement Nécessaire. L'Uniformità del Diritto Europeo

concerning the alleged continuation of the abuse, even after the infringement decision, would not be backed up by the Commission's findings of fact. For this latter part, the action was a standalone one that does not risk conflicts with any contemplated EU legal act and that, therefore, did not need to be stayed pending Google's appeal before the EU courts. Of course, 7Pixel could not use the interim preliminary assessment procedure for this standalone action and would have needed to sue Google in ordinary proceedings on the merits.

Concerning the European appeal, the 2017 Google Shopping decision sanctioning Google's self-preferencing abuse has been confirmed by both the General Court in 2021 and the Court of Justice on 10 September 2024. In essence, the CJEU concluded that Google was super dominant in the general search services market and leveraged its position over the neighbouring comparison-shopping services market. It also excluded that the Oscar Bronner test applies to self-preferencing abuses and that the as-efficient-competitor test becomes necessary only if the defendant establishes its relevance.

On 5 September 2023, Google has been designated as gatekeeper for Search. Shortly after Google's first DMA compliance report, on 25 March 2024, the Commission has opened non-compliance proceedings for breach of Art. 6(5) DMA which prohibits self-preferencing in ranking. During the proceedings, the Commission has to determine whether the display of Google search results may lead to self-preferencing in relation to Google's other complementary specialised search services over competitors' ones. The Commission is concerned that Google's DMA compliance measures may not ensure that third-party services are treated under FRAND terms on Google Search in comparison with proprietary services.

V. CONCLUSION

The three case studies represent good examples to forecast future trends in private enforcement of antitrust law in Europe vis-à-vis BigTechs in the coming years. Although the cases were decided under EU competition law and under the Italian rules concerning economic dependence, similar cases might be decided in the future by national civil and commercial courts in relation to future violations of the Digital Markets Act and Digital Services Act by BigTechs. As mentioned in the introduction, since these Regulations pursue different objectives in comparison to EU competition law, in the future, plaintiffs might rely on multiple legal basis, thus multiplying the opportunities for private enforcement actions in national courts.

The case studies show that, in digital markets, plaintiffs are more likely to be business than end users. Business users, such as merchants and advertisers that rely on the platform services, are more likely to start private enforcement actions

della Concorrenza e il Valore Giuridico delle Decisioni della Commissione Europea', *Mercato Concorrenza Regole*, vol. 3, 2019, p. 395, 399-402.

in the future. Actions by harmed end users, on the other hand, remain unlikely. Art. 42 DMA refers to the Representative Action Directive, recently entered into force.¹²¹ In transposing the Directive, some EU Member States (e.g. Germany), have extended the scope of application of the Directive to introduce representative actions in the field of EU competition law.¹²² Representative actions should be started by a 'qualified entity', such as a consumer organization or a public body.¹²³ It is doubtful, however, that consumer organizations might effectively start this type of actions in the future, since traditionally they are less familiar with antitrust law; they prefer relying on consumer law as legal basis in collective actions. Finally, digital markets are mostly characterized by zero-price markets, where end users 'pay' for a digital service by sharing their personal data or by paying attention to target advertising. The challenges in estimating the monetary losses faced by the end users is a further reason to discourage damages actions by groups of harmed consumers.

In relation to the remedies requested by the plaintiff, the Italian cases show that business users are likely to opt for an injunctive relief, whereby the digital platform would be forced by the court decision to stop the contested behaviour which limits the online business activities of the plaintiff. In the three case studies, no plaintiff asked for damages compensation. Unlike the classical cartel scenario, where damages may be estimated in terms of price over-charge suffered by the customers of the cartellists, damages caused by the unilateral exclusionary conduct of a digital platform usually cause a loss of profits for the business user. Traditionally, loss of profits is hard to estimate, due to the multiple factors affecting a firm's profits over a long period of time. In other words, it is hard to establish a causal link between the anti-competitive behaviour by the digital platform and the loss of profits suffered by the plaintiff. Furthermore, when it comes to the DMA and DSA obligations, damages will be calculated only from the moment in which these obligations have entered into force, and they have not been complied by the defendant.

When it comes to the prevalence of stand-alone v. follow on actions, the three case studies are inconclusive: Attrakt and Vaporat cases were litigated as stand-alone cases, while 7Pixel followed the EU Commission decision in Google Shopping. The prevalence of stand-alone v. follow-on actions in the future will be influenced by 'how active' competition authorities in will be sanctioning the anti-competitive behaviours by BigTechs, and the European Commission and national authorities in enforcing the DMA and DSA obligations. However, the Italian cases discussed in this paper interestingly point to a blurring distinction between private and public enforcement: Vaporat, for instance, was a stand-alone action,

121. 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. OJ L409/1, 4.12.2020.

122. HORNKOHL L., 'Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive in Germany.' *Journal of European Competition Law & Practice*, vol. 15, 2024, pp. 311-317.

123. *Supra*, Directive 2020/1828, Art. 3(4).

which anticipated the EU Commission in Google Ad-Sense decision. Similarly, the three competition law cases discussed in the present paper could be reframed today as violations of the DMA and DSA obligations. Traditionally, stand-alone actions are affected by a problem of information asymmetry that discourages the plaintiff to bring the claim to court. In the contest of digital markets, the problem of information asymmetry seems less relevant: the three cases discussed in the present paper concern either a breach or a termination of contract, or unfair contractual conditions imposed by the dominant platform on its business users. In other words, the plaintiff would be well placed to argue the case based on the available information, without asking for additional documents disclosure.

To conclude, the present paper has analysed three case studies as examples of possible future trends of private enforcement of antitrust law in Europe vis-à-vis BigTech. The entry into force of the DMA and the DSA are likely to increase private enforcement actions by harmed by business users vis-à-vis dominant digital platforms. Since these Regulations pursue different objectives in comparison to EU competition law, damaged entities will be able to pick up the best legal tool for the case, thus increasing the chance of having claims brought for violation of multiple legal regimes. The present paper thus represented a forecast of the future trends based on the Italian experience; time will tell us if our forecast is indeed correct.

VI. BIBLIOGRAPHY

1. Journal articles

1.1. Journal articles

- CAIAZZO R., 'The Legislative Decree of Implementation of Directive 2014/104/EU on Antitrust Damages Actions', *Italian Antitrust Review*, vol. 2, 2016, p. 104.
- Calini C., IOSSA E., 'Multiplicity of Tools For Antitrust and Consumer Protection in Digital Markets: The Italian Experience and the Road Ahead', *European Competition Journal*, vol. 20, 2024, p. 274.
- CAROVANO G., 'Art. 16(1), Regolamento n. 1/2003: Un Revirement Nécessaire. L'Uniformità del Diritto Europeo della Concorrenza e il Valore Giuridico delle Decisioni della Commissione Europea', *Mercato Concorrenza Regole*, vol. 3, 2019, p. 395.
- DEUTSCHER E., 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU', *European Papers*, Vol. 6, 2021, p. 1345.
- FABBIO P., 'Nota a Trib. Milano, Sez. Impresa, sent. 17 giugno 2016 - Attrakt c. Google', *Annali Italiani del Diritto d'Autore*, 2017, pp. 996-1009.
- Hornkohl L., 'Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive in Germany.' *Journal of European Competition Law & Practice*, vol. 15, 2024, pp. 311-317.

- MOUTON J., REED L., 'Following the Google Shopping Judgment, Should We Expect a Private Enforcement Action?', *Journal of European Competition Law and Practice*, vol. 13(2), 2022, pp. 154-163.
- PADILLA J., PERKINS J., PICCOLO S., 'Self-Preferencing in Markets With Vertically Integrated Gatekeeper Platforms' *Journal of Industrial Economics*, vol. 70, 2022, p. 371.
- PODSZUN R., 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act.', *Journal of European Competition Law and Practice*, vol. 13(4), 2022, pp. 254-267.
- SCALZINI S., 'Economic Dependence in Digital Markets: EU Remedies and Tools', *Market and Competition Law Review*, vol. 5, 2021, p. 81.
- SOUSA FERRO M., 'Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions' *Market and Competition Law Review*, vol. 3, 2019, p. 51.

1.2. Contributions to collective works

- FABBIO P., 'Il Contributo della Comparazione Giuridica Nello Studio dell'Abuso di Dipendenza Economica' in G. Colangelo, V. Minervini (eds), *La Nuova Stagione dell'Abuso di Dipendenza Economica*, Il Mulino, 2023.
- KOMNINOS A., 'The Digital Markets Act and private enforcement: Proposals for an optimal system.' In Charbit N., Gachot S. (eds.), *Eleanor M. Fox Liber Amicorum*. Concurrences Books, 2021.

1.3. Websites. Last accessed 18 February 2025, unless stated differently

- <<https://web.archive.org/web/20121016160308/http://www.attrakt.com/about-us.html>>.
- <<https://www.vaporart.it/>>.
- CARLOS S., 'New Search Engine Attrakt Focuses on Curated Content' (24 April 2012, Search Engine Land) <<https://searchengineland.com/new-search-engine-attrakt-focuses-on-curated-content-117920>>.
- LARDARA M., 'Vinto da "Attrakt" Il Primo Round Contro Google' (Il Tirreno 12 Ottobre 2016) <<https://www.iltirreno.it/prato/cronaca/2016/10/12/news/vinto-da-attrakt-il-primo-round-contro-google-1.14234227>>.
- D'ALESSANDRO J., 'Attrakt, La Startup Fiorentina Che Ha Battuto Google' (14 October 2016 La Repubblica) <https://www.repubblica.it/tecnologia/2016/10/14/news/schiaffo_a_google_risarcisca_la_startup_che_ha_fatto_fallire_-149751895/>.
- FAMILIARI S., 'Google vs Attrakt: La Sentenza Sull'Abuso di Dipendenza Economica Tra Imprese On-Line' (Altalex, 27 January 2017) <<https://www.altalex.com/documents/2017/01/27/google-vs-attrakt-la-sentenza-sull-abuso-di-dipendenza-economica-tra-imprese-on-line>>.
- <https://ads.google.com/intl/en_uk/home/partners/become-a-partner/>

https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en (last access 31.1.2025).

<<https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops>>.

<<https://support.google.com/google-ads/answer/9702452>>.

<<https://www.claimsfunding-europe.eu/projects/european-truck-cartel/>>.

<<https://www.noerr.com/en/insights/competition-outlook-2025-antitrust-damages-further-boost-to-private-enforcement-of-antitrust-law>>.

Search Engine Law, 'An Italian Start-up Under Google's Abuse of Economic Dependence' <<https://searchenginelaw.net/antitrust/67-an-italian-start-up-defeats-google-s-abuse-of-economic-dependence>>.

2. Jurisprudence and administrative decisions

2.1. National level

Case R.G. No. 11120/2019 Milan Court of First Instance Interim Order of 10 May 2019.

Case R.G. No. 14634/2017 Milan Court of First Instance, Vaporart s.r.l. vs Facebook Ireland Ltd., Summary Judgment of 19 June 2019.

Case R.G. No. 59172/2019 Milan Court of First Instance, 7Pixel vs Google, Interim Order of 4 January 2021.

Case R.G. No. 86198/2013 Milan Court of First Instance, Attrakt s.r.l. vs Google Ireland Ltd., Judgment No. 7638/2016 of 17 July 2016.

Italian Supreme Court Order No. 10880/2016.

2.2. CJEU

Judgement of the Court, Joined cases C-241/91 and C-242/91 P *RTE and ITP v Commission (Magill)* (ECLI:EU:C:1995:98).

Judgement of the Court, Case C-7/97 *Bronner v Mediaprint* (ECLI:EU:C:1997:264).

Judgement of the Court, Case C-344/98 *Masterfoods v HB Ice Cream* (ECLI:EU:C:2000:689).

Judgement of the Court, Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd.* (ECLI:EU:C:2002:497).

Judgment of the Court, Case C-418/01 *IMS Health v NDS Health* (ECLI:EU:C:2004:257).

Judgment of the General Court, Case T-201/04 *Microsoft v Commission* (ECLI:EU:T:2007:289).

Judgment of the Court, Case C-157/14 *Neptune Distribution* (ECLI:EU:C:2015:823).

Judgement of the Court, Case C-477/14 *Pillbox 38* (ECLI:EU:C:2016:324).

Judgment of the Court, Case C-48/22 P *Google and Alphabet v Commission (Google Shopping)* (ECLI:EU:C:2024:726).

Judgement of the Court, Case C-605/21 *Heureka Group v. Google* (ECLI:EU:C:2024:324)

Judgement of the General Court, Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)* (ECLI:EU:T:2024:634).

Appeal Application in Case C-826/24 P *Commission v Google and Alphabet* [2024].

2.3. Commission's Decisions

Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 final [2017] published as summary in OJ [2018] C 9/11.

Google Search (AdSense) Case AT.40411 Commission Decision C(2019) 2173 final [2019] published as summary in OJ C 369/6.

Meta – online social networking services (DMA.100020) Commission Decision of 5 September 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.

Meta Platforms Ireland Limited, Commission decision designating Facebook as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council C(2023) 2756 final of 25 April 2023.

Alphabet – Online advertising services Case DMA.100010 Commission Decision C(2023) 6101 final [2023] published as summary in OJ C/2023/549.

3. Legislation

3.1. National

Italian Code of Civil Procedure Royal Decree No. 1443 of 1940.

Italian Legislative Decree No. 168 of 2003.

Italian Civil Code Royal Decree No. 262 of 1942.

Italian Legislative Decree No. 3 of 2017.

3.2. European Union

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Communication from the Commission 2009/C 45/02 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 as amended by Communication from the Commission 2023/C 116/01 [2023] OJ C 116/1.

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 Mem-

- ber States and of the European Union Text with EEA relevance (2014) OJ L 349/1.
- Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127/1.
- 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. OJ L-409/1, 4.12.2020.
- 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) [2022] OJ L 265/1
- 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).
- Draft Art. 102 guidance on enforcement priorities: Communication from the Commission (2024) draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.

THE PROBLEM OF ACCESS TO JUSTICE IN DIGITAL MARKETS: COLLECTIVE REDRESS SOLUTIONS¹

Carmen Herrero Suárez

Professor of Commercial Law

University of Valladolid

ABSTRACT: To deal with the limitations of the individual actions in certain scenarios, two solutions are acquiring much strength, one of a procedural nature, the collective or representative action, and another of a substantive nature, by means of contractual instruments, the assignment of credits or claims to a litigation vehicle. The purpose of this paper is to examine these two solutions, assessing their admissibility and implementation in practice in the European framework and the role they are playing or may play in the future to solve the problems of access to justice for victims of anti-competitive practices or other illegalities in digital markets.

Keywords: assignment, collective redress, access to justice, representative actions.

SUMMARY: I. THE PROBLEM OF EFFECTIVE ACCESS TO JUSTICE. II. A PRIVATE LAW MECHANISM: THE ASSIGNMENT OF CLAIMS A. Operation and assessment of the model. B. The assignment model in practice: legal and judicial recognition. 1. The European Union's placet. 2. The admissibility of the model in Europe: a brief comparative law analysis. III. A PROCEDURAL SOLUTION: THE REPRESENTATIVE ACTION. A. Collective redress in Europe. 1. What has been so far the impact of collective actions in digital markets? IV. SOME FINAL THOUGHTS.V. BIBLIOGRAPHY.

1. This study forms a part of the Research Project untitled "La consolidación de la revolución digital y sus desafíos: adaptación de las estrategias competitivas de los operadores económicos y de las normas ordenadoras de los mercados. PID2022- 139741OB-C21, Spanish Ministry of Science and Innovation.

I. THE PROBLEM OF EFFECTIVE ACCESS TO JUSTICE

The classical process of resolving conflicts through individual actions, one plaintiff litigating a particular claim against one defendant, can be ineffective in certain situations. Various factors, such as the cost of individual litigation or the technical complexity of the procedures, contribute to this inefficiency, which leads to two problematic and very relevant situations in today's context.

On the one hand, not all the cases that ought to be litigated are actually pursued in court. There is a lack of litigation or "under-litigation" in the sense that many victims of right violations give up and do not pursue actions to protect their rights. This results in a situation of material injustice, a failure to redress the damage caused, and impunity for the offenders.

On the other hand, those who do decide to go to court, in the absence of mechanisms, do not do so properly, resulting in an avalanche of claims, often poorly presented or unfounded (for example, with low-quality expert evidence) which saturate the courts and impede or prevent the proper administration of justice². A multiplicity of claims based on the same facts before a plurality of courts also creates the risk of contradictory solutions with the consequent impact on legal certainty.

Let's try to develop these ideas further. First, with regard to the challenges of access to justice, the welfare state marked a departure from the liberal principles of the nineteenth century and their individualistic, *laissez-faire* view of rights. It led to a reappraisal of the role of public authorities in shaping relations between individuals and highlighted the need for their intervention to rebalance contractual positions, in order to achieve a fair organization and resolution of interests. In this context, since the late 20th century, individuals have been armed with new substantive rights in their positions as consumers, workers, tenants, policyholders... and even citizens. While the acknowledgment of these rights is a significant advancement, it must be accompanied by effective means to enforce them when they are violated. Among these newly recognized rights, the right of access can then be considered of paramount importance since the possession of rights is meaningless without mechanisms for their effective vindication.

The judicial process, which allows for individual actions that bring offenders and aggrieved parties face to face, aims to ensure that the outcome relies solely on the relative merits of the opposing positions, irrespective of any factors unrelated to the merits of their claims.

In practice, however, barriers to this ideal of parity often arise in practice. The cost of the process, whether financial or time-related, coupled with differences in the capacity of the parties (financial, intellectual or arising from greater

2. There are numerous examples of this type of "mass lawsuits" in the Spanish courts, such as the floor clauses, costs of mortgages or claims arising from the truck or car cartels or air delays.

experience in litigation) may deter (potential or alleged) victims from going to court to seek redress for the harm they have suffered³.

There are various areas or sectors where problems of access to justice are particularly acute. Probably one of the areas where difficulties are most evident is in relation to consumer rights and breaches of consumer protection rules (consumer law), especially where there are massive and widespread harms resulting from the same practice or conduct, and where the harms are fragmented, diffuse or difficult to assess⁴.

In the case of digital markets, especially in areas close to fundamental rights (privacy, equal treatment, health and product security...), breaches of regulatory rules, such as in the European case, the *General Data Protection Regulation* (GDPR)⁵ or *AI Act*, can result in material damages for consumers, but also immaterial damages, which since they cannot be measured precisely in monetary terms, but only estimated by a judge, are more complicated to prove in a claim for compensation⁶ resulting in many cases in an underenforcement situation. Moreover, the damage per individual concerned may not be significant enough to justify the cost, time and negative energy of litigation.

Another specific manifestation of the difficulty of access to the courts for the exercise of a right recognized by the legal system can be found in the framework of the private enforcement of competition law, specifically, in the exercise of the right to be compensated for pecuniary damages resulting from anti-competitive conduct or practices. In these cases, although the difficulties in bringing a claim are not limited to consumers and may also affect small and medium-sized enterprises⁷, practice shows that private enforcement of competition law against consumers has so far been minimal, or as the doctrine has graphically pointed out “the sun of private enforcement has not yet shone on consumers”⁸.

3. Vid. *in extenso*, GARTH, B./CAPPELLETTI, M.: “Access to Justice: The Newest Wave in Worldwide Movement to Make Rights Effective”, *Buffalo Law Review*, vol. 27, 1978, pp. 186 y ss.

4. Vid. GARTH, B./CAPPELLETTI, M.: “Access to Justice”, *cit.*, p. 194, recogiendo las palabras de PERROT: “Le consommateur, c’est tout et c’est rien”.

5. 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*).

6. Regarding the difficulties in specifying the scope and calculation of damages in digital markets, see HORNKOHL, L.: “Damages in digital single market law: definition of damages, scope of damages, damage items and methods of calculating damages”, *Schadensersatz im digitalen Binnenmarktrecht: Schadensbegriff, Schadensumfang, Schadensposten und Schadensberechnungsmethoden* in BAUERMEISTER/SCHWAMBERGER (eds): *Private Enforcement im Digitalen Binnenmarkt*, Mohr Siebeck, 2025 (forthcoming), pp. 85-101.

7. Both companies and consumers can be affected by these conducts, either directly, for example, due to the presence of a cartel of consumer products, or indirectly as a consequence of the repercussion of the damage throughout the different stages of the production process.

8. Vid. SOUSA FERRO, M., “Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible”, *Journal of European Competition Law & Practice*, Volume 13, Issue 8, 2022, p. 579. See the author’s detailed and in-depth analysis of consumer redress across different jurisdictions in the context of the private enforcement of competition law.

Some of the obstacles that businesses, especially SMEs, and consumers may face in enforcing their rights are⁹:

- Difficulties of damage quantification. For cartel damage claims, unlike, for example, compensation claims for delayed flights, there is no fixed regulation, grid or formula for determining the monetary value of a specific claim. Proof of damages is complex, requiring a multitude of data and costly.
- Information asymmetries vis-à-vis offenders, as well as lack of evidence, due to the secrecy of, in particular, cartels.
- Possible burden on ongoing business relations due to claims against business partners on whom the claimant might be dependent (fear of retaliation, e.g. delivery disruptions).
- Risk of long-lasting litigation due to the legal and economic complexities involved.
- Difficulty in raising third party funding for litigation, as the potential damage to a company, firm or individual consumer caused by the infringement may be too small to attract investors.

The major obstacles to access to justice will be gradually addressed in most jurisdictions through various strategies. New mechanisms will be implemented to facilitate the affordability of legal processes, such as legal aid. Efforts will also be made to reduce time and financial burdens by promoting alternative dispute resolutions methods like arbitration and mediation, which are quicker and less expensive¹⁰. Additionally, indirect financing options will be considered, such as recognizing the validity of contingency fees or allowing insurance products like After The Event (ATE) insurance to cover legal costs¹¹.

Although these solutions address some of the aforementioned problems in an *ad hoc* or specific manner, they do not manage to avoid all the difficulties identified, especially in cases where there is a collective of affected parties, with numerous problems persisting, above all, of initiative to claim in the case of damages of small amounts or damages that are difficult to assess and prove, and of financing in more complex and costly processes. Problems that, as noted, may increase in the evanescent and fast-paced digital world.

9. Vid. KRÜGER, C.: “La cesión de las acciones de daños derivados de ilícitos anticoncurrenciales”, 2024, available at <https://almacendederecho.org/la-cesion-de-las-acciones-de-danos-derivados-de-ilicitos-concurrenciales>.

10. Vid. GARTH, B./CAPPELLETTI, M.: “Access to Justice”, *cit.*, pp. 196 et seq.;

11. *After The Event Insurance* (ATE Insurance) refers to insurance which covers the legal costs and expenses involved in litigation. It can be used in any type of litigation and by either a claimant or a defendant, although in practice ATE Insurance is mainly used by claimants. After The Event Insurance policies normally cover the legal costs which a claimant must pay to a defendant when a claim is unsuccessful – when the claim is either lost at trial, or abandoned/settled after the defendant has incurred costs which the claimant is liable to pay.

To deal with them, two solutions are currently acquiring much strength and space on the plaintiff side, one of a procedural nature, the collective or representative action, and another of a substantive nature, by means of contractual instruments, the assignment of credits or claims to a specialized entity or litigation vehicle (*assignment model*). In any case, although these two scenarios can solve the problems of lack of initiative, which will be assumed by a third party, in many cases (unless the representative entity or the assignee has sufficient resources of its own), they do not solve the problems of financing, which can lead to the intervention of another third party in the process: the funder.

The purpose of this paper is precisely to briefly examine these two solutions, assessing their admissibility and implementation in practice in the European framework and the role they are playing or may play in the future to solve the problems of access to justice for victims of anti-competitive practices or other illegalities, for example, violations of data protection rules or other regulations, in digital markets.

II. A PRIVATE LAW MECHANISM: THE ASSIGNMENT OF CLAIMS

A. Operation and assessment of the model

This model attempts to solve the problems of litigation when there is a plurality of affected parties by resorting to private law mechanisms, specifically, and on the basis of the principle of contractual freedom and general transferability of rights, through an assignment contract. Those affected by unlawful conduct transfer their rights to claim to a specialized entity or company. The latter acquires ownership of the rights in exchange for a fee, which may consist of an initial fixed amount or, most commonly, a percentage of the outcome of the proceedings (similar to a *litigation fee*), and exercises them in court or out of court in its own name. The company acts as a litigation *vehicle* or *claimant vehicle*, bears all the costs of the litigation and, as it holds all the rights, bundles them into a single proceeding.

This third party may be created *ad hoc* for a specific case or, on the contrary, it may be a provider specialized in the assignment of claims, such as Cartel Damages Claim, myRight, flightright, Deutsche Bahn, TransAtlantis, etc. The function of such entities is to collect evidence related to the claims in question, assess their merits, and market their services to individual claimants. They may also select litigation lawyers and economic experts. Assignors receive the amount ultimately recovered, less a pre-agreed share from the assignee. It is important to note that the assignors do not incur any costs (no win, no fee) and are not involved in the legal proceedings as parties. The plaintiff finances the case from its own assets or from an external litigation funder.

The efficacy of this model is contingent upon the presence of a substantial number of assignments. The main difficulty faced by companies that resort to this

business model is *book building*, the formation of this portfolio of affected companies or consumers. The formation of this book is obviously more problematic in the case of consumers, both because of the difficulties in identifying them and because of the expiry of a reluctance to complain, especially in the case of small claims. This explains why, at least in the context of competition law, it has so far proved to be more interesting or operational in cases where the victims are businesses. This is without prejudice to the fact that the assignment model is frequently used in other areas of consumer protection, such as defective products, rent control, capital markets, data protection and passenger rights. This is also without prejudice to the fact that, recently and thanks to the emergence of “legal tech”, this picture is gradually changing. The contact possibilities offered by social networks make it easier to advertise and search for consumers, and digitalisation favours the rapid conclusion of contracts and the provision of documentation¹².

In any case, this problem is shared with *opt-in* class actions, in fact, this assignment of claims has been called “de facto class actions”. The limitations of this mechanism are evident in the case of the damages actions brought through this system in the courts of Valladolid against car manufacturers for financial damages arising from the national car cartel¹³. While these actions have succeeded in bringing together a significant number of claims, they still constitute a negligible percentage of the total number of individuals affected by the cartel.

This mechanism has been demonstrated to have numerous positive aspects and advantages. Primarily, it resolves the issues of absence of initiative or cessation of legal action, thus facilitating claims and the rectification of damages that would otherwise not occur. The presence of a specialised entity, a professional plaintiff, and the increased availability of data and resources facilitate the substantiation of damages. The balance that the “individual” process does not achieve is re-established, even if only partially, by levelling the positions of the parties (both judicially and, if necessary, extra-judicially, to reach a settlement agreement). In summary, the process facilitates the compensation of victims of offences or wrongdoing, prevents the unjust enrichment of offenders, and, if the compensation system functions efficiently, can also be expected to more effectively fulfil its derivative or collateral function of deterrence.

Furthermore, it has been demonstrated that the assignment system can serve to both prevent and reduce the number of individual actions and the overcrowding of courts, thereby minimising the risk of contradictory solutions.

Obviously, this model also has its detractors and has not escaped criticism. The most prevalent and pervasive of these criticisms is, seemingly, of an “ethical” nature. However, it is noteworthy that in numerous instances, it is the very companies being sued, or those fearing such legal action, that are the most vocal proponents of this critique. The accusation has been made that this system

12. Vid. KRÜGER, C./WEITBRECHT, A.: “Bundling of claims by way of assignment in Germany”, *Mass Claims*, 2021-2, p. 5.

13. CNMC Resolution of 23 July 2015, File S/0482/13, *Fabricantes de automóviles*.

promotes the commodification of justice, the introduction of a capitalist and market element, and the profit motive, in the resolution of conflicts.

To qualify this criticism. If only it were not necessary to introduce it, if everything were smooth and easy, and if only the law and the adversarial process could resolve disputes, but we have already seen that this is not the case, that there is a “market failure”, that there is no fundamental equality. Few areas are pure, they escape the market. This is nothing new... contingency fee agreements, which have been generally recognized in Spain since the STS of 4 November 2008, are nothing more than a form of financing with which the lawyer, in order to make a profit, tries to overcome the reluctance of the injured party to sue... and they have also been (or are being) accused of involving speculation and, therefore, of being incompatible with the dignity of the profession.

The assignment of claims to a specialized entity is also linked to problems of professionalism that could arise from the intervention in the process of a service provider in addition to lawyers (a concern that is very present, for example, in Germany), or problems of possible conflicts of interest between assignors and assignees, between assignors among themselves or even, in cases where there is a financing agreement, between the latter and the fund. These are arguments that undoubtedly call for the need for control and the requirement of a high degree of transparency in the conclusion of contracts, especially in the case of resorting to third-party financing, in order to avoid a possible conflict of interest, but which are neither inherent to the model nor, in any case, sufficiently serious or significant to reject (or prohibit) it in general.

Many of the criticisms associated with this model are shared with other forms of collective litigation, such as representative actions. Thus, for example, those who argue that if the circle of potential claimants is widened, eliminating the exclusivity of the victim, there is a risk of unleashing excessive litigation, an avalanche of frivolous claims. Although those who warn of this danger seem to be unaware of the role of the judge in blocking unfounded claims and the existence of mechanisms to avoid this risk, such as the rules on abuse of process or reckless litigation¹⁴, I believe that we are far from this apocalyptic scenario. Let us remember that we start from the opposite situation, “under-litigation” and underenforcement in which very solid, very well-founded claims do not reach the courts.

14. Vid. FITZPATRICK, B.: *The Conservative Case for Class Actions*, The University of Chicago Press, Chicago, 2021, p.5.

B. The assignment model in practice: legal and judicial recognition

1. The European Union's placet

This mechanism has a longer history and is more widespread in some European countries than in others, where it is a relatively new phenomenon, as is the case in Spain.

Although, in principle, the way in which the rights recognized by European law are exercised is usually left in the hands of the Member States, the European authorities have been showing an open and favourable attitude towards this model of collective litigation.

In the field of competition law, there has been a gradual recognition by the various Community institutions, such as the European Parliament¹⁵ and, importantly, the European Commission, which in the Damages Directive explicitly provides for the possibility of damages actions being brought by third parties to whom the victim has transferred his action¹⁶. Similarly, the judgements of the CJEU and most of the GC show a permissive orientation, having progressively recognized the viability of the assignment model, in a forceful manner and linked to the very principle of effectiveness in areas such as the assignment of air passenger claims.

The *Eventmedia* case¹⁷ refers to a preliminary ruling in the context of air passenger transport and the application of the 2004 Regulation on compensation in the event of flight cancellations. In this case, six passengers affected by the cancellation of a flight from Bolivia to Madrid assigned their claims against Air Europa for the due cancellation to the commercial company Eventmedia. Air Europa rejected the assignee's standing to bring proceedings because the transport contracts concluded included a clause prohibiting the assignment of rights derived from the Regulation. The CJEU considered that such clauses are inadmissible because they prevent the exercise of a right recognised by European law. In this sense, the judgement is important because the inadmissibility extends not only to limitations that refer directly to the right (its recognition or extension) but also to those that significantly restrict the conditions or form of exercise of that right. It

15. In a study of 2012, *Collective Redress in Antitrust*, it is acknowledged that the "claims transfer to a third party may help to overcome the problem of lack of participation by injured parties", disponible en: [https://www.europarl.europa.eu/thinktank/en/document/IPOL-ECON_ET\(2012\)475120](https://www.europarl.europa.eu/thinktank/en/document/IPOL-ECON_ET(2012)475120).

16. 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. In article 2, when defining 'action for damages', it states that means: "an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim".

17. Judgment of the CJEU of 29 February 2024, *Eventmedia Soluciones SL v. Air Europa*, Case C-11/23.

is based on a fundamental idea, which is the freedom of the right holder and the need to guarantee that the affected party chooses the most convenient way to defend it.

As far as the scope of this judgement is concerned (and, always within the specific framework in which it occurs) its main consequence is that the transfer cannot be limited by contract. It seems to be deduced from the literal wording that a different question would be whether the limitation is provided for by law (in this specific case, as the assignment is not being questioned from a legal perspective, the court clearly recognises that the assignment is permitted in Spain - at least in relation to passengers' rights). The compatibility of a law that restricts the possibilities of transferring the right to claim, in this case, for damages arising from an anti-competitive practice is precisely the subject of the preliminary ruling raised by the Regional Court of Dortmund in the case of the *Roundwood* cartel, which we will refer to below.

In the framework of competition law, the courts had been less explicit, referring to the credit transfer model more indirectly in cases such as *Hydrogen Peroxide*¹⁸ or in the air transport cartel in the case *Stichting Cartel Compensation and Equilib Netherlands*¹⁹. The judgment in response to the preliminary ruling raised by the Dortmund court, mainly following the publication of the opinion of the Advocate General²⁰, was awaited with anticipation by the defenders of the assignment model, in the hope that it would mean the definitive confirmation of this model under EU law.

However, the response of the CJEU²¹, perhaps due to the weakness of the questions posed conditioned by the national law, is disappointing, ambiguous and does not really offer much EU law guidance. The Court limits itself to saying that only if there are no other reasonable and effective alternatives under domestic law, whether collective mechanisms or individual actions, to exercise the right to redress recognised by European law, can the impossibility of resorting to the assignment model be considered to violate the principle of effectiveness and the right to effective judicial protection. The Court makes it clear that no strict obligation to implement collective redress can be drawn from the principle of effectiveness.

18. Judgment of the Court (Fourth Chamber) of 21 May 2015. Cartel Damage Claims (CDC) *Hydrogen Peroxide SA v Evonik Degussa GmbH and Others*, Case 352/13.

19. Judgment of the Court (Second Chamber) of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands BV v Koninklijke Luchtvaart Maatschappij NV and Others*, Case C-819/19.

20. Opinion of Advocate General Szpunar delivered on 19 September 2024, Case C-253/23 ASG *2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen*. The analysis of the case is complex and very close to the facts of the dispute. However, the Advocate General's reasoning is clear that, while procedural rules are a matter for the Member States, national rules that impose complex or excessive requirements that jeopardise the right to effective redress are contrary to Community law. In other words, very demanding rules that make the assignment of claims in the field of competition law excessively difficult could be contrary to Community law if such excessive difficulty in practice forces claimants to desist from pursuing their claims.

21. Judgment of the Court of Justice of the EU of 28 January 2025. Case C-253/23 (ASG 2).

2. The admissibility of the model in Europe: a brief comparative law analysis

The assignment of claims is generally admitted in continental systems, where, although not expressly regulated, it finds shelter in civil rules and the general principles of free contracting and transferability of rights. Thus, for example, this model is widespread in practice in states such as the **Netherlands, Finland and Austria**, where the courts have had occasion to expressly rule on the legality of the assignment of claims for damages arising from anti-competitive practices.

In **Spain**, the use of this mechanism in mass claims is more recent, with various cases of assignment of compensation rights in the insurance sector, air passenger transport and, more recently, in competition law, with the admission of the claims brought against the truck cartel and by CDC in relation to the car cartel.

In our legal system, the legal basis for articulating the transfer of the claim is the credit transfer contract regulated in articles 1526 et seq. of the Civil Code. From any unlawful act arises a right of credit for the injured party to demand compensation for the damage caused. This right is essentially transferable in accordance with article 1112 of the Civil Code (*all rights acquired by virtue of an obligation are transferable subject to the law, unless otherwise agreed*) through the institution of credit transfer and 1512 of the Spanish Civil Code²². This is a bilateral legal transaction by virtue of which the assigning creditor transfers the ownership of a claim to a third party (assignee) by acts *inter vivos*, who is subrogated to his position. This means that the assignee does not only acquire the right of the assignor as a victim of practices to be compensated, but also the right to seek the protection of the courts to achieve its effectiveness, suing those responsible, if necessary, with all the powers and accessories that are necessary for this purpose. The possibility that this business can be used to carry out the transfer of credits related to the actions for compensation derived from the infringement of the rules of competition is expressly contemplated in Additional Provision 4.3.1. LDC (Competition Law) which, when defining actions for damages, refers to the fact that such actions may be brought by the alleged injured parties ‘including the person who has acquired the share’, an assumption that unequivocally refers to the assignment of the claims corresponding to those actions. Furthermore, article 283 bis j.3 LEC (Spanish Civil Procedure Law) states that evidence obtained exclusively through access to a file of a competition authority may only be used in an action for damages arising from infringements of competition law by that person or by the natural or legal person who is the successor to their rights, *including the person who has acquired their claim*. It is a mechanism that is being progressively introduced in Spain, in my view with full legislative backing and a largely favourable reception by judges and magistrates.

22. STS, 1st, 13/07/2007, *Once*, ECLI:ES:TS:2007:5014, FD 4. And in *camiones*: STS, First Chamber, 14/06/2023, rec. 5855/2020, ECLI:ES:TS:2023:2496 and in *leche*: SAP Granada, 29/09/2023, rec. 1303/2021, ECLI:ES:APGR:2023:873.

The assignment of compensation claims in the event of claims in the field of air transport. In this sense, several Provincial Courts (for example, Barcelona,²³ Valencia,²⁴ Balearic Islands²⁵ and Madrid²⁶), with reference to the case law of the First Chamber of the Supreme Court, have validated this legal business in relation to the procedural standing of the assignee entities: (i) accepting the provision of a percentage of the compensation as remuneration; and (ii) clearly distinguishing it from the figure of management or entrustment of collection.

In some jurisdictions, however, it has encountered some regulatory obstacles or resistance.

In **common law countries** (Australia, United States, United Kingdom...) restrictions or difficulties can be posed to the assignment of credits and other forms of financing of proceedings derived from the medieval doctrines of *maintenance, barrety and champerty*, which imply the prohibition of any form of financing of the parties subject to a trial²⁷. These doctrines of medieval origin were initially based, at a time when the administration of public justice was weak and corrupt, on preventing the abuse and distortion of the process by the great feudal lords as a means of trying to increase their territorial dominions, acquiring “pretended rights” over the lands of third parties and exercising all their power and influence against the possessors of the lands. Subsequently, this prohibition would be maintained, supported by the existence of a social rejection of litigation, in the limitation of any type of trial, meritorious or not²⁸, as contrary to the Christian doctrine of forgiveness.

These motivations will gradually lose their *raison d'être*, clearly becoming obsolete today. Nowadays litigation is not a bad thing but a socially useful way of resolving disputes. Moreover, with the strengthening of the judicial system, the paradoxical situation will arise that what was instituted at a given moment to protect the weak was, in practice, producing the opposite effect. As the cost of litigation increased, prohibitions were denounced as placing justice out of the reach of most people in society and had the main effect of giving wealth the monopoly of justice against poverty²⁹.

The *maintenance* and *champerty* doctrines have been losing their force in some jurisdictions, either through express derogation, inapplication in practice or restrictive interpretation, as in Australia, the UK and some US states. However, it

23. SAP Barcelona, 15^a, 17/12/2018, appeal n.º 1165/2017, ECLI:ES:APB:2018:12528, FD 3

24. SAP Valencia, 9th, 20/05/2019, appeal no. 2514/2018, ECLI:ES:APV:2019:2383, FD 2.

25. SAP Balears, 5th, 17/05/2023, appeal no. 95/2023, ECLI:ES:APIB:2023:1345, FD 2.

26. SAP Madrid, 28th, 25/11/2022, appeal n.º 24/2022, ECLI:ES:APM:2022:17753, FD 2.

27. These have their origins in Greek and Roman law, where there were prohibitions (sycophancy and calumnia) designed to deal with people who promoted unfounded litigation for financial gain.

28. The abuse consisted not only of using the legal process unjustifiably, but also of using it excessively, even when it was justified, or of not using it at all except under pressure of necessity.

29. Vid. *in extenso*, DOBNER, A.: “Litigation for Sale”, 144 *U. Pa. L. Rev.* 1996, pp. 1529 y ss.; NEUBERGER, D.: “From Barrety, Maintenance and Champerty to Litigation Funding”, Harbour Litigation Funding First Annual Lecture, 8 mayo 2013, disponible en: <https://searchworks.stanford.edu/view/10153251>; RADIN, M.: “Maintenance by Champerty”, 24, *California Law Review*, núm.1, 1935, pp. 48-78.

is formally maintained or actively enforced in others, and its permanence and rationale is debated, with more contemporary justifications being sought in its defence, such as discouraging frivolous litigation, preventing non-professionals from engaging in the unauthorised practice of law, or funding arrangements that harm clients by creating conflicts of interest and threatening the independence of lawyers' professional judgement.

And finally, **Germany**, one of the jurisdictions that imposes the most restrictions on the various forms of collective litigation, including the *assignment* model which has had a long and bumpy road³⁰. Not only civil rules apply to this model, but also the rules regulating the provision of legal services, which will give rise to a judicial *mare magnum* of contradictory positions, which, however, will gradually lead to the recognition of this model and its full operability in the framework of competition law. In fact, it has been used to bring actions for damages against the cement, bleaching chemicals, timber, sugar, air fares and trucks cartels.

In short, the assignment of claims is a useful mechanism for resolving problems of access to justice, facilitating the filing of actions that would otherwise not be carried out, but whose operability, so far in the case of consumer protection against illegal practices in digital markets, has been limited.

III. A PROCEDURAL SOLUTION: THE REPRESENTATIVE ACTION

A. Collective redress in Europe

A second mechanism for the protection of collective interests, this one of a strictly procedural nature, is constituted by the so-called class or collective actions, or to follow the terminology used in Europe, in a clear desire to mark differentiating limits with the American model, representative actions. With this term, emphasis is placed on the core of the phenomenon, consisting of shifting the exercise of the action to a subject who is not the holder of the rights or interests harmed by the infringement, but who is considered to be adequately representative *lato sensu* of those rights or interests.

This extraordinary legal standing allows an entity representing the interests of a group affected by an unlawful practice to bring injunctive or compensatory actions on its behalf.

The regimes available for class or group actions broadly fall into two categories: 1) The opt-in regime, where the claim is brought on behalf of only those claimants who are identified in the proceedings and authorise the claim to be brought on their behalf and 2) the opt-out regime, where the claim is brought

30. Vid. *in extenso*, KRÜGER, C./WEITBRECHT, A.: "Bundling of claims by way of assignment in Germany", *cit.*

on behalf of all those who fall within a defined class of claimants (unless they take positive steps to opt out) and there is no need for the individual class members to be identified or to authorise the claim to be brought on their behalf.

Class actions entail numerous advantages, such as lower legal costs, uniformity in the treatment of similar cases and, above all, they make it possible to overcome the resistance (or directly the impossibility) to claim in certain cases.

The criticisms of this procedural mechanism, the introduction of which in continental systems has been, or is being complex, since it has to pass through some rigidities or formalisms of legal dogma, are in part shared with those made in relation to the assignment model, to which we have already referred. This is, of course, without prejudice to the fact that collective actions also have some of their own, focused fundamentally on their possible abusive use. In this sense, the European Commission itself warns of the risk of actions being used as an instrument to damage the market position of another business competitor (financially or in terms of reputation). Another dangerous scenario refers to the possibility of the defendant controlling the association, in principle constituted for the defence of consumers, and using it to bring collective actions with the aim of obtaining the suspension of individual civil actions or, directly, exercising this action in an unduly diligent manner in order to seek the effect of *res judicata* materia, and prevent the rest of those affected from suing in the future³¹.

Despite all these criticisms, as we know, class actions are a very widespread collective protection mechanism in the USA. In Europe, at least in the last twenty years, the concern to arbitrate, from the Community institutions, a mechanism for collective redress has always been present to a greater or lesser extent and scope. The initial idea of establishing a model of collective redress within the framework of competition law³² was replaced by a horizontal model of consumer protection, initially through soft-law mechanisms³³ and subsequently through the approval in 2020 of the Directive on representative actions for the protection of the collective interests of consumers (*cit.*). The Directive does not contain a general regulation and gives freedom to the Member States in different aspects of the regime. Among others, in some important aspects, such as the option for an *opt-in* or *opt-out* model, which clearly conditions the effectiveness of collective protection in practice.

31. 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* (OJ L 409/1, 04/12/2020).

32. European Commission Green Paper -*Damages actions for breach of the EC antitrust rules* (COM/2005/0672 final); European Commission *White Paper on Damages actions for breach of the EC antitrust rules* (COM 2008 165 final). See the statements of the then Commissioner for Competition, Joaquín Almunia: 'Common standards for group claims across the EU', available at https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_10_554.

33. 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* (2013/396/EU).

As far as its extension is concerned, as was the case with the transfer model, its implementation in practice is uneven, mainly depending on the extent of its legal recognition, with some jurisdictions being much more wary than others of this procedural mechanism for collective litigation.

Although December 2022 was the final deadline for implementation of the directive, it is still pending in several countries, including Spain, which has, for the moment, a project that is undergoing an interminable parliamentary process³⁴. The draft presented was open and rather positive to this form of litigation, although it contained some obstacles to effective implementation, such as the unjustified and discriminatory limitation of standing or certain restrictions on funding. However, despite the fact that the deadline for transposition was missed, it was decided to paralyse the parliamentary procedure by removing the part of the bill relating to representative actions. It remains to be seen how this story will end and whether the opt-out model provided for in the bill will be able to withstand the strong business lobbies. What is certain at this stage is that the EU rules have resulted in very different collective redress mechanisms across Europe, and their respective effectiveness in dealing with situations of mass damage may vary significantly between Member States.

1. What has been so far the impact of collective actions in digital markets?

Unlike the assignment of claims model whose use in digital and consumer markets has so far not been of significant relevance, numerous class actions have been brought in the last decade in this area, with a significant and increasing rise of competition and data related class actions in the tech sector.

In the US case, class actions against tech firms are very numerous and show no sign of abating. Claimant firms continue to pursue litigation in parallel with government enforcement. Dominance cases on behalf of classes of consumers, developers and advertisers have been brought against Google, Apple, Amazon, Meta.

In Europe, it is a very widespread mechanism in the most claimant-friendly jurisdictions, such as the United Kingdom, the Netherlands and Portugal, which have chosen an opt-out model, and with less potential in others, such as Germany and Italy, which, on the contrary, have decided on an opt-in model.

Although the basis for claims varies, most claims for damages can be categorised into one of two types: (1) claims for damages arising from breaches of data protection rules, or (2) breaches of competition law (sometimes including unfair competition law).

Thus, as far as competition law is concerned, we will take as a point of reference the UK, where we are witnessing a real reboot of class actions since

34. https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-16-1.PDF

2021. Following the US Supreme Court Decision in *Merricks v. Mastercard*³⁵, more than 50 competition law class actions have been filed in the CAT, with a considerable number being against Big Tech firms. On these actions, 2/3 of the claimants are the final consumers, the other being third-party sellers of app-developers.

The possibility of bringing a class action under an opt-out system for infringement of competition rules follows the reform of the Competition Act 1998 by the Consumers Right Act 2015, establishing an action similar to the American ones, but only for private competition litigation. The extensive interpretation carried out by the English Supreme Court in *Mastercard*, very favourable to the system as it is based on the principle that these claims should be facilitated rather than prevented, has had as a fundamental effect a significant increase in class actions follow-on, but also stand alone, some of them, with novel “theories of harm”, in order to ensure access to the collective proceedings regime, for the time being, only available for competition law violations. Claimants are increasingly deploying theories of harm not traditionally considered through by competition law. The case against Meta alleges it abused its dominant position by taking excessive data from the users without appropriate compensation, whilst a second class action against Apple alleges it abused its dominant position by throttling older handsets to circumvent battery performance issues. These alleged practices might once have once been dealt with under data protection and consumer protection legislation. Instead, the high damages potentially recoverable through an opt-out claim provide strong incentives to litigation funders and claimant law firms to re-cast claims as competition infringements.

In Portugal, for example, the consumer protection association Ius Omnibus has brought class actions against Sony, Tik Tok, Google and Apple for infringement of antitrust and unfair competition law³⁶.

But it is not all about competition. Class action litigation against data abusers is also being used. The increase in data regulation class actions in the tech and digital sector can be observed. Class actions on personal data protection increased 11-fold between 2016 and 2020 (an increase of 1000%)³⁷.

I. Privacy concerns in class actions within the digital realm are diverse and can include unauthorised data collection, breaches, improper use of personal information, and violations of privacy laws. For example, individuals may join class actions against companies that fail to adequately protect their sensitive data, leading to data breaches. Issues related to invasive data tracking, profiling, or the misuse of user information by tech companies also frequently give rise to privacy-focused class actions.

35. Judgement UKSC of 11 of December 2020, *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)*, [2020] UKSC 51.

36. A detailed description of the cases can be found at <https://iusomnibus.eu/cases/>

37. Vid. ALIAGA, L./GUTIÉRREZ, E.: “Acciones colectivas y la restauración de la legalidad en materia de protección de datos en el Reino Unido”, *La Ley privacidad*, núm.9, 2021.

This expansive concept of collective actions in the area of privacy and personal data protection has been favoured, among other factors, by a positive regulatory framework. Articles 80 and 82 of the GDPR³⁸ have opened the door to collective redress, making it possible for entities or non-profit organisations to claim material and non-material damages for the infringement of data subjects' rights as a result of the processing of their data, provided that this is provided for in the legislation of the Member States. Although the Regulation does not explicitly mention class actions, it legitimises entities, associations and organisations that meet certain requirements to bring collective claims on behalf of data subjects. Article 80 of the GDPR explicitly gives a non-profit organisation the opportunity to submit a complaint to the regulatory authority or to institute private proceedings for damages against the controller or processor on behalf of data subjects.

Class actions involving technology and privacy face various challenges and complexities.

One key challenge is the rapid evolution of technology, which may outpace regulatory frameworks, making it challenging for legal systems to keep up.

Secondly, the identification and certification of a suitable class of plaintiffs with common issues can also pose difficulties.

Additionally, determining the extent of harm and the appropriate compensation for affected individuals in a digital context can be complex. Precisely, one of the great battle horses in the collective protection of rights due to infringement of data protection regulations arises with the accreditation and quantification of moral damages, especially in cases of loss of control of data. In most security breaches, moral damages are claimed for distress or loss of control. However, the Regulation does not establish specific criteria for the quantification of this type of damages, beyond some provisions contained in Recital 146, so it will be necessary for judges and courts to interpret the scope and quantification of this type of non-material damages, which will gradually make their way, especially in some jurisdictions.

Some recent decisions of the Dutch courts are beginning to establish decisive criteria for the quantification of the damage, such as the nature of the personal data affected (whether ordinary or special categories of data), the seriousness of the breach and the number of data subjects affected, the duration of the breach and the irreversible and irreparable nature of the breach, as would be the case where there is a permanent loss of control of the data subjects over their personal data due to the adverse consequences that this may entail in the future.

In the United Kingdom, numerous actions have been brought for breach of data protection rules, both for unlawful use of data (*Lloyd George v. Google*; *McCann v. Google*, *The Privacy Collective v. Oracle and Salesforce*) or claims for material and non-material damages due to security breaches (*British Airways*, *Morrison*, *Equifax*, *Easyjet*). Two possible collective litigation systems have been

38. 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).

used: group litigation orders (opt-in mechanism) or representative actions (opt-out model, more difficult to succeed in practice, given the traditionally restrictive judicial interpretation of the “same interest” requirement).

An important judgment in relation to the evolution of the UK class action and data protection regimes is the judgment of 10 November 2021 of the Supreme Court in the case *Lloyd.v. Google*³⁹. This case is a representative action against Google that concerns the alleged (unlawful) tracking of Iphone users (more than 4 million) and the use of these data for behavioural advertising. In this case, the claimant sought a uniform amount of damages without seeking to prove damage for each individual, which significantly reduces the complexity and cost of the claim.

Its importance lies in the fact that the Supreme Court is going to once again restrict both the possibilities of compensation for non-material damages reversing the appeal judgement of 2 October 2019. In this judgement, the Court of Appeal had established that damages were, in principle, capable of being awarded for loss of control of data under the Data protection law, even if there was no pecuniary loss and no distress. The Supreme Court rejects this notion and states that an award of compensation for a non-trivial breach of the Data Protection Act 1998 can be made only if the data subject has suffered some form of material damage, *id est*, tangible financial loss, or if they have suffered distress.

In Germany there is an important ruling of the German Federal Court of Justice (BGH) of 18 November 2024, favoring that the mere loss of control of data may be sufficient to obtain compensation. Even though the BGH was specifically dealing with a data breach on Facebook, the statements in the judgment can probably be applied to other scenarios in which data subjects are unlawfully deprived of control over their privacy⁴⁰.

IV. SOME FINAL THOUGHTS

The following conclusions can be drawn from a brief examination of these two collective redress mechanisms.

The divestiture model is supported by the European authorities and is seen as an effective tool for private enforcement of competition law, especially when the victims of anti-competitive practices are companies, but has so far proved to be of little use to consumers. Its use in digital markets has also been limited, focusing almost exclusively on data protection infringements.

Collective actions, on the other hand, have in principle proved to be a more useful tool to protect consumers against infringements of their rights, in particular breaches of competition or data protection rules. However, the use of this mechanism depends to a large extent on its national configuration. Most of the procedures are still in their infancy and it is too early to assess their impact.

39. Judgement of the Supreme Court of 10 November 2021, *Lloyd v. Google LLC*, [2021] UKSC 50.

40. Case no. VI ZR 10/24

However, I think it is important that, in these debates that are taking place, and even more so in the context of the parliamentary deadlock on the draft law on representative actions in Spain, we do not lose perspective and that we really take into account the conflicting interests. We must not forget that the ultimate goal is to achieve a public good: to facilitate access to justice and to guarantee effective - not just nominal - protection for consumers and others who have been harmed by illegal practices. We must be cautious and carefully regulate (or interpret) any measure that could prevent the effective exercise of rights, especially where those rights have been recognized by European law and their effectiveness could be called into question.

V. BIBLIOGRAPHY

- CATALÁN CHAMORRO, M.J.: *El acceso a la justicia de consumidores: los nuevos instrumentos del ADR y ODR de consumo*, Tirant lo Blanch, Valencia, 2019.
- DOBNER, A.: "Litigation for Sale", 144 *U. Pa. L. Rev.* 1996, pp. 1529 y ss.
- FITZPATRICK, B.: *The Conservative Case for Class Actions*, The University of Chicago Press, Chicago, 2021.
- GASCÓN INCHAUSTI, F.: "¿Hacia un modelo europeo de tutela colectiva?", *Cuadernos de Derecho Transnacional*, vol.12, n.2, 2020, pp. 1290 y ss.
- GARTH, B./CAPPELLETTI, M.: "Access to Justice: The Newest Wave in Worldwide Movement to Make Rights Effective", *Buffalo Law Review*, vol. 27, 1978, pp. 181 y ss.
- KRÜGER C./WEITBRECHT A.: "Bundling of Claims by way of Assignment in Germany", *Mass Claims* 2021-2, pp. 1 y ss.
- HORNKOHL, L.: "Damages in digital single market law: definition of damages, scope of damages, damage items and methods of calculating damages", *Schadensersatz im digitalen Binnenmarktrecht: Schadensbegriff, Schadensumfang, Schadensposten und Schadensberechnungsmethoden* in BAUERMEISTER/SCHWAMBERGER (eds): *Private Enforcement im Digitalen Binnenmarkt*, Mohr Siebeck, 2025 (forthcoming), pp. 85-101
- LÓPEZ SÁNCHEZ, J.: *El sistema de las class actions en los Estados Unidos de América*, Comares, Granada, 2011.
- LYON, J.: "Revolution in Progress: Third-Party Funding of American Litigation", 58, *UCLA Law Review*, 2010, pp. 571 y ss.
- MARCUSHAMER, I.: "Selling your torts: creating a market for torts claims and liability", *Hofstra Law Review*, Volume 33, Issue 4, 2005, pp. 1544 y ss.
- MOLITERNO, J.: "Broad Prohibition, Thin Rationale: The Acquisition of an Interest and Financial Assistance in Litigation Rules", 16 *Georgetown Journal of Legal Ethics*, 2003, pp. 223 y ss.
- MONTESINOS GARCÍA, A.: *La tutela de los derechos e intereses colectivos en la justicia del siglo XXI*, Tirant lo Blanch, Valencia, 2020.
- MUÑOZ ARANGUREN, A.: *La litigación abusiva: delimitación, análisis y remedios*, Marcial Pons, Madrid, 2018.

- NEUBERGER, D.: “From Barretery, Maintenance and Champerty to Litigation Funding”, Harbour Litigation Funding First Annual Lecture, 8 mayo 2013, disponible en: <https://searchworks.stanford.edu/view/10153251>.
- ORTELLS RAMOS, M.: “Proceso colectivo, procesos en serie y proceso testigo. Jueces y CGPJ ante los litigios civiles en masa”, *Revista General de Derecho Procesal*, núm.54, 2021, pp. 1 y ss.
- PINNA A.: “Financing Civil Litigation. The Case for the Assignment and Securitization of Liability Claims”, en Tuil, M./Visscher, L. (ed.): *New Trends in Financing Civil Litigation in Europe*, Edward Elgar Publishing, Cheltenham, 2010, pp. 109 y ss.
- RADIN, M.: “Maintenance by Champerty”, 24, *California Law Review*, núm.1, 1935, pp. 48-78.
- SEEGERS M./KRÜGER C.: “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, Kluwer Competition Law Blog, 2023, disponible en <https://competitionlawblog.kluwercompetitionlaw.com/2023/08/25/>.
- SOUSA FERRO, M., “Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible”, *Journal of European Competition Law & Practice*, Volume 13, Issue 8, 2022, Pages 578-593.

PRIVATE ENFORCEMENT AND COMPENSATION FOR THE DAMAGES CAUSED BY APP STORES IN VIOLATION OF THE DMA

Eugenio Olmedo Peralta

Commercial Law Full Professor (hab.)

University of Málaga

ABSTRACT: This paper examines the competitive constraints inherent in the current configuration of digital mobile ecosystems, with a focus on practices that restrict developers from directly distributing their applications. It explores how dominant app distribution platforms -Apple's App Store and Alphabet's Google Play- have established gatekeeping positions that enable them to control developer access to end-users. These practices are assessed through the lens of competition law enforcement, highlighting the limitations of traditional antitrust tools in addressing structural and behavioral barriers within these markets. In response to these regulatory shortcomings, the European Union has adopted a proactive ex ante framework through the Digital Markets Act (DMA), which imposes binding obligations on designated gatekeepers. The conduct of Apple and Alphabet, particularly in relation to app distribution and user access, has informed the inclusion of targeted prohibitions within this new regulatory regime. Despite the formal entry into force of the DMA and the submission of initial compliance reports, both firms continue to engage in strategic behaviors central to the entrenchment of their market power. The effectiveness of the DMA will ultimately depend on the availability of robust enforcement mechanisms. In this regard, the development of efficient private enforcement pathways is essential to ensure compliance and to enable effective redress for affected market participants. Particular emphasis is placed on the need to safeguard the right of developers to directly distribute their apps, free from gatekeepers' undue restrictions.

Keywords: Mobile, Apple, iOS, Android, App Store, anti-steering, Digital Markets Act, Epic Games, Damages.

SUMMARY: I. THE PRE-DMA SITUATION: OPEN AND CLOSED MOBILE ECOSYSTEMS A. The app developer – app store conflict. B. Some kind of regulatory solution through the Digital

Markets Act. II. UNITED STATES: EPIC GAMES CASES AGAINST MOBILE APP STORES A. Common basis of the cases against Alphabet and Apple. B. Epic Games vs Google Play Store. C. Epic Games vs Apple App Store. III. III. CASES CONCERNING COMPETITION LAW INFRINGEMENTS IN EUROPE INVOLVING IOS AND ANDROID OPERATING SYSTEMS AND THEIR APP STORES. A. Cases in Europe against Apple's App Store. 1. Mobile Payments (Apple Mobile Payments, case AT.40452. 2. App Store Practices (cases AT.40437, AT.40716.AT.40652). B. Google Android Before the European Commission. C. Cases Before National Competition Authorities: App Store Practices Considered by the ACM in the Netherlands. IV. POST DMA SITUATION. A. Obligations and Prohibitions to Regulate the Market for App Stores. B. New Possibilities for the Distribution of Apps. V. COMPLIANCE WITH THE DMA. A. Non-Compliance Proceedings. B. Specification Proceedings. V. PRIVATE ENFORCEMENT OF THE DIGITAL MARKETS ACT IN CASES OF INFRINGEMENTS IN APP STORES. A. Direct Effect of DMA Obligations and Prohibitions. B. Exercise and Effect of Private Actions under the DMA C. A Brief Consideration on the Risk of Fragmentation Arising from the Private Enforcement of the DMA. D. Possible Actions for Breaches of the DMA in the App Store Sector. E. Compensation for Damages. VI. References.

I. THE PRE-DMA SITUATION: OPEN AND CLOSED MOBILE ECOSYSTEMS

For many years, the distribution of applications for mobile phones and tablets has been controlled by the platforms operating the device-specific operating systems. Android and iOS, distributed respectively by Alphabet and Apple, have employed different mechanisms to ensure that access to mobile application distribution necessarily occurred via their proprietary app stores (Play Store or App Store)¹.

The business models adopted by these two technological giants differ significantly. The model structured around Android is an open system, allowing the installation of this operating system on mobile phones and tablets manufactured by any entity obtaining the necessary licence. Generally, these licences are distributed free of charge but are accompanied by incentives designed to enable Alphabet to recover investments made in the development and security of the operating system, as well as to secure direct and indirect benefits from its distribution². Among the monetisation mechanisms deployed is the mandatory,

1. On the functioning of mobile ecosystems structured around the connection between operating systems and app stores, several competition and consumer authorities have published highly significant studies. Without aiming to be exhaustive, we can highlight those of the COMPETITION & MARKETS AUTHORITY (UK), *Mobile Ecosystems. Market study final report*, 10 June 2022; AUTORITEIT CONSUMENT & MARKT (NL), *Market study into mobile app stores*, 11 April 2019; AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *Digital platform services inquiry, Interim report No.2 – App marketplaces*, March 2021.

2. For an in-depth analysis of these dynamics, we refer to OLMEDO PERALTA, E., “How does Android protect its dominance in the mobile ecosystem, and why might the Digital Markets Act be not enough?: concerns on alphabet practices on operating systems”, *New European Competition Trends in Digital Markets*, eds. Ruiz Peris / Estevan de Quesada, Atelier, 2024, pp. 209-235.

default installation of the *Play Store* app on devices operating under an Android licence³. Exceptions are possible through the use of so-called *forks*⁴—alternative or derivative versions of the Android operating system. In such instances, device manufacturers install only basic Android functionalities, forfeiting access to other Alphabet-provided services and thereby avoiding related obligations (such as the mandatory installation of *Play Store* or routing internet searches through Google's search engine)⁵. Consequently, by lacking the benefit of these highly sought-after secondary applications, these alternative operating systems have proved less appealing to consumers, often resulting in their market failure⁶. Notable examples include *Fire OS* (developed by Amazon), *HarmonyOS* (Huawei), and *LineageOS*. In certain specific cases, such as the Android-based *One UI* version deployed by Samsung on its mobile devices, general Android functionalities are permitted along with some concessions granted to the manufacturer⁷, notably the ability to include its proprietary *Galaxy Store* app.

Conversely, Apple operates a closed-ecosystem model. As a vertically integrated firm, the Californian tech giant designs and manufactures devices running exclusively on its proprietary operating system, *iOS*, thereby imposing that app distribution occurs solely via its *App Store*. Given the absence of interaction with other corporations, Apple is not compelled to enter exclusive distribution agreements or commitments preventing the installation of alternative app stores. This has enabled Apple to effectively extend its dominance across the entire vertical supply chain associated with its mobile devices⁸.

3. EDLEMAN, Benjamin G. (2015) «Does Google Leverage Market Power Through Tying and Bundling?», *Journal of Competition Law & Economics*, 11, 2015, pp. 365-400.

4. VEZZOSO, S., «Android and Forking Restrictions: On the Hidden Closedness of Open», *Market and Competition Law Review*, vol. II, no. 2, 2018, pp. 17-46.

5. Regarding the limitations of this option that hinder the success of the device and secondary markets, *vid.* EDELMAN, Benjamin G. / GERADIN, Damien (2016) «Android and Competition Law: Exploring and Assessing Google's Practices in Mobile», *European Competition Journal*, 12, 2-3, p. 165.

6. TODD, P., «Out of the Box: Illegal Tying and Google's Suite of Apps for the Android OS», *European Competition Journal*, 13, 1, 2017, pp. 62-92.

7. Naturally, these concessions could only be granted due to Samsung's stronger bargaining power when negotiating the Android licence, as it was the world's leading mobile device manufacturer. However, in 2024, it appears that Apple has slightly surpassed Samsung in market share (with 18.7% compared to 18%). Nevertheless, Apple's devices do not constitute a market for the *iOS* operating system, as they use their own operating system within a closed digital ecosystem.

8. It is evident that access to platforms such as an operating system or, more specifically, an app store is essential for app developers to reach end users. Regarding the classification of such platforms as an essential facility within the conceptual framework of competition law, *vid.* GUGGENBERGER, N., «Essential Platforms», *Stanford Technology Law Review*, 24, 237, 2021, pp. 237-343; NELSON, J., «Tech Platforms are Essential Facilities», *Nevada Law Journal*, 22, 1, 2021, pp. 379-404.

A. The app developer – app store conflict

The distribution of applications faced a significant bottleneck. To commercialise their mobile applications and reach end-users, app developers were compelled to distribute through the app stores provided by each operating system. To reach the majority of end-users, developers had to enter into distribution agreements primarily with Play Store and the App Store⁹, and even with alternative stores (such as Galaxy Store, Amazon AppStore, Huawei AppGallery, and Aptoide) to cover the remainder of the market.

Reaching the broadest possible audience is critical for the commercial success of mobile applications, placing developers in a position of economic dependency on the leading operating systems' app stores. This monopolistic control over app distribution afforded Alphabet and Apple considerable market power, enabling them to engage in exploitative and exclusionary practices aimed at enhancing their platform power and maximising profits.

The market structure precluded even the largest app developers from directly commercialising their applications, either by creating their own alternative app stores or through sideloading. Although technically feasible, the development of alternative stores faced market foreclosure imposed by Apple and Alphabet through their dominance of their respective operating systems. By controlling the iOS and Android systems, these tech giants prevented the installation of alternative app stores, effectively extending their monopoly into the distribution sphere.

Sideloading, or parallel software downloading, refers to installing apps on a mobile phone outside the official app stores. Within Apple's closed mobile ecosystem, sideloading is not permitted, though technically possible through the process known as jailbreaking, which enables users to install software unavailable on the App Store. However, the practical impact of this method remains minimal, due to its technical complexity and violation of Apple's contractual terms—potentially invalidating device warranties—and consequently, it is seldom utilised by the average user.

Although sideloading is simpler and more accessible on the Android system, average consumers rarely use this method, typically limiting its use to apps already well-known and widely adopted. This limited utilisation arises partly because app stores play an essential role in informing users about available applications and their potential uses. Moreover, even when users decide to install applications from sources other than Play Store¹⁰, they face an extended process

9. According to Statista, in 2024, the Play Store and the App Store dominated the global mobile app distribution market. As of August that year, the number of available applications on the Play Store was 2,297,365, while those on the App Store totaled 2,047,364. The third-largest player, Amazon AppStore, only managed to distribute 526,626 apps. *Vid.* <https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/> In terms of downloads, it is estimated that in the first quarter of 2024, approximately 25.6 billion apps were downloaded via the Play Store, while 8.4 billion apps were downloaded via the App Store. <https://www.statista.com/statistics/695094/quarterly-number-of-mobile-app-downloads-store/>

10. For example, the installation of Fortnite by Epic Games directly from its website.

involving multiple warnings about potential device harm, security risks, and explicit permissions for installations from unknown sources. Practically, these repeated warnings dissuade a significant number of consumers, prompting them to revert to standard downloads through Play Store.

An alternative, albeit limited, avenue for accessing applications without compliance with Alphabet's and Apple's distribution rules is through web-based (non-native) applications. These applications provide content accessible directly via a web page on the device without the need for dedicated app installation. However, such applications often lack full integration with device-specific functionalities (e.g., camera, sensors), limiting their appeal and reducing their potential compared to native apps.

The purpose of this study is to analyse competition restrictions arising from the described market situation, particularly focusing on the barriers preventing developers from directly distributing their applications. It also examines various anti-competitive conditions imposed by dominant app stores, restricting developers' ability to reach end-users, and analyses relevant competition law cases. Both scenarios reveal substantial harm to app developers, thus driving the core objective of this research: identifying the means by which developers may achieve compensation for these damages. As will be discussed shortly, the situation has changed significantly with the entry into force of the Digital Markets Act (DMA), which obliges designated gatekeeper platforms to permit alternative app stores. Consequently, this analysis will explore how private enforcement mechanisms could be applied, detailing how app developers may legally pursue compliance with these new regulations, thereby overcoming barriers to the direct distribution of their applications.

B. Some kind of regulatory solution through the Digital Markets Act

The Digital Markets Act (Regulation (EU) 2022/1925) was adopted to provide a regulatory solution to situations such as those described in the mobile application distribution market. The regulation explicitly classifies operating systems as core platform services and app stores as online intermediation services. Under Article 3 of the DMA, its rules apply exclusively to companies designated as gatekeepers due to their significant market influence, the provision of core platform services acting as vital gateways for professional users to reach end-users, and possessing a well-established, enduring market position (or being expected to achieve such a position in the near future).

On 6 September 2023, the European Commission designated Alphabet and Apple, along with four other companies, as gatekeepers. Decisions specifically targeted mobile operating systems (Android¹¹ and iOS¹²) and their respective app

11. DMA.100009, 6 September 2023.

12. DMA.100025, 6 September 2023.

stores (Google Play Store¹³ and App Store¹⁴). Subsequently, on 29 April 2024, Apple was also designated as a gatekeeper concerning its tablet operating system, iPadOS¹⁵.

Initially, six gatekeepers were designated to comply with the DMA's obligations and prohibitions: Alphabet (Google), Amazon, Apple, ByteDance (TikTok), Meta (Facebook), and Microsoft. Regarding core platform services related to operating systems, only three platforms were identified as gatekeepers: Google Android and Apple iOS for mobile operating systems, and Microsoft Windows for computer operating systems. A market investigation was also opened to determine whether Apple's iPadOS, as an iOS variant specifically for tablets, should be designated as a gatekeeper despite not surpassing Article 3 thresholds. Following this designation, these platforms must adhere to obligations and prohibitions detailed in Articles 5-7 of the regulation.

Among these obligations, gatekeepers must notably allow the installation and use of third-party apps or app stores, enabling them to operate or interoperate with their operating systems (Article 6.4 DMA)¹⁶. Furthermore, gatekeepers cannot obstruct or complicate setting such apps or app stores as default options¹⁷.

13. DMA.100002, 6 September 2023.

14. DMA.100013, 6 September 2023.

15. DMA.100047, 29 April 2024.

16. Art. 6.4 DMA: «The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper shall, where applicable, not prevent the downloaded third-party software applications or software application stores from prompting end users to decide whether they want to set that downloaded software application or software application store as their default. The gatekeeper shall technically enable end users who decide to set that downloaded software application or software application store as their default to carry out that change easily.

The gatekeeper shall not be prevented from taking, to the extent that they are strictly necessary and proportionate, measures to ensure that third-party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper.

Furthermore, the gatekeeper shall not be prevented from applying, to the extent that they are strictly necessary and proportionate, measures and settings other than default settings, enabling end users to effectively protect security in relation to third-party software applications or software application stores, provided that such measures and settings other than default settings are duly justified by the gatekeeper».

17. The real possibilities of configuring the functioning of devices more freely, deciding on the specific applications that will be used by default (defaults), are also delineated by the Regulation itself in Article 6(3), which establishes certain safeguards for the gatekeeper. Thus, although the general obligation is to technically enable end users to uninstall pre-installed applications on their devices, gatekeepers are granted the possibility to restrict the uninstallation of pre-installed software applications that are essential for the functioning of the operating system or the device and that, from a technical perspective, cannot be independently provided by third parties. While an app store is not essential for the functioning of an operating system, a favourable interpretation of this provision could be argued, considering that it is the only means by which the operating system can ensure that device users always have access to and updates for the necessary elements for the security and proper operation of both the operating system and the device.

However, the DMA includes a safeguard allowing operating system providers to implement strictly necessary and proportionate measures to protect hardware or system integrity.

To ensure regulatory effectiveness, gatekeepers must permit professional users to offer their products (applications, in this context) via third-party online intermediation services or their own direct sales channels (i.e., alternative or proprietary app stores). Additionally, gatekeepers must allow alternative distribution at different prices or conditions compared to their own intermediation services (Article 5.3 DMA)¹⁸.

Another significant DMA provision aimed at opening the app distribution market is the prohibition on gatekeepers from mandating the use of their own identification, payment, or technical services for in-app payments. Hence, developers may employ independent payment systems within their applications, regardless of whether the apps are distributed through official or third-party app stores¹⁹.

Apple and Alphabet have published compliance reports detailing their strategies to meet the DMA's obligations and prohibitions²⁰.

Outside the EU regulatory framework, significant litigation between app stores and prominent app developers (such as Epic Games) has occurred in the United States, with different outcomes.

II. UNITED STATES: EPIC GAMES CASES AGAINST MOBILE APP STORES

A. Common basis of the cases against Alphabet and Apple

It seemed inevitable that Epic Games, being one of the foremost mobile game developers—particularly known for the highly popular game Fortnite—would be among the first companies to initiate legal action. Epic Games had long experienced the detrimental effects of the anti-competitive, or at the very least, imbalanced terms imposed by Alphabet and Apple through their respective app

18. Art. 5.3 DMA: « The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper».

19. Art. 5.7 DMA: « The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services».

20. In the case of Apple, two reports were published: the first on 7 March 2024, which, due to its shortcomings and lack of specificity, was supplemented by another on 1 November 2024. Alphabet, for its part, published a report on 7 March 2024 regarding its compliance with the Regulation concerning all its platform services.

stores. Consequently, Epic Games pursued separate legal battles to assert its rights and advocate for a fairer, more competitive distribution system.

Specifically, both legal actions against Alphabet and Apple were based on the dominant positions these digital giants hold over mobile application distribution within their operating system ecosystems. This dominant position effectively barred competitive market entry, preventing the establishment of alternative app stores or the utilisation of other app distribution methods. This strategy aimed at controlling the bottleneck created by the app stores allowed Alphabet and Apple to monopolise the in-app payment processing services available to consumers who downloaded applications via their stores. Such control enabled them to impose disproportionate commissions for app distribution and in-app content purchases or subscriptions, effectively eliminating any price-based competition for both app distribution and in-app transactions.

B. Epic Games vs Google Play Store

In December 2023, Judge James Donato delivered a ruling in the case of *Epic Games v. Google Play Store* before the United States District Court for the Northern District of California²¹. This decision challenged Google's business model and its control over the Android ecosystem, particularly in relation to app distribution and payment systems within the Play Store.

The litigation against Google Play Store commenced after Alphabet removed the video game *Fortnite* from its Play Store in 2020. The removal was prompted by Epic's attempt to circumvent the in-app payment system (In-App Payments or IAPs, referred to as Google Play Billing (GPB) in the Android ecosystem). The use of this system enabled Alphabet to retain a percentage of all transactions conducted within the applications available on its store. That is, developers were not only charged for the distribution of their applications but were also subjected to additional charges on each purchase made within the application itself (such as subscriptions, upgrades, etc.). In an effort to avoid these fees, on 13 August 2020, Epic Games introduced a direct payment option within its *Fortnite* application, distributed via both Google Play Store and Apple's App Store. This initiative sought to bypass the mandatory use of the in-app payment services of these app stores. In response to this action, both Alphabet and Apple removed *Fortnite* from their respective app stores.

During the litigation, Epic argued that the Play Store constituted a "walled garden," that is, a monopolistic structure that effectively prevented competition among alternative app distributors and payment providers. The case was tried before a jury²², which concluded that Alphabet had violated antitrust regulations

21. Case 20-cv-05671-JD U.S. District Court, Northern District of California, *Epic Games Inc. v. Google Inc.*

22. We will see below that the parallel litigation brought by Epic Games concerning Apple's conduct in its App Store was not pursued through this procedural route.

by imposing its in-app billing system as the exclusive mechanism for in-app purchases. As a result of this conduct, market competition was distorted, preventing developers from opting for more favourable solutions for both themselves and consumers. Furthermore, innovation was stifled by restricting effective competition from alternative payment providers, such as Stripe, PayPal, or Paddle, which could offer equivalent services at significantly lower costs.

In response, Google implemented the so-called User Choice Billing (UCB), purportedly offering an alternative. However, according to Epic's economic analysis²³, this measure was insufficient to restore effective competition. Specifically, Google designed this optional billing system (UCB) under economically unappealing terms, granting only a 4% discount on its standard commission—an amount deemed inadequate to create genuine incentives for developers to adopt alternative solutions. The actual processing costs ranged between 4% and 6%.

It was also argued that Google's anti-competitive practices not only affected the market for in-app payment solutions but also reinforced its dominant position in Android app distribution. Internal Google documents revealed that the company feared competitors such as Stripe or PayPal, upon consolidating their presence in the payments market, could expand their services into app distribution (a phenomenon known as laddering up), thereby directly threatening Google Play Store's dominant position in this sector.

Epic's lawsuit did not seek direct financial compensation for damages suffered but rather aimed to achieve structural remedies that would facilitate market openness. Thus, the video game developer's petition focused on measures to remove the barriers imposed by Alphabet through Google Play, ensuring free app distribution and the diversification of payment methods. Consequently, the ruling imposed a series of restrictions on Alphabet for a three-year period, designed to mitigate the network effects that consolidate its dominant position in Android app distribution. Specifically, for three years, Alphabet is prohibited from restricting the use of alternative in-app payment methods and from limiting the distribution of applications through competing app stores. Notably, similar measures had already been codified and imposed on gatekeepers in Europe under the Digital Markets Act. Likewise, to prevent the indirect extension of Alphabet's dominance from the operating system to app distribution, the ruling prohibits Alphabet from continuing the practice of paying device manufacturers to pre-install Play Store as the default option, as well as from engaging in revenue-sharing agreements with other app stores to secure a privileged position²⁴.

The objective of these measures is to foster a more competitive digital environment in which developers can freely choose the platform that best suits

23. Statement of Steven Tadelis on Behalf of Epic Games Inc.

24. On these practices, see OLMEDO PERALTA, E., "How does android protects its dominance in the mobile ecosystem, and why might the Digital Markets Act not be enough?: concerns on alphabet practices on operating systems", *New European Competition Trends in Digital Markets*, eds. Ruiz Peris / Estevan de Quesada, Atelier, 2024, sp. pp. 219 ff.

their commercial needs. This, in turn, is expected to reduce app distribution costs, benefiting both developers and consumers.

One of the most significant aspects of the ruling is the obligation imposed on Google to allow the distribution of rival app stores within Play Store. This measure not only expands the choices available to users but also compels Google to provide the necessary technological infrastructure to ensure the security and reliability of these alternative stores. Within eight months, Alphabet must implement the required tools to enable the coexistence of different distribution models within its platform. It must also ensure that these alternative stores can offer the full catalogue of applications currently available on Google Play, preventing any active or passive measures that hinder developers who wish to distribute their products through multiple app stores from effectively doing so. This would allow content creators to benefit from multiple distribution channels, selecting the app stores offering the most advantageous terms or the widest reach. As a result, the development of specialised app stores with improved services would be encouraged. Simultaneously, Android must guarantee that these rival stores do not become havens for malware or illicit products and services.

To promote effective competition, the ruling explicitly prohibits any form of coercion or incentive aimed at encouraging developers to release their applications exclusively on Play Store. This provision seeks to prevent Google from leveraging its dominant position to suppress competition, whether through exclusivity agreements or financial incentives that discourage the use of competing platforms.

Due to the Android operating system's distribution model—where licences are tied to the acceptance of additional agreements—it was crucial for the ruling to address the prohibition of revenue-sharing agreements with competing app store operators. This practice had previously allowed Google to consolidate its dominance by maintaining rival firms' dependence on the Google ecosystem, thereby discouraging the development of effective competition. By prohibiting revenue-sharing agreements, the ruling aims to diversify the market and encourage the emergence of alternative business models.

To enable market entry by rivals, Alphabet is also prohibited from offering any incentives to device manufacturers to pre-install Play Store in a privileged position on Android-operated devices. This measure is critical in allowing alternative developer-led app stores to gain greater visibility, reducing users' dependency on Play Store.

Regarding in-app payment systems, the ruling explicitly invalidates the anti-steering clauses enforced by app stores. These clauses prohibited developers from informing users about alternative payment methods that would allow them to bypass the app stores' payment systems (IAPs), thereby avoiding the corresponding commissions charged by Alphabet or Apple. The ruling imposes a prohibition on Alphabet from requiring applications distributed through Play Store to use its billing system. Additionally, it bars Alphabet from preventing developers from informing consumers about alternative payment options. This measure is expected to liberalise in-app payment management, reducing digital market costs and

enabling content creators to offer more competitive pricing, thereby improving consumer access conditions.

The ruling had an immediate financial impact on Alphabet, Google's parent company. Following the judgment, the company's shares fell by 2.2%, reflecting investor concerns regarding the long-term implications of these new restrictions. The obligation to allow alternative payment systems and open the Android ecosystem to rival stores represents a direct challenge to Google's app distribution revenue model.

In the absence of a regulatory framework akin to the DMA in the United States, this ruling seeks to produce similar effects to those imposed on gatekeepers in Europe. Although these measures are initially set for three years, their implementation and effects could reshape market dynamics, laying the foundations for a more competitive app distribution market. To monitor compliance, Judge Donato appointed a technical committee comprising three members—one designated by Alphabet, one by Epic, and a third chosen by mutual agreement between these appointees.

C. Epic Games vs Apple App Store

On the same date that Epic Games filed its lawsuit against Alphabet regarding Google Play's conduct, Epic filed a similar claim against Apple concerning the same actions in its App Store. However, both the procedural handling of the case and the final ruling differed. This divergence can be attributed to the specific characteristics of Apple's business model as a closed ecosystem.

From a procedural standpoint, while the case against Alphabet was tried before a jury, the lawsuit against Apple was adjudicated through a bench trial before Judge Yvonne González Rogers at the United States District Court for the Northern District of California²⁵. In my opinion, the different procedural routes may have been decisive in shaping the legal reasoning of the ruling and its outcome²⁶.

As was the case with Google Play, in 2020, Apple removed *Fortnite* from its App Store in response to Epic's implementation of a direct payment system within the application, circumventing the mandatory use of Apple's in-app payment system. Under this IAP system, Apple retained a 30% commission on all transactions conducted within applications (subscriptions, premium content, etc.)²⁷. By enabling alternative payment methods outside Apple's system, Epic

25. Case 4:20-cv-0560-YGR U.S. District Court, Northern District of California, *Epic Games Inc. v. Apple Inc.*

26. An in-deep analysis of these procedural features is provided by EVINGER, J.A., "Walled Gardens & Forbidden Apples: Software Access Amid Antimonopoly Resurgence", *Richmond Journal of Law and Technology*, 31, 1, 2024, pp. 35 ff.

27. On these fees, see YUN, J.M., "App Stores, Afermarkets & Antitrust", *Arizona State Law Journal*, 53, 2021, pp. 1318 ff.

Games breached the anti-steering obligations imposed by Apple's app distribution agreements. Following this retaliatory action, Epic sued Apple, arguing that it exercised abusive control over software distribution on iOS by imposing an unbalanced payment system through its platform.

The ruling in this case, issued in September 2021, dismissed most of Epic's claims. Judge González Rogers rejected nine out of the ten claims brought by Epic, concluding that the video game developer had failed to demonstrate that Apple was operating an illegal monopoly under U.S. antitrust law. Specifically, the ruling determined that Apple's inclusion of its App Store within a closed ecosystem did not, in itself, constitute a monopoly in the strict sense. Total control over this closed ecosystem justified Apple's authority to determine the operation of its various components, all of which fell under its exclusive control. According to the court, Apple's decision to prohibit alternative payment methods was part of a legitimate commercial strategy rather than an inherently anti-competitive practice. This conclusion was based solely on federal antitrust law.

A different conclusion was reached under California state law. Under its application, Judge González Rogers ruled against Apple, finding that the prohibition imposed on developers preventing them from informing users about alternative payment options violated California's unfair competition law. As a result, the judge ordered Apple to allow developers to include links to external payment systems within their applications, thus limiting the effectiveness of Apple's anti-steering clauses. However, the ruling did not impose any obligation or prohibition concerning the remainder of Apple's business model or its control over app distribution within the iOS system.

As is evident, the impact of this ruling was far more limited than that of the case against Google. The divergence in rulings is partly explained by the structural differences between the platforms: while Android allows multiple channels for app distribution, iOS operates under a closed system, leading the court to conclude that the presence of alternatives in the mobile device market mitigated any potential abuse of power by Apple. Additionally, the different procedural approaches (jury trial vs. bench trial) may have influenced the final outcome. Another significant distinction that may have affected the disparity in rulings was that, during the proceedings, Epic Games demonstrated that Google had been deleting internal communications and employee messages, whereas no destruction of evidence occurred in the Apple case. This obstructive conduct by Google likely influenced the court's decision on the merits of the case.

From a competition law perspective, it is also relevant to highlight the different definitions of the relevant market used in each case. In the lawsuit against Apple, a broader market definition was applied, encompassing not only the Apple App Store but also other comparable mobile app stores that offer games to end users. Conversely, in the Google Play case, the relevant market was defined more narrowly, referring specifically to the distribution of applications for Android and in-app billing services for digital goods and services transactions within Android applications.

Epic appealed the ruling to the Ninth Circuit Court of Appeals²⁸. However, the original judgment was upheld in April 2023, maintaining Apple's obligation to allow links to external payment options within applications while leaving the rest of its policies unchanged²⁹. Finally, despite Epic's petition to the U.S. Supreme Court, in January 2024, the Court declined to review the case, thereby affirming the appellate court's decision³⁰.

The differences between the ruling in the case against Alphabet and that in the case against Apple extend beyond the scope of the measures imposed; they also concern the legal characterisation of the companies' commercial practices. While Alphabet was found guilty of anti-competitive practices under federal law, Apple was only found liable under California's unfair competition statute.

As a result of this ruling, Apple was required to partially modify its policies by allowing the use of alternative payment systems. However, its closed-ecosystem business model remained unaffected, as it was not deemed to constitute an antitrust violation.

III. CASES CONCERNING COMPETITION LAW INFRINGEMENTS IN EUROPE INVOLVING IOS AND ANDROID OPERATING SYSTEMS AND THEIR APP STORES

Prior to the entry into force of the Digital Markets Act (DMA), the European Commission had initiated several cases against Apple and Alphabet concerning the distribution of mobile applications through the app stores associated with their respective operating systems. Although these cases addressed some of the central restrictive practices employed by these platforms, the Commission's rulings were limited in scope and lacked clarity. It is likely that, given the imminent implementation of the DMA, the Commission opted for a measured approach, choosing not to issue definitive decisions on aspects that would be directly addressed by the obligations and prohibitions imposed by the new regulation.

28. United States Court of Appeals for the Ninth Circuit, ruling of 24 April 2023, in case 21-16506 and 21-16595, *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946 (9th Cir. 2023).

29. For an analysis of the procedural development of the case and its impact on the interpretation of the restriction, see BURGIN, J.S., "Epic Games Played by the Rule of Reason: Rebalancing Antitrust's Improbable Standard", *Columbia Journal of Law and Social Problems*, 58, 1, 2024, pp. 123 ff.

30. Decision of the Supreme Court of the United States of January 16, 2024, Case No. 23-337, *Epic Games, Inc. v. Apple Inc.*

A. Cases in Europe against Apple's App Store

On 16 April 2020, the European Commission opened four proceedings against Apple regarding potential anti-competitive practices, which resulted in the following cases:

- Apple Mobile Payments (Case AT.40452)
- App Store Practices – Music Streaming (Case AT.40437)
- App Store Practices – E-books/Audiobooks (Case AT.40652)
- App Store Practices (Case AT.40716)

Given their substantive content, the last three cases can be examined collectively.

1. Mobile Payments (Apple Mobile Payments, case AT.40452)

The European Commission concluded this case on 11 July 2024 through a commitment decision, accepting the commitments proposed by Apple to address the competition concerns raised.

This case investigated the terms, conditions, and measures implemented by Apple concerning the integration, implementation, display, and use of its mobile payment system, Apple Pay, for executing online purchases of goods and services via iOS devices within the European Economic Area. Specifically, the Commission focused on Apple's restriction on third-party access to its Near Field Communication (NFC) technology, commonly known as tap-and-go. This technology, embedded in Apple's mobile devices running iOS, enables swift in-store payments via mobile devices. The issue, however, was that such payments were only permitted through Apple Pay.

The adoption of these commitments to resolve the case was based on the assessment of Apple's mobile ecosystem as a closed model, where its devices operate exclusively on its proprietary iOS system. The entire framework remains under Apple's control, including the conditions imposed on mobile wallet developers. It is evident that, beyond its significant market power in the mobile device sector, Apple holds an indisputable dominant position in the in-store mobile wallet market for iOS devices, as Apple Pay is the only wallet granted access to NFC hardware and software technologies for in-store payments. Third-party developers were denied access to this technology. Consequently, the European Commission's preliminary assessment suggested a potential abuse of dominance by Apple in refusing to grant third-party mobile wallet developers access to NFC technology, thereby reserving the market exclusively for its own Apple Pay service.

Instead of issuing a prohibition decision and sanctioning Apple's conduct, the European Commission opted to accept the commitments proposed by Apple to remedy the identified competition restriction. The commitments put forward by Apple aimed at enabling third-party wallet providers to access NFC functionalities

in iOS devices free of charge, thereby offering an alternative to Apple Pay. This would be achieved through access to NFC technology via Host Card Emulation (HCE), allowing secure storage of payment credentials and the completion of transactions via NFC without reliance on a Secure Element integrated into the device. Third-party access to NFC technology would be granted under fair, objective, transparent, and non-discriminatory eligibility criteria. Furthermore, to ensure effective competition, users would be allowed to set an HCE-based payment application as their default service, prioritising it over Apple's own service. This service would support field detection mechanisms (triggering the payment application when the device is near an NFC reader) and additional functionalities such as double-click payment activation, fingerprint or facial recognition, or device passcode authentication.

While these measures may be deemed sufficient and appropriate to address the competition concerns regarding Apple Pay, in my view, a commitment decision was not the most suitable approach to resolving this case. The commitments assumed by Apple did not stem from a voluntary and spontaneous proposal to remedy the competition concerns raised. Rather, these measures should have been imposed on Apple as a mandatory requirement following its designation as a gatekeeper for the iOS operating system under the DMA. The consensual closure of this case adds little to the resolution that would have inevitably been enforced under the DMA's obligations. No finding of abuse of dominance (or any competition law infringement) was made against Apple, and consequently, no sanction was imposed. In the absence of a prohibition decision, no binding precedent is established upon which competitors harmed by Apple's conduct could base follow-on private enforcement claims for damages³¹.

2. App Store Practices (cases AT.40437, AT.40716, AT.40652)

Regarding Apple's practices in the App Store, the European Commission opened three cases: two specifically related to certain services distributed through the app store (music streaming and digital books/audiobooks) and a third of a more general scope. The first two cases were initiated following complaints from competitors affected by Apple's app distribution practices, namely Spotify and Rakuten³². Simultaneously, as will be discussed later, the Netherlands Authority for Consumers and Markets (ACM) opened a similar case, conducting a more in-

31. In any case, we may be dealing with a pseudo or crypto follow-on, as, despite the absence of a ruling on the merits of the case by the European Commission, the file contains data that may serve as *prima facie* evidence in a private action. We have addressed this type of case in OLMEDO PERALTA, E., "The Evidential Effect of Commitment Decisions in Damage Claims: What is the Assumptive Value of a Pledge?", *Common Market Law Review*, 56, 4, 2019, pp. 979-1004.

32. An excellent, in-depth, and detailed analysis of the practical and theoretical implications of these cases is provided by GERADIN, D. / KATSIFIS, D., "The Antitrust Case against the Apple App Store", *Journal of Competition Law & Economics*, 17, 3, 2021, pp. 503 ff.; to those who would respond critically VÖLCKER, S.B. / BAKER, D., "Why There is No Antitrust Case Against Apple's App Store. A Response to Geradin & Katsifis", SSRN: <https://ssrn.com/abstract=3660896>

depth analysis of Apple's requirement to use its in-app payment system (IAP) in the App Store.

In all three cases, the European Commission examined the same types of conduct used by Apple in its App Store terms for mobile app distribution. Specifically, it assessed the mandatory use of Apple's in-app purchase system (IAP) and the prohibition—through App Store distribution agreements—on developers informing Apple device users about alternative, potentially cheaper purchasing options outside the apps (anti-steering obligations). Both measures were imposed on app developers wishing to distribute their products on Apple devices through licensing agreements and the App Store Review Guidelines.

Concerning in-app payments, the investigations focused on the competitive effects of Apple's 30% commission on developers for all subscription fees and in-app purchases processed through its IAP system. In its second Statement of Objections against Apple in the *Music Streaming* case, the Commission decided to drop this aspect of the case, focusing exclusively on the anti-steering clauses. The justification for this decision was Apple's argument that maintaining a secure environment for device functionality necessitated its IAP system and that these fees compensated Apple for the infrastructure it provided, including technology, customer connection, and consumer trust, to facilitate in-app purchases³³.

The core issue examined in the *App Store Practices – Music Streaming* case was Apple's prohibition on redirecting users to alternative payment services, thereby preventing them from avoiding the App Store's commission. While mobile apps allow users to acquire content from external sources (such as the developer's own website) and integrate it into their apps, Apple's contractual clauses prohibited developers from informing users about these potentially cheaper options. Notably, the violation of this clause led Apple to retaliate against Epic Games in the U.S. case by excluding it from the App Store.

To comply without breaching this prohibition, some app developers opted either to disable subscription options through Apple's IAP system (thus avoiding the commission charge) or to increase the in-app subscription price, effectively passing Apple's commission on to consumers (passing-on strategy).

As is common in digital markets, the definition of the relevant market was central to analysing these practices³⁴. In Apple's closed ecosystem, the key question was whether the App Store constituted a single relevant market or whether distinct—though interconnected—markets should be defined for the two user groups of the app store (i.e., the two sides of the bilateral market). The Commission's decision appears to align with the new EU Communication on Market Definition³⁵, which recognises both a single-market and a multi-market

33. On the theories of harm used in such cases, see BOSTOEN, F. / MÂNDRESCU, D., "Assessing abuse of dominance in the platform economy: a case study of app stores", *European Competition Journal*, 16, 2-3, 2020, pp. 431-491.

34. HÖPPNER, T. / WESTERHOFF, P. / WEBER, J.M., "Taking a bit at the Apple: ensuring a level-playing-field for competition on app stores", 13 May 2019, at: <https://ssrn.com/abstract=3394773>

35. C/2024/1645, OJEU 22.2.2024.

approach. Accordingly, the Commission adopted a single relevant market approach within the iOS ecosystem when assessing Apple's abuse of dominance, given that the App Store was the sole distribution channel available within Apple's ecosystem.

However, this segmentation raises questions. Why define separate markets for different categories of applications if all face the same App Store restrictions? Could such a narrow market definition be justified when iOS's closed system precludes alternative app distribution channels? This distinction would have been relevant only if different types of apps (music streaming, e-books, etc.) faced varying substitutability conditions and alternatives within iOS. Similarly, it would have made sense if Apple's App Store and Google's Play Store were considered substitutes, which is not the case in practice, as users within an ecosystem are generally locked in and cannot switch to the rival system.

Apple's anti-steering clause granted it complete control over the relationship between competing app developers and their customers, allowing it to access commercially sensitive information about competitors' pricing and offerings without intermediation. This provided Apple with a significant competitive advantage. Consequently, these practices could constitute an infringement of Article 102 TFEU by preventing developers from informing customers about where and how to subscribe to streaming services at lower prices. The Commission concluded that these obligations were neither necessary nor proportionate for the provision of App Store services on Apple devices and that they harmed end users by compelling them to pay higher prices. Moreover, the practices also negatively impacted app developers by limiting consumers' effective choices.

The outcome of these three cases was, once again, unsatisfactory. The Commission closed the *App Store Practices* (AT.40716) and *E-books/Audiobooks* (AT.40652) cases on 24 June and 22 November 2024, respectively, without issuing substantive decisions. Only in the *Music Streaming* case (AT.40437) did the European Commission issue a prohibition decision on 4 March 2024, imposing a €1.8 billion fine on Apple for abuse of dominance.

The decision found that Apple's anti-steering clauses violated Article 102(a) TFEU by imposing unfair commercial conditions on app developers, concluding that such clauses were neither necessary nor proportionate to protect Apple's commercial interests regarding the App Store on Apple mobile devices. These clauses directly harmed app developers by increasing their costs and forcing them to share a portion of their revenues with the App Store. Additionally, they harmed end users by preventing them from making informed and effective choices regarding digital content subscriptions within apps.

The sanctioned conduct once again reflects obligations under the Digital Markets Act (DMA). Article 5(4) and (5) of the DMA already impose on gatekeepers the duty to allow professional users (application developers) to communicate and promote offers, under different conditions, to end users acquired via their core platform service or other channels and to enter into contracts with them. Furthermore, they must allow end users, via their core platform services, to access, subscribe to, and utilise content, services, or other digital products through the professional user's application, even when these have been acquired outside

the gatekeeper's platform. Given that the Commission found that the infringing conduct had persisted for almost a decade before the DMA came into force, it was appropriate to sanction Apple for maintaining these clauses. The obligation to remove them is now based on the DMA, despite the fact that the decision itself imposes such a measure.

However, the resolution remains incomplete. If Apple continues to impose its in-app payment system, there will be no restriction on its pricing structure in the App Store. While redirection to alternative subscription services is now permitted, many consumers will likely continue using App Store payments. Therefore, it would have been appropriate to regulate the platform's behaviour further or establish conditions to assess its validity.

Moreover, eliminating the anti-steering prohibition does not necessarily mean that Apple is required to allow out-of-app purchases to remain commission-free. If the Commission's decision does not include a more detailed damage analysis and prescriptive remedies, it may fail to fully address the harm caused to consumers. Critics argue that the case oversimplified the damage theory to reach a resolution. This simplified approach also leaves room for varying interpretations by national authorities. In any case, the DMA's prohibitions serve as a safeguard, providing an ex-ante regulatory framework that platforms must not infringe³⁶.

The private implications of this decision are particularly significant. The Commission expressly acknowledged that many iOS users paid significantly higher prices for their music streaming subscriptions due to the commission Apple imposed on developers. This commission was ultimately passed on to consumers through higher App Store prices. The conduct also negatively impacted user experience by forcing them to search for alternative, lower-cost offers outside the application to avoid the commission surcharge. This additional cost may have deterred some users from subscribing to a service altogether. Consequently, this decision now enables victims of these practices—particularly Spotify—to file claims for damages suffered.

The fact that only one of the three cases resulted in a prohibition decision creates a problematic situation for private competition law enforcement. The finding of an infringement in the *Music Streaming* case allows victims to seek compensation through follow-on litigation, where they only need to demonstrate and quantify the damages suffered. But what about other application developers outside the music streaming sector? Their cases—both the general one and the specific one concerning e-books and audiobooks—were closed without a substantive ruling, despite the identical nature of the conduct. Can these victims also file follow-on claims, or would they need to pursue stand-alone actions?

In my opinion, given that the Commission's decision is limited to the anti-steering clauses within the music streaming sector, only developers and users in this sector can strictly pursue follow-on claims. However, given the absolute

36. MANDRESCU, D., "The Apple App Store – A New Kind of Hallmark Case", *Kluwer Competition Law Blog*, 18-3-2024, at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>

similarity in facts and contractual terms, developers of other mobile applications may also seek compensation through private litigation. While these actions would no longer qualify as follow-on claims, the adjudicating court should nevertheless be bound by the European Commission's legal qualification of Apple's conduct as an anti-competitive abuse. At the very least, the Commission's findings should be considered as proof of the facts (Apple's imposition of such clauses) and their legal classification as an abuse of dominance.

B. Google Android before the European Commission

Unlike Apple, the European Commission has not conducted a case specifically analysing Alphabet's conduct through Google Play. The only relevant case is Case AT.40099, *Google Android*, which was concluded by the European Commission's decision of 18 July 2018.

The Commission initiated proceedings in 2015 following complaints regarding potential abusive practices in the Android mobile operating system. The investigation focused on Alphabet's potentially anti-competitive conduct in the Android operating system and its associated ecosystem, with particular attention to the Google Search engine and the Google Chrome browser. Although Android was distributed under free and open-source licences, access to Google Play was conditioned on accepting certain restrictions.

Focusing exclusively on the Play Store, the Commission found that Alphabet required device manufacturers to preinstall the Google Search engine and the Google Chrome browser as a condition for accessing the app store³⁷. It is important to consider that having access to an extensive app catalogue, such as Google Play, was a fundamental requirement for device manufacturers to succeed in the market. End consumers place significant value on the availability of applications, making access to a broad selection of apps critical to the success of mobile devices. Through this practice, Alphabet engaged in a form of product tying: requiring the preinstallation of its Search and Chrome services (tying products) as a condition for accessing the app store (tied product). As a result, despite the ostensibly free licensing model, user search traffic on Android devices was effectively channelled through Google services, hindering competitors' entry into the online search market³⁸.

37. The other two services in which the European Commission analyzed anticompetitive conduct concern: (1) the making of payments to manufacturers and operators to secure the exclusivity of Google Search, offering financial incentives to prevent them from preinstalling rival search engines on their devices; and (2) the imposition of restrictions on manufacturers seeking to develop alternative versions of Android (forks), preventing them from selling devices that did not comply with the strict compatibility requirements set forth in their agreements. This conduct limited innovation and competition by restricting the development of viable alternatives to the services offered by Alphabet.

38. For a more in-depth analysis of these practices and the architecture of anticompetitive relationships designed within Android, we refer to OLMEDO PERALTA, E., "How does Android protect its dominance in the mobile ecosystem, and why might the Digital Markets Act not be

The Commission determined that this conduct constituted an abuse of dominance in violation of Article 102 TFEU and Article 54 of the EEA Agreement. This conclusion was based on the definition of two relevant markets, in both of which Alphabet held an overwhelming dominant position due to the lack of viable alternatives. First, the market for smart mobile operating systems, where Android held a market share exceeding 95%. Second, the market for app stores on the Android operating system, where Google Play Store, while not the only alternative, was the only practically viable option for most users and app developers (given the limited reach of other valid alternatives, such as Samsung's Galaxy Store).

Against this backdrop, the Commission found that Alphabet had leveraged its dominant position to reinforce its control over the online search and mobile browser markets (which serve as primary access points for search traffic), to the detriment of competitors. It should be noted that Alphabet's business model is based on directing users towards its search service, from which it derives the majority of its revenue through advertising and related services. The tying practices and mandatory preinstallation obligations deprived consumers of an effective choice, making it more difficult for competing search engines and browsers to enter the market, as these conditions were imposed on device manufacturers through their Android licensing agreements.

In addition to imposing a fine of €4.34 billion³⁹, the Commission required Android to cease tying its search and browser services to access to the app store. Manufacturers and mobile network operators were granted the ability to install Google Play Store without being required to preinstall Google Search and Chrome. Exclusive agreements with these manufacturers and operators were restricted, preventing Alphabet from offering revenue-sharing agreements in exchange for preferential treatment of its services. Finally, restrictions on developing Android-based forks were lifted, fostering greater innovation.

C. Cases before National Competition Authorities: App Store Practices Considered by the ACM in the Netherlands

Parallel to the European Commission's proceedings, the Netherlands Authority for Consumers and Markets (ACM)⁴⁰ opened an investigation on 24 August 2021 to examine the potential abuse of dominance by Apple through the contractual

enough?: concerns on alphabet practices on operating systems", *New European Competition Trends in Digital Markets*, eds. Ruiz Peris / Estevan de Quesada, Atelier, 2024, pp. 209-235.

39. This fine would be reduced by the General Court of the European Union to €4.125 billion. See Judgment of the General Court of September 14, 2022, Case T-604/18, *Google and Alphabet v. Commission (Google Android)*.

40. On the regulatory framework most conducive to the application of digital markets legislation at the national level in the Netherlands, see VAN DEN BOOM, J. / BOSTOEN, F. / MONTI, G., "The Netherlands: DMA Enforcement Paradise?", TILEC Discussion Paper No. 2024-06, Tilburg Law School Research Paper, SSRN: <https://ssrn.com/abstract=4869454>

clauses imposed on app developers via its App Store⁴¹. Regarding its subjective scope, while the investigation initially covered various app categories, due to market definition considerations and the ACM's jurisdiction, it ultimately focused on dating applications, such as those operated by Match Group Inc. (Tinder).

As in the European-level case, the investigation centred on contractual provisions that required app developers to use Apple's in-app purchase (IAP) system, imposing commissions ranging between 15% and 30% on digital content subscriptions and prohibiting developers from using alternative payment systems. In addition to assessing the validity of anti-steering clauses, the Dutch authority took a further step by evaluating the real feasibility of using alternative payment systems. These practices were deemed to constitute an abuse of dominance since, by mandating the exclusive use of its IAP system and the associated fees, Apple was limiting developers' ability to offer more competitive alternatives. This harmed developers (who were forced to share their revenues with Apple) and end users (who faced higher prices).

In December 2021, the ACM ordered Apple to amend its app distribution conditions, allowing dating app providers to use alternative payment systems for their subscriptions. A deadline was set for the implementation of these measures by 15 January 2022. Upon Apple's failure to comply with this obligation, the ACM imposed a fine exceeding €50 million. Apple appealed the decision, arguing that the market definition was incorrect, claiming that it should consider alternatives such as web applications and other operating systems. This argument was rejected by the ACM, which favoured an ecosystem-based approach, emphasising that iOS users have no alternative app store options. Apple also unsuccessfully contested the findings by arguing that it neither held a dominant position nor engaged in abusive conduct⁴².

The sanctioning decision was upheld by the ACM in its ruling of 13 July 2023, concluding that Apple had violated the order and was required to pay the imposed fine. In this status quaestionis, app developers were given four alternatives⁴³: (a) continue using Apple's IAP service; (b) use a third-party payment service within the app; (c) include a link within the app redirecting users to the developer's website to complete purchases (steering); or (d) use a third-party payment system within the app while also including a link directing users to the developer's website to complete the transaction. Apple offered a 3% reduction in its commission for developers choosing one of the last three options.

This solution can be considered unsatisfactory, as developers now face the obligation to choose between these options in exchange for an insignificant reduction in fees. The discount is even smaller when factoring in transaction fees

41. ACM/21/053587, at <https://www.acm.nl/en/publications/acm-rejects-apples-objections-against-order-subject-periodic-penalty-payments>

42. This decisión has been scrutinized by RIBERA MARTÍNEZ, A., "It's (not) a Match! Apple's In-App Purchase functionality scrutinized by the Netherlands Authority for Consumers and Markets", 2022, SSRN: <https://ssrn.com/abstract=4116801>

43. Apple communication to its developers: "Distributing dating apps in the Netherlands", available at: <https://developer.apple.com/de/support/storekit-external-entitlement/>

from third-party payment solutions, i.e., commissions charged by other IAP processing services. In many cases, the final cost to app developers may exceed that of continuing to use Apple's IAP services. Among the available options (except for direct subscription via redirection to the developer's website), the viable choices are limited to either a 30% fee (Apple's standard commission) or a 27% fee (Apple's reduced commission for those using alternative payment services), which must be supplemented by additional charges from third-party providers. These price increases are wholly or partially passed on to end users⁴⁴.

IV. POST-DMA SITUATION

A. Obligations and Prohibitions to Regulate the Market for App Stores

The entry into force of the DMA has resolved some of the competition issues in the app store market that had already been highlighted in the aforementioned cases. Unlike competition law proceedings, the Regulation allows for greater agility and speed in the enforcement of measures, as its obligations and prohibitions apply from the moment a platform is designated as a gatekeeper, without the need to first demonstrate the occurrence of anti-competitive harm.

Among the specific measures affecting these markets, the following stand out:

- The prohibition on imposing the use of in-app payment (IAP) systems (Article 5(7) DMA);
- The prohibition of anti-steering clauses (Article 5(4) DMA);
- The prohibition of parity clauses (Article 5(3) DMA), which—relevant to this context—prevents developers from being required to offer their best distribution terms through the App Store;
- The obligation to allow subscriptions and services to be purchased outside the apps (Article 5(4) DMA);
- The obligation to permit third parties to develop their own app stores that are compatible with the operating system (Articles 6(4) and 6(12) DMA);
- More generally, the obligation to ensure full interoperability (Article 6(7) DMA), which entails guaranteeing that app developers are not penalised for taking advantage of the new possibilities provided by the Regulation. In particular, it must be ensured that the rules enabling new app distribution models do not lead to changes in the conditions of dominant app stores (App Store or Google Play) that produce undesirable effects,

44. MANDRESCU, D., "The Apple App Store – A New Kind of Hallmark Case", *Kluwer Competition Law Blog*, 18-3-2024, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>

such as preventing price reductions or allowing dominant platforms to maintain widespread access to end-user data.

Regarding the regulatory prohibition of anti-steering clauses, it is important to highlight that developers must be able to redirect their users to alternative subscription methods without additional costs or penalties in the general economic terms of the distribution contract. Given these conditions, it is foreseeable that dominant mobile app distribution platforms will adjust their commission policies to prevent free-riding practices, i.e., developers redirecting users outside the app to complete transactions without paying the corresponding commission to the platform. In response, it is likely that the App Store and Google Play will revise their conditions for all developers to retain part of their revenues in one way or another⁴⁵.

B. New Possibilities for the Distribution of Apps

With the implementation of the Digital Markets Act (DMA), new avenues have emerged for the distribution of apps on mobile devices. The first option involves the possibility of developing and installing alternative app stores that function as marketplaces, allowing users of a device operating under a given operating system to access applications without relying on the store tied to that system (App Store for iOS or Google Play for Android). These alternative app stores (e.g., Epic Games Store) function as “apps of apps,” meaning they are software installed on the device’s operating system that enables access to applications developed by the store’s creator or by other third-party developers. The second option is based on disintermediation, meaning the direct download of applications via the web without using an app store. However, this approach presents certain challenges in mobile operating systems, as it lacks security verification mechanisms, potentially compromising the stability of the operating system and the device’s functionality.

For Apple, direct downloads of apps and alternative app stores are subject to specific eligibility criteria⁴⁶. Additionally, developers must accept the *Alternative Terms Addendum for Apps in the EU*⁴⁷ and submit an access request. Apple requires compliance with the following conditions for web-based app distribution:

45. MANDRESCU, D., “The Apple App Store – A New Kind of Hallmark Case”, *Kluwer Competition Law Blog*, 18-3-2024, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>

46. «Distributing apps directly from a website requires responsibility for and oversight of the user experience, including the ability to manage apps and provide customer support and refunds. Apple will authorize developers after meeting specific criteria and committing to ongoing requirements that help protect users» (<https://developer.apple.com/support/web-distribution-eu/>).

47. <https://developer.apple.com/contact/request/alternative-eu-terms-addendum/>

1. Registration in the Apple Developer Program as an organisation member, with a registered address or legal headquarters within the European Union, and inclusion in the App Store Connect listing. This EU affiliation must be reflected in the developer account's registered address.
2. Continuous membership and compliance with the Apple Developer Program's terms for at least two consecutive years, along with a record of at least one million initial annual installations on iOS and/or iPadOS within the EU in the previous year.
3. Acceptance of various conditions, including: offering applications exclusively from the developer's account; responding to Apple's inquiries related to apps distributed via the Web Distribution system, particularly concerning fraudulent, malicious, or illegal behaviour, as well as any security, privacy, or user protection concerns; publishing transparent data collection policies that grant users control over their data usage; and handling governmental and third-party requests regarding distributed apps.

To utilise this distribution model, developers must pay the *Core Technology Fee* (CTF), which Apple claims is designed to compensate for the value it provides to developers through its investments in tools, technologies, and services that enable the creation and global distribution of innovative applications.

Indicatively, the CTF conditions specify that Apple Developer Program membership includes one million free initial annual installations for applications distributed via the App Store, alternative marketplaces, and/or web distribution. Beyond this threshold, developers are required to pay a CTF commission of €0.50 per additional annual initial installation. Non-profit organisations, accredited educational institutions, and governmental entities are exempt from the annual membership fee and the CTF charge.

This measure must be assessed by balancing Apple's actual service provision with the need to open up the market⁴⁸. Some legal scholars have suggested that this requirement may be reasonable, as it would be unrealistic to demand that Apple oversee the technical and security aspects of apps and app stores without receiving any compensation. Thus, the responsibility is shifted to individual applications and app stores to determine their own pricing structures and cost strategies to remain as competitive as possible⁴⁹.

48. BOSTOEN, F., "Online Platforms and Vertical Integration: The Return of Margin Squeeze?", *Stockholm Faculty of Law Research Paper Series*, no. 42, 2018 analyzes the vertical integration effects of platforms. In cases such as those involving the tying of an operating system and an app store, the potential risk of undue exploitation of vertical linkage is evident, potentially leading to margin squeeze situations.

49. MANDRESCU, D., "The Apple App Store – A New Kind of Hallmark Case", *Kluwer Competition Law Blog*, 18-3-2024, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>

V. COMPLIANCE WITH THE DMA.

When Apple published its report on how it intended to comply with the obligations and prohibitions imposed by the Digital Markets Act (DMA), it was already apparent that it was doing so reluctantly and with little willingness to cooperate with the new European competition framework in the digital sector. In contrast to other reports, Apple's submission was overly generic and ambiguous.

A. Non-Compliance Proceedings

It is therefore unsurprising that the first cases opened by the European Commission for potential non-compliance with the DMA's obligations and prohibitions have been directed against Apple. Specifically, these investigations seek to scrutinise the contractual terms and conditions employed by the technology giant both within its app stores and regarding the distribution and installation of apps and stores within its iOS operating system.

On 24 June 2024, the European Commission initiated two proceedings concerning potential non-compliance with the Regulation⁵⁰. In the first case, the Commission issued its preliminary assessment, considering that Apple was preventing app developers from informing consumers about alternative means of accessing offers and content (anti-steering obligation). The second proceeding investigated Apple's Core Technology Fee, which is imposed on third-party app and app store developers. The Commission has expressed concerns that this charge may prevent the effective fulfilment of the obligations established under the DMA.

Regarding anti-steering clauses, the Commission's preliminary assessment found that Apple's contractual terms do not effectively allow developers to direct their users to alternative subscription channels. In particular, developers are prevented from providing pricing information within the app itself or from directly communicating with end users to inform them about promotional offers available through other distribution channels. Subscriptions can only be accessed via link-outs, meaning external links redirecting users outside the app. These link-outs are subject to multiple restrictions imposed by Apple, preventing app developers from engaging in direct and personalised communication with their users.

Regarding the Core Technology Fee, while charging developers for the initial acquisition of new users through the App Store is considered reasonable, the

50. On the motivation and timing of the initiation of this case, see FRANK, N. / KLECZKA, M., "Complying with the Digital Markets Act by introducing exclusivity rebates? – Why the European Commission opened a non-compliance procedure against Apple", SSRN: <https://ssrn.com/abstract=4919411>. This article provides an insightful economic analysis of how Apple proposed to comply with the provisions of the DMA, highlighting that such measures were insufficient to ensure market fairness and contestability.

same cannot be said for the imposition of commissions on subsequent purchases of digital products or services within the app or for app updates. The investigation focuses particularly on the fee of €0.50 per annual installation beyond the first million downloads, which could constitute an anti-competitive barrier and a violation of the DMA, both in terms of its amount and the service being remunerated. The Commission considers that these fees exceed what is strictly necessary for fair compensation.

The application of Article 6(4) of the DMA requires a recalibration of the contractual terms concerning the development of alternative app stores and the distribution of apps through alternative channels. Prior to the Regulation's entry into force, developers were required to adhere to contractual conditions that did not allow for any alternative distribution systems.

The investigation also examines the conditions imposed on third-party app stores, particularly Apple's requirement that developers provide a €1 million letter of credit and have been members of the Apple Developer Program for at least two years. Additionally, the Commission has expressed concern over Apple's requirement for a "membership of good standing" in its Developer Program, mandating that developers maintain a compliant commercial history to qualify for alternative distribution channels.

The investigation further considers the process for installing third-party applications, as Apple's mechanism for enabling installations outside the App Store is perceived as overly complex and time-consuming, potentially discouraging end users from utilising alternative channels. In practice, the installation of apps and stores through these channels requires navigating multiple alarmist warning screens that may influence user behaviour. The Commission is also analysing whether Apple charges developers for accessing key iOS system functions when distributing their apps outside the App Store, given that the DMA mandates free interoperability of hardware and software. The inquiry will include a review of Apple's verification procedures for alternative app downloads and third-party app store installations.

The concern surrounding these practices is that they could produce effects similar to those resulting from exclusive discount schemes. Apple's maintained practices incentivise most developers (whether offering free apps without in-app purchases or paid apps with in-app purchases) to remain within Apple's traditional commission system and exclusively distribute their apps through the App Store.

Following the initiation of these proceedings, the Commission has begun its investigation to establish the facts and determine whether they constitute a breach of the DMA. If found in violation, Apple could face fines of up to 10% of its global turnover⁵¹. However, the ongoing trade war initiated by President Trump in the United States, along with protectionist measures concerning American technology firms, has created an atmosphere of uncertainty. As a result, the European

51. In the event of repeated violations, the DMA provides that the fine could be increased to 20%. Furthermore, in cases of systematic infringements, additional remedies—either structural or behavioral—may be imposed.

Commission is likely to carefully weigh all potential scenarios and consequences before taking further enforcement action. It is highly probable that this U.S. trade policy will weaken the enforcement of digital markets regulation within the European Union.

B. Specification proceedings

In parallel, on 19 September 2024, the Commission opened two additional proceedings against Apple⁵², aimed at specifying how interoperability obligations should be fulfilled in accordance with Article 6(7) of the DMA. These proceedings focus on two key aspects:

- The connectivity functions and features of iOS, primarily used for and by connected devices;
- The process established by Apple to manage interoperability requests submitted by developers and third parties for iOS and iPadOS.

On 18 December, the European Commission issued two decisions reflecting its preliminary assessment of these matters.

V. PRIVATE ENFORCEMENT OF THE DIGITAL MARKETS ACT IN CASES OF INFRINGEMENTS IN APP STORES

The Digital Markets Act (DMA) is a mandatory regulation that imposes unconditional compliance with a series of prohibitions and obligations on its addressees—the platforms designated as gatekeepers. These rules are intended to regulate market functioning, prevent restrictions on competition, promote a fairer digital marketplace, and enhance contestability. The primary enforcement mechanism is administrative, with the European Commission responsible for designating gatekeepers, monitoring their conduct, and ensuring compliance with the imposed obligations and prohibitions. In cases of non-compliance, the Commission may impose fines of up to 10% of a gatekeeper's total global turnover (non-compliance proceedings).

It is evident that platforms designated as gatekeepers are directly and unconditionally subject to the obligations of Articles 5, 6, and 7 of the Regulation. Failure to comply with these obligations not only allows the Commission to initiate enforcement proceedings but also entitles third parties to bring actions before national courts to have these platforms declared in breach of the DMA and

52. Respectively, the referenced cases DMA.100203 and DMA.100204, initiated on September 18, 2024.

compelled to comply⁵³. Judicial protection under these provisions also enables claimants to seek interim relief where necessary. Furthermore, where third parties have suffered harm due to such breaches, they may claim damages before the courts. This legal recourse is referred to as the private enforcement of the DMA, analogous to the private enforcement of competition law.

A. Direct Effect of DMA Obligations and Prohibitions

The foundation of private enforcement of the DMA lies in the direct effect of its obligations. By their nature, in accordance with Article 288 of the Treaty on the Functioning of the European Union (TFEU), regulations are fully binding and directly applicable in all Member States. This direct effect creates individual rights for private parties, which national courts must uphold, covering both vertical and horizontal direct effects. Some Member States explicitly supported the DMA's direct effect, recognising that private enforcement would enhance its effectiveness and confirming that gatekeepers' obligations could be privately enforced⁵⁴.

For a regulation to have such direct effect, its provisions must be sufficiently precise and impose unconditional obligations, allowing private parties to derive rights from them. This requirement is easily met for the obligations established in Article 5 of the DMA, but is less straightforward for those under Article 6, as these obligations may require further specification through compliance proceedings⁵⁵.

Thus, while the direct application of Article 5's obligations and prohibitions is clear-cut, uncertainties arise regarding Article 6, given that it is subject to specification procedures. The necessity for further elaboration raises doubts about whether these provisions are immediately enforceable (how can an obligation be applied if its contours are not fully defined?) and suggests that their effectiveness may be suspended until the relevant specification proceedings have been completed⁵⁶.

53. ANDRIYCHUK, O., "Do DMA obligations for gatekeepers create entitlements for business users?", *Journal of Antitrust Enforcement*, 11, 1, 2023, pp. 123-132.

54. «Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible» declaración conjunta de los Ministros de Francia, Alemania y los Países Bajos, "Friends of an effective Digital Markets Act", "Strengthening the Digital Markets Act and its Enforcement", 2020 available at: https://www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4

55. See KOMNINOS, A.P., "The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement", *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World* (Concurrences, 2021), open Access draft at: <https://ssrn.com/abstract=3914932>

56. KOMNINOS, A.P., "The Digital Markets Act and Private Enforcement...", *op. cit.*, argues that this characteristic does not affect its direct effect in any way. According to Article 7(2) of the Regulation and Recital 58, the specification process does not alter the nature of the obligations set out in the provision but merely concerns the measures that the gatekeeper must implement to comply with its obligation: «(...) although a Commission decision may specify the necessary compliance

B. Exercise and Effect of Private Actions under the DMA

The direct effect of the obligations and prohibitions under the Digital Markets Act (DMA) enables interested parties to bring actions before ordinary courts to enforce compliance⁵⁷. Specifically, declaratory actions may be filed to obtain a judicial ruling on a platform's non-compliance with the regulation, particularly in cases where the European Commission has not initiated a non-compliance proceeding. Additionally, courts may be requested to impose measures ensuring effective compliance with the obligations established in the DMA. To guarantee the intended effectiveness of the Digital Markets Act and to prevent potential harm arising from delays in enforcement, interim measures may be sought to safeguard the relevant interests. Lastly, affected third parties may claim compensation for damages suffered as a consequence of an infringement of these obligations and prohibitions.

Similar to the private enforcement of competition law, two types of judicial actions can be distinguished depending on whether the European Commission has previously issued a decision in an administrative enforcement proceeding⁵⁸. If a prior Commission decision exists, the case qualifies as a follow-on action, where the claimant benefits from a solid evidentiary basis due to the Commission's established findings of infringement. However, unlike private enforcement in competition law, there is currently no mandatory provision in the DMA dictating that a Commission decision is fully binding on national courts, nor that it constitutes irrefutable proof of an infringement⁵⁹.

measures, the Article 6 obligations themselves are unconditional and precise legal rules, and to that extent they are also generally applicable and directly effective».

57. PODSZUN, R., "Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act", *Journal of European Competition Law and Policy*, 13, 4, 2022, pp. 254-267.

58. On this dichotomy between follow-on and stand-alone actions, see OLMEDO PERALTA, E., "La reclamación de daños sufridos por los consumidores como consecuencia de un cártel (private enforcement): follow-on damages vs. stand alone actions", *La protección de los consumidores en tiempo de cambio*, eds. Miranda Serrano / Pagador López, Marcial Pons, 2015, pp. 171-188; CASADO NAVARRO, A., "Algunas reflexiones sobre las acciones de daños stand-alone", *Estudios de la Red Académica de Defensa de la Competencia (RADC) 2022*, eds. Olmedo Peralta / Robles Martín-Laborda, Aranzadi, 2022, pp. 247-267.

59. There is no provision in the field of digital markets equivalent to Article 9(1) of 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 competition law by the Member States and the European Union. As is well known, this article provides that: «Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.» This rule was transposed into Spanish law through Article 75 of the Competition Act, which establishes that a finding of an infringement by a Spanish competition authority or court shall be deemed irrefutable for the purposes of an action for damages before a Spanish court.

In the absence of such a provision, the effect of Commission decisions in judicial proceedings will be assessed under the general procedural rules applicable in each Member State, meaning national courts are not necessarily bound by the Commission's determination⁶⁰. Although the DMA does not explicitly reference competition law proceedings, it could be argued that the principle established in Article 16 of Regulation 1/2003 should apply by analogy. This provision states that when national courts rule on (anti-competitive) practices that have already been subject to a Commission decision, they must not issue rulings inconsistent with it and should also avoid decisions that could conflict with a pending Commission case. In such situations, national courts should consider whether to stay proceedings until the Commission has reached a decision.

Conversely, in cases where no prior Commission decision exists, the actions qualify as stand-alone claims. These claims face similar challenges to judicial proceedings under competition law. Claimants must establish the infringing conduct, often with limited access to evidence proving the existence of an infringement. Additionally, they must justify the unlawfulness of the conduct before courts that may not be fully familiar with the regulatory framework of the DMA. The burden of proof rests entirely on the claimant.

Given their private nature and adjudication under civil law, these actions produce only inter partes effects, meaning they do not create binding precedents or res judicata effects applicable to other cases.

Ultimately, the real success of these actions will largely depend on the effectiveness of collective action mechanisms, as the damages resulting from DMA infringements typically affect a defined group of victims. The feasibility of collective redress will significantly influence the cost-benefit analysis of initiating litigation. Moreover, collective actions may facilitate uniform and consistent solutions across a broad range of cases⁶¹.

60. See FONTESTAD PORTALÉS, L., "La pretendida eficacia de cosa juzgada de las resoluciones administrativas en el Derecho de la Competencia a la luz del Reglamento (CE) 1/2003 y la Directiva 2014/104/UE", *Revista de Derecho de la Competencia y la Distribución*, 26, 2020; FONTESTAD PORTALÉS, L., "La independencia judicial en el Derecho de la competencia", *Técnicas cooperativas para la aplicación del Derecho de la Competencia en la Unión Europea y España*, ed. Olmedo peralta, Aranzadi, 2019, pp. 193-228.

61. This specific issue of collective standing for the exercise of private damages actions goes beyond the scope of this contribution. However, legal scholarship has begun to address the challenges of its implementation and the necessity of its promotion to ensure the full effectiveness of the private enforcement system under the DMA. See, *inter alia*, HORNKOHL, L. / RIBERA MARTÍNEZ, A., "Collective Actions and the Digital Markets Act: A Bird Without Wings", SSRN: <https://ssrn.com/abstract=4637661>; HORNKOHL, L., "Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)", *Journal of European Competition Law & Practice*, 15, 4, 2024, pp. 311-317.

C. Brief Consideration on the Risk of Fragmentation Arising from the Private Enforcement of the DMA

Although the direct effect of the Digital Markets Act (DMA) is legally unquestionable and allows private parties to enforce their rights in national courts, scholars have highlighted the risk of fragmentation that may arise from decentralised enforcement by national authorities in each Member State⁶².

Despite being designed as a centralised mechanism managed by the European Commission, the private enforcement of the DMA at the national level poses challenges to regulatory coherence and uniformity in interpretation and implementation. If national courts begin applying the Regulation independently, serious issues could arise, such as divergent rulings across Member States. Courts in different jurisdictions might interpret gatekeepers' obligations inconsistently, creating uncertainty and undermining legal certainty. Furthermore, decentralised rulings could result in multiple mini-regulations, leading to a patchwork of national rules without general applicability (considering the restricted inter partes binding effect of such decisions), thereby reducing predictability in the digital market.

As a consequence, businesses could face increased regulatory burdens, as they would no longer engage solely with a single regulatory authority (the Commission) but might also need to navigate multiple legal disputes before national courts, each subject to different legal frameworks and judicial cultures.

This situation could also interfere with public enforcement. The Commission could be conducting an investigation and negotiating compliance measures with a gatekeeper, while simultaneously, national courts might issue conflicting rulings, potentially undermining the effectiveness of the Regulation.

To mitigate this risk of fragmentation, it has been suggested that private enforcement of the DMA should initially be limited to follow-on actions during the early stages of its implementation⁶³. Before opening the field to stand-alone private enforcement, it would be essential to establish a clear framework for applying the Regulation. Unlike competition law, which was already supported by a solid body of case law and jurisprudence, the DMA introduces a novel regulatory framework that requires time to stabilise its application and develop a clearer understanding of its provisions. This approach would also help prevent contradictory national rulings.

62. We highlight the contribution of KOMNINOS, A.P., "The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement", in *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World* (Concurrences, 2021), open access draft available at: <https://ssrn.com/abstract=3914932> Additionally, see CERRE, *DMA Recommendations for the Council and the Parliament*, April 2021, p. 74, which discusses the possibility of a national judge determining an infringement of one of the obligations under the DMA, in cases where the Commission has not done so—or vice versa.

63. See KOMNINOS, *supra*.

However, despite the merits of this proposal in addressing a genuine risk, there is no legal basis for restricting or prohibiting stand-alone actions. As a result, such claims must continue to be admissible.

D. Possible Actions for Breaches of the DMA in the App Store Sector

In cases of non-compliance with the obligations and prohibitions imposed on app stores by the Digital Markets Act (DMA), app developers may turn to national courts to enforce these rules. Drawing on established practice in previous antitrust cases, different types of legal actions could be pursued. Thus, if faced with restrictive clauses contrary to the Regulation, content creators could request a judicial declaration of nullity of agreements such as anti-steering obligations. Should an app store retaliate against an application for asserting these rights and remove it from the app store, the developer could seek an interim measure ordering the reinstatement of the application in the store, ensuring its continued distribution. The validity and effectiveness of such interim measures will be critical to ensuring the prompt enforcement of the DMA's provisions, particularly given the significant damage that could result from prolonged non-compliance, potentially leading to the market exclusion of the affected developer or potential competitor.

The enforcement of obligations to act presents an even greater challenge, as it involves a dual difficulty. Firstly, the effective implementation of these obligations by national courts may be hindered by a lack of precise knowledge regarding the specific conduct that must be enforced. Secondly, uncertainties arise concerning the advisability of judicially imposing such obligations, adding an element of unpredictability that complicates their practical execution. Examples of such obligations include orders requiring the installation of alternative app stores or enabling direct app downloads. Another example would be mandating the acceptance of alternative in-app payment (IAP) systems. Clearly, these obligations require a degree of technical determination and specification that may exceed the competence of national judges.

As a result, judicial intervention is more straightforward when it comes to determining the validity or invalidity of contractual clauses rather than imposing technically complex conduct⁶⁴. In this regard, through private enforcement, those harmed by breaches of the DMA could obtain the nullification of unfair or anti-competitive contractual clauses, such as parity clauses, anti-steering obligations, exclusive agreements, and similar restrictive provisions.

⁶⁴. This can be observed in the German experience, as discussed by PODSZUN, R., "Private Enforcement and Platform Regulation: Two GAFA Cases – and What They Tell Us About the Digital Markets Act", SSRN: <https://ssrn.com/abstract=3862497>, especially pp. 9 ff.

E. Compensation for damages

Finally, once an infringement has been established and harm has been demonstrated, the affected party may seek compensation for unlawfully sustained damages before national courts. Such claims may be brought both when the infringement has been declared by the European Commission in a non-compliance proceeding (follow-on actions) and when a national court is asked to establish the infringing conduct, declare its nullity, and order reparation for the damage suffered (stand-alone actions).

A key difficulty in this regard arises from the fact that the DMA does not contain any specific provision expressly recognising the possibility of seeking compensation for damages resulting from violations of its obligations. Consequently, such compensation claims must be pursued under the general liability rules of each national legal system. For instance, in Spain, such claims would have to be based on general tort liability rules under Article 1902 of the Civil Code or on the specific actions available under the Unfair Competition Act in cases of regulatory violations.

In any case, the exercise of these actions will require the demonstration of a regulatory breach, proof that such a breach has caused harm, and the establishment of a causal link between the infringing conduct and the damage suffered.

As previously mentioned, the complexity of applying DMA provisions in national courts and the risk of fragmentation in its enforcement make follow-on actions preferable to stand-alone actions. However, seeking damages before national courts following a European Commission decision declaring an infringement presents the additional difficulty that the DMA does not specify the legal effect or evidentiary weight that such a decision should have in national civil proceedings. Consequently, each jurisdiction will have to assess and determine the legal impact of a Commission decision in accordance with its own procedural rules.

In my view, it would be advisable to introduce an explicit provision in the DMA granting binding effect to European Commission decisions in national courts, similar to the rules established in the Damages Directive for competition law infringements (subsequently incorporated into the competition regulations of EU Member States). This would provide a solid and uniform legal basis ensuring, across the entire European Union, the binding nature of the Commission's infringement findings.

Similar to antitrust damages actions, claims for damages arising from violations of the DMA face the central challenge of quantifying the actual harm suffered. In the case of the annulment of anti-steering obligations, such harm could be represented by the potential excess commission charged by Apple or Android for the use of their in-app purchase (IAP) services. However, the framing of the issue may not be entirely appropriate, as the amount of the commission applied is likely to be lawful and equitable. The harm does not stem from the amount charged per se, but rather from the lack of alternatives and the inability to use proprietary payment services. Even if the commission were deemed partially or entirely unlawful, further quantification issues would arise, such as determining

the number of affected users, including end users whom developers lost due to their unwillingness to bear the service price (including the app store commission). In any event, the compensated damage should cover only the difference between the applied commission and the actual cost of the provided service, namely, the cost of delivering digital payment processing services.

Difficult-to-quantify damages may also arise in cases of blocking or hindering the installation of alternative app stores or the direct download of applications. These situations would constitute exclusionary abuses of dominance, where the challenge in quantifying the damage would stem from determining the specific profits that the new app store might have generated. The assessment of these damages could be excessively speculative to be recognised and awarded in judicial proceedings. A similar issue would arise when alternative in-app payment services are obstructed.

Alongside other operators, Epic Games has filed a claim before the United Kingdom's Competition Appeal Tribunal (CAT), seeking damages and injunctive relief against Alphabet for failing to comply with its platform obligations under Section 47A of the Competition Act 1998⁶⁵. Although the trial was initially scheduled for 6 May 2025, it has been postponed due to the joint case management of multiple actions and the consolidated trial of several proceedings. Epic is leveraging the greater expertise and efficiency of the UK tribunal, which is more inclined to rule favourably on such claims, to obtain compensation for the damages suffered as a result of its apps being removed from the Android app store, the blocking of direct distribution of its games and app stores, and the obligation to process its in-app payments exclusively through Alphabet's payment system.

VI. REFERENCES

- ANDRIYCHUK, O., "Do DMA obligations for gatekeepers create entitlements for business users?", *Journal of Antitrust Enforcement*, 11, 1, 2023, pp. 123-132.
- AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *Digital platform services inquiry, Interim report No.2 – App marketplaces*, March 2021
- AUTORITEIT CONSUMENT & MARKT (NL), *Market study into mobile app stores*, 11 April 2019
- BOSTOEN, F. / MÂNDRESCU, D., "Assessing abuse of dominance in the platform economy: a case study of app stores", *European Competition Journal*, 16, 2-3, 2020, pp. 431-491.
- BOSTOEN, F., "Online Platforms and Vertical Integration: The Return of Margin Squeeze?", *Stockholm Faculty of Law Research Paper Series*, no. 42, 2018.
- BURGIN, J.S., "Epic Games Played by the Rule of Reason: Rebalancing Antitrust's Improbable Standard", *Columbia Journal of Law and Social Problems*, 58, 1, 2024, pp. 101-145.

65. Further information on the case can be found at: <https://www.catribunal.org.uk/cases/13785720-epic-games-inc-and-others>.

- CASADO NAVARRO, A., “Algunas reflexiones sobre las acciones de daños stand-alone”, en *Estudios de la Red Académica de Defensa de la Competencia (RADC)* 2022, ed. Olmedo Peralta / Robles Martín-Laborda, Aranzadi, 2022, pp. 247-267.
- CERRE, *DMA Recommendations for the Council and the Parliament*, April 2021
- COMPETITION & MARKETS AUTHORITY (UK), *Mobile Ecosystems. Market study final report*, 10 June 2022
- EDELMAN, B. G. / GERADIN, D., “Android and Competition Law: Exploring and Assessing Google’s Practices in Mobile”, *European Competition Journal*, 12, 2-3, 2016, pp. 159-194.
- EDLEMAN, B. G., “Does Google Leverage Market Power Through Tying and Bundling?”, *Journal of Competition Law & Economics*, 11, 2015, pp. 365-400.
- EVINGER, J.A., “Walled Gardens & Forbidden Apples: Software Access Amid Antimonopoly Resurgence”, *Richmond Journal of Law and Technology*, 31, 1, 2024
- FONTESTAD PORTALÉS, L., “La independencia judicial en el Derecho de la competencia”, en *Técnicas cooperativas para la aplicación del Derecho de la Competencia en la Unión Europea y España*, ed. Olmedo peralta, Aranzadi, 2019, pp. 193-228
- FONTESTAD PORTALÉS, L., “La pretendida eficacia de cosa juzgada de las resoluciones administrativas en el Derecho de la Competencia a la luz del Reglamento (CE) 1/2003 y la Directiva 2014/104/UE”, *Revista de Derecho de la Competencia y la Distribución*, 26, 2020
- FRANK, N. / KLECKA, M., “Complying with the Digital Markets Act by introducing exclusivity rebates? – Why the European Commission opened a non-compliance procedure against Apple?”, available at SSRN: <https://ssrn.com/abstract=4919411>
- FRANK, N. / KLECZKA, M., “Complying with the Digital Markets Act by introducing exclusivity rebates? – Why the European Commission opened a non-compliance procedure against Apple”, SSRN: <https://ssrn.com/abstract=4919411>
- GERADIN, D. / KATSIFIS, D., “The Antitrust Case against the Apple App Store”, *Journal of Competition Law & Economics*, 17, 3, 2021, pp. 503-585.
- GUGGENBERGER, N., “Essential Platforms”, *Stanford Technology Law Review*, 24, 237, 2021, pp. 237-343
- HÖPPNER, T. / WESTERHOFF, P. / WEBER, J.M., “Taking a bit at the Apple: ensuring a level-playing-field for competition on app stores”, 13 de mayo de 2019, disponible en: <https://ssrn.com/abstract=3394773>
- HORNKOHL, L. / RIBERA MARTÍNEZ, A., “Collective Actions and the Digital Markets Act: A Bird Without Wings”, SSRN: <https://ssrn.com/abstract=4637661>
- HORNKOHL, L., “Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)”, *Journal of European Competition Law & Practice*, 15, 4, 2024, pp. 311-317
- KOMNINOS, A.P., “The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement”, *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World* (Concurrences, 2021), open Access draft disponible en: <https://ssrn.com/abstract=3914932>

- MANDRESCU, D., “The ACM vs. Apple App Store – A Second Chance At Getting it Right”, Kluwer Competition Law Blog, 7-11-2023, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/11/07/the-acm-vs-apple-app-store-a-second-chance-at-getting-it-right/>
- MANDRESCU, D., “The Apple App Store – A New Kind of Hallmark Case”, *Kluwer Competition Law Blog*, 18-3-2024, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>
- NELSON, J., “Tech Platforms are Essential Facilities”, *Nevada Law Journal*, 22, 1, 2021, pp. 379-404.
- OLMEDO PERALTA, E., “How does Android protects its dominance in the mobile ecosystem, and why might the Digital Markets Act not be enough?: concerns on alphabet practices on operating systems”, *New European Competition Trends in Digital Markets*, eds. Ruiz Peris / Estevan de Quesada, Atelier, 2024, pp. 209-235.
- OLMEDO PERALTA, E., “La reclamación de daños sufridos por los consumidores como consecuencia de un cártel (private enforcement): follow-on damages vs. stand alone actions”, en *La protección de los consumidores en tiempo de cambio*, eds. Miranda Serrano / Pagador López, Marcial Pons, 2015, pp. 171-188.
- OLMEDO PERALTA, E., “The Evidential Effect of Commitment Decisions in Damage Claims: What is the Assumptive Value of a Pledge?”, *Common Market Law Review*, 56, 4, 2019, pp. 979-1004.
- PODSZUN, R., “Private enforcement and platform regulation: Two GAFA-cases – and what they tell us about the Digital Markets Act”, SSRN: <https://ssrn.com/abstract=3862497>
- PODSZUN, R., “Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act”, *Journal of European Competition Law and Policy*, 13, 4, 2022, pp. 254-267.
- RIBERA MARTÍNEZ, A., “It’s (not) a Match! Apple’s In-App Purchase functionality scrutinized by the Netherlands Authority for Consumers and Markets”, 2022, SSRN: <https://ssrn.com/abstract=4116801>
- TODD, P., “Out of the Box: Illegal Tying and Google’s Suite of Apps for the Android OS”, *European Competition Journal*, 13, 1, 2017, pp. 62-92.
- VAN DEN BOOM, J. / BOSTOEN, F. / MONTI, G., “The Netherlands: DMA Enforcement Paradise?”, *TILEC Discussion Paper No. 2024-06*, Tilburg Law School Research Paper, SSRN: <https://ssrn.com/abstract=4869454>
- VEZZOSO, S., “Android and Forking Restrictions: On the Hidden Closedness of Open”, *Market and Competition Law Review*, vol. II, no. 2, 2018, pp. 17-46.
- Völcker, S.B. / BAKER, D., “Why There is No Antitrust Case Against Apple’s App Store. A Response to Geradin & Katsifis”, SSRN: <https://ssrn.com/abstract=3660896>
- YUN, J.M., “App Stores, Afermarkets & Antitrust”, *Arizona State Law Journal*, 53, 2021, pp. 1283-1327

UNLAWFUL STATE AIDS TO STARTUPS IN DIGITAL AND TECHNOLOGICAL MARKETS*

Carlos Gómez Asensio

Associated Professor

University of Valencia

ABSTRACT: Within the framework of the multiple State aids granted in implementation of the Spanish Recovery Plan, startups in digital and technological markets are postulated as potential recipients of various categories of such State aids. This paper carries out an analysis from the point of view of Competition Law of the lawful and compatible nature of such State aids with the internal market.

Keywords: State aids; startups; digital and technological markets; single undertaking; undertaking in crisis.

SUMMARY: I. STATE AIDS TO EMERGING COMPANIES IN DIGITAL AND TECHNOLOGICAL MARKETS. A. Modernisation and digitalisation of the industrial fabric and SMEs. 1. PERTES in digital and technological markets. B. The State aid system for entrepreneurship based on innovation. II. ENFORCEMENT OF THE STATE AID SCHEME. A. Applicable instruments. B. *De minimis* aids and economic unit. C. Application of the General Block Exemption regime. III. STARTUPS IN CRISIS AND STATE AIDS. IV. CONCLUSIONS. V. BIBLIOGRAPHY.

* This chapter is the result of the tasks developed in the frame of the research projects “Concentración, Daños, Abuso y Cooperación en los Mercados Digitales” PID2021-128111OB-I00, del Ministerio de Ciencia e Innovación; y “Competition Power Control” CIAICO/2021/202, de la Conselleria de Innovación, Universidades, Ciencia y Sociedad Digital de la Generalitat Valenciana.

I. STATE AIDS TO EMERGING COMPANIES IN DIGITAL AND TECHNOLOGICAL MARKETS

On 31 December 2020, Royal Decree-Law 36/2020 was published in the BOE (Spanish Official Journal)¹, approving the Recovery, Transformation and Resilience Plan (hereinafter the Recovery Plan), i.e. the Spanish national plan whose approval was necessary to be eligible for the NextGenerationEU Recovery Plan for Europe², which includes the Recovery and Resilience Mechanism (RRF)³.

The Spanish Recovery Plan is based on 4 cross-cutting axes⁴: ecological transition; digital transformation; gender equality; as well as social, economic and territorial cohesion. In turn, these 4 axes are specified in 10 lever policies and 30 components, each of the latter focused on the achievement of a specific objective, detailing the reforms and investments necessary to achieve it⁵.

The content of the Recovery Plan has been the subject of further development by the Spanish Government, which, in September 2023, presented its *Adenda a la segunda fase del Plan de Recuperación Transformación y Resiliencia del Reino de España: Impulso a la Industrialización*, which received a favourable report from the European Commission on 2 October 2023. being subsequently approved at the ECOFIN meeting on the 17th of the same month⁶.

With regard to the second axis of the Recovery Plan, namely “Digital Transformation”, it aims to guarantee accessibility for society as a whole, promoting the digitalisation of companies—especially SMEs and startups—and industry, R+D+i, and the digital training of the population, deploying its actions, given its cross-cutting nature, through the 10 lever policies and 30 components that make up the Recovery Plan⁷.

1. Royal Decree-Law 36/2020, of 30 December, approving urgent measures for the modernisation of the Public Administration and for the implementation of the Recovery, Transformation and Resilience Plan.

2. Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery from the COVID-19 crisis.

3. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

4. See arts. 12 and 13 Royal Decree-Law 36/2020.

5. The content of the Recovery, Transformation and Resilience Plan can be downloaded at the following link: <https://planderecuperacion.gob.es/plan-espanol-de-recuperacion-transformacion-y-resiliencia>.

6. The full text of the *Adenda a la segunda fase del Plan de Recuperación Transformación y Resiliencia del Reino de España: Impulso a la Industrialización*, is available in: <https://planderecuperacion.gob.es/plan-espanol-de-recuperacion-transformacion-y-resiliencia>.

7. A breakdown of the contribution to digital transformation of each component of the Recovery Plan can be found in GOBIERNO DE ESPAÑA, *Plan de Recuperación, Transformación y Resiliencia*, 16 junio de 2021, p. 65.

A. Modernisation and digitalisation of the industrial fabric and SMEs

In order to achieve the objectives of the second axis of the Recovery Plan corresponding to “Digital Transformation”, the four components (numbers 12 to 15) that make up the content of lever policy number V “Modernisation and digitalisation of the industrial and SME fabric, recovery of tourism and promotion of Spain as an entrepreneurial nation” are particularly decisive⁸: 12. Spain 2030 Industrial Policy; 13. Foster the growth of SMEs; 14. Plan for the modernization and competitiveness of the tourism sector; 15. Digital connectivity, the promotion of cybersecurity and deployment of 5G.

In this sense, and for the purposes of interest here, the content of component 13 “Foster the growth of SMEs” is particularly relevant, which, based on the importance in figures of SMEs and micro-SMEs for the Spanish business fabric⁹, aims to increase the productivity of this type of company, reinforcing their capacities and resilience, contributing to job creation, and boosting competitiveness and the potential growth of the Spanish economy. To achieve these objectives, the component foresees two action lines:

On the one hand, the implementation of different legal reforms aimed at improving the quality of regulation (better regulation)¹⁰, in order to promote the competitiveness and growth of the business fabric, which favours the business climate and the emergence and success of new entrepreneurial initiatives, eliminating the obstacles that hinder the growth of SMEs, promoting, in particular, the creation of highly innovative emerging companies in the technological (startups) and industrial fields, as well as also providing for a reform of insolvency restructuring mechanisms¹¹.

8. In this regard, GOBIERNO DE ESPAÑA, Plan de Recuperación, Transformación y Resiliencia, ob.cit., p. 27: “It is key to improve the business climate, encourage investment and promote business creation and growth, increasing the size and productivity of companies and consolidating our country as a place of reference in the support of entrepreneurship and in particular technology startups, with a comprehensive approach, adopting the best international practices to make Spain an entrepreneurial nation. Along the same lines, it is necessary to promote a coherent plan for the digitalisation of the entire value chain in driving sectors, which allows full use of the synergies and opportunities of new technological and data management developments in the field of the agri-food and logistics chain, trade, tourism, health or mobility”. (Translation by us).

9. For these purposes, in accordance with the data published by the DIRECCIÓN GENERAL DE LA INDUSTRIA Y DE LA PEQUEÑA Y MEDIANA EMPRESA, *Cifras Pyme*, November 2024, the percentage of SMEs in Spain, attending only to the number of employees (up to 249), reaches 99, 2% of the Spanish business fabric. Available in: <https://ipyme.org/es-es/publicaciones/Paginas/estadisticaspyme.aspx>

10. An early study of the foundations, objectives and aims of this policy can be found in GÓMEZ ASENSIO, C., *La mejora regulatoria (“Better Regulation”): aplicaciones en materia de contratación pública*, Valencia, Tirant lo Blanch, 2013.

11. In detail, GOBIERNO DE ESPAÑA, Plan de Recuperación, Transformación y Resiliencia, ob.cit., p. 156.

This set of legal reforms is grouped around two subcomponents: C13.R1 “Better regulation and business climate” on the one hand, and C13.R2 “Strategy Spain as an entrepreneurial nation”¹², for the implementation of which a High Commissioner for Spain Entrepreneurial Nation (Alto Comisionado para España Nación Emprendedora ACENE) was established, suppressed since February 14, 2023, for having achieved its objectives¹³.

Regardless of the value judgement that its content deserves, the set of proposed legislative reforms has already materialised, leading to the approval, among others, of¹⁴: Law 16/2022, of 5 September, amending the revised text of the Insolvency Law¹⁵; Law 18/2022, of 28 September, on the Creation and Growth of companies; Law 28/2022, of 21 December, on the Promotion of the Startup Ecosystem; Royal Decree 815/2023, of 8 November, implementing Law 6/2023, of 17 March, on Securities Markets and Investment Services, in relation to the official registers of the National Securities Market Commission, cooperation with other authorities and the supervision of investment services companies.

On the other hand, and in addition to the legislative reforms set out above, in order to achieve the objectives of component 13 “Foster the growth of SMEs”, a public policy of investments has been promoted focused on 13 strategic action areas.

For the purposes of interest here, must be pointed out the inversion “C13.I1 Entrepreneurship”, whose objective is to strengthen the entrepreneurial ecosystem, to make it more resilient and competitive through four areas of action: (i) strengthen entrepreneurial capacities and support entrepreneurs; (ii) to offer tools

12. The “Spain Entrepreneurial Nation Strategy” was presented on February 11, 2021 and proposes a set of 50 measures to be executed, aimed at achieving the four goals proposed by the Strategy: accelerate the maturation of investment in Spain; attracting, developing and retaining talent; promote scalability; and articulate an entrepreneurial public sector. The full report on the content of this strategy is available at: <https://nacionemprendedora.gob.es/estrategia-espana-nacion-emprendedora>

13. In detail about this commissioner and in general, the “Spain Entrepreneurial Nation Strategy”, see <https://nacionemprendedora.gob.es/>; as well as the executive report available at: https://www.lamoncloa.gob.es/temas/espana-nacion-emprendedora/Documents/ENE_Resumen%20ejecutivo.pdf

14. References in Spanish: Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal; Ley 18/2022, de 28 de septiembre, de creación y crecimiento de empresas; Ley 28/2022, de 21 de diciembre, de fomento del ecosistema de las empresas emergentes; Real Decreto 815/2023, de 8 de noviembre, por el que se desarrolla la Ley 6/2023, de 17 de marzo, de los Mercados de Valores y de los Servicios de Inversión, en relación con los registros oficiales de la Comisión Nacional del Mercado de Valores, la cooperación con otras autoridades y la supervisión de empresas de servicios de inversión.

15. Full title in Spanish: Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal, aprobado por el Real Decreto Legislativo 1/2020, de 5 de mayo, para la transposición de la Directiva (UE) 2019/1023 del Parlamento Europeo y del Consejo, de 20 de junio de 2019, sobre marcos de reestructuración preventiva, exoneración de deudas e inhabilitaciones, y sobre medidas para aumentar la eficiencia de los procedimientos de reestructuración, insolvencia y exoneración de deudas, y por la que se modifica la Directiva (UE) 2017/1132 del Parlamento Europeo y del Consejo, sobre determinados aspectos del Derecho de sociedades (Directiva sobre reestructuración e insolvencia).

to support the creation and management of SMEs; (iii) dissemination and communication actions to strengthen Spain's position as an entrepreneurial nation; and (iv) financing of entrepreneurial activity¹⁶.

Likewise, for the purposes of this work, must be highlighted the line of investment, "C13.I7 Fund to scale technology startups" Next Tech, aimed at developing innovative high-impact digital projects in scale-ups¹⁷, it is a joint initiative of the Official Credit Institute (Instituto de Crédito Oficial, ICO) and Axis (a venture capital manager in which ICO has a 100% stake), with the Secretaría de Estado de Digitalización e Inteligencia Artificial, whose investment strategy is implemented both, through venture capital funds and corporate funds/vehicles, as well as by investing directly in companies that meet the fund's investment criteria¹⁸.

The fund was created with the aim of mobilising up to 4,000 million euros in the digital and artificial intelligence sectors¹⁹, of which 1,000 million euros will be allocated to the European initiative "Tech Champions", which aims to provide European funding for the *scale-up* of European innovative companies with the greatest growth potential on a global scale²⁰.

Finally, among the strategic investment areas of component 13 "Foster the growth of SMEs", must be noted investments C13.I6 "ICO funds support for businesses"²¹; and "C13.I12 Entrepreneurship and SME fund", which, in relation to

16. One of the first lines of aid granted within the framework of this line of investment is the "Activa Startup", endowed with 44 million euros, managed by the Fundación de la Escuela de Organización Industrial (EOI), attached to the Secretaría General de Industria y PYME and which aimed to support 11,100 SMEs in 2023 in the development of collaboration projects between SMEs and startups, which serve to boost their business growth. Information available at: https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/industria/Paginas/2021/221221-prtr_activa-startups.aspx.

Also noteworthy is the Programa Capacidades Emprendedoras para la aceleración de startups "Programa de Aceleración de Startups", whose call for the regulatory bases of such aid was published in the BOE of August 3, 2022. Information available at: <https://planderecuperacion.gob.es/noticias/conoce-Programa-activa-aceleracion-startups-prtr>.

17. In this regard, GOBIERNO DE ESPAÑA, *Plan de Recuperación, Transformación y Resiliencia*, ob.cit., p. 122: "Accompanying the regulatory changes, the financial instruments to support entrepreneurship will be strengthened through, among others, a new public-private NEXT TECH venture capital fund to support the growth of startups in disruptive technologies through ICO, reform and increased efficiency by exploiting synergies between the different networks of existing offices both, from the State and regional and local governments, to support companies on the ground and the creation of a Oficina Nacional de Emprendimiento, a single portal for entrepreneurs to access aid instruments". (Translation by us).

18. The investment criteria are available at: <https://www.ico.es/web/axis/fond-ico-next-tech>.

19. Specifically, the Next Tech Fund aims to invest in the following sectors: Advanced data analytics, cloud computing, edge computing, virtual reality, natural language processing, biometrics and digital identity, blockchain technology, Internet of Things, robotics, nanotechnology, quantum computing, green algorithms, 3D printing and additive manufacturing, massive data processing. Further information on this can be found at: <https://planderecuperacion.gob.es/noticias/conoce-Fond-ICO-Next-Tech-desarrollo-proyectos-digitales-innovadores-alto-impacto-prtr>.

20. More information about the content of this initiative can be found on the website of the European Investment Fund (EIF): <https://www.eif.org/etc/about-etci/index.htm>.

21. In accordance with GOBIERNO DE ESPAÑA, *Adenda segunda fase del Plan de Recuperación, Transformación y Resiliencia del Reino de España. Impulso a la industrialización estratégica*, septiembre

the projects that, financed with these funds, implement and/or develop Artificial Intelligence and Language Technologies, are framed within the PERTE “New Language Economy”.

1. PERTEs in digital and technological markets

Strategic Projects for Economic Recovery and Transformation (Proyectos Estratégicos para la Recuperación y Transformación Económica PERTEs), are tractor projects aimed at meeting the objectives of the Recovery Plan²². Inspired by the PIICE—Proyectos Importantes de Interés Común Europeo—, PERTEs constitute a new figure of public-private collaboration²³, to develop projects of a strategic nature and with a great capacity to drive economic growth, employment and the competitiveness of the Spanish economy.

At the time of writing this work, a total of 12 PERTEs have been approved²⁴, among which, due to their connection with technology-based and innovative startups, the “PERTE for cutting-edge health”, the “Aerospace PERTE” or PERTE “New Language Economy”, the latter approved by the Council of Ministers on March 1, 2022, stand out.

PERTE “New Language Economy” aims to promote 14 tractor projects, structured around 6 key principles, based on 5 strategic axes, among which the second, “Artificial Intelligence in Spanish”, stands out, which aims to invest more than 330 million euros to launch projects such as the creation of a Network of Excellence in Artificial Intelligence and the Accessible Language Programmes. with the aim of providing digital tools for people with disabilities and functional diversity and actions of the National Language Technology Plan and its industry²⁵.

de 2023, p. 163, ICO funds to support companies include: “ICO Green Line for financial support for the green transition; as well as the ICO Companies and Entrepreneurs Line for the financing of business growth and resilience. This line includes a subline aimed at tourism companies. Within the framework of the New Language Economy PERTE, loans will be granted to Spanish universities to finance Artificial Intelligence and Language Technologies projects”. (Translation by us).

22. Article 8.1 of Royal Decree-Law 36/2020 defines PERTEs as: “Those projects of a strategic nature with a great capacity to drive economic growth, employment and competitiveness of the Spanish economy”; Paragraph 3 of the precept includes the criteria to be assessed in order to declare a project as a PERTE: having an innovative character and added value in R+D+i, with a structural transformative impact on strategic sectors or with disruptive and ambitious research and innovation phases, beyond the state of the art in the sector, followed by a first industrial deployment. (Translation by us).

23. In this regard, art. 8.2 of Royal Decree-Law 36/2020 establishes that: “The declaration of a project as a PERTE will be made by Agreement of the Council of Ministers, at the proposal of the head or heads of the department or departments competent by reason of the matter, accompanied by an explanatory report describing the planning of planned public-private support and collaboration measures and the requirements for the identification of possible interested parties. Where appropriate, its fit within the Plan for the Transformation, Recovery and Resilience of the Spanish Economy will be described”. (Translation by us).

24. Information on the content of all these PERTEs is available at: <https://planderecuperacion.gob.es/como-acceder-a-los-fondos/pertes>

25. In detail about the content of this PERTE see. <https://planderecuperacion.gob.es/como-acceder-a-los-fondos/pertes/perte-nueva-economia-de-la-lengua>

B. The State aid system for entrepreneurship based on innovation

The State aid system for entrepreneurship based on innovation is included within the main components of the Recovery Plan that make up the content of the lever policy number V “Modernisation and digitalisation of the industrial and SME fabric, recovery of tourism and promotion of Spain as an entrepreneurial nation”.

In this sense, the approval of Law 28/2022, of 21 December, on the Promotion of the Startup Ecosystem (Ley 28/2022, de Fomento del Ecosistema de las Empresas Emergentes, hereinafter LFEEE by its acronym in Spanish), commonly known in economic traffic as the “Startup Law”, is the result of the implementation of the set of legislative reforms provided for within component 13 “ Foster the growth of SMEs”, and more specifically, constitutes the materialization of one of the priority measures included in the “Strategy Spain as an entrepreneurial nation”²⁶.

In this frame, the LFEEE dedicates its Title VI to include a whole series of measures aimed at promoting startups, the main one being the establishment of the State aid system for entrepreneurship based on innovation, whose objective is “to promote the creation in Spain of startups, promote their international expansion, stimulate national and foreign investment in this type of companies, collaboration between companies and increase the participation of women and territories in this phenomenon”²⁷.

To achieve this objective, a series of priority actions are proposed in the article 20 LFEEE, among which, the following stand out: the establishment of co-investment funds to attract private capital to finance emerging companies in their different phases of creation, growth and internationalization; the creation of contact and collaboration networks, platforms and meeting points between startups and between them and mature companies, as well as with the other agents of the Spanish startup ecosystem; the financing of collaborative projects between small and medium-sized enterprises and startups; or actions aimed at reducing the gender gap and promoting women’s participation in this field.

In the exercise of these priority actions, and as a manifestation of the creation of networks, platforms and meeting points and collaboration between emerging companies among themselves and with respect to mature companies, the National Entrepreneurship Office (Oficina Nacional de Emprendimiento ONE) stands out, created in execution of one of the priority measures included in the “Strategy Spain as an entrepreneurial nation”. In this sense, the ONE, in addition to

26. In this regard, in accordance with ALTO COMISIONADO ESPAÑA NACIÓN EMPRENDEDORA, *Estrategia España Nación Emprendedora*, febrero 2021, the 9 priority measures included in this strategy are, p. 20: “Marca para España como Nación Emprendedora; Creación de la Oficina Nacional de Emprendimiento (ONE); Ley de Fomento del Ecosistema de las Empresas Emergentes; RENACE. Red Nacional de Centros de Emprendimiento; Scaleup Spain: apoyo a la escalabilidad; Programa internacional de atracción de talento de las mujeres; Programa de visados; Programa Bandera; Compra pública como motor de innovación”.

27. Art. 19.1 LFEEE.

providing other services²⁸, collects information on the different calls for public aid that startups can benefit from, regardless of their funding body.

Thus, for the purposes of this work, must be highlighted the initiatives to support R+D+i of the Centre for Technological Development and Innovation E.P.E (Centro para el Desarrollo Tecnológico y la Innovación E.P.E, CDTI), both through loans (partially repayable aid)²⁹, and through grants or non-refundable aids³⁰; the Support Fund for Productive Industrial Investment (Fondo de Apoyo a la Inversión Industrial Productiva (FAIIP), promoted by Ministerio de Industria, Comercio y Turismo and managed by the public company SEPIDES³¹; Kit Digital, inside the program Acelera PYME developed by Red.es³²; or the Programa de Aceleración de Startups managed by Fundación Escuela de Organización Industrial (EOI), which constitutes a modality of aid in kind³³.

Likewise, it should also be noted, in the exercise of the functions of channelling financing for emerging companies, as well as financing collaborative projects, the actions carried out by the National Innovation Company S.M.E., SA, (Empresa Nacional de Innovación S.M.E., SA, ENISA) who, on the other hand, is the entity in charge of evaluating the concurrence of the requirements established in articles 3 and 6 of the LFEED for granting the certification as an emerging company—“innovative entrepreneurship certification”—, thus, being able to access the benefits and specialties recognized to startups in the LFEED³⁴.

28. The ONE platform aims to become the virtual meeting and collaboration point between all the agents involved in entrepreneurship in Spain, providing innovative entrepreneurship with the following services: Map of entrepreneurship and other agents of the ecosystem, to facilitate networking; support service to resolve legal doubts, procedures and procedures; self-diagnosis of the business model and entrepreneurial profile; information and events; and Information on calls for public aid. For more information, see: <https://one.gob.es/es>.

29. These loans include the “Línea Directa de Innovación”, “Línea Directa de Expansión”, la “Línea Directa de Innovación Aeroespacial y Salud”, “Línea Directa de Expansión Aeroespacial y Salud”, as well as the “Proyectos de I+D”. The information and technical data sheet of these loans is available at: <https://www.cdti.es/aprs-2>

30. Among these aids, are noteworthy those aimed at the “Ecosistemas de Innovación”, “Ayudas Cervera para Centros Tecnológicos”, “Ayudas Neotec, Misiones Ciencia e Innovación”, “Misiones PERTE Chip”, “Programa Tecnológico Aeronáutico (PTA)”, “Proyectos de I+D, Audiovisual y Videojuegos”, “Programa Tecnológico de Automoción Sostenible (PTAS)”, “Ayudas PYMES Sello de Excelencia”, “CDTI-Eurostars”, “CDTI-Partenariados Pilar 2 (SERA)”, “CDTI-Era-Net”, “KSSP Financiación Nacional”, or “Programa EuroHPC”. The information and technical data sheet of these grants is available at: <https://www.cdti.es/ayudas-subvenciones2>

31. This fund provides for various lines of business financing, both with public funds and venture capital or direct financing. More information at: <https://sepides.es/fondo-faiip-sepides/>

32. Information on this call is available at: <https://www.acelerapyme.gob.es/kit-digital>

33. The aid consists of the delivery of different training and acceleration programs to the companies benefiting from the aid. More information at: <https://www.eoi.es/es/acelerastartups>

34. ENISA will carry out this assessment in application of the criteria established by Order PCM/825/2023, of 20 July, which regulates the criteria and procedure for the certification of startups that give access to the benefits and specialties recognised in Law 28/2022, of 21 December, on the Promotion of the Startup Ecosystem.

On the vicissitudes of this certification procedure and its relationship with the qualification of the Commercial Registrar in certain aspects vid. VÁZQUEZ CUETO, J.C., “Los requisitos legales de las

In this way, ENISA has various lines of financing aimed at innovative entrepreneurship, all of them in the form of participatory loans: Young Entrepreneurs Line; Growth Line; Agro-boost Line; Digital Entrepreneurs Line; as well as the Audiovisual Line and Cultural and Creative Industries³⁵.

Finally, as a closing piece of the State aid system based on innovation, and as a tool for the *ex post* evaluation of the State aid granted³⁶, stands out the mechanism for self-monitoring the effectiveness, efficiency, coherence and effectiveness of these lines of State aid set out in the 2º Additional Disposition of LFEEE.

By virtue of this mechanism, the Government will instruct the Independent Authority for Fiscal Responsibility (Autoridad Independiente de Responsabilidad Fiscal, AIReF) to carry out an inventory of all existing lines of State aids in the State and its institutional public sector aimed at startups or their creation, with AIReF having a period of 9 months, it can be understood from the Government's commission, for the delivery of the inventory and the evaluation report on the public system of support for startups through subsidies and State aids.

At the time of writing this work, there is no record that the Government has commissioned AIReF to prepare this inventory and report.

II. ENFORCEMENT OF THE STATE AID SCHEME

Once it has been exposed the regulatory context within which the different lines of public financing aimed at technology-based and innovative startups in technological and digital markets are circumscribed, which constitute an integral part of the so-called entrepreneurial ecosystem³⁷, now it is necessary to analyse their treatment from the perspective of Competition Law, in particular with regard to their consideration as State aids, as well as the regime applicable to their eventual recovery in the event that they are declared unlawful and incompatible.

A. Applicable instruments

The antitrust study of the State aid granted within the framework of the execution of the different components of the Recovery Plan set out above must be

startups desde una perspectiva jurídico-privada", *La Ley Mercantil*, nº. 110, febrero de 2024, pp. 5 y 6 versión online.

35. The specific content of each of these lines, as well as the documents related to them, including the templates of the different participative loan policies, is available at: <https://www.enisa.es/es/financia-tu-empresa/lineas-de-financiacion>

36. In general, on the formal and methodological aspects for the ex-post evaluation of State aid vid. CNMC, *PRO/CNMC/001/16 Documento metodológico para la evaluación de ayudas públicas*, 2016, pp. 25-53. Disponible en: <https://www.cnmc.es/expedientes/procnmc00116>.

37. In detail regarding the content of the term, VÁZQUEZ LEPINETTE, T., *Aspectos contractuales de las Startups*, Tirant lo Blanch, Valencia, 2023, pp. 42-50.

based on the prior delimitation of the special regulatory context within which they are inserted.

In this sense, beyond the updated general regulations governing the State aid regime—General Block Exemption Regulation (GBER)³⁸, *de minimis* aid regulation³⁹—it should be taken into account that, since 2020, European legislation on State aids has incorporated two sets of exceptional regulations: The first, due to the Coronavirus pandemic crisis, giving rise to the Temporary Framework for State Aid Measures (TFSAM)⁴⁰ as well as the set of indicative State aid templates to help Member States design their national plans under the Recovery and Resilience Facility (RRF)⁴¹; the second set of rules is the Temporary Crisis Framework for State Aid measures as a result of the war in Ukraine (TCFSAM)⁴², the content of which will not be analysed in this paper due to the tangential nature of the inclusion of technology startups in the list of sectors and subsectors particularly affected identified by this instrument.

Situated in the scope of the national recovery plans, the European Commission published a practical guidance to Member States for a swift treatment of State aid notifications in the RRF. This guide is based on the assumption that, to the extent that the Member States have had at their disposal the indicative templates outlined

38. Commission Regulation (EU) N° 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, last amended by Commission Regulation (EU) 2023/1315 of 23 June 2023.

39. Commission Regulation (EU) 2023/2831 of 13 December 2023, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. Effective January 1, 2024. (Hereinafter Regulation 2023/2831).

40. Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01. This communication has been amended several times, the last reform by the Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2022/C 423/04).

A referential analysis of the content of this Temporary Framework can be found in BERENGUER FUSTER, L., “Régimen europeo de las ayudas públicas en tiempos del COVID 19”, *Revista de Derecho Administrativo*, n°. 21, 2022, pp. 222-241; FILPO, F., “State Aid control during the covid-19 pandemic”, *Revista General de Insolvencias y Reestructuraciones*, n°. 2, 2021, pp. 391-407; LADO CASTRO-RIAL, C., “Las ayudas públicas en el nuevo marco europeo de reestructuración temprana: retos ante la crisis del COVID-19”, *Revista General Insolvencias y Reestructuraciones*, n°. 1, 2021, pp. 153-167, Id. “Fondo de apoyo a la solvencia y calificación concursal del endeudamiento SEPI”, *Revista General Insolvencias y Reestructuraciones*, n°. 8, 2022, pp. 113-138; RODRÍGUEZ MÍGUEZ, J.A., “Pandemia, ayudas de estado y ayudas a los Estados: el reto de la eficiente asignación de recursos públicos en tiempos de crisis”, *Revista Galega de Administración Pública (REGAP)*, n°. 60, 2020, pp. 369-400; SIGNES DE MESA, J.I., “El marco temporal de la comisión relativo al régimen europeo de ayudas de estudio en el contexto de crisis sanitaria”, *Revista de Derecho Concursal y Paraconcursal*, n°. 33, 2020, pp. 151-166.

41. These guides are available on https://ec.europa.eu/competition-policy/state-aid/coronavirus/rrf-guiding-templates_en

42. Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, on tis consolidated version after the amendments made by communications C/2023/1188 and C/2024/3113. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02023XC0317%2801%29-20240502>

above and that they have had the active collaboration of the Commission in the design of their national recovery plans, it is expected that many measures likely to be proposed by Member States, such as certain infrastructure investments and direct support to citizens, will not be subject to State aid control, so that, prior notification to the Commission is not necessary⁴³.

Other measures are however likely to constitute aid but will be exempted from the prior notification obligation as they will fall within the scope of block-exemption rules, in particular the GBER or be covered by an existing approved scheme⁴⁴.

B. De minimis aids and economic unit

Based on this regulatory framework, some of the aids aimed at startups and innovative entrepreneurs listed in the previous section, in accordance with the regulatory order of the bases of their call, and with the version of the *de minimis* aid regulation in force at the time of their call⁴⁵, have the consideration of minor or *de minimis* aid and, therefore, such aids are considered lawful as they don't affect trade between Member States and don't distort or threaten to distort competition ex. art. 107.1 TFEU *a contrario sensu*⁴⁶.

However, the fact that the order regulating the bases of the call for State aid considers them as *de minimis* aid—it can be understood by reason of their individual amount, considered in isolation—does not necessarily imply that, in the specific case, due to the concurrent circumstances in the beneficiary undertaking, these aids meet the requirements to be qualify as *de minimis* aids.

In particular, and for the purposes of interest here, it will be necessary that, during 3 fiscal years, said “single undertaking” has not received more than

43. Practical guidance to Member States for a swift treatment of State aid notifications in the RRF framework (updated on 03/02/2022), p.1. Available on: https://competition-policy.ec.europa.eu/state-aid/legislation/rrf-guiding-templates_en

44. Practical guidance to Member States for a swift treatment of State aid notifications in the RRF framework, p.1.

45. Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (hereinafter, Regulation 1407/2013).

46. This is the case, for example, of the aids granted within the framework of the “Programa de Aceleración de Startups”, whose call for the regulatory bases of such aid was published in the BOE of August 3, 2022; also, the loans (partially repayable aid) granted by the CDTI, see above. footnote 30; the Programa de Aceleración de Startups managed by the Fundación Escuela de Organización Industrial (EOI), which is a modality of aid in kind, see supra note 34; or the Digital Kit, within the Acelera PYME programme developed by Red.es, see above note 33. In the latter case, the basic order refers not only to Regulation 1047/2013 on *de minimis* aid, but also, given the cross-cutting nature of the programme, to the rest of the sectoral *de minimis* aid regulations, adopted on the basis of the Enabling Regulation, Council Regulation (EU) 2018/1911 of 26 November 2018 amending Regulation (EU) 2015/1588 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid.

€200,000 in *de minimis* aid granted by a Member State⁴⁷, €300,000 during any period of 3 fiscal years in accordance with the current version of the *de minimis* aid Regulation, in force since January 1, 2024⁴⁸.

For the purposes of the rules on competition laid down in the Treaty, an undertaking is any entity, be it a natural or a legal person, engaged in an economic activity, regardless of its legal status and the way in which it is financed⁴⁹. For its part, the Court of Justice of the European Union (CJEU) has specified that⁵⁰: “the term “undertaking” must be understood as designating an *economic unit*⁵¹ even if in law that economic unit consists of several persons, natural or legal⁵²”, so that “when such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement⁵³”.

This unitary concept of “undertaking”, in relation to the concept of *economic unit*⁵⁴, is also included in the Commission Notice on the notion of State aid⁵⁵, as well as in European case law on State aid⁵⁶, which, in order to determine the

47. Art. 3.2. Regulation 1407/2013.

48. Art. 3.2 Regulation 2023/2831.

49. This is expressly stated in Recital 4 of Regulation 2023/2831, with reference to the case-law of the CJEU in Case C-382/99, *Netherlands v Commission*, ECR 2002, p. I-5163; and C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze and Others*, ECLI:EU:C:2006:8, p. 107.

50. CJEU, Case C-882/19, *Sumal, S. L., v Mercedes Benz Trucks España, S.L.*, ECLI:EU:C:2021:800, p. 41. Also, CJEU, Case C-516/15 P, *Akzo Nobel and Others v Commission*, EU:C:2017:314, pp. 47 and 48.

51. The emphasis through the use of italics is ours.

52. CJEU, Case C-90/09 P, *General Química and Others v Commission*, EU:C:2011:21, p. 35.

53. CJEU, Cases C-201/09 P and C-216/09 P, *Arcelor Mittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg and Others*, EU:C:2011:190, p. 95.

54. About the unitary concept of “undertaking” for Competition Law, RUIZ PERIS, J.I., “Imputación por pertenencia a una entidad económica, fundada en el concepto funcionalmente unitario de empresa policorporativa de los artículos 101 y 102 TFUE”, *Revista de Derecho de la Competencia y la Distribución*, n.º. 29, 2021, p. 2 of the online version: “According to the case-law of the Court of Justice, Article 101 TFEU is addressed to companies. In fact, all European competition rules, both of primary law, Articles 101 to 109 TFEU, and of secondary legislation, including Council Regulation (EC) No 139/2004 of 20 January 2004 on merger control, regulate the activity of undertakings. The concept of an undertaking, within the meaning of Article 101 TFEU, is an autonomous concept of EU law. This implies that it must be interpreted in accordance with the doctrine emanating from the European courts and ultimately from the Court of Justice, and not from the national courts. They are obliged to apply the doctrine emanating from the Court of Justice”. (Translation by us).

In the same sense, MARTÍ MIRAVALLS, J., *Responsabilidad civil por infracción del Derecho de la Competencia*, Tirant lo Blanch, Valencia, 2022, pp. 245-249

55. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) p. 11: “Several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant”.

56. A compendium of this jurisprudence, part of which will be cited below in the following notes, can be found in the reference work of RUIZ PERIS, J.I., “Ayudas de salvamento y reestructuración en el marco de la Directiva (UE) 2019/1023”, en C. Gómez Asensio (dir.), *Derecho europeo de la*

existence of such *an economic unit*, has taken into account, among others, the possibility to: “exercise functions relating to control, direction and financial support—going beyond the simple placing of capital by an investor—and illustrate the existence of organic and functional links between an entity owning a controlling shareholding in a company and the controlled company itself⁵⁷”, or the existence of contractual clauses that ensure control⁵⁸.

In line with this notion of *economic unit*, both article 2.2 of the previous one, and of the current *de minimis* aid Regulation, develop the substantive notion of “single undertaking”: all companies that maintain between them, at least one of the *links* listed in letters a) to d) of the precept⁵⁹, either directly, or through another company or companies, a relationship that links this notion of “single undertaking” with that of “connected undertakings”, used in other block exemption regulations⁶⁰.

It should be noted that this notion of “single undertaking” is constructed on the basis of the existence of *de facto* or *de iure* control relationships of one undertaking over another, which enable the former to exercise “decisive influence”, within the meaning of Article 3(2)(b) of the Merger Control Regulation⁶¹ over the latter, ultimately forming an *economic unit*.

Placed in this context, with regard to startups operating in technological and digital markets, it must be taken into account that it is part of their own physiology

insolvenzia: armonización, reestructuración y exoneración de deudas, Aranzadi, Cizur Menor, 2024 pp. 33-37 arguing the author after this analysis that it is necessary to promote, p. 37: “a homogeneous horizontal application of the term undertaking and the principle of economic unity in all the precepts of competition contained in the Treaty, that is to say in Articles 101 to 109 TFEU”. (Translation by us).

57. CJEU, Case C-480/09 P, *AceaElectrabel Produzione/Comisión*, EU:C:2010:787, p. 51; CJEU, Case C-222/04, *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze y otros*, EU:C:2006:8, pp. 87 -93.

58. CJEU, Case C-480/09 P, *op. cit.*, p. 57.

59. Art. 2.2 Regulation (UE) 2023/2831: “Single undertaking” means, for the purposes of this Regulation, all enterprises having at least one of the following relationships with each other: (a) one enterprise has a majority of the shareholders’ or members’ voting rights in another enterprise; (b) one enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise; (c) one enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or pursuant to a provision in its memorandum or articles of association; (d) one enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders’ or members’ voting rights in that enterprise. Enterprises having any of the relationships referred to in points (a) to (d) through one or more other enterprises shall also be considered to be a single undertaking.”

60. In this regard, and as it is closely related to the subject matter of this work, see art. 1.2 of Commission Regulation (EU) 2023/1066 of 1 June 2023, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

61. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

the participation of investors in their internal governance, through different contractual mechanisms⁶².

In this way, and beyond the cases in which an investor effectively acquires a controlling stake in the company, it is possible that these subjects, in relation to the different types of organizational agreements⁶³ usually held between the investors and founding partners of a startup, can exert a “decisive influence” over it through control mechanisms of a contractual nature⁶⁴, consequently forming a “single undertaking” with it.

Therefore, in these cases, the correct application of the threshold of the total amount of *de minimis* State aid granted by a State to a “single undertaking” requires also taking into account the total amount of *de minimis* State aids from which the investors who exercise “decisive influence” over that startup have been benefited.

In this sense, these professional investors, whose activity consists precisely of investing on a regular basis in various technology-based and innovative startups, are likely to have also benefited from State aids granted to other startups in which they have also invested, and over which they also exert a “decisive influence”.

Therefore, Member States, in order to comply with their obligation to verify before granting a new *de minimis* aid, that the total amount of *de minimis* aids granted to the undertaking concerned will not result in exceeding the ceiling set out in Article 3(2) of Regulation 2023/2831, and that all the conditions laid down therein are met (Art. 6(4) of Regulation 2023/2831), in the case of startups, they must take into consideration the set of *de minimis* aids from which their investors, with whom they make up a “single undertaking”, have benefited⁶⁵.

Thus, this may imply exceeding the aforementioned maximum amount and, consequently, the impossibility for the new aid intended for that “single undertaking” to benefit from the *de minimis* exemption regime⁶⁶.

62. A monographic and referential study on all these issues is carried out by VÁZQUEZ LEPINETTE, T., *Aspectos contractuales de las Startups*, ob.cit., pp. 106-134.

63. On the different typology of organizational agreements or clauses used in startups SOLANS CHAMORRO, L., “Contratos entre socios y startups. Aspectos prácticos”, *Actualidad Jurídica Uría Menéndez*, n°. 52, 2019, pp. 36-52

64. A detailed analysis of these scenarios of contractual control in startups can be found in GÓMEZ ASENSIO, C., “Startups and killer acquisitions in technology and digital markets”, in J.I. Ruiz Peris, C. Estevan de Quesada (dirs.), *New European Competition Trends in Digital Markets*, Atelier, Barcelona, pp. 97-123.

65. In this regard, the CJEU, Case T-643/20, Ryanair DAC v Commission, ECLI:EU:T:2021:286. paragraph 46 recalls that: “The case-law has also recognised that, where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking for the purposes of EU competition law. In the area of State aid, the question as to whether an economic unit exists arises primarily where the beneficiary of the aid needs to be identified (see, to that effect, judgments of 14 November 1984, Intermills v Commission, 323/82, EU:C:1984:345, paragraphs 11 and 12, and of 8 September 2009, AceaElectrabel v Commission, T-303/05, not published, EU:T:2009:312, paragraph 101)”.

66. Art. 3.7 Regulation 2023/2831: “Where the ceiling laid down in paragraph 2 would be exceeded by the grant of new *de minimis* aid, that new aid shall not benefit from this Regulation.”.

C. Application of the General Block Exemption regime

However, the loss of the possibility of benefiting from the *de minimis* aid regulation does not determine, *per se*, the unlawful and incompatible nature of the State aid granted. In this sense, this new aid, which exceeds *de minimis* ceiling, can still be considered compatible with the internal market and be exempt from the notification obligation ex. art. 108.3 TFEU provided that it complies with the conditions established and applicable to it by the GBER referred to above⁶⁷.

In this way, if the new aid in question can be classified as aid to SMEs in the form of investment aid, operating aid and aid for access to finance for SMEs⁶⁸; or Aid for research and development and innovation⁶⁹; such aids are likely to be compatible with the internal market and, therefore, be exempt from the notification obligation, provided that it complies with all the general conditions—Chapter I, including the maximum aid thresholds⁷⁰—and specific conditions—Chapter III—established in the GBER.

With regard to the latter, in the case of investment aid to SMEs, the eligible costs will be the costs of investment in tangible and intangible assets, including one-off non-amortizable costs linked directly to the investment and its initial installation; the estimated wage costs of employment directly created by the investment project, calculated over two years; or a combination of both types of costs⁷¹.

Aid for access to finance for SMEs, are subdivided into 5 categories: risk finance aid (art. 21 GBER), Risk finance aid to SMEs in the form of tax incentives

67. See footnote 38 above.

68. In this regard, paragraphs 66-82 of Article 2 of the GBER are particularly relevant, which define, among others, for the purposes of applying the State aid regulations, the notions of: “quasi-equity investment” (p. 66), “risk finance investment” (p. 71), o “independent private investor”, which includes business angels (p. 72).

69. The notion of “innovative enterprise” is included in section 80 of art. 2 of the GBER, a precept that requires for such consideration, the concurrence of one of the 4 conditions listed therein. With regard to the first of the conditions – established under subparagraph (a) “it can demonstrate, by means of an evaluation carried out by an external expert, that it will in the foreseeable future develop products, services or processes which are new or substantially improved compared to the state of the art in its industry, and which carry a risk of technological or industrial failure” –, its concurrence may be verified through the certification issued by the ENISA ex. art. 4 LFEEE.

In addition, sections 83-98 bis of art. 2 GBER contain definitions for Aid for research and development and innovation, among which the notions of interest for the purposes of this work are: “effective collaboration” (p. 90), “innovation clusters” (p. 92), “highly qualified personnel” (p. 93), “innovation advisory services” (p.94), “innovation support services” (p. 95), “organisational innovation” (p. 96) and “process innovation” (p. 97).

70. In this regard, Article 4 of the GBER establishes that: “This Regulation shall not apply to aid exceeding the following thresholds: (c) for investment aid to SMEs: EUR 8.25 million per undertaking per investment project; (h) for aid for start-ups: the amounts laid down per undertaking in Article 22(3), (4), (5) and (7)”. For research and development aid, contained in letter i) of the provision, up to 11 maximum aid thresholds are foreseen, in several cases, linked to the fact that the financed action belongs to a specific European programme or quality label.

71. These costs are regulated and broken down in greater detail in Article 17 of the GBER.

for private investors who are natural persons (art. 21a GBER), aid for startups (art. 22 GBER), aid to alternative trading platforms specialised in SMEs (art. 23 GBER) and aid for scouting costs (art. 24 GBER)⁷².

In view of their own configuring characteristics, the category aid for startups is particularly suitable for benefiting from the exemption provided for in the aid scheme for new business projects⁷³, which even provides for a doubling of the maximum aid thresholds that allow them to benefit from the exemption, in the case of small and innovative enterprises (art. 22.5 GBER).

Finally, concerning Aid for research and development and innovation, for the purposes of this article⁷⁴, the innovation aid scheme for SMEs established in Article 28 of the GBER is noteworthy, which allows financing up to an amount of 50% of the eligible costs: costs of obtaining, validating and defending patents and other intangible assets; costs for secondment of highly qualified personnel from a research and knowledge-dissemination organization or a large enterprise; costs for innovation advisory and support services⁷⁵.

III. STARTUPS IN CRISIS AND STATE AIDS

In the regulatory bases of the different lines of State aid set out in section I of this work, it is observed that, in the calls published from 2024, it is included as a cause of exclusion to be eligible for the aid, that the beneficiary undertaking

72. A referential study of the legal regime applicable to this aid can be found in CAMPUZANO LAGUILLO, A.B., CALDERON, C., “Las ayudas públicas”, *El Derecho de la Competencia*, Tirant lo Blanch, Valencia, 2ª ed., 2019, pp. 369-410. More specifically, URRACA CAVIEDES, C., “El control europeo de las ayudas públicas (II): las excepciones a la prohibición. Autorizaciones en bloque e individuales”, in J.M. Beneyto Pérez, J. Maíllo González-Orús (dirs), *Tratado de derecho de la competencia: Unión Europea y España*, Wolters Kluwer, Madrid, Vol. 2, Tomo 2, 2017 (Tomo II), pp. 243-279.

73. In this sense, the requirements to benefit from this general exemption regime are parallel to those of the definition of technology-based and innovative startup contained in art. 3.1 LFEEE. Thus, art. 22.2 GBER establishes that: “Eligible undertakings shall be any unlisted small enterprise up to 5 years following its registration, that fulfils the following cumulative conditions: (a) it has not taken over the activity of another undertaking, unless the turnover of the overtaken activity accounts for less than 10 % of the turnover of the eligible undertaking in the financial year preceding the take-over; (b) it has not yet distributed profits; (c) it has not acquired another undertaking or has not been formed through a merger, unless the turnover of the acquired undertaking accounts for less than 10 % of the turnover of the eligible undertaking in the financial year preceding the acquisition or the turnover of the undertaking formed through a merger is less than 10 % higher than the combined turnover that the merging undertakings had in the financial year preceding the merger”.

74. As it far exceeds the scope of this work, legal regime of Aid for research and development and innovation will not be analysed, each of whose subtypes are regulated in articles 25-27, 29 and 30 GBER.

75. All these eligible costs are more fully detailed in Article 28 of the GBER, although the specific provision contained in Article 28.4 should be highlighted, by virtue of which: “In the particular case of aid for innovation advisory and support services the aid intensity can be increased up to 100 % of the eligible costs provided that the total amount of aid for innovation advisory and support services does not exceed EUR 220 000 per undertaking within any 3 year period”.

may be considered as an “undertaking in difficulty”⁷⁶, exclusion that, however, does not seem to be appreciated in the regulatory bases examined from earlier dates, which allows the hypothesis to be raised as to what would be the treatment of State aid aimed at a startup that could be classified as an “undertakings in difficulty”.

In this regard, Article 1.4 c) of the GBER excludes from its scope (with certain exceptions), aids to “undertakings in difficulty”, defined in accordance with article 2 paragraph 18 of the same regulation. Consequently, aids aimed at undertakings in difficulty must be assessed as State rescue and restructuring aid, so that it will only be compatible with the internal market to the extent that it complies with the content of the Guidelines on State aid for rescuing and restructuring⁷⁷, which has been extended until 31 December 2025⁷⁸.

In accordance with European case law, the concept of “undertaking in difficulty” is an objective concept which must be assessed solely on the basis of specific indications of the financial and economic situation of the undertaking concerned⁷⁹, on the basis of the establishment of clear criteria which do not require an assessment of all the particularities of the situation of an undertaking in order to determine whether it should be considered to be in crisis⁸⁰. Among these criteria, the “business viability test” stands out, based on which only economically viable companies must be subject to restructuring and, where appropriate, beneficiaries of State aid⁸¹.

In any case, the determination of the classification of an undertaking as an “undertaking in difficulty”, must be based on the broad meaning that the CJEU has given to the concept of “collective insolvency proceedings”⁸², to determine the moment from which a company can be considered as an “undertaking in difficulty”. This issue, although it seems simple in cases of current insolvency, begins to present edges in cases of “imminent insolvency” and, it becomes especially complex, in the field of “likelihood of insolvency”⁸³.

76. This is especially evident in the different lines of financing granted by the CDTI, see *supra* footnotes 30 and 31.

77. Communication from the Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01)

78. Communication from the Commission amending the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, as regards the period of application (C/2023/1212)

79. This is how it is described by the EGC, Case T-901/16, *Elche Club de Fútbol, S.A.D. V Commission*, ECLI:EU:T:2020:97; and the EGC, Case T-219/14, *Regione autonoma della Sardegna v Commission*, ECLI:EU:T:2017:266.

80. CJEU, Case C-349/17, *Eesti Pagar AS/ Ettevõtlike Arendamise Sihtasutus, Majandus- ja Kommunikatsiooniministeerium*, ECLI:EU:C:2019:172.

81. In this sense, RUIZ PERIS, J.I., “Compensación de daños por infracción de las normas de Ayudas de Estado en el marco concursal y preconcursal y COVID 19”, *Revista General de Insolvencias y Reestructuraciones*, n°. 4, 2021, p. 20: “Viable companies in crisis should not be confused with non-viable zombie companies whose survival in the market can produce barriers to entry, in addition to an increase in the cost of credit and a reduction in the pace of technological evolution”. (Translation by us).

82. In this regard, CJEU, Case C-245/16, *Nerea SpA v Regione Marche*, ECLI:EU:C:2017:521.

83. An early work on the topic, on the occasion of the transposition of Directive 2019/1023, is that carried out by HERNÁNDEZ-LAHOZ ORTIZ, P., “Ayudas públicas y marcos de reestructuración:

In addition, it should be taken into account the variety of insolvency-related procedures provided for in our insolvency regulations—especially after the transposition of Directive 2019/1023—which makes it necessary to determine whether or not they are “undertakings in difficulty” in each of these proceedings⁸⁴.

Based on these previous delimitations, it must be taken into account that startups, due to their small initial size, as well as the particularities of the technological and digital market in which they operate, have a high probability of failure⁸⁵, which reinforces the hypothesis of the probability of granting State aids to startups that could be classified as “undertakings in difficulty”.

In such a situation, the examination of the compatibility with the internal market of the grant of a State aid to a “startup in difficulty” must be carried out in two steps: First, it must be ascertained whether, in accordance with what has been set out in the previous section, the grant of that State aid is actually eligible for the *de minimis* exemption scheme.

Secondly, and in the event that this regime is not applicable, and the General Block Exemption Regulation is also not applicable ex. art. 1.4 c) GBER, the compatibility of such State aid must be previously assessed by the Commission after its notification, in accordance with the Guidelines on State aid for rescuing and restructuring.

However, this second level of assessment is based on a subjective delimitation that “newly created” undertakings (3 years from the start of their activity), cannot receive rescue and restructuring aid in accordance with these Guidelines⁸⁶. This exclusion, in the case of *startups*, is particularly burdensome, since the certification

definición comunitaria de “empresa en crisis” y aplicación al derecho español”, *Revista General de Insolvencias y Reestructuraciones*, n.º. 4, 2021, pp. 361-377.

84. A very interesting delimitation of these scenarios is carried out by LADO CASTRO-RIAL, C., “La confluencia entre el Derecho de la Insolvencia y el régimen comunitario de ayudas de estado”, in C. Gómez Asensio (dir.), *Derecho europeo de la insolvencia: armonización, reestructuración y exoneración de deudas*, Aranzadi, Cizur Menor, 2024 pp. 51-60, who defines the concept of “undertaking in crisis” in the following situations: Cumplimiento de un convenio (Libro I Texto Refundido de la Ley Concursal, TRLC); cumplimiento del plan de reestructuración (Libro II TRLC); comunicación de apertura de negociaciones con los acreedores (Libro II TRLC); solicitud de homologación del plan de reestructuración (Libro II TRLC); y cumplimiento del plan de continuación en el procedimiento de microempresas (Libro III TRLC).

85. This is referred to in Article 3.2 LFEEE: “An emerging company shall be considered to be innovative when its purpose is to solve a problem or improve an existing situation through the development of new or substantially improved products, services or processes compared to the state of the art and which implies a risk of technological failure, industrial or in the business model itself”. (Translation by us).

86. Thus, it states in paragraph 21 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01) that: “Newly created undertakings are not eligible for aid under these Guidelines even if their initial financial situation is precarious. This is especially the case if the newly created company has emerged from the liquidation of another previous company or the absorption of its assets. In principle, an undertaking shall be considered to be newly created during the first three years following the commencement of its operations in the relevant sector of activity. Only after the expiry of this period will it be able to obtain support under these Guidelines”.

of a company as an innovative and scalable entrepreneur is carried out, precisely, on the basis of its emerging nature, i.e. no more than five years have elapsed since the date of registration in the Mercantile Registry⁸⁷. Consequently, only State aid intended for startups more than 3 years old would be subject to the Guidelines on rescue and restructuring aid.

This exclusion has more aggravated effects if we take into account that, as explained above, startups, precisely because of their emerging nature, are potential recipients of the exemption regime for aid for startups (art. 22 GBER), although it is true that the application of this exemption regime also requires, by application of art. 1.4 c) GBE, that said company up to five years old, cannot be considered an “undertaking in difficulty”.

In any event, beyond this subjective exclusion, it must be taken into account that the only State aid that can be declared compatible with the internal market by the Commission is that which can be subsumed within the three categories of State aid set out in the Guidelines on rescue and restructuring aid. So that, only when the State aid intended for the startup in crisis take the form of rescue aid, restructuring aid or temporary restructuring support⁸⁸—which is not the case with the list of State aids set out in section I of this paper—could be declared compatible with the internal market.

IV. CONCLUSIONS

As part of the actions to achieve the objectives of lever policy number V “Modernisation and digitalisation of the industrial and SME fabric, recovery of tourism and promotion of Spain as an entrepreneurial nation” of the Spanish Recovery Plan, and more specifically within its component 13 “Foster the growth of SMEs”, the Government has launched a series of legislative reforms, as well as a public investment policy focused on 13 strategic areas of action, among which the following stand out: investment line “C13.I1 Entrepreneurship”, the investment line “C13.I7 Fund to scale technology startups”, the investments C13.I6 ICO “ICO funds support for business”, and investments C13.I12 “Entrepreneurship and SME fund”.

Within the framework of these lines of investment, and through the different entities that make up the State aid system for entrepreneurship based on innovation—ENISA, CDTI, ONE—, a wide variety of EU-funded State aid schemes have been launched on the market, whose potential targets are technology-based and innovative start-ups.

In a large part of the orders regulating the bases of the calls for such States aid, it is stated that they are considered to be *de minimis* aids, which, considered

87. Article 4 LFEEE, in relation to art. 3.1 a) LFEEE.

88. These three categories of State aids are defined in paragraphs 25 to 29 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01).

in isolation, determines their lawful nature and compatibility with the internal market.

However, the consideration of State aid as *de minimis* aid must be made not so much by reference to the State aid itself considered, but by reference to its beneficiary, a “single undertaking” in relation to the concept of *economic unit*, which must not exceed the maximum total amount of *de minimis* aids granted by a State provided for in Article 3.2 of the *de minimis* aid Regulation—in its current and previous versions—in order to be eligible for this exemption regime.

In the case of startups, the correct application of this maximum threshold requires to integrate the total amount of *de minimis* aid from which the professional investors of that startup have benefited by a State, when they exercise a “decisive influence” over that company and, therefore, form an *economic unit*.

The foregoing consideration may determine that the new State aid aimed at the startup exceeds the aforementioned maximum threshold and, therefore, it cannot benefit from the *de minimis* exemption regime. This does not determine whether State aid is unlawful and incompatible with the internal market, but its grant must be assessed in accordance with the GBER criteria.

This instrument regulates various categories of State aids that may be exempt, whose configuring characteristics, as exposed in this work are aligned with those of startups, in particular, with regard to aid for access to finance for SMEs and, particularly, with regard to Aid for startups.

Finally, and with regard to the treatment of a hypothetical State aid aimed at a startup that could be classified as an “undertaking in difficulty”, in the event that such new State aid could not benefit from the *de minimis* exemption regime—and in any case, as the General Block Exemption Regulation is not applicable to it—, such State aid could be considered incompatible with the internal market, since startups are not eligible for the exemption regime set out in the Guidelines on State aid for rescuing and restructuring, both because the new State aid does not fall within any of the categories of State aids provided for in those Guidelines, and because of the limitations arising from its classification as a “newly created” undertaking.

V. BIBLIOGRAPHY

- ALTO COMISIONADO ESPAÑA NACIÓN EMPRENDEDORA, *Estrategia España Nación Emprendedora*, febrero 2021.
- CAMPUZANO LAGUILLO, A.B., CALDERON, C., “Las ayudas públicas”, *El Derecho de la Competencia*, Tirant lo Blanch, Valencia, 2ª ed., 2019, pp. 369-410.
- CNMC, PRO/CNMC/001/16 *Documento metodológico para la evaluación de ayudas públicas*, 2016.
- FILPO, F., “State Aid control during the covid-19 pandemic”, *Revista General de Insolvencias y Reestructuraciones*, nº. 2, 2021, pp. 391-407.

- GOBIERNO DE ESPAÑA, *Adenda segunda fase del Plan de Recuperación, Transformación y Resiliencia del Reino de España. Impulso a la industrialización estratégica*, septiembre de 2023.
- Id. *Plan de Recuperación, Transformación y Resiliencia*, 16 junio de 2021.
- GÓMEZ ASENSIO, C., “Startups and killer acquisitions in technology and digital markets”, in J.I. Ruiz Peris, C. Estevan de Quesada (dirs.), *New European Competition Trends in Digital Markets*, Atelier, Barcelona, pp. 97-123.
- HERNÁNDEZ-LAHOZ ORTIZ, P., “Ayudas públicas y marcos de reestructuración: definición comunitaria de “empresa en crisis” y aplicación al derecho español”, *Revista General de Insolvencias y Reestructuraciones*, nº. 4, 2021, pp. 361-377.
- LADO CASTRO-RIAL, C., “La confluencia entre el Derecho de la Insolvencia y el régimen comunitario de ayudas de estado”, in C. Gómez Asensio (dir.), *Derecho europeo de la insolvencia: armonización, reestructuración y exoneración de deudas*, Aranzadi, Cizur Menor, 2024 pp. 45-76.
- Id. “Fondo de apoyo a la solvencia y calificación concursal del endeudamiento SEPI”, *Revista General Insolvencias y Reestructuraciones*, nº. 8, 2022, pp. 113-138.
- Id. “Las ayudas públicas en el nuevo marco europeo de reestructuración temprana: retos ante la crisis del COVID-19”, *Revista General Insolvencias y Reestructuraciones*, nº. 1, 2021, pp. 153-167.
- MARTÍ MIRAVALLS, J., *Responsabilidad civil por infracción del Derecho de la Competencia*, Tirant lo Blanch, Valencia, 2022.
- RODRÍGUEZ MÍGUEZ, J.A., “Pandemia, ayudas de estado y ayudas a los Estados: el reto de la eficiente asignación de recursos públicos en tiempos de crisis”, *Revista Galega de Administración Pública (REGAP)*, nº. 60, 2020, pp. 369-400.
- RUIZ PERIS, J.I., “Ayudas de salvamento y reestructuración en el marco de la Directiva (UE) 2019/1023”, in C. Gómez Asensio (dir.), *Derecho europeo de la insolvencia: armonización, reestructuración y exoneración de deudas*, Aranzadi, Cizur Menor, 2024 pp. 21-44.
- Id. “Imputación por pertenencia a una entidad económica, fundada en el concepto funcionalmente unitario de empresa policorporativa de los artículos 101 y 102 TFUE”, *Revista de Derecho de la Competencia y la Distribución*, nº. 29, 2021.
- Id. “Compensación de daños por infracción de las normas de Ayudas de Estado en el marco concursal y preconcursal y COVID 19”, *Revista General de Insolvencias y Reestructuraciones*, nº. 4, 2021, pp. 17-36.
- SIGNES DE MESA, J.I., “El marco temporal de la comisión relativo al régimen europeo de ayudas de estudio en el contexto de crisis sanitaria”, *Revista de Derecho Concursal y Paraconcursal*, nº. 33, 2020, pp. 151-166.
- SOLANS CHAMORRO, L., “Contratos entre socios y startups. Aspectos prácticos”, *Actualidad Jurídica Uría Menéndez*, nº. 52, 2019, pp. 36-52.
- URRACA CAVIEDES, C., “El control europeo de las ayudas públicas (II): las excepciones a la prohibición. Autorizaciones en bloque e individuales”, in J.M.

BENEYTO PÉREZ, J. MAILLO GONZÁLEZ-ORÚS (DIRS.), *Tratado de derecho de la competencia: Unión Europea y España*, Wolters Kluwer, Madrid, Vol. 2, Tomo 2, 2017 (Tomo II), pp. 243-279.

VÁZQUEZ CUETO, J.C., “Los requisitos legales de las startups desde una perspectiva jurídico-privada”, *La Ley Mercantil*, nº. 110, febrero de 2024.

VÁZQUEZ LEPINETTE, T., *Aspectos contractuales de las Startups*, Tirant lo Blanch, Valencia, 2023.

PRIVATE ANTITRUST ENFORCEMENT FOR CONSUMERS AND DIGITAL PLATFORMS. WHERE IS THE COMPENSATION?

Julia Suderow
University of Deusto

ABSTRACT: This article examines the evolving landscape of private enforcement in abuse of dominance cases within digital markets, focusing on the challenges faced by consumers and businesses in seeking redress from dominant digital platforms. It explores how the rise of Big Tech has intensified bargaining asymmetries and introduced new competition risks, prompting regulatory responses such as the EU's Digital Markets Act and Digital Services Act. Through an initial analysis of two cases, including *Idealo v. Google* in Germany and collective actions against Apple in the UK, the article highlights the procedural and evidentiary hurdles in quantifying harm, particularly for consumers. It discusses the limitations of current legal and economic methodologies, such as the lack of methods for the lack of choice for consumers in Europe. Despite a consensus on the need for effective private enforcement, significant barriers remain—particularly for consumers—due to the fragmentation of collective redress mechanisms and the complexity of proving harm in digital markets. This asymmetry undermines both consumer welfare and the effectiveness of EU competition law, underscoring the urgent need for more accessible and robust enforcement tools.

Keywords: Private antitrust enforcement, Consumers, Digital platforms, Abuse of dominance, Bargaining asymmetries.

SUMMARY: I. INTRODUCTION. II. INFRINGEMENT AND FAULT. III. THEORIES OF HARM. IV. GOOGLE SHOPPING CASE. A. Background. B. B. The effects alleged by Idealo based on the decision of the EC. C. Assessment of Harm. V. DAMAGE CLAIMS AGAINST APPLE IN THE UK COMPETITION APPEAL TRIBUNAL. VI. PRESUMPTION AND PRIVATE ENFORCEMENT IN ABUSE OF DOMINANCE CASES. VII. BIBLIOGRAPHY.

I. INTRODUCTION

Consumers are the final step in the value chain. They are also the main target of digital platforms, as a product or as a client. Traditional bargaining asymmetries have increased exponentially, driven by data and platform power, creating new competition dilemmas and risks for both consumers and other levels of the value chain, as well as for the other side of the platform. States are attempting to regulate these challenges with revamped tools, such as the Digital Markets Act¹ and the Digital Services Act², in the European Union. Abuse of dominance in all its forms requires a sophisticated analysis and often leads to complex and expensive litigation. Additionally, civil society is trying to enforce competition law, using new mechanisms such as collective redress and third-party litigation funding.

On both sides of the Atlantic, we are observing a rapid increase in private enforcement actions by companies and developers against the big platforms, but only a few actions by affected consumers.

While abuse cases are present in private competition law enforcement in national courts, most cases involve injunctive relief (e.g., orders for continued supply or prohibition of conduct). The most frequent damage claims involve excessive pricing in regulated or quasi-regulated markets. However, follow-on damages claims for abuse of dominance remain economically less significant compared to cartel cases.

One reason for this discrepancy may be the historically lower number of abuse cases brought by authorities. However, a shift in enforcement trends is becoming apparent. The number of cartel proceedings has decreased due to a decline in leniency applications, while the Bundeskartellamt (German Federal Cartel Office) and the European Commission are pursuing significantly more cases of abuse of dominance. This trend is expected to continue.

Authorities have focused their efforts on Big Tech companies (Google, Amazon, Facebook, Apple, Microsoft). This increasing number of abuse cases is likely to lead to more private damages claims, especially follow-on claims. However, as we will discuss in this article, private enforcement for consumers is only possible in a private enforcement-friendly system, which includes opt-out collective redress and third-party funding. Even in systems such as those in the United Kingdom or Portugal, access to justice for consumers remains impossible in certain types of abuse.

New theories of harm raise new questions about quantifying harm, such as the loss of profit caused by abusive practices or the passing on of issues to the

1. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1 (hereinafter: DMA); N Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] JECL & Pract 529.

2. 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)

other side of a platform. In such cases, the traditional methods may reach their limits.

Specific issues related to the harmful effects of abuse of dominance cases have not been broadly discussed in case law. European courts have extensive experience in cartel damage claims, but not in abuse of dominance cases, particularly in digital markets.

There is a consensus that private enforcement, in the form of damages actions, is essential in digital markets to safeguard the rights of European consumers, companies, and citizens. However, the heterogeneity in private enforcement poses several challenges from the procedural and material perspectives³.

All this prompts the question: Where is the harm, and how can it be compensated?

This work will discuss the central questions of private enforcement in abuse of dominance cases in digital markets, drawing on the jurisprudence of National Courts and ongoing cases.

II. INFRINGEMENT AND FAULT

Digital platforms operate in multi-sided markets, acting as intermediaries between service providers, businesses, and end-users. This environment poses challenges in terms of competition and regulation, as a single anticompetitive action can impact multiple parties on both sides of a platform or at different levels of the supply chain.

Therefore, over the last years, the European Commission, as well as National Competition Authorities, have imposed severe fines on the so-called Big Tech. Additionally, since the entry into force of the DMA, we have already observed the first cases involving the prohibitions of articles 5 to 7 of the DMA, including both public and private enforcement⁴.

3. See L. Hornkohl, *Schadensersatzansprüche wegen Verstöße gegen Verhaltensnormen des digitalen Binnenmarkts*, EUZW, 2024, 941 y ss.

4. See for private enforcement: Idealo, press release of 12 April 2019, Idealo sues Google for damages for abuse of its dominant market position, <https://fmos.link/29168> (last accessed on 14 January 2025) and OLG Köln 15 UKI 2/25, 23.5.2025 and for public enforcement: Commission, decision of 27 June 2017, AT.39740; Google Search (Shopping); decision of 18 July 2018, AT.40099 - Google Android; decision of 20 March 2019, AT.40411 - Google Search (AdSense). Commission, decision of 04.05.2017, AT.40153 - E-book MFNs and related matters (Amazon); decision of 20.12.2022, AT.40462 - Amazon Marketplace; decision of 20.12.2022, AT.40703 - Amazon - Buy Box; FCO, B2-881/18 (discontinuation decision of 17.07.2019 after adaptation by Amazon). Comm., decision of 14 November 2024, AT.40684 - Facebook Marketplace; BKartA, decision of 6 February 2019, B6-22/16 (case report). Ongoing proceedings: AT. 40652 - Apple - App Store Practices (e-books/audiobooks); Commission, decision of 4 March 2024, AT.40437, cited in WuW 2024, 411 - Apple - App Store Practices (music streaming); Commission, decision of 11 July 2024, AT.40452 - Apple - Mobile Payments. Commission, decision of 24 March 2004, AT.37792, Microsoft; decision of 16 December 2009, AT.39530 - Microsoft (tying); ongoing proceedings: AT.40721 - Microsoft Teams and AT.40873 - Microsoft Teams II.

Sections 72 et seq. of the Spanish Competition Act (“SCA”), as well as the Damages Directive⁵, also apply to proceedings for damages due to the abuse of a dominant market position. The burden of presentation and proof of an infringement lies with the plaintiff. However, the declaratory effect of Section 75 SCA or Article 16(1), sentence 1, of Regulation 1/2003 applies in all cases in which the authorities have initiated administrative or fine proceedings. Accordingly, courts are bound by the infringement as established in the final decision. The binding effect encompasses both facts and the legal assessment, applying to the operative part of the decision and its supporting reasons. In turn, the supporting reasons are those that support the administrative or fine decision, rather than those that are only relevant to the claim for damages. In stand-alone cases, i.e., cases without a prior decision by a competition authority or court, claimants must prove infringement. Fault is related to the infringement and not to the harm. Therefore, in follow-on cases, there will be no doubt. In cases with no prior decision, fault is also likely to exist since negligence is sufficient. However, in stand-alone 102 TFEU cases, courts cannot currently rely on the jurisprudence regarding cartel damage claims, and they must look to public enforcement cases for inspiration. The case law of the European Court of Justice is stringent for defendants, who can only rely on an unavoidable error of law in minimal cases⁶.

III. THEORIES OF HARM

Abuse of dominance can take many forms. We describe below some of the most common unilateral practices that can lead to competitive harm: refusal to deal, margin squeeze, exclusive dealing or loyalty rebates, bundling or tying, predatory pricing, exploitative abuse, self-preferencing on platforms, and privacy policy tying.

Refusal to Deal occurs when a dominant firm declines to deal with a competitor or a downstream player, especially when access to the firm’s product or service is essential for competition. This can be particularly damaging in markets where alternatives are limited or non-existent. For example, a dominant technology platform that refuses to allow a rival access to its operating system or app store can effectively exclude that rival from the market⁷. While firms generally have the freedom to choose their business partners, such refusals may be deemed anticompetitive if they lack legitimate business justification and foreclose competition⁸.

5. Directive 2014/104/EU, OJ 2014 L 349, p. 1-19

6. BGH, judgement of. 16.12.1986 (fn. 55), para. 23 - Taxizentrale Essen; Franck, in: Immenga/Mestmäcker (fn. 28), § 33a GWB para. 55.

7. See for instance ECJ, 25.2.2025, Case C-233/23, *Android Auto*.

8. Microsoft Corp. v. Commission (2007) Case T-201/04, where Microsoft was found to have abused its dominant position by refusing to supply interoperability information to rivals.

Margin squeeze is a tactic employed by vertically integrated firms that control both an essential input and a downstream market. The firm may set the price of the input so high—or the cost of its downstream product so low—that downstream competitors cannot compete profitably. For instance, a telecommunications company that owns both the network infrastructure and a retail service may charge rival retailers high access fees while undercutting them at the retail level. This squeezes rivals' profit margins and can ultimately drive them out of the market, reducing consumer choice⁹.

Exclusive Dealing and Loyalty Rebates are practices where a supplier requires customers to buy exclusively from them or incentivises loyalty through rebates. While such arrangements can sometimes increase efficiency, they may also foreclose market access for rivals. If a dominant supplier secures a substantial portion of the market through exclusivity or loyalty programs, new entrants may struggle to gain a foothold, thereby stifling competition and innovation¹⁰.

Bundling and tying involve purchasing one product or service conditional upon the purchase of another. A firm with market power in one area may leverage that power to gain an advantage in another, less competitive market. For example, a software company might require customers to purchase its operating system and office suite together, limiting consumer choice and foreclosing opportunities for competing software providers. Such practices are particularly concerning when they lack objective justification and restrict competition in the tied product market¹¹.

Predatory Pricing is the practice of setting prices below cost to drive competitors out of the market. Once rivals are eliminated, the dominant firm can raise prices to recoup its losses. While low prices are generally beneficial for consumers, predatory pricing can ultimately harm them by reducing competition and leading to higher prices in the long run. Proving predatory pricing requires evidence of both intent to eliminate competition and the ability to recoup losses after rivals exit the market¹².

Exploitative Abuse refers to practices where a dominant firm directly harms consumers or trading partners by imposing unfair prices or conditions. This can include excessive pricing, unfair contract terms, or other exploitative conduct. For example, a dominant digital platform might charge excessive fees to merchants or impose unfair terms on users, taking advantage of its market position. Such

9. Telefónica SA v. Commission (2010) Case T-336/07, where the European Commission found Telefónica guilty of margin squeeze in the Spanish broadband market.

10. Intel Corp. v. Commission (2017) Case C-413/14 P, where Intel's loyalty rebates to computer manufacturers were found to foreclose competition.

11. United States v. Microsoft Corp. (2001) 253 F.3d 34 (D.C. Cir.), where Microsoft was found to have illegally tied its Internet Explorer browser to its Windows operating system.

12. AKZO Chemie BV v. Commission (1991) Case C-62/86, a landmark EU case on predatory pricing.

conduct is particularly scrutinised in jurisdictions like the European Union, where consumer welfare is a central concern¹³.

Self-Preferencing on Platforms: With the rise of digital platforms, self-preferencing has become a significant concern for antitrust. This occurs when a platform operator favours its products or services over those of third parties, often by manipulating search rankings or visibility. For example, a search engine might prioritise its shopping service in search results, disadvantaging independent competitors. Self-preferencing can establish the platform's dominance and reduce consumer choice¹⁴.

Privacy Policy Tying: A more recent form of anticompetitive conduct involves privacy policy tying, where access to a service is conditioned on accepting broad data-sharing policies. A dominant platform might require users to consent to sharing their data across multiple services, thereby reinforcing its data advantage and making it harder for competitors to compete. This practice can harm competition by creating barriers to entry and reducing consumer control over personal data¹⁵.

Let's take two examples of ongoing cases in Germany, regarding self-preferencing (Idealo/Google), and in the United Kingdom, regarding exploitative abuse (Apple App Store).

IV. GOOGLE SHOPPING CASE

The German Idealo vs. Google case marks a significant turning point in the private enforcement of competition law within the European digital economy, underscoring the challenges posed by dominant online platforms and the evolving legal framework designed to address them. At the heart of this dispute is the allegation that Google, leveraging its dominance in online search, systematically favoured its shopping service over rival platforms, such as Idealo, thereby distorting competition and harming both consumers and competitors¹⁶. This case is widely regarded as a test case for similar claims by other European technology firms that have been affected by Google's practices.

13. Apple App Store Antitrust Litigation (2021) and Amazon Marketplace investigations, where platforms have been scrutinised for excessive fees and unfair terms.

14. Google Search (Shopping) Case AT.39740 (2017), where the European Commission fined Google for favoring its own comparison-shopping service in search results.

15. Bundeskartellamt (German Federal Cartel Office) decision against Facebook (19.2.2019), which found that Facebook abused its dominance by tying the use of its social network to the acceptance of extensive data collection across its services. FAQ_Facebook.pdf.

16. For an overview of the Google Shopping case and its implications for fair competition, see Petrucci, Carlo (2023) *Self-preferencing in the EU: a legal and policy analysis of the Google Shopping case and the Digital Markets Act*. Competition Law Journal, 22 (1). pp. 18-29. DOI <https://doi.org/10.4337/clj.2023.01.03>.

A. Background

Idealo, a European price comparison platform based in Berlin, initiated legal proceedings in Berlin, against Google in 2019, claiming that Google's self-preferencing practices—specifically, the preferential placement of Google Shopping results and the demotion of competitors in search rankings—resulted in substantial financial losses and reduced consumer choice. Idealo's initial damages claim amounted to approximately €500 million, reflecting the scale of harm it argued had been inflicted since Google began these practices in 2008.

Idealo is a follow-on claim based on the European Commission's 2017 decision, which found Google guilty of abusing its dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission imposed a record €2.42 billion fine on Google, concluding that the company had systematically given prominent placement to its comparison-shopping service while relegating rival services to less visible positions in search results. Google's conduct, the Commission argued, deprived consumers of genuine choice and stifled competition in the online shopping market.

Following the Commission's decision, the Berlin Regional Court suspended proceedings pending the outcome of Google's appeal at the European Court of Justice (ECJ). This was a strategic move, as the ECJ's interpretation of EU competition law would be binding on national courts and thus decisive for Idealo's claim.

On September 10, 2024, the ECJ upheld the European Commission's findings, affirming that Google's self-preferencing behaviour constituted an abuse of dominance. The Court clarified that such conduct is unlawful when it distorts competition by impeding equally efficient rivals, even if access to the platform is not entirely denied. The ruling underscored the importance of non-discrimination and fair access in digital markets, setting a precedent that is likely to influence future competition cases across Europe.

In early 2025, Idealo expanded its claim to at least €3.3 billion, including accrued interest, and demanded that Google disclose detailed information about the traffic, sales, and profits generated by its shopping service in Germany. Idealo argued that Google's conduct had not only inflicted financial damage on competitors but had also misled consumers and undermined the diversity of the European e-commerce landscape.

B. The effects alleged by Idealo based on the decision of the European Commission

The self-preferencing practised by Google made it significantly harder for Idealo to reach consumers, as their products were ranked lower or given less visibility compared to the platform's offerings. By leveraging its dominant position, Google created high barriers for new entrants, making it difficult for Idealo to gain a foothold in the market. This reduced the incentives to innovate

and invest in quality, limiting consumer choices. Over time, this could have resulted in reduced quality and variety, as well as higher prices for consumers. Finally, Google had access to valuable data from third-party sellers, which they can use to optimise their competing products, further entrenching their position and undermining fair competition.

C. Assessment of the harm

1. Idealo's harm

Idealo's claim for damages against Google is based on a counterfactual analysis of the difference between the actual market and a hypothetical scenario that describes what would have happened if Google had not engaged in self-preferencing. The study is based on historical data and tries to determine the lost traffic from Idealo diverted to Google, revenue and market share. According to the claim, Idealo lost up to 50% of this market segment to Google, dating back to at least 2008. For that purpose, Idealo has requested extensive disclosure from Google regarding its traffic, sales, and profits related to its shopping service in Germany. This information is necessary to quantify the full extent of the harm accurately and to substantiate Idealo's damages claim in court. The damages claim includes loss of profit, as well as compound interest over the years, which increases the global claim to up to 3.3 billion as of early 2025.

2. Impact on consumer choice and innovation

One of the most significant consequences of self-preferencing is its chilling effect on innovation¹⁷. Third-party providers, such as app developers or independent merchants, rely on platforms to access large consumer bases. When these platforms systematically favour their products—by giving them better placement, enhanced visibility, or preferential access to data—third-party providers are placed at a distinct disadvantage. Empirical research and regulatory studies consistently demonstrate that such practices deter third-party developers from investing in new features or enhancing product quality. If the platform can constantly override or overshadow their offerings, the expected returns on innovation diminish. Consequently, many developers may choose to reduce their investment in quality improvements or even shift their efforts to alternative markets where competition is more open and fairer.

17. Jürgensmeier, Lukas and Skiera, Bernd, Measuring Self-Preferencing on Digital Platforms (June 08, 2025). Available at SSRN: <https://ssrn.com/abstract=4393726> or <http://dx.doi.org/10.2139/ssrn.4393726>.

The reduction in innovation is closely linked to the issue of limited consumer choice¹⁸. When platforms prioritise their products, consumers are less likely to encounter the best or most relevant options available in the market. Instead, their choices are shaped by the platform's commercial interests, not by quality or relevance. This can lead to a marketplace characterised by lower quality, less variety, and, over time, potentially higher prices. The suppression of competitive alternatives not only stifles diversity but also reduces the pressure on platforms to improve their own offerings, thereby further establishing their market power.

In any case, it is a fact that the consumers suffered harm, which, in practice, will probably not be recovered. This harm is diffuse and extremely difficult to quantify, compared to traditional antitrust damages quantification methods that rely more on the surplus than on the loss of choice. Scholars suggest the loss of consumer choice can be quantified through choice experiments¹⁹, consumer surveys, and economic modelling of welfare loss, focusing on both tangible (financial) and intangible (utility) impacts²⁰. The loss of innovation is measured using a combination of input/output metrics, empirical studies, and counterfactual analysis; however, it remains challenging due to its speculative nature and the difficulty of capturing long-term or disruptive effects²¹.

These approaches are widely used in regulatory, antitrust, and policy contexts to ensure that the broader societal impacts of reduced choice and innovation are appropriately considered in decision-making.

However, the experience with private enforcement is currently limited or unknown in Europe. The Discrete Choice Experiment (DCE) method is not explicitly mentioned as a quantification method in the "Guide for Quantifying Harm from Competition Law" issued by the Spanish National Markets and Competition Commission (CNMC) or in the main European antitrust damages' calculation guidance documents. These guides primarily focus on economic and econometric methods, such as comparator-based approaches (cross-sectional, time series, difference-in-differences), financial analysis, and industrial organisation theory-based approaches for quantifying harm and damages in antitrust cases.

In Europe, while these methods are accepted in economics for measuring consumer preferences and changes in welfare (including the loss of consumer choice), they are not currently foreseen or explicitly recommended in the main official guides for calculating antitrust damages. The guides rely more on market

18. Yuta Kittaka, Susumu Sato, Yusuke Zenryo, Self-preferencing by platforms: A literature review, *Japan and the World Economy*, Volume 66, 2023, 101191, ISSN 0922 1425, <https://doi.org/10.1016/j.japwor.2023.101191>. (<https://www.sciencedirect.com/science/article/pii/S0922142523000178>)

19. Bonny Parkinson, *Measuring the Loss of Consumer Choice in Mandatory Health Programs Using Discrete Choice Experiments*, 2012, Sidney, available at: [wp2012_04.pdf](#).

20. Daniel F Spulber, Antitrust and Innovation Competition, *Journal of Antitrust Enforcement*, Volume 11, Issue 1, March 2023, Pages 5 -50, <https://doi.org/10.1093/jaenfo/jnac013>.

21. <https://www.promarket.org/2024/04/02/at-stake-in-the-apple-case-is-foregone-and-future-innovation/>.

data, econometric models, and financial analysis to establish counterfactual scenarios and quantify harm²².

In the US, there are specific case examples where Discrete Choice Experiments (DCE) have been used in damages estimation, particularly in antitrust litigation when market data is unavailable or insufficient.

In the *BNLfood Investments Limited SARL v. Martek Biosciences Corp.* case in the USA., BNLfood used a choice experiment method to estimate the damages caused by alleged anticompetitive foreclosure in the infant formula additives market. Economic experts designed a survey targeting recent purchasers of infant formula to assess consumer preferences for different additive types at various price points. The results from the experiment were used to estimate the market share BNLfood would have captured in a counterfactual scenario without the alleged foreclosure. This evidence supported the calculation of damages by showing the potential demand for BNLfood's products in the absence of the anticompetitive conduct²³.

In Europe, there are no documented cases²⁴. Most of our cases involve cartel damage claims, traditional abuse cases, or B2B cases.

Tools for quantifying the loss of consumer choice remain theoretical in European competition law damages estimation, rather than a practical, court-tested method.

In our view, the *BNLfood* case demonstrates that alternative methods, such as the choice experiment, can be applied in antitrust damages estimation when direct market evidence is lacking and a counterfactual scenario must be constructed.

Additionally, procedural hurdles, such as the imposition of individual proceedings and limitations on collective initiatives and actions, render this type of action against self-preferencing impossible in practice, leaving the harm suffered by consumers in the hands of the infringing undertaking. There is consensus about the harmful effects of self-preferencing. Still, this consensus is limited to the theoretical or regulatory sphere, leaving private enforcement in an asymmetrical situation that harms consumer welfare in the interest of dominant market players, all this eroding the principle of effectiveness.

22. Guide for Quantifying Harm from Competition Law” issued by the Spanish National Markets and Competition Commission (CNMC); Daniel L. Rubinfeld, Quantitative Methods in Antitrust, in 1 ISSUES IN COMPETITION LAW AND POLICY 723 (ABA Section of Antitrust Law 2008) <https://www.cnmc.es/sites/default/files/4968354.pdf>; <https://www.oxera.com/wp-content/uploads/2018/03/Quantifying-antitrust-damages-3.pdf> https://www.law.berkeley.edu/files/QM_Antitrust.pdf

23. <https://www.oxera.com/insights/agenda/articles/the-use-of-discrete-choice-experiments-in-applied-economic-analysis/>.

24. The Amazon Buy box opt out claim filed in the CAT follows a similar approach but the claim is limited to the harm caused to businesses. CAT Ruling 5.2.2024, Hunter vs. Amazon Case Nos: 1568/7/7/22.

V. DAMAGE CLAIMS AGAINST APPLE IN THE UK COMPETITION APPEAL TRIBUNAL

In recent years, Apple Inc. has faced multiple high-profile damages claims in the UK Competition Appeal Tribunal (CAT), reflecting growing scrutiny of its business practices under UK and EU competition law. These claims, brought as collective proceedings, allege abuses of dominance in relation to Apple's App Store, payment processing systems, and device performance management.

We will focus on two significant collective proceedings against Apple regarding its App Store practices: *Dr. Rachael Kent v Apple Inc.* (on behalf of consumers) and *Dr. Sean Ennis v Apple Inc.* (on behalf of developers). Both cases allege that Apple has abused its dominant position in the iOS app distribution market, but they approach the harm from different perspectives and represent different affected groups²⁵. Both claims combine the follow-on and stand-alone approaches, as they are based on specific theories of harm and partially based on the decisions of regulators across Europe.

A. Consumer Claims: *Dr. Rachael Kent v Apple Inc*

The consumer claim led by Dr. Rachael Kent seeks approximately £1.5 billion in damages on behalf of an estimated 19.6 million UK consumers who made purchases through the App Store. The theory of harm in this case is based on how Apple's practices ultimately harm end users through exclusionary and exploitative abuses:

1. Exclusionary Abuses Leading to Consumer Harm

The consumer claim alleges that Apple has engaged in exclusionary and exploitative practices that restrict competition and ultimately harm consumers through distribution restrictions, tying, anti-steering, unfair and excessive pricing.

a. App Distribution Restrictions and walled garden

Apple prohibits the distribution of iOS apps through any channel other than the App Store, creating a closed ecosystem that eliminates competition in app distribution. This restriction is central to establishing both the relevant market definition and Apple's dominance within it. This "closed ecosystem" approach is not only pivotal to defining the relevant market in competition law cases but also underpins Apple's dominance and according to the claimants, the resulting consumer and developer harms²⁶.

25. <https://www.catribunal.org.uk/cases/14037721-dr-rachael-kent>.

26. Evinger, Jake, *Walled Gardens & Forbidden Apples: Software Access Amid Antimonopoly Resurgence* (July 26, 2024). *Richmond Journal of Law and Technology*, Volume XXI, Issue 1

Apple's "walled garden" philosophy, rooted in the integration of hardware and software, has led to a tightly controlled ecosystem. The claimant affirms that this approach is marketed as ensuring security and a seamless user experience, while it stifles competition and innovation. In practice, developers and consumers are locked in, with no alternative means of distributing or accessing apps on iOS devices. This lock-in effect increases user reliance on Apple's products and services, making it difficult for consumers to switch to alternative platforms or for developers to reach iOS users without consenting to Apple's terms. The lack of power of developers can deter developers from innovating in favour of Apple's apps and services.

Competing app stores and payment processors are excluded, preventing rivals from entering the market. Developers often pass Apple's commission fees onto consumers, resulting in higher app and in-app purchase prices. The lack of alternative distribution channels means consumers have fewer choices and pay more for digital goods and services.

On the hardware side, Apple's ecosystem encompasses a suite of devices—iPhones, iPads, MacBooks, Apple Watches, and accessories—integrated with proprietary operating systems (iOS, macOS, watchOS) and a range of services (iCloud, Apple Music, App Store). The company's vertical integration ensures that hardware and software are designed in tandem, allowing features like Handoff, AirDrop, and Universal Clipboard to work seamlessly across devices. The App Store acts as a gatekeeper, with Apple controlling which applications are available and enforcing strict guidelines for developers.

The closed nature of Apple's ecosystem restricts user freedom, limiting the ability to customize devices or use third-party software and services not sanctioned by Apple. Interoperability with non-Apple products is often constrained, and users face challenges when attempting to switch to alternative platforms.

Developers must adhere to Apple's strict guidelines and pay commission fees to distribute apps via the App Store, which some argue stifles innovation and competition. The claimants contend that Apple's practices amount to monopolistic behaviour, using its control over the ecosystem to disadvantage rivals and limit consumer choice.

b. Tying Abuse

Apple requires that all payments on the App Store from iOS device users to developers must be processed through Apple's payment processing services, preventing competition in payment processing. This tying arrangement forces consumers to use Apple's payment system exclusively.

Apple's App Store rules historically mandated that any app offering digital goods or subscriptions on iOS must use Apple's in-app purchase (IAP) system.

(forthcoming), Available at SSRN: <https://ssrn.com/abstract=4946889> or <http://dx.doi.org/10.2139/ssrn.4946889>.

Developers were prohibited from integrating alternative payment processors within their apps and from even linking users to external payment sites. This meant that developers could not offer or advertise cheaper payment methods within their apps. Consumers were forced to use Apple's payment system, with no alternative for in-app transactions.

By tying app distribution (where Apple is dominant) to its proprietary payment service, Apple foreclosed the market for payment processing on iOS. Competing payment providers were locked out, and developers had no choice but to use Apple's system. This lack of competition enabled Apple to set commission rates (typically 30%) without market constraints. The tying arrangement resulted in several forms of consumer harm, including higher prices, reduced choice, and a poorer user experience.

The claimants also base their claims on decisions of regulators and courts in the EU, Netherlands, and the US, which have found this tying practice to be abusive:

The European Commission found that Apple's restrictions on payment processing and anti-steering rules violated competition law, ordering Apple to open up its system to third-party payment providers and to allow developers to inform users about alternative payment options²⁷.

The Dutch Competition Authority (ACM) and Court of Rotterdam ruled that Apple's tying of payment processing for dating apps was an abuse of dominance and imposed fines until Apple allowed alternative payment options²⁸.

US Courts: Following Epic Games' litigation, Apple was required to allow apps to link to external payment sites, though it initially sought to retain a commission on such transactions²⁹.

2. Exploitative Abuses Affecting Consumers

a. Excessive and Unfair Pricing

Apple imposes a commission of typically 30% on all app purchases and in-app transactions, which the claim alleges is excessive and unfair. The theory of harm suggests that this commission is substantially passed on to consumers in the form of higher app prices. A central element of the consumer claim is that developers pass on a significant portion of Apple's 30% commission to end users, resulting in artificially inflated prices for apps and in-app purchases. The claim argues that in a competitive market, these prices would be substantially lower.

The fee of Apple applies to:

27. CASE AT.40437 – Apple – App Store Practices (music streaming) ec.europa.eu/competition/antitrust/cases1/202419/AT_40437_10026012_3547_4.pdf.

28. Rechtbank Rotterdam, 16.6.2025, ROT 23/5690 & ROT 23/6570, Apple, ACM.

29. <https://techcrunch.com/2025/05/02/apple-changes-us-app-store-rules-to-let-apps-redirect-users-to-their-own-websites-for-payments/>.

- Initial app purchases (for paid apps)
- In-app purchases of digital goods and services
- Subscription payments (reducing to 15% after the first year)

In recent years, Apple has introduced modifications to this structure, including reduced rates of 15% for small businesses earning less than \$1 million annually through the App Store Small Business Program. The standard 30% commission remains in place for most major developers and transactions.

b. Anti-steering provisions

Apple's anti-steering provisions prevent app developers from informing users about alternative, often cheaper, ways to purchase subscriptions or content outside of the App Store ecosystem. This means developers cannot direct users to their websites or other payment methods that avoid Apple's commission fees. By prohibiting developers from advertising cheaper options, Apple ensures that consumers are unaware of more affordable alternatives. As a result, consumers are "locked in" to purchasing via the App Store, where prices are typically higher due to Apple's commission (up to 30%), which developers often pass on to consumers. Additionally, some users may abandon purchases altogether due to the cumbersome process of searching for external options, resulting in non-monetary harm such as a degraded user experience.

3. Pass on to consumers

According to the consumer claim, developers, lacking alternative distribution channels due to Apple's closed ecosystem, are forced to pass a significant portion of Apple's commission onto consumers. The claimant asserts that developers increase their app prices to maintain profit margins in response to Apple's commission. The commission creates a price floor below which developers cannot profitably operate, reducing price competition and maintaining artificially high prices. Some developers charge higher prices on iOS than on other platforms to account for Apple's commission, directly demonstrating the pass-through effect³⁰.

The primary evidence supporting the theory is that Apple's commission is based on price differentials and developer behaviour.

Price differentials: Music streaming services like Spotify have historically charged higher subscription fees (€12.99 vs €9.99) for subscriptions purchased through iOS apps compared to those purchased directly on their websites, with the difference approximately matching Apple's commission.

30. See also: the DMA proceedings of the EC against Apple: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1086 and proceedings in the US Supreme Court Apple v. Pepper: the Court recognized consumers' standing to sue Apple directly over App Store commissions, implicitly acknowledging the potential for pass-through harm.

Developer Behaviours: When faced with Apple's commission, developers typically respond in one of three ways, all of which can harm consumers:

- Raise prices to cover the commission
- Absorb the commission but reduce investment in app quality
- Remove in-app purchase functionality entirely, reducing convenience for users³¹.

4. Quantifying Consumer Harm

The UK claim alone represents approximately 19.6 million consumers who may have been overcharged for app purchases and in-app transactions. The estimated damages in the UK claim amount to approximately £1.5 billion, representing the alleged overcharges that have been passed on to consumers. While the exact pass-through rate varies by app category and developer, economic experts have estimated that a significant portion of Apple's commission is passed on to consumers, with some analyses suggesting rates of 50-90% for specific app categories³².

Apple has contested the claim on the certification phase and on the passing on to consumers on several grounds, such as the value that it provides through the App Store, the freedom of choice of developers and the limited impact of the commission on the market since 85% of the apps on the App Store pay no commission.

B. Developer Claims: Dr. Sean Ennis v. Apple Inc

The developer claim led by Dr. Sean Ennis seeks up to £785 million in damages on behalf of approximately 13,000 UK-based iOS app developers³³. The theory of harm in this case focuses on how Apple's practices directly impact app developers by charging excessive and unfair commissions, as well as limiting their choice in the payment processing system.

The claim alleges that Apple's commission structure is unfair as a pricing system because it "fails to recognise the true economic value contributed by app developers". It places a disproportionate burden on certain developers. Only about 16% of developers on the App Store pay any commission at all, creating an

31. See CAT Ruling, 5.4.2023, Rachael Kent vs. Apple [https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20\(Experts\)%20\(FINAL\).pdf](https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20(Experts)%20(FINAL).pdf).

32. See CAT Ruling, 5.4.2023, Rachael Kent vs. Apple [https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20\(Experts\)%20\(FINAL\).pdf](https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20(Experts)%20(FINAL).pdf).

33. See Cat Ruling 18.10.2024 Dr. Sean Ennis vs. Apple, <https://www.catribunal.org.uk/sites/cat/files/2024-10/16017723%20Dr%20Sean%20Ennis%20v%20Apple%20Inc%20and%20Others%20-%20Judgment%20%2018%20Oct%202024.pdf>.

inequitable distribution of costs. This commission is inescapable for developers who need to monetise their apps.

This structure is also foreclosing competition in the processing of payments and alternative app stores. Additionally, the commission reduces the resources for innovation and investment in new apps or features, harming the app ecosystem.

C. Common elements and potential conflicts of interest between the two claims

The theories of harm in both the consumer and developer claims against Apple in the Competition Appeal Tribunal revolve around Apple's control of the iOS app ecosystem and the resulting market power. While the consumer claim focuses on pass-on effects and higher prices for end users, the developer claim emphasizes direct financial harm and unfair business conditions for app creators. Both claims ultimately challenge the same fundamental practices: Apple's exclusive control over iOS app distribution, the mandatory use of Apple's payment processing, and its 30% commission structure. The Competition Appeal Tribunal (CAT) acknowledged that trying these cases separately could lead to conflicting rulings on shared issues like market definition or dominance, or legal questions such as excessive pricing³⁴. Despite this, the CAT declined to merge the trials, as the developer's claim was filed two years after the consumer's claim, and the two classes experienced harm in different ways. This reduces the direct conflict but makes the calculation of the passing on more complex.

Apple contended that Ennis's class contained internal conflicts (e.g., developers with varying commission rates or vulnerability to defences), but the CAT dismissed this, stating:

“A class representative's duty is not to pursue different claims [...] but to prosecute collective proceedings in a way that furthers the interests of the group as a whole”

While overlapping legal issues (market definition, dominance, overcharge) create a risk of inconsistent rulings, they do not constitute a *conflict of interest*. The claims target distinct groups (consumers versus developers) and seek redress for different types of harm. The CAT permits both to proceed independently, prioritising the timely resolution for Kent's class while managing inconsistency risks through evidence sharing and staggered trials.

34. CAT 18.111601/7/7/23; 1403/7/7/21 Dr Sean Ennis v Apple Inc and Others; Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd - Ruling [2024] CAT 64 | 8 Nov 2024.

VI. PRESUMPTIONS AND PRIVATE ENFORCEMENT IN ABUSE OF DOMINANCE CASES

The assessment of the damage is usually based on the difference hypothesis. The claimant will have to compare the market with a counterfactual scenario that does not involve infringement. Abuse can cause primary and secondary damages. Additionally, it can cause damages different from a price overcharge, such as loss of profit resulting from exclusivity, discounts, or self-preferencing. In many cases, the damage is caused upstream and downstream, but also to competitors. In exclusionary abuses, the primary harm is the market exit or marginalisation of competitors, thus a loss of profit in most cases. Secondary harm or consequential damages may also arise. Direct partners, such as game or application developers, may charge their customers excessive prices imposed by the platform. The harm in these cases is suffered by the other side of the market where the exploitative conduct occurs.

These two cases demonstrate that proving harm can be challenging, if not impossible, depending on the position within the value chain. While harmed businesses can access sophisticated legal solutions and economic assessments, even in individual or group actions, consumers still rely on a functioning opt-out collective claim system to access justice. This type of claim typically requires third-party funding to assess whether the harm was passed on to consumers and to cover potential adverse costs.

Courts have developed presumptions about the harm in cartel cases. This presumption is expressly recognised in Article 17 (2) of the Damages Directive 2014/104. However, such a presumption only applies to cartels.

Another critical difference is the absence of a deviation problem in cases of abuse. Cartels risk instability due to the incentive for members to lower prices to gain market share secretly. Abuses, however, are carried out by a single dominant firm, eliminating this risk and making the harmful effects more stable and enduring.

Additionally, abusive practices can cause long-term structural market damage, particularly in industries with network effects (e.g., the described cases against Google Shopping and Apple App Store). Unlike cartels, where price effects typically last for about a year, abuses can suppress competition for years, delaying the recovery of marginalised competitors.

Given these factors, abuses pose at least the same, if not greater, damage potential than cartels. As such, damages claims are necessary both from a legal policy perspective and under the principle of effectiveness to ensure fair market competition.

Under the current regime, claimants must prove the harm and its quantification, limiting enforcement to jurisdictions with businesses that have a high volume of commerce affected by the conduct, as well as jurisdictions that permit collective actions on an opt-out basis for both companies and consumers. In Europe, in the absence of a Europe-wide opt-out collective action proceeding, consumers in some jurisdictions will have access to a judicial remedy, as seen in the Netherlands

and Portugal. In contrast, other consumers, domiciled in countries where opt-out is not possible, such as Germany and France, will likely remain uncompensated. This asymmetry harms not only consumers but also the principle of effectiveness of EU Law

VII. BIBLIOGRAPHY.

Case Law

ECJ, Judgment of 18 June 2013, C-681/11, ECLI:EU: C:2013:126 – Schenker & Co. et al.
ECJ, 25 February 2025, Case C-233/23, Android Auto.
Microsoft Corp. v. Commission (2007) Case T-201/04.
Telefónica SA v. Commission (2010) Case T-336/07.
Intel Corp. v. Commission (2017) Case C-413/14 P.
United States v. Microsoft Corp. (2001) 253 F.3d 34 (D.C. Cir.).
AKZO Chemie BV v. Commission (1991) Case C-62/86.
Google Search (Shopping) Case AT.39740 (2017).
Bundeskartellamt (German Federal Cartel Office), Decision against Facebook (19.2.2019), B6-22/16.
Commission, Decision of 27 June 2017, AT.39740 – Google Search (Shopping).
Commission, Decision of 18 July 2018, AT.40099 – Google Android.
Commission, Decision of 20 March 2019, AT.40411 – Google Search (AdSense).
Commission, Decision of 4 May 2017, AT.40153 – E-book MFNs and related matters (Amazon).
Commission, Decision of 20 December 2022, AT.40462 – Amazon Marketplace.
Commission, Decision of 20 December 2022, AT.40703 – Amazon – Buy Box.
FCO, B2-881/18 (discontinuation decision of 17.07.2019 after adaptation by Amazon).
Commission, Decision of 14 November 2024, AT.40684 – Facebook Marketplace.
OLG Köln 15 UKI 2/25, 23.5.2025.
Commission, Decision of 4 March 2024, AT.40437 – Apple – App Store Practices (music streaming).
Commission, Decision of 11 July 2024, AT.40452 – Apple – Mobile Payments.
Commission, Decision of 24 March 2004, AT.37792 – Microsoft.
Commission, Decision of 16 December 2009, AT.39530 – Microsoft (tying).
Ongoing proceedings: AT.40721 – Microsoft Teams and AT.40873 – Microsoft Teams II.
Rechtbank Rotterdam, 16.6.2025, ROT 23/5690 & ROT 23/6570, Apple, ACM.
CAT Ruling, 5 April 2023, Rachael Kent v. Apple, [https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20\(Experts\)%20\(FINAL\).pdf](https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20(Experts)%20(FINAL).pdf)
CAT Ruling, 18 October 2024, Dr. Sean Ennis v. Apple, <https://www.catribunal.org.uk/sites/cat/files/2024-10/16017723%20Dr%20Sean%20Ennis%20v%20>

[Apple%20Inc%20and%20Others%20-%20Judgment%20%2018%20Oct%202024.pdf](#)

CAT 18.11.1601/7/7/23; 1403/7/7/21 Dr Sean Ennis v Apple Inc and Others; Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd - Ruling [2024] CAT 64 | 8 Nov 2024

Academic Literature

- N. PETIT, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] JECL & Pract 529.
- L. HORNSKÖHL, Schadensersatzansprüche wegen Verstöße gegen Verhaltensnormen des digitalen Binnenmarktrechts, EUZW, 2024, 941 ff.
- E. FRANCK, in: Immenga/Mestmäcker, Section 33a GWB, ed. 2022 para. 50-56.
- LÜBBIG, in: Münchener Kommentar zum Wettbewerbsrecht, vol. 2, 4th ed. 2022, Section 33a ARC para. 28.
- J.U. FRANCK, in: Immenga/Mestmäcker, § 33a GWB, ed. 2022 para. 55.
- PETRUCCI, Carlo (2023) 'Self-preferencing in the EU: a legal and policy analysis of the Google Shopping case and the Digital Markets Act.' Competition Law Journal, 22(1), pp. 18-29. <https://doi.org/10.4337/clj.2023.01.03>
- JÜRGENSMEIER, Lukas and Skiera, Bernd, Measuring Self-Preferencing on Digital Platforms (June 08, 2025). SSRN: <https://ssrn.com/abstract=4393726> or <http://dx.doi.org/10.2139/ssrn.4393726>
- YUTA KITAKA, SUSUMU SATO, YUSUKE ZENNYO, 'Self-preferencing by platforms: A literature review,' Japan and the World Economy, Volume 66, 2023, 101191, ISSN 0922-1425, <https://doi.org/10.1016/j.japwor.2023.101191>
- Bonny PARKINSON, 'Measuring the Loss of Consumer Choice in Mandatory Health Programs Using Discrete Choice Experiments,' 2012, Sidney, available at: wp2012_04.pdf.
- Daniel F. SPULBER, 'Antitrust and Innovation Competition,' Journal of Antitrust Enforcement, Volume 11, Issue 1, March 2023, Pages 5-50, <https://doi.org/10.1093/jaenfo/jnac013>
- Jake EVINGER, 'Walled Gardens & Forbidden Apples: Software Access Amid Antimonopoly Resurgence' (July 26, 2024). Richmond Journal of Law and Technology, Volume XXI, Issue 1 (forthcoming), SSRN: <https://ssrn.com/abstract=4946889> or <http://dx.doi.org/10.2139/ssrn.4946889>

Reports, Guides, and Press Releases

Idealo, Press Release of 12 April 2019, 'Idealo sues Google for damages for abuse of its dominant market position,' <https://fmos.link/29168> (last accessed 14 January 2025).

- Guide for Quantifying Harm from Competition Law, Spanish National Markets and Competition Commission (CNMC), <https://www.cnmc.es/sites/default/files/4968354.pdf>
- Daniel L. RUBINFELD, 'Quantitative Methods in Antitrust,' in 1 ISSUES IN COMPETITION LAW AND POLICY 723 (ABA Section of Antitrust Law 2008), https://www.law.berkeley.edu/files/QM_Antitrust.pdf
- OXERA, 'The use of discrete choice experiments in applied economic analysis,' <https://www.oxera.com/insights/agenda/articles/the-use-of-discrete-choice-experiments-in-applied-economic-analysis/>
- OXERA, 'Quantifying antitrust damages,' <https://www.oxera.com/wp-content/uploads/2018/03/Quantifying-antitrust-damages-3.pdf>
- ProMarket, 'At Stake in the Apple Case is Foregone and Future Innovation,' <https://www.promarket.org/2024/04/02/at-stake-in-the-apple-case-is-foregone-and-future-innovation/>
- TechCrunch, 'Apple changes US App Store rules to let apps redirect users to their websites for payments,' <https://techcrunch.com/2025/05/02/apple-changes-us-app-store-rules-to-let-apps-redirect-users-to-their-own-websites-for-payments/>
- European Commission, 'DMA proceedings against Apple,' https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1086

Official Documents and Case Files

- CASE AT.40437 – Apple – App Store Practices (music streaming), https://ec.europa.eu/competition/antitrust/cases1/202419/AT_40437_10026012_3547_4.pdf
- Bundeskartellamt, FAQ on Facebook case, FAQ_Facebook.pdf

THE APPLICATION OF THE DIRECTIVE (EU) 2020/1828 ON REPRESENTATIVE ACTIONS IN THE CONTEXT OF THE DIGITAL MARKETS ACT*

María Gómez Santos

Assist. Professor in Commercial Law

Complutense University of Madrid

ABSTRACT: This paper explores the connections and applications of Directive 2020/1828 within the context of the Digital Markets Act (DMA), particularly emphasizing their weaknesses. Two main conclusions are reached. First, small and medium-sized enterprises (SMEs) fall outside the scope of Directive 2020/1828. Consequently, these operators are unable to pursue representative actions in cases of potential violations of the DMA. However, they still have the option to engage in individual litigation or combine their actions, though this approach carries certain disadvantages for the plaintiffs. The second conclusion addresses the potential issues that may arise from using third-party funds to finance representative actions, particularly concerning public enforcement. Lastly, the paper reviews the status of the transposition of Directive 2020/1828 into the Spanish legal system and identifies some areas for improvement.

Keywords: “Directive (EU) 2020/1828”; “representative actions directive”; “private enforcement”; “Competition law”.

SUMMARY: I. THE GENESIS AND CONNECTIONS BETWEEN THE DIRECTIVE (EU) 2020/1828 ON REPRESENTATIVE ACTIONS AND THE DMA. II. APPLICATION OF THE DIRECTIVE 2020/1828 IN THE CONTEXT OF THE DMA. A. Direct constraints. 1.The personal scope of the Directive 2020/1828. 2.The different Member State approaches to implementing the Directive 2020/1828. B. Indirect constraints: the third-litigation funding of representative actions as a

* This work has been carried out as a result of the national research project entitled: “Instrumentos para la justicia civil ante los litigios-masa, en especial, acciones de representación y régimen del proceso-testigo” (PID2021-122569OB-100). IP: Alicia Armengot Vilaplana.

problem from the public enforcement of competition law. III. THE SPANISH APPROACH. IV. FINAL REMARKS. VI. BIBLIOGRAPHY.

I. THE GENESIS AND CONNECTIONS BETWEEN THE DIRECTIVE (EU) 2020/1828 ON REPRESENTATIVE ACTIONS AND THE DMA

Mass litigation did not capture the attention of academics and practitioners in Europe until the 1970s. However, it wasn't until the early 21st century that European legislators began to show a genuine interest in implementing such tools. Specifically, it was from the first decade of the 2000s that the Directorate-General (DG) for Competition started to explore the possibility of incorporating instruments like North American class actions into the European legal system. This consideration is particularly relevant in the context of private enforcement of competition law.

The design of such actions within the European Union has primarily been influenced not by procedural studies, but rather by works produced by the DG Competition. This includes significant contributions like the Green Paper in 2005¹ and the White Paper in 2008², which have shaped the discourse around this topic while also acknowledging the specific nuances of the discipline.

The benefits of using collective litigation mechanisms are clear when compared to individual lawsuits, regardless of their legal form. One major issue with individual litigation is rational apathy, which refers to situations where the time and effort required to stay informed about a legal matter outweigh the potential benefits. For example, the costs for a plaintiff—such as time spent, attorney fees, and other legal expenses—can be significant, especially when there is no guarantee of winning the case.³

Another factor related to rational apathy is information asymmetry. This occurs when a party is unaware that they have suffered harm due to a violation of competition law or lacks sufficient information to meet the burden of proof on their own. Additionally, individuals may tend to act as free riders, preferring to wait for others to take the initiative and simplify the process for them.⁴

Furthermore, it's important to note that traditional litigation systems assume that all parties have equal financial resources and time to defend their positions.

1. Green Paper. Damages actions for breach of the EC antitrust rules (Brussels, 19.12.2005 *COM (2005) 672 final*).

2. White Paper on damages actions for breach of the EC antitrust rules (Brussels, 2.4.2008 *COM (2008) 165 final*).

3. WAGNER, G., "Collective redress - Categories of loss and legislative options", *Law Quarterly Review*, 127, 2011, pp. 63-64.

4. FAURE, M., WEBER, F., "Dispersed losses in tort law - An economic analysis", *Journal of European Tort Law*, 6, 2015, pp. 174-175.

However, this assumption is increasingly unrealistic, especially in cases involving standardized contracts and complex issues.⁵

The debate surrounding the implementation of mass litigation instruments has been intense and continues to be prominent, largely due to the practical dysfunctions experienced by such systems in North America. From its early discussions, the European legislator aims to distance itself from the concept of class actions. This is evident in the use of different terminology to describe the specific mechanisms for mass litigation, a choice designed to dispel the negative connotations that class actions carry in Europe.⁶

One of the key concerns shaping the current European legal framework, particularly the *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*⁷, has been the fear of replicating the errors found in the American class action system.

It is important to recognize that North American regulations differ significantly from the continental European tradition. As a result, any attempt to translate the U.S. class action system would require substantial modifications to neutralize many of its negative effects.⁸ Due to skepticism toward class actions, the European Commission published a Recommendation in 2013⁹ outlining common principles for collective redress mechanisms intended for Member States. This Recommendation was aimed at addressing cessation or compensation when there are violations of recognized rights within the Union, particularly emphasizing the need for these principles in the private enforcement of competition law.¹⁰

The 2013 EU Recommendation provided a broad approach to its implementation and included various safeguards designed to prevent the improper and excessive use of collective litigation. This is a significant concern influenced by the American experience with class actions. However, despite its well-intentioned goals, the 2013 Recommendation experienced limited success. One possible reason for this

5. VISSCHER, L. L., FAURE, M. M., "Law and economics perspective on the EU Directive on representative actions", *Journal of Consumer Policy*, 44 (3), 2021, pp. 459.

6. A point particularly valued by the European business lobby, as this has undoubtedly been one of the main obstacles to implementing any collective litigation system, given that this sector is the most affected.

7. 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 (DOUE-L-2020-81785). Hereinafter the "Directive 2020/1828").

8. The North American legal system allows for the possibility of claiming punitive damages, conducting jury trials, and following the "American rule" concerning procedural costs. These factors not only shape the structure of class actions but also contribute to the negative effects that such litigation can produce. Some authors have even described the combination of these elements as "a toxic cocktail." HODGES, C.C., "Collective redress: the need for new technologies", *Journal of Consumer Policy*, 42 (1), 2019, p. 61.

9. 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 (OJ L 201, 26.7.2013, p. 60-65).

10. Recital (7) of the referred Recommendation.

failure may not solely be attributed to its non-binding nature —as it was presented as a Recommendation, or soft law— but rather to the timing of its release.¹¹

The connections between the basic principles outlined in the 2013 Recommendation and the regulatory reforms implemented in various Member States of the European Union since its publication are evident.¹² However, the lack of harmonization among the different mechanisms adopted by these states has resulted in the reality of mass litigation not achieving the anticipated success. This dissatisfaction is not just theoretical; it is also practical. It quickly prompted a reaction from European legislators when the inadequacy of European regulations on mass litigation became apparent, particularly following the global scandal known as “Dieselgate” in 2015.

The key challenges that claimants face in enforcing their antitrust claims are significant and multifaceted. First and foremost, claimants must effectively demonstrate the harmful impact of market-wide competition law violations, particularly cartels, on their individual businesses. This requirement often entails a rigorous economic analysis and quantification process, including establishing causality, which demands comprehensive data spanning the market’s performance before, during, and after the infringement.

Additionally, the hidden nature of cartels creates considerable information asymmetries and a scarcity of evidence, making it difficult for claimants to build their cases. There is also the potential for strains on ongoing business relationships due to exposure to multiple defendants, which can complicate negotiations and partnerships. Moreover, the high costs associated with legal representation and engaging economic experts can be daunting, particularly since the outcomes remain uncertain. Finally, in cases that span the European Union, cartel members are likely to be established in various jurisdictions, further complicating matters for victims who have suffered damages across Europe.¹³ Addressing these challenges is crucial for fostering fair competition and ensuring that victims can effectively enforce their rights. In this context, the public pressure stemming from the “Dieselgate” scandal has been a key factor in accelerating the discussion and fostering the development of a European mechanism for collective actions, which culminated in the Directive 2020/1828.¹⁴ This change has not only encouraged this new form of legal action but also suggests the emergence of a related

11. In 2013, various regulatory reforms had already been undertaken by many of the member states aimed at introducing instruments for collective redress into their respective internal systems (Sweden in 2003, the Netherlands in 2005, Italy in 2007, Finland in 2007, Denmark in 2008 and Poland in 2010), so that the influence of the 2013 Recommendation was tarnished.

12. From 2013 until the approval of the Directive 2020/1828, several Member States have implemented collective litigation mechanisms in their respective territories: France in 2014, Lithuania in 2015, Belgium in 2016, Slovenia in 2018 or Netherlands in 2019.

13. SCHREIBER, T., SEEGER, M., “Collective or Class Actions and Claims Aggregation in the EU: the Claimant’s Perspective”, Ed. *Global Competition Review*, 2nd edition, 2020, p.29.

14. KOCEV, L., “Actions for Damages for Breach of EU Competition Law – Efficient Market Protection through Private Enforcement - With Emphasis on North Macedonia,” *EU and Comparative Law Issues and Challenges*, Series 4, 2020, p. 884 y ss.

phenomenon: the financing of mass litigation processes by third parties, which is increasingly viewed as a sophisticated investment and speculation opportunity.¹⁵

On other matters, in the DMA context, the primary concern regarding the private enforcement of competition law relates to actions aimed at compensating intermediaries for damages incurred due to gatekeepers' failure to comply with new obligations established under this regulation. Specifically, the focus is on individual litigation between business owners (*b2b litigation*), rather than remedies designed to repair other sort of damages. The DMA explicitly allows for the possibility of claiming damages through representative actions as outlined in Directive 2020/1828 against gatekeepers that harm or may harm the collective interests of consumers (art. 42 DMA).¹⁶ However, while the legislator intended to incorporate the mechanism of representative litigation for consumers within the DMA framework, it provides little further guidance on the matter, merely referencing the legal regime established by the Directive.¹⁷

With that context in mind, the following analysis will explore the limitations surrounding the application of collective litigation by consumers within the regulatory framework of the DMA.

II. APPLICATION OF THE DIRECTIVE 2020/1828 IN THE CONTEXT OF THE DMA

A. Direct constraints

1. The personal scope of the Directive 2020/1828

Directive 2020/1828 only applies to representative actions taken against traders who infringe on the provisions listed in Annex I, which harm or may

15. A brief overview that explains how the process of entry of third-party litigation funds into the European territory is being carried out can be found at RICKARD, L. A., TERZINO, M. H., "Collective action, collective reaction: what in-house lawyers should know about European class actions", *International In-House Counsel Journal*, 12 (48), 2019, pp.2-4.

16. Please note that the DMA, through the provisions of Article 52, modifies Annex I of Directive (EU) 2020/1828. It introduces a new point that explicitly includes the application of this Directive in relation to consumer damage claims within the framework of the DMA.

17. Moreover, the use of digital platforms by consumers raises significant concerns regarding the personal data provided to access services offered by gatekeepers. This situation can lead to increased market power for these entities, making it a pressing legal issue for practitioners and academics in recent years. In terms of competition law enforcement, recent cases indicate that competition authorities are becoming increasingly aware of the risks posed by certain data activities that violate data protection regulations, especially in the context of market power. However, in the Spanish competition law system, there may be alternative enforcement options worth exploring to examine. Notably, Prof. Estevan de Quesada has conducted significant work on evaluating violations of data protection regulations under Article 15 of the Spanish Unfair Competition Law Act, which deems the breach of legal rules as an infringement of unfair competition. ESTEVAN DE QUESADA, C., "Data-protection related abuses by digital platforms: a Spanish enforcement alternative", *New European Competition Trends in Digital Markets*, Atelier, 2024, pp. 281-303.

harm the collective interests of consumers (Art. 2 of Directive 2020/1828). As a result, the scope of representative actions within the context of the DMA is limited. Furthermore, the terminology used in the DMA and Directive 2020/1828 differs, which is understandable given that both regulations serve different purposes. Consequently, in certain instances, the interests they protect do not align.

Under Directive 2020/1828, a “consumer” is defined as “any natural person who acts for purposes which are outside that person’s trade, business, craft or profession”. In contrast, the term “collective interests of consumers” refers to “the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers”.¹⁸ On the other hand, the DMA defines a “final user” as “any natural or legal person using core platform services other than as a business user”.¹⁹

From these points, some conclusions can be drawn.

First, the definitions provided by both Directive 2020/1828 and the DMA are formulated by exclusion. This means they do not specify which individuals are included in the concepts of “consumer” or “end user” but rather identify what characteristics disqualify other operators from being classified as such.

The second point concerns the scope of the definitions of “consumer” and “end user,” particularly how these concepts can vary in extent depending on the considered legislation (DMA or the Directive 2020/1828).

The concept of “consumer” in the Directive 2020/1828 applies only to “natural persons,” while “end users” in terms of the DMA can be either “natural or legal persons.” However, while the definition of “consumer” includes those who are not involved in “trade, business, craft, or profession,” the definition of “end user” provided by the DMA specifically refers to operators “other than a business user,” and this is conditioned on the operator’s use of “core platform services.” Consequently, because the type of activity conducted by the operator affects this classification, in general terms, the consumer definition is broader.²⁰

It is evident that the concepts of “consumer” and “end user” do not align. This distinction has significant implications: there may be instances where an operator classified as an end user under the DMA might not be able to pursue a representative action for damages resulting from a gatekeeper’s breach of obligations if that operator is a legal entity. In such cases, this type of operator does not fall within the scope of Directive 2020/1828.

In summary, many operators, particularly small and medium-sized enterprises (SMEs), who frequently participate in digital platforms as end users, lack the ability to pursue representative actions for damages caused by a gatekeeper. This situation leaves a significant portion of the operators that the DMA aims to protect

18. Art. 3 (1) and (3) of the Directive 2020/1828, respectively.

19. Art. 2 (20) DMA.

20. In the same sense, *vid.* HORNSKOH, L., RIBERA MARTÍNEZ, A., *Collective Actions and the Digital Markets Act: A Bird Without Wings* (November 19, 2023), p. 48. Available at SSRN: <https://ssrn.com/abstract=4637661> or <http://dx.doi.org/10.2139/ssrn.4637661>

unable to act in collective litigation. However, this does not mean they are without options for joint action; such mechanisms do exist.²¹ Nonetheless, considering the intent behind the DMA's regulatory framework, the coordination with the implementation of Directive 2020/1828 appears to be ineffective.

2. The different Member State approaches to implementing the Directive 2020/1828

One of the main challenges associated with filing representative actions under the DMA is the variety of legal regimes across European countries. This diversity has resulted from the different ways in which each Member State has transposed Directive 2020/1828. The Directive allows substantial discretion for countries to shape their national systems for collective claims and representative actions²². Consequently, although the DMA is directly applicable to Member States, the procedural execution of representative actions will differ significantly based on the legal frameworks established in each country.

In this context, it is noteworthy that the European legislator has shown interest in facilitating transnational representative actions. This approach aligns with the objectives of the DMA, as individuals harmed by similar violations of regulations by the same gatekeepers are often found in different Member States. Implementing cross-border representative actions can thus enhance the effectiveness of the DMA and foster the protection of consumers across the European Union.

Directive 2020/1828 stipulates that Member States must ensure that qualified entities designated in one Member State can initiate cross-border representative actions in the courts or administrative authorities of another Member State. Furthermore, Member States are required to allow multiple qualified entities to bring a cross-border representative action before the courts or administrative authorities if the alleged infringement of European Union law affects, or is likely to affect, consumers in various Member States. To facilitate the filing of such actions, courts and administrative authorities must accept a list of qualified entities appointed by each Member State as evidence of their legal standing to initiate cross-border representative actions.²³

However, an important aspect to consider regarding the effectiveness of future representative actions in the context of the DMA is that, when implementing Directive 2020/1828, many Member States have not included mechanisms tailored

21. While non-consumer end users cannot litigate individually, they may still seek to accumulate actions in court.

22. The Directive 2020/1828 does not prevent Member States from adopting or retaining in force procedural means for the protection of the collective interests of consumers at national level. The only one condition established by this new regulation is to guarantee at least one procedural mechanism that allows qualified entities to bring representative actions for the purpose of both injunctive measures and redress measures complies with this Directive, including, as well, the representative actions in the context of the DMA. Art. 2 (1) of the Directive 2020/1828.

23. Art. 6 Directive 2020/1828.

to the unique characteristics of this type of collective procedure — cross-border representative actions—, particularly its complexity. This omission could lead to problems related to forum shopping, as litigation through representative actions may be more accessible in some jurisdictions than in others, depending on how legal frameworks are structured in each Member State.²⁴

B. Indirect constraints: the third-litigation funding of representative actions as a problem from the public enforcement of the competition law

Directive 2020/1828 defines “qualified entities” as organizations or public bodies that represent consumer interests and have been designated by a Member State to initiate representative actions under this Directive. These entities will be the only operators with the standing to initiate such actions on behalf of consumers, allowing them to collectively request injunctions, compensatory measures, or both.²⁵

To be designated as qualified entities, they must be independent, non-profit legal organizations established under the national law of their Member State. They are required to demonstrate that they have been actively engaged in public and effective consumer protection activities for at least twelve months prior to their application for designation. Furthermore, their purpose must align with protecting consumer interests and must not be influenced by parties other than consumers, especially entrepreneurs who may have an economic interest in any type of representative action.²⁶

The European legislator does not specify whether these entities should be public, private, or mixed, nor does it set any criteria for making such decisions. The only requirement is that these entities meet a series of minimum criteria, leaving Member States the option to impose higher standards of control if they choose.²⁷

As discussed throughout this chapter, the European legislator has granted Member States considerable flexibility in implementing Directive 2020/1828. This creates a situation in which qualified entities can take various forms.

Specifically, regarding the financing of qualified entities, Directive 2020/1828 allows for several funding mechanisms. First, the financial support for a qualified entity’s operations may come from contributions made by the affected consumers.²⁸

24. HORNKOHL, L., RIBERA MARTÍNEZ, A., *Collective Actions and the Digital Markets Act: A Bird Without Wings*, op.cit., pp. 56-68.

25. Art. 3 Directive 2020/1828.

26. Art. 4.3 Directive 2020/1828.

27. HODGES, C.C., “Collective redress: the need for new technologies”, *op.cit.*, p. 81. In this regard, as will be shown, the Spanish legislator, in transposing Directive 2020/1828, has opted not to impose stricter control requirements than the minimum established in the aforementioned Directive.

28. Without prejudice to the existence of financing from third parties or public aid, financing through fees paid by affected consumers is optimal without, in any case, constituting an obstacle to

In cases where a representative action is successful, most Member States' laws on costs allow for the expenses of litigation to be transferred to the defendant company. However, if the action is ultimately unsuccessful, the plaintiff—namely, the qualified entity—will be responsible not only for its own legal costs but also for the costs incurred by the opposing party. Therefore, relying solely on contributions from members to finance these actions seems unlikely.

Furthermore, there are other funding options available for qualified entities, such as corporate donations made through their social responsibility programs or public aid specifically designated for this purpose. Regardless of their source, these funds must adhere to the transparency, independence, and conflict-of-interest requirements outlined in Directive 2020/1828.²⁹

Regarding public aid, the European legislator has established that, in addition to direct funding, qualified entities may receive various forms of structural support and additional resources to assist them in their activities. Examples of this support include access to free legal assistance and the reduction of standard court or administrative fees. However, it is important to note that Member States are not obligated to provide financial assistance to these organizations.³⁰

Additionally, Directive 2020/1828 allows private operators to finance activities carried out by qualified entities. This financing can be ongoing to support the entire activity or specific to a particular representative action. Although the Directive gives each Member State significant leeway in determining which mechanisms will be used to finance representative actions within their territories, the overall content of the text implies that such financing is a necessary component, even if it is not explicitly stated.³¹

Funding antitrust cases presents a compelling opportunity for external litigation funders for several key reasons. First, these cases typically arise in a “follow-up” scenario where a competition authority has already confirmed an infringement, providing a solid foundation for further action. Second, by pooling claims and utilizing integrated data collection and economic analysis, the likelihood of successfully quantifying and enforcing claims increases significantly. Collective enforcement transforms complex claims into valuable assets, including accruing legal interest from the moment damage occurs until the conclusion of the proceedings, enhancing overall recovery potential.

The “English rule”, a common practice throughout the EU, motivates claim aggregators, representative entities, and external funders to carefully select cases upfront. Specialized entities with a proven track record can negotiate more advantageous financing terms, which is beneficial for operators looking to sell or entrust their claims to skilled entities. The practice of aggregating claims and

guaranteeing access to justice for this group. AGULLÓ AGULLÓ, D., “The Interplay of Data, Consumer and Private International Law Rules in the Area of Collective Access to Justice in the European Union,” *Cuadernos de Derecho Transnacional*, Vol. 14, n.º. 2, 2022, pp. 80-81.

29. Recital (52) Directive 2020/1828.

30. Recital (70) and art. 20.2 Directive 2020/1828.

31. HODGES, C.C., “Collective redress: the need for new technologies”, *op.cit.*, p. 73.

class actions virtually opens the doors to justice for damage claims that would otherwise remain unaddressed. As well, in cases with a European-wide scope, aggregated claims can be enforced in the jurisdiction best suited to handle them.³²

However, since the financing of representative actions by specialized companies is one of the primary ways for authorized entities to raise funds, it is important to examine potential issues that may arise from this dynamic, particularly regarding the exercise of these actions within the framework of the DMA.

The financing of representative actions by third parties presents several challenges, the most prominent being the potential for conflicts of interest. From the perspective of principal-agent theory, these conflicts can arise at different levels among the various participants involved. One of the main issues in such cases is the complex network of interconnected bilateral relationships that litigation creates. At the first level, there is a relationship between end user consumers and the qualified entity that conducts the representative action on their behalf. Secondly, a relationship exists between the qualified entity and the third party that finances the legal proceedings. Lastly, conflicts may arise among the different end user consumers within the affected group.

The primary goal of Directive 2020/1828 is to safeguard consumer rights, while the DMA aims to ensure the proper functioning of markets in the digital sector, specifically for end users. Therefore, it is essential to analyze the potential conflicts of interest involving end-user consumers. These conflicts could arise directly between end user consumers and authorized entities or indirectly through the involvement of third-party financiers.³³

Directive 2020/1828 establishes mechanisms to enhance the independence of actions and to eliminate potential conflicts of interest stemming from the financing of such actions.³⁴ Member States must ensure that their national legislation prohibits interference in the procedure by third-party financiers in representative actions that could undermine the collective interests of affected consumers. Furthermore, Member States are required to prevent the pursuit of representative actions that involve compensatory measures when the third-party financier of the qualified entity is either a direct competitor of the financier or relies on the financier for support.

32. SCHREIBER, T., SEEGER, M., "Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective", *op.cit.*, p.37.

33. Agency problems tend to increase with the size of an organization and the diversity of its objectives. Additionally, situations involving conflicts of interest are likely to intensify as the number of consumers represented grows, since the potential for conflicts among the members of this group rises significantly.

34. While not explicitly criticizing it, some authors suggest that supervising financing may divert energy and "resources from authorities during a preliminary phase that, while important, is still distant from addressing the core issue of effectively protecting consumers" (the translation is ours). LÓPEZ JIMÉNEZ, J.M., "La protección de los consumidores y las acciones de representación: una primera aproximación a la Directiva (UE) 2020/1828", *La Ley*, N.º 9830, Sección Tribuna, 15 de abril de 2021, p. 5/10.

Regarding the situation where the third-party financier of the qualified entity is a competitor, Directive 2020/1828 does not clarify whether this competitor should be a direct or an indirect competitor. However, based on the provisions outlined in Recital (52), it seems that Article 10 pertains only to direct competitors and not to indirect ones.

In cases where a third party is financing a qualified entity, and this third party is dependent on the defendant, it makes sense to prevent this third party from being in a position of dependence on the defendant. This is because the true motivation behind such financing may not be to protect the interests of the affected consumers but rather to minimize the economic or reputational impact that a representative action could have on the defendant.

From the perspective of external financing, there are instances where the company or entity funding a representative action has direct interests in the lawsuit's outcome, particularly if it competes with the defendant in the same relevant market. In this context, Directive 2020/1828 highlights that due to the conflict of interest between the financing entity and the defendant company, the goals driving the representative action may not align with the true interests of consumers.³⁵ Instead, they might reflect an individual interest that diverges from that of the consumer group, such as mitigating the significant reputational damage associated with filing the action.

If a conflict of interest is confirmed, Member States must allow for appropriate measures to resolve this potential conflict. This could involve requiring the qualified entity to either refuse or modify the financing it receives. Directive 2020/1828 even allows for the denial of the qualified entity's right to initiate a specific representative action if the conflict of interest is not resolved. However, this must not negatively impact the affected consumer group.

Additionally, in cases where there are reasonable doubts about the existence of a potential conflict of interest, qualified entities are required to provide the judicial or administrative body overseeing the decision with a financial summary. This summary must detail the sources of financing that support the specific representative action being proposed.

If a conflict of interest is confirmed, Member States must allow for appropriate measures to resolve this potential conflict. This could involve requiring the qualified entity to either refuse or modify the financing it receives. Directive 2020/1828 even allows for the denial of the qualified entity's right to initiate a specific representative action if the conflict of interest is not resolved. However, this must not negatively impact the affected consumer group.

Additionally, in cases where there are reasonable doubts about the existence of a potential conflict of interest, qualified entities are required to provide the judicial or administrative body overseeing the decision with a financial summary. This summary must detail the sources of financing that support the specific representative action being proposed.³⁶

35. Recital (52) and art. 4.3 e) Directive 2020/1828.

36. Art. 10, paragraphs 3 and 4, respectively, of Directive 2020/1828.

It is also important to consider the interests that the authorized entity may have regarding the filing of a representative action. These interests can vary based on the entity's nature and scope. For instance, if the entity is a general organization that consistently represents the interests of those affected, it may have objectives that differ from those of the group it represents. Such interests could include increasing membership, enhancing its reputation in the market, or securing better public funding. Conversely, if the qualified entity was created specifically for a single procedure related to representative actions, its interests may be more narrowly focused.³⁷

In these cases, the potential incentives for qualified entities to act in ways that do not align with the interests of the consumers they represent can be significantly greater for permanent, large-scale organizations than for those created on an *ad hoc* basis. This is especially true if the stable organization holds a kind of monopoly. Therefore, it is essential to foster effective competition among different qualified entities, whether they are stable or *ad hoc* and whether they have a broad or narrow scope. The risk of losing clients to another entity can serve as a strong incentive to prevent any conflicts of interest.³⁸

The number of entities permitted to bring representative actions is crucial for achieving the objectives of Directive 2020/1828. Additionally, within the context of the Digital Markets Act, there is a clear goal to prioritize the interests of end users, who are also consumers that have suffered damages due to violations of obligations imposed on gatekeepers. From this perspective, there are several important clarifications regarding market functioning that can be made.

Allowing a large number of representative entities to enter the market can be as harmful as restricting access to it, such as by designating a single entity or organization to initiate representative actions in each case.

In the first scenario —many representative entities— the absence of barriers to entry for filing representative actions could lead to a downward trend in prices due to intense competition among these entities. However, this situation might also decrease the quality of legal services provided to consumers, ultimately undermining the goals established in Directive 2020/1828. Conversely, the establishment of a single operator with active standing could result in monopolistic pricing, which would harm the economic welfare of affected consumers.

Moreover, while having a certain number of qualified entities to bring representative actions could promote competition in terms of price and service quality to attract affected consumers, having too few entities could foster collusive behaviour, thereby ultimately harming effective competition in the market.

37. KESKE, S., et al, "Financing and group litigation", *New trends in financing civil litigation in Europe. A legal, empirical and economic analysis* (M. Tuil & L. T. Visscher (Eds.), Edward Elgar, 2010, p. 186; VAN DEN BERGH, R. J., "Enforcement of consumer law by consumer associations", *Essays in the law and economics of regulation. In honour of Anthony Ogus* M. Faure & F. Stephen (Eds.), 2008, p. 294; MILLER, G., "Group litigation in the enforcement of tort law", *Research handbook on the economics of torts* J. H. Arlen (Ed.), Edward Elgar, 2013, p. 271.

38. VAN DEN BERGH, R. J., "Enforcement of consumer law by consumer associations", *op.cit.*, p. 294.

In addition to the problems mentioned earlier, another challenge related to the incorporation of representative actions across Europe —not just within the framework of the Digital Markets Act (DMA)— is the risk that qualified entities may abuse this legal instrument to their advantage, potentially harming consumers.³⁹

Such behaviour can manifest as the filing of lawsuits with little chance of success, solely to pressure the defendant company into accepting an out-of-court settlement⁴⁰. This tactic allows the company to save on reputational costs, resources, and time associated with a prolonged judicial process. As noted, this dysfunction is a significant concern for European legislators when considering the introduction of collective litigation mechanisms into European law, particularly any system that resembles American class actions.⁴¹

While the theoretical possibility of abusive behaviour by large American law firms exists, it appears less likely in practice.⁴² The abusive conduct exhibited by these firms does not necessarily stem from a deliberate strategy or coercion to pressure companies into settling out of court for damages inflicted on consumers. Instead, this behavior may be attributed to a variety of factors inherent in American legislation, particularly the “American Rule” regarding legal costs.⁴³

39. Confronted with the issue of potentially excessive or abusive collective actions, experts agree that the most effective legal response is to implement stringent transparency controls on financing from third parties. REVILLA GONZÁLEZ, J. A., “Third party litigation funding: un concepto relativamente nuevo y un negocio que crece rápidamente”, *Derecho y proceso, Libro homenaje al profesor Ramos Méndez*, Barcelona, vol. 3, 2018, p. 2125; DAMIÁN MORENO, J., “Consideraciones en torno a las acciones de representación para la protección de los intereses colectivos de los consumidores”, *ADC*, tomo LXXVI, 2023, fasc. III (julio-septiembre), p. 1168.

40. WAGNER, G. “Collective redress - Categories of loss and legislative options”, *Law Quarterly Review*, vol. 127, 2011, p. 72; HODGES, C. *Note on European Commission green paper on consumer collective redress*, Centre for Socio-Legal Studies, University of Oxford, 2008, p.4.

41. In this regard, the *Resolution of February 2, 2012* (Considering M.2) states that “Notes the efforts made by the US Supreme Court to limit frivolous litigation and abuse of the US class action system (8), and stresses that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions”; or the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress” (*COM/2013/0401 final*) (p.3): “For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in ‘class actions’ as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.”

42. NAGY, C. I., *Collective actions in Europe - A comparative, economic and transsystemic analysis*, Springer, Cham, 2019, p. 37; MILLER, G., “Group litigation in the enforcement of tort law”, *op.cit.*, p. 266; IOANNIDU, M., “Compensatory collective redress for low-value consumer claims in the EU: A reality check”, *European Review of Private Law*, vol. 27, 2019.

43. In the American legal system, each party involved in litigation is responsible for paying its own legal costs, regardless of who wins the case. This principle is known as the “American Rule.” In contrast, the “English Rule” dictates that the losing party must pay all legal costs, including their own and those of the opposing party. This approach is common in many Member States. As a result, the

In contrast to this distinctive American context, which diverges from European traditions, it is evident that in any individual lawsuit, lawyers act as agents representing their clients. However, as agents, lawyers may have interests that differ from their clients' and may make decisions that serve their own interests. Clients often lack complete information and are unable to fully oversee their lawyers' activities, as the costs associated with such supervision can be prohibitively high.

Although this information asymmetry is problematic, it is less pronounced in individual lawsuits than in class actions—such as representative actions—where agency issues are significantly more pronounced.⁴⁴

On the other hand, qualified entities that specialize in the collective defence of consumers who are also end users may emerge in the market. The establishment of such specialized entities would be particularly beneficial in cross-border representative actions. This is because the damages caused by breaches of obligations under the Digital Markets Act (DMA) by gatekeepers inherently have an international impact.

In summary, qualified entities will play a crucial role in bringing representative actions in general, particularly in the context of the DMA. Additionally, the methods used to finance the establishment and ongoing operations of these qualified entities will be especially important for ensuring effective compliance with competition public policies.

In this sense, after analysing the challenges associated with third-party funding of representative actions, it is evident that one of the primary issues that may arise is the potential jeopardization of the effectiveness of public competition policies within the European Union. Beyond the potential damages related to the effective protection of consumers, as outlined in Directive 2020/1828, or the protection of end users within the DMA framework, the lack of effective mechanisms for filing representative actions in the context of the DMA poses a

concern about potential abuse or excessive use of courts through representative actions does not appear to be a significant issue within the European Union. The hesitation of lawmakers to adopt collective litigation may stem from other factors, such as pressure from business lobbyists against implementing this new form of litigation. Notably, the general principle established by the European legislature regarding the allocation of costs in representative actions for compensation states that the losing party must cover the legal costs of the winning party. However, individual Member States may have specific exceptions to this rule. Generally, consumers are not required to pay the legal costs incurred during these proceedings unless they have acted negligently. In such cases, those specific consumers may be held liable for the costs. Comments regarding costs in Spain about the private application of competition can be found in MARTÍ MIRAVALS, J., “Daños, competencia y legitimación activa: la noción de persona perjudicada en la reciente jurisprudencia”, *Daños y competencia. Revisión de temas candentes*, Tirant lo Blanch, 2021, p.95. The author suggests that since most rulings in Spain are only partially upholding the claims of the plaintiffs, it may be appropriate to consider not strictly applying the English Rule. This could potentially allow for the assertion of the full compensation principle.

44. COFFEE, J. C., “Class action accountability: Reconciling exit, voice and loyalty in representative litigation”, *Columbia Law Review*, vol. 100, 2000, pp. 378-379; SILVER, C., “Class actions - Representative proceedings”, *Encyclopedia of law and economics. The economics of crime and litigation* (Bouckaert & G. De Geest (Eds.), Vol. V, Edward Elgar, 2000, p. 215.

significant challenge from a competition policy perspective as the private enforcement of this policy is a powerful tool in combating antitrust practices.

Many of these deficiencies are linked to issues surrounding the financing of these representative actions and the risk that consumer compensation could be redirected to less honorable purposes related to financial speculation. In my view, if representative actions aimed at defending consumers and end users are treated as financial assets, it could distort the original intent of these collective litigation instruments, which is to ensure effective compensation for consumers.⁴⁵

III. THE SPANISH APPROACH

Directive 2020/1828 requires Member States to publish the legal, regulatory, and administrative provisions necessary for compliance by December 25, 2022. Additionally, they must address the application of these new legal instruments by June 25, 2023, at the latest.⁴⁶ However, despite this mandate, the Spanish legislator has not timely transposed Directive 2020/1828, resulting in a delay of over two years, and the matter is still pending in the parliamentary process.

Initially, the transposition of Directive 2020/1828 was conducted individually.⁴⁷ Later, the Spanish legislator decided to integrate this transposition into the legal

45. This opinion represents just one perspective in the ongoing debate regarding the impact of third-party litigation funding on representative actions. It is important to acknowledge that there are opposing viewpoints on this issue. For example, Prof. Ruiz Peris argues that it is more beneficial for the entire system to allow litigation funds to gain from the collective exercise of representative actions, rather than permitting the profits from wrongdoing to remain with the infringer responsible for such illicit activities (RUIZ PERIS, J.I., "Obtaining effective application of competition law", *Formación intensiva en acciones de daños por infracción de las normas de defensa de la competencia (In-depth training on current issues in competition damages claims)*, Atelier, p. 24, 2023). In this sense, I would like to express my gratitude to Prof. Ruiz Peris, Prof. Herrero Suárez and Prof. Sousa Ferro for their insightful comments during the *IV Valencia International Meeting on Competition Law (VIM) 2024*, where this work was firstly presented.

46. Art. 24 Directive 2020/1828.

47. The first text prepared was the Preliminary Draft Law on representative actions for the protection of collective interests of consumers, published by the Ministry of Justice on January 9, 2023, accessible at the following link: <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/Anteproyecto%20de%20Ley%20acciones%20representativas.pdf>. Three of the most significant works carried out in this regard have been the Report on the preliminary draft of the Law on representative actions for the protection of the collective interests of consumers, approved by the Agreement adopted by the Plenary Session of the General Council of the Judiciary at its meeting on April 27, 2023 (accessible at: <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Informes/Informe-sobre-el-anteproyecto-de-Ley-de-acciones-de-representacion-para-la-proteccion-de-los-intereses-colectivos-de-los-consumidores>), Opinion 1/2023 on the Preliminary Draft Law on Representative Actions for the Protection of the Collective Interests of Consumers, approved at the ordinary session of the Plenary Session of the Economic and Social Council of Spain on January 25, 2023 (accessible at: <https://www.ces.es/documents/10180/5271672/Dic012023.pdf/173abe9c-0247-07a7-f3b8-26f38614244f>), as well as the Report of the Fiscal Council on the draft law on representative actions for the protection of the collective interests of consumers, dated April 3, 2023, available at the following link: <https://www.>

framework through the processing of the *Organic Law Draft on measures regarding the efficiency of the Public Justice Service and collective actions for the protection and defence of the rights and interests of consumers and users*⁴⁸. This Organic Law Draft addresses a range of important topics related to the organization, governance, and resolution of legal conflicts. These include the reform of the justice system, the regulation of appropriate means for resolving disputes through non-jurisdictional approaches, and collective actions aimed at protecting and defending the rights and interests of consumers and users. It also includes significant modifications to numerous legal texts, such as the Organic Law of the Judiciary, the Civil Procedure Law, the Criminal Procedure Law, the Mortgage Law, the Consolidated Text of the General Law for the Defence of Consumers and Users, the Law on Demarcation and Judicial Plant, the Law on Unfair Competition, and the Law on Voluntary Jurisdiction, among others.

Notably, regarding collective actions, the new Organic Law Draft incorporates several changes compared to the initial Draft. One significant change is the terminology used to describe its regulatory focus. The term “representative actions,” which accurately reflects the translation of the content in Directive 2020/1828, has been replaced with “collective actions.” In my opinion, this change may not be the most suitable choice, as it could lead to confusion with other legal processes within the Spanish legal system.

According to the new regulations, the current Register of General Contracting Conditions will also serve as the register for collective actions. Additionally, the deadlines for certain procedural actions will be extended. The cases in which an opt-in system may be established will be reduced from 5.000 euros to 3.000 euros per beneficiary. The court may require the plaintiff to provide the financing contract during a hearing that includes the financier, where the implications for consumers and users will be examined. Furthermore, if there are unidentified beneficiaries, the distribution will be handled by a liquidator, who will be responsible for providing accounts and will be subject to specific liabilities.

In relation to the current study, it is essential to explore the opportunities that the Organic Law Draft presents for filing collective actions under the framework of the DMA.

It appears that, although not explicitly stated, the Spanish legislator has chosen to encompass claims for damages arising from anti-competitive behaviour within the scope of collective actions. This inference is drawn from the content of the Statement of Reasons accompanying the Organic Law Draft.⁴⁹ Furthermore,

fiscal.es/documents/20142/290789/INFORME+CF+APL+Acciones+consumidores_firmado.pdf/bc3fe63e-8d1f-be84-02a5-5566fb3c5460?t=1681115101053

48. 121/000016 Organic Law Draft on measures regarding the efficiency of the Public Justice Service and collective actions for the protection and defense of the rights and interests of consumers and users, of March 22, 2024. Accessible at: https://www.congreso.es/public_oficiales/L15/CONG/BOCG/A/BOCG-15-A-16-1.PDF

49. “A broad scope of application is proposed, encompassing actions against any type of infringement that harms the collective rights and interests of consumers and users. This includes the provisions of the Directive, which is detailed in its annex and refers to a wide range of regulations

regarding potential nuances that the new legislative text could introduce to facilitate the filing of collective actions in the context of the DMA, it does not seem that the Spanish legislator has considered any specific issues.

The new legal framework established by the Organic Law Draft introduces a dual system to protect against damages and losses suffered by indirect buyers.⁵⁰ On one hand, it aims to safeguard consumers by enabling collective actions. On the other hand, it provides procedural channels that allow companies and small to medium-sized enterprises (SMEs) to individually seek compensation for damages in court.

Despite past challenges with collective actions⁵¹, this new framework creates a dual protection system based on the characteristics of the claimant. For operators who do not fit the strict definition of consumers and wish to file claims in court, it is essential to navigate through the designated procedural channels. These primarily include the objective-subjective accumulation of actions⁵² and the transfer of claims to specialized entities that focus on recovering damages.⁵³

The traditional approach to the accumulation of actions may not seem very practical in the context of consumer damage claims. However, the new legal

resulting from the European Union's legislative activities in various areas related to consumer relationships. Additionally, it covers any other violations of consumer or user rights that are not specifically mentioned in the annex." (The translation is ours).

50. The current collective action system outlined in Article 15 of the Civil Procedure Act has a notable flaw: its applicability is limited to consumers. This exclusion means that companies, small and medium-sized enterprises (SMEs), and other non-consumer operators are left out of its provisions. MARTÍN PASTOR, J., "Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia", *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, Aranzadi, 2016, p. 191; NÚÑEZ OSORIO, M.I., "Las demandas colectivas de los consumidores por daños y perjuicios derivados de ilícitos anticompetitivos en Europa y en España", *Derecho de la competencia, desafíos y cuestiones de actualidad*, Marcial Pons, 2018, p. 506.

51. The failure of class actions under Article 15 of the Civil Procedure Law in the realm of private competition enforcement can be attributed to several factors. As Vela Torres points out: "(i) the low financial compensation that individual consumers can obtain after a judgment is executed; (ii) the lack of experience among legal professionals, particularly lawyers, in handling this type of action; and (iii) the inherent challenges in constructing and managing a class action effectively." VELA TORRES, P.J., "Experiencia de la Sala Primera del Tribunal Supremo en aplicación privada de la competencia", *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, Aranzadi, 2016, p.68.

52. On the objective-subjective accumulation of actions in the field of private enforcement of competition in the Spanish law, *vid.* VILATA, S., "Acumulación de acciones", *Daños y competencia. Revisión de cuestiones candentes*, Tirant lo Blanch, 2021, pp. 136-146; MARTÍN PASTOR, J., "Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia", *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, Aranzadi, 2016, pp. 191-202.

53. From a theoretical perspective, there are three legal mechanisms that enable the defense of the collective interests of indirect buyers: the transfer of the right to claim to specialized entities that can pursue legal action in court, the accumulation of actions or collective instruments. Within this last mechanism, three distinct modalities can be identified based on how the collective is defined: class actions, collective actions, and representative actions. A brief examination of all these modalities can be found in GARCÍA-PERROTE MARTÍNEZ, I., *La repercusión del sobre coste y la compensación de los daños causados por un cártel*, Comares, 2022, pp. 174-178.

framework allows consumers not only to seek compensation for their damages through collective actions but also to transfer their claim rights to qualified entities.

As a result, we might see a significant increase in the inclusion of clauses that prohibit the transfer of claim rights to third parties (*pactum de non cedendo*) in contracts, both with consumers and between companies. Nevertheless, the effectiveness of these clauses is likely to vary depending on the type of contract in which they are included. Specifically, non-transfer agreements in contracts with consumers are expected to be deemed void⁵⁴, whereas such agreements in contracts between companies could be enforceable, thereby restricting the claim options for those businesses.

One important issue that may undermine the effectiveness of collective actions in Spain, particularly those involving compensatory measures, is their infrequent use. This rarity can be attributed to the lack of qualified entities capable of managing these cases, or to the limited number of organizations able to shoulder the high costs associated with such litigation. The risk of underutilization is especially concerning in cross-border cases, which often carry significant complexity. This is particularly worrisome in the context of potential collective actions within the framework of DMA, as this legal avenue seems to hold the most promise for addressing these concerns.

Depending on how financing for these cases evolves in other Member States, the market for collective actions could become more established. However, there is a risk that it might turn into a tool for speculation by large investment funds. If this occurs, it could ultimately distort the process of compensating consumers for damages caused by anti-competitive practices or other offenses, leaving their legitimate right to compensation unfulfilled.

The experience in Spain indicates that the mechanisms established in the LEC (Law on Civil Procedure) for collective litigation in consumer matters have not been adequate. In many cases, these claims have been rejected, although the legal framework still allows for judicial protection through the accumulation of actions. One notable example is the failed collective procedure initiated under Article 15 of the LEC. In this case, the consumer association *Ausbanc* sought to obtain compensation for damages caused to consumers due to the ruling in case T-336/07, *Ausbanc vs. Telefónica*.

After being fined 151 million euros, Telefónica was sued by *Ausbanc*, which claimed a total of 458 million euros in damages. The basis for the claim was the reduction of margins in ADSL prices charged to competing wholesale companies. However, the court determined that *Ausbanc* did not have the necessary standing to pursue the action because it was not representative of the affected consumers. As a result, the claim was dismissed, with the option remaining for each individual affected party to act on their own.

54. NOWAG, J., TARKKILA, L., "How much effectiveness for the EU Damages Directive? Contractual clauses and antitrust damages actions", *Common Market Law Review*, Vol. 57, 2020, pp. 469-471.

At the European level, consumers have generally struggled to successfully claim damages related to anti-competitive practices. A study conducted by Professor Sousa Ferro analyses the effectiveness of consumer litigation in seeking damages from such offenses across Europe. The findings suggest that, except for Portugal, the Netherlands, and to a lesser extent Slovenia and Norway, most of the countries analysed still lack effective mechanisms for mass litigation that would allow consumers to claim damages for anti-competitive offenses.⁵⁵

In summary, the text outlining the transposition of Directive 2020/1828 is still pending processing. Since this regulatory framework is part of an organic law, the effective transposition of the Directive is expected to take considerable time in Spain.

IV. FINAL REMARKS

For several decades, collective litigation has been recognized—at least in theory—as the most effective mechanism for defending the interests of consumers and users. The advantages of utilizing collective litigation are evident when compared to individual lawsuits. However, the challenges posed by new digital services offered by large technology platforms, particularly for consumers, are more recent and present a series of issues that need to be addressed.

In this context, Directive 2020/1828 was introduced, aiming to establish a new legal framework that requires Member States to implement collective litigation mechanisms within their legal systems to protect consumer rights. Additionally, the European legislator has developed the DMA, a groundbreaking instrument on an international scale that seeks to regulate the power that gatekeepers can exert in the digital domain by imposing various obligations on these operators.

In the DMA context, the primary concern regarding the private enforcement of competition law relates to actions aimed at compensating intermediaries for damages incurred due to gatekeepers' failure to comply with new obligations established under this regulation. Specifically, the focus is on individual litigation between business owners (*b2b litigation*), rather than remedies designed to repair other sort of damages.

Due to the reasons stated above, small and medium-sized enterprises (SMEs) are not included in the scope of Directive 2020/1828. As a result, these operators cannot pursue representative actions in cases of potential violations of the DMA. Nonetheless, they still have the option to pursue individual litigation or combine their actions, although this comes with certain disadvantages for the plaintiff.

55. In this context, the author highlights two key elements that differentiate the creation of effective systems: the implementation of an opt-out system and the availability of third-party financing (or *quota litis*). SOUSA FERRERO, M., "Consumer antitrust private enforcement in Europe", *Journal of European Competition Law & Practice*, Vol. 13, No. 8, 2022, pp. 578-593.

Furthermore, the DMA explicitly allows for the possibility of claiming damages through representative actions as outlined in Directive 2020/1828 against gatekeepers that harm or may harm the collective interests of consumers. However, while the legislator intended to incorporate the mechanism of representative litigation for consumers within the DMA framework, it provides little further guidance on the matter, merely referencing the legal regime established by the Directive.

Another critical concern is the financing of qualified entities. Directive 2020/1828 offers various funding mechanisms to address this issue. Financial support for a qualified entity's operations can arise from contributions by affected consumers, corporate donations as part of social responsibility initiatives, targeted public aid, or third-party litigation funding.

Nevertheless, the option of third-party financing for representative actions presents significant challenges, notably the risk of conflicts of interest. While Directive 2020/1828 introduces safeguards to bolster the independence of these actions and minimize potential conflicts, a fundamental issue persists: the risk that the original intent of representative actions could be compromised — the protection of consumer and user rights—, reducing them to mere financial instruments.

Finally, in relation to the Spanish case, it appears that regarding potential nuances that the *Organic Law Draft on measures regarding the efficiency of the Public Justice Service and collective actions for the protection and defence of the rights and interests of consumers and users* could introduce to facilitate the filing of collective actions in the context of the DMA, it does not seem that the Spanish legislator has considered any specific issues.

V. BIBLIOGRAPHY

- AGULLÓ AGULLÓ, D., "The Interplay of Data, Consumer and Private International Law Rules in the Area of Collective Access to Justice in the European Union," *Cuadernos de Derecho Transnacional*, Vol. 14, n.º. 2, 2022, pp. 71-91.
- COFFEE, J. C., "Class action accountability: Reconciling exit, voice and loyalty in representative litigation", *Columbia Law Review*, vol. 100, 2000, pp. 370-439.
- DAMIÁN MORENO, J., "Consideraciones en torno a las acciones de representación para la protección de los intereses colectivos de los consumidores", *ADC*, tomo LXXVI, 2023, fasc. III (julio-septiembre), pp. 1151-1178.
- ESTEVAN DE QUESADA, C., "Data-protection related abuses by digital platforms: a Spanish enforcement alternative", *New European Competition Trends in Digital Markets*, Atelier, 2024, pp. 281-303.
- FAURE, M., WEBER, F., "Dispersed losses in tort law - An economic analysis", *Journal of European Tort Law*, vol. 6, (April) 2015.
- GARCÍA-PERROTE MARTÍNEZ, I., *La repercusión del sobrecoste y la compensación de los daños causados por un cártel*, Comares, 2022.
- HODGES, C.C., "Collective redress: the need for new technologies", *Journal of Consumer Policy*, 42 (1), 2019, pp. 59-90.

- HODGES, C.C., *Note on European Commission green paper on consumer collective redress*, Centre for Socio-Legal Studies, University of Oxford, 2008.
- HORNKOHL, L., RIBERA MARTÍNEZ, A., *Collective Actions and the Digital Markets Act: A Bird Without Wings* (November 19, 2023). Available at SSRN: <https://ssrn.com/abstract=4637661> or <http://dx.doi.org/10.2139/ssrn.4637661>
- IOANNIDU, M., “Compensatory collective redress for low-value consumer claims in the EU: A reality check”, *European Review of Private Law*, vol. 27, 2019, pp. 1367-1388.
- KESKE, S., et al, “Financing and group litigation”, *New trends in financing civil litigation in Europe. A legal, empirical and economic analysis* (M. Tuil & L. T. Visscher (Eds.), Edward Elgar, 2010, pp. 57-91.
- KOCEV, L., “Actions for Damages for Breach of EU Competition Law – Efficient Market Protection through Private Enforcement - With Emphasis on North Macedonia,” *EU and Comparative Law Issues and Challenges*, Series 4, 2020, pp. 896-893.
- LÓPEZ JIMÉNEZ, J.M., “La protección de los consumidores y las acciones de representación: una primera aproximación a la Directiva (UE) 2020/1828”, *La Ley*, N.º 9830, Sección Tribuna, 15 de abril de 2021.
- MARTÍ MIRAVALS, J., “Daños, competencia y legitimación activa: la noción de persona perjudicada en la reciente jurisprudencia”, *Daños y competencia. Revisión de temas candentes*, Tirant lo Blanch, pp. 57-99, 2021.
- MARTÍN PASTOR, J., “Las acciones colectivas en España: especial referencia a la aplicación privada de la competencia”, *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, Aranzadi, 2016, pp. 187-230.
- MILLER, G., “Group litigation in the enforcement of tort law”, *Research handbook on the economics of torts* J. H. Arlen (Ed.), Edward Elgar, 2013, pp. 262-278.
- NAGY, C. I., *Collective actions in Europe - A comparative, economic and trans-systemic analysis*, Springer, Cham, 2019.
- NOWAG, J., TARKKILA, L., “How much effectiveness for the EU Damages Directive? Contractual clauses and antitrust damages actions”, *Common Market Law Review*, Vol. 57, 2020, pp. 433-474.
- NÚÑEZ OSORIO, M.I., “Las demandas colectivas de los consumidores por daños y perjuicios derivados de ilícitos anticompetitivos en Europa y en España”, *Derecho de la competencia, desafíos y cuestiones de actualidad*, Marcial Pons, 2018, pp. 498-508.
- REVILLA GONZÁLEZ, J. A., “Third party litigation funding: un concepto relativamente nuevo y un negocio que crece rápidamente”, *Derecho y proceso, Libro homenaje al profesor Ramos Méndez*, Barcelona, vol. 3, 2018, pp. 2115-2128.
- RICKARD, L. A., TERZINO, M. H., “Collective action, collective reaction: what in-house lawyers should know about European class actions”, *International In-House Counsel Journal*, 12 (48), 2019, pp. 1-7.
- RUIZ PERIS, J.I., “Obtaining effective application of competition law”, *Formación intensiva en acciones de daños por infracción de las normas de defensa de*

- la competencia (In-depth training on current issues in competition damages claims)*, Atelier, 2023, pp. 15-25.
- SILVER, C., "Class actions - Representative proceedings", *Encyclopedia of law and economics. The economics of crime and litigation* (Bouckaert & G. De Geest (Eds.)), Vol. V, Edward Elgar, 2000, pp. 197-240.
- SOUSA FERRERO, M., "Consumer antitrust private enforcement in Europe", *Journal of European Competition Law & Practice*, Vol. 13, No. 8, 2022, pp. 578-593.
- SCHREIBER, T., SEEGER, M., "Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective", Ed. Global Competition Review, 2nd edition, 2020, pp. 28-38.
- VAN DEN BERGH, R. J., "Enforcement of consumer law by consumer associations", *Essays in the law and economics of regulation. In honour of Anthony Ogus* M. Faure & F. Stephen (Eds.), 2008, pp. 279-305.
- VELA TORRES, P.J., "Experiencia de la Sala Primera del Tribunal Supremo en aplicación privada de la competencia", *La compensación de los daños por infracción de las normas de competencia tras la Directiva 2014/104/UE*, Aranzadi, 2016, pp. 53-76.
- VILATA, S., "Acumulación de acciones", *Daños y competencia. Revisión de cuestiones candentes*, Tirant lo Blanch, 2021, pp. 135-154.
- VISSCHER, L. L., FAURE, M. M., "Law and economics perspective on the EU Directive on representative actions", *Journal of Consumer Policy*, 44 (3), 2021, pp. 455-488.
- WAGNER, G., "Collective redress - Categories of loss and legislative options", *Law Quarterly Review*, 127, 2011, pp. 55-82.

COMPETITION RISKS AND DAMAGE ACTIONS IN STREAMING PLATFORMS: NFL SUNDAY TICKET LAWSUIT AND MORE

Miquel Aznar Company

Pre-Doctoral Researcher

Universitat de València

ABSTRACT: Streaming platforms have become a reality that has transformed the way audiovisual content is consumed. These platforms, through the application of Over-The-Top technology, offer the user different functionalities to access audiovisual content with just an internet connection. Due to their digital nature, they present a series of competition risks typical of this sector, such as vertical integration or tying. In this paper, these risks will be analysed, as well as different judicial procedures that are being developed in the United States on the subject, which offer us an insight into the application of competition law to this type of platforms.

Keywords: Antitrust, Streaming, Digital Platforms, Private enforcement.

SUMMARY: I. INTRODUCTION. II. DIFFERENT APPLICATIONS OF STREAMING TECHNOLOGY. III. POTENTIAL COMPETITION PROBLEMS. A. Tying and bundling. B. Vertical Integration. C. Horizontal integration (And Cooperation) D. Most Favoured Nation Clauses. IV. ONGOING PROCEEDINGS A. Heather Biddle v. The Walt Disney Company. 1. Case facts. 2. Relevant Market and Theory of Harm. 3. Antitrust Standing. 4. Concluding Remarks. B. National Football League's Sunday Ticket Antitrust Litigation. 1. Case Facts. 2. Relevant Market and Theory of Harm. 3. Antitrust Standing. 4. Concluding Remarks. C. FuboTVInc v. The Walt Disney Company. 1. Case Facts. 2. Market Definition and Theory of Harm. 3. The injunctive relief decision. 4 Concluding Remarks. V. CONCLUSION. BIBLIOGRAPHY

I. INTRODUCTION

Digital platforms have radically transformed society's behaviour. Since their irruption, many of our consumption habits have changed completely, with our behaviour being very different to what it was before the massification of the use of digital technologies.

The audiovisual sector has not been unaffected by this phenomenon. In this sense, the era dominated by broadcasting via antennae now seems very distant. But the technologies that transformed the sector a few decades ago, such as cable, satellite and digital television, are also seeing their market position decline in favour of a technology that has managed to take the lead in the market over the last ten years: streaming. Let's take a look at a series of data from the United States, the main television market, which provides detailed information on the above statements.

In the United States, streaming reached record highs in terms of its presence in audiovisual consumption during the second quarter of 2024. Thus, 41% of television content consumption was made through this technology¹. This percentage represents an increase of 3% compared to the previous year²; an increase that rises exponentially when compared to the share obtained at the beginning of 2020, which placed the percentage of consumption via streaming at 19%³. This increase in consumption is a direct consequence of its proliferation among users, as evidenced by the fact that 99% of US households have a subscription to a streaming service⁴.

These figures for the increase in streaming consumption are accompanied by declines in the consumption methods that have traditionally dominated the market, namely broadcast television and cable television⁵. Thus, in 2023, for the first time, TV consumption via these two channels fell below 50% of the total⁶, a trend that continues today⁷. The decline is even more intense in relation to cable

* This chapter is the result of the tasks developed in the frame of the research projects "Concentración, Daños, Abuso y Cooperación en los Mercados Digitales" PID2021-128111OB-I00, del Ministerio de Ciencia e Innovación; y "Competition Power Control" CIAICO/2021/202, de la Conselleria de Innovación, Universidades, Ciencia y Sociedad Digital de la Generalitat Valenciana.

1. NIELSEN, "The Gauge: T.V. viewing trends in the US", nielsen.com, August 2024, available at: <https://www.nielsen.com/data-center/the-gauge/>.

2. Ibid.

3. PORTER, R., "Streaming TV Usage Nearly Doubles in Less Than 2 Years, Nielsen Says", The Hollywood Reporter, 11th February 2020, available at: <https://www.hollywoodreporter.com/tv/tv-news/streaming-tv-usage-doubles-2-years-nielsen-says-1278637/>.

4. ALLEN, A., DURRANI S., "Top Streaming Statistics In 2024", Forbes.com, 15th August 2024, available at: <https://www.forbes.com/home-improvement/internet/streaming-stats/>.

5. For an analysis of the replacement of cable platforms by streaming ones see: MALONE, J.B., et Alt., "Is OTT Video a Substitute for TV? Policy Insights from Cord-Cutting", The Review of Economics and Statistics, vol. 105, 2023, pp. 1615-1623 and LEE, S., YAMATSU, T., "Multiple Relationships between Streaming and Linear TV: Examining Media Substitution Theory Using Big Data", Journal of Broadcasting & Electronic Media, vol. 67, 2024, p. 442-465.

6. VALINSKY, J., "For the first time, cable and broadcast makes up less than half of TV viewing", CNN.com, 15th August 2023, available at: <https://edition.cnn.com/2023/08/15/media/cable-broadcast-tv-decline-nielsen-report/index.html>.

7. Ibid. at 1.

TV consumption, whose subscriber figures are falling at a dizzying pace, highlighting the critical situation of the sector⁸.

We can therefore affirm that streaming, a technology that burst onto the market a decade ago, is no longer a trend or a novelty, but the reality of the market. But what does streaming technology applied to television consumption comprise?

II. THE DIFFERENT APPLICATIONS OF STREAMING TECHNOLOGY

Streaming technology applied to audiovisual consumption is characterised by the application of over the top (OTT) technology, which allows audiovisual content to be transmitted over the internet⁹. This allows platforms to broadcast content without the need to have their own network, as is the case with traditional television or satellite, where prior access to these structures was required in order to operate in the market¹⁰.

Streaming technology is not used in a unique way, but its different applications allow for differentiated functions, which can give rise to differentiated models¹¹. The variation between the different models is crucial in order to be able to determine whether there is a single market or a plurality of markets within the use of streaming technology for audiovisual consumption.

Video on demand (VoD) is the modality in which the main platforms that apply streaming technology to the distribution of audiovisual content operate¹². Through the network, the platforms make available to the consumer a huge catalogue of series and films, which are available for the user to consume whenever he/she wishes¹³. The latter has been the great revolution implemented by streaming platforms, which allows access to premium content in an easier and more affordable way than the video-on-demand platforms of television that had been dominating the market¹⁴.

When the model described above is channelled through a periodic payment, we are faced with the so-called Subscription Video on Demand (SVOD), in which

8. ADGATE, B., "With Cord-Cutting, Cable TV Industry Is Facing Financial Challenges", Forbes.com, 10th October 2023, available at: <https://www.forbes.com/sites/bradadgate/2023/10/10/with-cord-cutting-cable-tv-industry-is-facing-financial-challenges/>.

9. COMISIÓN NACIONAL DE LOS MERCADOS Y DE LA COMPETENCIA, Caracterización Del Uso De Algunos Servicios Over The Top En España (Comunicaciones Electrónicas Y Servicios Audiovisuales), p. 7. Available at: <https://www.cnmc.es/sites/default/files/1533234.pdf>.

10. Ibid.

11. Platform models vary depending on how they monetise their content. See: CHALABYJ.K., "The streaming industry and the platform economy: An analysis", Media Culture and Society, vol. 46, 2023, p. 556.

12. Ibid.

13. CHALABYJ.K., "The streaming...", op. cit., p. 557.

14. CHALABYJ.K., "The streaming...", op. cit., p. 558.

the user, in exchange for a subscription, generally monthly, has access to the platform's content¹⁵. This is the basic model implemented by the main streaming platforms such as Netflix, PrimeVideo, Disney+ Hulu or HBO Max, platforms that lead the market in terms of number of subscribers¹⁶.

Other platforms opt for the model based on the inclusion of advertising, which is called Advertising Video on Demand (AVOD). In this case, the user can access the content free of charge, but before and during his session, he must view a series of advertisements on a mandatory basis¹⁷. Thus, the platform earns its revenue by selling these advertising placements to potential advertisers¹⁸.

In recent years, the main platforms on the market, such as Netflix or PrimeVideo, have launched a hybrid model that combines the main features of the two previous models¹⁹. In this way, the user must continue to pay a subscription to access the content, but the amount to be paid is lower in those plans that include advertising during viewing²⁰.

Although video on demand has been the main application of streaming technology to audiovisual consumption, in recent years a new functionality has been emerging that focuses on live consumption over the Internet²¹. Thus, through an internet connection, the user can access a multitude of live channels, in a similar way to traditional cable television but in a simpler way through a network connection²². This type of platform is called VMVPD²³ (Virtual MultiChannel Video Programming Distribution) and among the most prominent of this type are YoutubeTV and Hulu+ liveTV²⁴.

15. MULLA, T., "Assessing the factors influencing the adoption of over-the-top streaming platforms: A literature review from 2007 to 2021", *Telematics and Informatics*, vol. 69, 2022, p.5.

16. Netflix is the platform with higher number of subscribers, with 269 millions, followed by PrimeVideo with slightly over 200 millions. See: NICKINSON, P., "The 10 most popular streaming services, ranked by subscriber count", *DigitalTrends*, 2nd October 2024, available at: <https://www.digitaltrends.com/home-theater/most-popular-streaming-services-by-subscribers/#dt-heading-5-paramount-712-million>.

17. MULLA, T., "Assessing the factors...", op. cit., p. 5.

18. CHALABYJ.K., "The streaming...", op. cit., p. 556.

19. CHALABYJ.K., "The streaming...", op. cit., p. 557.

20. For example, at Netflix, the price of the basic subscription without ads is 15.49 USD per month, reducing to 6.99 USD for the option that includes ads. See: Netflix Help Centre, 'Plans and Price', available at: <https://help.netflix.com/en/node/24926>.

21. For a basic insight on VMVPD see: MUTHUSWAMY, B., SANKARANARYANAN, S., "Virtual MultiChannel Video Programming Distribution: The game, the players and the playing field", *Infosys*, available at: <https://www.infosys.com/industries/communication-services/white-papers/documents/virtual-multichannel-video-programming.pdf>.

22. RODRÍGUEZ CANFRANC, P., "Hacia un mercado televisivo post Netflix", *Fundación Telefónica*, available at: <https://telos.fundaciontelefonica.com/?pdf=6435>.

23. Symphony AI, "Virtual Multichannel Video Programming Distributors (vMVPDs)," available at <https://www.symphonyai.com/glossary/media/vmpd-virtual-multichannel-video-programmingdistributor/>.

24. Youtube TV has more than 18 million subscribers, while Hulu+LiveTV numbers are set at 11 million. See: STOLL, J., "Number of viewers of selected virtual multichannel video programming distributors (vMVPD) in the United States in 2024", *Statista*, 10th April 2024, available at: <https://www.statista.com/statistics/1460166/number-viewers-virtual-multichannel-video-programming-distributors/>.

In short, streaming technology can be applied in different ways to audiovisual consumption, giving rise to different products that fulfil different functionalities. However, despite their differences, they have a series of similarities, among which we find the fundamental role of digital technology in their development. As a result of their digital nature, they also share a number of potential competition issues, which will be analysed in the following section.

III. POTENTIAL COMPETITION PROBLEMS

Digital markets present a number of behaviours that create a risk for effective competition in the market. Due to the digital nature of streaming technology, these risks are also present in the market of audiovisual consumption via streaming technology. Among these practices we should highlight the following, as these ones represent the most risky practices for an effective competition in the market.

A. Tying and bundling

In relation to tying, this practice can be found when the consumer purchases a product that is accompanied by an additional product, which must generally be purchased simultaneously by the consumer²⁵. Tying can take different forms, depending on whether it is structured technically or contractually. The products can, however, be purchased separately, but on less advantageous terms²⁶. Bundling, on the other hand, is a more restricted type of tying, as in this case the consumer can only purchase the products in the form of a joint package²⁷.

In relation to audiovisual content platforms, the most common practice is bundling, whereby they offer a series of content that must be acquired in joint packages, without the possibility of acquiring them separately. In this sense, SVOD services such as Netflix or HBO Max include a set of series and films that consumers can access, without the possibility of configuring their subscription with a list of films or series that they want to watch and pay individually for the content consumed. In VMVPD platforms, which replicate the model of cable TV MVPDs, the consumer purchases channels in the form of packages, without being able to purchase the channels that make up the different packages individually.

Mention should also be made of so-called mixed-bundling. This is characterised by the possibility of acquiring the products as separate packages or as a bundle, offering economic advantages to those who choose to purchase the bundle²⁸. An

25. For an analysis of tying from the Competition Law perspective, see: BAILEY, D., WHISH, R., *Competition Law*, Oxford, Oxford, 2015, pp. 705-713.

26. BAILEY, D., WHISH, R., *Competition Law...*, ob. cit. p. 705.

27. Ibid.

28. Ibid.

example of this type of behaviour can be found in the NBA League Pass streaming service, which allows NBA fans to subscribe to a subscription that includes only one team's games (separate package) or to purchase the full package of all NBA games.

These practices may be pro-competitive, generating a number of efficiencies such as economies of scale, positive network effects or reduced access costs or quality gains²⁹. However, they also generate a number of risks, in particular when the operator adopting such practices enjoys a dominant position in the market. In such cases, the use of tying and bundling creates a risky situation, as it may lead to foreclosure of competitors from the market, the imposition of entry barriers or the extraction of revenue from consumers³⁰.

B. Vertical integration

Another of the risks present in digital markets, and especially in the use of streaming for audiovisual consumption, is the vertical integration of operators³¹. Thus, operators with a dominant position in one of the stages of the value chain seek to transfer their position to the other parts of the product production and distribution phase. In the audiovisual streaming market, the key points in the value chain are the creation of content and its distribution through the internet³². It is therefore not surprising that the main platforms operating in the market come from these two sectors, whether they are large film studios, such as Disney+ or Paramount+, or large technology companies, such as AppleTV or PrimeVideo³³. It is the latter that present the clearest examples of vertical integration, investing large amounts of capital to create their own productions, thus developing the platform at all stages of the value chain³⁴. This integration is often associated with another risk present in the market, namely content exclusivity³⁵. As a result, platforms these own productions are only distributed through the operator's platform³⁶. This behaviour may also lead to the creation of entry barriers, as new streaming platforms will have to make higher investments to acquire content³⁷.

29. BAILEY, D., WHISH, R., *Competition Law...*, ob. cit., p. 706.

30. BAILEY, D., WHISH, R., *Competition Law...*, ob. cit., p. 707.

31. BAILEY, D., WHISH, R., *Competition Law...*, ob. cit., pp. 632-633.

32. CHALABYJ.K., "The streaming...", op. cit., p. 564.

33. CHALABYJ.K., "The streaming...", op. cit., p. 565.

34. NORRIS, M.E., "Now Streaming: How Streaming Streaming Services Are Following in the Footsteps of Hollywood's Golden Age", *University of Miami Business Law Review*, vol. 31, 2023, p. 178.

35. VISHNU, S., "Copyright and...", op. cit., p. 31.

36. NORRIS, M.E., "Now Streaming...", op. cit., p. 179.

37. CHO, C., "Competition Among Video Streaming Services", *Congresional Research Service*, 2020, p.5 available at: <https://sgp.fas.org/crs/misc/R46545.pdf>

Vertical integration may also come from the technological side of streaming platforms³⁸. Thus, telecommunications companies can provide their platforms with faster network traffic capacity than their competitors in times of congestion³⁹. In the case of cloud technology companies, they could prevent access to competing platforms to their servers that allow them to store their catalogue of audiovisual content⁴⁰. Such vertical integration practices may be anti-competitive, as they aim to reduce competition in the market by extending activities further down the value chain⁴¹.

C. Horizontal integration. (And Cooperation)

Horizontal integration, through the merger of two operators operating at the same point in the value chain, also poses a risk in the streaming market. There have been a number of mergers, such as the merger between Warner Bros and Discovery or between Paramount and Skydance (the latter in the pipeline), which highlight the reality of this risk. Among the effects that these mergers may produce are notably the possibility of price increases by the new operator, a reduction of available content, as well as the reduction of incentives to innovate on the part of the platforms⁴². The risks of horizontal integration are not limited to pure mergers and acquisitions, but can also take the form of joint ventures, in which we will be talking about horizontal cooperation⁴³. By them traditional TV operators combine their packages in the creation of a new streaming service that combines their linear offerings, as exemplified by the launch of VenuSports, a streaming platform that combines the sports broadcasting rights of the three main players in the area such as Disney, Fox and Warner⁴⁴.

D. Most Favoured Nation Clauses

Another risk in the audiovisual streaming sector is the use of Most Favoured Nation (MFN) clauses, whose presence is particularly relevant in relation to the

38. CHALABYJ.K., "The streaming...", op. cit., p. 565.

39. CHO, C., "Competition Among...", op. cit., p. 10.

40. CHO, C., "Competition Among...", op. cit., p. 11.

41. NORRIS, M.E., "Now Streaming...", op. cit., p. 179.

42. NORRIS, M.E., "Now Streaming...", op. cit., p. 181.

43. The European Union Merger Regime gives joint ventures the consideration of a concentration when it functions as an independent entity performing on a lasting basis. See: BAILEY, D., WHISH, R., *Competition Law...*, ob. cit., p. 706.

44. NYLEN, L., SHIELDS, T., "Disney-Fox-Warner Streaming Deal Faces DOJ Antitrust Review", *Bloomberg Law*, 15th February 2024, available at: <https://news.bloomberglaw.com/antitrust/disney-fox-warner-streaming-deal-faces-doj-antitrust-review>

VMVPD market⁴⁵. Through these clauses, a streaming distributor can replace the contractual conditions that it has determined with its content provider with those that this provider has guaranteed to a third party, often without having to fulfil the requirements that the provider demands of the latter, in the case of unconditional MFN clauses, or at least also having to modify its conditions in order to exercise the clause, in the case of conditional MFN clauses.

MFNs, although in some cases pro-competitive, can also generate anti-competitive effects⁴⁶. Thus, the presence of NPMs in contracts between content providers and large distributors reduces the incentives of the former to negotiate agreements with new entrants, as the latter will demand a lower price⁴⁷. In the event that the provider accepts, it would be disadvantaged because the large operator could demand the same terms and conditions as the new entrant⁴⁸. In this way, market conditions are established that preserve the status quo, while generating other anti-competitive effects, such as the loss of innovation or the creation of barriers to the entry of new products and formats⁴⁹.

The use of such clauses also generates horizontal cooperation risks, which may affect the final price paid by the consumer⁵⁰. In this sense, the inclusion of MFN clauses may allow suppliers-distributors who have their own production to charge prices above market value to other distributors who wish to have this content. In this way these distributors will incur increased costs, which they will not hesitate to pass on downstream by raising the final price charged to the user⁵¹.

IV. ONGOING PROCEEDINGS

As mentioned above, streaming services are now a reality in the market, and competition concerns have quickly emerged, giving rise to a number of private antitrust enforcement proceedings. Such litigation is taking place in the United States, the jurisdiction where streaming technology is most established. In view of the potential growth of this mode of Audiovisual content consumption in the European Union, the analysis of these proceedings may serve as a foretaste of future competition problems in the EU market. In this sense, in this section we will deal with three procedures that highlight the competition problems in the

45. The VMVPD market can be considered a sub-market of the MVPD market, so the following paper is of great interest in relation to the use of MFN clauses. See: HOVENKAMP, E., SUKHATME, N.U., "Vertical Mergers and the MFN Thicket in Television", Georgetown Law Faculty Publications and Other Works, 2018. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213884.

46. HOVENKAMP, E., SUKHATME, N.U., "Vertical Mergers and the MFN"... op. cit., p. 8.

47. Ibid.

48. Ibid.

49. Ibid.

50. HOVENKAMP, E., SUKHATME, N.U., "Vertical Mergers and the MFN"... op. cit., p. 11.

51. HOVENKAMP, E., SUKHATME, N.U., "Vertical Mergers and the MFN"... op. cit., p. 13.

market, as well as the possibility for users to obtain compensation for the antitrust damages suffered.

A. Heather Biddle v. The Walt Disney Company

In this case⁵², we deal with a procedure in which a group of consumers claims the overcharge paid due to the carriage agreements that Disney has with its vMVPD provider. In this context, Disney ensures that the basic packages of vMVPD providers include a series of channels. As a result, Disney has the ability to increase the price of these channels, forcing vMVPD providers to raise the price of their services.

1. Case facts

As it has been showed, the consolidation of streaming technology has led to the birth of VMVPDs. These kinds of services offer consumers an alternative to satellite television (MVPD) for subscribing to pay-TV at a much cheaper price. Thus, the average price of a monthly subscription to a VMPVD was between 30 and 45 dollars, while that of the traditional MVPD was in the range of 70-120 dollars. This lower price, as well as the possibility of access from a multitude of devices, has allowed the emergence and consolidation of these platforms in the pay-TV market.

Among the operators in the market, we found the entertainment giant Disney, which controls the Hulu+LiveTv platform. In addition, Disney's network of owned channels includes the Entertainment and Sports Programming Network (ESPN), which is dedicated to the broadcasting of sports events, one of the core contents of pay-TV. When negotiating distribution agreements for its channels, Disney required distributors to include ESPN, the channel on which it charged the highest per-subscriber rates to distributors, in its basic package. In these agreements, Disney also included a Most Favoured Nation clause concerning the price of ESPN, which allowed it to fix a minimum price for all operators.

Thus, as Disney controls a VMVPD operator and a valuable asset such as ESPN. Disney imposes the carriage of ESPN to the others VMVPD on its basic package services, increasing then the costs a platform incurs. Consequently, consumers experience an increase in the prices of the VMVPD services whose origin is to be found in the anti-competitive carriage agreements promoted by Disney. Aggrieved by the price increase experienced, a group of consumers filed a class action against Disney, requesting that the above conduct be declared contrary to Section 1 of the Sherman Act, and that they be compensated for the harm they had experienced⁵³.

52. Biddle v. The Walt Disney Company, 5:22-cv-07317, (N.D. Cal.).

53. SCARCELLA, M., "YouTube TV users sue Disney over streaming TV market prices", Reuters, 21st November 2022. Available at: <https://www.reuters.com/legal/litigation/youtube-tv-users-sue-disney-over-streaming-tv-market-prices-2022-11-21/>.

2. Relevant Market and Theory of Harm

For the Antitrust analysis of the facts, once they have been determined, the relevant market should be established. In this case, this is configured as the Streaming Live Pay Television market, in which the operators are the different platforms which, by means of VMVPD services, allow live television to be viewed via an Internet connection⁵⁴. This market constitutes a separate sub-market within the pay-TV market⁵⁵. Demand-side characteristics, such as a preference for the use of mobile devices, lower price sensitivity, and supply-side characteristics, such as the inclusion of fewer channels in the packages or the differentiation of the market by the providers, make it possible to determine that we are dealing with a separate sub-market⁵⁶.

Once the relevant market has been determined, we must proceed to analyse the potentially anti-competitive conduct. In this case, the plaintiffs allege that the agreements reached between Disney and the VMVPD platforms prevent the different platforms from developing competitive strategies based on price reduction⁵⁷. In this way, Disney's practices reduce competition between operators on price. These practices in turn allow Disney to raise the price of its Hulu+Live TV platform without being challenged by price reductions from its competitors⁵⁸. Moreover, the practices described above reinforce the existing barriers to entry in the market, as new entrants who wish to enter the market must face the already high entry costs, to which must be added ESPN's distribution price, which is inflated by Disney's anti-competitive practices⁵⁹. These arguments lead the Court to find that there is sufficient evidence of anti-competitive conduct to reject the motion to dismiss brought by Disney.

3. Antitrust Standing

Having established the relevant market as well as the theory of harm, it remains to test the standing of the plaintiffs. In the landmark Illinois Brick case, the Supreme Court of the United States excluded the possibility that indirect purchasers could claim damages arising from anti-competitive conduct contrary to the Sherman Act carried out two or more levels upstream⁶⁰. This Illinois Brick jurisprudence is not absolute, as it can be avoided by the so-called Conspiracy

54. For the market definition conducted by the Court see: Order Granting In Part And Denying In Part 67 Defendant's Motion To Dismiss Consolidated Amended Class Action Complaint, pp. 19-22. Available at: https://storage.courtlistener.com/recap/gov.uscourts.cand.404031/gov.uscourts.cand.404031.85.0_1.pdf.

55. Ibid at p. 20.

56. Ibid.

57. Ibid at p. 24.

58. Ibid.

59. Ibid at p. 25

60. In this sense see: AREEDA, P., TURNER, D., *Antitrust Law*, Little, Brown & Company, Boston 1978, pp. 187-189.

Exception, which requires that the anticompetitive conduct must have occurred between operators acting at different stages of the value chain⁶¹. In these cases, the Illinois Brick doctrine is not applicable, but since the infringers are at different levels, there will also be direct buyers who are harmed at different levels. In view of these two theories, the question arises as to which of the two categories the purchasers of VMVPD services who brought this action fall into.

The decisive element in resolving this issue is whether the operator from whom the plaintiffs purchased the product participated in the anticompetitive conduct, giving rise to the conspiracy exemption, or whether they were also harmed and charged the overcharge to consumers, so that under Illinois Brick there would be no standing. In this case, YoutubeTV and Direct TV observed that because of the agreements signed with Disney in relation to ESPN they experienced increased costs, costs which they decided to pass on to their customers⁶², who are now claiming. Consequently, as a passing-on case, the plaintiffs lack standing to claim damages arising from a violation of the Sherman Act⁶³. However, this does not mean that the plaintiffs are left without the possibility of claiming compensation for the damages they allege to have suffered, but rather that they cannot base their claim on the Sherman Act⁶⁴, leaving the possibility of claiming under state antitrust law⁶⁵.

4. Concluding remarks

The *Biddle v. The Walt Disney Company* case highlights the various potential competition issues in relation to the streaming market. On the one hand, there is the presence of bundling, the practice of which obliges all consumers to subscribe to packages that include ESPN. This also creates barriers to entry, as operators wishing to enter the market will have to bear the cost of ESPN if they want to be able to distribute the different channels controlled by Disney, the importance of which is vital for the viability of a VMVPD platform. There is also the presence of MFN clauses, the use of which may lead to floor pricing, as well as to an increase in costs and therefore in the price paid by end-consumers. All this together with the risks arising from vertical integration, as Disney operates at both levels of the value chain, both in the creation of content and in the distribution of content through its own streaming service. In relation to the possibility of claiming damages by consumers, due to the particularities of the US federal system, it is essential to locate the link in the value chain where the anticompetitive conduct has its effects in order to know whether they can base their claim on Section 1 of

61. *ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012).

62. *Ibid* ft 54 at p. 27.

63. *Ibid*.

64. *Ibid* at p. 28.

65. *Sates Antitrust Statutes*, unlike the Sherman Act, allows indirect purchasers to seek for antitrust damages. See: BOLIEK, B., "The States and Antitrust Law", *Journal of Law & Innovation*, vol. 7, 2024. Available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1036&context=jli>.

the Sherman Act, or whether they must avail themselves of the state law option. If the practices occur at the next higher level, where the operator from whom the product is purchased is involved, the consumer will have standing as a direct purchaser. If it occurs upstream, we will have to determine whether we are dealing with an Illinois Brick or a Conspiracy Exception, and only if it is the latter will he be able to claim damages by invoking Section 1 of the Sherman Act.

B. National Football Leagues' Sunday Ticket Antitrust Litigation

In this case⁶⁶, the proceeding concerns the so-called Sunday Ticket NFL, the only subscription service that allows the viewing of all out-of-market National Football League games. During the course of the proceedings, the platform has moved from cable technology to streaming technology, but the conditions that gave rise to the proceedings have remained the same, so that the conclusions of the case can be transferred to the subject matter of this article.

1. Case facts

As to the facts of the case, it must first be said that the National Football League (NFL) is the most relevant sports league in the United States, but not only that, it is a major television asset, as evidenced by the audiences for the games of the competition. As regards the marketing of its broadcasting rights, since the passage of the Sports Broadcasting Act of 1961⁶⁷, the different franchises that make up the competition jointly market their television rights, assigning their rights to the league, a marketing to which the Sherman Act does not apply when such sale is made to distributors that meet the condition of 'sponsored telecasting'⁶⁸. Thus, for the next 25 years, the NFL marketed its rights to free-to-air operators, until, with the advent of new distribution technologies, the NFL began to sell packages of games to distributors operating under subscription. In this regard, since 1994 the NFL has marketed a package called Sunday Ticket, which includes all out-of-market games, which can be accessed through a subscription service⁶⁹, distributed by DirecTV in the period 1994-2022, and since then by YoutubeTV, both under a subscription model.

In short, the different teams cede the rights to the league, which negotiates with the distributors, establishing two types of agreement. Firstly, agreements for

66. National Football Leagues' Sunday Ticket Antitrust Litigation, 2:15-ml-02668, (C.D. Cal.).

67. Sports Broadcasting Act of 1961, Act of September 30, 1961. Available at: <https://www.govinfo.gov/app/details/COMPS-12156>.

68. BOLIEK, B., "Antitrust, Regulation, and the "New" Rules of Sports Telecasts", Hastings Law Journal, vol. 65, 2004, p. 512. Available at: <https://dev.hastingslawjournal.org/wp-content/uploads/2014/03/Boliek-65.2.pdf>.

69. BOLIEK, B., "Antitrust, Regulation, and the "New..."", ob. cit. p. 542.

local matches with free-to-air operators and secondly, for out-of-market matches, the so-called Sunday Ticket. This has the following effects: the teams cannot negotiate their rights individually. Similarly, fans who do not wish to pay for the Sunday Ticket subscription can only access the local market games. Finally, Sunday Ticket subscribers are obliged to subscribe to the entire package, with no possibility to subscribe to individual matches or packages including only their favourite team. Faced with this situation, a group of consumers filed a class action denouncing the illegality of the system as being contrary to the Sherman Act, as well as requesting the corresponding compensation for the damage suffered⁷⁰.

2. Relevant Market and Theory of Harm

In cases such as this one involving streaming services that broadcast professional competitions, before the antitrust scrutiny is conducted, it has to be determined whether the Sport Broadcasting Act is applicable, which would exempt them from the corresponding antitrust test. The answer in this case must be in the negative, since these services cannot be classified as sponsored telecasting as referred to in the regulation⁷¹, and therefore, following the criterion followed in other cases concerning subscription services for sports broadcasting⁷², an antitrust review of the aforementioned agreements must be carried out.

In order to initiate the antitrust examination of the conduct, it is necessary to determine the relevant market. However, in this case, where the practices developed by the different NFL teams, through the assignment of their rights to the league, as well as the exclusive distribution of the games, managed to limit the production of NFL game broadcasts to which consumers can have access. As it was a conduct limiting production, it was considered as a naked restriction, so it is not necessary to determine the relevant market in order to proceed with the examination⁷³.

In assessing the conduct in question, we must first determine whether the two agreements mentioned should be analysed individually or jointly. In this case we are dealing with a first horizontal pooling agreement which is combined with

70. ANDREJEV, A., "What to know about 'NFL Sunday Ticket' case that could cost the league billions", *The Athletic*, 25th June 2024. Available at: <https://www.nytimes.com/athletic/5578029/2024/06/25/nfl-sunday-ticket-lawsuit-explained/>.

71. BUBBLICK, A.Y., "Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package", *Federal Communications Law Journal*, vol. 64, 2011, p. 233.

72. Subscription based services for sports broadcasting have been considered out of the exemption provided by the Sports Broadcasting Act. See: *Chicago Pro. Sports v. National Basketball Ass'n*, 754 F. Supp. 1336 (N.D. Ill. 1991) and *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001).

73. When a rule of reason test is conducted to a naked restriction, as for example one that limits output, the Court will not need to determine either the market definition or the market power of the defendant. See: WEG, A., "Per Se Treatment: An Unnecessary Relic of Antitrust Litigation", *Hastings Law Journal*, vol. 60, 2009, p. 1541. Available at: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=3756&context=hastings_law_journal.

a exclusive distribution agreement, which could lead to foreclosure effects⁷⁴. The Court considers that both agreements function as a kind of tandem, and must therefore be analysed together in order to determine whether or not they are contrary to antitrust law.

With regard to the theory of harm, it must be established on the basis of the ownership of the broadcasting rights, which belong to the franchises as they have control over the venue where the game takes place. This would allow each franchise to market its games individually, which they do not do because of the first contested agreement, whereby all franchises assign their rights to the league for joint marketing⁷⁵. Then, through the second agreement between the NFL and its exclusive distributor of out-of-market games, there is a limitation on the production of such broadcasts⁷⁶. Consumers only have access to one type of out-of-market broadcasts, those agreed by the NFL with its exclusive distributor⁷⁷. Without the two agreements mentioned above, there would be many more out-of-market games, as different teams would be able to negotiate their rights with different distributors⁷⁸. This would increase the choice of televised games available to consumers, since on the one hand teams would be able to negotiate with as many distributors as they wish and on the other hand consumers would have access to different providers⁷⁹ and not just one as in the current situation, where this operator enjoys a monopoly position with respect to out of market games.

3. Antitrust Standing

Finally, it remains to establish whether there is standing on the part of the plaintiffs, which in this case are those who purchased Sunday Ticket subscriptions. With respect to the NFL-DirectTV agreement, which gives rise to the product created and purchased by the plaintiffs, there is no doubt about standing, as the plaintiffs are direct purchasers of the service⁸⁰. Doubts exist as to the standing to seek damages for the agreement between the various franchises and the NFL, whereby the franchises assign their rights to the league⁸¹. In this case, the key to

74. SIRANOSIAN, H., "Ticket to an Antitrust Violation? Why the NFL and DirecTV's Exclusive Distributorship Agreement for Sunday Ticket May Violate Antitrust Laws, and How the U.S. District Court for the Central District of California May Have Gotten It Wrong", *Hastings Business Law Review*, vol. 15, p. 351. Available at: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1194&context=hastings_business_law_journal.

75. MCCANN, M., "Why DirecTV's NFL Sunday Ticket Might Be Illegal Under Antitrust Law", *Sports Illustrated*, 14th August 2019. Available at: <https://www.si.com/nfl/2019/08/14/nfl-sunday-ticket-directv-antitrust-violation-lawsuit>.

76. *Ibid*.

77. BUBLICK, A.Y., "Are You Ready for Some Football?...", *ob. cit.* p. 238.

78. BUBLICK, A.Y., "Are You Ready for Some Football?...", *ob. cit.* p. 243.

79. BUBLICK, A.Y., "Are You Ready for Some Football?...", *ob. cit.* p. 242.

80. Direct purchasers have their antitrust standing XXXX.

81. RUSTOM, M., "The New Era of NFL Antitrust Law a of NFL Antitrust Law, the Sunda, the Sunday Ticket Package: ackage: Was the Ninth Circuit Ruling a Touchdown or a Penalty?",

the answer lies in determining whether the Illinois Brick Doctrine is applicable, or whether we are dealing with a conspiracy exemption⁸². In this case, the damage alleged by the plaintiffs is caused by the joint action of both agreements, so the conspiracy exemption is applicable, whereby any purchaser of the members of the conduct, as the conduct operates jointly, is considered a direct purchaser for the purposes of antitrust standing⁸³. Thus, in this case DirectTV, the NFL and its franchises, through the agreements acting as a single course of conduct, acted jointly to limit the production of out-of-market matches. This means that even if the plaintiffs purchased their subscriptions from Direct TV and not from the NFL or its franchises, they have antitrust standing, as they were harmed by the conduct jointly undertaken by the NFL, its franchises and Direct TV.

4. Concluding remarks

The proceedings continued with the subsequent certification of the classes⁸⁴. After a hearing, the jury found that the NFL, its franchises and DirectTV had engaged in practices contrary to the Sherman Act, and awarded damages of \$4.7 billion. However, the judge vacated that verdict, finding that no average jury could have reached the determination and quantification of damages that the jury established, and therefore vacated the verdict⁸⁵. The decision has been appealed and is currently on appeal⁸⁶.

The present case serves as an example of anti-competitive conduct that can be qualified as a conspiracy exemption. The anti-competitive behaviour has involved operators acting at different levels of the value chain, which means that the final purchasers, in this case the consumers, can claim the overprice paid from operators that are higher up the value chain than the one from which they purchased the product.

Pepperdine Law Review, vol. 48, p. 565. Available at: <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2578&context=plr>.

82. Ibid.

83. Some commentators have considered that the Court mistakenly applied the Conspiracy Exemption, arguing that the need of a pass on theory to claim damages for the NFL-Franchises agreement makes this exemption not applicable. For a critique of the Court reasoning see: RUSTOM, M., "The New Era of NFL Antitrust...", *ob. cit.*, pp. 565-567.

84. Order DENYING all motions to exclude, GRANTING Plaintiffs' motion for class certification, and DENYING Defendants' motion for sanctions, in *In re National Football League's Sunday Ticket Antitrust Litigation*. Full text of the Order can be found at: https://storage.courtlistener.com/recap/gov.uscourts.cacd.635536/gov.uscourts.cacd.635536.894.0_1.pdf.

85. The Judge concluded that the Jury was misled by the expert testimony, and has miscalculated the class damages award. See: MCCANN, M., "NFL Scores Sunday Ticket Win on Stunning Judicial Reversal", Sportico, 1st August 2024. Available at: <https://www.sportico.com/law/analysis/2024/nfl-wins-sunday-ticket-class-action-1234791976/>.

86. MCCANN, M., "NFL Must Defend Stunning Sunday Ticket Victory on Appeal", Sportico, 9th September 2024. Available at: <https://www.sportico.com/law/analysis/2024/nfl-sunday-ticket-lawsuit-appeal-1234796491/>.

C. FuboTV Inc. v. The Walt Disney Company

Horizontal cooperation is also one of the potential risks that has already manifested in the market. In this regard, it is worth highlighting the possible alliances launched by consolidated undertakings in the sector, aiming to transfer their position in the traditional tv market to the streaming market. One way to achieve this is by launching a joint platform that combines the traditional television assets of different operators into a single streaming service. This is the case of the Venu Sports platform, which combines the sports assets of the operators Disney, Fox, and Warner⁸⁷.

1. Case facts

In the beginnings of 2024, three major audiovisual companies—Disney, Fox, and Warner—announced the launch of a new streaming platform that shook the market⁸⁸. The platform, Venu Sports, would see the three operators combine all their sports rights into a single streaming service. This meant that a new player would enter the streaming market, concentrating 80% of the sports rights in the United States, which had previously been distributed separately by the operators forming the joint venture⁸⁹.

This new player posed a significant threat to the development of the streaming market, particularly in relation to sports consumption. FuboTV, an emerging operator offering a streaming platform focused on sports content, expressed its concerns. Considering Venu Sports to be a joint venture in violation of antitrust regulations, FuboTV filed a legal action to prevent its launch⁹⁰.

2. Market Definition and Theory of Harm

When defining the potential anticompetitive effects of the joint venture, the first step is to define the relevant market. In this case, the relevant market is composed of the different services offering live pay television⁹¹. A key factor in this definition is the substitutability between MVPDs and VMVPDs, as both types

87. FuboTV Inc. v. The Walt Disney Company, 1:24-cv-01363, (S.D.N.Y.).

88. SPANGLER, T., “Disney, Fox and WBD Unveil Name of Sports-Streaming Venture: Venu Sports”, Variety, 16th May 2024. Available at: <https://variety.com/2024/digital/news/venu-sports-streaming-disney-fox-warner-bros-discovery-1236006111/>.

89. MCCAN, M., “ESPN Gains Support of Six AGs in Appeal of Venu Sports Decision”, Sportico, 26th September 2024. Available at: <https://www.sportico.com/law/analysis/2024/venu-sports-amicus-brief-1234799001/>.

90. REUTERS., “FuboTV files antitrust lawsuit to block Disney, Fox, Warner sports streaming deal”, Reuters, 24th February 2024. Available at: <https://www.reuters.com/business/media-telecom/fubotv-sues-block-espn-warner-fox-sports-streaming-deal-wsj-reports-2024-02-20/>.

91. For the market definition see: OPINION AND ORDER re: 94 MOTION for Preliminary Injunction, pp. 37-40. Available at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.616223/gov.uscourts.nysd.616223.290.0_2.pdf.

of platforms allow consumers to access a wide range of live sports channels. This market definition excludes SVOD services like Netflix, as their content is not focused on live sports, and therefore, there is insufficient substitutability to include such platforms in the relevant market⁹². After defining the market, it has to be assessed if the Joint Venture would have a dominant position in it. As the single platform that will hold 80% of United States sport broadcasting rights the undertakings are creating a Joint Venture that would be able to achieve a superdominant position in the relevant market⁹³.

With this high amount of sports broadcasting rights, the Joint Venture will be able to capture the existing and future demand in the market. In this sense, the launch of a combined streaming platform will allow the three undertakings to establish a joint dominant position in the streaming sector. It has to be noted that these undertakings are competitors in the traditional TV market, so the Joint Venture prevents their competition in the market, allowing them to coordinate their activities, rather than compete in detrimental to the market and consumers⁹⁴.

Furthermore, as the new platform would be able to suppress all the meaningful competition, it will put the undertakings in a position in which they will eventually have the incentive and the ability of raising prices of their service⁹⁵. But the potential anticompetitive effects go further than an eventual price increase. Moreover, in a future situation with few and weak competition, due to the Joint Venture, the undertakings will have few incentives to invest in innovation. Considering that the streaming market is an evolving one, in which innovation plays a fundamental role that benefits consumers and competition with the creation of new features that improve the service, the Joint Venture would be able to stop this process in detrimental to consumers⁹⁶. Furthermore, the possible reduction of available options is also a lost related to the anticompetitive risks. In this sense the Joint Venture could lead to a reduction of output, meaning that consumers will not have access to a diverse range of content that they currently have⁹⁷.

3. The injunctive relief decision

In this case the plaintiff asked the Court to block the launch of the Joint Venture, that was set to September 2024. For granting that petition the Court first assessed the harm that the Joint Venture could create in the plaintiff. In this

92. Ibid footnote 33.

93. Ibid at p. 47.

94. Ibid.

95. Ibid at p. 51.

96. For potential detrimental regarding innovation see: Brief Of Amici Curiae Sports Fans Coalition, American Economic Liberties Project, The Electronic Frontier Foundation, Open Markets Institute, And Public Knowledge In Support Of Plaintiffs' Motion For Preliminary Injunction, pp. 15-16. Available at: https://publicknowledge.org/wp-content/uploads/2024/08/Sports_Joint_venture_Amicus-Brief.pdf.

97. Ibid at p. 16.

sense, the Court determined that the Plaintiff have correctly proved that it could be injured in an irreparable way if the Joint Venture was allowed to start operating⁹⁸. Moreover, the plaintiff would not be the only injured by the launch of the Joint Venture. As the theory of harm previously explained has showed, also consumers and competition in the market would be injured. Also, it has to be noted that in this case, monetary compensation has to be considered as an inadequate compensation⁹⁹. The plaintiff has showed that the competitive dynamic of the markets would change in a way if the Joint Venture is launched, that it faces bankruptcy, situation in which money would constitute an inadequate award to repair the damages suffered¹⁰⁰. Finally the Court considers the impact on the public interest, which must not be disserved by the injunction. As the plaintiff has proven a likelihood success on the merits, granting the injunction asked will not harm the public interest¹⁰¹. Taking into account the previous considerations, the Court granted the preliminary injunction, blocking the launch of the Joint Venture until the final decision of the case, which is set on October 2025¹⁰².

4. Concluding remarks

This case highlights the potential risks of certain collaborative activities in the streaming consumption market. Specifically, the launch of a joint streaming platform by undertakings that compete in the traditional television market introduces a series of risks. Chief among these is the potential hindrance to competitive activity in an emerging market, stemming from the creation of a new super-dominant platform that enables these undertakings to coordinate their activities in the market rather than compete.

If this operator consolidates its market position by eliminating much of the potential competition, it would gain the ability to raise prices without the risk of subscribers switching to another platform. Additionally, consumers would suffer from reduced options in the market and a slowdown in quality and innovation, as the new super-operator would lack competitive pressure to invest in enhancing its product.

V. CONCLUSION

Streaming TV consumption is already a reality. The various applications of this technology can give rise to different relevant markets, differentiating from

98. Ibid ft 91 at p. 66.

99. Ibid at p. 64.

100. Ibid at pp. 62-63.

101. Ibid at pp. 65-66.

102. HAYES, D., "Trial Date Set For October 2025 In Fubo Antitrust Lawsuit Against Disney, Fox And Warner Bros. Discovery", Deadline, 12th September 2024. Available at: <https://deadline.com/2024/09/fubo-antitrust-lawsuit-trial-date-set-disney-fox-warner-bros-discovery-1236086628/>.

video on demand to live video. Also, some niche submarkets, related to content can erupt. Among potential competition issues I would highlight vertical agreements in which one of the undertakings is integrated in relation to key content or to necessary inputs for content delivery, such as premium sports rights. As we have seen, there are some undertakings which have a strong presence in various phases of the value chain. Also, horizontal cooperation, when it allows undertakings to coordinate activities in the streaming markets rather than compete as they do in the traditional TV market worths to be noted. Finally, regarding damages, in the actions that have been developing in the United States until now, the antitrust standing has been the critical issue, in which determination is fundamental identifying in which part of the value chain the anticompetitive conduct is being conducted.

VI. BIBLIOGRAPHY

- AREEDA, P., TURNER, D., *Antitrust Law*, Little, Brown & Company, Boston 1978
- BAILEY, D., WHISH, R., *Competition Law*, Oxford University Press, Oxford, 2021.
- BOLIEK, B., "Antitrust, Regulation, and the "New" Rules of Sports Telecasts", *Hastings Law Journal*, vol. 65, 2014, p. 502-552. Available at: <https://dev.hastingslawjournal.org/wp-content/uploads/2014/03/Boliek-65.2.pdf>
- BUBLICK, A.Y., "Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package", *Federal Communications Law Journal*, vol. 64, 2011, pp. 224-246.
- CHALABYJ.K., "The streaming industry and the platform economy: An analysis", *Media Culture and Society*, vol. 46, 2023, pp. 552-571.
- CHO, C., "Competition Among Video Streaming Services", Congressional Research Service, 2020. Available at: <https://sgp.fas.org/crs/misc/R46545.pdf>
- COMISIÓN NACIONAL DE LOS MERCADOS Y DE LA COMPETENCIA, *Caracterización Del Uso De Algunos Servicios Over The Top En España (Comunicaciones Electrónicas Y Servicios Audiovisuales)*. Available at: <https://www.cnmc.es/sites/default/files/1533234.pdf>.
- LEE, S., YAMATSU, T., "Multiple Relationships between Streaming and Linear TV: Examining Media Substitution Theory Using Big Data", *Journal of Broadcasting & Electronic Media*, vol. 67, 2024, 442-465.
- MUTHUSWAMY, B., SANKARANARYANAN, S., "Virtual MultiChannel Video Programming Distribution: The game, the players and the playing field", Infosys, available at: <https://www.infosys.com/industries/communication-services/white-papers/documents/virtual-multichannel-video-programming.pdf>.
- NORRIS, M.E., "How Streaming Services are in the Antitrust Footsteps of Hollywood's Golden Age", *University of Miami Business Law Review*, vol. 31, 2023, pp. 160-195.
- RUSTOM, M., "The New era of the NFL Antitrust: Was the Ninth Circuit Ruling a Touchdown or a Penalty?", *Pepperdine Law Review*, vol. 48, 2023, pp.

538-576. Available at: <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2578&context=plr>.

BIDDLE v. The Walt Disney Company, 5:22-cv-07317, (N.D. Cal.).

National Football Leagues' Sunday Ticket Antitrust Litigation, 2:15-ml-02668, (C.D. Cal.).

FuboTV Inc. v. The Walt Disney Company, 1:24-cv-01363, (S.D.N.Y.).

The private enforcement of Competition Law constitutes a cornerstone for the effective implementation of this discipline. Its application within digital markets, however, entails a high degree of complexity. This volume examines the subject from a range of contemporary and complementary perspectives.

The first part identifies and analyses the key factors necessary to ensure that private enforcement mechanisms operate effectively in the digital economy. Subsequently, the discussion turns to the Digital Markets Act (DMA) private enforcement, exploring the principles of the private enforcement of this new regulatory framework and its relation to the private enforcement of Articles 101 and 102 of the TFEU.

In addition, the work presents a comparative analysis of private enforcement across several Member State jurisdictions, thereby offering a panoramic view of the current state of play within the European Union. Finally, the study addresses the perspective of the injured parties, with particular attention to issues arising in actions brought by consumers, app developers, and start-ups, thus highlighting the practical implications of private enforcement in the digital context.

The present book is a collection of papers presented in the IV Valencia International Meeting on Competition Law held within the framework of the following Research Projects: «Concentración, Daños, Abuso y Cooperación en los Mercados Digitales» PID2021-128111OB-I00 by the Ministerio de Ciencia e Innovación and “Competition Power Control”. CIAICO/2021/202 by the Consellería de Educación, Universidades y Empleo de la Generalitat Valenciana.