SCHULTERECHTSANWÄLTE.

Risks of legal and factual bypassing of the objectives and regulatory content of the Digital Markets Act.

A proposal to strengthen the Digital Markets Act in the current legislative process.

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Executive Summary

We have identified the following areas as potential risks of legal and factual bypassing of the objectives and regulatory content of the Digital Markets Act[1] ("**DMA**") by digital platforms:

Deficits in regulatory enforcement due to limited capacities of the EU Commission

In an interview, the former chief economist of the EU Commission explained how relatively small the capacities available to the EU Commission are compared to the capacities of the large digital corporations, but also in relation to national competition authorities.[2]

Such capacity constraints may result in cases not being taken up and being terminated by political concession decisions without achieving the full effectiveness of the protection of contestability of the markets concerned or fairness on the platforms.

The DMA should therefore not repeat the same mistakes that are already known from EU merger control. In order to avoid too little capacity, the following measures should therefore be taken:

– Formalised involvement of national authorities and their capacities in the EU Commission's regulatory process through application and participation rights

Article 33 Paragraph 1 new: ***When ~~three or more Member States~~ one or more competent national authority*** *request the Commission to open an investigation pursuant to Article 15 because they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper, the Commission shall within four months examine whether there are reasonable grounds to open such an investigation.*

Article 33 Paragraph 3a new: *The Commission may also ask one or more competent national authority to support its market investigation.* ***When the Commission opens a market investigation based on the request of at least one competent national authority, at least all authorities that have made such a request shall participate in the investigation.***

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1 EU Commission, Communication of 19 January 2017, EU law: Better outcomes through better implementation, OJ 2017 C 18/14.

2 *Tomasso Valetti*, interview, 20 April, 2021, published in The Counterbalance; available at: The European System of Monopoly - The Counterbalance (substack.com).

– Formalised involvement of (affected) third parties such as competitors or customers of the gatekeepers in the regulatory process, including the right to information, application, hearing and challenge before the ECJ.

Article 30a new: ***In addition to the gatekeeper concerned, parties to the proceedings of the EU Commission under this Regulation shall include, upon request:***

(a) National competition authorities from Member States sufficiently concerned by the proceedings.

(b) Third parties who have applied for the proceedings to be initiated.

(c) Persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted to the proceedings by EU-Commission; the interests of consumer associations are substantially affected also in cases in which the decision affects a large number of consumers and in which therefore the interests of consumers in general are substantially affected.

The Commission shall take a formal decision on requests of participation within no more than seven days.

Article 35 new paragraph (1a): ***Parties to the proceedings of the EU Commission under this Regulation in accordance with Article 30a shall be deemed to be directly and individually concerned within the meaning of Article 263 paragraph 4 TFEU. This shall also apply to denied requests of participation.***

– Strengthening private law enforcement by affected third parties such as competitors, customers and consumer organisations.

Article 37a new - Private Enforcement:

1. Each Member State shall ensure adequate and effective private enforcement of this Regulation. Member States shall lay down the rules setting out the measures applicable to infringements of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.

Member States shall implement adequate interim measures in court proceedings in case of urgency due to the risk of serious and irreparable damage for business users or end users.

Member States shall ensure that individual persons as well as qualified entities within the meaning of Article 3 paragraph 4 of the Representative Actions Directive can bring enforcement actions for violation of this Regulation before national courts.

Political concession decisions by the EU Commission due to fear of legal defeats

The EU Commission's decision-making practice in merger proceedings is characterised by political comfort decisions, based in particular on the fear of defeat in court before the ECJ.[3]

In order to avoid such political comfort decisions under the DMA without substantial added value for contestability and fairness, the following measures in particular should be taken:

– National authorities should have rights of participation and appeal against the EU Commission's decision (see above).

– The deletion of the possibility for the EU Commission to make commitments under Article 23 DMA should be retained, as such commitments are the gateway for political comfort decisions. Otherwise, there should at least be mandatory rights to appeal for national competition authorities and affected third parties.

– Formalised involvement of (affected) third parties such as competitors or customers of the gatekeepers in the regulatory process, including the right to information, application, hearing and challenge by way of an action for annulment before the ECJ (see above).

– Strengthening private law enforcement by affected third parties such as competitors or customers (see above).

Insufficient implementation of the EU Commission's decision by gatekeepers

The practice of the EU Commission in proceedings against digital groups proves that digital groups do not always comply with conditions or try to circumvent them. The EU Commission should therefore focus more on cooperation with national competition authorities and affected third parties when enforcing decisions.

In this respect, we propose the following measures:

– Creation of access rights for affected third parties that can be implemented under private law.

– Strengthening the participation and application rights of private third parties in the follow-up to the official process.

Article 33a Paragraph 1 new - Request for a non-compliance market investigation: ***Persons and associations of persons whose interests are***

[3] *Tomasso Valetti*, interview, 20 April, 2021, published in The Counterbalance; available at: The European System of Monopoly - The Counterbalance (substack.com).

substantially affected by the non-compliance of a gatekeeper with the obligations laid down in Articles 5 and 6 may request to open an investigation pursuant to Article 16 by presenting reasonable grounds to suspect that a gatekeeper infringed such obligations. The Commission shall take a formal decision on whether it will open an investigation or not within no more than two month.

Inadequate handling of structural deterioration through "killer acquisitions"

The DMA does not provide for an efficient control of structural deterioration in mergers involving gatekeepers that efficiently protects the contestability or fairness of the affected markets. EU Competition law's track record shows that once a market has been structurally damaged, contestability can hardly be restored again by mere behavioural remedies.

The inadequacy of the current control of mergers involving gatekeepers is demonstrated by a recent press release from the German Federal Cartel Office, in which the president of the authority makes the following statement about the clearance of the takeover of Kustomer by Facebook: "*As part of our examination, we focused on the significance of the takeover for Meta's overall strategy. Kustomer can become a relevant building block here in the future. Nevertheless, on balance we had to acknowledge with some stomach ache that the effects of the takeover would not have justified a prohibition under the applicable antitrust law.*"[4]

We therefore propose the following amendments to the DMA:

– Structural ex-ante control of mergers affecting the contestability of markets.

– Shifting the burden of proof to the gatekeepers regarding the impact of the merger on contestability.

– Creation of unbundling possibilities as an ex-post control of mergers: independent of abusive behaviour to restore the contestability of the markets and dependent on abusive behaviour in the case of significant infringements after the merger.

This could be amended in the existing Article 12 DMA as follows:

Article 12 new: *A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.*

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4 BKartA, press release of 11 February 2022; available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.pdf?__blob=publicationFile&v=2

A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Concentrations which are capable of significantly limiting the contestability of markets shall be prohibited.

In the case of concentrations involving digital services whose linkage with the gatekeeper's central platform services cannot be excluded and which may facilitate infringements of Articles 5 or 6 of this Regulation, a significant restriction of contestability shall be presumed. The gatekeeper may rebut this presumption.

In the event of a non-opposition, the EU Commission shall unbundle concentration of the gatekeeper, provided that, contrary to the gatekeeper's claim, the contestability of the affected markets has structurally deteriorated as a result of the concentration.

In the event of a non-opposition, the EU Commission shall unbundle the concentration, if the gatekeeper violates Articles 5 or 6 of this Regulation in a not insignificant way in connection with the acquired target company.

Long duration of proceedings jeopardises interim contestability and fairness

In particular, the EU Commission's proceedings against digital corporations based on abuse of market power under Article 102 TFEU prove that proceedings often take too long to maintain or improve contestability and fairness in the markets concerned.

To ensure that these weaknesses are not repeated under the DMA, we propose the following measures:

– Strengthening provisional measures. According to Article 22 (2) DMA, these are currently only for cases of non-compliance of a gatekeeper in the sense of Article 25 DMA. However, the EU Commission should be able to neutralise short-term threats, especially to the contestability of markets, in the meantime in order to avoid irreparable damage to contestability.

Article 22 new:

1. in case of urgency due to the risk of serious and irreparable damage ***to the contestability of any affected market or*** *for business users or end users of gatekeepers, the Commission may, by decision adopted in accordance with the advisory procedure referred to in Article 32(4), order interim measures against a*

gatekeeper on the basis of a prima facie finding of an infringement of Articles 5 or 6.

2. ~~a decision pursuant to paragraph 1 may only be adopted in the context of proceedings opened in view of the possible adoption of a decision of non-compliance pursuant to Article 25(1).~~ The decision shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

– Affected third parties (competitors or gatekeepers' customers) shall be allowed to challenge insufficient behavioural remedies in favour of structural measures.

Article 16a paragraph 2 new - Request for structural remedies: *If the Commission decides to put in place behavioural remedies in accordance with* ***Article 16 paragraph 1, persons and associations of persons whose interests are substantially affected by the non-compliance of a gatekeeper with the obligations laid down in Article 16 paragraph 1 may request the Commission to adopt structural remedies instead by proposing concrete structural remedies and by submitting reasonable arguments for the structural remedies. The Commission shall take a formal decision on the request within no more than one month.***

– Structural control of mergers, to maintain contestability of markets (see before).

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1. Goals of the DMA

With the Digital Markets Act, the European Commission aims at fair and contestable markets in the digital sector and targets large online platforms that are to be classified as so-called "gatekeepers" based on certain criteria. It imposes specific obligations on these gatekeepers with regard to particularly relevant core platform services, which include online intermediaries, search engines, social networks, video-sharing platforms, certain communication services and cloud services. The proposal aims to provide an effective and proportionate framework for addressing the problems in the digital economy that are currently not addressed or cannot be addressed effectively. 1

The **contestability of markets** refers to the structural component of keeping markets open to service providers other than the gatekeeper and to business customers or consumers. The notion “gatekeepers” indicates the role of large digital corporations on the affected markets: they are not only mere market participants, but can also control markets to some extent. The contestability of the market therefore suffers in particular if the gatekeepers create or raise legal or actual barriers to market entry for other market participants. The contestability of markets can therefore be impeded[5] in particular by the following conduct of gatekeepers: 2

– Refusing competitors non-discriminatory access to the gatekeeper’s platforms, data and services. 3

– Preventing the simultaneous use of competing services (multi-homing) or the switching of users. 4

– Restricting users from using services that are not controlled by the gatekeeper. 5

– Leveraging the gatekeepers’ power position to markets not yet dominated by them. 6

Fairness in the provision of platform services is more concerned with the direct conduct of gatekeepers than its impact on keeping markets open. Like the Unfair Trading Practices Directive[6], fairness aims at control of outcomes in business relationships with unbalanced bargaining positions. The focus is therefore on ensuring that gatekeepers do not impose obligations on suppliers or users that represent a significant imbalance of rights, duties and opportunities for profit.[7] 7

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5 *Podszun/Bongartz/Langenstein*, Proposals on how to improve the Digital Markets Act, p. 4; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571

6 Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 concerning unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ 2019 L 111/59.

7 *Podszun/Bongartz/Langenstein*, Proposals on how to improve the Digital Markets Act, p. 5; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571

The success of the DMA will therefore have to be measured by whether it efficiently ensures the contestability and fairness of the markets concerned. Since the contestability of the markets is directly linked to the structures of the market, the DMA must in particular ensure that it does not allow irreparable structural damage to the market through the conduct of the gatekeepers, which cannot be compensated ex-post through fines and damages, unlike it may be the case for unfair conduct. 8

2. Examples of circumvention strategies of large digital corporations outside the DMA

Important hints for possible avoidance tactics of large digital corporations are provided by current behaviour in connection with other regulatory requirements, for example in connection with the P2B[8] Regulation, (EU) competition regulations or national laws such as the German Law to Improve Law Enforcement in Social Networks ("**NetzDG**")[9]. Consequently, these past behavioural patterns need to be analysed and reviewed for the risk of transferability to the DMA. 9

In summary, it can be stated that the alleged gatekeepers regularly interpret newly enacted laws, amendments to laws and decisions by authorities in a way that runs counter to the intended meaning and purpose of the law or the official decision. To this extent, compliance with the laws and decisions is partially 10

– claimed without further explanation, 11

– despite formal compliance with the relevant requirements, the respective purpose of the law is thwarted, 12

– or a manifestly erroneous understanding of a decision used for the purpose of delaying proceedings. 13

Gatekeepers regularly defend themselves with both legal and factual claims of protection, with the aim of evading legal, regulatory and judicial orders despite an undoubted legal situation. In particular, gatekeepers express security and data protection concerns or question the practical feasibility, despite corresponding technological possibilities. In detail: 14

2.1 (EU) Competition rules

With regard to competition law decisions and laws, particular attention should be paid to the amendments to the South Korean *Telecommunication Business Act*[10] of 15

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8 Regulation (EU) 2019/1150 on promoting fairness and transparency of 20 June 2019.

9 BGBl. I p. 3352.

10 *Kwang Hyun Ryoo, Ji Yeon Park and Juho Yoon*, Korean telecom law amended to regulate practices of "app market service providers" such as app stores, paper dated 30 August 2021,

2021 and Apple's and Google's reactions thereto, the decision of the Dutch Competition Authority ("**ACM**") of 24 August 2021 on the mandatory use of ApplePay[11] as a payment service provider in the context of Apple's App Store, as well as the Android[12] decision of the European Commission of 18 July 2018 based on Article 102 TFEU.

2.1.1 ACM on ApplePay

The ACM's decision concerned the terms and conditions of Apple's App Store. According to this, in-app payments of apps downloaded from Apple's App Store had to be processed via Apple Pay. This incurs a fee of 15-30 % of the face amount for app developers. The ACM ruled that the mandatory use of ApplePay as a payment service provider in the context of in-app payments is an abuse of Apple's dominant position, as dating app providers have little choice but to accept Apple's terms.[13] Through the T&Cs, Apple restricts the freedom of choice of dating app providers in relation to the processing of payments for the digital content and services they sell. Dating app providers cannot have payments for their in-app services processed through other payment systems and cannot refer to payment options outside the app. App providers are also denied direct contact with users of their apps, e.g. for customer support. 16

The ACM believes that Apple's motives for forcing the use of Apple Pay, to commercialise the App Store and to protect the quality, privacy and security of its mobile devices and their users, do not justify the terms and conditions, as these objectives can be achieved by equally appropriate but less invasive means. Apple has been given until 15 January 2022 to amend the relevant terms and conditions so that dating app providers can use payment service providers other than ApplePay. Should Apple not adjust the inappropriate terms and conditions within two months, a fine of 5 million euros per week up to a maximum of 50 million euros would be imposed. 17

Apple defended itself against this decision in summary proceedings, claiming, among other things, that the ACM's order necessitated too far-reaching changes to the App Store. The District Court of Rotterdam rejected Apple's argument.[14] The technical adjustments necessary in an app are designed by the app provider and not 18

available at https://www.lexology.com/library/detail.aspx?g=bbb8fb96-2bfa-466e-a1ca-ace016c1ff9e.

11 Decision of the Authority for Consumers & Markets of 24 August 2021, available at https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store.

12 Decision of the European Commission of 18 July 2018, ref. AT.40099 - *Google Android*.

13 Decision of the Authority for Consumers & Markets of 24 August 2021, available at https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store.

14 Interim injunction of the Rechtbank Rotterdam of 24 December 2021, ref. ROT 21/4781 and ROT 21/4782, available in Dutch at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:12851&showbutton=true.

by Apple, and are merely submitted to Apple for approval. Apple only has to check and approve the update, so that no far-reaching changes on the part of Apple are necessary.

On 14 January 2022, Apple issued a press release claiming that the relevant changes had been implemented with effect from 15 January 2022.[15] The company noted that developers were not required to use non-Apple payment services and warned that Apple would not be able to assist with the security or reimbursement of payments that occur outside of its systems because Apple had "no direct knowledge of them". In addition, Apple stated that it will continue to charge a 27% commission on non-Apple in-app payments, a small reduction of 3% in the commission. 19

Just one week later, the ACM found that Apple had not implemented the regulatory order, contrary to assurances made on 14 January 2022, and imposed the first fine of EUR 5 million.[16] Providers of dating apps are still not able to use other payment systems besides Apple Pay. Rather, they can only express their "interest" to Apple in using other payment systems. In addition, Apple has imposed several new hurdles on dating app providers for the use of third-party payment systems. This also contradicts the decision of the antitrust authorities. Apple apparently forced the app providers to decide whether to refer to a payment system outside the app or to an entirely alternative payment system. This forced decision by dating app providers contradicts the ACM's order, as providers must also have the option to offer both options to their app users. 20

Apple thus used a combination of the avoidance tactics outlined above in this case: 21

– On the one hand, the official decision was attacked by means of protection assertation. 22

– Shortly before the deadline for implementing the injunction expired, compliance with the regulatory injunction was publicly claimed, although this was not true, as the opportunity to express an interest in using other payment services does not correspond to the actual choice of dating app providers and a significant commission of 27% continues to apply, so that there are almost no financial incentives for software developers to use a payment service provider other than Apple Pay. 23

– Finally, in the changes that were implemented, Apple introduced new hurdles for dating app providers that were contrary to the spirit of the regulatory decision and suggest a deliberate misunderstanding of the ACM's order. 24

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15 Release from Apple, 14 January 2022, Apple Developer Blog, available at https://developer.apple.com/support/storekit-external-entitlement.

16 ACM decision of 24 January 2022, press release available at https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm.

2.1.2 Telecommunication Business Acts in Korea

The amendment to the Telecommunication Business Act in South Korea came into force in September 2021 and also affected the use of payment services in the context of app stores. According to this globally unique law, app store operators are prohibited from obliging software developers to use a certain payment service, as Google (Play Store) and Apple (App Store) stipulated internationally in their terms and conditions. 25

After the new law came into force, Apple explained to the Korean government that the terms and conditions of the Korean App Store were already legally compliant and therefore no change was necessary. The Korean MP Jo Seoung-lae, whose initiative brought about the change in the law, commented on this with the following words: 26

"*Frankly, we are not satisfied.... Apple's claim that the company is already compliant is nonsensical*". 27

Google, on the other hand, said that it planned to allow third-party payment systems in South Korea. However, the service fee for developers is to be reduced by only 4 percentage points in the case of end consumers using an alternative payment service. 28

The two companies thus again used the avoidance tactics described above: 29

– Untruthful claim to already be in compliance with the law, although the new law was created exclusively to change the behaviour of the two big app store providers Apple and Google. 30

– Interpretation of the law contrary to the spirit and purpose of the law by charging a fee. Competition, according to the gatekeepers, is supposed to take place within their own eco-system, not for the services offered themselves. 31

2.1.3 Google Android Decision of the EU Commission

The European Commission's 2018 decision against Google[17] regarding the Android mobile operating system concerned the abuse of market power (Article 102 TFEU) to strengthen the dominant position of Google's own search engine. 32

This was achieved by bundling and pre-installing the Search app and Chrome app (on which Google Search is set as the default search engine) with Google's Play Store. In doing so, the Commission found that this bundling constituted an anti-competitive distribution advantage that other general search engine providers did not have. A fine of EUR 4.34 billion was imposed on Google and its parent company Alphabet for this and other infringements. 33

[17] Decision of the European Commission of 18 July 2018, ref. AT.40099 - *Google Android*.

Google then introduced a Choice Screen, where end users could choose between various search engine provider options. However, the competing general search services had to participate in an auction in order to be displayed on the few available slots of this Choice Screen. 34

Search providers displaying Google's own search results and search ads could also participate in this auction. They could bid higher than real competitors because Google could cross-subsidise their participation with benefits from their revenue-sharing agreements.[18] 35

At the same time, Google's remedy resulted in Google's previous competitors becoming Google's customers, forcing them into an auction situation and thus into a financial competitive situation. In addition, only 12 bidders were displayed on the Choice Screen. All other participants in the auction made uncertain upfront investments that ultimately turned out to be sunk costs. 36

Google again used the avoidance tactics described above: 37

– Claim to already be in compliance with the law. 38

– Interpretation of the administrative order contrary to the spirit of the decision by introducing a competition-distorting auction mechanism. 39

As the changes made had not effectively stopped the identified abuse, Google redesigned access to the Choice Screen on European Android devices on 8 June 2021, i.e. almost three years after the Commission's decision, in order to avoid further proceedings by the Commission.[19] 40

In particular, the auction mechanism was abolished so that general search services are granted free access to the Choice Screen based on objective criteria. Google also committed not to collect search data on third party search services and not to give access to search engines that only map Google search results. 41

2.2 P2B Regulation

The Platform-to-Business Regulation ("**P2B Regulation**")[20] was introduced in 2019 as an European legal act to provide adequate transparency, fairness and effective remedies for business users of online intermediary services and users with business websites with regard to search engines. According to recital 7 of the P2B 42

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18 *Höppner*, Antitrust remedies in digital markets: lessons for enforcement authorities from non-compliance with EU Google decisions, available at https://www.hausfeld.com/de-de/was-wir-denken/competition-bulletin/antitrust-remedies-in-digital-markets-lessons-for-enforcement-authorities-from-non-compliance-with-eu-google-decisions/.

19 Post by Google on Google Blog, 8 June 2021, available at: https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/, last accessed 11 February 2021 at 09:15.

20 Regulation (EU) 2019/1150 on promoting fairness and transparency of 20 June 2019.

Regulation, the purpose of the Regulation is to ensure a fair, predictable, sustainable and trustworthy online business environment in the internal market.

According to Article 4 para. 1 P2B Regulation, online intermediary services, such as Amazon as the provider of Amazon Marketplace, must justify this decision if a commercial user is blocked or terminated. The reasons here can be manifold, such as the purchase of product reviews or the sale of counterfeit goods by the merchants. 43

Despite the clear wording of the provision, Amazon apparently continues to regularly use general text modules without a concrete reference to the individual cases or without citing evidence for the general statements, as the diverse cases from German judicial decision-making practice show[21]. Amazon also does not provide for an adequate procedure for hearing affected traders.[22] Finally, the goods stored in Amazon's logistics centres are disposed of by blocked merchants within 30 days unless a return order is filed. However, such a return order can only be placed via the merchant account, so that in the case of a blocked account, the merchant is not able to place the return order, so that shortly after the account has been blocked, the merchant's own goods are threatened with destruction.[23] 44

Amazon defended itself against corresponding lawsuits and applications for interim injunctions to unblock merchant accounts with a variety of arguments: 45

– In some cases, it is already being questioned (with success) whether the Amazon Group company being sued is[24] the correct defendant at all; 46

– In some cases it is argued that Luxembourg and not German law is applicable;[25] 47

– Some argue that Amazon does not have a dominant position in online retail or on the market for online marketplaces in Germany, contrary to the statutory presumption rule of Section 18 (4) ARC, according to which a dominant position is presumed from a market share of 40%;[26] 48

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[21] LG Hannover, order of 22 July 2021, ref. 25 O 221/21, GRUR-RS 2021, 24622; LG München I, order of 14 January 2021, ref. 37 O 32/21, BeckRS 2021, 10613; LG Mühlhausen, order of 29 June 2020, ref. HK O 26/20; LG Hildesheim, order of 26 June 2019, ref. 3 O 179/19.

[22] LG München I, order of 14 January 2021, ref. no. 37 O 32/21, BeckRS 2021, 10613.

[23] LG Hannover, order of 22 July2021 , file no. 25 O 221/21, GRUR-RS 2021, 24622 marginal no. 5, 6.

[24] LG München I, judgement of 07 October 2020, ref. 31 O 17559/19.

[25] LG München I, order of 14 January 2021, ref. no. 37 O 32/21, BeckRS 2021, 10613 marginal no. 25

[26] According to market surveys such as the HDE Online Monitor, Amazon had a total market share of 53 % of German online retail in 2020, with more than half of this being accounted for by the Marketplace. In contrast, other marketplaces have a market share of only 10% of total online trade, and the remaining online trade (generally direct sales by manufacturers and other medium-sized retailers) has a share of only 37%.

– Finally, it is also argued that the disclosure of the relevant evidence of reprehensible trader behaviour is unreasonable, as this would make it easier for traders to circumvent Amazon's control systems.[27]

So Amazon again used the avoidance tactics described above: 50

– Claiming to already be in compliance with the law, although the legally clear order to justify blockings individually and specifically was not complied with; 51

– Legal protection claims, such as the assertion that Amazon is not a dominant company, although Amazon's market shares are in a range of more than 50% on both the German market for online retail and the German market for online marketplaces, where market dominance is beyond question (cf. Section 18 (4) ARC). 52

2.3 German Law to Improve Law Enforcement in Social Networks ("NetzDG")

The German German Law to Improve Law Enforcement in Social Networks ("**NetzDG**") entered into force on 1 October 2017[28] and is a German law containing provisions for social network providers subject to fines regarding the handling of criminal content posted on the platform as well as regarding user reports of hate crimes and other criminal offences committed on the social networks. In addition, according to Section 2 NetzDG, social network providers are ordered to report on such events every six months. 53

In recent years, Facebook in particular has increasingly attracted attention with violations of the NetzDG. In the following, the conduct of Facebook as well as its authorised representative for service of process to be appointed pursuant to Section 5 of the NetzDG will be examined. 54

Pursuant to Section 5 (1) of the NetzDG, providers of social networks must appoint an authorised service agent in (German) Germany and draw attention to him or her on their platform in an easily recognisable and directly accessible manner. Service can be effected on this authorised representative in proceedings for the imposition of fines and in supervisory proceedings pursuant to Sections 4, 4a NetzDG or in court proceedings before German courts due to the dissemination or due to the unfounded assumption of the dissemination of illegal content. 55

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27 LG München I, order of 14 January 2021, ref. 37 O 32/21, BeckRS 2021, 10613 marginal no. 29.

28 BGBl. I p. 3352.

According to previous court rulings on this issue, Facebook or the large law firm appointed as the authorised service agent regularly [29]refuses to accept pleadings, court orders and judgements [30]despite the NetzDG coming into force, among other things on the grounds that the company does not have any employees who are sufficiently proficient in the German language. Not only are warnings for blocking or deleting websites due to alleged violations of the law sent back unprocessed, but also interim injunctions from courts are simply ignored.

In a case before the Berlin Regional Court in 2018[31], the Regional Court prohibited the deletion of a comment and the blocking of the user from the Facebook network for thirty days. However, Facebook did not lift the block upon service of the injunction, but only after the self-imposed blocking period had expired. 57

In other interim injunction proceedings, the applicant also claimed against Facebook for an injunction to delete a comment.[32] The court followed the applicant's request and served the order on the respondent (Facebook Ireland Ltd.) without a translation. In response, the respondent stated in a written statement of 27 June 2019 that it refused to accept the order within the meaning of Article 8(1) of the Regulation because it did not speak German. According to Article 8 of the Regulation, the addressee may refuse to accept service if the document is not written in a language that the addressee understands (Article 8(1)(a) of the Regulation) or is not written in the official language of the Member State addressed (in this case, Ireland). 58

Contrary to Facebook's submissions, the court of next instance found that service had been effected effectively and should not have been refused by Facebook with reference to Article 8 of the Regulation. The decisive factor was not the language skills of the organs of the legal person, but rather the skills actually existing and available in the company, which the recipient could reasonably access. In the case of Facebook, there was already a factual presumption that Facebook was proficient in the German language, since Facebook conducted business on a large scale, so that it could be assumed that Facebook also had employees "*who would take care of legal disputes with customers resident in that state*" and had sufficient knowledge of the language in which business was conducted with the customers in question.[33] This assumption was also supported by the fact that Facebook had committed itself to processing contracts in German and by the fact that all contractual documents were made available by Facebook in German. The understanding that only the language skills of the employees working in Ireland mattered was wrong. 59

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29 OLG Munich, order of 14 October 2019, ref. 14 W 1170/19; OLG Stuttgart, order of 13 March 2018, ref. 4 W 17/18; LG Berlin, order of 23 March 2018, ref. 31 O 21/18; LG Hamburg, order of 7 March 2018, ref. 324 O 51/18; LG Stuttgart, order of 6 February 2018, ref. 11 O 22/18.

30 See Facebook TOS, available at https://www.facebook.com/legal/terms, last accessed on 10 February 2022 at 20:10.

31 LG Berlin, order of 23 March2018 .

32 Regional Court of Kempten (Allgäu), order of 26 April 2019, ref. no. 22 O 590/19.

33 OLG Munich, Order of 14 October 2019, Ref. 14 W 1170/19

The same approach by Facebook was classified as "abuse of rights" and as a "mere protection assertation" in another case before the OLG Düsseldorf[34] (emphasis by the editor): 60

> "*If an internet portal with its seat in a member state (here: Facebook Ireland Ltd.) has* ***numerous users in Germany*** *and if the platform, but also the* ***documents*** *used between the parties* ***(general terms and conditions, terms of use, so-called community standards) are made available to the*** *users* ***completely in German and also oriented towards German law,*** *this speaks in favour of sufficient knowledge of the German language within the meaning of § 8 para. 1 of the Regulation, a contrary submission may be* ***a mere assertion of protection and the*** *refusal to accept a document that has not been translated (here: order in German) in the case of service by way of mutual assistance may prove to be inadmissible and, as a result, an* ***abuse of rights*** *(see also: OLG Köln, order of the Court of Appeal of Cologne, order of the Court of First Instance of the European Communities, order of the Court of First Instance of the European Communities, order of the Court of Justice of the European Communities). on this also: OLG Cologne, order of 09.05.2019 - 15 W 70/18; OLG Munich, order of 09.04.2019 - 18 W 523/19; OLG Dresden, order of 05.04.2019 - 3 W 286/19; LG Stuttgart, judgment of 29.08.2019 - 11 O 292/18; LG Offenburg, judgment of 26.09.2018 - 2 O 310/18; LG Schwerin, order of 05.03.2019 - 3 O 162/18).* " 61

So Facebook again used the avoidance tactics described above: 62

– Making factual protection claims such as that the company is not able to understand the German language, although Facebook has 31 million customers in Germany; 63

– Making legal protection claims based on a purely formalistic approach; 64

– Preventing service or simply failing to comply with injunctions despite clear orders from the courts. 65

3. Potential deficits in the achievement of the DMA's objectives according to the current draft

The appropriateness of further amendments to the current draft of the DMA depends on its potential deficits. These may, in particular, include the following aspects: 66

[34] OLG Düsseldorf, order of 18.12.2019, ref. I-7 W 66/19.

3.1 Deficits in regulatory enforcement due to limited capacities of the EU Commission

In an interview, the former chief economist of the EU Commission explained how relatively small the capacities available to the EU Commission are compared to the capacities of the large digital corporations, but also in relation to national competition authorities.[35] 67

Such capacity constraints may result in cases not being taken up and being terminated by political comfort decisions without achieving the full effectiveness of the protection of contestability of the markets concerned or fairness on the platforms. 68

3.2 Avoid efficient enforcement by compromising with enforcement authority

The EU Commission's decision-making practice in merger proceedings is characterised by political compromise decisions, based in particular on the fear of a legal defeat before the ECJ.[36] 69

This fear works one-sidedly in favour of the companies to be controlled, which are the addressees of the Commission's decision. According to the jurisprudence of the EU courts, the addresses are entitled to challenge decisions of the EU Commission with an action for annulment. 70

Third parties such as competitors, business customers or consumers must overcome the hurdle of being directly and individually concerned in order to take action for annulment pursuant to Article 263 (4) TFEU. Since individual and direct concern is interpreted very narrowly, such actions often already fail due to procedural issues. Furthermore, the risk of having to bear the costs of litigation prevents some third party actions from being brought in advance. 71

Insofar as the EU Commission finds a compromise with the addressees of its decision, it hardly has to fear that anyone will legally attack this compromise. This leads to a one-sided preference for the interests of the addressees of the decision within the framework of a legal process. This imbalance should and can be balanced by corresponding participation and challenge rights of other third parties. 72

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35 *Tomasso Valetti*, interview, 20 April, 2021, published in The Counterbalance; available at: The European System of Monopoly - The Counterbalance (substack.com).

36 *Tomasso Valetti*, interview, 20 April, 2021, published in The Counterbalance; available at: The European System of Monopoly - The Counterbalance (substack.com).

3.3 Deviating implementation of regulatory decisions in case of insufficient regulatory supervision

Even if the EU Commission takes clear decisions in the sense of the DMA, this is not synonymous with effectively ensuring contestability and fairness in the markets concerned. The practical examples at 2. show that digital companies do not always comply with decisions and requirements or try to circumvent them. 73

For the efficient enforcement and monitoring of its decisions, the EU Commission should therefore rely more on cooperation with national competition authorities and affected third parties than stipulated in the current version of the DMA. 74

3.4 Inadequate handling of structural deterioration by "killer acquisitions"

The current version of the DMA does not allow for efficient control of structural deterioration in mergers involving gatekeepers. This also rules out efficient protection of the contestability or fairness of the affected markets. Experience shows that once a market has been structurally damaged, it cannot be made contestable again with mere behavioural measures. 75

The inadequacy of the current possibility of controlling mergers involving gatekeepers is demonstrated by a recent press release from the German Federal Cartel Office, in which the president of the authority makes the following statement about the clearance of the takeover of Kustomer by Facebook: "*As part of our examination, we focused on the significance of the takeover for Meta's overall strategy. Kustomer may become a relevant building block here in the future. Nevertheless, on balance we had to acknowledge with some stomach ache that the effects of the takeover would not have justified a prohibition under the applicable antitrust law.*"[37]. 76

The German Parliament is also currently calling for stricter control of "killer acquisitions" by gatekeepers within the framework of the DMA: "*The German Parliament calls on the Federal Government to work towards creating [...] possibilities in the trilogue negotiations on the Digital Markets Act to prohibit gatekeepers from buying up (potential) competitors ("killer acquisition"), for example as a fixed legal consequence for violations of the* DMA *by gatekeepers.*"[38]. 77

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[37] BKartA, press release of 11 February 2022; available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.pdf?__blob=publicationFile&v=2

[38] BT-Drs. 20/686 of 15 February 2022,

3.5 Long duration of proceedings jeopardises interim contestability and fairness

In particular, the EU Commission's proceedings against digital corporations based on abuse of market power under Article 102 TFEU prove that proceedings often take too long to maintain or improve contestability and fairness in the markets concerned. 78

4. Strengthening Public Enforcement

Many of the deficits mentioned under 3. can be eliminated by strengthening regulatory enforcement. This applies in particular to formalised cooperation with national competition authorities (see 4.1) but also for the involvement of third parties (see 4.1.2). 79

4.1 Formalised cooperation with national authorities

So far, the draft DMA only provides for a few regulations on the formalised cooperation of the EU Commission with the national competition authorities (see 4.1.1). These cannot compensate for the deficits described at 3. We therefore propose more far-reaching provisions on formalised cooperation (see 4.1.2). 80

4.1.1 Formalised cooperation according to current draft

Currently, the draft DMA provides only a few regulations for formalised cooperation with national authorities: 81

4.1.1.1 Information obligations in the case of gatekeeper mergers

According to recital 31 and Article 12 DMA, the gatekeepers must also inform the national competition authorities about **mergers.** 82

4.1.1.2 Support and power of application for market investigations

According to Article 14 (3a) DMA, the EU Commission has the possibility to ask national competition authorities for assistance in **market investigations**. In this respect, however, there is no obligation, neither on the part of the Commission nor on the part of the national authorities. 83

According to Article 33 DMA, three or more Member States may request the EU Commission to carry out a **market investigation** within the meaning of Article 15 DMA. The Commission has a duty to investigate and must decide within 4 months. 84

4.1.1.3 Advisory Committees

According to Article 31a DMA, a **European High-Level Group of Digital Regulators** is to be created. It is to advise the Commission on decisions under the DMA and report to Parliament every two years. 85

According to Article 32 (1a) DMA, the **advisory committee for digital markets shall** consist of representatives of the national competition authorities. 86

4.1.2 Proposals to strengthen regulatory enforcement

Each national competition authority should be granted application rights vis-à-vis the EU Commission to initiate proceedings under the DMA. 87

With regard to the application for the **initiation of a market investigation** under Article 15 DMA, an obligation to investigate under Article 14 DMA should already be triggered if at least one national competition authority submits a corresponding application. Especially against the background of the political independence of the competition authorities according to Article 4 ECN+[39] Directive, they seem to be better protected from political influence than the governments of the respective Member States. 88

Article 33 Paragraph 1 new: ***When ~~three or more Member States~~ one or more competent national authority*** *request the Commission to open an investigation pursuant to Article 15 because they consider that there are reasonable grounds to suspect that a provider of core platform services should be designated as a gatekeeper, the Commission shall within four months examine whether there are reasonable grounds to open such an investigation.* 89

If the EU Commission initiates a market investigation based on the request of at least one national competition authority, the EU Commission should be obliged to involve all requesting competition authorities in the market investigation in any case. 90

Article 33 Paragraph 3a new: *The Commission may also ask one or more competent national authority to support its market investigation.* ***When the Commission opens a market investigation based on the request of at least one competent national authority, at least all authorities that have made such a request shall participate in the investigation.*** 91

Moreover, the national competition authorities should also have the right to apply for formal participation in proceedings of the EU Commission, at least if the respective member state is affected by the proceedings. 92

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[39] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on strengthening Member States' competition authorities with a view to enhancing the effectiveness of competition enforcement and ensuring the proper functioning of the internal market, OJ 2019 L 11/3.

***Article 30a new**: In addition to the gatekeeper concerned, parties to the proceedings of the EU Commission under this Regulation shall include, upon request:* 93

(a) National competition authorities from Member States sufficiently concerned by the proceedings. 94

(b) Third parties who have applied for the proceedings to be initiated. 95

(c) Persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted to the proceedings by EU-Commission; the interests of consumer associations are substantially affected also in cases in which the decision affects a large number of consumers and in which therefore the interests of consumers in general are substantially affected. 96

The Commission shall take a formal decision on requests of participation within no more than seven days. 97

5. Strengthening private enforcement

Experience in the application and enforcement of national and EU rules relating to different aspects of digital platforms demonstrates that effective enforcement of the Digital Markets Act[40] ("**DMA**") can only be achieved on the basis of balanced public and private enforcement. 98

Private enforcement of EU law is an essential pillar of the European Union's self-image. In a Communication on the enforcement of EU law, the EU Commission states: "The *principle of 'greatness and ambition in big matters and restraint and humility in small matters' should result in a more strategic and efficient approach to enforcement in the event of infringements. In implementing this approach, the Commission continues to attach great importance to individual complaints in identifying wider problems in the enforcement of EU law which may affect the interests of citizens and businesses.* ". The ECJ, in its consistent case law on the enforcement of EU regulations (such as the DMA), also leaves no doubt about this: "*According to* [Article 288 TFEU], *the regulation has general application and is directly applicable in every Member State. Thus, by its very nature and function in the legal source system of Community law, it may create rights of individuals which national courts must protect.* ".[41] 99

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[40] EU Commission, Communication of 19 January 2017, EU law: Better outcomes through better implementation, OJ 2017 C 18/14.

[41] ECJ, Judgment of 17 September 2002, C-253/00, para. 27 - *Muñoz/Frumar.*

There are no obvious reasons why this should be different in the case of the DMA. On the contrary, the following aspects in particular speak in favour of a supporting enforcement of the DMA under private law:

– **Limited availability of the EU Commission's resources** in view of the expected large number of complaints based on the DMA, the **legal and factual complexity of the cases** and the **predominant resources of the digital groups covered by the DMA**. These are aspects that are already known from EU merger control cases and competition cases based on the prohibition of abuse of dominant position and are also confirmed by former employees of the EU Commission. 101

– **Limited legal protection and participation opportunities for affected third parties** in official proceedings of the EU Commission. In this respect, the EU Commission can control the opportunities for participation of the digital groups directly affected by the conduct of the DMA at its own discretion. The possibilities for legal protection against decisions of the EU Commission on the basis of an action for annulment pursuant to Article 263 TFEU are considerably limited due to the very narrow understanding of the Commission and the ECJ with regard to the requirements of "individual concern" pursuant to Article 263 (4) TFEU and, due to this legal certainty, prevent a large number of potential complaints against decisions of the Commission in advance, which are perceived as insufficient by affected competitors, customers and also consumers. 102

– **Risk of compromise decisions on authority policy** to signal pro-active action against digital corporations covered by the DMA without actually remedying the negative effects of the misconduct. 103

– Lack of overview and deviating allocation of resources with regard to the **monitoring of an efficient implementation of** possible requirements and decisions of the EU Commission vis-à-vis digital groups covered by the DMA. 104

Particularly in the area of enforcement of the competition provisions related to the DMA under Articles 101, 102 TFEU, the EU has increasingly recognised the importance of accompanying enforcement under private law and has finally even partially harmonised the civil antitrust proceedings in the Member States by means of a directive, although it is recognised that antitrust damages actions can have a negative effect on the willingness of cartel participants to report infringements themselves by way of a leniency application and although the leniency applications are the most important source of information for the official enforcement of the competition provisions. Such negative effects on regulatory enforcement are not to be expected in the case of private enforcement of the DMA, since complaints by third parties against the conduct of the gatekeepers will be the most important source of knowledge for regulatory prosecution. 105

5.1 Private Enforcement according to the current draft of the DMA

The Commission's draft of the DMA did not contain explicit provisions on private enforcement. Comments from member states highlight the added value that a clear commitment to private enforcement of the DMA can provide. [42] 106

The participation of third parties in the context of official procedures is stipulated in Articles 19, 20 and 30 DMA. Article 19 DMA contains powers to obtain information from undertakings and associations of undertakings. Article 20 DMA regulates the right to interview and take statements from natural and legal persons. These are exclusively rights granted to the EU Commission. Article 30 DMA, on the other hand, regulates the right to be heard and to inspect files of both gatekeepers and other companies affected by decisions of the Commission (e.g. requests for information). Theoretically, this provides room for sufficient involvement of third parties by the EU Commission. However, this still depends on the discretion of the authority and can be undermined by it for a wide variety of considerations. There is thus no institutionalised participation of (affected) third parties. In particular, this will also lead to civil society representatives not (having to) be heard. 107

Consideration of at least the "fundamental rights" of third parties is mentioned in recital 29, but is a matter of course due to the EU Commission's commitment to fundamental rights. The term "fundamental rights" remains vague. Concrete procedural and participation rights of third parties cannot be derived from this. 108

Furthermore, when examining the possible suspension of an obligation (Article 8 DMA) which the EU Commission has imposed on a gatekeeper, the effects of the fulfilment of the obligation to be suspended on the profitability of the business activity of the third parties must also be taken into account. In the case of an exemption for reasons of public interest (Article 9 DMA), the effects on them as well as on the gatekeeper and third parties must also be taken into account. However, no special enforcement or participation rights of third parties follow from these obligations to take into account. Nevertheless, the provision clarifies the importance of the DMA for third parties and underlines that in appropriate cases they should also have the possibility to enforce these interests under private law. 109

According to the amendments adopted by the Parliamen[43], the role of national courts in the enforcement of the DMA is also emphasised. Article 77a DMA 110

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42 Joint Statement by the Ministries of Economic Affairs of France, Germany and the Netherlands, Strengthening the Digital Markets Act and Its Enforcement, p. 2: "*Private enforcement would further increase the effectiveness of the DMA. Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible.* "

43 Based on the proposal of the European Commission for a regulation on contestable and fair markets in the digital sector of 15 December 2020 plus the amendments of the European Parliament according to P9_TA(2021)0499: Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act); COM(2020)0842 - C9- 0419/2020 - 2020/0374(COD).

provides for participation rights of the EU Commission as *amicus curiae* before national courts. The courts are also entitled to request information.

5.2 Private enforcement of the DMA by national law using the example of Germany

Even if an EU regulation itself does not provide for rules on private enforcement, the private law systems of the Member States remain applicable. If the conditions for this are met, the member states are in principle obliged, within the framework of the principles of effectiveness and equivalence, to enforce relevant civil law claims precisely in relation to EU regulations. For example, cartel damage claims based on violations of the EU ban on cartels (now Article 101 (1) TFEU) before July 2005 are based under German law on the general tort claim for violation of a law protecting third parties within the meaning of Section 823 (2) BGB. 111

From the current DMA, the prohibitions in Article 5 and 6 DMA in particular come into consideration for direct enforcement by means of national procedural law, whereby it is questionable whether the EU Commission must first have positively established the position of a digital group as a gatekeeper within the meaning of Article 3 DMA.[44] 112

The private enforcement of the current DMA under German law is particularly important from the point of view of the Act Against Unfair Competition (Gesetz gegen unlauteren Wettbewerb; see 5.2.1), the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen; see 5.2.2) and the general civil law of torts (see 5.2.3). 113

5.2.1 Private law enforcement based on the law against unfair competition

The German Unfair Competition Act ("**UWG**") [45]contains a general clause that allows competitors and qualified associations to remedy violations of market 114

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[44] *Komninos,* The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement (August 31, 2021). Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World (Concurrences, 2021), p. 1; available at https://ssrn.com/abstract=3914932; *Louven*, Proposal for a Digital Markets Act - Private Enforcement; available at: https://www.cr-online.de/blog/2021/09/17/vorschlag-fuer-einen-digital-markets-act-private-enforcement/.

[45] Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) in the version promulgated on 3 March 2010 (BGBl. I p. 254), as last amended by Article 1 of the Act of 10 August 2021 (BGBl. I p. 3504). The Act also serves to implement Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22; corrected in OJ L 253, 25.9.2009, p. 18) and Directive 2006/114/EC

conduct rules by means of claims for removal and injunctive relief (Section 8 (1) sentence 1 UWG in conjunction with Sections 3, 3a UWG). Despite the granting of pure investigative competence in the area of consumer and fair trading law to the Federal Cartel Office, the enforcement of consumer and fair trading law in Germany is based on the activities of market participants and institutionalised consumer[46] and competition associations. [47]

The enforcement in particular of the claims for removal and injunctive relief under the UWG is regularly carried out by way of interim measures. Particularly in comparison to the many years of antitrust proceedings by the authorities, not least against large digital corporations, in the context of which the authorities have so far been very reluctant to make use of their legal possibilities for interim injunctions, affected companies and competitors can have potentially harmful conduct temporarily stopped at very short notice. 115

Nevertheless, corresponding proceedings against large digital corporations and platforms in Germany, for example, in the case of unlawful blocking due to violations of the P2B[48] Regulation, show that a distinction must be made between a successful application for interim measures in court and their de facto enforcement against companies based abroad. Private prosecution is therefore no guarantee of effective enforcement of the legal requirements of large digital corporations. Sector-specific requirements and facilitations, such as on questions of service in the NetzDG[49], beyond the existence of general regulation in the UWG, can therefore contribute to efficient private law enforcement. 116

Central to the application of the claims of affected competitors against digital corporations under Section 8 (1) sentence 1 UWG in conjunction with Sections 3, 3a UWG for infringement of the DMA is the classification of the prohibitions of the DMA as a rule of market conduct within the meaning of the UWG. There are good reasons to assume that this is the case. Nevertheless, the recurring discussions, also in the context of the DMA prohibitions as rules of market conduct, show that this feature can lead to legal uncertainty. 117

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of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (OJ L 376, 27.12.2006, p. 21). It also transposes Article 13 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p. 37), as last amended by Article 2(7) of Directive 2009/136/EC (OJ L 337, 18.12.2009, p. 11).

[46] See https://www.vzbv.de/sites/default/files/downloads/Recht-durchsetzen-Verbraucher-staerken-Broschuere_vzbv.pdf

[47] See for example the activities of the Wettbewerbszentrale: https://www.wettbewerbszentrale.de/de/home/

[48] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediary services, OJ 2019 L 186/57.

[49] Act to Improve Law Enforcement on Social Networks of 1 September 2017 (Federal Law Gazette I p. 3352), last amended by Article 1 of the Act of 3 June 2021 (Federal Law Gazette I p. 1436).

Furthermore, the claims are only available to certain associations or competitors of the gatekeeper within the meaning of Section 8 (3) UWG, but not to consumers, for example, who may also have an interest in stopping certain conduct by the digital corporations covered. 118

As a result, prohibitions of the DMA can in principle be enforced by the affected competitors of the gatekeepers via the unfair competition law claims under Section 8 (1) sentence 1 UWG in conjunction with Sections 3, 3a UWG. Legal uncertainties remain with regard to the qualification of the prohibitions as "market conduct rules". In addition, third parties other than competitors are excluded from the claims. 119

5.2.2 No private law enforcement based on the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen)

Sections 33, 33a ARC also provide for claims for removal, injunctive relief and damages, which, however, are explicitly linked to violations of genuinely antitrust law provisions. The claims standards explicitly refer only to violations of a provision of the first part of the ARC or of Article 101 or 102 of the TFEU. This naturally excludes violations of the DMA, unless they also violate antitrust law. 120

The current lack of coverage of violations of the DMA by Sections 33, 33a ARC is all the more serious because the national civil cartel law systems provide for a whole range of facilitations for the private law enforcement of the cartel law provisions, which are to a very considerable extent based on an EU Directive on the efficient private law enforcement of the cartel law prohibitions.[50] These facilitations include in particular: 121

– **Follow-on actions**: Section 33b ARC provides that the adjudicating civil court is bound by the finding of the infringement as made in a final decision of the cartel authority, the European Commission or the competition authority or the court acting as such in another Member State of the European Union. Private claimants therefore do not have to present and prove the cartel infringement of the cartelists according to the usual rules of civil procedure, but can rely in this respect on findings that have already become final. 122

– **Special limitation regime**: Antitrust claims under Sections 33, 33a ARC become time-barred after five years, whereby the limitation period only begins to run when the infringement underlying the claim has ended (Section 33h (1), (2) No. 3 ARC). This is a clear privilege compared to the general limitation rules under civil law pursuant to Sections 194 et seq. BGB. 123

[50] 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 laws of the Member States and of the European Union, OJ 2014 L 349/1.

– **Relief from the burden of proof**: Since the amount of antitrust damages claims is based on the difference to a counterfactual scenario without a cartel violation, which cannot be proven and evidenced, it is rebuttably presumed in favour of the claimants pursuant to Section 33a (2) sentence 1 ARC that a cartel caused damage and that legal transactions concerning goods or services with cartel participants, which factually, temporally and geographically fall within the scope of a cartel, were covered by this cartel (Section 33a (2) sentence 4 ARC). 124

– **Claims for information**: Section 33g ARC also provides for claims by the claimant for the surrender of evidence and the provision of information to the companies involved in the cartel. 125

– **Reduction of cost risks**: Section 89a (1) ARC provides for an adjustment of the amount in dispute if a claimant makes a credible case that the burden of litigation costs according to the full amount in dispute would significantly jeopardise its economic situation. This reduces the cost risks for the parties, but will only actually intervene in a few cases. 126

Summary: Under current law, the civil antitrust claims of the ARC do not cover violations of the DMA. At the same time, the rules on private enforcement of antitrust claims underline the necessity and appropriateness of sector-specific requirements. 127

5.2.3 Enforcement based on general civil tort law

Finally, a private-law enforcement of the violations of the DMA can be considered within the framework of the general civil-law tort claim for violation of a norm protecting third parties according to Section 823 (2) BGB. 128

In the area of directly applicable EU provisions, a necessary interpretation in conformity with EU law leads, in contrast to the usual dogmatics of Section 823 (2) BGB, to the fact that liability does not depend on whether the infringed standard of conduct is intended to serve the protection of the party seeking compensation.[51] However, the relevant criteria of the ECJ in deciding on an obligation of the Member States to sanction violations of Union law under private law or for the assumption of subjective rights of private parties to compensation are considered to be opaque, which can lead to considerable legal uncertainty.[52] However, the ECJ's decision-making practice shows that it tends to take a very broad view of the need to enforce EU law under private law. On the labelling obligation of table grape varieties under Council Regulation (EEC) No. 1035/72 of 18 May 1972 and Council Regulation (EC) No. 2200/96 of 28 October 1996, for example, the ECJ ruled that it must be possible for an economic operator to enforce compliance with the 129

[51] *Wagner*, in: Münchener Kommentar zum BGB, 8th edition 2020, § 823 marginal no. 540.
[52] *Wagner*, in: Münchener Kommentar zum BGB, 8th edition 2020, § 823 marginal no. 542.

provisions on quality standards for fruit and vegetables against a competitor by means of civil proceedings.[53]

Interim result: For the rules of the DMA as an EU regulation, this means that legal infringements of third parties, including damages incurred due to violations of the prohibitions of Articles 5, 6 DMA, can be asserted by anyone via Section 823 (2) BGB. This must apply at least if the EU Commission has already determined that the digital company in question is a gatekeeper within the meaning of Article 3 DMA. 130

5.2.4 Summary and recommendation

With the claims under unfair competition law from Section 8 (1) UWG in conjunction with Sections 3, 3a UWG and general civil law tort claims from Section 823 (2) BGB, there are at least connecting factors under German law for private law enforcement. Sections 3, 3a UWG and the general civil law tort claim under Section 823 (2) BGB, there are at least starting points under German law for the enforcement of the prohibitions of the DMA under private law. However, their application is fraught with uncertainties, as it cannot be ruled out that the applicability of the norms already fails due to essential elements of the facts (e.g. market conduct rule in the sense of the UWG? individual-protecting EU norm in the sense of Section 823 (2) BGB even before the gatekeeper property has been established? These legal uncertainties can already prevent many third parties from basing claims on this in purely factual terms. 131

Even if the private law claims under the current legal situation in Germany should be relevant in the case of a breach of the DMA, it is questionable whether these are expedient for an efficient private law enforcement of the DMA in the absence of sector-specific special rules (e.g. information claims, easing of the burden of proof, etc.). As a result, there are better reasons for creating specific rules, as was (subsequently) done in the field of antitrust law on the basis of the Cartel Damages Directive. 132

5.3 Weighing the advantages and disadvantages of private law enforcement of the DMA

In the following, the advantages and disadvantages of an additional private law enforcement of the DMA are presented. The presentation concludes with an assessment and a recommendation. 133

[53] ECJ, Judgment of 17 September 2002, C-253/00 - *Muñoz/Frumar.*

5.3.1 Advantages of private law enforcement of the DMA

The advantages of private law enforcement of the DMA can be derived in particular from positive experiences of private law enforcement of other EU regulations or the deficits of purely official enforcement. 134

5.3.1.1 Elimination of information deficits

The elimination of information deficits is cited as a major advantage of private law enforcement of the DMA.[54] Competitors, customers and consumers usually have the most direct insight into certain sub-areas and conduct of the digital corporations covered by the DMA. It is true that information deficits can, at least in part, be reduced by third parties' rights of application, participation, hearing and challenge within the framework of the regulatory procedure.[55] However, especially if the enforcement authority pursues requested cases and notifications of private third parties according to the principle of opportunity at its own discretion and available resources, there may be significant enforcement deficits, for example, if a factual situation is assessed incorrectly or rejected for reasons of procedural economy. 135

5.3.1.2 Resource enhancement through private law enforcement

Enabling private enforcement of the DMA leads to a considerable expansion of the available capacities and resources by competitors and customers of the digital corporations covered by the DMA. The disadvantages of the limited resources of an EU Commission left to its own devices in complex competition proceedings have been impressively described in an interview by the former chief economist of the EU Commission, Tommaso Valletti.[56] With regard to EU merger control, Valetti criticises the superiority of the advisors hired by the digital companies over the staff available to the EU Commission: "*The chief economist team which I was heading had 30 people: that's it. Google, Facebook, or Amazon could put hundreds of people onto every case*. ". 136

Without private law enforcement, there is a risk that these mistakes will be repeated in the enforcement of the DMA. The Monopolies Commission also emphasises potential deficits in the resources available, although in this context it argues in favour of limiting the personal scope of the DMA: "*This ecosystem criterion would also allow for a more effective use of resources to enforce the DMA*".[57] The Ministries of Economic Affairs of France, Germany and the Netherlands argue similarly, concluding that both national enforcement authorities and private 137

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54 *Podszun*, Private enforcement and the Digital Markets Act: The Commission will not be able to do this alone, VerfBlog, 2021/9/01, https://verfassungsblog.de/power-dsa-dma-05/, DOI: 10.17176/20210901-112941-0.

55 See Articles 19, 20, 30 DMA.

56 Interview of 20 April, 2021, published in "The Counterbalance"; available at: The European System of Monopoly - The Counterbalance (substack.com)

57 Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, para. 40; available at: https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html

enforcement should *be* involved: "*All available resources to enforce the DMA must be used to avoid an enforcement bottleneck: Centralising certain powers at the EU level, for example designating globally active gatekeepers improves effectiveness and reduces fragmentation. However, the importance of the digital markets for our economies is too high to rely on one single pillar of enforcement only. Therefore, a larger role should be played by national authorities in supporting the Commission. This does require sufficient enforcement capacity and expertise, especially in the area of competition enforcement, but possibly also beyond, e.g. as regards market regulation, data analysts and IT experts.* [...] *Private enforcement would further increase the effectiveness of the DMA. Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible.*[58]

5.3.1.3 Non-political motivation of private law enforcement

The practice of EU merger control in difficult, resource-intensive proceedings shows that the EU Commission is willing to compromise, especially if it fears divergent decisions by the GC or the ECJ.[59] A corresponding compromise can be seen as a political success, even if it does not sufficiently address the actual disadvantages for third parties. This is also confirmed by the former chief economist of the EU Commission, Tommaso Valletti: "*But there is a legalistic culture within DG Comp - the Directorate-General for Competition - which is extreme. There is stigma attached to losing cases in court, of having decisions reversed. The stigma is so bad that basically it freezes people from taking novel approaches. But you have to push the boundaries, especially with new markets, and Big Tech in particular. If you never take risks, the consequences are clear: market consolidation, and market power. If you are not losing cases in court, you are not being ambitious enough.*"[60] 138

The interests of these affected third parties are thus not congruent with the politically motivated interests of the enforcement authorities. The disadvantages of the divergence of these interests are exacerbated at the EU level by the fact that the legal protection of affected third parties against decisions of the EU Commission by means of an action for annulment under Article 263 TFEU effectively comes to nothing due to the restrictive interpretation of the criterion of individual concern by the ECJ. The limited legal protection of third parties against decisions of the EU Commission is illustrated by a case of an attempted annulment of a state aid decision by the EU Commission.[61] In the case in question, the then EU member state Great Britain notified the European Commission of a package of state aid consisting of several measures to support the new Block C of the Hinkley Point nuclear power plant. The EU Commission opened a formal investigation procedure, invited interested parties to comment on these measures and decided that the state 139

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58 Joint Declaration of the Ministries of Economic Affairs of France, Germany and the Netherlands (Fn. 42), S. 2.

59 *Valetti*, (fn. 56).

60 See footnote 56.

61 ECJ, Order of 10 October 2017, C-640/16 P - *Greenpeace Energy eG v Commission.*

aid in question was compatible with the internal market within the meaning of Article 107(3)(c) TFEU. c TFEU was compatible with the internal market. Greenpeace Energy eG brought an action for annulment against this decision, as it considered its rights as an operator of wind power plants and three solar power plants to be affected as a competitor of the nuclear power plant. The ECJ rejected the action against the state aid decision on formal grounds, as Greenpeace Energy eG was a competitor, but not significantly affected and therefore lacked the individual concern as a prerequisite for bringing an action for annulment within the meaning of Article 263 (4) TFEU.

In this respect, a delegitimising effect vis-à-vis the Union institutions cannot be completely ruled out, insofar as the impression is created that the EU Commission and the large digital corporations are negotiating the scope - and thus also the extent of protection - of the DMA to the exclusion of the public and the third parties concerned. 140

5.3.1.4 Monitoring compliance with remedial actions

Compared to the limited resources and market insights of the enforcement authority, private parties can monitor compliance with (regulatory) remedies better and with greater self-motivation. In any case, the EU Commission's antitrust practice sometimes shows signs of enforcement deficits, for example in the merger control clearance of the acquisition of WhatsApp by Facebook and the merging of the respective user data records, with regard to which the EU Commission subsequently issued a fine decision for violating the conditions of the merger clearance.[62] 141

5.3.1.5 Effective enforcement of the DMA through claims for damages

For the effective enforcement of competition rules, it is in line with the understanding of the ECJ[63] as well as the EU Commission and the EU legislator[64] that the private prosecution of cartel damages claims is an essential element. This assessment applies in the antitrust context although private-law prosecution of cartel damages can reduce the incentives for companies involved in the cartel to apply for leniency. This must apply a fortiori to violations of the DMA, since these are generally not based on conspiratorial agreements between several companies and leniency applications are not expected to be an important source of knowledge for uncovering violations of the DMA. On the contrary, the practice of antitrust 142

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62 EU Commission, Case M.8228 - *Facebook / WhatsApp*; available at: https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf

63 ECJ, Judgment of 20. September 2001, C-453/99, para. 26 - *Courage.*

64 Antitrust Damages Directive (fn. 50), recital (3): "*The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, require that everyone - whether individuals, including consumers and undertakings, or public authorities - should be able to seek compensation before national courts for the harm they have suffered as a result of an infringement of those provisions.* "

abuse proceedings against large digital groups proves that violations of the DMA are also mostly likely to be triggered by complaints from affected companies.

Why, in the case of violations of the prohibition of restrictive agreements, private law actions should be an essential pillar of efficient enforcement, although adverse effects on the use of the leniency programme as the most important source of knowledge are attributed to them, while private law actions in the case of DMA violations are not given an explicit normative framework, although complaints by private third parties are the most important source of knowledge for official procedures there, seems illogical and systemic. 143

5.3.1.6 Shaping the decisional practice through decisions of the civil courts

A further argument in favour of private enforcement of infringements of the DMA is the resulting referral of the novel set of rules to the civil courts of the Member States. Consequently, the EU Parliament has also proposed a supplementary recital 77a to the DMA, according to which the national courts have an important role in the application of the DMA.[65] They should therefore have the possibility to request the Commission to provide them with 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 the courts of the Member States. 144

This involves further resources that can fill the standards with practice through their decisions. The coherence of the decisions can be established through preliminary ruling procedures before the ECJ. These in turn are an important source of knowledge for the application of the standards in official practice. Consequently, legal certainty can be increased for the digital groups covered by the DMA, for the companies affected by the conduct of the digital groups, but also for the EU Commission in a significantly shorter time. The EU legislator will also receive feedback from practice much more quickly as to whether and in which areas the DMA needs to be revised. 145

5.3.2 Disadvantages of private law enforcement of the DMA

Private law enforcement of the DMA can also be associated with disadvantages, which are outlined below. 146

5.3.2.1 Fear factor

To the extent that companies are dependent on a gatekeeper that is subject to the DMA, these dependent companies might refrain from filing civil claims or even enforcing them in court due to the legal possibilities of economic punishment by the gatekeeper. This effect, sometimes referred to as “fear factor”, is familiar from antitrust law and is difficult to avoid in the case of private law actions, as these 147

[65] European Parliament (fn. 43), Amendment 53.

claims are generally brought by the affected companies themselves. A remedy can be found in representative actions (e.g. collective redress, class action), although it will be difficult in practice to present and prove the facts of the case without revealing the identity of the companies concerned.

5.3.2.2 Long procedural durations

Civil proceedings can also take a very long time, especially if they include appellate proceedings and preliminary ruling proceedings before the ECJ on the interpretation of the DMA. 148

Nevertheless, the example of the enforcement of market conduct rules under private law in Germany based on the Unfair Competition Act (UWG) shows that the hurdles for interim measures in civil law proceedings are significantly lower than for such measures by public authorities. These interim measures can help to maintain the contestability of markets. 149

5.3.2.3 Cost factor

In particular, smaller competitors and customers may be deterred by the potential litigation costs associated with civil proceedings and therefore refrain from doing so despite a breach of the DMA to their detriment. In particular, the enforcement of the P2B Regulation in the case of (unfounded) blocking of small merchants by Amazon on the Amazon Marketplace shows that litigation costs can have a deterrent effect, as the litigation cost risks can easily represent a significant part of the affected merchant's usual sales on the Marketplace. For the gatekeepers affected by the DMA, on the other hand, the litigation cost risks will regularly not play a role. 150

However, the cost factor can be countered by various measures. For example, there could be special declaratory actions for violations of the DMA, as the German Code of Civil Procedure already provides today for consumer actions (Section 606 ZPO). It is also conceivable to define relatively low legal and court fees for actions based on DMA infringements or rules for the adjustment of the height of the fees, as in the case of Section 89a GWB. 151

5.3.2.4 Information deficit

The enforcement of the DMA under private law can lead to the elimination of information deficits on the part of the authority. Conversely, the EU Commission has sovereign powers to enforce the DMA, such as the right to information, in order to obtain internal information from the digital companies affected by the DMA, which is not available to third parties. 152

These information deficits can also be reduced by remedial measures. Special rules on the burden of proof and presumptions such as already exist in civil cartel proceedings are conceivable. Also conceivable is the involvement of the authorities in civil proceedings as *amicus curiae* as in cartel law proceedings in accordance 153

with Section 90 GWB. Finally, civil law claims for the surrender of evidence and claims for the provision of information can be granted in favour of the claimants (cf. Section 33g GWB).

5.3.2.5 Fragmentation of judicial decisions

The involvement of the civil courts can lead to a considerable dispersion of decisions, especially in the initial phase. Such dispersion can also have a negative impact on regulatory enforcement if strict interpretative approaches in judicial decisions are also held against the authorities. 154

The dispersion can be partly countered by concentrating corresponding actions in connection with infringements of the DMA at a few courts and forming special chambers. Moreover, after an initial phase, increasing standardisation can be expected through preliminary ruling proceedings before the ECJ. 155

5.3.3 Summary and recommendation

If one compares the advantages and disadvantages of private-law enforcement of the DMA, it is noticeable that the disadvantages are largely “internal disadvantages”, i.e. they can partly lower the efficiency of private-law enforcement, but do not compromise official enforcement, as is discussed, for example, in antitrust law in the relationship between follow-on cartel damages actions and leniency applications to the competition authorities. Even taking into account the potential disadvantages of private law enforcement of the DMA, it appears to be have always a positive total result. Consequently, it is recommended to implement the private-law enforcement of the DMA in the course of the current legislative process. 156

5.4 Proposals for optimising private law enforcement of the DMA

The EU legislator should eliminate legal uncertainties and either in the recitals or in the text of the regulation itself express ambiguously which of the prohibitions of the DMA are also to be enforced under private law. Corresponding clarifications can save many years of litigation, which initially concentrate on the question of "whether" enforcement under private law should take place, at all. 157

In addition, the legislator should implement the following measures: 158

5.4.1 Formalised involvement of (affected) third parties in the official process

Third parties affected by the gatekeepers' conduct, such as competitors, business customers or consumers, should be involved in the regulatory process, including powers of information, application, hearing and challenge before the ECJ. 159

Article 30a new: ***In addition to the gatekeeper concerned, parties to the proceedings of the EU Commission under this Regulation shall include, upon request:*** 160

(a) National competition authorities from Member States sufficiently concerned by the proceedings. 161

(b) Third parties who have applied for the proceedings to be initiated. 162

(c) Persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted to the proceedings by EU-Commission; the interests of consumer associations are substantially affected also in cases in which the decision affects a large number of consumers and in which therefore the interests of consumers in general are substantially affected. 163

The Commission shall take a formal decision on requests of participation within no more than seven days. 164

5.4.2 Contestability of insufficient behavioural remedies by affected third parties

Furthermore, affected third parties should be able to challenge behavioural remedies of the EU Commission in favour of structural measures in case they are perceived as insufficient. 165

Affected third parties feel the consequences of inadequate remedial action directly and immediately and are thus the best source of information for the EU Commission, as a balance to the talk of the gatekeepers in the proceedings. 166

Article 16a paragraph 2 new - Request for structural remedies: *If the Commission decides to put in place behavioural remedies in accordance with* ***Article 16 paragraph 1, persons and associations of persons whose interests are substantially affected by the non-compliance of a gatekeeper with the obligations laid down in Article 16 paragraph 1 may request the Commission to adopt structural remedies instead by proposing concrete structural remedies and by submitting reasonable arguments for the structural remedies. The Commission shall take a formal decision on the request within no more than one month.*** 167

5.4.3 Legal certainty with regard to the third parties' standing to sue

In order to create legal certainty with regard to the power to bring an action for annulment, it should be clarified that the formal participation of third parties in the administrative process automatically leads to them being individually concerned. 168

Article 35 new paragraph (1a): ***Parties to the proceedings of the EU Commission under this Regulation in accordance with Article 30a shall be deemed to be*** 169

directly and individually concerned within the meaning of Article 263 paragraph 4 TFEU. This shall also apply to denied requests of participation.

5.4.4 Guidelines for private law enforcement

The DMA should at least provide the member states with programmatic guidelines for strengthening private law enforcement by affected third parties such as competitors, customers and consumer organisations. It should also refer to the Directive on representative actions for the protection of the collective interests of consumers.[66] 170

Article 37a new - Private Enforcement: 171

1. Each Member State shall ensure adequate and effective private enforcement of this Regulation. Member States shall lay down the rules setting out the measures applicable to infringements of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive. 172

Member States shall implement adequate interim measures in court proceedings in case of urgency due to the risk of serious and irreparable damage for business users or end users. 173

Member States shall ensure that individual persons as well as qualified entities within the meaning of Article 3 paragraph 4 of the Representative Actions Directive can bring enforcement actions for violation of this Regulation before national courts. 174

The EU legislator should already use the DMA to bring about partial harmonisation of Member States' civil procedures with regard to certain areas of private law enforcement of the DMA. This concerns in particular the following areas: 175

– **Follow-on**: Positive binding of the civil courts on the EU Commission's finding that a particular company is a gatekeeper. 176

– **No binding of national courts** in case of (not yet) application of the DMA by the EU Commission, e.g. due to exercise of discretion, political compromise, complaints not taken up, etc. 177

– Third party **information claims in** respect of regulatory files and against gatekeepers for the examination, preparation and enforcement of claims under the DMA. 178

– Guidelines for efficient **interim measures of private law enforcement** to preserve or enable the contestability of markets, in particular in the form of interim access claims. 179

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66 OJ 2020 L 409/1.

– **Amicus curiae rights and duties of the enforcement authority** to participate in civil litigation. 180

– **Special limitation rules to** allow follow-on actions even in protracted authority proceedings, especially when contestability has been impaired and compensatory aspects are paramount. 181

– **Rebuttable presumptions of harm in** the case of certain breaches of the DMA, especially where deniability has already been impaired and compensatory aspects are paramount. 182

6. Strengthening substantive and procedural standards

Finally, we propose further strengthening of substantive and procedural standards in some places. This applies in particular to the introduction of effective control of "killer acquisitions" by gatekeepers (see 6.1), the strengthening of interim measures in the administrative process (see 6.2) and the presumption of gatekeeper status in the event of a refusal to cooperate with the EU Commission (see 6.3). 183

6.1 Effective control of "killer acquisitions

Article 12 DMA so far only provides for an obligation of the gatekeepers to inform the EU Commission and the national competition authorities about mergers. However, against the background of the goals of contestability of the markets and fairness of the platforms, a real control of these mergers should be carried out. There should be a presumption that mergers which include digital services and whose connection with the gatekeeper's central platform services cannot be ruled out restrict the contestability of the markets. The gatekeeper should be able to rebut the presumption. 184

In the event of clearance, the EU Commission should be given the possibility of behaviour-independent unbundling, provided that, contrary to the gatekeeper's claim, the contestability of the affected markets has structurally deteriorated as a result of the merger. 185

With regard to the objective of fairness of platform services, an abuse-based unbundling option should be introduced. 186

Affected companies (competitors, business customers) and national competition authorities should have the right to participate in the merger proceedings. If they have participated in the proceedings, they should also have the right to challenge the EU Commission's decision before the ECJ. 187

Article 12 new: *A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services* 188

provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.

A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. 189

Concentrations which are capable of significantly limiting the contestability of markets shall be prohibited. 190

In the case of concentrations involving digital services whose linkage with the gatekeeper's central platform services cannot be excluded and which may facilitate infringements of Articles 5 or 6 of this Regulation, a significant restriction of contestability shall be presumed. The gatekeeper may rebut this presumption. 191

In the event of a non-opposition, the EU Commission shall unbundle concentration of the gatekeeper, provided that, contrary to the gatekeeper's claim, the contestability of the affected markets has structurally deteriorated as a result of the concentration. 192

In the event of a non-opposition, the EU Commission shall unbundle the concentration, if the gatekeeper violates Articles 5 or 6 of this Regulation in a not insignificant way in connection with the acquired target company. 193

6.2 Strengthening interim measures in the administrative process

In proceedings before the EU Commission, provisional measures are currently only provided for under Article 22 (2) DMA in cases of non-compliance by a gatekeeper within the meaning of Article 25 DMA. However, the EU Commission should be able to neutralise short-term threats to the contestability of markets at an early stage in order to avoid irreparable damage to contestability. 194

Article 22 new: 195

1. in case of urgency due to the risk of serious and irreparable damage ***to the contestability of any affected market or*** *for business users or end users of gatekeepers, the Commission may, by decision adopted in accordance with the advisory procedure referred to in Article 32(4), order interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Articles 5 or 6.* 196

2. ~~a decision pursuant to paragraph 1 may only be adopted in the context of proceedings opened in view of the possible adoption of a decision of non-~~ 197

~~*compliance pursuant to Article 25(1).*~~ *The decision shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.*

6.3 Presumption of gatekeeper function in the case of refusal to comply

Companies could try to prevent or delay the determination of their qualification as gatekeepers within the meaning of Article 3 DMA by an attitude of refusal and blockade. The original draft of the DMA provided for this case that corresponding companies would be considered gatekeepers. The amended version of the DMA has replaced this with the rule that the EU Commission must then decide on the basis of the facts available. This privileges those companies that refuse to cooperate and can thus achieve to produce as few facts as possible within the decision deadline. Even more, companies could try to publish indirectly only those facts that speak against their position as gatekeepers. 198

In this respect, the original rule should be retained as a presumption rule. Admittedly, the legal concerns against the original rule are understandable. However, the Commission would have to decide on the basis of the actual facts anyway and could not ignore them. In this respect, the presumption rules can be made subject to the existence of overriding facts that speak against the presumption. 199

Article 3 - paragraph 6 - subparagraph 4 new: *Where the provider of a core platform service that satisfies the quantitative thresholds of paragraph 2 fails to comply with the investigative measures ordered by the Commission in a significant manner and the failure persists after the provider has been invited to comply within a reasonable time-limit and to submit observations, the Commission shall be entitled to designate that provider as a gatekeeper* ***unless the available facts substantially refute such assumption***. 200

Article 3 - paragraph 6 - subparagraph 5 new: *Where the provider of a core platform service that does not satisfy the quantitative thresholds of paragraph 2 fails to comply with the investigative measures ordered by the Commission in a significant manner and the failure persists after the provider has been invited to comply within a reasonable time-limit and to submit observations, the Commission shall be entitled to designate that provider as a gatekeeper* ***unless the available facts substantially refute such assumption.*** 201

Frankfurt am Main, 23 February 2022 Dr. Kim Manuel Künstner