

# Kluwer Competition Law Blog

## Tracing Forum Shopping within the DMA's Private Enforcement: Seeking Equitable Solutions

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Prompted by concerns about the effectiveness of EU competition law in digital markets, the introduction of the [Digital Markets Act \(DMA\)](#) marks a significant milestone. This forward-looking regulation, focusing on overseeing major digital platforms termed gatekeepers, prioritizes fair competition by treating their services as core platform services. Despite the DMA's primary reliance on the European Commission for enforcement, there is a growing recognition of the potential for private enforcement to enhance fair and competitive digital markets.

This blog explores the DMA's framework, noting hints of private enforcement within certain provisions and the proactive steps of countries like France, Germany, and the Netherlands in promoting private enforcement. It addresses concerns about ensuring uniformity and consistency in private enforcement across EU Member States and tackles the issue of forum shopping, advocating for harmonisation measures to maintain consistent DMA enforcement.

### The DMA's Dynamics of Enforcement

In today's rapidly evolving digital landscape, the retrospective nature of enforcing competition laws has become increasingly impractical. Digital services and online platforms play a fundamental role in the EU's internal market, facilitating cross-border trade and redefining business structures for Union-based companies. These platforms' offerings, known as core platform services, cover a broad spectrum of services, from online search engines and social networking to cloud computing and online advertising services. While they offer numerous benefits to businesses and consumers, their immense economic power, characterised by factors like economies of scale and strong network effects can potentially stifle competition, limiting choices and innovation for consumers.

Certain major players providing these core platform services have amassed considerable economic influence, which provides the foreground for their [designation as gatekeepers under the DMA](#). These gatekeepers wield significant control over digital ecosystems, creating barriers for competitors and posing risks of market dysfunction. While existing competition enforcement mechanisms, such as Articles 101 and 102 TFEU apply to these activities, the focus is on specific instances of market power and anti-competitive behaviour. In contrast, the DMA serves a distinct purpose, aiming to maintain contestability and fairness in markets with gatekeepers, independent of

their specific impacts on market competition. It is important to note that the DMA complements rather than replaces Articles 101 and 102 TFEU, signifying a harmonized approach to competition public enforcement without impeding the existing framework, following the approach set out by Articles 1(5) and 1(6) DMA.

Thus, it can be argued that with the introduction of the DMA, a shift occurred in competition enforcement specifically for digital markets moving from reactive to proactive intervention and transitioning from an effects-based analysis to a framework based on explicit prohibitions of conducts. Inspired by the antitrust case law, the DMA is a combination of substantive and procedural rules, complemented by [Commission Implementing Regulation \(EU\) 2023/814](#), forming a unique regulatory tool for the digital era.

Yet, the bedrock of most competition law enforcement systems rests on two main pillars: public enforcement and private enforcement. Public enforcement involves actions by state authorities with specialised powers to investigate and penalise antitrust violations. On the other hand, private enforcement includes legal actions by individual plaintiffs in court to address competition law infringements.

While private enforcement actions are strongly incentivised by the EU competition law in the aftermath of the [Damages Directive](#), by acknowledging the significance of private antitrust enforcement alongside public enforcement within EU law, its application is still limited in the dynamic digital landscape. The Damages Directive aligns with the retrospective nature of general antitrust enforcement. In contrast, the DMA introduces a proactive mechanism operating as an ex-ante regulatory model departing from the traditional competition law framework.

### **Alerting on Private Enforcement in the DMA framework**

Whether the Damages Directive might establish a mechanism within the DMA's private enforcement or if the DMA inherently allows for private actions attracted much controversy. Similar to other EU regulations, there is a growing consensus that Article 288 TFEU potentially enables direct effect in relation to the DMA given that it is an EU regulation, in affording individuals with rights that national courts are obligated to safeguard.

However, the mere regulation's direct applicability within EU law does not automatically guarantee that all of its parts bear a direct effect. They need to be precise, clear, and unconditional for direct applicability, as seen in the [Van Gend and Loos Judgement](#) that shaped this principle. This condition applies to the Digital Markets Act (DMA), as well.

If one analyses the DMA's framework stemming from the mandates set out in Articles 5, 6, and 7, they stand out as the primary obligations of the gatekeepers, alongside the designation process contained under Article 3 by serving a dual function in addressing both substantive and procedural elements of the regulatory framework. While the level of preciseness may differ, Articles 5, 6, and 7 of the DMA clearly define what gatekeepers can and cannot do forming a strong basis for legal enforcement. The main inquiry revolves around the clarity and unambiguous nature of these articles, which is essential for considering whether they fulfill the requirements of the principle of direct effect for private actions.

Article 5 is construed in a way that is sufficiently clear and unconditional. However, there is a

debate about whether Articles 6 and 7's specification option (contained in Article 8) might hinder their direct effect. While some argue that the specification procedure embedded for the Commission could shield gatekeepers from private actions by rejecting their direct effect, an opposing viewpoint upholds that Article 8(2) empowers the Commission to specify the measures enshrined in Articles 6 and 7, which actually strengthens their clarity and unconditionality, framing them primarily as a right vested on the Commission itself. [The Commission supports](#) this same argument by affirming that the DMA's provisions bear direct applicability and effect before the national courts and allow the affected parties to claim damages from non-compliant gatekeepers.

As a result, the inherent right to seek compensation for damages resulting from a DMA violation appears to be present, by potentially reducing the need to additionally depend on the national framework as the DMA operates in a self-executing manner. This assertion finds reinforcement in Recital 92 and Article 39 of the DMA, which recognise a mandatory collaborative relationship between national courts and the Commission in interpreting the DMA. National courts possess the authority to request the Commission information regarding the DMA's implementation. On their part, Member States are obliged to transmit judgments related to private enforcement within the DMA framework, while the Commission has the option to participate in national DMA-related proceedings, offering observations to the courts, both in writing and orally. Additionally, Article 39(5) mirroring the language of Article 16(1) in Regulation 1/2003, directs national courts to avoid conflicting decisions with those made by the Commission under the DMA. It enables courts to seek clarity through preliminary rulings under Article 267 TFEU.

The DMA's support for private enforcement is further evident in Article 42 and Recital 104, specifically addressing consumer rights. Consumers are empowered to enforce their claims against gatekeepers' obligations through representative actions aligning with [Directive \(EU\) 2020/1828](#).

The evaluation above indicates that while the DMA potentially holds an inherent self-executing power for private actions, the absence of explicit wording confirming this argument leaves grounds for speculation. Notably, Article 54 of the Digital Service Act openly acknowledges the right to compensation, creating uncertainty about the DMA's stance. The differing wording between the two acts raises questions about compensation rights in the DMA, necessitating careful consideration and potential legal clarification on the lawmaker's intent. Although the DMA's wording prompts the self-executing power of its provisions with effects on private enforcement, the explicit mention of compensation in the Digital Service Act complicates that same interpretation, highlighting the need to align provisions across legislations that share the same focus of fostering a fair and competitive digital environment.

### **What are the Consequences of Uncoordinated Private Enforcement?**

The coalition formed by Germany, France, and the Netherlands, known as the "[Friends of an Effective Digital Markets Act](#)," had thrown its support behind the proposed DMA objectives. They advocated for strengthening the involvement of national authorities in supporting the Commission by emphasizing the need for adequate enforcement capabilities and expertise. Their belief was that facilitating private enforcement of gatekeeper obligations and ensuring clarity in DMA language would heighten its effectiveness. Despite their valuable suggestions, their initiative was initially deemed too extensive for its immediate integration into the EU regulatory framework.

Consequently, the focus shifted towards efforts at an individual level. Germany led the charge by taking the pioneering step of incorporating DMA private action principles into its Competition Act (“GWB”). [The 11th amendment](#) proposed specific additions outlining the Bundeskartellamt’s enforcement authority regarding DMA obligations. For instance, [Article 32g](#) delineates the powers granted to the Bundeskartellamt concerning potential violations of specific DMA articles. It empowers the Bundeskartellamt to conduct investigations and take necessary measures, including inquiries and relevant legal procedures. Moreover, the amendment incorporates the DMA into the existing legal toolkit of the GWB for claims related to injunctions, rectifications, and liability for damages. This amendment in the GWB also establishes a legal foundation for pursuing damage claims resulting from the DMA, aligning with principles deeply rooted in Germany’s competition landscape. It emphasises the importance of clear guidelines for private enforcement within the DMA context, obliging German courts to adhere to the European Commission’s decisions. However, unlike provisions addressing benefit recoupment, there is no presumption covering the existence and extent of damages, presenting a challenge like antitrust claims. Notably, simplifications in antitrust damage regulations have not been extended to the DMA, potentially limiting substantial changes in private DMA enforcement in Germany.

In the Netherlands, the adaptation to new European digital oversight regulations is ongoing. The Authority for Consumers and Markets (ACM) has completed guidelines explaining the [Platform-to-Business Regulation \(“P2B”\)](#) and provided its stance on enforcing the Digital Markets Act. ACM is expected to [handle reports of potential DMA violations](#) upon the passage of a proposed bill. While the Netherlands lacks a distinct emphasis on private enforcement, indications suggest the relevance of the self-executing nature of the DMA within this context.

The laconic nature of private enforcement within the DMA and the individual initiatives by the Member States truly raise concerns. Additional national legislative actions will potentially lead to fragmentation within private enforcement. This fragmentation might result in numerous requests for preliminary rulings, causing delays and undermining the effectiveness of enforcing gatekeeper obligations. Individual Member States’ initiatives might exacerbate the challenge of forum shopping, adding complexity to the existing enforcement landscape.

### **Assessing the Forum Shopping Concerns**

Forum shopping spins around plaintiffs deliberately choosing a legal jurisdiction where they feel most comfortable or can gain an upper hand, which might disadvantage the defendant. In competition law, it is a strategic move that surpasses the complexities of legal systems. It involves purposefully selecting a specific court or regulatory body believed to be more favourable in resolving disputes related to antitrust regulations. This tactic aims to optimise results for the plaintiff by capitalising on different (and more favourable) interpretations, procedures, or precedents across various legal settings. While forum shopping brings value to claimants, it poses practical and ethical challenges in shaping how competition laws are enforced and interpreted in different jurisdictions.

Thus, it is argued, that the lack of consistency and clarity in the DMA’s private enforcement, alongside with the individual initiatives across different jurisdictions fuels forum shopping. Differences in interpretations, procedures, and precedents among courts or regulatory bodies create an environment where litigants seek out venues aligning with their strategic goals. Inconsistencies

in how end-users seek remedies for DMA violations lead plaintiffs and defendants to choose forums seen as interpreting and applying these regulations more favourably, resulting in varying decisions and potentially undermining the DMA's goal of fair competition. This discourse may extend beyond to include influencing the equitable administration of justice in the digital sphere.

### **What drives forum shopping within the DMA's context and what factors might discourage it?**

The answers to these questions mainly revolve around the procedural norms across the EU Member States. These norms govern the rules for commencing legal actions, determining where and how such actions can take place. They encompass prerequisites for filing a claim like specifying its legal basis, presenting evidence, and adhering to protocols or administrative procedures within the jurisdiction. Moreover, conforming to deadlines for claim submission, appropriately serving legal documents, and following specified submission formats constitute vital aspects of EU procedural standards. Factors such as the principle of *forum non conveniens*—where a court may reject jurisdiction if it deems another forum more suitable—cost implications, language barriers, and complexities arising from diverse legal systems – can also dissuade or minimise the risks related to forum shopping.

Therefore, zooming in on the jurisdictional rules, the first question to ask is where a case can be brought. Most procedural norms outline that a case can be brought to courts where the defendant resides or where the incident causing harm occurred. This principle is rooted in Article 4 of the [Brussels I Regulation](#), establishing that a defendant within an EU Member State should face legal proceedings in the courts of that specific Member State. This holds, provided that the national laws of that Member State recognise a mechanism for competition private enforcement, notably the DMA obligations.

Generally, Article 4 notably favours the defendant. The deliberate structuring of the Brussels Regime follows the principle of *actor sequitur forum rei*, emphasising that defendants should reasonably anticipate the jurisdiction in which they might face legal action. Yet, there could also be advantages for the claimant within Article 4. Particularly, the definition of the domicile of companies or legal entities outlined in Article 63(1) of the Brussels I Regulation might, in a DMA private enforcement context, work in favour of the claimant.

Article 63(1) states that the domicile of legal entities is tied to the statutory seat, central administration, or principal place of business, giving the claimant the freedom to choose any of these as the basis for establishing jurisdiction. Additionally, Article 7(2) of the Brussels I Regulation holds significance in antitrust cases for its tort-related aspects granting jurisdiction to courts where the harmful event occurred or could occur. Typically, the CJEU interprets this in two distinct ways: i) where the harmful event causing the damage happened (the place of acting); or ii) where the actual damage was experienced (the place where harm was felt). This interpretation aligns with the principle of ubiquity providing the claimant with a choice between these two forums. However, it is important to note that the principle of ubiquity has been constrained through case law by the “[mosaic principle](#)”. This principle stipulates that claims should be confined to the damage occurring in the forum state, excluding worldwide damage sustained elsewhere.

In a digital context, the efficacy of the mosaic principle might be limited. The digital landscape

blurs the traditional boundaries for actions within specific physical locations. This ambiguity regarding where the harmful event occurs or where the damage is sustained poses challenges when applying the mosaic principle in the realm of online operations. The interconnectedness of digital platforms and the difficulty in delineating where specific actions take place could potentially undermine the clear vision of damage confined to a specific forum state. Therefore, previously held assumptions in a non-digital setting may not apply as strongly within the DMA context, affecting the application of jurisdictional rules laid out in Articles 4 or 7(2) of the Brussels I Regulation.

### **Where to march now?!**

Presently, forum shopping in the DMA's private enforcement might appear speculative but its critical role in legal strategies remains evident. It bears practical significance, notably in scenarios where certain jurisdictions fail to acknowledge the self-executive nature of the DMA or the legitimacy of third-party funding litigations, which are vital tools for challenging gatekeepers. In such cases, forum shopping emerges as a pathway for litigants and claimants to seek more advantageous legal terrains.

This setting highlights the necessity for a robust foundation in private enforcement to mitigate the risks associated with forum shopping. Establishing standardised rules, enhancing collective redress mechanisms, and addressing third-party funding litigation norms across all of the Member States could help alleviate these risks. Centralised repositories aggregating DMA-related case information throughout the EU Member States would enhance transparency and streamline decision-making thereby reducing the attraction to specific jurisdictions subject to the looming risk of forum shopping.

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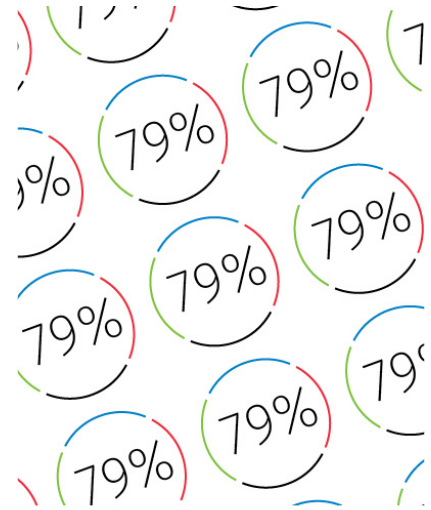
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