Challenging Gatekeepers: Private Enforcement of the DMA

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Since March 7th, all core platform services that the European Commission has designated as gatekeepers under the Digital Markets Act (**DMA**) so far, must comply with the DMA's obligations and had to submit comprehensive compliance reports. In these reports, they must show in a detailed and transparent manner all relevant information needed by the European Commission to assess the gatekeeper's effective compliance with the DMA.

In our series of briefings, we recap the key milestones of the DMA implementation, deep dive into the various obligations that gatekeepers are facing, lay out the DMA's implications for stakeholders who are not (currently) within the direct scope of the legislation and update you on the current status of affairs in the DMA's implementation.

This time we focus on: Private enforcement of the DMA.

Shifting the Focus – Third Parties and the DMA

Past discussions have been centered around the obligations imposed by the DMA and the gatekeepers it seeks to regulate. However, with the DMA having come into full force, attention may pivot to those the DMA seeks to protect.

Noteworthy, gatekeepers do not only hold power towards their end users. Businesses may often feel the same power imbalance when using or competing with a gatekeeper's service. The DMA opens substantial opportunities for these two distinct groups of businesses to assert their rights.

- **Business partners of gatekeepers** can get active if they experience non-compliance with DMA-provisions by gatekeepers that are relevant to their business model. For example, a retailer using a gatekeeper´s digital marketplace may ask private courts to strike down a most-favored-nation (MFN) clause imposed by the gatekeeper whereby the retailer must not offer his products at a lower price elsewhere – MFN clauses are now illegal under Art. 5(3) DMA.

- Similarly, **competitors of gatekeepers** are encouraged to monitor compliance with the DMA-provisions. To give an example: a search engine provider can enforce fair, reasonable and non-discriminatory access to ranking, query, click and

view data against a competing gatekeeper search engine in court, if necessary, Art. 6(11) DMA.

Why Private Enforcement Matters

The European Commission has not only equipped businesses with the tools to challenge gatekeepers, but it also expects them to make use of them since private enforcement is an essential pillar in DMA enforcement:

- The European Commission has finite resources, and thus can only go after selected cases of non-compliance. High-profile cases might well be prioritized to the detriment of investigating smaller-scale anticompetitive behavior.

- The European Commission is at a natural disadvantage compared to third-party businesses, when it comes to identifying DMA non-compliance effectively. As per their industry expertise, third-party businesses will learn faster and understand better when potential measures by gatekeepers run counter the DMA provisions.

- If the European Commission initiates proceedings, they may take time. In contrast, private litigation eventually backed by emergency legal relief can lead to swifter resolutions, a feature of considerable importance in the fast-evolving digital sector where delays can lead to irreversible market shifts and consumer harm.

- The European Commission may impose fines and behavioral remedies on a non-compliant gatekeeper. However, via private enforcement third-party businesses may seek damages, offering tangible monetary relief.

- Private enforcement does more than safeguard third-party businesses' interests. The case law following from it, will be vital in shaping the interpretation of the often deliberately vaguely phrased DMA ensuring the rules governing digital markets reflect the everyday challenges of those who navigate them daily.

No Separate Private Enforcement Framework

While the DMA doesn't introduce groundbreaking enforcement mechanisms, it delineates two distinct categories – informal and formal mechanisms – providing businesses with diverse strategies to challenge gatekeepers.

In terms of **informal enforcement measures**, Art. 27(1) DMA provides that any third party, including business users, competitors or end-users of a "core platform service", are invited to inform their National Competition Authority (***NCA***) or the European Commission directly about any potential DMA-non-compliance. While this comes at limited financial, legal and reputational risk, it carries the downside that authorities have full discretion on whether to act on the information received. For the moment it is unclear how willing NCAs will be to spend their resources on DMA enforcement. Still, they may

take any information provided to request the European Commission to conduct a market investigation that can trigger further designation decisions, a finding of "systemic non-compliance" by a gatekeeper as well as the examination of new services and new practices, see Artt. 41, 17, 18, 19 DMA.

Another, even less confrontational option for affected third-party businesses is to reach out to authorities informally, e.g. by making suggestions to the European Commission on how to apply the relevant DMA provisions to their respective cases.

In terms of **formal enforcement measures**, Art. 24 DMA provides that any third party may apply for interim measures upon an alleged DMA non-compliance. Again, the European Commission has broad discretion whether to adopt interim measures or not and may in any case only do so based on a *prima facie* finding of DMA non-compliance.

However, the DMA´s premise is that it will be enforceable in national courts as stated in Recital 42: *"it is important to safeguard the right of business users and end users, including whistleblowers, to raise concerns about unfair practices by gatekeepers raising any issue of non-compliance with the relevant Union or national law with any relevant administrative or other public authorities, including national courts."* In addition, Art. 39 DMA lays down a number of procedural rules for the cooperation between national courts and the European Commission: For instance, national courts may ask the European Commission to share any information or views they may have on pending DMA proceedings, Art. 39(1) DMA. Reversely, they are bound by any previous decision by the European Commission under the DMA, Art. 39(5) DMA).

Yet, the DMA, on its own, doesn't provide all the necessary tools. The absence of EU-wide harmonization efforts, like those seen with the Damages Directive 2014/104/EU for competition law infringements, underscores the importance of robust national legal frameworks for effective private enforcement.

Private Enforcement in National Courts – Germany is First

With respect to enforcement mechanisms in national law, the German Act against Restraints of Competition (***ARC***) offers tailored tools that have already been updated by the German legislator to enforce the DMA as effectively as possible. With this, Germany is leading the way in terms of private enforcement of the DMA. The German legislator utilized the latest 11th amendment to the ARC and decided to include private DMA enforcement into the ARC's general framework for antitrust private enforcement, thereby creating a comparably elaborate enforcement environment that goes beyond regimes established in other Member States (if any so far).

Injunctive Relief and Damages

Under the ARC, businesses can seek injunctive relief (injunctions and rectification) and damages, under Sec. 33 and 33a respectively, aligning with the principles governing traditional antitrust enforcement.

Injunctive relief is available to competitors of gatekeepers or other market participants impaired by potential DMA non-compliance once a DMA infringement is impending or already occurring. Here, interim relief is also available for plaintiffs under the rules of the German Code of Civil Procedure (***CCP***). Under Sec. 33(4) ARC, claims for injunctive relief may also be asserted by certain registered trade associations and qualified consumer protection organizations.

To pick up the example of a business faced with an MFN clause by one of the gatekeepers: under the ARC, that business could e.g. claim that the gatekeeper stops insisting on the MFN clause and simultaneously demand an injunction whereby the gatekeeper shall re-enable access to its service. Plus, it could also seek redress and claim **damages** suffered from not being able to offer its products for lower prices on its own online store as long as the gatekeeper insisted on the MFN clause.

Easing the Burden for Challengers: ARC's Support for DMA Plaintiffs

The ARC also provides affected businesses with strategic advantages alleviating the heavy burdens the GCC imposes on those who challenge a gatekeeper. Sec. 33b ARC holds that EU Courts's or the European Commission´s decisions are binding in "follow-on" disputes before German courts for DMA infringements. This is useful for plaintiffs in two ways: Local courts are bound to both the European Commission´s categorization of a company as a gatekeeper and to a non-compliance decision under Art. 29 DMA. "Stand-alone" proceedings that cannot benefit from a non-compliance decision by the European Commission (e.g. in cases in which the European Commission has not yet screened the relevant gatekeeper´s behavior) can at least profit from extended rights of disclosure for the plaintiff that are detailed in Sec. 33g ARC. When it comes to damages, proving the actual harm can be a substantial hurdle. Therefore, courts are permitted to estimate, Sec. 33a(3) ARC in conjunction with Sec. 287 CCP.

Shaping Digital Markets Together

Despite these procedural easements, the DMA's effectiveness ultimately depends on third-party businesses' decisions to assert their rights. The future of digital competition is now shaped not only by gatekeepers, and the authorities regulating them, but also by other third-party businesses that are willing to step forward and utilize the tools provided by the DMA and the ARC. Their initiatives, challenges, and potential wins in court will define the digital landscape by fostering a level playing field.

BLOMSTEIN will continue to monitor and assess the developments and practical application of the DMA provisions. If you have any questions on the topic, Anna Huttenlauch, Elisa Theresa Hauch and Kai Woeste will be happy to assist you.