Max Planck Institute
for Innovation and Competition

Max Planck Institute for Innovation and Competition Research Paper No. 23-11

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Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)

Max Planck Institute for Innovation and Competition Research Paper Series

Electronic copy available at: https://ssrn.com/abstract=4437220

Position Statement

of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)

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Abstract: *Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act; DMA) entered into force on 1 November 2022 and applies from 2 May 2023. The DMA is a novel type of regulation laying down harmonised rules for core platform services provided or offered by gatekeepers to business users and end users established or located in the Union. It pursues the objective of achieving fairness and contestability in the digital sector across the Union where gatekeepers are present.*

In its position statement of 2 May 2023, the Institute acknowledges that uniform rules throughout the European Union and centralised enforcement are necessary to prevent internal market fragmentation and welcomes the first Commission Implementing Regulation for the DMA of 14 April 2023. However, it remains concerned by the DMA's unique institutional design and its interaction with other laws as outlined under Articles 1(5), 1(6) and 1(7).

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In particular, the Institute raises awareness about the possible overly broad blocking effects of the DMA on national rules, which may have the unintended consequences of privileging gatekeepers by jeopardizing future national legislative initiatives. This ultimately obstructs the achievement of contestability and fairness in digital markets. A complementary application of the competition rules and effective enforcement of the DMA is, against this backdrop, crucial. Yet there is uncertainty over administrative enforcement mechanisms, and it is unclear what role private enforcement plays in the current legal design of the DMA. The position statement identifies and examines challenges in the implementation of the DMA, along with recommendations for overcoming them.

Keywords: *Digital Markets Act; DMA; platform regulation; digital economy; antitrust; online platforms; European Union competition law; gatekeepers; fairness; contestability; private enforcement; centralisation; implementation.*

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The Max Planck Institute for Innovation and Competition is a research institute within the Max Planck Society for the Advancement of Science. The Max Planck Institute is committed to fundamental legal and economic research on processes of innovation and competition and their regulation. Its research focus is on the incentives, determinants and implications of innovation. The Institute informs and guides legal and economic discourse on an impartial basis. It hereby provides its position on the implementation of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act; DMA).

I. Introduction

(1) On 15 December 2020, the European Commission presented the Digital Markets Act Proposal. After several changes in the proposal's text, a final draft was approved on 14 September 2022, and published in the Official Journal on 12 October 2022. It entered into force on 1 November 2022 and will apply from 2 May 2023.

(2) The DMA is a novel type of regulation. It applies to core platform services provided or offered by gatekeepers to business users and end users established or located in the European Union (Article 1(2) DMA). It imposes a number of obligations to the undertakings providing these services. It is inspired primarily by the experience with the enforcement of the EU competition rules (DMA Proposal, Explanatory Memorandum, p. 6) and pursues the objective of ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present (Article 1(1) DMA).

(3) The digital economy and the gatekeepers' economic power transcend national boundaries. Thus, uniform application throughout the European Union and centralised enforcement are necessary to prevent internal market fragmentation. Although the Institute welcomes the first Commission Implementing Regulation for the DMA,[1] published on 14 April 2023, it remains concerned by the DMA's unique institutional design and its interaction with other laws as brought about by Articles 1(5), 1(6) and 1(7).

(4) In particular, the Institute draws attention to possible overly broad blocking effects of the DMA on national rules, which may have the unintended consequences of privileging gatekeepers, jeopardizing

[1] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (C/2023/2530) ELI: <http://data.europa.eu/eli/reg_impl/2023/814/oj> accessed 27 April 2023.

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future national legislative initiatives and ultimately obstructing the achievement of contestability and fairness in digital markets. A complementary application of the competition rules and an effective enforcement of the DMA is, against this backdrop, even more crucial. Yet there is uncertainty over administrative enforcement mechanisms, and it is unclear what role private enforcement should play. In what follows, this position statement identifies and examines challenges in the implementation of the DMA, along with recommendations for meeting them.

II. Key Statements

National laws that pursue the same or similar goals as the DMA, while not specifically addressing core platform services offered by gatekeepers, should remain applicable as long as they do not directly conflict with provisions laid down in the DMA.

(5) The DMA risks a too-broad blocking effect on national laws. While welcoming the harmonisation goal the DMA pursues, the Institute sees a real risk that a broad interpretation of Article 1(5) would exclude the application of national laws pursuing the same or similar goals as the DMA. The DMA's self-executing character is limited to obligations laid down in Articles 5 to 7 DMA. These obligations, however, should not exclude already existing obligations enshrined in national laws that pursue the same or similar goals, such as unfair competition laws, contract laws or sector-specific regulation. Otherwise, this centralisation of competences may potentially privilege gatekeepers vis-a-vis non-gatekeepers, as the former would no longer fall under those national legal obligations. While the DMA's catalogue of obligations is susceptible to being amended and a lower protection level could thus be prevented, the updating procedure provided for by the DMA may take a long time and its initiation ultimately is at the discretion of the Commission. Therefore, Article 1(5) DMA should be interpreted as narrowly as possible to allow current and future national laws following similar legislative rationales to remain applicable in parallel.

(6) For this purpose, a narrow interpretation of the concepts of contestability and fairness, which are used as demarcation criteria, is needed. As it stands, the DMA fails to provide for a clear-cut definition of these concepts. Both contestability and fairness should be interpreted against the backdrop of the provision of the specific core platform services that the DMA regulates and not the gatekeeper status per se. Consequently, national laws that *de facto* reduce economic power of gatekeepers in the broadest sense would not be conflicting provisions

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under Article 1(5) DMA. A conflicting provision would merely exist if it regulates the provision of core platform services itself.

The DMA should not curtail novel legal approaches at the national level addressing competition problems in digital markets.

(7) The risk posed by an excessive centralisation of competences at EU level has been rightly balanced with a more decentralised approach under Article 1(6) DMA as regards competition law. Article 1(6) DMA generally allows parallel application of European and national competition rules to gatekeepers' conduct. While acknowledging that this provision should not enable Member States to illegitimately circumvent Article 1(5) DMA, the Institute proposes a broad interpretation of the term 'competition rules'. Accordingly, Article 1(6) DMA should be interpreted as a rule to facilitate the application of novel legal approaches that address the particularities of competition problems in markets where gatekeepers are present.

Complementary enforcement of the DMA and competition rules is key to ensure contestable, fair and competitive digital markets.

(8) The Institute stresses the importance of enforcing the DMA and the competition rules in a truly complementary manner in order to take full advantage of the added value provided by each set of rules. Given the complexity and fast evolving nature of gatekeepers' conduct, competition law does necessarily play an umbrella function targeting behaviour that cannot be wholly subsumed – and remedied – under the DMA. At the same time, in the Institute's view, national competition authorities should refrain from enforcing competition rules when the anticompetitive harm resulting from a possible non-compliance with the DMA is sufficiently addressed by ensuring future compliance with the DMA obligations.

Commission decisions under the DMA should not unduly restrict decisions of national competition authorities.

(9) Though the Institute endorses the legitimate purpose of Article 1(7) DMA of ensuring a uniform and effective application of the obligations imposed on gatekeepers under the DMA, it maintains that the DMA cannot have any defining or limiting effect on the scope of Articles 101 and 102 TFEU and their applicability by national competition authorities.

(10) Also, having regard to the minimum harmonisation rationale of the DMA with respect to national competition laws, Article 1(7)

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DMA should be narrowly understood as a rule that ensures both consistency in the application of the DMA obligations and legal certainty for those subject to these obligations, and consequently protects gatekeepers from having to fulfil contradictory obligations arising from different regimes.

Early coordination and close cooperation between the Commission and national authorities will facilitate effective public enforcement of the DMA

(11) A meaningful and efficient division of work between the Commission and the national authorities, in particular the competition authorities, will very much depend on both sides making early and extensive use of the coordination and cooperation mechanisms provided for in the DMA.

(12) An active involvement of national authorities in the process of public enforcement of the DMA's obligations by the Commission is crucial. For this purpose, the Commission should actively and extensively use Articles 16(5) and 38(6) DMA to involve the Member States' competent authorities in its market investigations. Conversely, the Institute advises Member States to make full use of the possibilities laid down in Articles 27 and 38(7) DMA.

(13) The Institute also stresses the importance of early coordination between the Commission and the national competition authorities for detecting and closing possible DMA gaps and identifying conduct that needs to be assessed with the more flexible competition rules.

The assisting function of the High-Level Group for the Commission should be actively supported.

(14) The Institute welcomes the Commission's timely establishment of the High-Level Group for the DMA under the Commission Decision of 23 March 2023. The High-Level Group has the potential to become a central instrument in fostering synergies between the supervisory and regulatory European bodies and networks referred to in Article 40(2) DMA. It can also reduce potential tensions between the DMA and national regimes that could take place despite the harmonisation under Articles 1(5) and 1(6), and in light of the binding rule of Article 1(7). Yet, for this instrument to be used to its full potential, it is necessary that the representatives of national authorities take an active role in requesting meetings to discuss specific issues, in addition to the mandatory meetings established by the Commission, and

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irrespective of whether they concern actual DMA investigations or proceedings.

Collaboration with Member States and judicial bodies is key to effective private enforcement of the DMA.

(15) As the European experience in competition law shows, the coexistence of effective public and private enforcement will be essential to ensure broad and widespread compliance with the DMA, and full protection of those who may be affected by infringements of it. However, the DMA dedicates very few provisions to regulating private enforcement, and these may not provide a sufficiently clear framework to encourage claimants to take legal action and courts to decide quickly.

(16) To make private enforcement more effective, the Institute recommends that the Commission initiate targeted collaborations with Member States as soon as possible, specifically with bodies like the Judicial Competition Training program, which represents associations of judges. Such partnerships can promote private enforcement of the DMA and provide valuable insights into the legal systems of different countries, thereby promoting a more consistent application of the DMA across the EU.

The role of the national and EU legislature is crucial to enabling national courts to enforce stand-alone and follow-on DMA cases.

(17) The DMA is also open to development. While national judges play a vital role in ensuring the application of EU law, the responsibility for establishing a robust framework that facilitates private enforcement of the DMA lies with the legislature at both the national and European levels. This could involve reforming substantive rules on remedies. Therefore, the legislature's role is crucial in enabling national courts to effectively handle stand-alone and follow-on DMA cases. By providing a supportive infrastructure, the legislature can empower private parties to enforce their rights under the DMA.

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III. Individual Aspects

1. Relationship to national legislation according to Article 1(5) DMA

1.1. Applicability of national rules

(18) Regarding the relationship to other legislation than competition law, the DMA establishes a concept that differs from the approach chosen in Regulation (EC) 1/2003. Article 1(5) DMA states the following:

> In order to avoid the fragmentation of the internal market, Member States shall not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets. Nothing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.

It explicitly prohibits *further national obligations* on gatekeepers that are contained in national laws other than competition law[2] and pursue contestability and fairness goals. This approach follows a full harmonisation rationale and discards overlapping national laws for the sake of preventing a fragmented internal market for core platform services.

(19) The European legislature is right in assuming that varying regulatory approaches from national legislatures can be detrimental to the integration of the internal market and create disparities between the competitive conditions for the users of gatekeepers core platform services. Approximating diverging national laws may thus indeed eliminate obstacles to the freedom of providing and receiving services within the internal market. The Institute therefore welcomes the approach chosen by the Commission.

(20) Yet the DMA fails to provide for a clear-cut definition regarding its contestability and fairness goals. It establishes regulatory concepts of fairness and contestability that are multi-layered and that overlap with already existing regulatory concepts in other areas of the law. The resulting uncertainty risks causing a too far-reaching blocking effect on the applicability of national rules. A broad scope of Articles

2 Cf. Article 1(6) DMA.

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1(5), 1(7), 37(5) DMA might bar Member States' legislatures, public authorities and courts from imposing and enforcing a great number of national rules pursuing – at least to some extent – contestability and fairness goals. This may include unfair competition laws, contract laws and sector-specific regulation on gatekeepers for instance. In the course of the implementation of the DMA one should not aim to centralise competences on the European level more than potentially envisaged by the European legislature. Such centralisation approach would deprive Member States of the possibility to alleviate the existing competitive and fairness constraints for non-gatekeepers by imposing further obligations on gatekeepers. Centralisation should not turn into an obstacle for the attainment of contestable and fair markets.

1.2. A narrow interpretation of the scope of the DMA

(21) Therefore, it is important to interpret the scope of the DMA to relate to the regulation of core platform services only and not to the regulation of the economic power of gatekeepers *per se*.[3] Unfortunately, Article 1(5) DMA refers to gatekeepers instead of the core platform services that are ostensibly the subject of the DMA's regulation and harmonisation.[4] However, the referring to the regulation of gatekeepers could be justified by a much broader legislative rationale, namely the control of the economic power of the individual gatekeepers. Indeed, this goal was unarguably one that the legislature had in mind when designing the DMA.[5] Yet this would make nearly any national legislation inapplicable. Many (national) laws seek to control the economic power of gatekeepers directly or indirectly. Articles 5(1) and 6(1) DMA specify that their respective obligations are applicable only to gatekeepers' core platform services and not to the whole gatekeeper undertaking. Article 1(5) DMA's wording is thus unfortunate. It is not only contrary to the legislative intent; it stands in conflict with the principle of subsidiarity under Article 5(3) TEU.[6]

(22) Regarding the DMA's scope, a thorough analysis reveals that the criteria of fairness and contestability do not provide clear standards for demarcation.[7] In its recitals, the DMA explains that considerable economic power and leverage potential of gatekeepers has led to market

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[3] Hoffmann, Herrmann, Kestler, 'Potential gatekeeper's privilege – the need to limit DMA's centralisation' (2023) Max Planck Institute for Innovation and Paper Research Paper 1/2023, 5 ff.

[4] Article 1(2) DMA.

[5] Recital 3 DMA.

[6] Recital 107 DMA.

[7] Hoffmann, Herrmann, Kestler, 'Potential gatekeeper's privilege – the need to limit DMA's centralisation' (2023) (n 11) 9 f.

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conditions that are structurally characterised by very high entry barriers. Gatekeepers exercise control over entire platform ecosystems in the digital economy and are structurally extremely difficult for existing or new market operators to challenge or contest, irrespective of how innovative and efficient they may be. This situation cannot endure long without causing malfunction of the underlying markets. The combination of those features of gatekeepers is likely to lead in many cases to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users as well as end users of core platform services provided by gatekeepers, with the potential effect of increasing prices and lowering quality, choice and innovation.[8] Tackling imbalances of bargaining power that induce unfair practices and business conditions as a result are not new to already existing laws and regulatory concepts.

(23) The concept of contestability for instance has already been used in various settings. Most prominently, scholarly work in the field of industrial organization has coined the theory of contestability, which has influenced competition policy and jurisprudence.[9] There, it is used to justify higher market concentration with potential short-term entry of firms. Recent scholarly work regarding the regulation of platform undertakings further uses the term contestability for explaining the need of lowering entry barriers for firms to compete with platform undertakings in the long run.[10] Refusal-to-deal cases under competition law relate to the contestability goal by ordering access to key inputs. Public utility and infrastructure regulation provides for universal access in order to spur competition. The DMA does not refer to one of the concepts explicitly. It uses contestability merely as a generic term. Assessing what the legislature meant by 'contestability' in the context of the DMA without a clear legal definition is difficult. According to Recital 32 of the DMA, contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services. This may encompass various aspects that are also addressed in other non-sector-specific laws, i.e. unfair competition laws or general contract law. A thorough analysis by scholars of the Institute revealed that the DMA was designed against the backdrop of a broad understanding of contestability that indeed potentially overlaps with

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[8] Recital 3, 4 DMA.

[9] Baumol, Panzar and Willig, *Contestable Markets and the Theory of Industry Structure* (HBJ, 1982).

[10] Crémer, de Montjoye and Schweitzer, 'Competition policy for the digital era' (2019) European Commission, 1-127, at 19 ff.

Electronic copy available at: https://ssrn.com/abstract=4437220

regulatory concepts in other areas of the law.[11] This overlap makes a coordination of the various legal regimes inevitably necessary.

(24) The same applies to the DMA's fairness concept. According to Recital 33 of the DMA, unfairness is defined as relating to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage. This definition however does not reflect the real scope of the concept of fairness as established under the DMA. Moreover, the DMA's fairness concept is overly broad, is not new and overlaps with other areas of the law. First and foremost, the DMA's fairness concept as designed by the European legislature has a broader scope than outlined under Recital 33. It protects business users, competitors and end users in both B2B and B2C relations.[12] The latter – namely, addressing end users in B2C relations – is of particular importance. On the positive side, this makes certain DMA obligations directly enforceable by both businesses and consumers. On the negative side, this may lead to even further unintended blocking effects on national laws. This adverse effect is reinforced by the vagueness of the concept and the fact that it is not genuinely new: it relies heavily on fairness concepts of other areas of law, namely competition law, unfair competition law and general contract law.[13] This causes overlaps with already existing and future laws pertaining to B2B and B2C relations.[14] Indeed, unfair competition law and general contract law as regards B2C relations are harmonised on a European level. This already leaves Member States with little leeway regarding national law-making. In contrast, B2B relations have largely remained in the domain of national legislation. The latter is however changing with the current wave of European laws regulating the digital economy, which further restricts the legislative competences of Member States. Nevertheless, there is urgent need to interpret Article 1(5) DMA narrowly. National laws that pursue the same or similar goals as the DMA, while not specifically addressing core platform services offered by gatekeepers, should remain applicable as long as they do not directly conflict with provisions laid down in the DMA. This holds particularly true for unfair competition laws, contract laws and sector-specific regulation.

[11] Hoffmann, Herrmann, Kestler, 'Potential gatekeeper's privilege – the need to limit DMA's centralisation' (n 11) 5 ff.

[12] Ibid 12 ff.

[13] Ibid 12 ff.

[14] Ibid 17 ff.

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2. Relationship to competition rules according to Article 1(6) DMA

2.1. Applicability of competition rules

(25) Article 1(6) DMA establishes that the DMA is 'without prejudice to the application of':

- the European competition rules – more specifically, Articles 101 and 102 TFEU and Regulation 139/2004 on merger control,
- corresponding national competition rules and
- national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers.

(26) The explicit recognition of the application of Articles 101 and 102 TFEU simply confirms the primacy of the competition law provisions contained in the Treaty on the Functioning of the European Union. With regard to national competition rules, Article 1(6) DMA provides for an exception to Article 1(5) DMA and echoes the principle of minimum harmonisation established under Regulation 1/2003.

(27) In Recitals 10 and 11 DMA, the parallel application of the competition rules is justified by the different objectives pursued by the DMA and the competition rules and thus their complementary nature. Accordingly, while the goal of the DMA is to ensure that markets where gatekeepers are present are and remain contestable and fair, the European and national competition rules have as their objective the protection of undistorted competition in the market.

(28) A clear delimitation between the stated objectives of the DMA and those of competition rules is, however, difficult, as market contestability and fairness are traditionally among the goals of competition law. This potential overlap is implicitly confirmed by the introduction of a provision like Article 1(6) DMA. Had the EU legislature not intended this overlap, an exception from the general prohibition of Article 1(5) DMA would not have been necessary. *De facto*, competition rules are applicable whenever the conduct of a gatekeeper distorts competition in the market, irrespective of whether their application – directly or indirectly – also ensures contestable and fair digital markets.

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(29) With regard to national provisions corresponding to Articles 101 and 102 TFEU, Article 1(6)(a) DMA does not pose any limit to their application. Differently, Article 1(6)(b) DMA conditions the application of national competition rules not corresponding to Articles 101 and 102 TFEU and prohibiting other forms of unilateral conduct on the circumstance that they amount to the imposition of further obligations on gatekeepers. Consequently, while these rules can be applied against a gatekeeper's conduct that would also fall within the scope of application of the DMA, they cannot result in the imposition of remedies that would overlap with those provided for in Articles 5 to 7 DMA. Even though at first sight this provision constrains the application of these other national competition rules, national authorities retain broad discretion to design *different* remedies capable of addressing the competition concern identified.

(30) It should not be difficult to identify competition rules corresponding to Articles 101 and 102 TFEU under Article 1(6)(a) DMA. For the purpose of Article 1(6)(b) DMA it is decisive that the qualification of a national rule as a competition rule is based on uniform concepts of (European) competition law.[15] Otherwise, leaving this decision to the discretion of the Member States would allow for an easy circumvention of the limitation provided for in Article 1(5) DMA and ultimately put its uniform application at risk.

(31) Both Article 3(2) Regulation 1/2003 and Recital 10 DMA offer guidance as to what is to be considered a competition rule. Article 3(2) Regulation 1/2003 allows Member States to apply stricter national rules than Article 102 TFEU to prohibit or sanction unilateral conduct of undertakings. Though not further specified in that provision, if read in conjunction with Recital 8 of the same Regulation, stricter national competition rules encompass those addressing abusive unilateral conduct that have their source in forms of market power other than market dominance. For its part, Recital 10 DMA defines competition rules in a rather procedural manner. Accordingly, competition rules are based on an individualised assessment of market positions and behaviour while providing undertakings with the possibility to justify their conduct.

(32) The Institute stresses the flexibility embedded in these – substantive and procedural – criteria and advocates for a wide interpretation of the term 'competition rules'. As oftentimes a clear-cut

[15] Zimmer, Göhsl, 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' ZweR vol 19, no 1 (2021) <https://doi.org/10.15375/zwer-2021-0105> accessed 27 April 2023.

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distinction between competition rules and regulation is difficult, Article 1(6) DMA and not Article 1(5) DMA should be applied to laws that may not resemble a traditional competition approach, such as the recently introduced Sections 19(a) and 20(1a) of the German Act Against Restraints of Competition.[16] This would mitigate the risk of excessively reducing the applicability of national rules.

2.2. Parallel enforcement of DMA and competition rules

(33) Articles 5 to 7 DMA lay down obligations relating to core platform services with which undertakings must comply within a period of six months after their designation as a gatekeeper (Article 3(10) DMA). Many of these obligations address conduct that may be problematic under Article 102 TFEU and/or national competition rules. By imposing directly applicable obligations on gatekeepers directed at increasing market contestability and fairness, the DMA acts as a filter[17] with regard to some forms of gatekeepers' conduct that could otherwise potentially trigger the application of the competition rules. An effective enforcement of the DMA obligations – including a strong monitoring of the gatekeepers' compliance – would thus complement competition rules by precisely rendering their application unnecessary.[18]

(34) Parallel enforcement of the DMA and the competition rules would by definition be ruled out in those cases that only fall under the scope of application of one of the two sets of rules. As stressed in Recital 5 DMA, the (European) competition rules fall short of addressing the conduct of gatekeepers, which are not necessarily dominant in competition-law terms. On the other hand, abusive conduct of dominant gatekeepers not related to core platform services, for example, could only be prohibited under Article 102 TFEU and/or the corresponding national rules.

(35) Parallel enforcement of the DMA and the competition rules could instead take place when non-compliant conduct – including

[16] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz), BGBl. 2021 Teil I, 2.

[17] Monopolkommission, Wettbewerb 2022, XXIV. Hauptgutachten, paras 483 et seq.

[18] European Commission, 'Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers' Press Release IP/23/1217, 28 February 2023, <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217> accessed 27 April 2023.

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conduct directed at circumventing the obligations imposed – under the DMA also constitutes a violation of competition law.

(36) As far as the Commission is concerned, it has concurrent powers to enforce the DMA and the European competition rules. Given the *ex ante* nature of the DMA obligations, whose enforcement dispenses with the need to perform – proof-intensive – analyses of a conduct's effects on competition, it is likely that the Commission will in future opt to use its enforcement powers under the DMA to address gatekeepers' conduct. An enforcement of the competition rules, in particular Article 102 TFEU, may however be necessary in those cases in which the competitive harm is not fully addressed by the DMA rules either because the gatekeeper's conduct does not wholly fall under the DMA's scope or because past anticompetitive conduct needs to be sanctioned.

(37) National competition authorities have only limited powers to enforce the DMA.[19] As explained above, however, they are not precluded from opening an investigation and taking a decision on a gatekeeper's conduct based on competition rules. The fact that the Commission investigates conduct as a violation of the DMA does not rule out the opening of parallel proceedings under competition law by national authorities. Only if the Commission decides to initiate proceedings under Article 101 or 102 TFEU will the national competition authorities be prevented from exercising their competence (Article 11(6) Regulation 1/2003). Yet the Commission does not have the power to prevent or interrupt proceedings opened by national competition authorities based on national competition rules not corresponding to Articles 101 and 102 TFEU.

(38) Yet, for the sake of an efficient pursuit of the objectives of the DMA and the competition rules, it is essential that – in the light of the spirit of the DMA's institutional design – both sets of rules be enforced in a coordinated and truly complementary manner.

(39) Consequently, national competition authorities should refrain from enforcing both the EU and the national competition rules when the anticompetitive harm can be *sufficiently* addressed by ensuring future compliance with the DMA obligations. Parallel enforcement, which in those cases would be unnecessary, might well result in a fragmentation of the internal market and contravene the principles of procedural economy and proportionality. As an example

[19] On the involvement of national competition authorities in the enforcement of the DMA see below at 4.1.

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of the latter, in a case where compliance with the DMA obligations would completely resolve the competition concerns addressed by a parallel decision of a national authority, the gatekeeper involved could legitimately request – and obtain – the review and subsequent annulment of the remedies imposed by the national decision on the grounds that they are no longer necessary. In addition, it is also doubtful whether the parallel application of the DMA and the competition rules would be covered by the exception to the *non bis in idem* principle as recently interpreted by the Court of Justice of the European Union (CJEU).[20] In any case, since according to this principle an application of the competition rules could not result in a significant increase of the overall fine imposed on the gatekeeper,[21] the deterrent effect brought about by an application of the competition rules would certainly be limited.

(40) This being said, competition law does necessarily play an umbrella function capturing behaviour that cannot be wholly addressed – and remedied – under the DMA. Given the complexity of gatekeepers' conduct and the evolving nature of digital markets, this kind of case may arise more often than expected. A meaningful and efficient division of work between the Commission and the national competition authorities in these scenarios necessarily requires that they make extensive use of the coordination mechanisms laid down in Article 38(2) and (3) DMA.[22]

3. Binding effect of Commission's decisions under the DMA on national authorities according to Article 1(7) DMA

(41) Article 1(7) DMA provides that national authorities shall not take decisions, which run counter to a decision adopted by the Commission under the DMA. The explicit reference to Articles 37 and 38 DMA in the second paragraph of the provision confirms that the addressees are both national authorities applying competition rules and national authorities applying other rules.

(42) As regards national competition authorities, Article 1(7) DMA resembles the rule laid down in Article 16(2) Regulation 1/2003. According to this provision, when national competition authorities rule on agreements, decisions or practices under Articles 101 and 102 TFEU that have already been addressed in a Commission decision, they cannot make decisions that would run counter to the decision adopted by the

[20] Case C-117/20 *bpost* [2022] ECLI :EU:C:2022:202, paras 49 et seq.
[21] Ibid para 51.
[22] See below at 4.2 and 4.3.

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Commission. However, other than Article 16(2) Regulation 1/2003, which aims to avoid conflicting decisions of competition authorities applying the same legal rules, Article 1(7) DMA seems to introduce a broad binding effect of Commission decisions adopted under the DMA.

(43) The Institute is concerned that an extensive interpretation of Article 1(7) DMA could undermine the parallel application of competition law as provided for in Article 1(6) DMA and, moreover, enter into conflict with primary EU competition law as regards the application of Article 101 and 102 TFEU.

(44) Considering both the cross-border nature of gatekeepers' conduct and the obligation laid down in Article 3(1) Regulation 1/2003 that national competition authorities apply the competition provisions of the TFEU when the conditions established therein are fulfilled, situations in which national authorities apply Articles 101 and/or 102 TFEU to gatekeepers' practices will be far from exceptional. Such a situation would arise when a national competition authority assesses the compatibility of a gatekeeper's conduct with the EU competition rules in a manner that contradicts the enforcement of the DMA obligations by the Commission. As a hypothetical example, a national competition authority could find that an agreement concluded to implement the data-access obligations contained in the DMA facilitates collusion and thus violates Article 101 TFEU. The key question is hence when and under what conditions a decision of a national competition authority based on EU competition law can 'run counter' to a Commission decision on the enforcement of the DMA.

(45) It is established case law of the CJEU that a provision of secondary law is not capable of restricting the scope or direct applicability of primary law. In this context, Articles 101 and 102 TFEU are directly applicable provisions of primary law. With regard to Article 102 TFEU in particular, the CJEU has recently confirmed in the *Towercast* judgment that 'it is well established that this article is a provision having direct effect' and that its prohibition 'is sufficiently clear, precise and unconditional, with the result that there is no need for a rule of secondary law expressly prescribing or authorising its application by the national authorities and the courts.'[23]

(46) In the same judgment, the Court however also explicitly acknowledges that for reasons of legal certainty, secondary legislation may be applied as a 'matter of priority.'[24] Concretely, the Court

[23] Case C-449/21 *Towercast* [2022] ECLI:EU:C:2022:207, paras 44 and 51.
[24] Ibid para 40.

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confirms that with the adoption of Merger Control Regulation 139/2004 (and formerly Regulation 4064/89) a recourse to the rules implementing Article 101 and 102 TFEU to control concentrations with an EU dimension has become devoid of purpose.[25] The Court's reasoning rests on the argument that Regulation 139/2004 'forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union.'[26] At this point, the Court expressly states that Regulation 139/2004 was adopted on the basis of Articles 103 and 352 TFEU.

(47) Similar to Regulation 139/2004, the DMA introduces a system of *ex ante* assessment of certain types of conduct of specific undertakings (gatekeepers) in the market, and vests the Commission with its exclusive enforcement. This however exhausts the similarities with the Merger Control Regulation. In contrast, Recital 11 of the DMA clearly states that the DMA pursues an objective that is different from that of protecting undistorted competition in any given market. The explicit choice of the EU legislature to adopt the DMA on the sole basis of Article 114 TFEU and not in combination with Article 103 TFEU corroborates this formally.

(48) Although Article 1(7) DMA pursues the legitimate purpose of ensuring uniform and effective application of the obligations imposed on gatekeepers under the DMA, this provision cannot limit the applicability and scope of Articles 101 and 102 TFEU. To reach that result, the EU legislature should have adopted the DMA on the basis of Article 103 TFEU. Therefore, it should be concluded that Article 1(7) DMA cannot be interpreted as being intended to prevent national authorities from adopting decisions under EU competition law as such.

(49) Yet conflicts may still arise as regards the assessment of an infringement (see hypothetical at para 44) or the design of remedies that national authorities could impose. In both of these contexts, the Institute deems comprehensive and especially early coordination between the Commission and the national competition authorities to be crucial for a truly complementary enforcement of the DMA and the competition rules. The second paragraph of Article 1(7) DMA stresses the importance of the coordination mechanisms contained in the DMA. A timely information exchange and case discussion should certainly help to prevent potential conflicts. Likewise, the proposal made in this position statement in the sense that national competition authorities

[25] Ibid para 49.
[26] Ibid para 40.

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refrain from parallel application of the competition rules if the DMA provisions sufficiently address the anticompetitive harm goes in this direction. As a last resort, as also in the hypothetical mentioned above (para 44), the Commission can always initiate proceedings under Articles 101 and 102 TFEU itself to deprive the national competition authority of its enforcement competence (Article 11(6) Regulation 1/2003) and ensure that the enforcement of Articles 101 and 102 TFEU stays in line with its own DMA enforcement.

(50) The obligation not to take decisions that run counter to a decision adopted by the Commission under the DMA can also arise when national competition authorities are about to adopt decisions based on national law. As stated above, Article 1(6)(b) DMA echoes the principle of minimum harmonisation in EU competition law under Regulation 1/2003 and explicitly allows Member States to impose on gatekeepers further national obligations that prohibit forms of unilateral gatekeepers' conduct. National competition authorities thus retain a considerable degree of discretion to design remedies that do not overlap with the obligations laid down in the DMA. Having regard to the minimum harmonisation rationale of the DMA with respect to national competition laws, Article 1(7) DMA should therefore not be understood as a rule to – even indirectly – further (de)limit competences of national authorities. Rather, it should be interpreted as a rule that ensures both consistency in the application of the DMA obligations and legal certainty for those subject to these obligations, and consequently protects the latter from having to fulfil contradictory obligations arising from different regimes.

(51) In practical terms, this means that if a national competition authority finds that a gatekeeper's conduct violates stricter national law and imposes on it different behavioural obligations, only those that materially conflict with the fulfilment of DMA obligations would fall under the rule of Article 1(7) DMA, while the rest of the national competition authority's decision would remain valid.

(52) The full harmonisation rationale followed in Article 1(5) DMA significantly reduces the risk that national authorities will hand down conflicting decisions when they apply other national laws. Still, it cannot be ruled out from the outset that situations will arise in which it may be materially impossible for a gatekeeper to simultaneously comply with different obligations. The Institute advocates a narrow understanding of the obligation for national authorities set out in Article 1(7) DMA in this context as well. As is the case for competition authorities, coordination between the Commission and other national

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authorities, in particular in the framework of the High-Level-Group, must play a crucial role for identifying trans-regulatory issues and assessing potential interactions between the DMA and sector-specific rules.[27]

4. Early coordination and close cooperation between the Commission and national authorities facilitates enforcement of the DMA

4.1. Active involvement of national authorities in the DMA's enforcement process

(53) The Institute is convinced that an active involvement of national authorities, in particular competition authorities, in the DMA's public enforcement process is of crucial importance for the attainment of the DMA's goals – although Article 38(7) DMA and Recital 91 DMA state that the Commission is the sole enforcer of the Regulation. The role of national competition authorities is limited to assisting the Commission in its investigations and providing information. As national competition authorities cannot conclude their own market investigations under the DMA and make final, binding decisions, the DMA establishes a novel centralised public enforcement regime.

(54) Against the backdrop of preventing a fragmentation of the internal market by an incoherent enforcement of the gatekeeper obligations, this novel centralisation approach is to be welcomed. However, the centralised public enforcement regime fundamentally differs from the well-established decentralised enforcement mechanism of European competition law. Therefore, the risks attached to this approach must be addressed: firstly, the Institute is concerned that the limited resources of the Commission might be insufficient to enforce the DMA's obligations effectively against all gatekeepers' core platform services. Secondly, it is also concerned that the existing expertise of national competition authorities would not be sufficiently utilised to achieve the DMA's objectives of fairness and contestability.

(55) The DMA contains various provisions[28] that are in principle appropriate to master these challenges. Particularly worth mentioning in this context are the following articles, which provide for the involvement of national authorities: first, Article 16(5) DMA allows the Commission to request national competent authorities to assist in a

[27] On the High-Level Group see below at 4.3.
[28] cf. Articles 16(5), 27(3), 37(2), 37(6), 37(7), 38(6), (7) and 40 DMA.

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market investigation with the purpose of designating gatekeepers, into systematic non-compliance or into new services and practices. This provision leaves it to the Commission to decide *if* and *to what extent* national authorities are to be involved in market investigations. The national authorities, on the other hand, can decline such a request. Second, Article 27 DMA clarifies that national competition authorities are contact points for third parties to provide information about any practice or behaviour by gatekeepers that falls within the scope of the DMA. Third, Article 37(2) allows the Commission to consult national authorities on any matter relating to the DMA's application. Fourth, Article 38(6) DMA gives the Commission the option to obtain support from national competition authorities in any of its market investigations. In addition, Article 38(7) DMA clarifies that, if the respective national law provides the necessary legal basis, a national competition authority will be able, on its own initiative, to conduct an investigation into a case of possible non-compliance with the DMA obligations on its territory as long as the Commission itself does not open proceedings.

(56) However, the success of these provisions will depend very much on their actual implementation by the Commission and the national authorities. The final use of these cooperation mechanisms remains at the discretion of both the Commission and national authorities. Therefore, the Institute sees a key factor for the success of the legislative framework in creating incentives for cooperation between the Commission and national authorities. The latter will only be willing to participate in the Commission's investigations if they benefit from this cooperation, for instance by gaining specialised knowledge that could be relevant for their own (related) national cases. On the other hand, the advantage of close cooperation for the Commission is clear: the use of already existing unique knowledge of national authorities about digital markets, business models and behaviours of undertakings will lead to a more efficient public enforcement of the DMA obligations.[29] As the DMA explicitly determines the Commission as its sole public enforcer, it will be very much up to the Commission to create an enforcement environment that encourages national authorities to participate.

[29] In this context, see also the joint position of the heads of the national competition authorities of the European Union, 'How national competition agencies can strengthen the DMA' (22 June 2021) <https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf> accessed 27 April 2023.

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(57) The Institute sees specific areas where necessary cooperation between the Commission and national competition authorities can be extended: The national competition authorities should waste no time in communicating their expertise in the digital sectors[30] and national markets and explicitly offering their assistance for the enforcement of the DMA to the Commission. By doing this now, they can contribute to offsetting the Commission's personnel and financial limitations. The Commission should make extensive use of these offers and realise the cooperation envisioned by the abovementioned cooperative framework. Moreover, the Institute urges all Member States to establish the necessary legal basis under Article 38(7) DMA in their respective national laws. This would empower national competition authorities to conduct their independent investigations into possible non-compliance with Articles 5 to 7 DMA in their national territory. The corresponding legislative process has already been concluded in Hungary and is currently ongoing in Germany and the Netherlands. While Hungary has given its competition authority the investigative power to conduct such an investigation in its most recent amendment to the Hungarian Competition Act,[31] Germany and the Netherlands plan to go further and equip their competition authorities with more investigative powers.[32] The proposal for the 11th amendment of the German Competition Act sets out a markets inquiry tool that gives the German Competition Authority the possibility to impose behavioural and structural remedies and ultimately even break up companies. The Dutch legislative proposal is likewise to be welcomed as it gives the national competition authority a very wide scope of investigative powers. For example, the proposal provides the authority with the power to issue formal requests for information and carry out inspections on domestic premises. Furthermore, the Dutch Competition Authority could use any information obtained in a DMA investigation for its other tasks, like investigations into potential breaches of competition or consumer law.

[30] For instance, the French Competition Authority has years of experience with the online advertising sector; likewise, the German Competition Authority (BKartA) has profound knowledge of the market realities and problems in the e-commerce sector.

[31] Hungarian Competition Authority, 'Changes in Competition Law: expanding GVH toolbox and less administrative burden for undertakings' (1 January 2023) <https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/changes-in-competition-law-expanding-gvh-toolbox-and-less-administrative-burden-for-undertakings> accessed 27 April 2023.

[32] German Federal Government, 'Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze' (5 April 2023) <https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6> accessed 27 April 2023. The Netherlands have begun the legislative process to establish the legal basis in their national law to conduct investigations under Art. 38(7) DMA, cf. <https://www.internetconsultatie.nl/uitvoeringswetdma/b1> accessed 27 April 2023.

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We encourage all Member States to follow at least the Dutch approach and instate similarly extensive investigative powers for their national competition authorities in their respective national laws. Once these are enacted, national competition authorities should extensively exercise the power provided for in Article 38(7) DMA and open investigations into non-compliance. This could be most advantageous in cases where the anticompetitive harm caused by gatekeepers' conduct can be more easily remedied by enforcing the DMA obligations. As sole enforcer of the DMA, however, it is for the Commission to adopt a non-compliance decision and to sanction the gatekeeper's non-compliance. Furthermore, the Institute advises national competition authorities to collaborate closely with the Commission in obtaining information from third parties under Article 27 DMA. In this way, both the national authorities and the Commission can serve as equivalent channels for submitting information related to potential non-compliance by gatekeepers with the DMA.

(58) Regarding this cooperation process between the Commission and national competition authorities, the Institute sees the need for further clarification of its exact legal design. The DMA allows direct cooperation between national competition authorities only through the European Competition Network (ECN) in the framework of the High-Level Group. The main purpose of the High-Level Group is to create a consistent transdisciplinary approach for the parallel enforcement of the DMA and other sectoral regulations[33] but not to coordinate the DMA investigations of national competition authorities. Regarding European competition law enforcement, the system of close cooperation within the ECN is regulated in the ECN+ Directive.[34] Therefore, the principles and rules laid down in the ECN+ Directive could – where feasible – serve as a blueprint for the cooperation of national competition authorities in the DMA's public enforcement process. This Directive has already established a coordination mechanism available for the parallel enforcement of European and national competition law to the same case.[35] A similar set of rules for the DMA would be useful to avoid parallel and overlapping investigations into cross-border cases of (possible) non-compliance with DMA obligations by the Commission and national competition authorities. As Article 38(7) DMA limits the

[33] Cf. Article 40(7) DMA.

[34] See Article 1(3) and Recital 2 of Directive 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive) ELI: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN> accessed 27 April 2023.

[35] Cf. Article 1(2) ECN+ Directive.

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investigative powers of national competition authorities to their own territory, coordinating the investigations of different national competition authorities with each other is key to ensure efficient enforcement. Otherwise, valuable resources might be wasted when the same gatekeeper conduct is subject to several parallel national DMA-compliance investigations. In this context, especially the general principles of cooperation laid down in Articles 24, 25 and 27 of Directive 2019/1/EU could be used to develop a joint procedural approach for cross-border cases. In doing so, a cooperative legal framework has to take into account the centralised public enforcement approach of the DMA. Since the centralised approach does not provide national competition authorities with the power to conclude DMA investigations and impose a remedy or fine, it is up to the Commission to design the cooperative framework effectively taking into account the outlined problem.

4.2. Timely coordination between the Commission and national competition authorities

(59) The Institute also sees the need for early coordination between the Commission and national competition authorities regarding the latter's enforcement of competition law on gatekeepers. This is crucial for detecting and closing the DMA's gaps and loopholes that need to be remedied with the help of the more flexible competition rules. National competition authorities should enforce competition law whenever gatekeeper behaviour cannot be wholly subsumed and remedied under the DMA. For this purpose, the DMA provides in Article 38(2) and (3) two legal bases for the coordination process, which should both be actively used. National competition authorities must inform the Commission both before initiating and before concluding a competition law investigation of gatekeepers. These extensive informational duties show the legislature's willingness to ensure comprehensive coordination between the Commission and the national competition authorities from an early point in time. The Institute fully supports this comprehensive coordination approach, but also points out that it is best to start coordinating at the earliest possible stage in order to prevent inefficient enforcement actions from arising in the first place. Once enforcement procedures under the DMA and competition rules have started, subsequent coordination between the Commission and national competition authorities will turn out more resource-intensive and should therefore be avoided for efficiency reasons.

4.3. Coordination within the High-Level Group

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(60) Both the synergies between authorities and the existence of possible tensions in the enforcement of the DMA and national and other EU rules make the existence of coordination instruments relevant to ensure a coherent and effective implementation of the DMA and other sectoral regulations applicable to gatekeepers. The Institute therefore welcomes the Commission's timely establishment of the High-Level Group for the DMA under the Commission Decision of 23 March 2023, which establishes the framework for the Group to become operational. While replicating the tasks already set out in Article 40 DMA, the Commission Decision also states that the Group shall not be involved in, or otherwise provide advice on, ongoing proceedings or investigations conducted by the Commission under the DMA, to safeguard these prerogatives of the Commission as the sole enforcer of that Regulation, subject to the Advisory Committee procedure as laid down in Article 50(2) of Regulation (EU) 2022/1925. This limitation, however, should not inhibit the Group's members from taking an active role in requesting meetings, according to Article 5(2) of the Commission Decision of 23 March 2023, in order to address specific issues that may concern obligations or facts that are subject to DMA proceedings or investigations. This is particularly relevant for taking advantage of this instrument to prevent tensions that may occur in light of Article 1(7) DMA, as discussed above.

5. Private Enforcement[36]

5.1. Coordinating EU and national laws for an effective private enforcement architecture

(61) Public enforcement will play an essential role in ensuring that the DMA is applied and complied with. The Commission and the competition authorities will act in the public interest and employ powerful investigative tools. However, the importance of private enforcement should not be disregarded.

(62) National courts will decide on follow-on actions and grant due compensations to those that have been damaged by infringing conduct previously found by the Commission. They will also play a complementary role to the Commission in stand-alone actions, identifying violations of the obligations under Articles 5, 6 and 7 of the DMA and ordering infringers to cease and desist. These kinds of actions will probably be even more effective than in competition law, due to the per-se nature of most of the prohibitions imposed by the DMA.

[36] The Institute would like to stress that this section is not meant to explore in full all issues and challenges related to private enforcement of the DMA.

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More specifically, after the Commission designates a gatekeeper (Article 3 DMA), victims could request an injunction before a national court to enforce the directly applicable obligations (Article 5 DMA). These obligations could, in principle, be easily argued before a court. Moreover, private enforcement could also provide very effective and quick protection through interim measures. Indeed, following the example of the *Broadcom* case,[37] individual victims could request an interim measure before a national court, providing even faster relief in the market than in the case of interim measures adopted by the Commission under Article 24 DMA. Last, national courts could also play a complementary role in cases of obligations specified or updated after the regulatory dialogues provided for by Articles 8 and 12 DMA. In these scenarios, when a decision by the Commission under these articles establishes certain remedies or limitations on the behavioural commitments of the designated gatekeeper, victims could, to the extent this is required, request enforcement before a national court.

(63) Moreover, national judicial bodies should also contribute, together with the CJEU, to determining the proper implementation of the DMA by the Commission, thus providing a judicial review of the (still wide) discretion attributed to the Commission in this matter. For example, when assessing an infringement, a national court might request a preliminary ruling under Article 267 TFEU on the validity (or the interpretation) of an implementing act specifying the obligations provided under Articles 6 and 7 DMA, should it have any doubts on the legitimacy of such an act. Under Article 265 TFEU, the CJEU will instead have exclusive jurisdiction in remedying a failure by the Commission to designate as a gatekeeper an undertaking meeting the criteria established by Article 3 DMA.

(64) Policymakers and scholars have stressed the need for better articulation of private enforcement in the DMA to increase its effectiveness.[38] Concerns mainly focus on the terseness of provisions

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[37] Decision 2011/695/EU. Broadcom – Interim Measures Procedure (Case AT.40608), OJ C 81, 10.3.2021, p. 13–22.

[38] French Ministry of the Economy, Finance and the Recovery, German Federal Ministry for Economic Affairs and Energy and Dutch Ministry of Economic Affairs and Climate Policy, 'Letter and proposal: Strengthening the Digital Markets Act and Its Enforcement' (2021), 2 and 5–9 <https://www.permanentrepresentations.nl/permanent-representations/pr-eu-brussels/documents/publications/2021/09/9/strengthening-the-digital-markets-act-and-its-enforcement> accessed 27 April 2023. See also Giorgio Monti, 'The Digital Markets Act—Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper No. 2021-04, 7–8 <https://ssrn.com/abstract=3797730>11–4

Electronic copy available at: https://ssrn.com/abstract=4437220

on private enforcement in the DMA and the fear of additional national legislative action leading to fragmentation in private enforcement. This could lead to multiple preliminary ruling references, delaying private enforcement and impacting the deterrent effect of enforcing gatekeeper obligations.

(65) The DMA is an instrument of sectoral regulation to which two set of rules will be applicable. On the one hand, EU law (the Treaty, the jurisprudence of the CJEU, and the DMA); on the other hand, national law in application of the principle of procedural autonomy, subject to the usual limits set out by the principles of effectiveness and equivalence. Additionally, the principle of direct application of regulations from Article 288 TFEU and existing in the European legal doctrine established in the *Van Gend & Loos* case[39] would support a decentralised system of private enforcement. As AG Ćapeta has recently observed, 'the possible occurrence of divergences is part of the regional integration process, such as is present within the European Union.'[40] Thus, coordinated processes are of enormous relevance and will lessen the fragmentation risk.

(66) The standing of the DMA's private enforcement architecture builds on and resembles that of Regulation 1/2003. However, the simplicity of Recital 92 and Article 39 is unexpected given the evolution of private enforcement of competition law and other attempts at harmonising European private procedural law.[41] For instance, while Recital 91 affirms the Commission as the sole enforcer of the DMA and Recital 92 emphasises the importance of national courts having access to all relevant information, a broad interpretation of Article 1(5) DMA in conjunction with Article 39(5) DMA could affect the principle of division of powers and the fundamental right to a fair trial. This provision could require national courts to pause proceedings until the delivery of a decision from the Commission, thereby delaying private

accessed 27 April 2023; Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2021) Journal of European Competition Law & Practice, <https://doi.org/10.1093/jeclap/lpab076> accessed 27 April 2023; Peter Picht, 'Private Enforcement for the DSA/DGA/DMA Package' (2021) Verfassungsblog https://verfassungsblog.de/power-dsa-dma-09/ accessed 27 April 2023.

[39] Case 26-62 *van Gend en Loos* [1963] ECLI:EU:C:1963:1.

[40] Case 721/20 *DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH* [2022] ECLI:EU:C:2022:288, para 67.

[41] See for instance, Burkhard Hess, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure*, In-Depth Analysis for the JURI Committee (2016) <http://www.europarl.europa.eu/supporting-analyses> accessed 27 April 2023, <http://www.europarl.europa.eu/supporting-analyses> accessed 27 April 2023.

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enforcement.[42] Therefore, a narrow interpretation of Article 1(5) DMA, as previously stressed, is also crucial from a private enforcement perspective. Furthermore, it will be important to coordinate any lessons learned and improvements derived from the revision of Regulation 1/2003 with national legislatures and courts.

5.2. Strengthening and simplifying DMA private enforcement: The supporting role of national legislatures in enacting supplementary laws

(67) The DMA has been designed as a regulatory instrument open to development. Member States have the competence to enact supplementary laws outside the DMA that support its enforcement in line with Article 4(3) TEU. In particular, national legislatures retain the competence to introduce rules that simplify the enforcement of private claims for injunctive relief and damages in the case of violations of the DMA obligations. The importance that claims for access to data and injunctions will have in practice cannot be underestimated. Against this backdrop, some practitioners have argued that for gatekeepers operating across the internal market, having to comply with different national decisions could be technically burdensome and will lead to fragmentation. Furthermore, instead of litigating, parties may rely on Commission infringement decisions providing evidence on the infringement to bring follow-on actions. Nonetheless, even in the absence of more detailed provisions on private enforcement of the DMA, one could also take a more holistic approach and anticipate that such brevity does not imply the intention of full centralisation but rather the opposite. It could be seen as a call for close collaboration between the Commission, the national legislature and national courts. An example of it could be the first-mover approach taken by the German legislature. The Federal Cabinet has adopted the proposal from the German Federal Ministry for Economic Affairs and Climate Action (BMWK) on its draft bill for a Competition Enforcement Act as the 11th amendment to the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB; Act against Restraints of Competition) as a Government Proposal. In its Sections 33, 33b, 33g and 33h the proposal provides for the possibility of bringing an action for violation of the obligations

[42] Regarding blocking effects on national laws from a private enforcement perspective, see Hoffmann, Herrmann, Kestler, 'Potential gatekeeper's privilege – the need to limit DMA's centralisation' (2023) (n 11) cf. 6.

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under Articles 5 to 7, in particular for injunctive relief, removal and damages.[43]

(68) However, the practicability of a private damages claim under the DMA remains unclear. Even if damages claims would be available to those harmed by gatekeepers' conduct based on general principles of EU law and long-established competition law jurisprudence by the CJEU, this solution is far from optimal. First, Directive 2014/104[44] (the Damages Directive) is not applicable to damages derived from the DMA. Article 1 of the Damages Directive is clear in establishing that it only applies to claims of those who have suffered harm caused by an infringement of competition law. Second, damages are a minor aspect of private enforcement, as they are often the final component of a case. Damages litigation may occur years after the infringement, which is sometimes too late for those who have been injured. Third, the difficulties in pursuing damages under competition law have demonstrated the need for attention to detail when establishing the legal basis. Damages for victims of cartels remain difficult to obtain, despite the CJEU's best efforts in the landmark *Courage* and *Manfredi* decisions and a comprehensive set of provisions in the 2014 Damages Directive. In this regard, the Institute is of the opinion that national legislatures could provide for simplifications in the assessment of damages and make use of already existing EU Regulations, such as Article 11a (redress actions)[45] and 12 (substantiation of claims) of the

[43] German Federal Government, 'Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze' (5 April 2023) <https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6> accessed 27 April 2023.

[44] 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 law provisions of the Member States and of the European Union, ELI: <http://data.europa.eu/eli/dir/2014/104/oj> accessed 27 April 2023.

[45] Article 11a as introduced by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. (Omnibus Directive) ELI: <http://data.europa.eu/eli/dir/2019/2161/oj> accessed 27 April 2023.

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Unfair Commercial Practices Directive[46] or Article 15 of the Platform-to-Business (P2B) Regulation.[47]

(69) From a consumer protection standpoint, the incorporation of the possibility of representative actions for redress measures under Directive (EU) 2020/1828[48] (RAD Directive) in Article 42 DMA may seem like a breakthrough. Such actions would be brought 'against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers'. In this regard, it is worth noting that the DMA explicitly requires Member States to include the DMA in the scope of their national laws when transposing the RAD Directive[49] and thus the role of the national legislature will be crucial. However, the Institute is concerned about the lack of clarity regarding which of the gatekeepers' obligations laid down in Articles 5 to 7 may be actionable by consumers and on which legal basis. On the one hand, many of the obligations for gatekeepers outlined in Articles 5 to 7 are relevant to consumer protection, and their introduction will undoubtedly improve consumer rights by providing consumers with a genuine choice when selecting and using core platform services by securing their ability to make independent decisions. On the other hand,

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[46] Consolidated text: 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 (Unfair Commercial Practices Directive) ELI: <http://data.europa.eu/eli/dir/2005/29/2022-05-28> accessed 27 April 2023. Article 12 requires Member States to empower civil or administrative courts to '(a) require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and (b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.'

[47] 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 intermediation services (P2B Regulation) ELI: <http://data.europa.eu/eli/reg/2019/1150/oj> accessed 27 April 2023. Article 15 mandates Member States to ensure adequate and effective enforcement, as well as to lay down the rules setting out the measures applicable to infringements of the P2B Regulation and ensuring their implementation. Measures must be 'effective, proportionate and dissuasive'.

[48] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (RAD Directive), ELI: <http://data.europa.eu/eli/dir/2020/1828/oj> accessed 27 April 2023.

[49] See Recital 104 and Article 42 DMA.

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these obligations do not necessarily enhance the status of consumers. For instance, the enforcement of obligations such as Article 6(11) for third-party online search engines could contribute to strengthening the competitive pressure on gatekeepers, but it may not be enforceable through a representative action per the RAD Directive's standards. While the enforcement of obligations pursuing consumer protection interests is a legitimate regulatory goal, the achievement of contestable and fair markets requires a great deal more enforcement actions by gatekeepers' direct competitors or dependent business customers. In general, the DMA's primary focus (like other legislation such as the P2B Regulation)[50] is on platforms and business users. The role of consumers as a crucial component of market regulation is not acknowledged.

(70) Finally, it is worth noting that private actions resulting from violations of the DMA may raise some jurisdictional challenges at national level as well as for private international law. At the national level, Member States may provide for jurisdiction of existing specialised courts, such as competition law courts, also for the DMA. This seems most appropriate for cases where a violation of the DMA may also entail a violation of competition rules. However, due to differences in national procedural laws it may not be straightforward that the assignment of a DMA case goes to a specialised court. At the international level, while the Brussels Regulation[51] may allocate jurisdiction the same way as with competition law cases, the same may not automatically happen as regards the applicable law. The scope of application of Article 6(3) Rome II Regulation[52] has already raised doctrinal discussion in some Member States on whether the law applicable to a non-contractual obligation applies to all conduct restricting free competition or only to conduct prohibited in the TFEU.[53] Thus, in cross-border situations, it remains unclear whether Article 6(3)

[50] 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 intermediation services, ELI: <http://data.europa.eu/eli/reg/2019/1150/oj> accessed 27 April 2023.

[51] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), ELI: <http://data.europa.eu/eli/reg/2012/1215/oj> accessed 27 April 2023.

[52] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), ELI: <http://data.europa.eu/eli/reg/2007/864/oj> accessed 27 April 2023.

[53] Migliorini, Lein, Bonzé, et al., 'Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations' (Publications Office of the European Union, 2021, 36) <https://data.europa.eu/doi/10.2838/399539> accessed 27 April 2023.

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Rome II Regulation applies automatically to similar rules that non-EU Member States may adopt. The reason for this is that the DMA's private enforcement may not fall under Article 6(3) of the Rome II Regulation. Therefore, it is important for the Commission to engage in a dialogue with national legislatures and judges to ensure that a certain level of consensus is reached.

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