COMMEO Rechtsanwälte und Notar

Meeting Competition

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Digital Markets Act: Private enforcement comes into play!

The enforcement of the DMA does not solely rest with the European Commission, private litigation before the national courts of the member states will play a key role in shaping the competitive landscape of digital markets with corresponding opportunities for affected parties

Following 6 March 2024, the European Commission ("Commission") may enforce the obligations under the DMA imposed to the first designated gatekeepers for the relevant core platform services by opening non-compliance proceedings – and the first proceedings are already underway. Irrespective of any public enforcement, private parties can also bring an action for DMA-compliance before the national courts or demand compensation for damage incurred as a result of a DMA-violation. In doing so, claimants can rely on the claimant-friendly rules on cartel damages under German law. In view of the limited capacities of the Commission, a potential quick remedy by way of interim relief and the possibility of claiming damages, it can be assumed that private litigation will play a key role in the DMA's enforcement.

Background

The DMA came into force on 1 November 2022 and aims to ensure the contestability for the markets in the digital sector. The DMA is designed to create a fair market environment, especially in favor of **business users** relying on the gatekeepers' online platforms to sell their products, and to offer new market players the chance to compete with the gatekeepers within the online platform environment. Companies designated as gatekeepers will be obliged to abstain from certain unfair practices that undermine the contestability of markets (such as restrictions regarding distribution, data use and interoperability).[1]

The first undertakings designated by the Commission as gatekeepers in September 2023 (Apple, Alphabet, Meta, Amazon, Microsoft and ByteDance) had time until 6 March 2024 to take the necessary measures to comply with the behavioral obligations laid down in Art. 5-7 of the DMA. The Commission has not been idle and, starting in mid-March, held a number of technical workshops with interested stakeholders regarding specific measures implemented by the gatekeepers in view of the DMA. The first non-compliance proceedings were opened only a few days later.[2] Booking, being the latest undertaking designated as gatekeeper on 13 May 2024, has time until 13 November 2024 to comply with the DMA behavioral obligations.

The DMA does not contain any specific rules regarding its private enforcement. As with cartel damages, it is up to the national law to create rules for the private enforcement of EU law. And Germany has been at the forefront in doing so by extending the core provisions for pursuing antitrust claims to DMA violations following the 11th amendment of the Act against Restraints of Competition ("**ARC**"). These provisions are designed to be claimant-friendly and give therefore future DMA-claimants a tailwind.

Who can file a law suit?

Among the potential claimants are primarily the gatekeeper's (i) **business partners** and (ii) **competitors**. Business associations can also assert claims for their members. Even **end-users** can benefit from the provisions of the ARC, but are generally less likely to file a claim given the often limited impact of the DMA violation on them and the information asymmetry vis-à-vis the gatekeeper. To fight this imbalance, however, end-users may rely on the newly introduced German Consumer Rights Enforcement Act (VRUG) to pursue claims as part of a collective law suit by way of an opt-in model.

What can be claimed?

Market players directly or indirectly affected by DMA violations can assert a claim for the **removal of the infringement** or seek **injunctive relief** if there is an immanent risk of a violation (or its repetition). The claims can also be pur-

[1] See our Newsletter of November 2023 "The EU's Digital Markets Act: A legal giant against tech giants" for more details about the obligations of the gatekeepers.

[2] On 25 March 2024 the Commission opened non-compliance investigations against Alphabet, Apple and Meta.

sued by way of interim relief in line with the general rules of civil procedure. Additionally, the affected market players can assert a **claim for damages** inflicted by the DMA violation.

How to file a claim

According to Art. 39(5) DMA national courts cannot give a decision which runs counter to a decision adopted by the Commission. Therefore, national courts are bound by the Commission's designation decision, i.e. claimants do not need to establish the qualification as gatekeepers. At the same time, such decision is the bare minimum for any litigation. Absent a designation decision, the obligations under Art. 5-7 DMA simply do not apply, hence cannot be litigated.

Likewise, national courts are bound by the Commission's decision finding a DMA-violation. With respect to follow-on damages proceedings (i.e. such that are based on a designation and subsequent violation decision), claimants can also rely on the **binding effect** pursuant so Sec. 33b sent. 1 ARC, i.e. in such merely have to establish that and to what extent damages were suffered. Even though the claimants in stand-alone proceedings will only be able to profit from a Commission's designation decision, it is for the gatekeeper to demonstrate DMA-compliance vis-à-vis the Commission, Art. 8 DMA. While said provision isn't directly applicable in private litigation proceedings, it can be reasonably expected that the German courts will assume the same distribution of the burden of proof, or otherwise – similar to antitrust damages proceedings – develop a significantly reduced standard.

In any event, claimants suing for damages may profit from extended **rights of disclosure of information and evidence** as laid down in Sec. 33g ARC. Based on this, claimants may request from the gatekeeper or third parties the disclosure of evidence necessary for the assertion of their claims as long as they specify the evidence and demonstrate that it is at least probable that harm was suffered in result of a DMA violation.

With respect to the **statute of limitations** the same rules apply as in claims resulting from antitrust infringements. Thus, all claims resulting from a DMA-violation are subject to the favourable knowledge-dependent statute of limitations of five years, Sec. 33h ARC. The limitation period doesn't begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know of the infringement.

Regarding the **quantification of damages** it is noteworthy that the German legislator decided not to extend the rebuttable presumption of damage resulting from an antitrust-infringement pursuant to Sec. 33a (2) ARC to DMA-obligation violations. Due to the dissimilarity of the DMA obligations and the lack of case practice, this seems coherent. However, with regard to the exact quantification of the damage suffered, the claimant can again rely on the same simplified standard of proof that applies in antitrust damages proceedings. Thus, the judge can estimate the damage based on the facts presented by the parties if it is not possible or excessively difficult to put an exact figure on it (which will regularly be the case).

Comment and Outlook

Private litigation before the national civil courts will prove to be an essential pillar to enforce the obligations of gatekeepers under the DMA. The Commission, given its limited resources and discretion to pick up cases is likely to resort to high-profile cases. It is for affected parties to resort to litigation in the remainder of the cases. From the claimant's perspective, it is helpful that the DMA is a regulation containing precise obligations and prohibitions and that the DMA provides for a mechanism for cooperation between national courts and the Commission.

Last but not least, civil actions remain the weapon with respect to the compensation of damages incurred as a result of a DMA violation. Similar to cartel damages proceedings, the German courts are likely to lean towards a claimant-friendly interpretation of the rules of civil procedure in view of the principle of effectiveness of EU law. In any event, the way is paved for future claimants. The tools are ready, now it's time to put them to good use.

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