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Collective Actions and the DMA: A Bird Without Wings

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The Digital Markets Act has been analysed from a myriad of prisms, both from the public and private enforcement perspectives. However, less attention has been dedicated to analysing the actual content of private enforcement via collective actions, as set out explicitly in Articles 42 and 52 of the DMA.

Article 42 DMA establishes that "*Directive (EU) 2020/1828 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*". Directive (EU) 2020/1828 (RAD) is the Directive corresponding to the configuration of an EU-wide system for collective actions in the form of representative actions. Article 52 DMA adds the substantive provisions of the DMA to the RAD's scope. Thus, in principle, the EU legislator has chosen to open the gate for consumers to collectively enforce the DMA in national courts.

Although the development via Articles 42 and 52 DMA has been left to oblivion by both academics and practitioners, the current post (which builds on the conclusions and arguments of a working paper available here) considers the intricacies of merging together both pieces of regulation and how they might interact, both from a substantive and a procedural viewpoint. Furthermore, it touches upon some other options for collective actions in the context of the DMA.

The DMA's infringements are particularly prone to collective enforcement

If one observes the provisions that are prominently going to be showcased across the coming years, i.e., Articles 5, 6 and 7 DMA, an idiosyncratic patchwork of mandates and obligations arises before one's own eyes. The provisions that the Commission will expect to be complied with as soon as March 2024 are normally analysed under the lens of public enforcement and the complexities that may arise for the gatekeepers in documenting their compliance with the obligations via their compliance reports (Article 11 DMA).

However, a distinct challenge arises as a consequence of the DMA's application: the private application of the national courts of the rules set out in the DMA. As with any other piece of secondary law, the DMA is a directly applicable regulation across the Member States and, thus, individuals may seek relief against the regulatory framework's infringements, provided that the provisions are judiciable, *i.e.* have direct effect. Collective actions are a form of the private

application of the DMA's rules by the Member State's national courts. Articles 42 and 52 DMA directly provide for the procedural scope and space of collective representative actions as a consequence of the presence of harm on consumers derived from DMA violations.

The general reasons that justify that individuals take recourse to collective actions vis-à-vis the choice of individual litigation also apply in the context of the DMA. For instance, the form of collective action enables consumers to overcome their rational disinterest (which is normally provoked by considerations of high litigation costs, lengthy procedures, and the need to overcome information asymmetries before the biggest of companies, such as those operating the Big Tech) by seeking a form of corrective justice through collective relief actions.

On top of these considerations, the institutional design and substantive content of the DMA is particularly prone to collective enforcement in national courts, if one takes a close look at infringements that may affect both business users and end users.

Each of the provisions paints a different picture in terms of the impacts that they bring to business users and end users. Five different types of provisions may be categorised in this sense: i) those provisions that protect the interests of business users directly, whereas they only impact end users indirectly by increasing the core platform services' contestability and/or fairness, such as in the prohibition under Article 5(2) DMA; ii) those provisions that only protect the interests of end users (for example, via the recognition of a right); iii) those provisions that impact them both on an equal footing directly (for example, because they are both entitled to facing the same conduct on the side of the gatekeeper such as in the case of Article 5(6) DMA); iv) those provisions that protect end users directly and business users indirectly (because they unlock business opportunities to business users via the recognition of a right on the end user, such as via the portability right under Article 6(9) DMA; and v) those provisions that only impact business users indirectly, due to the fact that they support the business users' operations only in this fashion via transparency obligations (via the expected conduct imposed on the gatekeeper on Articles 5(9) and 5(10) DMA). Despite the myriad of different provisions, the majority of the obligations imposed upon the gatekeeper belong to the first category, i.e., those provisions that directly benefit business users and indirectly benefit end users.

In any case, the provisions are particularly tailored to be applied collectively insofar as they mandate vast transformations in the business models of the gatekeepers at large. In other words, compliance with the provisions is not individualistic in the sense that a change in the legal and/or factual position of a business user or an end user is substantive in the Commission's monitoring of effective enforcement. Instead, the aggregation of the benefits that the obligations produce upon those same business users and end users underlie the rationale of the DMA. By this same token, private individual litigation does not make much sense in this context, especially when SMEs and medium-sized enterprises are concerned, insofar as the impact of the obligations upon them will be, individualistically considered, minimal but collectively huge.

Hence, from the *theoretical* perspective of collective action, the DMA is ideally conceived to enable all of those effects that may be inferred upon business users and end users surrounding the infringement of the same obligation. For instance, the force of a private action will be much more relevant when it addresses the harms of a range of business users claiming that the gatekeeper refrains from enforcing parity clauses across the platforms in which they advertise their services according to Article 5(3) DMA vis-à-vis the individual harm that an individualised claimant may file for before the national courts. In this same vein, collective actions and relief may also be

deemed ideal to bring under a single claim a range of infringements caused by the gatekeeper's conduct with regard to those provisions that are inextricably linked.

Moreover, going back to the idea that most of the provisions under Articles 5 to 7 DMA directly protect the interests of business users (and only the interests of end users in an indirect fashion), collective actions are also particularly susceptible to unifying the defence of the interests of claimants -either business or end users- under a single claim. Although end users are not *de facto* excluded from formulating collective actions on their own, the task of alleging DMA violations might prove complex in those scenarios and provisions where they are not protected directly, and only business users may prove a direct harm to the gatekeeper's conduct on their own economic operations. On top of the possibility of re-directing collective actions to claims based on multiple violations, the instrument may also be deemed useful in the context of claims aggregating multiple parties with a distinct nature before the national courts.

The DMA and the Representative Action Directive Model

Article 42 DMA recognises that *consumers* have the possibility to file before the national courts for harm derived from infringements of the DMA via the mechanism of the RAD. In this regard, the provision steers away from the definitions set out under Articles 2(20) and 2(21) DMA for end users and business users and is applicable to consumers in the sense of the definition under Article 3(1) RAD. In the DMA, end users are defined to the exclusion of business users as "*any natural or legal person using core platform services other than as a business user*" whereas business users are determined by the regulatory instrument on the basis of their commercial or professional capacity in using the gatekeeper's core platform services. The definition for consumers under Article 3(1) RAD is similar to that of end users under the DMA, insofar as only natural persons acting for purposes which are outside of a person's trade, business, craft or profession are captured under the scope of the Directive.

Therefore, private actions filed via the RAD model are restricted in their subjective scope only to end users. Business users are, *prima facie*, excluded from this option, at least when it comes to the approach directly taken in EU law – some Member States, such as Germany or the Netherlands, went another way and gold-plated the RAD and/or the DMA in relation to the RAD and included forms of business user representative actions in their national systems. Generally, the national implementing laws of the RAD are decisive for metering the success of the DMA's representative actions. The RAD leaves huge discretion to the Member States' procedural autonomy and most Member States have taken an approach that is not focused on the DMA, particularly when it comes to procedural rules specifically targeted to the complexity of digital markets.

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

Let’s be creative

Given the overall deficits and limits of the RAD system, one has to be creative when it comes to other means of collective enforcement of the DMA. The UCP Directive, P2B Regulation, and the GDPR offer residual options for collective actions for DMA infringements in EU law, where their rules overlap or interact with the DMA. All three approaches are equally generally flawed from a harmonisation standpoint, as they align with the common model found in EU legislation for collective enforcement: ultimately, it is up to the Member States to implement a system of collective enforcement within their procedural framework. In a limited amount of cases from a DMA perspective, the three instruments mandate the installation of a system of collective action but leave huge discretion to the Member States regarding the system of collective enforcement.

Some help could be offered by the so-called assignment model known from private enforcement of competition law. Under the assignment model, a large number of injured parties, usually companies harmed by the same infringement of competition law, contractually assign their respective claims for damages to a specialised commercial company or entity. At the moment, the necessity from a perspective of effective enforcement of EU competition law is tested at the ECJ due to a preliminary reference from the Regional Court Dortmund. Even if the arguments put forward under the effet utile principle could be transposed for the DMA, such a creative model not laid down in law without further-reaching procedural rules on the EU level will ultimately not mitigate the harmonisation issues.

Key takeaways

Theoretically, collective actions for DMA infringements could play an important role in guaranteeing the rights of affected parties and the overall effective enforcement of the DMA against the deficits of individual private enforcement. In the context of a digital economy, the risk that a large number of individuals will be affected by the same or similar unlawful practice has increased.

Looking at the *explicit approach* taken by the DMA by integrating its collective enforcement in the system of the RAD, huge deficits accompany this choice. *Other options* for collective actions in the context of the DMA suffer from similar deficits from a harmonisational perspective. A discrepancy becomes clear: although there is significant potential and demand for a more unified procedural framework on the EU level for collective actions regarding DMA violations (and beyond), the availabilities *de lege lata* for collective actions are restricted, leaving ample room for improvement.

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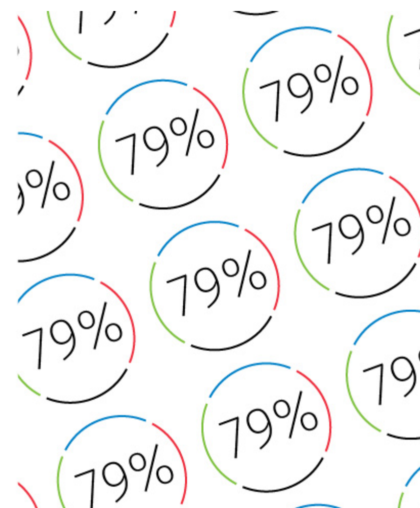

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