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The NCAs Piggyback on to the European Commission: Hungary and The Netherlands Trigger the Race for Monitoring National DMA Compliance

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On 13 March 2023, the Ministry of Economic Affairs and Climate of The Netherlands published the first draft of its implementing regulation (the 'Draft Bill') subject to public consultation until the 10th of April, to attribute its national competition authority (ACM) with the power to monitor compliance with the DMA in its national territory. The development follows a similar change in Hungary, where the national competition authority announced it had amended its national competition law regime to confer investigative powers upon the NCA to ensure compliance with the DMA. Similar amendments by other NCAs are also in the works. For instance, Germany is also currently considering the 11th amendment to its competition law regime.

Following the provisions of the DMA in Articles 37 to 39, Member States are passing additional provisions to ensure that their national competition authorities will be able to perform the conferred powers that the DMA reserved for them. However, this move has been contested and it is not quite clear whether additional legislation does not attempt to go as far as contradicting the DMA's intended objective of avoiding fragmentation in the enforcement against conduct taking place in the digital arena (previous commentators to the proposal have touched upon this same idea, such as Stijn Huijts and Assimakis Komninos).

Articles 37, 38 and 39 of the DMA: An open door, but yet a small gap

The road to NCA collaboration in the DMA

Throughout the DMA's legislative process and since the European Commission issued the first draft of the regulatory instrument, the NCAs' involvement in the DMA has been a hot topic amongst Member States. In the draft tabled in December 2020, national competition authorities had no say in terms of their capacity to intervene in the enforcement of the DMA, regardless that they were attributed the function to assist the Commission through their participation in the Digital Markets Advisory Committee (Article 32 of the DMA's first draft).

In a blatant response to the European Commission's no-NCA stance, on May 2021, the

representatives of Germany, France and The Netherlands released a non-paper setting out a myriad of suggestions for the consecution of a stricter DMA (the full review of the non-paper may be found here). In the non-paper, the three Member States called for a more intense intervention of the NCAs in the enforcement of the DMA, irrespective of the fact that the European Commission would retain its role as the sole enforcer of the regulatory instrument. For instance, the non-paper proposed that the re-drafting of the DMA after the trilogue would incorporate the possibility of the NCAs requesting a market investigation or triggering the proceedings under the systematic non-compliance mechanism.

A few days after that, the heads of the national competition authorities of the European Union issued a joint paper through the European Competition Network (ECN) to secure a mechanism for close coordination and cooperation with the NCAs which would carry out complementary functions in terms of the DMA's enforcement. In the joint paper's own terms, the EC could do with the cooperative efforts of the NCAs to 'demultiply' the DMA's reach.

In this regard, two alternative measures were directly proposed: i) the joint application of the DMA by the European Commission and by national competition authorities in light of the existing Regulation 1/2003 model; ii) shared enforcement powers conferred upon the NCAs under the supervision of DG COMP which could facilitate the exchange of information and evidence relevant for the DMA's effective implementation, namely the capacity to initiate proceedings or carry out investigative actions against the designated gatekeepers at the request of the Commission. Again, the joint paper demanded, in a similar vein to the non-paper, that NCAs should be legitimised to request the Commission to open proceedings or market investigations.

During the trilogue, the NCAs advocated in favour of their case, and the DMA's final text is the result of the finding of a middle ground regarding their involvement in the enforcement efforts of the regulatory instrument. Although the Digital Markets Advisory Committee subsisted the legislative process (Article 50 of the final draft), an additional forum was added to the DMA's provisions to incorporate the NCAs' experience and knowledge: the High-Level Group (Article 40).

Article 38 of the DMA: the explicit recognition of the NCAs' active collaboration

The future-to-be-applicable DMA explicitly considered the cooperation of the European Commission with national authorities, where they could act both in support of the Commission's own enforcement efforts and in the capacity of a consultation on any matter relating to the DMA (Article 37). The DMA also provides the blueprint for one-sided collaboration, i.e., to enhance information exchange in those scenarios where the application of the national competition law regime may intersect with the DMA's provisions, as set out by Article 1(6) (on these overlaps see comment here). To this end, NCAs are forced to notify the European Commission about their enforcement actions against gatekeepers in the realm of competition, despite that the DMA is not an antitrust law instrument (Article 38(1) to 38(5)). Regarding the DMA's enforcement, the EC may also request the active collaboration of the NCAs to enforce the DMA's provisions, namely, to support any of its market investigations (Article 38(6).

On the other side, NCAs may, on their own initiative, investigate a possible non-compliance with Articles 5, 6 and 7 of the DMA on its territory, although the NCA must inform the Commission in

writing before it takes its first formal investigative measure (Article 38(7), first paragraph). Hence, Article 38(7) of the DMA provides for the possibility that NCAs directly enforce the regulatory instrument's provisions, but in a multi-tiered manner: once the NCA has performed its investigative measures and proceedings, it is relieved from performing any further action, insofar as the EC is the only authority competent to produce a finding against a gatekeeper based on the DMA's provisions (Article 38(7), second paragraph).

Even though the provision opens up the possibility for NCA collaboration in the DMA's enforcement, it sets out that those NCAs must have the competence and investigative powers to perform those enforcement actions under their national law. This is the hurdle that the Hungarian and Dutch competition authorities have tried to overcome with the amendment of their national competition law regimes and the passing of complementary rules to facilitate DMA-related enforcement. Nonetheless, it is unclear whether these additional national instruments legitimising the enforcement action of NCAs are necessary in light of Article 38(7) of the DMA. As pointed out previously by Komninos, the Court of Justice of the European Union (CJEU) has been clear throughout its rulings that national laws cannot reproduce or repeat provisions of EU legislation and, as such, any reproduction would amount to a breach of EU law (in this sense, see cases *Commission v. Italian Republic* and *Fratelli Variola v. Admministrazione Italiana delle Finanze*).

Given that the DMA is a regulation in the sense of Article 288 TFEU, and Article 38(7) explicitly provides for the NCAs' collaboration in the enforcement actions of the DMA, the new measures proposed by the Dutch Government and already passed in Hungary would contravene this general principle of EU law. Additionally, these same measures do not fulfil the exceptional case where the reproduction of a regulation is admitted, i.e., when the national legislation is justified to provide a complete code of legislation that will be more intelligible to the reader than the provisions scattered in several instruments would be and when the origin of those rules is clearly indicated.

Article 39 of the DMA: Cooperation in the context of private enforcement

The heat that the first draft of the DMA faced from the national sphere also made its way into the substantive provisions of the regulatory instrument not only by conferring greater intervention upon NCAs regarding the DMA's enforcement actions but also by recognising the active collaboration of national courts might bear when the DMA is applied in the context of private enforcement in their fora. According to Article 42 of the DMA, redress may be sought through representative actions brought against infringements by gatekeepers of the provisions of the DMA that harm or may harm the collective interests of consumers (where the provisions of Directive 2020/1828 expressly apply).

Article 39 of the DMA recognises that national courts may ask the Commission to transmit to them information concerning the application of the regulatory instrument (Article 39(1)), whereas the Member States shall also forward the national courts' judgments issued in the context of private enforcement (Article 39(2)). Additionally, the European Commission may also intervene in the national proceedings resulting in the application of the DMA in the capacity of an *amicus curiae* by making written and oral observations to the national courts (Article 39(3)). Concerning this particular provision in the context of private enforcement, one may ask whether and to what extent all the *corpus* of case law in this area in the field of antitrust (and the Damages Directive and accompanying guidelines) would apply to the DMA's redress, at least by analogy.

The first draft implementing regulation issued by the European Commission in December 2022 did not address the issue directly, although the aspects relating to confidentiality were quite scattered and scarce in terms of due process and the protection of business secrets and/or other confidential information coming from the gatekeepers (for a comment on the draft, see here).

Similarly to the provision contained in Article 16(1) of Regulation 1/2003, national courts are also obliged to not produce any decision which may run counter to any of the decisions produced by the Commission under the DMA, as well as with those impending decisions which may be adopted as a consequence of the initiation of proceedings. The final draft of the DMA also provides the possibility for the national courts to request a preliminary ruling under Article 267 TFEU concerning the interpretation of the provisions of the DMA (Article 39(5) of the DMA).

This is the second tenet that the Dutch draft bill revolves around (even though the Hungarian amendment of the competition law did not provide for the same intervention) in order to facilitate information exchange between the national courts and the European Commission in the context of the DMA's private enforcement.

The Netherlands draft bill to enable ACM and the national courts' intervention in the DMA

Once the Ministry of Economic Affairs and Climate of The Netherlands released its draft bill, it did so in a transparent manner both by addressing the public through consultation until the 10th of April as well as by issuing an explanatory memorandum (the 'Memorandum') on the amendments proposed to the Code of Civil Procedure and the Draft Bill which will be potentially introduced in the future (see the Dutch version of the Memorandum here). The 26-page long Memorandum analyses the DMA's objectives in full as well as the Dutch Draft Bill in coherence with the regulatory instruments' conferred powers upon national competition authorities.

The Draft Bill is composed of seven articles: the first three concern the ACM's attribution of competition following Article 38 of the DMA, whereas the fourth and fifth address the collaboration scheme designed by Article 39 of the DMA by reproducing the substance of the regulatory instrument (Article 4 of the Draft Bill) and amending Article 44(b) of the Dutch Code of Civil Procedure to provide for the channels of information exchange between the national courts and the European Commission in the context of private enforcement.

Article 2 of the Dutch Draft Bill establishes "*the Authority Consumer and Markets Authority is in charge of monitoring compliance with Articles 5, 6 and 7 of the Digital Markets Regulation in The Netherlands*". Although the provision seems quite blatant, it reproduces the substance of Article 38(7) of the DMA by stating that the ACM may initiate its own investigations regarding conducts performed by gatekeepers at the national scale and then refer the findings of those enforcement actions back to the European Commission regarding the DMA's interpretation.

In the Draft Bill's own words, the ACM possesses a discretionary space to deliver on the task set out in Article 38(7) of the DMA and it has chosen to make use of this discretion (thus, the Draft Bill is the crystallisation of a discretionary open door placed by the regulatory instrument) for a number of reasons: i) to make it more accessible for third parties to raise potential violations regarding the DMA directly with the DMA; ii) to ensure a more approachable and effective implementation of the DMA where the ACM may provide its knowledge, power and experience on

the functioning of the digital markets and operators in The Netherlands; iii) to maintain and create cooperative advantages in line with Article 38(7) of the DMA; and iv) to support the European Commission in its enforcement in line with its capacity constraints.

Following the ACM's role in monitoring compliance, Articles 3 and 4 of the Draft Bill confer upon the ACM officials the power and capacity to provide their assistance to the European Commission during its inspections in The Netherlands when applying the DMA, especially in those instances where an authorisation for the entry into the premises of any of the gatekeepers may be required and may be necessarily requested before the Rotterdam District Court, in line with the active cooperation set out in Articles 23(7), (8), (9) and 10 of the DMA.

The Memorandum of the Draft Bill extends these competences attributed to the ACM in Articles 2, 3 and 4 of the Draft Bill further insofar as it mentions those scenarios where it might be unclear what legal bases the national competition authority utilises when analysing certain conduct performed by a gatekeeper in the Dutch market (whether that under Article 38(5) of the DMA or Article 102 TFEU as established and permitted by Article 1(6) of the DMA). Nonetheless, the Draft Bill seems to go too far and wide regarding this possibility. Although it is true to say that an NCA may alter the terms of the infringement that it initially pursued when initiating a sanctioning proceeding (for instance, it may drop some of its allegations and also add on an infringement of Article 101 TFEU to the initial potential infringement of Article 102 TFEU), the DMA's multi-level cooperation design does not seem to enable collaboration in these scenarios where an infringement of Article 102 TFEU would unveil an infringement of the DMA or vice versa.

In my view, these proceedings would be completely distinct and separate from each other. On one side, if the ACM were to initiate sanctioning proceedings against a gatekeeper under the prohibition of an abuse of a dominant position through its national competition law regime, it would be bound to inform the Commission before performing any formal investigative measure, as per Article 38(2) of the DMA. In this scenario, it is quite clear that the ACM would be free to apply its own national idiosyncratic proceedings to the conduct at hand.

Nonetheless, on the other side, if the ACM were to initiate sanctioning proceedings against a gatekeeper due to an infringement of the DMA, it would also have to inform the Commission, but it would be bound to 'abandon' the proceedings mid-way, once the investigation was completed and refer the matter to the Commission for its final resolution, in line with Article 38(7) of the DMA.

Two related issues arise from this setting. First, whether the Commission would be forced to decide favourably (in the sense of agreeing with the NCAs stance regarding the infringement) or not regarding the conduct investigated by the NCA. That is to say, whether the European Commission could exert the possibility of prioritising the rest of its enforcement actions performed *motu proprio* with detriment to the NCAs investigation and findings. Second, what is the applicable procedure to follow once Article 38(7) of the DMA has been triggered? Given that the proceedings would not be punitive in nature (although Oles Andriychuk would agree to disagree), would the same principles apply in the national sphere as those which will inspire the European Commission once it decides to open proceedings to monitor the DMA's compliance, in line with Article 20 of the DMA. Or on the contrary, would the NCAs have the capacity to exert their discretion by applying the same national rules which are applicable to sanctioning proceedings in this context? The former option seems more plausible, although the interpretation of the clause may vary across Member States insofar as many NCAs have both a competition-related and

consumer protection-oriented mandate (as in the case of the ACM). Beware fragmentation (in interpretation), calls Article 1(5) of the DMA.

Finally, Article 5 of the Draft Bill introduces an amendment to the provisions of the Dutch Code of Civil Procedure to facilitate the cooperation between the national courts and the Commission, in the terms set out by Article 39 of the DMA, when both business and end users seek redress through the mechanism established in Article 42 of the DMA. In this sense, the Draft Bill ensures that copies of the findings of the national courts applying the DMA are sent to the Commission through the Dutch Registrar and the intervention of the Judicial Council.

Key takeaways: go as far as an NCA can go, come what may

The Dutch Draft Bill has triggered the race for national competition authorities to expand their enforcement actions under the DMA, even if that means going even further than the provisions of the regulatory instrument, in line with their initial efforts to make the DMA look like Article 3 of Regulation 1/2003. Nonetheless, the Dutch proposal is flawed on a number of fronts:

- First, because it replicates the substance and nuance of Articles 38 and 39 of the DMA, without adding anything new or systematising the applicable rules for those gatekeepers operating in The Netherlands, contrary to the *Variola* case law.
- Second, it confers upon the ACM a greater power and responsibility than that attributed through the DMA's provisions to collaborate with the European Commission.
- And finally, it anticipates and accentuates the flaws of the own DMA's institutional design in terms of procedural basis and the securement of the right to due process recognised in favour of the designated gatekeepers.

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