

PRIVATE ENFORCEMENT UNDER THE DIGITAL MARKETS ACT: RIGHTS AND REMEDIES REVISITED

MAGNUS STRAND*

The Digital Markets Act (DMA) is a new instrument of EU competition policy. It has been pointed out that although the DMA does not include any provisions on private enforcement, there should still be room for private enforcement of rights under the DMA. However, it has not been properly scrutinised to what extent the provisions of the DMA are suitable for such private enforcement. This article contributes to the literature by addressing this deficit and explaining the interwoven aspects of EU law and national law upon which private enforcement of the DMA will rely.

The analysis is carried out in two main tiers. First, the core substantive provisions of the DMA are analysed. It is concluded in this stage that there are some rules in the DMA which may trigger private law sanctions when breached. Second, the system of judicial protection of rights conferred on individuals under EU law is explained and applied to the DMA. In this regard, it is concluded that it would be appropriate to extend any private law remedies that are available to claimants who have been victims of an infringement of Article 101 or 102 TFEU to claimants who have been victims of an infringement of protective provisions in the DMA.

1 INTRODUCTION

The Digital Markets Act (DMA), adopted in 2022, is a new instrument of EU competition policy which is designed to complement existing rules. Its role within EU competition law will be to safeguard the proper functioning of the internal market from challenges ‘posed by the conduct of [online] gatekeepers that are not necessarily dominant in competition-law terms’.¹

It has been pointed out that although the DMA does not include any provisions on private enforcement, there should still be room for private enforcement filling the same function as under Articles 101 and 102 TFEU.² However, it has not been properly scrutinised to what extent the core protective provisions of the DMA, Articles 5-7, are suitable for such private enforcement. Moreover, it has not been explained how those Articles could systematically be connected to the general principles of private enforcement of EU law. This is what this article sets out to do.

* Associate professor of European law and senior lecturer in commercial law at Uppsala University.

¹ 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) [2022] OJ L265/1, recital 5. There are also important end user aspects to the DMA, that are more closely related to data and consumer protection, but these will not be examined more closely here.

² Assimakis Komninos, ‘The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement’ [2021] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3914932>> accessed 01 June 2024; Anne C Witt, ‘The Digital Markets Act: Regulating the Wild West’ (2023) 60(3) Common Market Law Review 625.

The analysis is carried out in two main stages. First, the core substantive provisions of the DMA are analysed in order to identify whether they have the protective purpose necessary for individuals to derive rights from them that can be privately enforced. It is argued that this is so with regard to certain rules in Articles 5-7. Second, the system of judicial protection of rights conferred on individuals under EU law, and in particular judicial protection through private enforcement of those rights, is explained. This includes the right to an effective remedy, and the right to equivalent remedies. Under EU law, national courts must protect the rights held by individuals under EU law and provide them with at least one effective remedy, but also make available to such individuals any remedies available in equivalent situations if the action were brought under national law. This system further includes the EU law principles of equivalence and effectiveness, under which national procedures and other conditions that apply to the exercise of remedies are scrutinised.

This article thereby contributes to the literature by pushing beyond general statements on the possible beneficial contributions of private enforcement under the DMA. This article proceeds to explain, concretely, what rights under the DMA can be privately enforced, how national courts should identify the remedies to be made available to claimants who seek to enforce the rights conferred on them under the DMA, and the extent to which EU law governs the exercise of those remedies.

2 BACKGROUND: THE DMA AND PRIVATE ENFORCEMENT

The DMA is part of the wave of EU legislation being rolled out in order to govern the new digital markets and digital society within ‘A Europe fit for the digital age’.³ Supervision and enforcement under the DMA is largely entrusted with the European Commission,⁴ in accordance with the general *modus operandi* of EU competition law.⁵ By comparison with the European Competition Network, however, public enforcement under the DMA is much more concentrated to the Commission, with national authorities only appearing in supporting roles.⁶ Although the reasons for this choice are not explained in the Regulation or in its preparatory works, it must be understood as a consequence of the market structures at issue: the gatekeepers targeted by the DMA are very powerful undertakings, operating on a global scale.

Further, under Articles 101 and 102 TFEU, private enforcement has become increasingly important, especially since the entry into force of Directive 2014/104 on damages actions for infringement of competition law.⁷ Private enforcement is an umbrella

³ European Commission, ‘A Europe Fit for the Digital Age: Empowering people with a new generation of technologies’ (*European Commission*, 19 February 2020) < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en > accessed 01 June 2024.

⁴ Digital Markets Act. Chapters IV and V set out the powers of the Commission.

⁵ As set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.

⁶ Digital Markets Act, Art. 37. Cf. Art 1(7).

⁷ 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 [2014] OJ L349/1 (Directive 2014/104); Jean-François Laborde, ‘Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges (2021 Ed.)’ (2021) 3 *Concurrences Review* 232 < <https://www.concurrences.com/en/review/issues/no-3-2021/pratiques/102086> > accessed 01 June 2024.

concept that includes any type of initiative by a private party in order to protect their rights. In this article, focus is on private enforcement of rights conferred on individuals under EU law. Such a definition is still a bit broad for our present purposes, as it encompasses, for example, an action brought by an individual against an EU institution under Article 340(2) TFEU, as well as an action brought against a Member State pursuant to the case law on damages liability for Member States.⁸ With regard to the DMA, we are instead concerned with private enforcement by a private party against another private party, by reason of the latter's infringement of the DMA. A parallel to this is private enforcement under the aforementioned damages regime for competition infringements under Directive 2014/104.

Private enforcement, through which private individuals (people or businesses) bring legal actions to safeguard their rights, is a complement to the centrepiece of competition law enforcement in Europe: public enforcement. The latter serves to protect the general interest of a properly functioning internal market with fair competition by deterring anti-competitive behaviour and by holding infringers to account. However, public enforcement does not offer compensation to victims who have suffered harm from the infringement. By contrast, compensation for harm is the main focus of private enforcement. Private enforcement can nonetheless contribute to deterrence and accountability in instances where the public enforcer has, for whatever reason, chosen not to pursue a specific possible infringement.⁹

3 SUBSTANTIVE RIGHTS AND OBLIGATIONS UNDER THE DMA

The DMA is a legislative act adopted by the EU in the form of a regulation. This choice is significant to its legal status, as regulations are (in contrast with other legislative acts, such as directives) binding 'and directly applicable in all Member States' under Article 288 TFEU. The Court of Justice has established that regulations are therefore capable of conferring 'rights on individuals that the national courts have a duty to protect'.¹⁰ In essence, regulations as instruments are thought to become applicable law in all Member States when enacted, as if they had been enacted by the national legislators. It is another matter that the specific rules within a regulation must be analysed to ascertain its legal meaning, scope and capacity to give rise to rights and obligations.¹¹

Since the DMA is a regulation, we can conclude that it is capable of giving rights to individuals that correspond to obligations for the targeted gatekeepers. The relevant question from a private enforcement perspective is thus to decide whether the DMA includes rules that are such that they can be enforced by individuals against gatekeepers. Since the latter are

⁸ Liability for Member States was famously stipulated in Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifazi and others v Italian Republic* EU:C:1991:428. However, its final form was arguably settled in Joined cases C-178/94, C-179/94, C-188/94 C-189/94 C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* EU:C:1996:375.

⁹ For several insightful contributions on the roles of public and private enforcement, see Philip Lowe and Mel Marquis (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies* (Hart Publishing 2014).

¹⁰ Case C-253/00 *Antonio Muñoz y Cia SA and Superior Frutícola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* EU:C:2002:497, para 27.

¹¹ Paul Craig and Gráinne De Búrca, *EU Law; Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 233.

also individuals in the legal sense, what we are looking at is if and how the DMA can be applied in private law relations through private law sanctions.

In that regard, the crux of the matter is to decide whether there are rules in the DMA that have a protective purpose. In other words, are any rules in the DMA designed to protect the interests of individuals, so that for instance a breach of that rule may constitute a tort, triggering liability in damages for the tortfeasor to anyone who has suffered harm caused by the tortious act? Rules with this character are known under German legal doctrine as *Schutzgesetze*, and they are contrasted against rules designed to protect general interests rather than individual interests.¹² Rules protecting general interests are not eligible for private enforcement, while rules protecting individual interests are.

The candidate rules in the DMA are located in its Chapter III: ‘Practices of gatekeepers that limit contestability or are unfair’. The first articles under this chapter are the substantive rules of the DMA, in which the concrete legal obligations of gatekeepers are listed. Some of these are obligations against end users (usually individual people using the services of the gatekeepers), and some of these are obligations against other businesses. For the purposes of this inquiry, we will focus on the latter, that is, on the substantive competition policy rules of the DMA.

To the best of my understanding, Articles 5-7 of the DMA can be roughly categorized as follows:

Rules protecting end users’ rights	Article 5(5), 6(3)(1), 6(4), 6(6), 6(9), 7(7)
Competition policy rules	Article 5(3), 5(4), 5(7), 5(8), 6(2), 6(3)(2), 6(5), 6(7), 6(10)-(13), 7(1), 7(5)
Other (eg marketing rules, process)	Article 5(1), 5(2), 5(6), 5(9), 5(10), 6(1), 6(8), 7(2)-(4), 7(6), 7(8)-(9)

Some of those listed as competition policy rules have a mixed character. I have nonetheless included as competition policy rules all those that include a competition policy aspect by regulating the interrelationship between gatekeepers and other businesses concerning potentially abusive practices by the gatekeeper: Articles 5(3), 5(4) and 6(12)-(13) prevent gatekeepers from restricting competition on their platforms or using unfair terms of access; Articles 5(7), 5(8) prevent gatekeepers from tying the use of their platform to other services, such as their own payment services; Articles 6(2) and 6(10) prevent gatekeepers from appropriating the data generated by other businesses using their platforms or restricting the availability of that data to the businesses generating them; Article 6(3)(2) says gatekeepers must not design their interfaces so that end users are compelled to use their services rather than other businesses’ services;¹³ Articles 6(5) and 6(11) stop gatekeepers from artificially favouring its own services and products in their indexes and rankings; and Articles 6(7), 7(1)

¹² On Arts 101 and 102 TFEU and the past debate on their character in this regard, see Magnus Strand, ‘Alternative Remedies in the Private Enforcement of Articles 101 and 102 TFEU’ in Barry J Rodger, Miguel Sousa Ferro, and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 187–191.

¹³ This rule is not written as a right for other businesses but it evidently is designed to protect fair competition.

and 7(5) require gatekeepers to ensure reasonable interoperability with other systems. It is submitted that all these rules are designed to give substantive rights to businesses when using the services of gatekeepers. They are furthermore designed to protect the individual interests of those businesses. Consequently, it is concluded that they have a protective purpose and that it is therefore plausible for them to be enforced using private law sanctions.

The next issue to be addressed is whether the rules at issue are capable of conferring legal obligations on gatekeepers. This may seem straightforward but should be distinguished from the examination of whether they produce rights and have a protective purpose. In order for the rights of individuals (including businesses) under the DMA to be privately enforceable against gatekeepers, those rights must correspond to a legal obligation of the targeted gatekeeper. This means, in turn, that the rule at issue must have direct effect in relations between individuals and be binding on the gatekeeper.¹⁴ As explained above, the DMA is a regulation, and consequently the instrument as such is capable of including rules which are binding for private individuals. It must nonetheless be ascertained, in relation to each of the rules at issue, whether they are sufficiently clear, precise, and unconditional to produce direct effect between individuals, and whether the legal obligations that follow from the rules belong with the gatekeepers.¹⁵

The latter issue is less complicated in this context. It is clear from the wording of the DMA that the legal obligations in Articles 5-7 belong with the gatekeepers. In an individual case, it should suffice in this regard to prove that the right of the claimant business was infringed by the specific defendant gatekeeper.

A more complex issue is whether the rules meet the criteria of having direct effect. In that regard, the DMA is designed in a different manner from, for instance, the Data Act,¹⁶ Article 13 of which uses a generally phrased prohibition against unfair terms in business-to-business contracts on data, and which combines this general prohibition against unfair terms with a black list and grey list providing examples of prohibited or presumably prohibited contractual terms.¹⁷ The DMA instead offers an exhaustive set of specified rules. This design choice arguably strengthens the case for construing the competition policy rules in Articles 5-7 of the DMA as having direct effect between individuals, since it adds clarity and precision to the legal obligations of gatekeepers. Almost all the rules are also unconditional. A possible exception to this is Article 6(7), which includes a sub-paragraph allowing gatekeepers to take ‘strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity’ of their systems, as long as those measures ‘are duly justified’. This includes a balancing exercise which is less foreseeable, and there is therefore room for an argument that Article 6(7) of the DMA might fail to meet the criteria for having direct effect between individuals. With this said, it may be counter argued

¹⁴ It should not suffice in this regard for the EU law rule to have ‘exclusionary effect’, even though it has been confirmed by the Court of Justice that such rules can be ‘relied upon’ in disputes between private individuals; *Joined Cases C-271/22 to C-274/22 XT and Others v Keolis Agen SARL* EU:C:2023:834 para 23. For liability in damages to ensue, a more direct legal obligation of the individual should be necessary.

¹⁵ For an extended discussion on the criteria for damages liability between individuals based on a breach of EU law, see Magnus Strand and Ignacio García-Perrote Martínez, *The Passing-On Problem in Damages and Restitution under EU Law* (2nd edn, Edward Elgar Publishing 2023) 399–404.

¹⁶ Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act) [2023] OJ L.

¹⁷ The Data Act is nonetheless privately enforceable as contract law, see Magnus Strand, ‘The Data Act as EU Contract Law’ in Björn Lundqvist *et al* (eds), *In Memory of Ulf Bernitz* (Hart Publishing 2025, forthcoming).

that this sub-paragraph is quite restrictively phrased and should not be read as a condition on the obligation for gatekeepers to offer interoperability, which follows also from Article 7.

On the basis of the above, it is concluded that the competition policy rules of the DMA confer rights on businesses using the services of gatekeepers, that they have a protective purpose, that they all (or almost all) seem also to have direct effect between gatekeepers and the businesses using their services and that they are thus binding on gatekeepers, stipulating legal obligations for them corresponding to the rights of the businesses using their services. It follows that a breach of those rules can trigger private law sanctions.

4 FROM RIGHTS TO REMEDIES UNDER THE DMA

4.1 INTRODUCING PRIVATE ENFORCEMENT REMEDIES UNDER EU LAW

As indicated above, private enforcement presupposes that the claimant is the holder of a substantive right under the DMA, that the right at issue corresponds to an obligation on behalf of the defendant and that the rule stipulating this right and obligation was designed to protect the personal interests of individuals. These are all issues that must be addressed under EU law and have been subject to analysis above.

By contrast, the actions used (damages, injunctions, restitution etc.) for private enforcement of a right will fall under the jurisdiction of the national courts of the Member States and are largely governed by national law. Admittedly, the remedies and procedures applicable may have been subject to full or partial harmonization, but in the absence of EU rules national law will indicate the remedies and procedures that apply. Nevertheless, national law on the enforcement of EU law rights is subject to review under the principles of judicial protection of such rights developed by the Court of Justice.¹⁸ As a consequence, our analysis of how private enforcement of the substantive competition policy rules in the DMA will work has only come across its first step: establishing that there are rules that can be privately enforced. We must now proceed to examine the EU law requirements on how these rights are enforced by national courts.

Former Advocate General van Gerven famously introduced a three-tiered model for understanding judicial protection under EU law. The three tiers of the model are: (1) the substantive right conferred by EU law; (2) the remedies available under national law that may be relevant for enforcing that right; and (3) the procedures and other conditions governing the use of those remedies.¹⁹ The point made by van Gerven is that it does not make sense to start discussing remedies unless it has been ascertained that there is a substantive right to be protected; and that there is no point in discussing procedures and other conditions until you have decided which remedy you are discussing. Hence, you proceed in three steps: the right, the remedy, the procedure and other conditions. The Court does seem to use this model, for instance in *E.ON*.²⁰

¹⁸ On the key principles of EU law and the case law through which they have been established, see eg Folkert Wilman, *Private Enforcement of EU Law before National Courts: The EU Legislative Framework* (Edward Elgar Publishing 2015) chapter 2; Strand and García-Perrote Martínez (n 15) chapter 2.

¹⁹ Walter van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37(3) *Common Market Law Review* 501.

²⁰ Case C-510/13 *EON Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal* EU:C:2015:189.

Each tier has its elements to address. The discussion above has covered the elements of the first tier in relation to private enforcement of substantive rules in the DMA. The next step is to address the elements of what remedies are available, and under what circumstances EU law would require a remedy to be made available to claimant businesses. The analysis concerning remedies has two distinct aspects. First, the EU law requirements for equal remedies to be made available to claimants irrespective of whether the right to be enforced is based on national law or on EU law. Second, the EU law right to an effective remedy. In section 5, focus will be on the third tier of the van Gerven model and how the EU law principles of equivalence and effectiveness function as a dual test in scrutiny of national procedures and other conditions governing the exercise of remedies.

4.2 REMEDIES: EQUIVALENT REMEDIES

The right to equivalent remedies has been developed by the Court of Justice. In *Butter Buying Cruises* the Court held:

[...] the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.²¹

This means that if a claimant has a remedy or certain set of remedies available in a sufficiently similar situation governed by national law, the same remedy or set of remedies must be available to a claimant relying on EU law under similar circumstances.²² In the present context, it seems appropriate to point to the private law remedy or remedies available to claimants who have been victims of an infringement of Article 101 or 102 TFEU, since the DMA rules discussed here are also competition policy rules. This means, at the very least, that in each Member State a damages remedy will be available by analogy from the national rules transposing Directive 2014/104. Plausibly, and depending on the circumstances of each case, an infringement of competition law may also trigger alternative remedies available under national law, such as restitutionary remedies, injunctions, or declaratory judgments.²³ If so, they should be made equally available in private enforcement of competition policy rules in the DMA.

4.3 REMEDIES: THE RIGHT TO AN EFFECTIVE REMEDY

The general right to an effective remedy under EU law was first developed by the Court of Justice, but is now enshrined in Article 19(1) TEU and in Article 47 of the Charter. As a point of departure, where rights conferred on individuals by EU law are enforced before

²¹ Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* EU:C:1981:163 para 44. See also (concerning penalisation of EU law infringements) Case C-68/88 *Commission of the European Communities v Hellenic Republic* EU:C:1989:339, para 24.

²² An extended discussion of this case law by this author is available in Strand (n 12) 186–187.

²³ Strand (n 12).

national courts, it is presupposed under EU law that claimants will have sufficient remedies at their disposal for the enforcement of their right. In the case of doubt, the right to equivalent remedies (as explained above) should fix the problem.

On occasion, however, situations have arisen where individuals have found themselves unable to avail themselves of any effective remedy in order to protect their rights under EU law. Under such circumstances, the Court of Justice has intervened to require that the national court make an effective remedy available to the claimant.²⁴ However, the Court has not required for all remedies known under national law to be made available to the claimant, but only for an (one) effective remedy to be available.²⁵

In the context of private enforcement of the substantive competition policy rules of the DMA, if an absence of effective remedies were at all to arise, the situation might be such that the claimant needs a reactive or a proactive remedy. For reactive remedies, i.e. after-the-fact private enforcement, the extension of the damages remedy for competition law infringements as mentioned above should suffice in most circumstances. In situations where claimants need to proactively hinder an infringement of the DMA from causing them harm, they would need to use a prohibitive injunction and may also need interim injunctive relief. There is no EU case law on whether prohibitive injunctions must be available as a consequence of the right to an effective remedy, and they are not covered by Directive 2014/104. Nonetheless, there seems to be consensus in EU law literature that prohibitive injunctions must be available in private enforcement of, for instance, competition law, so that victims can safeguard their rights.²⁶ EU law could also require interim relief to be made available if it were, for some reason, not available under national law. There is precedent for such an intervention in *Factortame I*.²⁷

5 EXERCISING PRIVATE ENFORCEMENT REMEDIES UNDER THE DMA

5.1 PROCEDURES AND CONDITIONS: THE DUAL TEST OF EQUIVALENCE AND EFFECTIVENESS

It has been examined above how rights for individuals emerge from the substantive competition policy rules in the DMA, and how EU law requires these rights to be enforceable through equivalent and effective remedies. In this section, focus will be on the third tier of the van Gerven model: National conditions and procedures governing the exercise of those

²⁴ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257; *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (n 8); Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* EU:C:2001:465.

²⁵ Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* EU:C:2013:625. With regard to what qualities make a remedy ‘effective’, the Court of Justice has not offered any clear guidance. For a discussion, see Strand and García-Perrote Martínez (n 16) 34–37.

²⁶ Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 382; Thomas MJ Möllers, Andreas Heinemann, and David J Gerber, *The Enforcement of Competition Law in Europe* (Cambridge University Press 2009) 640; Torbjörn Andersson, *Dispositionsprincipen och EG:s konkurrensregler: en studie i snittet av svensk civilprocess och EG-rätten* (Iustus 1999) 124.

²⁷ *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 24).

remedies, and how the EU law principles of equivalence and effectiveness function as a dual test in scrutiny of such national procedures and conditions.

The EU law principles of equivalence and effectiveness have, since the 1970s, been developed as a dual test for the framework of national rules and conditions within which actions based on EU law are brought before national courts.²⁸ In brief, the principle of equivalence provides that national rules and conditions governing actions based on EU law must not be less favourable than those governing similar domestic actions, while the principle of effectiveness stipulates that national rules governing actions based on EU law must not render the exercise of rights conferred on individuals by EU law virtually impossible or excessively difficult.

The principle of equivalence is a rather straightforward non-discrimination rule. The difficulty, as with all such rules, is to identify and delineate the relevant *comparator*. The Court of Justice has given some guidance on this in cases such as *Levez* and *Transportes Urbanos*.²⁹

The principle of effectiveness is less easily captured, but it is a test under which national substantive and procedural conditions for the use of a remedy can be discarded. The national rules must be read in context with a view to examine whether they render the exercise of rights conferred on individuals by EU law virtually impossible or excessively difficult, and Member States enjoy a certain margin of appreciation in the analysis.³⁰ Common national rules that may be discarded under this principle are bars, delays, costs, and other burdensome requirements that may hamper the exercise of the remedy.³¹

Next, it will be examined how these principles may be put to use in relation to elements of an action for damages arising from an infringement of the substantive competition policy rules in the DMA. For the purposes of this presentation, focus will be on the damages remedy. This focus has been chosen for two reasons. First, because the damages remedy is available for infringements of Articles 101 and 102 TFEU and has been harmonised through Directive 2014/104, making it an obvious choice for the private enforcement of the competition policy rules in the DMA too. Second, because the damages remedy offers illustrative examples of how the principles of equivalence and effectiveness work in practice.

5.2 THE ELEMENTS OF DAMAGES CLAIMS IN PRIVATE ENFORCEMENT UNDER THE DMA

For damages to be payable under private law, whether contractual or non-contractual in nature, the common criteria are usually summarised as follows: there should be a basis for

²⁸ Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188; Case C-45/76 *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191; Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* EU:C:1998:401; Case C-326/96 *BS Levez v TH Jennings (Harlow Pools) Ltd* EU:C:1998:577; Case C-312/93 *Peterbroeck, Van Campenbout & Cie SCS v Belgian State* EU:C:1995:437; Joined cases C-317/08, C-318/08, C-319/08 C-320/08 *Rosalba Alassini v Telecom Italia SpA (C-317/08)*, *Filomena Califano v Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)* EU:C:2010:146.

²⁹ *BS Levez v TH Jennings (Harlow Pools) Ltd* (n 28) paras 41-43; Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* EU:C:2010:39 paras 35-44.

³⁰ *Peterbroeck, Van Campenbout & Cie SCS v Belgian State* (n 28) para 14. See further Anna Wallerman, 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States Self-Imposed Limits on National Procedural Autonomy' (2016) 53(2) *Common Market Law Review* 339.

³¹ For examples see *Alassini* (n 28) paras 54-59.

the action (a breach of contract, breach of law/duty, or other culpability), there should be proven harm suffered by the claimant and there should be causation between the basis and the harm. Even if what goes into these three elements may vary considerably, these three elements are usually present in all EU jurisdictions (as well as in public liability under Article 340(2) and Member State liability for a breach of EU law).³² The first relevant issue for our purposes is to decide what elements (and aspects of those elements) are governed by EU law or by national law.

The first element has already been covered above and is almost entirely governed by EU law. The basis for the action is the breach of a rule in the DMA which confers a right on businesses who use the services of a gatekeeper, which is binding and places obligations on that gatekeeper that correspond to the aforementioned rights. This analysis includes the requirements of protective purpose and direct effect, as explained above. Satisfying these criteria should arguably suffice as basis in most respects. However, there may be national rules that exclude damages liability if the defendant gatekeeper has only committed an insignificant or irrelevant transgression of the substantive rule or if the gatekeeper can prove it has acted in good faith and with due diligence. The national rules at issue can be such that they require for claimants to prove culpability, a ‘manifest error’ by the gatekeeper or similar criteria indicating that the breach of the DMA rule must be somehow qualified. In damages for a breach of Article 101 or 102 TFEU, recital 11 of Directive 2014/104 offers some room for such national rules:

Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

Arguably, Member States should, *mutatis mutandis*, enjoy the same margin of discretion in damages actions for an infringement of the DMA. Such a solution may lead to less foreseeability, but it may also do away with certain unwarranted inflexibilities and allow for the final assessment to be made in each case. As stated in the recital, the principles of equivalence and effectiveness will apply, ensuring proper scrutiny of the national conditions so that unequal treatment and unjustified burdensome requirements are restricted. In sum, national additional requirements may be allowed but will be kept under EU law scrutiny.

The second element is to establish harm. This is a fact-intensive assessment governed by national law, albeit subject to the dual test of the EU law principles of equivalence and effectiveness. In essence, the harm or damage suffered through the breach of the DMA must be eligible for compensation, and it must be sufficiently proven in order to be estimated by the national court. Nonetheless, the Court of Justice has intervened on a number of occasions to eliminate national caps to the amount of damages payable,³³ or to ensure that

³² Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Hart Publishing 2011). In public liability, the basis for an action is in a breach of EU law and that element includes for the breach to be ‘sufficiently serious’. This does not apply in private law actions even if based on EU law.

³³ Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153. See also Case C-271/91 *M Helen Marshall v Southampton and South-West Hampshire Area Health Authority* EU:C:1993:335.

specific heads of damages are available.³⁴ With regard to the latter, the Court has consistently held that it follows from the principle of effectiveness that harm to be compensated should include both direct losses (*damnum emergens*) and loss of profit (*lucrum cessans*), plus interest.³⁵ This means that national rules that impede such recovery can be struck down by the Court of Justice if they make the exercise of the damages remedy virtually impossible or excessively difficult (effectiveness) or if they treat claims connected to the DMA less favourably than similar claims with no EU law dimension (equivalence). This does not as such alter the basic fact that the detailed factual assessment of harm suffered is left to the national courts to be examined on the basis of the evidence presented to them, just as it is in Directive 2014/104.

The third element is causation, which sub-divides into so-called legal and factual causation. The latter is ideally only about the establishment of facts through an assessment of the evidence, with a view to ascertain whether the breach of the DMA was actually the cause of the harm incurred by the claimant. This includes examining alternative causes, and sometimes balancing contributing causes.³⁶ Issues such as these are usually left to the national courts, and the Court of Justice has indeed been disinclined to grapple with them even under Article 340(2) TFEU where it has exclusive jurisdiction.³⁷ The former aspect, legal causation, is a normative evaluation of the proximity between cause and effect, which can be phrased in many different ways. Common approaches include to examine whether the breach and harm are sufficiently directly interrelated, whether it was foreseeable that the harm would arise from the infringement or whether the type of harm suffered falls within the protective scope of the infringed rule.³⁸ There are no explicit EU law rules on legal causation, but the national rules on legal causation have been scrutinized by the Court on several occasions, usually by reference to the EU law principles of effectiveness and equivalence. The case law indicates that the Court of Justice will allow reasonable legal causation standards in national law, even if they lead to the failure of some claims.³⁹ Where the Court has intervened it has done so to eliminate national standards that automatically exclude causation, barring certain claimants from presenting their evidence of causation to the national court.⁴⁰ In sum, national courts are entrusted with assessing the evidence, but the principles of equivalence and

³⁴ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1996:79. The concept of 'heads of damages' refers to the compensatory amounts corresponding to different classes of harm incurred, such as direct harm, loss of income, and interest. Alternative heads of damages are gain-based damages. For instance, in the event of a breach of Art 6(2) of the DMA, preventing gatekeepers from appropriating the data of businesses using their services, it may be more useful to focus on disgorgement of the gain made by the gatekeeper than on harm suffered by the victim.

³⁵ In competition law, Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA* EU:C:2006:461. See also e.g. *M Helen Marshall v Southampton and South-West Hampshire Area Health Authority* (n 33).

³⁶ Eg Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich* EU:C:1999:306; Joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *P Dumortier Frères SA and others v Council of the European Communities* EU:C:1982:184.

³⁷ Cf *P Dumortier Frères SA and others v Council of the European Communities* (n 36). Otherwise, the General Court has done most of the work on this. See also Strand and García-Perrote Martínez (n 15) 82–85.

³⁸ Cees van Dam, *European Tort Law* (2nd edn, Oxford University Press 2013) chapter 11.

³⁹ Case C-420/11 *Jutta Leth v Republik Österreich, Land Niederösterreich* EU:C:2013:166.

⁴⁰ Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* EU:C:2014:1317; Case C-435/18 *Otis Gesellschaft mbH and Others v Land Oberösterreich and Others* EU:C:2019:1069.

effectiveness are applicable and the Court of Justice will for instance strike down automatic bars disguised as causation rules.

This illustrates that with regard to the three elements of a damages claim (the basis for the claim, harm, and causation), there is interaction between national law and EU law. The first element is mainly governed by EU law, and the other two are mainly governed by national law, but a full analysis of any of the three elements cannot be done without including both EU and national law. In the analysis, the principles of equivalence and effectiveness serve as a dual test on the compatibility of national rules with EU law requirements.

Focus here has been on the damages remedy, but the structure of the analysis could just as well have been applied to, for example, prohibitive injunctions. The third tier to the van Gerven model consists of carrying out this mixed analysis in order to ensure that a claimant has proper judicial protection in the exercise of the remedies that are used for the private enforcement of rights conferred on the claimant, for instance by the substantive competition policy rules in the DMA.

6 CONCLUSIONS

The analysis above has pushed beyond general statements on the possible beneficial contributions of private enforcement under the DMA to examining, concretely, what aspects of the DMA can be privately enforced, how national courts should identify the remedies to be made available to claimants who seek to enforce the rights conferred on them under the DMA and the extent to which EU law governs the exercise of those remedies. This was done by using the so-called van Gerven model of analysis, focusing in turn on the existence of a right, a remedy, and the conditions for the exercise of the remedy.

The core substantive provisions of the DMA were identified in Articles 5-7. It was concluded that certain rules in the DMA confer rights on businesses using the services of gatekeepers, that they have a protective purpose, that they all (or almost all) seem able to have direct effect between gatekeepers and the businesses using their services and that they are thus binding on gatekeepers and stipulate legal obligations for them corresponding to the rights of the businesses using their services. It would follow that a breach of those rules can trigger private law sanctions.

While it is a matter of national law to identify the applicable private law sanctions, it was further concluded that, if a claimant has a remedy or certain set of remedies available in a situation governed by national law, the same remedy or set of remedies must be available to a claimant relying on EU law under similar circumstances and that it would be appropriate to extend any private law remedies that are available to claimants who have been victims of an infringement of Article 101 or 102 TFEU to claimants who have been victims of an infringement of the DMA. This is so because the DMA rules discussed in this article are also competition policy rules. In each Member State a damages remedy will be available by analogy from the national rules transposing Directive 2014/104, but other remedies — for example, prohibitive injunctions — may also be necessary for claimants to have access to an effective remedy.

In order to explain how the EU law principles of equivalence and effectiveness function as a dual test on national procedures and other conditions governing the exercise of remedies, the example of damages was used. It was demonstrated that, with regard to the

three elements of a damages claim (the basis for the claim, harm and causation), there is interaction between national law and EU law and that a full analysis of any of the three elements cannot be done without including both EU and national law. In the analysis, the principles of equivalence and effectiveness serve as a dual test on the compatibility of national rules with EU law requirements.

Under Articles 101 and 102 TFEU, private enforcement has become increasingly important. For the DMA to become an integral part of competition policy in Europe, it should be integrated not only into public enforcement but also into private enforcement. This article has demonstrated the basic tenets of such private enforcement of the DMA.

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