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DIGITALISATION IN EU COMPETITION LAW AND THE SWEDISH PRINCIPLE OF TRANSPARENCY

ANNEGRET ENGEL & XAVIER GROUSSOT*

The procedural and institutional rights granted by the EU Charter of Fundamental Rights have an important impact at national level in the application and interpretation of competition law by national courts and national authorities. In Sweden, the situation is particularly fascinating since the principle of openness – which affords a maximum standard of human right protection – may conflict with the procedural and institutional rights of the Charter, i.e. Articles 41, 47 and 53 of the Charter. The application of the Charter by the public procurement authority is also of interest here. Arguably, the principle of openness as defined by Swedish law should be respected in light of the procedural and institutional rights granted by the EU Charter.

1 BACKGROUND

Fundamental rights as enshrined under the EU Charter not only bind EU institutions, but also national authorities in their application of EU laws under the Treaties,[1] and thus have a direct influence on enforcement procedures in competition laws at national level. For the impact of the procedural and institutional dimensions of Charter rights at national level, it is important to note that there is national procedural autonomy within the EU. Such national procedural autonomy is subject to the principles of equivalence, effectiveness, and effective judicial protection. According to Article 19(1) TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.
In Sweden, none of the four fundamental laws refer to the EU Charter. Similarly, EU primary law is not explicitly mentioned, however, Chapter 11, section 14 and Chapter 12, section 10 of the Instrument of Government specify that if a rule of fundamental law or 'other superior statute' conflicts with a provision of national law the latter shall not be applied. However, what is the impact of Chapter VI of the EU Charter on Swedish competition law? This special issue and the contributions therein will attempt to provide an answer to that.

With a particular focus on the principle of openness/transparency, the Swedish example will provide the starting point of this issue, as it plays a much greater role in the Nordic region than in other EU Member States.[2] It is common knowledge that Sweden has also played an important role in the litigation of the principle of transparency at EU level. But what is the scope of this principle in EU law and does it conflict with its EU version enshrined in Articles 41 and 47 of the EU Charter? And if it does, is it possible to

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[1] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:280.
[2] Eg Liane Colonna, 'Reconciling Privacy by Design with the Principle of Transparency' in Ulf Bernitz et al (eds), *General Principles of EU Law and the Digital Legal Order* (Kluwer Law International 2020) 405-422. See also Sacha Prechal and M E De Leeuw, 'Transparency: A General Principle of EU Law?' in Ulf Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 204-229.

accommodate its application through the interpretation of the horizontal clauses of the Charter (Chapter VII of Charter)?

In general, the Courts demand complete openness of the legislative process in terms of ensuring complete access to the relevant documents even of the ongoing procedures,[3] a position which is in line with the increased transparency requirements concerning general policy choices. Complete access to the documents concerning relevant administrative procedures remains also the principle.[4] Such an approach relates mainly to the ended administrative procedures, as it is explicitly recognized that documents relating to ongoing administrative procedures merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures and affecting the quality of the general decision.[5]

However, the CJEU has accepted a restriction of transparency when other fundamental values, such as the protection of personal data or the right to fair trial, could be undermined due to the publication of the relevant documents. In particular, the CJEU interpreted the relevant exceptions in the light of more specific rules contained in the Personal Data Protection Regulation,[6] the State Aid Regulation,[7] and its own Rules of Procedure.[8] It is worth mentioning that although the Court did not base the relevant reasoning in the above-mentioned judgments on the principle of *lex specialis derogat legi generalis*, it clearly emerges from the case law that the Regulation cannot deprive these specific access rules of their 'effectiveness'.[9]

In an ESO-report ('*Grundlag i Gungning*') conducted by Carl Fredrik Bergström and Mikael Ruotsi, it is considered that he principle of openness is weakened by EU law.[10] The report concludes that there is a clear need of modern Swedish research in this field.[11] This special issue offers precisely that by using the impact of the EU Charter in the field of competition law and by looking at the specific issue of access to the file in competition cases. It can be contended that this national principle – which affords a maximum protection in terms of fundamental rights – should be respected in light of the procedural and institutional rights granted by the EU Charter.

In this project, we have considered that the EU Charter can strongly impact the procedural and institutional dimensions of EU competition law and the application of the digital market regulations.[12] During the last years, we have seen an increase of this impact in

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[3] Eg Joined cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* EU:C:2008:374; and Case C-280/11 P *Council of the European Union v Access Info Europe* EU:C:2013:671.
[4] Case C-506/08 P *Kingdom of Sweden v European Commission and My Travel Group plc.* EU:C:2011:496.
[5] Case C-506/08 P *Sweden/My Travel and Commission* EU:C:2011:107, Opinion of AG Kokott paras 65-69.
[6] Case C-28/08 P *European Commission v The Bavarian Lager Co Ltd.* EU:C:2010:378.
[7] Case C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH* EU:C:2010:376.
[8] Joined cases C-514/07 P, C-528/07 P, C-532/07 P *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission, Association de la presse internationale ASBL (API) v European Commission, and European Commission v Association de la presse internationale ASBL (API)* EU:C:2010:541.
[9] Gaëtane Goddin, 'Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?' (2011) 2(1) Journal of European Competition Law & Practice 22.
[10] Carl–Fredrik Bergström and Mikael Ruotsi, *Grundlag i gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen* (Elanders Sverige AB 2018) 165. The ESO-report only refers very sporadically to competition law.
[11] ibid 165-181.
[12] See in general as to the impact of EU Fundamental Rights in national law and EU law, Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006).

competition law cases notably with the use of the principle of good administration (Article 41 EU Charter), effective judicial protection (Article 47 EU Charter), proportionality of fines (Article 49 EU Charter) and *ne bis in idem* (Article 50 EU Charter). Many of the contributions of this special issue discuss in detail the most recent cases on this matter.

In addition to the previous approach, we have also considered that the national law of the Member Stats (such as transparency laws but also privacy laws) may impact on the application of the EU Charter. This two-way traffic interaction is codified in EU law by Article 53 of the EU Charter but also Article 4(2) TEU on national constitutional identity. And in contrast to the previous approach, the case law – both national and EU cases – is here only in *statu nacendi*.

A crucial case concerning Bulgaria is now pending before the CJEU (Case C-619/23). This case is discussed in this special issue and concerns the interpretation of Article 4(2) TEU in competition law matters. One of the key questions asked by the national court in the preliminary reference made to the CJEU is whether Article 4(2) TEU should be interpreted as meaning that, when an inspection is conducted by the national competition authority, a person who is asked to provide access to a data carrier is entitled to refuse access to content which forms part of his or her private correspondence, given that the inviolability of private correspondence is guaranteed by the Member State's constitution and that the grounds for restricting the right to freedom and confidentiality of correspondence and other communications, enshrined in the constitution itself, are not in place.

Hopefully, this special issue will open the path to more research in this field, particularly concerning the potential impact of national constitutional law on the application of EU competition and the EU Charter.

2 OVERVIEW OF CONTRIBUTIONS

Vilhelm Persson starts off by looking at the principle of transparency with regard to the Swedish Competition Authority, with particular focus on access to public records and personal files. He then goes on to analyse the requirements for confidentiality as enshrined in the Swedish constitution, thus limiting the authority's discretional powers. In addition, the author comparatively analyses the situation in Sweden with that under EU law and discusses examples of some companies and courts relying on the latter, which provides for a more extensive right to access to documents, in order to bring an action for competition law damages. Vilhelm argues that only in the reverse situation – a document being confidential under EU law but not so under Swedish law – would there be a direct conflict and thus a problem with the primacy of EU law.

In her article on the legal professional privilege, Helene Andersson discusses confidentiality between a lawyer and their client in competition law cases. She analyses the scope and content of the right by looking at both ECHR and EU case law. The author argues that the legal professional privilege constitutes a key element in protecting the proper administration of justice, procedural efficiency, as well as the respect for fundamental rights, such as the right to defence and the right to privacy. Helene concludes that the Commission's approach is too narrow in scope and does not meet the ECHR standard in that it only protects the right to defence. With particular reference to more recent legislation in

digitalisation, such as the Digital Markets Act, the author encourages the Commission to revise its current approach in the interest of those companies target by the investigations.

Joakim Nergelius discusses in his article the three concepts of Drittwirkung, transparency, and personal integrity in the light of digitalisation and the extent of which they are all affected by the introduction of the EU Charter of Fundamental Lights. He analyses these principles with particular reference to ECHR and EU case law, finding that the respect for fundamental rights and national constitutional values is crucial for the integrity of the European courts and their interaction with national courts. The author further argues that for the CJEU to strengthen its own position in EU law and the enforcement fundamental rights it must also collaborate with the European Court of Human Rights, thus highlighting in his conclusion the importance of the three principles of Drittwirkung, transparency and personal integrity for this process.

In her article on the preliminary investigation phase, Riina Autio discusses the balancing of conflicting interests in the review of large data sets in light of digitalisation, fundamental rights and the principle of openness. With reference to national examples from Sweden and Finland, the author analyses the relevant EU legislation and case law, including Regulation 1/2003 and Directive 2019/1 as well as the still pending *Ronos* case, C-619/23. The latter, she argues, will force the CJEU to comment on the issue of national identity, which, in this case, is linked to higher safeguards of confidentiality than under EU law or the ECHR. Riina concludes that a better understanding of the different links between national, European, and international legislation and agreements is needed in order to achieve better outcomes in developing new investigative tools and best practices in the digital era.

In their twin articles on access to information in DMA proceedings, Lena Hornkohl and Julia Helminger respectively analyse transparency from an EU law and national law perspective (Austria and Germany, as contradictory systems). In particular, the authors discuss access to the file for gatekeepers, undertakings or associations of undertakings – as opposed to the requirement to protect business secrets – as important procedural guarantees for private enforcement under the DMA. In addition, the DMA imposes obligations for publication of certain information, which guarantees wider general transparency vis-à-vis third parties. However, the authors argue that these transparency requirements under the DMA remain limited and therefore have to be considered in the broader scheme of other legislation at EU and (at times fragmented) national level, which the DMA has some material overlap with in order to ensure the widest possible access to information.

Magnus Strand then discusses rights and remedies in his article on private enforcement mechanisms under the DMA as compared to the traditional competition law framework under Articles 101 and 102 TFEU. For this, the author uses the van Gerven model, analysing the existence of a right, a remedy and procedure. He argues that any private law remedies available to victims of infringement under Articles 101 and 102 TFEU should also be available to victims of infringement under the DMA, taking into account the principles of equivalence and effectiveness for the compatibility between national and EU laws. Magnus concludes that private law enforcement has in the past become increasingly important for the traditional system of competition law and thus will also have to be the case for the DMA if the latter were to integrate in that system.

The final article in this special issue, written by Cristina Teleki, is discussing the relationship between EU competition law and fundamental rights as an evolving

concept – from an initial operational (right to a fair trial) to an informative (right to privacy and data protection) and most recently to a foundational relationship. She argues that the latter requires substantive and institutional cooperation. As for the principle of transparency, the author highlights that this functions as an enabler and magnifier in this development, thus allowing for increased clarity and legal certainty about the relevant rules and regulations. Cristina concludes by stressing that other fundamental rights enshrined under the EU Charter will also have to be integrated into the foundational relationship, such as the freedom of thought or the right to a healthy environment.

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TRANSPARENCY OF THE SWEDISH COMPETITION AUTHORITY

VILHELM PERSSON*

The constitutional principle of access to public records and the administrative principle of parties' right to access their files create transparency in the Swedish Competition Authority. In many ways Swedish law is built on the same ideas as EU law. However, the Swedish constitution requires more specific provisions on confidentiality in statutes decided by the Parliament. As regards the Swedish Competition Authority, five different sections of the law protect confidentiality, depending on who is to be protected, what activities are concerned, what kind of information is involved and how likely it is that someone will be harmed. These detailed provisions can in principle contribute to predictability, limiting the authorities' discretional power, but they also constitute a complex patchwork that can be difficult to comprehend. A problematic legal conflict would arise if a document were confidential according to EU law, for example to protect trade secrets, but not confidential according to Swedish law. However, so far, EU law has only been invoked to expand the right to access to documents, especially regarding companies that intend to bring action for competition law damages.

1 INTRODUCTION

Sweden has a long tradition of transparency in the form of access to the documents of public authorities. Rules on such access were first introduced in the Freedom of the press act of 1766. Of course, they have been amended many times since then,[1] but the old roots of these rules are often emphasised in public debate in Sweden. Transparency was even considered so important that Sweden made a special declaration on it when joining the EU.[2] Nowadays, it is common for states to grant the public rights to access documents of public authorities, at least to some extent. It is also an established principle in EU law.[3] Likewise, it is generally recognised that those who are closely affected by an authority's decision should have a right to access information on the case from decision-making authorities. However, the Swedish constitutional regulation is unusually detailed and complex. The rules that apply to the Swedish Competition Authority are an illustrative example of this.

This article will first give an overview of the basic Swedish rules on public access to official records (section 2) and parties' access to material (section 3). Then the article discusses the provisions that are more specifically aimed at the Swedish Competition Authority (section 4). Finally some concluding remarks are offered (section 5).

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1 For a historical overview see Johan Hirschfeld, 'Free access to public documents – a heritage from 1766' in Anna-Sara Lind, Jane Reichel, and Inger Österdahl (eds), *Transparency in the Future* (Eddy.se 2017).

2 The act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C241/9, 397, declaration 47.

3 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

2 THE BASIS FOR THE PRINCIPLE OF PUBLIC ACCESS TO OFFICIAL RECORDS

The foundation of the Swedish right to access to official records is laid in Chapter 2 of the Freedom of the Press Act (the FPA, in Swedish 'Tryckfrihetsförordningen'). The very first Article of this chapter establishes the main principle that everyone shall be entitled to have free access to official documents. Most of the remaining 22 articles of the chapter detail the scope of, and thus limit, this main principle. Three important aspects of the principle are: what formal types of documents that should be made available to the public (section 2.1), what content is so sensitive that it should nevertheless be kept secret (section 2.2) and how the public should have access to the documents (section 2.3).[4]

Regarding EU institutions, both Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter of Fundamental Rights guarantee public access to documents. This is implemented by regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[5] (the Transparency Regulation). This regulation will serve as a point of reference below.[6]

2.1 TYPES OF DOCUMENTS

Regarding the types of documents, Chapter 2, Article 4 of the FPA states that a document is official if it is both held by a public authority and has been received or drawn up by such an authority. The limitation to public authorities can sometimes raise questions when private bodies are in some way involved in the activities of public authorities.

The limitation that the principle of public access only applies to documents already held by the authorities means that the authorities themselves do not need to contact other authorities to find documents just to hand them over to the public. However, this limitation raises several issues in relation to digitally stored information. First, it is enough that the document is accessible to the authority, even if the information is stored on a server outside the authority's premises. Second, the authorities are to some extent obliged to compile material, thus creating a new document. If the authority can compile information into a document using routine measures, they are obliged to do so.[7]

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[4] The principle of public access to official records is presented in rather few international publications, such as Iain Cameron, 'Secrecy and Disclosure of Information in Sweden' (2024) 30(2) European Public Law 117, Patricia Jonason, 'The Swedish Legal Framework on the Right of Access to Official Documents' in Hermann-Josef Blanke and Ricardo Perlingeiro (eds), *The Right of Access to Public Information: An International Comparative Legal Survey* (Springer 2018), Jonas Racine, *Das schwedische Öffentlichkeitsprinzip und dessen Anwendung im auswärtigen Handeln. Eine seit 1766 existierende Institution zur Sicherung der Transparenz im Verhältnis zur zunehmend internationalisierten Verwaltungstätigkeit* (EIZ Publishing 2022), and Patricia Jonason, 'Le droit d'accès à l'information en droit suédois : une épopée de 250 ans' (2016) 2 Revue Internationale De Droit Des données Et Du numérique 37. However, most litterature is in Swedish, such as Håkan Strömberg and Bengt Lundell, *Handlingsoffentlighet och sekretess* (14th edn, Studentlitteratur 2023), Alf Bohlin, *Offentlighetsprincipen* (9th edn, Norstedts juridik 2015), and Carl–Fredrik Bergström and Mikael Ruotsi, *Grundlag i gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen* (Elanders Sverige AB 2018).

[5] See for example Centre for Law and Democracy (CLD), 'The RTI Rating – analyses the quality of the world's access to information, laws' <https://www.rti-rating.org/> accessed 01 June 2024.

[6] For comprehensive analysis on this regulation and other EU law in relation to transparency in competitions proceedings, see Helene Andersson, *Access and Cartel Cases: Ensuring Effective Competition Law Enforcement* (Hart Publishing 2020).

[7] Chapter 2, Article 6 of the FPA.

In order for the public to have the right to access a document, it is also required, as mentioned above, that the document has either been received or drawn up by the authority. As to documents which are received by the authority, Chapter 2, Article 9 of the FPA reflects the presumption that every document that arrives to the authority is finalised enough to be relevant for public access. This applies regardless of whether the document is in the form of papers or digital information. It may be more difficult to determine when to give access to documents that public authorities (and their employees) draw up themselves. The intention is that the public only need to access documents that are so finalised that it is meaningful for the public to read it.[8] Therefore, the main rule is that the public is only entitled to access documents when they have been dispatched, for example if the authority has sent a decision or otherwise communicated with a party in a case. Documents that are not to be distributed are covered by the principle of public access when the matter to which it relates has been finally settled by the authority or when the documents have otherwise received final form.[9] There are also some special rules for certain kinds of documents.[10]

In sum, the Swedish constitutional provisions in general resemble the general structure of the Transparency Regulation, where article 2(3) states that the regulation applies to documents drawn up or received by an institution, and article 4(3) makes some exceptions for internal documents. However, since they are separate legal instruments, the application may of course always differ.

2.2 CLASSIFIED CONTENT

In addition to the above-mentioned restrictions regarding the forms of documents, the content may be so sensitive that access to the documents needs to be restricted. The FPA contains an extensive list of grounds for keeping documents secret, such as national security, the activities of authorities for inspection and the protection of individuals' financial circumstances.[11]

The content of this article as such is not unlike that of Article 4(1) and (3) of the Transparency Regulation. A major difference, however, is that article 2 of the FPA requires more precise provisions in law enacted by the parliament. Thus, the specific conditions for secrecy are laid down in the Public Access to Information and Secrecy Act. This act is very comprehensive, with 43 chapters and more than four hundred sections that specify which information is to be kept secret. Because the rules are so specific, they also need to be constantly amended as the authorities' activities change or new needs are identified.

It is of course not possible to describe all these hundreds of sections, and they are also very disparate. Some provisions apply to certain types of information, such as information about individuals' health. Other provisions focus on which authority handles the information, which activities it concerns or who is to be protected. In some provisions, openness is the main rule, so that confidentiality only applies if disclosure of the information would lead to harm in the individual case. In other provisions, on the contrary, confidentiality is the main rule, but exceptions are made when disclosure is harmless. Sometimes

[8] Cf. Government bill 1975/76:160 p. 72.
[9] Chapter 2, Article 10 of the FPA.
[10] Chapter 2, Articles 12–14 of the FPA.
[11] Chapter 2, Article 2 of the FPA.

confidentiality is absolute, so that the authority does not need to make a case-by-case assessment of whether the information is harmful. All in all, it is a complex patchwork of different specified rules that determine when information must be kept secret. As shown below (section 3), the regulation of the Swedish Competition Authority's activities is a good example of this complexity. The detailed rules leave Swedish authorities considerably less room for discretion than the Transparency regulation.[12]

2.3 DISCLOSURE OF DOCUMENTS

Authorities must disclose official documents very quickly. In principle, nothing else should be given higher priority. The public should be able to examine the documents immediately, or as soon as possible, free of charge on the authorities' premises (Chapter 2, Article 15 of the FPA). Anyone who prefers to have a copy may have to pay the cost of making the copy.[13] Thus, these general principles correspond to those in article 8 and 10 of the Transparency Regulation.

However, in contrast to article 12 of the Transparency regulation, Swedish authorities are in principle not obliged to release material recorded for electronic data processing in any form other than a printout on paper.[14] One of the main reasons for this is that it is considered to favour privacy by making it more difficult to compile and process data on individuals. If authorities consider it appropriate, they are allowed to send computer files via e-mail, for example, but there is no obligation to do so.[15]

Anyone who has been rejected a request to examine an official document may appeal.[16] These appeals go directly to the Administrative Court of Appeal as the first instance.[17] However, a person cannot appeal a decision of a public authority to reveal information that the person thinks is sensitive, even if the information concerns that person him-/herself. Further, in contrast to article 4(4) of the Transparency regulation, Swedish authorities have no obligation to consult third parties before releasing documents originating from the parties.

3 ACCESS TO DOCUMENTS FOR PARTIES

In addition to this general principle of public access to documents, those affected by a particular administrative procedure may have a special interest in and need for information on that procedure. In EU law this is, for example, recognised in 41(2) b of the Charter of Fundamental Rights. As to the Commission's competition procedures, Article 27(2) of

[12] The differences between Swedish law and EU law may cause potential problems when Swedish administrative authorities and EU institutions interact. However, each legal system is only applicable to its own institutions. Further, the Swedish Public Access to Information and Secrecy Act has provisions on confidentiality regarding information received from or transmitted on the basis of EU law acts or agreements, if it can be assumed that Sweden's ability to participate in the cooperation referred to in the act or agreement would be impaired if the information were disclosed (Chapter 15, Article Section 1 a).
[13] Chapter 2, Article 16 of the FPA.
[14] Chapter 2, Article 16 of the FPA.
[15] Some obligations to hand over data in electronic form may of course come from Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) [2019] OJ L172/56.
[16] Article 19 of the FPA.
[17] Chapter 6, Section 8 of the Public Access to Information and Secrecy Act.

Regulation 1/2003[18] and Article 15 of Regulation 773/2004[19] grant a right to access to documents. Unlike public access to documents, where Swedish law is more detailed than EU law, the two EU regulations provides more detailed provisions than Swedish law on parties' access to documents.

As to Swedish authorities, section 10 of the Administrative Procedure Act (2017:900) establishes a right to access documents. According to that section, a party in a matter has the right to access all material included in the matter.

A first question is who is a party. Here it can be mentioned that the person who reports a suspected infringement to the Swedish Competition Authority does not automatically become a party. However, notifiers' right to access material on a European law basis has been discussed in some court decisions, see below (section 4.3).

A second question is how the right to access for parties relates to the conflicting interests that authorities and individuals have of keeping information secret. This conflict is also apparent in corresponding EU law, which acknowledges the legitimate interests of confidentiality and of professional and business secrecy.[20]

In Swedish law, parties' access to classified material is regulated in Chapter 10, section 3 of the Public Access to Information and Secrecy Act. This states that the secrecy provisions in that Act shall in principle give way to a party's access. Parties thus have a more far-reaching right to information than the public.

However, this right is not without exception. Authorities may not disclose confidential information to the extent that, for reasons of public or private interest, it is of *particular importance* that the information is not disclosed. This may be the case, for example, where a whistleblower risks being penalised or if the authorities' investigative measures would be harmed.

If the information is not disclosed, the authorities must otherwise inform the party of the content of the material to the extent necessary to enable the party to exercise its rights and without serious harm to the interest that confidentiality is intended to protect. Confidentiality never prevents a party to a case or matter from taking part in a judgment or decision in the case or matter.

The authorities are also obliged to communicate relevant information on their own initiative before making a decision in a case.[21] This corresponds to Article 27(1) of Regulation 1/2003.

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[18] 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 [2003] OJ L1/1 (Regulation 1/2003). For a comprehensive analysis of right to transparency according to the right to access to Commission documents, see Andersson (n 6).

[19] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 (Regulation 773/2004).

[20] See 41(2) b of the Charter of Fundamental Rights, Article 27(1) of Regulation 1/2003, Article 15(2) of Regulation 773/2004 and more generally Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006), 224 ff. and 250 ff.

[21] Section 25 of the Administrative Procedure Act.

4 CONFIDENTIALITY AT THE SWEDISH COMPETITION AUTHORITY

As already mentioned, the confidentiality provisions that apply to the Swedish Competition Authority are a clear example of how the Swedish regulations are structured. The Public Access to Information and Secrecy Act contains five different sections that are specifically aimed at different aspects of the Swedish Competition Authority's activities. Chapter 17, section 3 aims to protect the Authority's activities (below section 4.1). Chapter 30, sections 1, 1a, 2 and 3 aim to protect the interests of individuals, including private corporations (below section 4.2). Parties and – in some cases other stakeholders – have a privileged situation regarding access to information (below section 4.3).

The case law on these provisions is limited. The Supreme Administrative Court has not ruled on any case specifically related to them. A search in available databases results in 18 judgments from the court of appeal in Stockholm (where the Swedish Competition Authority is located),[22] most of which are not so comprehensive. This is not a sufficient basis for drawing conclusions about the legal situation. However, the cases will in the following sections illustrate how parties and others have used the provisions.

4.1 PROTECTION OF THE SWEDISH COMPETITION AUTHORITY

Regarding the protection of the Swedish Competition Authority's activities, Chapter 17, Section 3 states that confidentiality may apply to information in investigations of infringements of Article 101 or 102 TFEU or corresponding provisions in Chapter 2, Section 1 or Section 7 of the Swedish Competition Act. However, for confidentiality to apply, the provision requires that it, with regard to the purpose of the investigation, is of *particular importance* that the information is not disclosed. The requirement of particular importance is thus very high. This is because the provision is primarily aimed at parties and the criterion is therefore coordinated with the wording of Chapter 10, section 3, which limits parties' access.[23]

The purpose of the provision is to prevent companies under investigation from gaining access to information that could enable them to sabotage the investigation.[24] According to the preparatory works to the Act, this risk is most significant in the initial stages of the investigation. The right to transparency should therefore normally increase as the

[22] A search on the relevant sections of the law was conducted in the Swedish database service JUNO on 27 February 2024. One of the cases was not available in full text in the database but was provided directly form the court (according to the principle of access to public records). The 18 cases of the Administrative Court of Appeal in Stockholm are case number 2990-05, 27 May 2005, case number 6102-08, 9 September 2008, case number 3602-09, 14 July 2009, case number 4684-10, 30 September 2010, case number 4991-11, 24 October 2011, case number 6507-11, 21 December 2011, case number 49-12, 22 March 2012, case number 1004-12, 29 June 2012, case number 6265-13, 17 December 2013, case number 5557-14, 12 December 2014, case number 6214-14, 17 September 2014, case number 7436-14, 22 December 2014, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015, case number 973-16, 26 April 2016, case number 3859-17, 28 July 2017 and case number 5989-23, 23 November 2023.
[23] Government bill 2001/02:69 p. 8 f. and 16.
[24] Government bill 2001/02:69 p. 13 and 21.

investigation progresses. , If the authority has not done so before, it should entitle the party full transparency, when the authority announces a decision that goes against a party.[25]

The Court of Appeal has applied Chapter 17, Section 3 in one third of the appeal court decisions studied.[26] In all cases except one,[27] it is the company under investigation that has requested documents. It is usually not evident in the decisions what kind of information the documents contain, but at least one case it concerned communication between two companies suspected of being part of a cartel.[28]

The companies that are subject to investigations naturally want to be able to understand and respond to suspicions as soon as possible. On the other hand, the Swedish Competition Authority argues that there is a need for confidentiality until the suspected infringement is so concrete that the authority can determine with certainty which circumstances, information and documents will be of central importance. If an undertaking receives disclosed material, it can adapt its explanations and thereby make the authority's investigation more difficult or impossible. It is also of great importance for the authority to be able to ask questions and hold hearings without the risk of the undertaking limiting its answers to that which is already apparent from the disclosed documents. Thus, the Swedish Competition Authority argues that until the authority has had the opportunity to ask questions regarding the collected material and to supplement it, it is of particular importance that the information in the requested documents is kept secret.[29] According to the administrative court of appeal, the fact that an investigation has been going on for ten months does not prevent it from being in an initial stage. Therefore, the material may be confidential.[30]

Even though the requirement for confidentiality – that it must be or is of *particular importance* that the information is not disclosed – is strict, the court upheld confidentiality in all but one of the cases in this study, and partly upheld it in the last case.[31] Since it is mostly the parties who have been prevented from gaining access to material under this section, the assessment is close to the assessment of party confidentiality (see section 4.3 below).

When the investigation has progressed so far that disclosure of documents would not interfere with the investigation, this provision cannot be used to support secrecy. However, there may still be reason to protect individuals. such that the documents must be kept secret according to the rules described in the next section.[32]

4.2 PROTECTION OF INDIVIDUALS AND COMPANIES

The regulation is more complex regarding the protection of individuals than regarding protection of the Swedish Competition Authority. Chapter 30, section 1, first paragraph contains a general rule on confidentiality in the authority's supervision and investigation

[25] Government bill 2001/02:69 p. 20 f.
[26] Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012, case number 4991-11, 24 October 2011, case number 3602-09, 14 July 2009, case number 5989-23, 23 November 2023, case number 6265-13, 17 December 2013, case number 3859-17, 28 July 2017.
[27] Administrative Court of Appeal in Stockholm, case number 6265-13, 17 December 2013.
[28] Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012.
[29] Cf. Administrative Court of Appeal in Stockholm, case number 3602-09, 14 July 2009.
[30] Administrative Court of Appeal in Stockholm, case number 5989-23, 23 November 2023.
[31] Administrative Court of Appeal in Stockholm, case number 1004-12, 29 June 2012.
[32] Government bill 2001/02:69 p. 18.

activities for information about an individual's business or operating conditions, inventions or research results. Such information is confidential if it can be assumed that the individual will suffer damage ('skada') if the information is disclosed.

Further, the second paragraph of the same section states that absolute confidentiality applies to information about other financial or personal circumstances of a person who has entered into a business or similar relationship with the subject of the authority's activities. There is therefore no need to assess any potential negative effects with regard to such information, and confidentiality always applies.

Most of the Court of Appeal judgments studied (thirteen) have concerned this section.[33] In seven of these cases,[34] a party has requested material. In three cases[35] it was the complainant and in two cases other companies that intended to sue for damages. In one case,[36] the relation to the investigation is not clear. The persons requesting documents won in full or in part in five[37] of the thirteen cases. The documents have, for example, included answers to questionnaires sent by the authority to customers or competing companies, including information on the company's annual turnover, the proportion of trade with a particular company, the company's investments and purchases, and the actual circumstances of the company's business and operating conditions.[38]

The Swedish Competition Authority has emphasised that it is of utmost importance for the Authority's activities that undertakings can submit material to the Authority with the certainty that it will not benefit competitors. The companies' need for confidentiality is therefore particularly significant. In addition, the undertakings have a far-reaching obligation to provide information about their circumstances to the Competition Authority.[39]

An important difference between the first and second paragraph is that publicity is the main rule under the first paragraph, while secrecy always prevails under the second. However, it is not entirely clear in the Court of Appeal's judgments how to separate the two provisions. In one case, the court emphasises that the decisive factor is whether the information concerns business or operating conditions, and, if so, the first paragraph should then be applied.[40] Unless the authority shows that someone risks suffering harm, the information

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[33] Administrative Court of Appeal in Stockholm, case number 973-16, 26 April 2016, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015, case number 7436-14, 22 December 2014, case number 5557-14, 12 December 2014, case number 6214-14, 17 September 2014, case number 6265-13, 17 December 2013, case number 49-12, 22 March 2012, case number 6507-11, 21 December 2011, case number 4684-10, 30 September 2010, case number 6102-08, 9 September 2008, case number 2990-05, 27 May 2005.

[34] Administrative Court of Appeal in Stockholm, case number 6102-08, 9 September 2008, case number 6507-11, 21 December 2011, case number 5557-14, 12 December 2014, case number 8289-14, 22 June 2015, case number 7436-14, 22 December 2014, case number 9867-14, 13 February 2015, case number 973-16, 26 April 2016.

[35] Administrative Court of Appeal in Stockholm, case number 2990-05, 27 May 2005, case number 49-12, 22 March 2012, case number 6265-13, 17 December 2013 KR 6265-13.

[36] Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010.

[37] Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010, case number 6507-11, 21 December 2011, case number 6214-14, 17 September 2014, case number 8289-14, 22 June 2015, case number 9867-14, 13 February 2015.

[38] Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 7436-14, 22 December 2014.

[39] Administrative Court of Appeal in Stockholm, case number 7436-14, 22 December 2014.

[40] Administrative Court of Appeal in Stockholm, case number 2990-05, 27 May 2005.

must be disclosed.[41] In another case, however, the court seems to primarily assess whether the information concerned someone who had connections with the company under investigation, in which case the second paragraph is applied and the information is kept secret.[42] The first approach seems most consistent with the wording of the law.

Chapter 30, Section 3 contains a somewhat more specific provision on investigations of infringements of Article 101 or 102 of the TFEU or corresponding rules in the Swedish Competition Act. For information provided by individuals in notifications or statements, confidentiality applies if it can be assumed that the individual will suffer *considerable* damage ('skada') or *significant* harm ('men') if the information is disclosed.

In the Public Access to Information and Secrecy Act, 'damage' ('skada') refers only to economic damage, whereas 'harm' ('men') has a very broad meaning. Harm can include both the risk of being exposed to the contempt of others and negative economic effects. Often it is enough that an outsider knows about the sensitive information. Even completely legal measures – such as the imposition of a sanction – can be considered damage or harm for the purposes of the act.[43]

In addition to the more general provisions, there are a few rules aimed at even more specific situations. Chapter 30, Section 1a is an implementation of Article 31(1) of Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. It therefore applies to leniency statements or settlement submissions. Such information is subject to absolute confidentiality, unless it is included in certain decisions of the Swedish Competition Authority. Chapter 30, Section 2 contains provisions on counselling prior to notification of a merger. During the actual counselling, absolute confidentiality applies. If such a notification is then made, however, the situation is instead covered by Section 1, which means that it is often necessary to assess whether there would be any harm in disclosing the information.

None of the cases studied in this article referenced section 1a, 2 or 3.

Overall, there are differences in the protection of confidentiality in terms of who is to be protected, what activities are concerned, what kind of information is involved and the degree to which particular injury must be expected. The differences can be summarised in the table below:

Activities	**Kind of information**	**Injury needed**	**Section**
The Competition Authority's activities consisting of supervision and investigation	Information about an individual's business or operating conditions, inventions or research results	Confidential if it can be assumed that the individual will suffer damage if the information is disclosed (possibly different in relation to a party)	Chapter 30, Section 1, 1
The Competition Authority's activities	Other financial or personal circumstances	Absolute confidentiality	Chapter 30, Section 1, 2

[41] Administrative Court of Appeal in Stockholm, case number 4684-10, 30 September 2010.
[42] Administrative Court of Appeal in Stockholm, case number 7436-14, 22 December 2014.
[43] Government bill 1979/80:2 Part A p. 83.

consisting of supervision and investigation	of a person who has entered into a business or similar relationship with the subject of the authority's activities		
All activities of the Competition Authority	Leniency statements or settlement submissions, if the information is not included in decisions	Absolute confidentiality	Chapter 30, Section 1a
The Competition Authority's counselling prior to notification of a merger	All information relating solely to the counselling	Absolute confidentiality	Chapter 30, Section 2
The Competition Authority's investigations of infringements	Information provided by individuals in notifications or statements	Confidential if it can be assumed that the individual will suffer considerable damage or significant harm if the information is disclosed (possibly different in relation to a party)	Chapter 30, Section 3

4.3 SPECIAL RIGHTS OF PARTIES AND OTHERS

As already mentioned, parties to administrative proceedings have both a special interest and a special right to access documents. In two thirds of the Court of Appeal cases studied,[44] the complainant was a party of an investigation. In these cases, the Court of Appeal emphasises that a special balancing of interests must be made between the party's right to transparency and opposing confidentiality interests.

In almost all cases, the court makes a distinction between, on the one hand, the assessments of confidentiality according to Chapter 17 or 30 of the Public Access to Information and Secrecy Act, and on the other hand the transparency of parties. That is true also with regard to Chapter 17, section 3, even though the requirement of *particular* importance is the same as Chapter 10, section 3, on parties' right of access to information. The courts also examine whether the parties have received enough information in anonymised or summarised form, or whether it would be possible to give them more information. In a few cases, the balancing of interests has taken place together with the assessment of confidentiality.[45]

As to Chapter 30, the wordings of the provisions are not the same as Chapter 10, section 3. Thus, it may be that the Competition Authority considers that there is a *risk of harm*

[44] Above n 26, 27 and 34.
[45] Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 8289-14, 22 June 2015.

if information is disseminated and therefore declares it confidential under Chapter 30, Section 1, first paragraph, or that there is a *risk of considerable harm* and declares it secret under Chapter 30, Section 3, but that it is not of *particular importance* that the information is kept secret in relation to a party. However, there is no clear example of that in the appeal court cases.

Further, it is strikingly how often the complainants are referring to EU law or the European Convention on Human Rights to support of their claims. Parties have argued that they needed access to more material in order to exercise their rights of defence under Article 6 of the European Convention on Human Rights and a directive on the right to information in criminal proceedings.[46] However, the courts have considered that the rules on transparency have been applied in a way that give the parties sufficient opportunities.[47]

For stakeholders other than parties, however, it has been useful to refer to EU law. Notifiers and competitors, who are not formal parties within the meaning of the Administrative Procedure Act, have invoked EU law to gain access to material. However, the court argued in one case – with reference to *Donau Chemie*[48] – that only undertakings intending to bring an action for damages against other operators fulfil a specific pro-competitive function. The court held that a notifier who did not declare such an intention was only entitled to the transparency provided by the general principle of public access to official documents.[49] On the other hand, when a notifier has expressed an intention to bring an action for damages, the court has held that EU case law requires the Competition Authority to balance the notifier's interest in obtaining access to the information against opposing interests. As examples of cases, the court again referred to *Donau Chemie*, but also to *Pfleiderer AG*.[50] Exactly how this balance relates to the regulation in the Public Access to Information and Secrecy Act is, however, not clear. Perhaps the courts deem that it follows directly from EU law.

5 CONCLUDING REMARKS

Many legal systems grant the public – and especially parties to administrative proceedings – access to public authorities' documents. In many ways the Swedish system is built on the same ideas as EU law. However, the Swedish system requires detailed statutory provisions enacted by the Parliament. These can in principle contribute to predictability, limiting the authorities' discretional power, but they also constitute a complex patchwork that can be difficult to comprehend.

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[46] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
[47] Administrative Court of Appeal in Stockholm, case number 5557-14, 12 December 2014, case number 1004-12, 29 June 2012 and case number 3602-09, 14 July 2009.
[48] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* EU:C:2013:366. For a comment on that case see Ingrid Vandenborre and Thorsten Goetz, 'EU Competition Law Procedural Issues' (2013) 4(6) Journal of European Competition Law & Practice 506.
[49] Administrative Court of Appeal in Stockholm, case number 6265-13, 17 December 2013. Cf. case number 2990-05, 27 May 2005 and case number 49-12, 22 March 2012.
[50] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, referred to in Administrative Court of Appeal in Stockholm, case number 6214-14,17 September 2014, case number 9867-14, 13 February 2015, case number 9869-14, 11 February 2015 and case number 9867-14, 13 February 2015.

The relatively small number of court cases on these provisions may indicate that the authority applies the provisions in a way that is not overly controversial to private stakeholders. An alternative explanation is, of course, that stakeholders do not consider it worthwhile to appeal. However, even though the majority of the court cases ended in favour of the authority, a considerable share of the applicants won at least in part.

As shown above, companies and courts have referred to EU law to expand the right to access to documents beyond what follows from Swedish law, especially regarding companies that intend to bring action for competition law damages. This is not problematic in relation to the Swedish constitution, since it stresses the interest of transparency.

A much more difficult situation would arise if a document were confidential according to EU law, for example to protect trade secrets, but not confidential according to Swedish law. It would then constitute a direct conflict between EU law and the Swedish constitutional principle. On the one hand, EU law requires precedence over national legal systems. On the other hand, the principle of public access to official documents has a long tradition in Sweden and was considered so important that Sweden made a special declaration on it when joining the EU. The principle could thus perhaps be seen as part of the Swedish national identity, inherent in the fundamental constitutional structure.[51] However, the same balances of interests are central in both EU law and Swedish law. Therefore, it would likely be possible to interpret EU law or Swedish law in ways that avoid that the situation comes to a head.

At present, digitalisation is probably a greater challenge to the principle of access to official documents. The current rules assume that documents in paper form are the norm. This is now largely a fiction. Digitalisation raises questions about what specifically constitutes a document to be disclosed and what is required of authorities to compile material. New opportunities to process large amounts of data also raise questions about the privacy of the information disclosed by public authorities.[52]

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[51] Cf. Article 4(2) of the Treaty on European Union and article 53 of Charter of Fundamental Rights and e.g. Case C-399/11 *Melloni* EU:C:2013:107, Elke Cloots, *National Identity in EU law* (Oxford University Press 2015), and Giuseppe Martinico, 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU' (2021) 27(3) European Public Law 447.

[52] Cf. for example Cecilia Magnusson Sjöberg, 'The Swedish Principle of Transparency in the context of e-learning' in Anna-Sara Lind, Jane Reichel, and Inger Österdahl (eds), *Transparency in the Future* (Eddy.se 2017). Regarding some kinds of online publication of personal data, the Swedish Authority for Privacy Protection (IMY) recently decided on a legal position in favor of the EU General Data Protection Regulation in relation to Swedish constitutional provisions. *Rättsligt ställningstagande IMYRS 2024:1 – Klagomål mot söktjänster med utgivningsbevis* (14 May 2024) <https://www.imy.se/globalassets/dokument/rattsligt-stallningstagande/imyrs-2024_1-klagomal-mot-soktjanster-med-utgivningsbevis.pdf> accessed 01 June 2024.

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THE LEGAL PROFESSIONAL PRIVILEGE IN COMPETITION LAW CASES – A KEY ELEMENT IN PROTECTING THE PROPER ADMINISTRATION OF JUSTICE

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The legal professional privilege is an important principle underpinning the EU judicial system as it ensures the proper administration of justice, procedural efficiency and protects fundamental rights such as a client's defence rights and the right to privacy enshrined in Articles 47 and 7 of the Charter. In competition cases, the European Commission has relied on an old ruling from the Court of Justice of the European Union (the ECJ), and only acknowledged one of these aims – the protection of the client's defence rights. While the ECJ has recently received the chance to align the EU standard to that of the ECHR by broadening the scope of protection, the Commission appears unwilling to abandon its previous stance.

It is important that the Commission shoulders the responsibility to ensure a procedure that is fair, and which acknowledges the basic principles underpinning a society governed by the rule of law. The current approach breathes life into questions on the legitimacy of its actions and the appropriateness of letting it take on the roles of enforcer, prosecutor and judge in competition cases, where companies not only risk having to pay fines of up to ten percent of their annual turnover, but now also appear to have to face the threat of divestitures should the Commission find that they are infringing the EU competition rules.

1 INTRODUCTION

The legal professional privilege protects correspondence between lawyer and client. As will be discussed in this article, protecting legal advice and correspondence is a key element in any legal system as it ensures not only the proper administration of justice and procedural efficiency but also the respect for fundamental rights such as the right of defence and the right to privacy. If a company receives an unexpected visit from a competition authority, it should therefore not have to fear that the inspectors peruse or make copies of documents containing legal advice from the company's external counsels.

This article analyses the scope and content of the protection afforded under EU law and concludes that the European Commission (the Commission) has chosen to give the privilege an unnecessarily narrow frame in competition cases by only acknowledging one of its aims, the protection of targeted companies' defence rights. This somehow seems to allow the Commission to exclude from the privilege both correspondence with non-EU lawyers and correspondence that is not directly related to the subject-matter of the investigation, or which was drafted before the investigation was initiated.

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The Commission's practice does not meet the standard set by the European Court of Human Rights (the Strasbourg Court), nor is it in line with the case law from the Court of Justice of the European Union (the ECJ). This is very unfortunate as the Commission's approach breathes life into questions on the legitimacy of its actions and on the appropriateness of letting it wear so many hats in the enforcement of the EU competition rules.

2 THE RATIONALE BEHIND THE PRIVILEGE

2.1 FROM THE LAWYER'S STANDPOINT TO THE CLIENT'S

With its roots in common law, the legal professional privilege was initially seen from the lawyer's standpoint and aimed at protecting the lawyer's honour or interests.[1] Lawyers should not be forced to betray a secret with which they had been entrusted. There has been a gradual shift towards the client's perspective and, today, it is generally considered to belong to the client and serves to protect the client's freedom from apprehension in consulting legal advice.[2] If a client withholds relevant information from his or her lawyer for fear of disclosure, the lawyer will not be able to effectively secure the full measure of the client's rights under the law.

The privilege does not only serve to protect the rights of individuals at the stage where there is an infringement but may also ensure compliance with the law. By encouraging candour in before-the-event consultations, this helps keep individuals within the law.[3]

2.2 ENSURING PROPER ADMINISTRATION OF JUSTICE

In *AM & S*, Advocate General (AG) Slynn pointed out that all Member States recognised that the public interest and the proper administration of justice demand that clients should be able to speak freely, frankly and fully to their lawyers. Slynn argued that the privilege springs not only from the basic need of a person in a civilised society to be able to turn to a lawyer for advice and help; it also springs from the advantages to a society, which evolves complex legislation extending into all the business affairs of persons, real and legal, that persons should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly and where they run risks.[4] This was in 1982. The legislation has not become less complex since then.

Slynn referred to the proper administration of justice.[5] The privilege is often said to serve this purpose. It is thus not necessarily, or only, the rights of the individual that form

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[1] H L Ho, 'Legal Professional Privilege and the Integrity of Legal Representation' (2006) 9(2) Legal Ethics 163, 165, Edward J Krauland and Troy H Cribb, 'The Attorney-Client Privilege in the United States: An Age-Old Principle under Modern Pressures' (2003) 37 The Professional Lawyer, American Bar Association 1; and Eric Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the Cursory Glance' (2004) 28(4) Fordham International Law Journal 967, 977.
[2] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 397; Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* (American Bar Association 2007) 4, Ho (n 1); and Krauland and Cribb (n 1).
[3] Ho (n 1) 169.
[4] Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:17, Opinion of AG Slynn.
[5] ibid 1654.

the basis for or the rationale behind the privilege, but rather the greater interest of ensuring a proper administration of justice. In the UK case of *R v Derby Magistrates' Court ex parte B*, Lord Taylor of Gosforth CJ captured the essence of this theory when he declared that legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. According to him, it is a fundamental condition on which the administration of justice rests. It is not for the sake of the applicant alone that the privilege must be upheld; it is in the wider interests of all those thereafter who might otherwise be deterred from being forthright with their solicitors.[6] There are also considerations of efficiency, as lawyers need full information from their clients to perform their duties effectively with minimum cost and delay. While the state provides machinery for the resolution of legal disputes, this machinery is expensive and time-consuming to run. There is therefore a public interest in the establishment of rules, such as legal professional privilege, which allow these mechanisms to function as cost-effectively as possible.[7]

2.3 ENSURING PROTECTION OF FUNDAMENTAL RIGHTS

The privilege does not only serve the interests of proper administration of justice or procedural efficiency, but it also protects the clients' defence rights as well as their right to privacy. This is ensured by Articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms (the ECHR) and therefore, by necessity, also by Articles 7 and 47 of the Charter of Fundamental Rights of the European Union (the Charter) which mirror the ECHR.

3 THE ECHR LAYS THE FLOOR TO EU FUNDAMENTAL RIGHTS PROTECTION

3.1 FUNDAMENTAL RIGHTS HAVE NOT ALWAYS FORMED PART OF THE EU LEGAL ORDER

While the Treaty of Rome was silent on the issue of fundamental rights protection, focusing entirely on market integration and the establishment of a common market, the legal landscape has gradually been redesigned over the years, as fundamental rights protection has gradually been woven into the EU legal system through the hands of the ECJ. Today, these rights do not only derive from the ECJ's case-law but are firmly established also in statutory legislation.

Article 2 TEU declares that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Article 6 TEU protects fundamental rights under three diverse and complementary perspectives: as general principles of EU law, as defined by the Charter and as protected by the ECHR. The Charter contains all the rights encompassed in the ECHR, together with some additional, third generation, rights, such as the right to good administration, laid down in Article 41 of the Charter.

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[6] *R v Derby Magistrates' Court ex parte B* [1996] AC 487, 508. See also Gippini-Fournier (n 1).
[7] Dennis (n 2) 398.

3.2 THE ROLE OF THE ECHR IN THE EU LEGAL ORDER

An important feature of the Charter is its Article 52(3), which stipulates that, to the extent that the Charter affords rights that correspond to ECHR rights, the meaning and scope of those rights shall be the same as those laid down by the ECHR. EU law may only derogate from the ECHR standard if such derogation means more extensive protection. As a result, the ECHR and the case law of the Strasbourg court now lay a floor to EU fundamental rights protection.[8] More or less through the back door, the EU has thus committed itself not only to ensuring a minimum standard of protection but has left it to the ECHR to determine what that standard should be. While the ECJ first showed some hesitance towards acknowledging that the Charter was linked to the ECHR,[9] references to the ECHR standard are now frequent.[10]

According to Article 52(1) of the Charter, the EU institutions shall always respect the Charter. This means that, in the absence of any explicit statutory legislation or any relevant case law from the ECJ, the EU institutions must themselves ensure that their practices meet the ECHR standard. As will be discussed below, this required the Commission to abandon its narrow application of the privilege several years ago. However, with the ECJ's ruling in *Orde van Vlaamse Balies*,[11] the Commission's practices now also run counter of the case law from the ECJ.

4 PROTECTING LEGAL PROFESSIONAL PRIVILEGE UNDER THE ECHR

4.1 PROTECTING LEGAL ADVICE UNDER ARTICLE 8 ECHR

By now, there is well-established case law from the Strasbourg Court acknowledging that confidentiality of communications between lawyer and client is necessary to guarantee the effectiveness of the right to legal representation. In cases such as *S. v Switzerland*[12] and *Modarca v Moldova*,[13] the Strasbourg Court declared that if lawyers were unable to confer with their clients and receive confidential instructions from them, their assistance would lose much of its usefulness. This line of reasoning suggests that the privilege may be enforced under Article 6 ECHR, which ensures the right to a fair trial, and it is thus linked to the right of the defence. In *Campbell v United Kingdom*, the Strasbourg Court did recognise that any interference with the correspondence between a lawyer and his client is in violation of Article 6 ECHR if it prevents the lawyer from effectively safeguarding the client's rights.[14]

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[8].; Case C-400/10 PPU *JMcB v LE* EU:C:2010:582

[9] Eg Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, where the ECJ referred to its own ruling in *Bonda* rather than the Strasbourg's Court's ruling in *Engel v the Netherlands*;; Case C-489/10 *Bonda* EU:C:2012:319; *Engel and Others v the Netherlands*, Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 08 June 1976).

[10] Case C-682/20 P *Les Mousquetaires SAS and ITM Entreprises SAS v European Commission* EU:C:2023:170 para 41.

[11] Case C-694/20 *Orde van Vlaamse Balies and Others v Vlaamse Regering* EU:C:2022:9638.

[12] *S v Switzerland* Apps nos 12629/87, 13965/88 (ECtHR, 28 November 1991).

[13] *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007).

[14] *Campbell v United Kingdom*. See also *Modarca v Moldova* (n 13), para 87, where the Strasbourg Court declared that one of the key elements in a lawyer's effective representation of a client's interests is the principle that

That said, the Strasbourg Court is more prone to apply Article 8 ECHR protecting the right to privacy to cases dealing with legal professional privilege.

This choice has two important implications. First, by applying Article 8 ECHR to cases dealing with legal professional privilege, the Strasbourg Court may ensure a much broader scope of protection than had it applied Article 6 ECHR. This is because the latter article primarily concerns the right to a fair trial. Relying solely on Article 6 ECHR and allowing the privilege to serve the aim of encouraging candour in before-the-event consultations, as a way to ensure compliance with the law, might be stretching the scope too far. By applying Article 8 ECHR, the Strasbourg Court ensures that the privilege may serve its aim and cover all forms of client-lawyer correspondence, irrespective of whether the advice has been given in an ongoing investigation or not.

Second, the fact that Article 8 ECHR is applied carries the logical consequence that the ECHR does not allow absolute protection from interference with communications between lawyer and client, as, unlike Article 6 ECHR, Article 8 allows for derogations from the rights provided therein. However, in *Foxley*,[15] the Strasbourg Court noted that the lawyer–client relationship is in principle privileged, and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature. This is a rather bold and all-embracing statement suggesting that all correspondence between lawyer and client, whatever its purpose, should be treated as confidential and that interferences with such correspondence would thus not be considered necessary in a democratic society.

4.2 THE APPLICATION OF THE PRIVILEGE IN COMPETITION CASES

While many of the cases brought before the Strasbourg Court concern criminal cases involving natural persons, the Strasbourg Court has also had the opportunity to give its view on the application of the privilege in cases concerning dawn raids at corporate premises. The case of *Vinci Construction* concerned the lawfulness of the measures taken by the French Competition Authority at the premises of the two companies, Vinci Construction France and GTM Génie Civil et Service, in October 2007.[16] Here, the central question was, according to the Strasbourg Court, the weighing up of interests relating, on the one hand, to the legitimate search for evidence of offences under competition law, and, on the other, respect for home, private life and correspondence, and particularly for the confidentiality of lawyer-client exchanges.[17]

During the inspections carried out at the premises of the two companies, numerous documents and electronic files were seized, along with the entire mailboxes of certain employees. The companies challenged the inspections, alleging that they had been widespread and indiscriminate, as thousands of electronic documents and entire mailboxes

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the confidentiality of information exchanged between them must be protected. The Strasbourg Court declared that the privilege encourages open and honest communication between clients and lawyers, and that confidential communication with one's lawyer is protected by the ECHR as an important safeguard of one's right of defence.

[15] *Foxley v United Kingdom* App no 33274/96 (ECtHR, 20 June 2000) para 43.

[16] *Vinci Construction et GTM Genie Civil et Services v France*, App no 63629/10 and 60567/10, (ECtHR, 2 April 2015).

[17] See the Strasbourg Court's press release issued on 2 April 2015, <https://hudoc.echr.coe.int/eng-press?i=003-5055260-6217032> accessed 01 June 2024.

had been seized by the authority, and many of these documents either lacked connection with the business covered by the inspection decision or were protected by legal professional privilege. Having no success before the French courts, the applicants eventually turned to Strasbourg.

In its ruling, the Strasbourg Court noted that the seizures had concerned numerous documents and contained correspondence exchanged with lawyers. It also noted that the applicants had been unable to discuss the appropriateness of the documents being seized, or inspect their content, while the operations were being conducted. Having been unable to object in advance to the seizure of documents covered by the confidentiality of lawyer-client exchanges or which were unrelated to the investigation, the applicants ought to have been able to obtain, after the inspection, a review of its lawfulness. As there had been no such possibility, the Strasbourg Court concluded that the inspections and seizures carried out in the applicants' premises had been disproportionate to the aim pursued, in breach of Article 8 ECHR.[18]

4.3 THE VIEW OF THE STRASBOURG COURT – CONCLUDING REMARKS

To conclude, the Strasbourg Court takes the view that correspondence between client and lawyer is, in principle, privileged and protected by Article 8 ECHR, but also by Article 6 ECHR in those cases where it serves to protect the client's defence rights. Since the ruling in *Vinci Construction*, there is no doubt that the privilege applies to companies targeted by the competition authorities' investigations and that those authorities have a duty to make sure that correspondence between the company and its outside counsels is excluded from the scope of the investigation. This is the case no matter if it is related to the subject matter of the investigation or not.

5 THE DEVELOPMENT OF THE LEGAL PROFESSIONAL PRIVILEGE UNDER EU LAW

5.1 THE PRIVILEGE WAS INITIALLY GIVEN A NARROW SCOPE

While the Strasbourg Court has taken a broad view and declared that both Articles 6 and 8 ECHR may come into play in cases dealing with legal professional privilege, the EU Courts have, up until recently, chosen a narrower path. This choice is not surprising given the fact that the privilege is not laid down in any written legislation and that it has therefore been the task of the EU Courts to establish the privilege under EU law. When this was first done in 1982, there was still no case law from Strasbourg. Instead, the ECJ had to frame the privilege upon those features that were common to the laws of the Member States. This meant that it came to cover only correspondence between the client and external lawyers, and provided that the lawyer was admitted to an EU Member State bar association. In principle, no objections can be made against the ECJ adopting this limited approach in 1982. Had the ECJ chosen a wider definition, it could easily have been argued that it was resorting to judicial

[18] *Vinci Construction et GTM Genie Civil et Services v France*, App no 63629/10 and 60567/10, (ECtHR, 2 April 2015)., paras 77-81.

activism. However, whether the limited scope is desirable and still justifiable is another matter. Fortunately, the ECJ has recently had the chance to adapt its view to the developments in this field, aligning it to that of the Strasbourg Court.

5.2 THE EMERGENCE OF THE PRIVILEGE UNDER EU LAW

The privilege was first recognised by the ECJ in the now-classic case of *AM & S*.[19] In February 1979, the Commission carried out unannounced inspections at the premises of American Mining & Smelting Europe Ltd (AM & S). At the conclusion of the inspection, the Commission officials left AM & S with a written request for further specified documents. AM & S refused to make some of these documents available, claiming that they were protected by legal professional privilege. The Commission's answer was to carry out a new dawn raid and seek access to the documents in question. AM & S refused to cooperate and lodged an application with the ECJ. The application was based on the submission that, in all the Member States, written communications between lawyer and client were protected by virtue of a principle common to all those states.

In its ruling, the ECJ did recognise that it must consider the principles and concepts common to all Member States in respect of the confidentiality of lawyer–client communication. It also acknowledged that written communication between lawyer and client was protected throughout the EU.[20] As far as the protection of written communication between client and lawyer was concerned, the ECJ recognised that, although all Member States provided protection, the scope of such protection varied. However, the ECJ was able to establish certain features that were common to the laws of all Member States, namely:

1. although some Member States did not protect communications with in-house counsels, they all recognised that communications with independent lawyers should be protected; and
2. as for the nature of the documents deserving protection, all Member States recognised that communications made for the purposes and in the interests of the client's right of defence should be privileged.[21]

Thus, the ECJ concluded, under EU law, legal professional privilege protects communications between a client and an independent lawyer that are made for the purpose and in the interests of the client's right of defence. This, it stated, was also in line with Regulation 17/62 itself,[22] as the regulation aimed at ensuring that the defence rights may be exercised in full.[23] In order to ensure this, the ECJ concluded, the protection must cover all written communication exchanged after the initiation of the administrative procedure under Regulation 17/62. However, it declared that it must also be possible to extend the protection to earlier communications which have a relationship with the subject matter of that

[19] Case 155/79 *AM & S Europe Ltd v Commission of the European Communities* EU:C:1982:157.
[20] ibid para 18.
[21] ibid para 21.
[22] Council Regulation (EC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13 was the predecessor to 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, [2003] OJ L1.
[23] *AM & S* (n 19) para 23.

procedure.[24] Furthermore, the privilege would only apply to communications with independent lawyers entitled to practise their profession in one of the Member States, regardless of the state in question, but could not be extended beyond that limit.[25]

While the ECJ has since then been given the possibility to fine-tune the scope of the privilege in a few subsequent cases dealing *inter alia* with the protection of correspondence with in-house counsels, it was not until recently that it had the possibility to fully align its case law with that of the Strasbourg Court and to acknowledge that the privilege mainly serves to protect a client's right to privacy under Article 7 of the Charter.

5.3 APPLYING ARTICLE 7 OF THE CHARTER TO THE PRIVILEGE

In a recent Grand Chamber ruling,[26] the ECJ now takes a step closer to the ECHR by explicitly acknowledging that the privilege not only serves to protect the right of the defence, but also the right to privacy.

The case before the Belgian court concerned the obligation imposed on lawyers acting as intermediaries to report certain cross-border tax arrangements to the competent authorities. More specifically, lawyers were exempted from this reporting duty where it would infringe the legal professional privilege. In those cases, they were instead required to notify any other intermediaries of the fact that they were unable to report the arrangement and also provide reasons for this.[27] The applicants had challenged this order before the Belgian courts arguing that this would also infringe the legal professional privilege. Under Belgian law, the mere fact of having recourse to a lawyer was covered by legal professional privilege and the applicants argued that the same applied, *a fortiori*, as regards the identity of a lawyer's client.[28]

The provision in question followed from an EU directive,[29] and the case concerned the validity, in the light of Articles 7 and 47 of the Charter, of the provision requiring Member States to ensure that lawyers acting as intermediaries – where they were exempt from the reporting obligation on account of the legal professional privilege – notified any other intermediaries of the reporting obligation and why they themselves were prevented from reporting. This made the Belgian court turn to Luxembourg.

In its preliminary ruling, the ECJ confirmed that Article 52(3) of the Charter lays a floor to EU fundamental rights protection and acknowledged its obligation to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR.[30] The ECJ then declared that Article 8 ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. Like Article 8 ECHR, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to

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[24] ibid.
[25] ibid para 26.
[26] *Orde van Vlaamse Balies* (n 11).
[27] ibid paras 10-13.
[28] ibid para 14.
[29] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended by Council Directive (EU) 2018/822 of 25 May 2018, Article 8ab(5).
[30] *Orde van Vlaamse Balies* (n 11) para 26.

its content and to its existence, the ECJ declared further. Referring to the Strasbourg Court's ruling in *Altay v Turkey*,[31] it then acknowledged that individuals who consult a lawyer should be able to expect that their communication is kept private and confidential, and that other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

According to the ECJ, the specific protection afforded to legal professional privilege by Article 7 of the Charter and Article 8 ECHR is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Citing its ruling in *AM & S*, the ECJ then continues to declare that this fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client.[32]

The obligation for a lawyer-intermediary to notify other intermediaries who are not his or her clients of their reporting duty necessarily entails that those other intermediaries become aware: of the identity of the notifying lawyer, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement. In those circumstances the obligation to notify entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter, the ECJ declared. Furthermore, the ECJ continued, that obligation leads, indirectly, to another interference with that right, resulting from the disclosure, by the third-party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted by the taxpayer.[33] The provision constitutes a limitation of the rights laid down in Article 7 of the Charter, the ECJ concluded.

It then assessed whether such a limitation may be justified under Article 52(1) of the Charter. Here it acknowledged that the limitation is provided for by law and that the obligation in question only entails to the lifting of the confidentiality of client/lawyer communication to a limited extent, as the contents of any such communications will not have to be revealed. Moving on to the proportionality assessment, the ECJ declared that this requires it to ascertain whether the reporting obligation meets an objective of general interest recognised by the EU. If so, it would also have to ascertain that: (i) the obligation is appropriate for attaining that objective; (ii) interference with the fundamental right to respect for communications between lawyers and their clients is limited to what is strictly necessary, and, if so; (iii) interference is not disproportionate to the objective pursued.[34]

When assessing this, the ECJ acknowledged that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the EU. Moving on to the second criterion, the ECJ was not equally convinced, declaring that the obligation imposed on lawyer-intermediaries cannot be regarded as strictly necessary to attain those objectives, and that it was thus disproportionate. On this ground the ECJ declared that the provision in the directive infringes the right to respect for

[31] *Altay v Turkey* (No 1), judgment of 9 April 2019, Application No 11236/09.
[32] *Orde van Vlaamse Balies* (n 11) para 28.
[33] ibid para 31.
[34] ; Joined Cases C-37/20 and C-601/20 *Luxembourg Business Registers and Sovim* EU:C:2022:912, para 66.

communications between a lawyer and client, guaranteed in Article 7 of the Charter, in so far as it provides, in essence, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.[35]

The ECJ also assessed the validity of the provision in the light of Article 47 of the Charter. According to the ECJ the provision serves to protect, *inter alia*, the rights of the defence, the principle of equality of arms, the right of access to the courts and the right of access to a lawyer, both in civil and criminal proceedings. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients if they were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations, the ECJ declared. This means that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, the ECJ continued. As the obligation to notify arises in an early stage, the lawyer is not acting as the defence counsel for his or her client in a dispute. The mere fact that the lawyer's advice or the cross-border arrangement, which is the subject of his or her consultation, may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes and in the interests of the rights of defence of his or her client, the ECJ declared further. In those circumstances, the obligation to notify other intermediaries does not entail an interference with the right to a fair trial, the ECJ concluded.[36] Thus, the provision in the directive was declared invalid in the light of Article 7, but not in the light of Article 47 of the Charter.

5.4 THE SCOPE OF PROTECTION AFFORDED UNDER EU LAW: CONCLUDING REMARKS

Nearly four decades have passed since the ECJ first declared that there is indeed a principle of legal professional privilege under EU law, and that it protects communications made between a client and an independent lawyer admitted to an EU bar association for the purpose and in the interests of the client's right of defence.

The ECJ has not had the chance to revisit its view on the application of the privilege to correspondence with lawyers admitted to bars outside the EU. This is unfortunate, as the Commission still appears to, at least formally, follow the lines adopted by the ECJ in *AM & S*. Thus, to the extent that a client consults with his external lawyer in the US or any other country outside the EU, there is a risk that such correspondence is not considered to be protected by the privilege during the course of a dawn raid.

Although it may be difficult to determine the standards of a bar association of a third country, and although the legal advice sought by a lawyer outside the EU will not necessarily deal with matters of EU law, it is difficult to accept this requirement. Indeed, when it comes to suspected infringements of EU competition rules, it is not uncommon that such alleged practices have effects or originate from countries outside the EU, such as the US. If the privilege is considered to belong to the client rather than the lawyer, and if its aim is to ensure the client's right of defence and/or the greater interest of ensuring a proper administration

[35] *Orde van Vlaamse Balies* (n 11) para 59.
[36] ibid para 65.

of justice, then it should cover any correspondence with outside lawyers which can have a bearing on the case at hand. Otherwise, there is an apparent risk that the client may not be able to properly exercise the right of defence. The problems created by a limited scope of protection became even more apparent with the ECJ's ruling in *Nexans*, where the ECJ confirmed the right of the Commission to review and copy documents related to projects with effects outside the EU.[37]

However, while there still appear to be some questionable limitations to the privilege, the referral by the Belgian court in *Orde van Vlaamse Balies* has allowed the ECJ to align its case law to that of the Strasbourg Court in another important aspect, as the ECJ now acknowledges that questions regarding the scope of the privilege will have to be determined in the light of both Articles 7 and 47 of the Charter. The legal privilege thus no longer applies only to communications that have been drawn up for the purpose and in the interests of the client's defence rights but to all communications between a lawyer and his/her client. However, this also means that, in those situations where only Article 7 of the Charter applies, the privilege is not absolute but can be limited to the extent allowed by Article 8(2) ECHR.

6 LEGAL PROFESSIONAL PRIVILEGE: WHAT CONCLUSIONS MAY BE DRAWN?

The legal professional privilege is an important principle underpinning the EU judicial system as it ensures the proper administration of justice, procedural efficiency and protects fundamental rights such as a client's defence rights and the right to privacy enshrined in Articles 47 and 7 of the Charter. It is therefore important that the EU institutions acknowledge the privilege and the interests that it serves to protect. By only acknowledging one of its aims, to protect the right of the defence, the Commission gives the privilege a scope that is too narrow to meet the ECHR standard.

This is especially troublesome given that the Commission may impose substantial fines on companies that obstruct its investigations and that the consequences of disclosure are irreversible – what has once been seen cannot be made unseen. This was acknowledged by the President of the General Court in *Akzo* who pointed to the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.[38]

It is therefore important that the Commission shoulders the responsibility to ensure a procedure that is fair, and which acknowledges the basic principles underpinning a society governed by the rule of law. The current approach breathes life into questions on the legitimacy of its actions and the appropriateness of letting it take on the roles of enforcer, prosecutor and judge in competition cases, where companies not only risk having to pay fines of up to ten percent of their annual turnover but now also appear to have to face the threat of divestitures should the Commission find that they are infringing the EU competition rules.[39] In addition, if the Commission adopts the same narrow approach also

[37] Case C-37/13 P *Nexans France SAS and Nexans SA v European Commission* EU:C:2014:2030.
[38] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* EU:T:2007:287, para 47.
[39] On 14 June 2023, the Commission sent a statement of objections to Google in the Google Ad tech case proposing a structural remedy, Case AT.40670.

in investigations under neighboring pieces of legislation, such as the Digital Markets Act,[40] this may have a hugely negative impact on the rights of companies targeted by the Commission's investigations under such legislation. It is therefore crucial that the Commission revises its policy and brings its practices into line with the ECHR standard.

[40] 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) [2022] OJ L265/1.

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A FEW WORDS ON DRITTWIRKUNG, TRANSPARENCY AND PERSONAL INTEGRITY IN THE LIGHT OF DIGITALIZATION

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This article analyses the three topics listed in the headline in that order, and it subsequently identifies and discusses a common thread between them. The fact that they have all been affected by the enactment of the EU Charter of Fundamental Rights (CFR), of which they belong to the core area, is very crucial here, and so is the interplay or interaction between the European Courts and leading national courts, not least in the constitutional area. Cases such as Melloni, from 2013, have shown the problems that may occur should the Court of Justice of the EU (CJEU) not respect fundamental rights and national constitutional values. If the CJEU wants to maintain its key role in the future structure of EU law, it needs to show that it cares about fundamental rights and that it wants to work together, not against the European Court of Human Rights (ECtHR) and national courts. The three concepts discussed in this article, all strengthened by the Charter, have so far been most helpful in this process – and may become even more important in the future.

1 INTRODUCTION

The issues mentioned in the title of this article are not among any of my legal specialities and are not the ones that I deal with on a regular basis when working in the field of constitutional law broadly, be it Swedish law or EU law. I have dealt with them before, however,[1] and will now take the opportunity to deal with them once again, in a somewhat updated context. And let's be clear: their practical importance is probably greater than ever.

In this short article, I will first go through the three different concepts and show their significance, based on the fact that they have all been affected by the enactment of the EU Charter of Fundamental Rights (CFR), of which they belong to the core area. Even if these are not new, modernised or updated rights, the practical impact of the Charter has been particularly strong here. After that, I will try to explain how they may, and actually do, interact in contemporary EU law.

2 DRITTWIRKUNG

Drittwirkung is a term that has long been used in EU and, of course, German constitutional doctrinal work. It basically means that fundamental rights may be claimed by individuals, not just against the state or the public powers in general, but also against

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[1] See e.g. the report on the 20-year anniversary of the EU Charter of Fundamental Rights – Joakim Nergelius, 'EU:s rättighetsstadga 20 år: Vad har den åstadkommit?' (2020) December 2020:14epa Sieps, Epa (European Policy analysis) <https://www.sieps.se/globalassets/publikationer/2020/2020_14epa.pdf?> accessed 01 June 2024.

private subjects, be they natural or legal persons. The fact that such a possibility does exist is generally recognized in German and EU law doctrine, at least for some rights, though their scope and extent in that context is still very much discussed.

Jurisprudence from the European Court of Human Rights (ECtHR) does not really show the extent to which the European Convention on Human Rights (ECHR) does contain a form of 'Drittwirkungseffekt'.[2] In the case *Verein gegen Tierfabriken v Switzerland* from 2002, where the court stressed the need for an *ad hoc* approach rather than a 'general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals'. Switzerland was seen as violating freedom of speech (Art. 10 ECHR) by not assuring that information from an animal rights organisation could be distributed through the TV networks. Furthermore, the obligation of all states to respect the private lives of all individuals is shown, e.g. by the well-known case brought by princess Caroline of Monaco.[3]

From a Swedish point of view, the *Evaldsson* judgment[4] is of particular interest. Evaldsson and four other construction workers had chosen not to join the union (Byggnadsarbetareförbundet), which had a collective agreement (kollektivavtal) with their employer, forcing or obliging them to pay 'control fees' (granskningsavgifter) amounting to 1,5 % of their salaries to the union, of which they were not members. The purpose of the fees was to enable the union to check working conditions and salaries. The Swedish Labour Court (Arbetsdomstolen, AD) decided in 2001 that the negative freedom of association could not be invoked in order to avoid the fees, since it only applied in Sweden to the extent that it had been acknowledged by the ECtHR (which was and still is fairly unclear, as explained above).[5] The case was brought to the ECtHR, which concluded that there was an insufficient transparency concerning the union's handling of the fees, which seemed to be financing a larger part of the union's activities than they were intended for. Therefore, the complainants were:

> entitled to information which was sufficiently exhaustive for them to verify that the fees corresponded to the actual cost of the inspection work and that the amounts paid were also not used for other purposes. This was even more important as they had to pay the fees against their will to an organisation with a political agenda which they did not support.[6]

Well, you could say, be that as it may, how could Sweden as a state be held responsible for this error? Because the court claimed:

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[2] *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* App no 24699/94 (ECtHR, 28 June 2002) para 46. See also *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (No 2) App no 32772/02 (ECtHR, Judgment of the Grand Chamber, 30 June 2009). An end to the case was finally reached at 22 December 2020; see *Schweizerische Radio- und Fernsehgesellschaft and Publisuisse SA v Switzerland* App no 41723/14 (ECtHR, 22 December 2020).

[3] *Caroline von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004). We may also note the case *E.S. (Söderman) v Sweden* App no 5786/08 (ECtHR, 12 November 2013), where Sweden was held to violate privacy, Art. 8 ECHR, by not having legislated against hidden cameras or filming.

[4] *Evaldsson and others v Sweden* App no 75252/01 (ECtHR, 13 February 2007).

[5] AD 2001:20. However, the case *Sigurdur A Sigurjonsson v Iceland* App no 16130/90 (ECtHR, 30 June 1993) strongly supports the existence of negative freedom of association.

[6] *Evaldsson and others v Sweden* (n 4) para 62.

> […] while the respondent State has to be given a wide margin of appreciation in the organisation of its labour market, a system which, as in the present case, in reality delegates the power to legislate, or regulate, important labour issues to independent organisations acting on that market requires that these organisations are held accountable for their activities. This requirement was particularly significant in the present case, where the relevant labour market organisations had concluded a collective agreement whose effects also extended to unorganised workers, obliging them to contribute financially to a particular activity carried out by a trade union. In these circumstances, the Court finds that the State had a positive obligation to protect the applicants' interests.[7]

The fact that the parties of the labour market were considered to represent the Swedish state was astonishing, to say the least, but of course it also shows that Drittwirkung is a legal reality. One also gets the impression that the court preferred to find a violation of the right to property[8] rather than analysing the limits of negative freedom of association in this specific context.

In German constitutional law, the concept of Drittwirkung is well-known since at least the 1960's are connected with important, early cases from *Bundesverfassungsgericht* and the German constitutional court, such as Lüth and Mephisto.[9] The doctrine on the topic is in fact quite rich.[10] And within EU law, we see clear signs of Drittwirkung for instance in the recent CSDD-directive on Corporate Sustainability.[11] Thus, though the exact extent of Drittwirkung may be unclear, it is clearly a legal reality in today's EU law, as well as at the national level in many EU Member States.

3 TRANSPARENCY

Today, transparency clearly features as an important element of EU law and is, for instance, mentioned and described quite precisely in Article 41(2) of the Charter of Fundamental Rights, where it is said to contain a right to access to documents for persons concerned, as well as an obligation for EU institutions to justify their decisions. However, this is a fairly recent development, clearly affected by Finland and Sweden joining the EU in 1995 and then together with Denmark and Netherlands forming a coalition of transparency-oriented Member States at the same time that political tendencies throughout Europe favoured openness and transparency within public administrations. Also, some important case-law, not least from the Tribunal of First Instance, contributed to this development.[12]

Personally, I view this as the area where Swedish and Nordic law has had the clearest influence on EU law.[13] The importance and extent of transparency in Swedish law is shown by Vilhelm Persson's contribution to this volume, so I do not need to dwell on that.

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[7] *Evaldsson and others v Sweden* (n 4) para 63.
[8] Article 1 in the first additional protocol to ECHR.
[9] BVerfGE 7, 198 and 30, 173.
[10] See Bodo Pieroth and Bernhard Schlink, *Grundrechte – Staatsrecht II* (27th edn, Heidelberg 2011).
[11] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM(2022) 71 final.
[12] See in particular Case T-174/95 *Svenska Journalistförbundet v Council* EU:T:1998:127, and Case T-14/98, *Hautala v Council* EU:T:1999:157.
[13] See also Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) 29 ff.

Through the case-law of the 1990s, via an agreement on transparency in the EU institutions in 2001 and Article 41(2) of the Charter, with equal status of the Treaties according to Article 6(3) of the Treaty of the European Union (TEU), transparency today has a totally different position within EU law than 30 years ago. The content of the *Melloni* case is indeed very hard to reconcile, with the prohibition for the Spanish Constitutional Court to apply Article 24 of the Spanish Constitution, which was established in that case. This contradiction becomes even clearer when reading para 48 of *Åkerberg Fransson*, where the CJEU with a clear message to the Swedish Supreme Court, which had previously made some severe mistakes in its handling of *ne bis in idem* matters,[14] stated that

> European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.[15]

Thus, in other words, and to keep it short, national courts simply must have the power to assess whether certain legal provisions are compatible with CFR. I will return to this issue towards the end of the article.

4 PERSONAL INTEGRITY AND DIGITALIZATION

If we focus on the so-called Data Retention Directive[16] in relation to personal integrity, we may note that, from the CJEU, cases such as *Digital Rights Ireland* in 2014 have clarified that the directive may violate the protection of personal integrity in Articles 7-8 of the CFR,[17] since it had not determined the grounds for access to the data pertaining to national authorities and its storage. Also, the case *Tele2* from 2016 should be mentioned.[18] Thus, the integrity of EU-citizens has clearly been strengthened since the Charter entered into force.

The same goes for the *Schrems* case ('Facebook'), where the CJEU reviewed and annulled a previous decision from the Commission, stating that USA had a sufficient protection for personal data for information to be sent there.[19] And in *Google Spain,* from 2014, where Google was ordered to remove information on a bankruptcy that was nine years old, Articles 7-8 in the were allowed clear horizontal effect ('Drittwirkung').[20] Thus, a connection between Drittwirkung and personal integrity is now acknowledged within EU law.

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[14] See the cases NJA 2010 p. 168 and 2011 p. 444.
[15] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105 para 48.
[16] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.
[17] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238.
[18] Joined Cases C-203/15 and C-698/15 *Tele 2* EU:C:2016:970.
[19] Case C-362/14 *Schrems* EU:C:2015:650.
[20] Case C-131/12 *Google Spain* EU:C:2014:217.

5 A SYNTHESIS WITH A WIDER VIEW

A common feature for the three issues discussed here is that they have all been affected by the enactment of the EU Charter of Fundamental Rights. In fact, they belong to the core area of, if not new, modernized or updated rights, where the impact of the Charter has been particularly strong.

However, this does not mean that the Charter, and the increased use of it by the CJEU, does not bring with it certain problems. Quite the contrary. It is therefore vital to discuss the relationship in the future case-law of the CJEU between the application(s) of the ECHR and the EU Charter, as well as future relations between the two courts. For instance, like many other 'insiders' of EU law, even a very learned scholar such as Allan Rosas believes that 'the risk of conflict between Strasbourg and Luxembourg case law has become negligible', without really managing to show how this can be true when the CJEU may make full use of the Charter that is not yet at the disposal of its Strasbourg counterpart.[21] It is also necessary to consider the difficulties connected with the accession of the EU to the Convention.

As a general background, it may be noted that according to Article 52(3) of the CFR, the rights therein that are also to be found in the ECHR shall have the same extent and meaning or significance as they have there. Nevertheless, there is in my view a clear risk that a different application and interpretation of these rights may now emerge between Luxembourg and Strasbourg, since the CFR, and hence the 'EU-specific catalogue of fundamental rights', will be exclusively elaborated by the CJEU (as well as by national courts when national bodies will 'apply' – i.e. implement or interpret themselves, independently so to speak – EU law at the national level, according to Article 51 CFR). Thus, the risk for a gradual divergence in the jurisprudence of the two EU courts, where the CJEU will interpret the rights in the CFR in another way than the ECtHR applies the rights that occur in both the CFR and the ECHR must not be underestimated. The CJEU may apply and interpret both texts, while the ECtHR is restricted to applying the ECHR. And the national courts are likely to be affected or inspired by and follow the interpretations of the CFR made by the CJEU, given the key position of the CJEU within the EU legal system.

An important argument in favour of the enactment in 2000 of the CFR, at the same time, was that it might provide EU citizens with a new and strong protection *against the EU institutions*, with their extensive competencies. Once the CFR became legally binding in 2009,[22] these institutions now have to act within a given legal framework, provided by the Union itself. Further, it is also necessary to take into account that the CFR contains certain important rights and principles that the ECHR lacks, such as the ones discussed above and the freedom to conduct a business (Art. 16).[23] Thus, through the CFR, the human rights protection within EU law is now materially more extensive than before December 2009, when the CFR entered into force. That is perhaps one of the reasons why the issue of EU accession to the ECHR does not seem to be high on the EU legal or political agenda,

[21] Allan Rosas and Lorna Amati, *EU Constitutional Law – An Introduction* (3rd edn, Hart Publishing 2018) 152.
[22] See Art. 6 TEU.
[23] For a closer study, see Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2014) 437 ff.

although the additional protocol no 14 of the ECHR does now make such an accession formally possible.

This possible accession was for a long time another main line in the discussion on the human rights protection within EU law. The ECJ declared in an Opinion from 1996 that such an accession required a treaty change (Opinion 2/94).[24] That same position was then as we know maintained, rather surprisingly, in the Opinion 2/12 from 2014, though Article 6 TEU does now urge the EU to accede to the ECHR.[25]

The current, unregulated relation between the CJEU and the ECtHR may create uncertainties for individual EU citizens as well as Member States. While the EU has not acceded to the ECHR, the CJEU is not formally bound by judgments from the ECtHR. This risk increased when the CFR became legally binding in December 2009, given the fact that the CJEU may easily deviate from interpretations made by the ECtHR concerning the same right(s) in the ECHR.

There are well-known examples of diverging opinions between the CJEU and the ECtHR, such as the so-called *Irish Abortion* case in the 1990s. There, an Irish court prohibited information regarding the possibilities for abortion in the UK. When the case came before the ECJ as a preliminary ruling according to Art. 267 TFEU, the court decided to see it as regarding free movement of services rather than freedom of speech or information, thus finding that Ireland had not broken EU law.[26] When the ECtHR dealt with the case a year later – in the days when that court would still treat cases relatively fast – it found that Ireland had violated both freedom of speech and freedom of information (Art. 10 ECHR), since the prohibition was not necessary in a democratic society.[27] The ECJ, however, maintains the view that the issue of human rights violations within EU law may not be reviewed when the national rule(s) in question will seem to lie outside the material scope of EU law.[28] This is true also for the CFR, which is subsidiary to other forms of EU law and may, according to Article 51(1) thereof, only come into force when some other kind of EU law – be it competition law or environmental law – is being applied.

6 JUDICIAL DIALOGUE IN THE FIELD OF EUROPEAN HUMAN RIGHTS LAW? THE GOOD EXAMPLES

It is of course very natural that an important and rather unexpected outcome like the one in Opinion 2/13 will have a huge aftermath and be very much discussed in legal and political circles throughout Europe. The question may even be raised whether an EU accession to the ECHR, with all the reservations and obstacles now identified by the ECJ, would be beneficial for and really strengthen the human rights protection in Europe of today, which is in fact far from certain. Here, I will, however, focus on what the Opinion might mean for the relationship between the CJEU and other European Courts, not only

[24] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:1996:140.
[25] Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:524.
[26] Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan and Others* EU:C:1991:378.
[27] *Open Door and Dublin Well Woman v Ireland* Apps no 14234/88 and 14235/88 (ECtHR, 29 October 1992).
[28] See also e.g. Case C-260/89 *ERT* EU:C:1991:254.

the ECtHR but also constitutional and/or supreme courts in the Member States (the so-called Bermuda Triangle of high European courts).

First, we may ask if such a thing as a legal dialogue between the highest courts in Europe does actually exist. Here, opinions seem to range from very optimistic to rather cynical ones. For example, Koen Lenaerts has talked about some 'sunshine stories' in this respect,[29] pointing to a case before the ECJ brought from Belgium[30] and decisions from the Austrian Constitutional Court (Verfassungsgerichtshof).[31] He stresses that the very existence of the preliminary ruling procedure in Article 267 TFEU is intended to create a climate of dialogue, which he believes will thrive in an era characterized by what is often called *constitutional pluralism*. Although his article was obviously written before Opinion 2/13 was published, he also pointed to some potential problems, such as the negative attitude towards the supremacy of EU law shown by the Czech Constitutional Court in 2012.[32]

There are undoubtedly some tendencies in the jurisprudence[33] and also a number of rules in the EU Treaties, the CFR and the ECHR that may very well foster such a dialogue. Here we may point to the obligation of the EU to respect the national identities of the Member States, 'inherent in their fundamental structures, political and constitutional' in Article 4(2) TEU, as well as the principle of loyalty according to Article 4(3), the fact that the fundamental rights form a part of the general principles of EU law according to Article 6(3) and not least the attempts to sideline the Charter with the ECHR and human rights in the constitutions of the Member States in Article 52 (3-4) CFR (whereas Article 53 CFR seems to be helplessly undermined by the *Melloni* judgment, as discussed below). Also Article 53 ECHR may be mentioned here, as well as the many articles in the ECHR (e.g. Articles 1, 13, 35) indicating that national courts must be involved in the application of the convention, in the spirit of subsidiarity, that is probably more important than ever given the very heavy workload of the ECtHR.[34] We may of course also find examples of cases from the ECJ that seem to be cooperative, so to speak, towards national courts. For instance, *Åkerberg Fransson* may be said to have such an effect, extending the range of the CFR (or perhaps rather stressing its already very wide range) while at the same time leaving the decision-making in individual cases to national courts, who know best the specific circumstances in each case.[35]

Another such case is *Kamberaj* from 2012,[36] where the ECJ found – albeit perhaps somewhat controversially – that Article 6(3) TEU does not in itself oblige national courts to set aside national rules that are contrary to the ECHR, since Article 6(3) does not regulate the relationship between the ECHR and national law. This may certainly be

[29] See Koen Lenaerts, 'Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten' (2015) 50(1) Europarecht 3.
[30] Case C-73/08 *Bressol* EU:C:2010:181.
[31] ÖVerfGH 28 November 2012, G-47/12-11 u.a.
[32] Pl. Ús 5/12 'Slovak Pensions', 31 January 2012, which is available in English at <http://www.usoud.cz/> accessed 01 June 2024. In this judgment, the Czech court declared the judgment in the Case C-399/09 *Landtova* EU:C:2011:415 to be *ultra vires*.
[33] See here in the doctrine Markus Ludwigs, 'Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR' (2014) 41(9-12) Europäische Grundrechte Zeitschrift 273, 278, invoking the case Michaud v France App no 12323/11 (ECtHR, 06 December 2012).
[34] See here also the new Additional Protocol No. 15 to the ECHR, that has yet not entered into force.
[35] *Åkerberg Fransson* (n 15).
[36] Case C-571/10 *Kamberaj* EU:C:2012:233.

interpreted in different ways, but it may after all make life a little bit easier for national judges, who are of course anyway obliged to set aside national rules that violate the ECHR due to the convention itself and to established rules and custom of international law.

7 AND THE BAD ONES

Melloni points in a totally different direction that makes judicial dialogue in Europe more or less impossible.[37]

In this case, Melloni had been sentenced in Italy to ten years of prison for fraud related to a bankruptcy. This was established in a trial in which he had not himself been present. The sentence was finally laid down in 2004 and the Italian authorities then wanted him extradited from Spain where he resided, invoking the European Arrest Warrant (EAW). In fact, Melloni had by then been in Spain for a long time, and Italian authorities had already wanted him extradited before in 1993. In 1996, Spain accepted this request, but Melloni disappeared and was not caught until 2008. After he had been arrested, a lower court, Audiencia Nacional, decided that he should be extradited, but Melloni then appealed to the Spanish Constitutional Court, Tribunal Constitucional, arguing that Article 24(2) of the Spanish Constitution strongly protects the right to a fair trial, which includes the right not to be sentenced to prison – at least not for long – in your absence. After fairly long proceedings, the Constitutional Court decided in June 2011 to ask three crucial questions to the ECJ.

Those three questions all concerned the relationship between three central rules in EU law, namely the EAW (secondary law), the Charter of Fundamental Rights (primary law) and the Spanish Constitution, though they were phrased in different terms. One of the reasons for the somewhat – in my view – odd outcome of the case, and one of the main difficulties for the ECJ, seems to have been the interpretation of the EAW, which in its original 2002 version prescribed that all Member States are to execute extraditions from other Member States according to the well-known principle of mutual recognition. At the same time, however, Article 5 of the text contained certain guarantees, clarifying that if someone was requested for extradition having been sentenced in his absence, there should be a possibility to have the sentence and judgment reviewed. Still, in the new framework decision of 2009, which should have been implemented in the Member States by March 2011 or at the very latest 1 January 2014, it is stated that these guarantees do not apply when the person requested for extradition had been represented by a lawyer and when he had known about the procedure against him and the fact that he might be sentenced in his absence.

Despite the fact that there may be reasons for these harsh rules – such as the interest in making the EAW work smoothly and, as far as Italy is concerned, the combatting of organized crime – the situation here was complicated, even more so since the ECJ actually

[37] Like many other European judges who have commented on the issue, Lenaerts, a most distinguished scholar if there is one, seems surprisingly unwilling to accept this. See Lenaerts, 'Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten' (n 29) 21 ff. Besselink ('The Parameters of Constitutional Conflict after Melloni' (2014) 39(4) European Law Review 531, 551), on the other hand, goes so far as to state that *Melloni* shows that ECJ finds it easier to get involved in a conflict with an 'embattled' constitutional court such as the Spanish than with a powerful one like the German, which in his view shows that the whole idea of a judicial dialogue is somewhat futile.

neglected to inform the readers of its judgment on the knowledge of such facts that Mr. Melloni might have had during the lengthy procedures. Furthermore, the possibilities for extradition were increased in 2009, as explained above, while the Spanish Constitutional Court ought to base its judgment on the situation in 2008.[38]

Anyway, against this background the Spanish Constitutional Court asked three questions to ECJ, which were formulated in the following way:

> 1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
> 2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter…, and from the rights of defence guaranteed under Article 48(2) of the Charter?
> 3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?[39]

8 CONSTITUTIONAL ANALYSIS OF *MELLONI*

Thus, though all three questions raise very important issues concerning the status of the EAW, the third and last question is in a sense wider, since it adds the huge constitutional issue, of general interest for the EU as whole, of the relationship between the EAW (secondary EU law), the Charter (primary EU law) and a national constitution.

Having this very interesting background in mind, the judgment is regrettably short. The ECJ applied the EAW in its new version; the fact that this in reality made the penalty or at least the application of the relevant penal rules harder was seen as mere procedural issue and thus obviously unproblematic, which is somewhat surprising.

Concerning the first question, the ECJ referred to the principle of mutual recognition and stated that extradition must take place in a case such as this, at least when the convicted person was aware of the trial against him and had the possibility to be represented by a lawyer (or was aware of the fact that a judgment against him may be given in his absence). Once again, it is not quite clear from the judgment what Melloni really

[38] Cf Article 7 ECHR and Article 49(1) CFR.
[39] Case C-399/11 *Melloni* EU:C:2013:107 para 26.

knew, though the judgment is obviously based on the pre-supposition that he was fully aware of all these facts.

In relation to question 2, then, the ECJ argued, invoking its own previous jurisprudence as well as case-law from the Strasbourg court, that the right to be present at a trial may be limited, thus arriving, in a not very convincing or persuasive line of reasoning, at the conclusion that the EAW (in particular Article 4a(1)) does not violate Articles 47-48 CFR. This argumentation is not convincing and may definitely be criticized, but the answer to the third question is nevertheless the most crucial part of the judgment, in my view.

As we know, Article 53 of the Charter states that none of its rules may limit or infringe upon the fundamental rights that are acknowledged by EU law, international law, international conventions to which the Member States are parties or the Constitutions of the Member States. The possibility for national courts to maintain a higher standard for single persons or cases in this respect than the one provided by the EAW (as interpreted by the ECJ) was, however, simply dismissed by the ECJ since that would 'undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply the legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution'.[40] But isn't that exactly what national courts ought to do, taking Article 53 of the Charter seriously?

This particular line of reasoning of the ECJ is not new. On the contrary, it is well-known from cases such as *Costa v Enel*[41] and *Simmenthal*.[42] It basically means that any kind of EU law, primary as well as secondary, is superior to any kind of national law of the Member States, including the national constitution. This latter part of this constitutional jurisprudence is not accepted by very many Member States or their highest courts, as is also well-known.

However, in this case the ECJ first, before maintaining its jurisprudence on this last point, on dubious grounds managed to find that the secondary EU law in question was compatible with the applicable primary EU law, which in itself states that it is inferior in relation to any more far-reaching protection of human rights that may be found in a national constitution. Thus, the ECJ has managed a double operation, both steps of which are most doubtful, in order to 'save the life' of the EAW, which has obviously been seen as very crucial. But while saving this patient, hasn't the 'life' or, at least, the legal status of the arguably considerably more important Charter been sacrificed instead, given that its Article 53 has so evidently been applied and interpreted *a contrario,* thus in reality losing its significance? At least, that is what follows from a close reading of the judgment.

Furthermore, unfortunate though it may be, it is clear that Opinion 2/13 reinforces the Melloni doctrine rather than loosening it. It is also worth noticing here that the 'Melloni-inspired' objections to accession based on mutual trust and the scope *ratione materiae* of EU law represent the only critical point in the Opinion which the AG didn't comment or analyse. In a way, then, this real or perceived problematic aspect of accession may be said to have been invented by the Court itself.

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[40] Melloni (n 35) para 58.
[41] Case C-6/64 *Costa v E.N.E.L.* EU:C:1964:66.
[42] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49.

When analysing the legally crucial parts of Opinion 2/13, it seems clear that the risk or possibility that the ECtHR might, after accession, have the right to examine aspects of the relationship between EU law and national law was one of the main problems for the ECJ. In particular, this sometimes perhaps understandable worry seems to have mattered in areas that are supposed to be characterized by a so-called mutual trust between the EU Member States. Here, it may even be said that the ECJ wished to impose an interpretation of the ECHR (including its Article 53) that is inspired by *Melloni* on the other main judicial actors in Europe, including the ECtHR. And that is not a sound basis for a dialogue.

Now, arguments in favour of the Melloni doctrine do of course exist.[43] In the doctrine, it has been argued that the Melloni doctrine and the idea of mutual trust is necessary within the areas of harmonized EU law, in order to protect the achievements of the Single Market, It may perhaps also be argued that the higher standard of human rights protection at national level that Article 53 stipulates shall only apply if this protection enjoys support from all or at least a majority of the Member States' constitutions, though that is far from clear.[44]

Nevertheless, even if those arguments are accepted to some extent, it is still quite surprising to find the Melloni argumentation at the very core of the Court's rejection of the accession to ECHR. Even if it should be accepted that the ECJ wishes to limit human rights protection *within* EU law in this manner due to certain other important key values of EU law,[45] it is still not easy to understand that those same values – i.e. mutual trust between Member States within the scope of EU law rationae materiae – should matter quite as much in relation to a future EU accession to the ECHR. Here, as said before, it seems like the ECJ wishes to impose its controversial jurisprudence on the ECtHR, in a situation where the ECJ fears a future supervision from the latter. To some extent, this is what permeates Opinion 2/13, and this attitude of the ECJ does not promote any future judicial dialogue between the highest courts in Europe. This reluctance to accept the final word of the ECtHR in future human rights issues that follows from this line of reasoning will hardly make national supreme or constitutional courts more willing to accept precedence for the CJEU in future conflicts between EU law and national constitutional law.

9 CONCLUSION

Thus, national courts must have the power to assess whether certain legal provisions are compatible with the CFR. In order to make such assessments, cooperation with the CJEU is sometimes necessary. But that cooperation, and the very basis of it, is, needless to say, undermined when the CJEU does not take the provisions of the Charter seriously.

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[43] For a kind of defense of Opinion 2/13 and its consequences, see Daniel Halberstam, "'It's the Autonomy, Stupid!". A modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the way forward' (2015) Michigan Law, University of Michigan, Public Law and Legal Theory Research Paper Series No 432 <http://ssrn.com/abstract=2567591> accessed 01 June 2024. Halberstam is however also critical towards many aspects of the opinion.

[44] This matter has never really been clarified, neither in the doctrine, nor in the jurisprudence of the CJEU or in any declarations, explanations, interpretations or other kinds of *travaux préparatoires* for the CFR. All that can be said for certain is that a human rights-friendly interpretation of Art. 53 should not impose too strict requirements in this respect.

[45] Cf Aida Torres Pérez, '*Melloni* in three Acts: From Dialogue to Monologue' (2014) 10(2) European Constitutional Law Review 308.

Therefore, the two simultaneous judgments of *Melloni* and *Åkerberg Fransson* have totally different implications. They point in different directions as far as the status of the Charter is concerned, *Åkerberg Fransson* increasing its status and impact in national law but *Melloni* in reality undermining it by protecting secondary EU law at any cost. Thus, reading and analysing *Melloni,* but also comparing it with *Åkerberg Fransson*, the shortcomings of the former, unfortunate judgment are indeed very clear.[46] Even the ECJ now seems to realize this, as may be seen, for example, in its judgment in the so-called *LM* case from 2018,[47] where a EAW was interpreted in a much more restrictive way in relation to Polish courts. That may of course be due to recent developments as an effect of the so-called rule of law crisis, but that's another story, that will not be dealt with here.[48]

In other words, and to summarise: If the CJEU wants to maintain its key role in the future structure of EU law,[49] it needs to show that it cares about fundamental rights and that it wants to work together, not against the ECtHR and national courts. The concepts discussed initially here, i.e. Drittwirkung, transparency and personal integrity, all strengthened by the Charter, have so far been most helpful in this process – and may be even more important in the future.

[46] It is however encouraging to note that the ECJ showed a far more human rights-friendly approach in its subsequent judgments on the Data Retention Directive (*Digital Rights Ireland* (n 17), as discussed above.
[47] C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586.
[48] For further reading, see e.g. Joakim Nergelius, 'Why Rule of Law Can Never be Part of an "Illiberal" Democracy' in Antonina Bakardjieva Engelbrekt, Andreas Moberg, and Joakim Nergelius (eds), *Rule of Law in the EU – 30 Years After the Fall of the Berlin Wall* (Hart Publishing 2021). See also Koen Lenaerts, 'On Values and Structures: The Rule of Law and the Court of Justice of the European Union' in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Sieps 2023).
[49] On such 'structural issues' see also Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 45 ff.

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DIGITALISATION OF THE PRELIMINARY INVESTIGATION PHASE, FUNDAMENTAL AND HUMAN RIGHTS AND THE PRINCIPLE OF OPENNESS – BALANCING CONFLICTING INTERESTS IN THE REVIEW OF LARGE DATA SETS

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The EU courts have divided an investigation into two distinct stages with different aims: the preliminary investigation phase and the contradictory phase. This paper examines issues related to the digitalisation of the preliminary investigation phase, from screening and open source intelligence to data processing during unannounced inspections or dawn raids. The question is how rights of defence are secured without jeopardising an investigation where data sets have grown beyond anything previously known. Within the context of the principle of openness of government activities in Finland and Sweden, the author sets out to find how the main rule of openness is balanced with the objectives of the preliminary investigation phase. The article examines case-law and literature, complemented with public statements from competition authorities, to find that a fair balance between conflicting interests has been achieved thus far. Examples of open questions currently subject to debate do, nonetheless, range from using personal apps for detection to whether national identity as per Article 4(2) of the Treaty on European Union can tip the balance between confidentiality of correspondence and cartel enforcement categorically in favour of the former. The Court of Justice will likely have to address the issue of national identity in the ongoing Ronos case.

1 INTRODUCTION

The EU courts have divided an investigation into two stages. In *Czech Railways*, the Court specified that the preliminary investigation phase and the contradictory phase should be seen as two distinct stages with different aims. The relevant timeline for detailed information concerning an investigated suspicion begins with a Statement of Objections (SO) being sent to the undertaking in question; the first part of the contradictory phase.[1] This article focusses on the first of the two phases. The focus is on, firstly, unannounced inspections or 'dawn raids' . Secondly, activities often included in the preliminary investigation phase preceding a possible inspection are discussed, as these may in part guide decisions on case prioritisation and the focus of inspections.

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[1] Case T-621/16 *České dráhy v Commission* EU:T:2018:367 paras 85 and 86; Case T-402/13 *Orange v European Commission* EU:T:2014:991 para 78; Case T-99/04 *AC-Treuhand AG v Commission* EU:T:2008:256 para 48. See also Riina Autio, 'Drawing the line at dawn raids: European courts' decisional practice on procedural issues arising from competition authorities' unannounced inspections' (2020) 41(6) European Competition Law Review 297, 303.

Digitalisation is not only a question of substantive law, but also one of considerable interest from the point of view of practical procedure. The shift from business documents on paper to electronic working environments is reflected in investigations of suspected competition restrictions. In the preliminary investigation phase in particular, the change means the Competition Authority (CA) also needs to discover new tools suited for new challenges, not least the fast-growing data sets relevant to such investigations. These include, to name but a few examples, screening tools, Open Source Intelligence (OSINT) and new technical solutions to reviewing large data sets.

There is a public interest in openness of government activities, but also a public interest in uncovering infringements. Uncovering infringements is only possible where enforcers can ensure that unannounced inspections, for instance, may be carried out without a potential target being informed beforehand. Details of tactical consequence such as precise search methods being made public may also make it too easy to conceal evidence of illegal conduct.

The present article first provides a brief overview of relevant legislation, from the Fundamental Rights Charter and the Human Rights Convention to EU Regulation 1/2003 and Directive 2019/1 to the Finnish Openness Act and duty to register information. The article then moves onto questions related to digital aspects of cartel detection, followed by observations on balancing the principle of openness with the interest of uncovering infringements and concluding remarks. Cartel detection is used as the primary context, as dawn raids are the presumption in cartel cases.[2]

2 LEGISLATION

2.1 THE CHARTER

The rule of law and respect for human rights are included in the founding values of the EU as established in Article 2 of the Treaty on European Union (TEU).[3] As indicated in Article 6(1) TEU, the Charter of Fundamental Rights of the European Union (the Charter) has the same value as the Treaties.[4] Article 7 of the Charter safeguards everyone's right to respect for their private and family life, home and communications. Article 47 of the Charter provides for the right to an effective remedy and to a fair trial.

As per Article 51(1) of the Charter, the provisions of the Charter bind the Member States when implementing Union law. Article 52(3) states that in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'the Convention'), the meaning and scope of those rights shall be the same as those laid down by the Convention. Article 52(4) further specifies that, in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Article 53 of the Charter stipulates that nothing in the Charter shall be interpreted as

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[2] Finnish Competition and Consumer Authority, 'Kartellit ja muut horisontaaliset kilpailunrajoitukset' <www.kkv.fi/kilpailuasiat/kartellit/> accessed 01 June 2024.
[3] Consolidated version of the Treaty on European Union [2012] OJ C326/13.
[4] The Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. This article hereby refers to relevant provisions in the Convention in the context of applicability to the EU and its Member States as provided for in the Charter.

2.2 THE CONVENTION

The Convention for the Protection of Human Rights and Fundamental Freedoms has been applied in a number of cases challenging the legality of inspection decisions or of inspections themselves. Typical questions raised with the ECtHR involve confidentiality of correspondence and adequate judicial safeguards, as in frequently cited cases such as *Société Colas*[5] or *Vinci*.[6]

Article 6 ECHR establishes the right to a fair trial. This includes, inter alia, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, the right to be informed promptly and in detail of the nature and cause of the accusation, and the right to defend oneself through legal assistance of one's own choosing.

Article 8 ECHR sets out the right to respect for private and family life. In the context of unannounced inspections perhaps the most relevant aspect of this protection is the right to respect for one's correspondence. Paragraph 2 of Article 8 specifies that there shall be no interference by a public authority with the exercise of this right except such as is *in accordance with the law* and is *necessary in a democratic society in the interests of* national security, public safety or *the economic well-being of the country*, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 ECHR establishes the right to an effective remedy. Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 8 was at the core of the *Delta Pekárny,*[7] *Vinci,*[8] *Janssen Cilag*[9] and *Kesko Senukai*[10] cases in the ECtHR. The issue of respect for one's correspondence is typically linked to claims of not having had access to a fair hearing by an impartial tribunal and of having been denied an effective remedy. Electronic data specifically is discussed in each of these cases.[11]

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[5] *Société Colas Est and others v France*, App no 37971/97 (ECtHR, 16 April 2002).
[6] *Vinci Construction et GTM Génie Civil et Services v France*, Apps nos 60567/10 and 63629/10 (ECtHR, 02 April 2015).
[7] *Delta Pekárny a.s. v Czech Republic* App no 97/11 (EctHR, 02 October 2014).
[8] *Vinci Construction et GTM Génie Civil et Services v France* (n 6).
[9] *Janssen Cilag s.a.s. v France* App no 33931/12 (ECtHR, 21 March 2017).
[10] *UAB Kesko Senukai Lithuania v Lithuania* App no 19162/19 (ECtHR, 4 April 2023).
[11] See eg *Delta Pekárny a.s. v Czech Republic* (n 7) para 9; *Vinci Construction et GTM Génie Civil et Services v France*, (n 6) para 10; *Janssen Cilag s.a.s. v France* (n 9) para 4; *UAB Kesko Senukai Lithuania v Lithuania* (n 10) para 9.

In *Roquette Frères*,[12] the Court of Justice reviewed its position in the earlier *Hoechst*[13] judgment and, referring to the ECtHR *Société Colas* judgment,[14] determined that the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover business premises.[15] However, the Court also highlights that in light of *Niemietz* rights of interference provided for in Article 8(2) ECHR may be more far-reaching in the case of business premises than where protection of the home is assessed in relation to other premises.[16]

It thereby appears well-established case law that the applicability of Article 8(1) ECHR extends beyond the individual home to business premises. Right to respect for private correspondence may thereby cover business correspondence. As established by the ECtHR already in *Niemietz* in 1992, however, the exception for interference by a public authority provided for in Article 8(2) may be more far-reaching in the case of business premises than a place of private residence.

2.3 REGULATION 1/2003

Regulation 1/2003 is the primary legislative instrument for enforcing the EU competition rules.[17] Article 11 covers cooperation between the Commission and the competition authorities of the Member States and stipulates, inter alia, that the competition authorities of the Member States shall, when acting under Article 101 or Article 102 of the Treaty on the Functioning of the European Union (TFEU),[18] inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.[19] National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 101 or Article 102.[20]

Article 12 further regulates exchange of information, specifying that, for the purpose of applying Articles 101 and 102 TFEU, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Information exchanged shall only be used as evidence in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may also be used for the application of national competition law.

These provisions are of interest in the present context, as CAs may exchange

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[12] Case C-94/00 *Roquette Frères* EU:C:2002:603.
[13] Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337.
[14] *Société Colas Est and others v. France* (n 5).
[15] *Roquette Frères* (n 12) para 29; *Hoechst v Commission* (n 13); *Société Colas Est and others v France* (n 5) para 41.
[16] *Roquette Frères* (n 12) para 29. Judgment *Niemietz v. Germany*, 16.12.1992, para 31.
[17] 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 [2003] OJ L1/1 (Regulation 1/2003).
[18] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. Regulation 1/2003 contains references to earlier numbering of the Treaty provisions, which are cited here using current numbering to avoid confusion.
[19] Regulation 1/2003 Art 11(3).
[20] ibid Art 11(4).

information during the preliminary investigation phase. Information may also be used as evidence not only by the collecting authority, but also by other EU CAs. The implications of the difficult balancing act that each CA faces when working with investigative tools not necessarily considered by the legislator may not be limited to a single national jurisdiction.

Article 20 establishes the Commission's powers of inspection. This includes the power to examine the books and other records related to the business under investigation, irrespective of the medium on which they are stored.[21]

In order to ensure that Member States are also able to efficiently enforce EU competition rules, Directive 2019/1 was drafted. In this present context, the Directive is largely in line with the Commission's powers.

2.4 DIRECTIVE 2019/1

Directive 2019/1, also known as 'ECN+', was to be implemented in Member States by 4 February 2021 with the aim to level the playing field of EU competition enforcement by way of minimum harmonisation.[22] Article 6 of the Directive covers powers to inspect business premises.

From the perspective of the present article, the provisions of Article 6 concerning platform neutrality, the access principle and continued inspections are of particular interest.[23] Member States are obliged to ensure that national administrative competition authorities are empowered to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection. Member States shall also empower CAs to continue making searches for information and the selection of copies or extracts at their own premises. These aspects were also highlighted in public communications made in relation to implementation in Sweden.[24]

2.5 FINNISH OPENNESS ACT AND THE DUTY TO REGISTER INFORMATION

The Finnish principle of openness of government activities and the Swedish principle of transparency each provide far more public access to public documents than in many other Member States. In Finland, the legislation was changed from a presumption of secrecy for documents concerning international relations to a presumption of public access in response to requirements of transparency for EU documents.[25] Membership has thereby solidified the

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[21] Regulation 1/2003 Art 20(2)(b).
[22] Directive (EU) 2019/1 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 [2019] OJ L11/3 (Directive 2019/1); Riina Autio, 'Harmonising Dawn Raids in a Global Village: The ECN+ Directive and Negotiating Legal Certainty Within Fragmented European Administrative Procedure' (2022) 6(2) Market and Competition Law Review 125, 136.
[23] Directive 2019/1 Arts 6(1)(b) and 6(1)(c).
[24] Government Offices of Sweden, Lagrådsremiss (draft legislative proposal), 'Konkurrensverkets befogenheter' (2 October 2020) <https://www.regeringen.se/rattsliga-dokument/lagradsremiss/2020/10/konkurrensverkets-befogenheter/> accessed 01 June 2024. See also Autio, 'Harmonising Dawn Raids in a Global Village' (n 22) 137.
[25] Government Proposal 30/1998, 88–89.

guiding principle that not only parties to an investigation, but also journalists and citizens ought to be able to observe how decisions are being made or how resources are being used within government activities.

The Finnish Act on the Openness of Government Activities (Openness Act 621/1999) is based on the core objective expressed in Section 3:

> The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.

The publicity of official documents is thus a strong main rule. Exceptions are classified into (1) confidentiality based on an individual assessment that justifies a presumption of harm, and (2) confidentiality based on the nature of the type of information as such. Business secrets are an example of the first category. This type of information shall not be kept confidential in circumstances such as fulfilment of the legal obligations of an undertaking. Examples of the latter category include information on an individual's health or use of health services, a psychological test or aptitude test on a person, political beliefs of private individuals or the financial status of a natural person.[26]

Section 42 of the Finnish Administrative Procedure Act (434/2003) stipulates that any details of orally submitted claims and evidence that may influence the decision to be made on the matter shall be registered or otherwise recorded. This duty to register information is complementary to the principle of openness, as any claims or evidence that may have influenced decisions made must be recorded in the register of a public authority such as the CA. This ensures that even information that is not available to the general public may be assessed in court or by the Chancellor of Justice, should a claim be made to call into question whether the CA has carried out its duties in accordance with the law.

In the *French Supermarkets* case, the Commission conducted inspections to investigate suspected concerted practices contrary to Article 101 TFEU, effectively exchanges of information, in the markets for the supply of fast-moving consumer goods, for the sale of services to manufacturers of branded goods and for consumer sales of fast-moving consumer goods. The targeted undertakings sought for the inspection decisions to be annulled.[27] The Court of Justice found that the Commission had failed to properly record interviews that constituted 'the essential elements of the indicia on which the Commission's [inspection] decisions are based'.[28] The Court annulled the inspection decisions that were not based on

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[26] Government Proposal 30/1998, 88, 99.

[27] Case C-682/20 P *Les Mousquetaires and ITM Entreprises v Commission* EU:C:2023:170; Case C-690/20 P *Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission* EU:C:2023:171; and Case C-693/20 P *Intermarché Casino Achats v Commission* EU:C:2023:172.

[28] The Court of Justice of the European Union, 'The Court sets aside in part the judgments of the General Court and, consequently, annuls the decisions of the Commission ordering inspections at the premises of a number of French undertakings in the distribution sector on account of suspicions of anticompetitive practices' (Press release No 44/23, Luxembourg, 9 March 2023)

sufficiently serious indicia as could be confirmed in the Commission's documentation.

This type of situation ought to be easier to avoid in a legal system with an established duty to register 'information applicable to all to central government authorities, municipal authorities, autonomous institutions governed by public law, the agencies operating under Parliament, and the Office of the President of the Republic', as per Section 2 of the Finnish Administrative Procedure Act. Worth noting, however, is a key consideration assessed differently in the Court of Justice as compared to the General Court judgment. The question was whether the Commission's obligation to record steps taken in order to collect information relating to the subject matter of an investigation is linked to the formal opening of an investigation. The General Court stated that there is a difference between the requirements posed to the Commission's collecting of evidence before and after an investigation has been formally opened. From this, the General Court deduced that the Commission was not required to record the interviews in question.[29] The inspection decisions were annulled in part, due to an unduly broad scope. The Court of Justice, however, ruled the General Court erred in this respect.[30]

3 DIGITAL DETECTION

3.1 SCREENING

Many CAs have hired data scientists in recent years. One of the reasons for doing so has been an increasing interest in screening projects and tools.[31] The Organisation for Economic Co-operation and Development (OECD) provides a useful definition: "Data screening tools in competition investigations are empirical methods that use digital datasets to evaluate markets and firms' behaviour in them, identify patterns and draw conclusions based on specific tested parameters".[32] The OECD notes that screens are most commonly designed to detect cartels. The typical example is bid-rigging. According to the definition of the OECD:

> Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed

<https://curia.europa.eu/jcms/jcms/p1_3876635/en/> accessed 01 June 2024. The same inspections were subject to a complaint in the ECtHR that was dropped following the judgments of the Court of Justice, decision *S.A. Casino, Guichard-Perrachon et S.A.S. A.M.C. v France* App no 59031/19 (ECtHR, 07 September 2023).

[29] Case T-254/17 *Intermarché Casino Achats v European Commission* EU:T:2020:459 paras 190–193.

[30] Case C-693/20 P *Intermarché Casino Achats SARL v European Commission* (n 27) paras 122–125.

[31] The author is by no means an expert on screening. I will only make some very general comments in this respect, in the interest of providing a competition lawyer's view to some current issues that merit further debate elsewhere.

[32] OECD, 'Data Screening Tools for Competition Investigations' (2022) OECD Competition Policy Roundtable Background Note 6.

> up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.[33]

In Finland, the public sector spends an average of 31 billion euros each year on products and services acquired from the private sector.[34] According to Aaltio et al 'cartels can result in a significant change in the distribution of bids'.[35]

Aaltio et al recently found that data screens with moderate data demands may be used to identify collusion in public procurement.[36] The study used data on 4,983 bids from 1,008 tenders for state-level asphalt paving contracts in Finland and Sweden between 1994–2019 and 1993–2009 respectively.[37]

The OECD has also looked at data screening tools for competition investigations, including screening processes relying on machine learning.[38] The OECD notes that 'there is no single perfect screen able to identify all violations in all markets', but suggests that 'machine-learning techniques can optimise the prediction of whether a conduct is consistent with collusion'.[39] The OECD also stresses that the results of screening are more likely to be useful for 'the opening of investigations and the prioritisation of cases', as a finding of infringement is subject to a higher standard of proof.[40]

In a nutshell, screening may give a CA useful information on whether collusion is likely in a given market. This is only possible if there is 'sufficient, relevant and accurate' data available to analyse.[41] The Finnish CA has worked towards a better availability of procurement data by identifying possibilities for updating a widely used procurement tool to facilitate use of the data generated for screening.[42] Aaltio et al found that screens trained on data from the Finnish asphalt cartel were notably less successful in identifying the Swedish cartel, operating at the same time period, and vice versa.[43] On the other hand, Huber et al

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[33] OECD, 'Guidelines for Fighting Bid Rigging in Public Procurement' (2009) 1 <https://www.oecd.org/competition/fightingbidriggininpublicprocurement.htm> accessed 01 June2024.
[34] Tuomas Hiilamo, Jan Jääskeläinen, and Reyes Willka, 'Kilpailu julkisissa hankinnoissa' (2023) 9 Tutkimusraportteja 9. See also Ministry of Economic Affairs and Employment of Finland, 'Innovative public procurement as an innovation policy instrument' <https://tem.fi/en/innovative-public-procurement> accessed 01 June 2024.
[35] Aapo Aaltio, Riku Buri, Antto Jokelainen, and Johan Lundberg, 'Complementary bidding and cartel detection: Evidence from Nordic asphalt markets' (2023) Finnish Competition and Consumer Authority Working Papers 1/2023, 3.
[36] ibid.
[37] Aaltio et al (n 35) 9–10.
[38] OECD, 'Data Screening Tools for Competition Investigations' (n 32).
[39] OECD, 'Data Screening Tools for Competition Investigations' (n 32) 16.
[40] ibid 27.
[41] ibid 19; OECD, 'Ex officio cartel investigations and the use of screens to detect cartels' (2013) Background Note, 38 <http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP(2013)14&docLanguage=En> accessed 01 June 2024.
[42] Finnish Competition and Consumer Authority, 'Harmaa talous ja hankinnat' (2019), 29–34.
[43] Aaltio et al (n 35) 28.

found that 'machine learning approaches originally considered in Swiss data perform very well in Japanese data when using the latter to both train and test predictive models for classifying tenders as collusive or competitive'.[44]

Various factors may affect the way a cartel either stands out in screening data or remains undiscovered. In the case of the Nordic asphalt cartels, many aspects were highly similar and there was data on a fair number of tenders. Regardless, the results produced by the screen differ, possibly because in Finland there was a single ringleader to the cartel and in Sweden four undertakings were active in decision-making.[45] It may be easier to spot anti-competitive behaviour where winning bids are consistently isolated or consistently clustered in a particular pattern, as opposed to a situation where the cartelists make cover bids that do not always follow the same pattern.[46] A cover bid is made to create the illusion of fierce competition.[47] Procurement units often notice something is not quite right if, for instance, the same four firms always bid for tenders or if there are always bids submitted late or otherwise failing to meet basic requirements. It is much harder to uncover collusion when there are cover bids made close to the price of the winning bid.

While cartel screening has taken great strides in recent years, one must remain mindful of the fact that no single screen is suited for all markets or cases. The similarities between the Finnish and Swedish asphalt cartels are striking. This striking similarity is yet not enough to mean that utilising the dataset from one cartel as training data would produce an identical result from screening for the purpose of detecting the other. In these markets, meetings twice a year were sufficient for bid-rigging in public procurement to run efficiently for years.[48] It stands to reason that a market such as Foreign Exchange spot trading, where the commercial value of the sensitive information shared expires in minutes or at most hours, will likely require a very different approach.[49]

3.2 OSINT

Open source intelligence is of particular importance in ex officio investigations. Within the context of cartel enforcement, investigations typically arise in one of two situations. In the first situation, the CA for example receives a tip-off reporting a suspected cartel or finds news reports indicating possible cartel activity. This type of suspicion leads to an investigation ex officio, which is to say by the authority's own (not a cartelist's) initiative. In the second situation, a cartelist files a leniency application, that is to say they admit to their participation in a cartel in exchange for immunity from fines or a reduction of fines that may

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[44] Martin Huber, David Imhof, and Rieko Ishii, 'Transnational Machine Learning with Screens for Flagging Bid-Rigging Cartels' (2022) 185(3) Journal of the Royal Statistical Society Series A: Statistics in Society 1074, 1105.
[45] Aaltio et al (n 35) 7, 19.
[46] Aaltio et al (n 35) 4, 7–8.
[47] OECD, 'Guidelines for Fighting Bid Rigging in Public Procurement' (n 33) 2, 13.
[48] Aaltio et al (n 35) 6–7.
[49] European Commission, 'Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel' (Press Release IP/21/6548, 2 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548> accessed 01 June 2024. Commission case AT.40135 FOREX (Sterling Lads) 02 December 2021, para 159.

be imposed for the cartel later on. In cases initiated by way of leniency applications, specifically so-called type I applications,[50] the CA typically has more specific information allowing for targeted inspections. In an investigation initiated ex officio, knowing where key persons are likely to be located (e.g., main offices, another branch office, home office) or how to enter a building, what personnel, documents and data and systems are likely to be encountered may be difficult to anticipate.[51]

The Commission cites 'intelligence collected through publicly available information' as a possible starting point for an ex officio investigation.[52] It should be noted that a finding of infringement, as with screening, suggests a higher standard of proof than initial prioritisation decisions or opening an investigation.

Open source intelligence has been defined as 'intelligence produced from publicly available sources that is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement'.[53] In the particular context of dawn raids, such sources may include material such as news items, the web sites of undertakings or public statements made by representatives of an undertaking.

The discussion has been raised in the Nordics also on whether or not public officials may make use of social media or apps to gather data for enforcement purposes. In Finland, there has been public debate concerning use of an app designed to locate hunting dogs, as police officers have used their personal apps to locate individuals for the purposes of checking licenses for instance.[54] The Swedish CA has referred to use of OSINT, also in the context of ex officio investigations.[55] There is nothing explicitly in Finnish legislation at least to either allow or prohibit the use of such tools for investigation purposes.

Open source intelligence can be the thing that makes or breaks the outcome of the dawn raid, as knowing the roles or locations of key individuals or what information to search for and where is essential to the success of an unannounced inspection. This is true whether the information gathered is useful for confirming or disproving the suspicion of an infringement. Open source intelligence may also dramatically reduce the duration of the inspection, or even the amount of data ending up in the case file. This is because a better understanding of the market in question and the activities and individuals involved therein, can help narrow down what documents and data may be relevant.[56]

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[50] Leniency applications made before an investigation is initiated are considered type I, while leniency applications providing significant new evidence once the CA is alredy investigating the cartel in question are considered type II.

[51] For OSINT use by the Spanish CA, see Cristina Vila, Floriane Sement, 'Digitalization of competition authorities' (*Competition Law Blog*, 2021) <www.cuatrecasas.com> accessed 25 March 2024.

[52] Commission, 'Ex officio investigations'<https://competition-policy.ec.europa.eu/antitrust/ex-officio-investigations_en> accessed 01 June 2024.

[53] Isabelle Böhm and Samuel Lolagar, 'Open source intelligence' (2021) 2 International Cybersecurity Law Review 317, 318.

[54] Markku Sandell, 'Poliisin mukaan koirien ja metsästäjien seurantaan tarkoitetut paikannustiedot ovat avointa tietoa – oikeusoppinut kritisoi' (*Yle*, 04 October 2023) <https://yle.fi/a/74-20052260> accessed 01 June 2024. See also Evgeniya Kurvinen, Matti Muukkonen, and Tomi Voutilainen, 'Hallintoasian selvittämisvelvollisuus ja siihen liittyvä tiedonhankinta' (2022) 3 Oikeus 381.

[55] Konkurrensverket, 'Konkurrens- och upphandlingstillsyn 2019' Rapport 2020:3, 17.

[56] Section 37 of the Finnish Competition Act empowers officials carrying out an inspection to examine the business correspondence, accounts, data processing records, any other records and data of the undertaking or

3.3 DATA PROCESSING DURING UNANNOUNCED INSPECTIONS

In the reality of present-day working environments, CAs no longer have any realistic option to avoid electronic data in various forms and on various data bases, carriers and platforms. The Swedish CA has relied to a significant extent on e-mail correspondence in, for instance, the 2022 taxi case.[57] In recent cases from the Finnish CA, penalty payment proposals to the Market Court in cartel cases include evidence such as metadata from spreadsheets, deleted messages, and WhatsApp messages.[58] The Commission's Forex cases (*Sterling Lads*,[59] *Three-Way Banana Split*,[60] *Essex Express*)[61] relied mainly on chats that had occurred in professional chatrooms.[62]

The amounts of data processed during unannounced CA inspections can be overwhelming both for the CA and for the undertaking inspected and its counsel. The particular challenges related to electronic working environments have been discussed in the OECD, amongst other forums. The Brazilian CA in this context referred to the challenge of handling data collected during inspections in a timely manner, providing the example of a bid-rigging case involving 50 terabytes of digital evidence.[63] This, in paper terms, may be estimated as hundreds of millions of pages.[64] This is worth noting as the challenges related to large data sets are shared by CAs worldwide. Many undertakings operate simultaneously in a number of jurisdictions and may face parallel investigations in the EU and elsewhere. A far smaller data set has been considered as a large amount of information in the ECtHR, as discussed below.

In the Lithuanian case of *Kesko Senukai*, the CA copied over 250 gigabytes of data.[65] To clarify the proportions of the Brazilian example given above, one terabyte equals 1000

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association of undertakings under investigation which may be relevant to the supervision of compliance with the Competition Act or the provisions issued under it, and to take copies thereof.

[57] Konkurrensverket, 'Beslutomkonkurrensskadeavgift; Konkurrensbegransandesamarbete-taxibranschen' Dnr 569/2020, 2.10.2022.

[58] Riina Autio, 'Competition authority dawn raid procedure since documents and data moved from stacks of paper to cloud servers' (2023) 3 Liikejuridiikka 8, 30.

[59] Commission Decision of 2 December 2021 relating to a proceeding under Article 101 of the Treaty on the functioning of the European Union and Article 53 of the EEA Agreement (CASE AT.40135 – FOREX – STERLING LADS) [2022] OJ C185/60.

[60] Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40135 – Forex-Three Way Banana Split) [2020] OJ C226/5.

[61] Commission Decision of 16 May 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40135 – Forex-Essex Express) [2020] OJ C219/8.

[62] European Commission, 'Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel' (n 49). On the Commission's Forensic IT procedures, see Dirk Van Erps and Nathalie Jalabert-Doury, 'Digital evidence gathering: An up-date' (2013) 2 Concurrences 213.

[63] Latin American and Caribbean Competition Forum, 'Session I: Digital Evidence Gathering in Cartel Investigations - Contribution from Brazil' DAF/COMP/LACF(2020)13, 2–3. Autio, 'Competition authority dawn raid procedure' (n 58) 31.

[64] Ariana Tadler et al, 'E-DISCOVERY TODAY: The Fault Lies Not In Our Rules…' (2011) 4(2) The Federal Courts Law Review 4, 6. See also University of Alaska Anchorage, 'How many files can I store?' (20 April 2020) <https://service.alaska.edu/TDClient/36/Portal/KB/PrintArticle?ID=95> accessed 01 June 2024.

[65] *UAB Kesko Senukai Lithuania v Lithuania* (n 10) para 9.

gigabytes. The 250 gigabytes discussed in *Kesko Senukai* included the entire mailbox contents from the computers of five employees.[66] The Competition Council argued that 'the Law on Competition had entitled it to examine, copy and seize any documents which were relevant to the investigation and which might have evidentiary value […] and that it had not copied any documents that were obviously unrelated to the subject of the investigation'.[67] The targeted undertaking had requested any information not related to the subject of the investigation be returned to it or removed from the Competition Council's storage devices, or otherwise destroyed.[68] The Competition Council replied that the information obtained had been assessed as necessary for the investigation and could only be removed from the investigation file following a well-founded request indicating within seven days the exact information to be removed and the grounds for its removal.[69] The ECtHR did not consider placing the task of examining each document and providing justification for its exclusion from the investigation file solely on the applicant company proportionate considering the large amount of data involved.[70]

In this respect, it is worth noting that the Finnish CA at least highlights the difference between temporary copies on the one hand, and documents and data copied into the case file on the other. Temporary copies are made so that documents and data in electronic format may be searched using digital forensic software and on devices a CA uses specifically for electronic inspections. This facilitates the use of search functions designed for investigative procedures and means the inspectors will not have to take hold of directors' or employees' devices for the entire duration of an inspection.[71] The Finnish CA's explanatory note on inspections of business premises states that the Finnish Competition and Consumer Authority (FCCA) may make temporary copies of data, or ask the undertaking to make such copies, in order to identify relevant documents and data in a centralised manner with as little strain to business functions as possible. Temporary copies of electronic data may be inspected in the Authority's own premises using separate computers and in rooms with restricted access. Search terms or other factors are used for the purpose of only copying documents and data into the case file that may be relevant to the investigation and that is not legally privileged. At the end of an inspection, all the data carriers where temporary copies have been stored are overwritten in a manner that does not allow for the material to be recovered.[72] The Swedish CA gives similar indications.[73] Since the *Kesko Senukai* inspection in 2018, the Lithuanian CA has also published an explanatory note on inspection procedure,

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[66] ibid para 14.
[67] ibid paras 18–19.
[68] ibid para 24.
[69] ibid para 25.
[70] ibid para 123.
[71] Riina Autio, 'Explaining Dawn Raids: A Soft Law Perspective into European Competition Authorities' Explanatory Notes on Unannounced Inspections' (2020) 11(9) Journal of European Competition Law & Practice 475, 482.
[72] Finnish Competition and Consumer Authority, 'Esite KKV:n toiminnasta Kilpailulain 35 §:n mukaisilla yritystarkastuksilla' (2017, 2021, 2022), 10.
[73] Konkurrensverket, 'Gryningsräder inom konkurrenstillsynen - Sökning i datorer och annan digital lagring' <www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/utredningsatgarder/gryningsrader/> accessed 01 June 2024.

part of which appears to address the issues raised in *Kesko Senukai*.[74]

Lately, the possibility of so-called virtual inspections has raised some discussion. The term refers to remote data collection, or in other words remote access to inspect data.[75] It is important to note that also during inspections carried out using remote access, there need to be adequate procedures in place to enable the target of the inspection or their counsel to safeguard the target's rights of defence.

In Finland, 'continued' inspections were made possible through legal reform in 2019. The term refers to the power to continue making searches for information and the selection of copies or extracts at the premises of the FCCA. During the COVID-19 pandemic, the FCCA carried out inspections using a so-called two-room model for the part of the inspection carried out at the premises of the Authority.[76] This means that the inspector goes through the electronic data collected as temporary copies, such as whole email boxes, in one room. Counsel is in another room at FCCA premises, and has a view of the inspector's computer screen, a view of the room the inspector is in, and a voice connection that may be muted on either side. This means that counsel is able to make comments in real time concerning the documents and data as the inspector views them. They are able to ensure that only officials named in the inspection decision have access to the data, and both inspector and counsel are able to consult a colleague without leaving the room and without being heard, if necessary. Forensic IT specialists may be called in to assist on either side of the connection.

A similar set-up could be a possible way of ensuring virtual inspections do not restrict the possibility of the undertaking targeted supervising the inspection as it is carried out. National procedural law may, of course, vary where it comes to the practicalities of inspection procedure.

3.4 CASE C-619/23 *RONOS* AS AN EXAMPLE OF NATIONAL DIFFERENCES

The *Ronos* case[77] should be an interesting one to follow, as the request for a preliminary ruling, lodged on 6 October 2023, concerns the conflict between powers to obtain information during a dawn raid as required by Directive 2019/1 on the one hand, and a degree of protection of correspondence higher than that required by the Charter or the Convention, in the Bulgarian Constitution, on the other. The subject matter of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice is a

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[74] Konkurencijos Taryba, 'Konkurencijos Taryba publishes explanatory note on inspections performed at business premises' (last updated 29 April 2020), para 20 <https://kt.gov.lt/en/news/konkurencijos-taryba-publishes-explanatory-note-on-inspections-performed-at-business-premises> (2020) accessed 01 June 2024. Also of interest within the context of the present article, para 12 covers the access principle and para 15 the power to conduct continued inspections.

[75] Autio, 'Harmonising Dawn Raids in a Global Village' (n 22) 145; Pedro Suárez Fernández, Pablo González de Zárate Catón, and María Allendesalazar Rivas, 'Spain' in Nathalie Jalabert-Doury (ed), *Competition Inspections in 21 jurisdictions: A Practitioner's Guide* (Institute of Competition Law, New York, 2022) 260.

[76] Riina Autio, 'Yllätystarkastusten jatkaminen Kilpailu- ja kuluttajaviraston omissa tiloissa – varhaisia kokemuksia jatketusta tarkastuksesta' (*FCCA blog*, 17 February 2023) <https://ajankohtaistakilpailusta.fi/2023/02/17/yllatystarkastusten-jatkaminen-kilpailu-ja-kuluttajaviraston-omissa-tiloissa-varhaisia-kokemuksia-jatketusta-tarkastuksesta/> accessed 01 June 2024. See also Finnish Government Proposal 72/2002 vp, 94.

[77] Case C-619/23 *Ronos* (case in progress).

decision by the Bulgarian Commission on Protection of Competition (Komisia za zashtita na konkurentsiata; 'KZK'). The KZK found a procedural infringement of the national competition law on the ground of a failure to comply with the obligation to cooperate with an inspection.

The KZK conducted an unannounced inspection at Ronos to investigate suspected bid-rigging. The examination of the managing director's laptop indicated the use of an app commonly used in Bulgaria for private calls and messages. The app linked to the one mobile phone used by the managing director. About half-an-hour after the inspector got access to the managing director's laptop, the inspector proceeded to review the correspondence accessible on the mobile phone and took screenshots of content relevant to the investigation.

Some four hours later, the KZK inspectors found almost all of the relevant correspondence had been deleted. The request for a preliminary ruling does not specify whether the KZK had exported the screenshots made previously prior to the correspondence accessible on the mobile phone being deleted.

Ronos and two natural persons present during the inspection were fined for obstructing the inspection. All three brought actions before the referring court (Administrativen sad Sofia-Oblast) against the KZK procedural fines.

The referring court highlights that the mobile phone in question contained, apart from business correspondence, private correspondence. The referring court notes that there is no contradiction between the inspection powers provided for in national competition law and the procedural safeguards for privacy as provided for in Article 3 of Directive 2019/1 and thereby in Article 7 of the Charter or Article 8 of the ECHR.

The Constitution of Bulgaria, however, provides Bulgarian citizens with stronger safeguards to protect the inviolability of their correspondence than EU law. The fundamental right to inviolability of correspondence may, as per the Bulgarian Constitution, be limited only with the authorisation of a judge and for a single purpose – to uncover or prevent serious criminal offences.[78] The referring court also points out that although bid-rigging is undoubtedly amongst the most serious forms of infringement of competition law, it is not a criminal offence within the meaning of the Criminal Code of Bulgaria.

The reason for the Bulgarian legislator having explicitly opted for stronger safeguards for privacy is, according to the referring court, bound up with Bulgarian national identity within the meaning of Article 4(2) TEU. According to the request, the Bulgarian Committee for State Security (Darzhavna Sigurnost) carried out large scale inspections of correspondence and operational surveillance of citizens without due cause during the period from 1944 to 1990. The national need for a higher standard of protection for privacy arises from this background.

According to the referring court:

> Determining the relationship between Member States' constitutional law and EU law is therefore essential to the present request for a preliminary ruling. The present case requires clarification of the relationship between the safeguards for

[78] Konstitutsia na Republika Balgaria Article 34, see request for a preliminary ruling in Case C-619/23 *Ronos* para 12.

> fundamental rights enshrined in the Constitution of Bulgaria and the provisions of EU law which it is for the national court to apply.[79]

The questions put to the Court of Justice are the following:

> 1. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as limiting the powers of a national competition authority, when conducting an inspection, to access private correspondence, the inviolability of which is guaranteed by the Member State's constitution, when the grounds for restricting the right to freedom and confidentiality of correspondence, enshrined in the constitution itself, are not in place?
> 2. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as meaning that, when an inspection is conducted by the national competition authority, a person who is asked to provide access to a data carrier is entitled to refuse access to content which forms part of his or her private correspondence, given that the inviolability of private correspondence is guaranteed by the Member State's constitution and that the grounds for restricting the right to freedom and confidentiality of correspondence and other communications, enshrined in the constitution itself, are not in place?

In the view of the referring court:

> An arrangement (even where enshrined in law) which limits the fundamental right to inviolability of correspondence for any reason other than those specified in the Constitution of Bulgaria is not only unlawful but unconstitutional. Therefore, it is not possible to assess the proportionality and appropriateness of such a limitation provided for by law, whatever the public, State or other high-level interest it is intended to serve.[80]

The referring court therefore considers it necessary to request a preliminary ruling to address the conflict whereby the national court is obliged to disapply EU law it is simultaneously bound to uphold.

The case is of interest from a Finnish perspective since Section 10(4) of the Finnish Constitution (731/1999) is not very far from the Bulgarian provision.[81] The Finnish provision states:

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[79] Request for a preliminary ruling in Case C-619/23 *Ronos* para 22.
[80] ibid para 14.
[81] For a comment from a Serbian law firm, see Nikola Ivković and Vuk Leković, 'Privacy Boundaries: The Ronos Case and Implications for Antitrust Enforcement' (*Gecić Law*, 12 March 2024) <https://geciclaw.com/privacy-boundaries-the-ronos-case-and-implications-for-antitrust-enforcement/> accessed 01 June 2024.

> Limitations of the secrecy of communications may be imposed by an Act if they are necessary in the investigation of *crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, during deprivation of liberty, and for the purpose of obtaining information on military activities or other such activities that pose a serious threat to national security*.

At present, although there has been some debate over whether some competition infringements might constitute fraud,[82] competition infringements are neither explicitly mentioned in the Finnish Criminal Code (39/1889), nor has the fraud theory been tested in practice.

The preliminary ruling in *Ronos* shall have broader implications than merely the outcome of the Bulgarian fining decisions in the case in question. Without the possibility of examining correspondence, and correspondence such as may be found in mobile apps in particular, competition enforcement is scarcely possible in present-day Europe.[83] On the other hand, if secondary EU legislation is found to stand higher in the hierarchy of sources of law than national constitutions even where there is a strong argument in favour of national identity demanding stronger safeguards to fundamental rights, the implications extend beyond competition enforcement.

It seems likely the Court will need to consider earlier rulings in cases concerning criminal matters like *Melloni* and *M.A.S.*[84] On the one hand, the primacy reasoning of the Court in *Melloni* seems straightforward. The Court found already in *Internationale Handelsgesellschaft* that recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by EU institutions would have an adverse effect on the uniformity and efficacy of EU law, and therefore the validity of an EU measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.[85] Rauchegger also suggests *M.A.S.* upholds the Court of Justice's

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[82] Juha-Matti Mäntylä, 'KKV esittää kartellien kriminalisointia – Emeritusprofessori: Se on kuin petos, josta ei joudu henkilökohtaiseen vastuuseen' (*Yle*, 04 September2018) <https://yle.fi/a/3-10386082> accessed 01 June 2024; Seppo Mölsä, 'Miksi kartelli on petos, mutta ei rikos?' (*Rakennuslehti*, 23 October 2016) <www.rakennuslehti.fi/blogit/miksi-kartelli-on-petos-mutta-ei-rikos/> accessed 01 June 2024.

[83] See eg The Netherlands Authority for Consumers and Markets, 'The ACM has imposed a fine of 184 million euros for deleting whatsapp chat-conversations during dawn raid' (11 December 2019) <www.acm.nl/en/publications/acm-has-imposed-fine-184-million-euros-deleting-whatsapp-chat-conversations-during-dawn-raid> accessed 01 June 2024; Bulgarian Commission on Protection of Competition, 'The CPC imposed a pecuniary sanction and fines on natural persons for failure to comply with the obligation for cooperation with the Commission in the exercise of its powers' (11 October 2022) <www.cpc.bg/en/news-11389?returnUrl=page%3d2> accessed 01 June 2024.

[84] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2012:600; Case C-42/17 *M.A.S. and M.B.* EU:C:2017:564. See also Vanessa Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection' (*European Law Blog*, 10 March 2014) <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> accessed 01 June 2024.

[85] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114 para 3; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* EU:C:2010:503 para 61.

> longstanding principle that EU law enjoys primacy over domestic constitutional law. Member States cannot give precedence to a domestic standard of fundamental rights protection because it offers better protection for individuals or because it is part of their national identity.[86]

As noted by de Boer, the opinion of the Advocate General in *Melloni* also addresses the issue of creating a safe haven for those wanting to escape prosecution within the Union, thus undermining the effectiveness of EU law.[87] Furthermore, in *M.A.S.*, the issue related to shared competence under Article 4(2) TFEU.[88] Establishing the competition rules necessary for the functioning of the internal market, as is the case with Directive 2019/1, falls within the exclusive competence of the Union, as per Article 3(1) TFEU.

On the other hand, there are significant differences between *Ronos* and earlier cases. Unlike *Internationale Handelsgesellschaft*, the issue is not one of a voluntarily assumed commitment[89] nor one of placing the interest of certain traders above the public interest of the EU as a whole.[90] The constitutional aspect in *Melloni* was based on an interpretation of a constitutional court, whereas in *Ronos* the conflict is with the constitution itself. The national identity argumentation was not present in *Melloni*, and the AG opinion in *Melloni* at least appears to leave the door open for making such a case.[91] Similarly, in *M.A.S.*, Advocate General Bot called into question whether the application of a limitation period long enough to protect the financial interests of the Union could be defined as conflicting with the Italian national identity. The referring court made this argument relying on the national constitution and the principle of legality. The Advocate General's opinion states: 'a Member State which considers that a provision of primary law or secondary law adversely affects its national identity may […] challenge it on the basis of the provisions laid down in Article 4(2) TEU'.[92] In *M.A.S.*, the Advocate General did not consider this to be the case.[93] The Court of Justice was able to give a ruling without addressing the issue of national identity. The national identity aspect as described by the referring court in *Ronos* appears to be clear.

On the one hand, Directive 2019/1 harmonises powers to inspect data precisely such as is at issue in *Ronos*. On the other hand, the compelling argumentation for consideration of national identity is not present in previous cases. It is true that the argument was put forward in *M.A.S.*, but why particular limitation periods ought to be considered part of national identity was not explained. In *Ronos*, however, national identity is clearly linked to higher safeguards for confidentiality of communications even in the case of public enforcement. It is difficult to see how the case could be resolved without addressing the issue of national identity.

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[86] Clara Rauchegger, 'National constitutional rights and the primacy of EU law: *M.A.S.*' (2018) 55(5) Common Market Law Review 1521, 1546.
[87] Nik de Boer, 'Addressing rights divergences under the Charter: *Melloni*' (2013) 50(4) Common Market Law Review 1083, 1088; *M.A.S. and M.B.* (n 84) paras 103 and 120.
[88] *M.A.S. and M.B.* (n 84) para 43.
[89] *Internationale Handelsgesellschaft* (n 85) para 18.
[90] ibid para 24.
[91] *Melloni* (n 84) paras 137–141; see also de Boer (n 87) 1090 and 1097.
[92] *M.A.S. and M.B.* (n 84) para 175.
[93] ibid para 176. The Advocate General in both *M.A.S.* and *Melloni* was Bot. See also de Boer (n 87) 1098 and 1100.

4 BALANCING THE PRINCIPLE OF OPENNESS WITH THE PERFORMANCE AND PURPOSE OF AN INSPECTION

The Finnish principle of openness of Government activities was discussed above. The Openness Act, does, however, also provide for limited instances of confidentiality.

Section 24 of the Finnish Openness Act contains a provision to protect the confidentiality of documents containing information in inspections or other statutory supervisory tasks of an authority, if access would compromise the performance of the inspection or its purpose. The same section protects the confidentiality of documents concerning the relationship of Finland with a foreign state or an international organisation; the documents concerning a matter pending before an international court of law, an international investigative body or some other international institution. It also protects the confidentiality of documents concerning the relationship of the Republic of Finland, Finnish citizens, Finnish residents or corporations operating in Finland with the authorities, persons or corporations in a foreign state, if access to such documents could damage or compromise Finland's international relations or its ability to participate in international co-operation.

The broad principle of openness is thereby balanced with considerations shielding inspections and international cooperation. This is also important in the context of preliminary investigations, as they may require participation from more than one EU CA.

Also, in the context of Commission investigations, it has been confirmed in *Orange*[94] that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage and that that undertaking has a right of access to the file. Consequently, it is only after notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence, given that were those rights to be extended to the period preceding the notification of the statement of objections, the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, and hence the information that could still be concealed from it.[95] Requiring the Commission to indicate the indicia leading it to consider that competition rules have possibly been infringed during the preliminary investigation stage would upset the balance between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.[96]

From this perspective, the details of an investigation in the preliminary phase appear to be well shielded. Once a CA has submitted an SO to an undertaking suspected of an infringement, the undertaking also has broad access to evidence in order to safeguard its rights of defence in the contradictory phase. The ruling in *French Supermarkets* stresses that where the Commission considers the possibility of using the information resulting from its exchanges with third parties for the purposes of adopting an inspection decision, it is required

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[94] Case T-402/13 *Orange v European Commission* EU:T:2014:991.
[95] *AC-Treuhand AG v Commission* (n 1) para 48 and the case-law cited; *Orange v European Commission* (n 94) para 78; *České dráhy v Commission* (n 1) paras 85 and 86.
[96] *Orange v European Commission* (n 94) para 81.

to record those exchanges.[97]

5 CONCLUSIONS

The interaction between a principle of openness or transparency of public administration such as in Finland or in Sweden, the protection of fundamental and human rights on a national or on an EU level, and broad powers to safeguard competition in the internal market raises a number of questions. Where does one strike the balance between protection of privacy and the public interest of uncovering competition restrictions? How may we secure the rights of defence without jeopardising an investigation where data sets have grown beyond anything previously known?

The decisional practice of the ECtHR related to dawn raids reflects beyond a doubt the fact that electronic data is essential for unannounced inspections in present-day Europe. This fact also highlights the importance of rulings made, currently awaited in the Bulgarian *Ronos* case pending in the Court of Justice.

Transparency is key. If CAs are collecting data in order to investigate suspected competition infringements, they also need to be able to provide a record of what has been done and how it has led to taking further steps. This is the case for the Commission and in Finland at least. At the same time, some details of tactical consequence must remain confidential.

In order to maintain a balance of outcomes, one needs to be aware of the many and varied links between national legislation, international legislation, agreements and co-operation, and rulings from not only national courts but also the EU courts and the ECtHR. The rate of developing new investigative tools and approaches must follow the rate of development of technology in business use. The rate of assessing best practices for procedures largely unregulated must, in turn, follow suit. Research into these issues is very much needed. Taking into account the realities of the activities in question, an inherently cross-border subject of regulation would undoubtedly benefit from combining different points-of-view, including those of Fundamental and Human Rights Law, Administrative Law, EU Competition Law, and national Constitutional and Criminal Law from more than one Member State.

[97] Case C-693/20 P *Intermarché Casino Achats SARL v. European Commission* (n 27) paras 122–125; Case C-682/20 P *Les Mousquetaires and ITM Entreprises v Commission* (n 27) para 163.

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TRANSPARENCY UNVEILED: ACCESS TO INFORMATION IN DIGITAL MARKETS ACT PROCEEDINGS ON EU LEVEL

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Access to information is essential in order to guarantee fundamental procedural rights under EU law – in particular in order to make full use of the right of defence. At the same time, access to information ensures the greatest possible transparency for all parties and stakeholders. Furthermore, access to information is also crucial in order to strengthen private enforcement, which is the second essential pillar of the effective enforcement of EU law in competition law. This article outlines the options provided for accessing information in the context of the new DMA on EU level. This article is part 1 on the issue of 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings'.

1 INTRODUCTION

The Digital Markets Act[1] contains a novel framework to ensure contestability and fair digital markets. Next to a plethora of substantive obligations for gatekeepers, the DMA provides for a sophisticated multi-layered enforcement system. The Commission constitutes the core enforcer of the DMA, with the Member States and their national competition authorities (NCAs) only having limited roles.[2] Furthermore, private enforcement of the DMA in national courts has been subject to much discussion.[3]

In this multi-layered enforcement system, and similarly to the related enforcement of EU competition law, procedural tools and rights are of considerable importance. In this context, access to information is decisive for stakeholders. For gatekeepers or undertakings or associations of undertakings concerned by DMA procedures, access to information is crucial to protect the rights of the defence, complement the right to be heard vis-a-vis the

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[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 and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/01 (DMA).

[2] Eg NCAs must inform the Commission when initiating investigations against gatekeepers under national competition law according to Articles 38(1), (2), (3), (5) DMA and once the Commission opens an investigation, the respective NCA must close its own and also report on the status of its investigations according to Article 38(7) DMA. See also Alexandre De Streel et al, 'Effective and Proportionate Implementation of the DMA' (2023) Centre on Regulation in Europe (CERRE) <https://ssrn.com/abstract=4323647> accessed 30 March 2024.

[3] Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13(4) Journal of European Competition Law & Practice 254.

enforcement authority and guarantee equality of arms vis-a-vis opponents in private enforcement proceedings.[4] Third parties may require access to information in order to understand the basis on which decisions that may affect them are being made or to gather information necessary for private enforcement actions. Rules that enable third parties to access information intend to compensate for the information asymmetry that usually exists.[5] For third parties that potentially suffered from harm caused by violations of the DMA-provision, access to documents referring investigations under the DMA are vital to establish their claim in the first place.[6] Moreover, it ensures that the fundamental principle of equality of arms under EU law is complied with, which can be derived from Article 6 ECHR[7] and which particularly plays an important role when it comes to private enforcement.[8] In general, access to information more broadly serves the principle of open justice, accountability, and transparency, fostering the general understanding and public confidence in DMA enforcement and public confidence.[9]

This article deals with access to information in the context of DMA enforcement. It covers access to information in the broader sense, including access to public enforcement files (discussed in-depth), inter-partes disclosure, publications of press releases, summaries and decisions. It delves into multiple angles of DMA enforcement procedures, from the Commission enforcement proceedings to Member States involvement and private enforcement proceeding in national courts. It does not deal with Commission-Member State cooperation in the context of the DMA, e.g. the obligation to inform Member States of acquisitions per Article 14(4) DMA. In addition, the applicability of other existing procedural rules at EU law level will be examined in more detail. Due to the regulatory proximity to competition law, a special focus will be placed on the possible applicability of the disclosure regime of the Damages Directive. In addition, a closer look is also taken at other EU substantive laws applicable in the periphery of the DMA, namely the GDPR[10] and the Representative Actions Directive (RAD).[11] It will be analysed whether and the therein containing regulations regarding access to information. A member state perspective will be provided in Helminger's article.[12]

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[4] OECD, 'Access to the case file and protection of confidential information – Background Note' (2019), 6 <https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf > accessed 30 March 2024.

[5] For competition law, see recital 15 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 L349/01 (Damages Directive).

[6] For competition law, see Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* EU:T:2006:151.

[7] *Zayidov v Azerbaijan (No 2)* App no 5386/10 (ECtHR, 24 June 2022) para 87.

[8] For competition law, see Recital 15 Damages Directive.

[9] Marios Costa, 'Accountability through Transparency and the role of the Court of Justice' in Ernst Hirsch Ballin, Gerhard van der Schyff, and Marteen Stremler LLM (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (T.M.C. Asser Press The Hague 2019).

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/01 (GDPR).

[11] 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 [2020] OJ L409/01 (RAD).

[12] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.

The DMA and the DMA Implementing Regulation (DMA IR)[13] provide access to the file only to the gatekeepers, undertakings and associations of undertakings under investigation and is limited by confidentiality considerations. Yet, third parties as well as the general public benefit from several publication obligations which are held by the DMA. Third parties in theory can also claim access to the Commission file under the Transparency Regulation, but the restrictive jurisprudence of competition law is likely to spill over to the DMA. EU procedural competition law, particularly the Damages Directive does not apply, as it is specific to competition law proceedings. While the GDPR and the RAD offer some access to documents under the respective disclosure regime, the applicable rules are very limited.

2 DMA AND DMA IMPLEMENTING REGULATION

The DMA and the DMA IR itself contain several rules on access to information in various DMA enforcement proceedings, which constitute an important source of information. To this end, the possibilities for gaining access to the Commission's files within the framework of the DMA are examined here. Moreover, it is also explained which decisions, resolutions or other information in connection with the DMA must be made publicly accessible.

2.1 ACCESS TO THE FILE

In the context of Commission proceedings, the Charter of Fundamental Rights (CFR) provides fundamental provisions regarding access to the file. Specifically, Articles 41(1) and (2)(b) of the CFR establish that individuals have the right to access their respective files, while taking into account the legitimate interests of confidentiality as well as professional and business secrecy. Moreover, these fundamental guarantees are typically reinforced by additional legal provisions, including those found in the DMA. The principal regulation governing access to the Commission file is outlined in Article 34 DMA, which is complemented by recital 88 DMA. To provide further clarity, more detailed provisions on access have been stipulated in Articles 7 and 8 DMA IR, which have been formulated in accordance with Article 46(1)k DMA. Contrary to competition law proceedings,[14] further guidelines or manuals have not been adopted yet but are likely.[15] The provisions concerning access to the files give detailed rules on access provided to the addressees of preliminary findings, not third parties. They contain rules on confidentiality and protection of internal documents.

2.1[a] Applicable DMA proceedings

Similar to competition proceedings, Article 34(4) DMA and Article 8 DMA IR connect the

[13] 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 [2023] OJ L 02/06 (DMA Implementing Regulation).
[14] Eg European Commission, Commission notice on the rules of access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C325/8 (Access to File Notice).
[15] See Article 47 DMA.

right to access to the file with the overall right to be heard as a procedural right of defence in various DMA public enforcement proceedings.[16] Especially Article 34(4) DMA mentions the rights of defence at the outset of the rules on access to the file. According to Article 34(4) DMA and Article 8(1) DMA IR, access to the file is given to addressees of preliminary findings pursuant to Article 34(1) DMA. Article 34(1) of the DMA mandates the Commission to provide the gatekeeper, or the undertaking or association of undertakings concerned with the preliminary findings of the Commission's investigation, including possible measures, in an exhaustive list of procedures, on which they may express their views in writing in accordance with Article 6 and Annex II of the DMA IR.

Accordingly, access to the file following the submission of preliminary findings by the Commission applies to different kinds of DMA proceedings. Access to the file is in a limited amount available in the gatekeeper designation procedure. Next to the fining decisions for procedural non-compliance in the context of gatekeeper designations discussed below, the Commission must grant access to the file after conducting a market investigation under Article 17 DMA in order to determine whether an undertaking providing core platform services (CPS) should be designated as a gatekeeper pursuant to Article 3(8) DMA, or in order to identify the CPS to be listed in the designation decision pursuant to Article 3(9) DMA. Access to the file is also given in the context of other market investigations, albeit only for market investigations for systemic non-compliance under Article 18 DMA, not for market investigations into new services and practices under Article 19 DMA.

Moreover, access to the file is given in the context of Commission decisions on gatekeeper obligations under the DMA. On the one hand, this concerns the possibility for the Commission under Article 8(2)-(9) DMA to specify the implementing measures for gatekeepers, in order for them to comply with the obligations in Articles 6 and 7 DMA. On the other hand, decisions on the suspension of obligations according to Article 9(1) DMA or on exemptions according to Article 10(1) DMA are covered. Furthermore, when it comes to non-compliance with DMA obligations, access to the file needs to be given before adopting an interim decision pursuant to Article 24 DMA or final decisions, either commitment decisions pursuant to Article 25 DMA or non-compliance decisions pursuant to Article 26 DMA, including the respective corresponding fining decisions under Article 30(1) DMA.

When it comes to procedural obligations of gatekeepers but also other undertakings or association of undertakings in the context of DMA public enforcement proceedings, access to the file is not provided in the context of any initial decision to conduct a procedural investigation mechanism, for example, to request information under Article 21 DMA or conduct inspections under Article 23 DMA. However, if the Commission plans to adopt a decision imposing fines for violation of any of these procedural obligations under Article 30(2) DMA, access to the file needs to be given. This does not only concern Commission investigatory measures, such as requests for information or inspections but also other procedural errors, e.g. in the context of the designation procedure, such as a failure to notify the Commission according to Article 3(3) DMA. Furthermore, fining decisions for

[16] For similar worded provisions in competition proceedings, see Wouter Wils and Henry Abbot, 'Access to the File in Competition Proceedings Before the European Commission' (2019) 42(3) World Competition 255, 260.

errors in the context of the specific notification obligations on gatekeepers for concentrations per Article 14 DMA or consumer profiling techniques per Article 15 DMA, for non-introduction of a compliance function under Article 28 DMA and errors in the context of access to the file under Article 34(4) DMA itself warrant the Commission to first provide a preliminary finding and (again) grant access to the file. The same applies in the context of decisions for setting the definitive amount of periodic penalty payment for different kinds of procedural violations for gatekeepers and other undertakings or associations of undertakings set out in Article 31(2) DMA.

2.1[b] Beneficiaries

Under Article 34(4) DMA, only the gatekeepers, undertakings or associations of undertakings concerned have access to the Commission files. Article 8 DMA IR defines the gatekeepers, undertakings or associations of undertakings 'concerned' as those to which the Commission has addressed its preliminary findings pursuant to Article 34(1) DMA, the so-called addressees. As a result, only addressees of envisaged decisions mentioned in Section 2.1[a] have a right to access to the file. Again, this limitation of the beneficiaries shows that access to the file in DMA proceedings is used in the context of rights of defence, i.e. in order to obtain information and prepare for the defence.

As stated clearly in Article 8(1) DMA IR, the Commission must only grant access to the file upon request. Ergo, the Commission does not have to act on its own initiative and grant access the file proactively. This also indicates that a beneficiary is free not to request access, can waive the right to access and cannot claim later on that its procedural access rights have not been respected.[17]

Hence, third parties have very limited access to the file under this DMA framework. They only have access insofar they can be considered undertakings 'concerned' in the sense of Article 34(4) DMA, as addressees of preliminary findings pursuant to Article 34(1) DMA and Article 8(1) DMA IR. Generally, the addressees of preliminary findings are gatekeepers or possible gatekeepers in proceedings mentioned in Section 2.1[a], such as decisions in market investigations under Articles 17 DMA for designating gatekeepers or under Article 18 DMA for systematic non-compliance. Outside of gatekeepers, undertakings and associations of undertakings would be the only addressees in proceedings mentioned in Section 2.1[a] in a case where the Commission plans to adopt a decision imposing fines for procedural violations under Article 30(2) DMA or setting the definitive amount of periodic penalty payment under Article 31(2) DMA for errors concerning investigatory measures mentioned in both Articles 30(2) and 31(2) DMA. Consequently, third parties are considered addressees, and they must receive preliminary findings and corresponding access to the file in cases where the Commission wants to adopt a decision concerning the third party's failure:

- to provide access to data, algorithms or information about testing in response to a request made pursuant to Article 21(3) DMA;

[17] For similar worded provisions in competition proceedings, see Cases T-145/89 *Baustahlgewebe v Commission* EU:T:1995:66 paras 23, 25, 26, 28 and 30; Case T-23/99 *LR AF 1998 v Commission* EU:T:2002:75, paras 173–185; Case T-376/10 *Mamoli Robinetteria v Commission* EU:T:2013:442 para 42; Case T-472/09 and T-55/10 *SP v. Commission* EU:T:2014:1040, paras 292–294.

- to supply the information requested within the time limit fixed pursuant to Article 21(3) DMA or supply incorrect, incomplete or misleading information or explanations that are requested pursuant to Article 21 DMA or given in an interview pursuant to Article 22 DMA;
- to rectify within a time limit set by the Commission, incorrect, incomplete or misleading information given by a representative or a member of staff, or fail or refuse to provide complete information on facts relating to the subject-matter and purpose of an inspection, pursuant to Article 23 DMA;
- to submit to an inspection pursuant to Article 23 DMA.

Other third parties are not undertakings 'concerned' in the sense of Article 34(4) DMA, as addressees of preliminary findings pursuant to Article 34(1) DMA and Article 8(1) DMA IR. They could be concerned by proceedings under the DMA, e.g. in case a violation of a DMA obligation causes harm on their part.[18] However, they have no corresponding access to the file under the DMA itself, which would allow them to access likely necessary or at least useful information to be able to initiate and successfully conduct, for example, follow-on private enforcement proceedings or judicial review against Commission decisions in the European courts. This regulatory decision is not contrary to Articles 41(1) and (2)(b) CFR, as those rights to be heard and access to the file also only apply for the addressee or object of the respective investigation,[19] not third parties.[20] Contrary to competition proceedings where at least complainants whose complaint the Commission intends to reject have access to the file,[21] such right is not given in the context of the DMA. Albeit third parties are free and even encouraged under Article 27 DMA to submit information to the Commission or national competition authorities, the DMA lacks a formal complaints procedure where complainants have certain rights as known from competition and state aid law.[22] Such a regulatory approach seems to be the trend in contemporary competition-akin regulation.[23] Accordingly, there is also no procedure to reject complaints under the DMA and no corresponding access to the file.

[18] Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' (November 19, 2023) <http://dx.doi.org/10.2139/ssrn.4637661> accessed 15 April 2024.
[19] Eg Case C-301/87 *France v Commission* EU:C:1990:67, para 29.
[20] Eg Case T-65/96 *Kish Glass v Commission* EU:T:2000:93, para 33.
[21] 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 [2003] OJ L1/1 (Regulation 1/2003) Article 7; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/01 (Regulation 773/2004) Articles 7 and 8; Joined Cases T-108/07 and T-354/08 *Diamanthandel A. Spira v Commission* EU:T:2013:367, para 65; Case T-699/14 *Topps v Commission* EU:T:2017:2 para 30; Case T-574/140 *EAEPC v Commission* EU:T:2018:605, para 93.
[22] Kati Cseres and Laurens de Korte, 'The role of third parties in the public enforcement of the Digital Markets Act' (forthcoming).
[23] Lena Hornkohl, 'The Role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review, and Private Enforcement' (2023) 8(1) Competition Law & Policy Debate 30.

2.1[c] Scope

The scope of the access rights under Article 34(4) DMA and Article 8 DMA IR relates to the Commission file. In competition proceedings, paragraphs 8 and 9 of the Access to File Notice,[24] in accordance with case law,[25] define the notion of 'Commission file'. In competition proceedings, this covers 'all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation' of the anti-competitive conduct as defined in line with the broad discretion of the Commission in terms of subject matter.[26] There are no clear-cut definitions in the DMA or DMA IR, and neither does there exist a specific notice or case law on the notion of file for DMA proceedings. Article 34(4) DMA simply mentions the file, without going into detail further. Article 8(2) DMA IR connects the right of access to the file to 'all documents mentioned in the preliminary findings', while Article 8(3) DMA IR goes beyond that by mentioning 'all documents' on the Commission's file. Furthermore, recital 3 DMA IR specifies that 'while the addressee of the preliminary findings should always have the right to obtain from the Commission the non-confidential versions of all documents mentioned in the preliminary findings, it should additionally be provided with access to all documents on the Commission's file, [...]'.

In the absence of any express guidance, the notion of file needs to be interpreted taking into account specifically the aim of the access provisions as an instrument that should facilitate the rights of defence, particularly the right to be heard. Article 34(4) DMA is regulated in the context of the rights of defence, particularly the right to be heard and mentions the rights of defence from the outset. Recital 3 DMA IR further underlines that aim. Furthermore, several provisions mention that 'all' documents of the file are covered by the access right, which shows a rather broad understanding. Although the question whether the EU competition law procedural framework should be applied by analogy to DMA proceedings will be discussed at a later stage,[27] the interpretation of general procedural principles conducted in the context of competition proceedings can at least serve as an indication for DMA proceedings. Taking all this into account, the notion of file and extent of the file must connect to the subject matter of the DMA proceedings as conducted by the Commission. As a defence instrument, the right to access must cover everything in the possession of the Commission connected to the subject matter and the scope of the respective investigation necessary to allow a defence against the Commission allegations. The form of the documents, tangible or not, cannot play a role.

Naturally, documents which are neither in the possession of the Commission nor considered in the Commission investigation cannot be subject to access to the file rights.[28] Furthermore, documents elsewhere in the possession of the Commission are not covered by

[24] Access to File Notice (n 14).
[25] Eg Case T-7/89 *Hercules v Commission* EU:T:1991:75 para 54; Case T-30/91 *Solvay v Commission* EU:T:1995:115 para 84; Case T-38/02 *Groupe Danone v Commission* EU:T:2005:367, paras 34 and 39; Case T-286/09 *Intel v Commission* EU:T:2014:547 para 351; *Topps v Commission* (n 21) para 30.
[26] On prioritisation and discretion see Or Brook and Kati Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' [2021] <http://dx.doi.org/10.2139/ssrn.3930189> accessed 30 March 2024.
[27] See below at 3.
[28] See 2.2 on possible inter-partes disclosure obligations.

the right to access to the file.[29] This might be particularly relevant in cases where a specific conduct could constitute both a competition law infringement and DMA violation.[30] In case the Commission uses documents from competition law investigations also in the context of the covered DMA proceedings, the documents concern the subject matter of the DMA investigation and are covered by the notion of file under Article 34(4) DMA. Yet, other documents in the possession of the Commission elsewhere are neither subject to the investigation nor subject to the allegations that the beneficiary seeks to defend itself against, and they are therefore not covered by the access to the file. Rules on further access to those documents have not been regulated in the context of DMA proceedings.[31]

2.1[d] Limitations

Ultimately based on Articles 41(1) and (2)(b) CFR, the right to access to the file is not an absolute right, but subject to limitations, as charter rights can be limited according to Article 52(1) CFR.[32] Practically most relevant and also explicitly regulated in Article 34(4) DMA and Articles 7 and 8 DMA IR are the limits for confidential information, particularly business secrets, and internal documents of the Commission or competition authorities of the Member States.

Confidentiality, in particular business secrets

General principles and procedures - In the context of access to the file[33] and disclosure of documents overall,[34] the protection of confidential information and business secrets plays a decisive limiting role. Contrary to competition proceedings, its further intertwining with leniency policy[35] does not play a role in the context of DMA proceedings due to the absence of leniency policy for the DMA. Generally, for competition law proceedings, the Commission has published a few detailed notices, templates and guidelines on confidentiality protection, such as the mentioned Access to File Notice, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU,[36] the

[29] Cf for competition proceedings, Wils and Abbot (n 16) 281–282.
[30] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19(1) European Competition Journal 57, 78; Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2022) 19(1) European Competition Journal 1, 17; Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2022) 19(1) European Competition Journal 86, 91.
[31] Cf for competition proceedings, Articles 3(7) and 7(1) of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L275/29; Access to File Notice (n 14) para 47.
[32] Cf for competition proceedings, Wouter Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay Between EU Law, National Law, the CFR of the EU and the European Convention on Human Rights' (2011) 34(2) World Competition 189.
[33] OECD, 'Access to the case file and protection of confidential information' (n 4).
[34] Lena Hornkohl, 'The Protection of Confidential Information and Disclosure in EU Private Enforcement of Competition Law' (2023) 16 GCLR 47; Lena Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021).
[35] Philipp Kirst and Roger Van den Bergh, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2016) 12(1) Journal of Competition Law & Economics 1.
[36] European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/06.

Guidance on confidentiality claims during Commission antitrust procedures,[37] the DG Competition's Guidance on Antitrust Confidentiality Rings,[38] or the DG Competition's Guidance on Data Room Procedures.[39] Such detailed framework does not exist for DMA proceedings. Yet, Article 34(4) DMA and Articles 7 and 8 DMA IR catch the essence and the principles of the confidentiality protection proceedings present in access to the file in competition law proceedings[40] and mandated by Article 339 TFEU. Further guidelines or extending the competition guidelines is nevertheless preferable for legal certainty.

Article 34(4) DMA only mentions that the access to the file is subject to 'the legitimate interest of undertakings in the protection of their business secrets' and access to the file 'shall not extend to confidential information'. Confidentiality and business secrets are tackled by Articles 7 and 8 DMA IR in greater depth. While business secrets, which could be algorithms of gatekeepers used for their CPS,[41] will play a huge role in the context of the DMA, other confidential information, such as privacy rights of individuals, can also become relevant, e.g. concerning proceedings for the non-compliance with privacy related provisions of the DMA such as Article 5(2) DMA.[42] Generally, neither the DMA nor the DMA IR contain any definition of what constitutes business secrets or confidential information. According to Article 7(7) DMA IR, 'any comments by third parties on a publication or consultation [...] shall be treated as non-confidential'. Beyond that, it will be essential to depend on established definitions derived from comparable case law[43] and other Union instruments.[44]

Proportionality and balancing – Otherwise, Article 34(4) DMA and Articles 7 and 8 DMA IR set out the rules, principles and procedures taken in case access to the file concerns confidential information and business secrets. They provide for a graded approach based on the principle of proportionality and balancing placed on the Commission in line with Article 339 TFEU as well as the objective of the access to the file in the context of the defence rights. The general rule of Article 34(4) sentence 4 DMA and Article 7(1) DMA IR is that business secrets and other confidential information cannot be disclosed unless otherwise provided for. Access to such information is otherwise provided for by Articles 7 and 8 DMA IR. Under these rules, access should be given in principle to all the documents, including confidential information. Thus, for DMA proceedings, a classic clash of rights or interests

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[37] European Commission, Communication on the protection of confidential information by national courts. in proceedings for the private enforcement of EU competition law [2020] OJ C242/01.
[38] European Commission, 'The use of confidentiality rings in antitrust access to file proceedings' <https://competition-policy.ec.europa.eu/document/download/1808bf30-2c83-40c9-a61f-69cdb246481f_en?filename=conf_rings.pdf> accessed 30 March 2024.
[39] European Commission, 'Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' <https://competition-policy.ec.europa.eu/document/download/4997fca8-af9e-4f7f-919f-e2bf5521a5df_en?filename=bp_disclosure_information_data_rooms_en.pdf> accessed 30 March 2024.
[40] Wils and Abbot (n 16) 271.
[41] Olga Kokoulina, 'Transparency of algorithmic decision-making: Limits posed by IPRs and trade secrets' in Jens Schovsbo (ed), *The Exploitation of Intellectual Property Rights* (ATRIP Intellectual Property series 2023) 28.
[42] Zsófia Maka, 'The Interrelation between Privacy and Competition Law with Special Regard to the Obligations under the Digital Markets Act' (2022) 2 ELTE Law Journal 17.
[43] Eg Case 53/85 *AKZO v Commission* EU:C:1986:256 para 28.
[44] Most notably, Article 2 No 1 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/01 (Directive 2016/943).

familiar to competition law[45] arises: access to information vs. protection of confidential information.

The DMA and DMA IR solve this issue itself by providing for different measures and steps to be taken. Furthermore, giving access to the file and protecting confidential information in case of disagreement should be governed by terms of disclosure set out in a Commission decision.[46] Consequently, the Commission can set the modalities for confidentiality protection on a case-by-case basis taking into account the specifics of each individual case and their general obligations under Article 339 TFEU. According to Article 7(2) DMA IR, the possibility to grant access to confidential information must be notified to persons submitting information based on requests for information or during interviews and by subjecting to these measures they also generally agree to their access under the conditions set out under Article 8 DMA IR.

Generally, both denying access to the file based on Article 34(4) sentence 4 DMA and Articles 7(1) and 8(4) DMA IR due to confidentiality reasons and giving access to confidential information in the file without any protective measures based on Articles 7(6) and 8(1) DMA IR should be the last resort after balancing the respective interests. The balancing test is explicitly only mentioned in Articles 7(6) ('overriding interest') or 8(4) DMA IR ('on balance, outweigh') as a step taken before granting access without confidentiality protection or denying access to information because of confidentiality considerations. However, overall, the balancing of interests under a proportionate approach is a general principle in the context of the clash of access and confidentiality.[47] Applying this approach indicates that access to confidential information with protective measures should be the norm, as long as the rights of defence of the parties may be effectively exercised on the basis of such protective measures. Such protective measures could be either redactions according to Articles 8(2) and 7(3)–(5) DMA IR or confidentiality rings according to Articles 8(3) and (4) DMA IR.

Redactions – One measure to protect confidential information when granting access to the Commission file in DMA proceedings is the redaction of confidential information as warranted by Article 8(2) DMA IR. Redaction means the removal of the confidential information in copies of the relevant piece of evidence.[48] Redaction can also include a non-confidential summary of the confidential content in square brackets.[49] Articles 7(3)–(6) DMA IR lay down detailed rules on the procedure surrounding redactions in the context of DMA proceedings. Importantly, the rules largely put the burden of claiming confidentiality, identifying confidential documents and passages thereof, as well as providing for the redactions on the originators of the respective documents. This relieves the Commission in this respect and involves the companies, which often have more resources and a greater interest in defending their confidentiality matters, on a large scale. While the Commission is in a general obligation to protect confidential information per

[45] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 49.
[46] Article 43(4) sentence 3 DMA; Article 8(3) DMA IR.
[47] Comparably for competition proceedings Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (n 34) 121–134.
[48] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 51.
[49] See, as an example of such practice in the context of the DMA, Decision C/2023/6100 of the European Commission of 5 September 2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector [2023] OJ Series C, para 34.

Article 339 TFEU, they can pass on such practical obligations to the undertakings concerned.[50] Generally, and against the background of confidentiality rings discussed in the next section, redactions might be particularly useful and create procedural efficiencies in case of small numbers of confidential documents. Giving access to the file based on non-confidential redacted versions is usually the proportionate approach as long as the undertaking requesting access is effectively exercising the rights of defence on that basis.[51]

In detail, Article 7(3) sentence 1 DMA IR mandates that the originators of documents in the file need to identify documents or parts thereof, which might contain business secrets. In case the originators do not identify such information, the Commission is in principle free to grant access to such information according to Article 8 DMA IR. The burden of claiming confidentiality is thus clearly on the originator; the Commission is, in line with Article 339 TFEU, under no obligation to check documents for confidential information upon their own motion without clear indications otherwise. The Commission can set a time-limit per Article 7(4)(a) DMA IR to further substantiate the confidentiality claim for any document or part thereof. This should allow the Commission to either grant access only to a redacted version due to confidentiality reasons per Article 8(2) DMA IR or to take the decision per Article 7(6) DMA IR to allow access to the confidential information without any redaction, because the Commission either considers the information to be non-confidential or the interest of giving access to the information is overriding the confidentiality considerations following the mentioned balancing test. In the latter case, the access to the confidential information, Article 7(6) DMA IR mandates the Commission to inform the concerned person and give the person a week to object. In case of objection, the Commission can adopt a reasoned decision to grant access to such information.

The Commission can further set a time-limit to provide the redactions per Article 7(4)(b) DMA IR. The person concerned must consequently submit a confidential and non-confidential version to the Commission. Confidentiality cannot be claimed vis-a-vis the Commission but only against access to the file or other types of disclosure of the information. The wording of Article 7(4)(b) DMA IR 'of the documents or statements' that should be redacted indicates that the documents must be available to the Commission in an unredacted version. This is further supported by the wording of the general Article 7(1) DMA IR, according to which rules on confidentiality protection apply towards 'information or documents collected or obtained by the Commission', i.e. the Commission must have full knowledge of the confidential information. Nevertheless, Article 7(4)(b) DMA IR also means that the originators of the respective documents claiming confidentiality must provide for the redaction and not the Commission, which lowers the authority's obligations. Still, the Commission must guarantee effective access to the file under the named balancing approach. Such redaction must be made 'in a clear and intelligible manner'. This pinpoints to the general principle of proportionality and balancing applicable also in this context, so that redaction depends on the degree, nature and extent that redaction is necessary for the protection of confidentiality as well as the comprehensibility of the redacted document.[52] In case of

[50] Marcel Nuys and Florian Huerkamp, in Rupprecht Podszun (ed), *Digital Markets Act: Gesetz über digitale Märkte* (Nomos 2023) Article 36.
[51] Cf for competition proceedings, Commission, 'Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' (n 39) para 9.
[52] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 52.

dispute, per Article 339 TFEU, it falls on the Commission when exercising the balancing approach, if these conditions have been met.

Moreover, the Commission can set a time-limit per Article 7(4)(c) DMA IR to provide 'a concise, non-confidential and clear description of each piece of redacted information'. Although not explicitly set-out, together with the generally applicable balancing and proportionality-approach, this might indicate that, for disputes on access to such redacted information, the Commission might also be able to grant only access to this description as a middle ground for giving full access to confidential information or such description could be provided under the subsequently discussed Articles 8(4) or (5) DMA IR when giving the addressee of the preliminary finding partly access to the documents. In case the person misses the deadline for any of these obligations, the Commission can consider the documents to be non-confidential per Article 7(5) DMA IR.

Confidentiality rings and data rooms – Instead of providing access to redacted documents, according to Article 8(3) DMA IR, the Commission can also grant access to a limited number of specified persons as determined by the terms of disclosure set out in a Commission decision. A procedure which only grants access to specific kinds of specified persons under certain conditions is usually called confidentiality rings, with the data room being a special form of confidentiality ring in connection to quantitative and qualitative data provided in electronic form.[53] The basic rules on the design of such confidentiality rings are laid down in Article 8(3)–(5) DMA IR but should further be determined by the mentioned terms of disclosure or future guidelines.

Interestingly, and against other procedures governed by EU law involving confidentiality rings, the confidentiality rings in DMA proceedings per Article 8(3) DMA IR are generally limited to *external* legal or economic counsel or technical advisors, each not in an employment relationship with the addressee. This means that according to Article 8(3) DMA IR, the addressees of preliminary findings and their employees, including members of legal departments are excluded from DMA confidentiality rings. On the contrary, the EU Trade Secrets Directive, for example, warrants that a confidentiality ring in trade secret procedures always 'shall include, at least, one natural person from each party'.[54] While confidentiality rings excluding parties but with external advisors are also the favoured option suggested by the Private Enforcement Confidentiality Communication of the Commission,[55] the Communication also allows to involve party representatives if necessary.[56]

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[53] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 36); European Commission, DG Competition's Guidance on Antitrust Confidentiality Rings <https://competition-policy.ec.europa.eu/document/download/1808bf30-2c83-40c9-a61f-69cdb246481f_en?filename=conf_rings.pdf> accessed 15 April 2024; European Commission, DG Competition's Guidance on Data Room Procedures <https://competition-policy.ec.europa.eu/document/download/f94afeca-0fa8-49e1-8a11-59cbb9dc136a_en?filename=data_room_rules_en.pdf> accessed 15 April 2024.

[54] Article 9(2) subpara 2 Directive 2016/943; Jochen Schlingloff, 'Geheimnisschutz im Zivilprozess aufgrund der "Know-how-Schutz"-Richtlinie' (2018) 64 Wettbewerb in Recht und Praxis 666.

[55] European Commission, Communication on adopting guidance for national courts when handling disclosure of confidential information [2020] OJ C242/1; Konstantina Strouvali and Efstathia Pantopoulu, 'Balancing Disclosure and the Protection of Confidential Information' (2021) 12(5) Journal of European Competition Law & Practice 393.

[56] European Commission, Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law [2020] OJ C242/1 para 67; Lena Hornkohl, 'Die neue Mitteilung der EU-Kommission über den Schutz vertraulicher Informationen in

The intentional exclusion of access to the file in DMA proceedings serves the purpose of safeguarding confidentiality,[57] while still enabling the addressees to participate in the process to the greatest extent possible. This participation is primarily facilitated through the engagement of external advisors, allowing them to comprehensively grasp the proceedings and exercise their rights of defense. The latter is specifically ensured by Article 8(5) DMA IR. The external advisors can ask (exceptionally, within one week) for access to a specific document of the confidentiality ring being made available in a non-confidential version to (a member of) the addressee (or an extension of the confidentiality ring towards other external legal, economic or technical advisors) itself, when this is 'indispensable for the proper exercise of the addressee's right to be heard'. In that instance, the addressee only gets access to a non-confidential version, i.e. a redacted version pursuant to Articles 7(3)–(6) DMA IR that the party that submitted the documents must provide per Article 8(7) DMA IR, not the confidential version itself. Should the party that submitted the document not agree to such a procedure, the Commission must adopt a reasoned decision per Article 8(7) DMA IR. In any case, the addressee is not fully added to the confidentiality ring, where access is given, in principle, without any redactions to the external advisors. Access to confidential information for the addressee can thus only be provided outside of the application of a protective measure, such as the confidentiality ring, which is a last resort case as previously described.

Moreover, Article 8(3) DMA IR sets out detailed procedural rules on the confidentiality obligations of the external advisors participating in the confidentiality ring, including if they enter into an employment relationship with any addressee.[58] Article 8(3)(e) DMA IR opens the door for electronic organisation of confidentiality rings, which is specifically relevant for data rooms.[59] Generally, members of the confidentiality ring have access to the full confidential versions of the documents in the file. However, Article 8(4) DMA IR allows not to grant access or to grant access to partly redacted documents if the Commission 'determines that the harm that the party that submitted the documents in question would likely suffer from disclosure under those terms would, on balance, outweigh the importance of the disclosure of the full document for the exercise of the right to be heard'. For procedural efficiency reasons, Article 8(9) DMA IR paves the way back to redactions, which can be used in confidentiality rings or instead of them 'on order to avoid a disproportionate delay or administrative burden'.

Internal and sensitive documents

Further limits to access to the file can be provided by internal documents of the Commission or other sensitive documents. Such are covered by both Article 34(4) sentence 4 and 5 DMA and Article 8(4) sentence 2 DMA IR. The rules are at least on the outset modelled on very similar rules for competition proceedings.[60] For competition proceedings, the rules have been

Kartellschadensersatzklagen und ihre Anwendung im deutschen Recht' (2020) 22 Europäische Zeitschrift für Wirtschaftsrecht 957, 961.

[57] For private enforcement of competition law, see Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (n 34) 262–283.

[58] Article 8(3)(c) DMA IR.

[59] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 36); DG Competition's Guidance on Antitrust Confidentiality Rings (n 53); DG Competition's Guidance on Data Room Procedures (n 53).

[60] Cf Wils and Abbot (n 16) 278–281.

backed by the European courts in order to guarantee the functioning of the competition proceedings.[61]

Contrary to confidential information and business secrets, there are fewer rules on the limitation provided by these kinds of documents. Various types of documents can fall in this category. Article 34(4) sentence 4 DMA mentions 'internal documents of the Commission or the competent authorities of the Member States'. Article 34(4) sentence 5 DMA underlines the correspondence between the Commission and the competent authorities of the Member States as particularly protectable. Article 8(4) sentence 2 DMA IR further mentions correspondence with public authorities of the Member States or third countries and 'other types of sensitive documents', which is much broader. Neither the DMA nor the DMA IR provide for definitions of these types of documents. Taking into account the jurisprudence on the right of defence from competition proceedings,[62] such defence rights can also not be circumvented by the public authorities in DMA proceedings by declaring a document internal. Ergo, internal and sensitive documents can neither be incriminating or exculpatory.

According to Article 34(4) sentence 4 DMA and Article 8(4) sentence 2 DMA IR for such internal and sensitive documents a balancing test applies, similar to the procedure on confidential information and business secrets. While Article 34(4) sentence 4 DMA underlines that internal information should generally not be disclosed, Article 8(4) sentence 2 DMA IR clarifies that such a decision can be taken following a balancing approach, i.e. if on balance the interest in protecting internal documents would not 'outweigh the importance of the disclosure of the full document for the exercise of the right to be heard'. Should access concern the correspondence between the Commission and the competent authorities of the Member States, Article 34(4) sentence 5 DMA clarifies that the balancing should usually result in denying access to such documents. Consequently, access to such documents is possible ('shall') but unlikely. Contrary to competition proceedings,[63] instead of non-disclosure of such internal documents, Article 8(4) sentence 2 DMA IR also allows the (partial) redaction of such documents as a mitigated approach compared to the full non-disclosure. Equally, contrary to competition proceedings,[64] this obligation to redact the documents then generally falls on the originator of such documents per Article 7(3) DMA IR, which constitutes the Commission, (competent) national authority, or third state authority. Confidentiality rings are generally not foreseen for internal and sensitive documents.

2.1[e] Timing

Article 34(4) DMA and Article 8(1) DMA IR give the right to access to the file to the addressees of preliminary findings pursuant to Article 34(1) DMA. Consequently, access to

[61] Eg Joined Cases T-25/95 et al *Cimenteries CBR and Others v Commission* EU:T:2000:77, para 420; Case T-62/99 *Sodima v Commission* EU:T:2001:53, paras 22 and 23; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* EU:T:2003:245, para 394; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* EU:T:2004:118, para 40; Case T-410/03 *Hoechst v Commission* EU:T:2008:211, para 165.

[62] See, e.g., Case T-44/00 *Mannesmannröhren-Werke v Commission* EU:T:2004:218, paras 54 and 56; Case T-210/01 *General Electric v Commission* EU:T:2005:456, paras 668–672; Case T-758/14 *Infineon Technologies v Commission* EU:T:2020:307, paras 56 and 79.

[63] *Mannesmannröhren-Werke v. Commission* (n 62) para 53.

[64] ibid.

the file can only be provided after the preliminary findings have been sent, in order to guarantee that the Commission can investigate the problematic behaviour without any interference by the addressee.[65] Article 8(1) sentence 2 DMA IR expressly provides that access shall not be given before the notification of the preliminary findings. In that sense, DMA proceedings are similar to competition proceedings.[66]

Further timelines, e.g. on the duration of access to the file, are not set out expressly in the provisions. However, Article 34(2) DMA and Article 6 DMA IR state that the Commission sets a time-limit for the addressees of the preliminary findings to respond in accordance with the procedural requirements laid down in article 6 DMA IR. Consequently, when determining the time limit to submit the observations, the Commission needs to take into account, that the addressee must have sufficient time to access the file and prepare the observations.[67] Since the right to be heard and access to the file relates to the allegations set out in the preliminary findings, the duration of the access itself depends on the magnitude of the file and allegations and must be sufficient in order to properly prepare a defence.

When it comes to documents included in the file after the preliminary findings have been sent to the addressees, access must be given to such documents if the Commission wants to rely on such documents in the final decision. According to Article 34(3) DMA, the Commission can only base its decisions on matters on which possible addressees have been able to comment on.

2.1[f] Procedure

In contrast to competition proceedings, which entail comprehensive notices and guidelines, the DMA and DMA IR lack detailed provisions regarding the procedure for accessing the file. While the DMA and DMA IR do address confidentiality protection through specific disclosure terms, they do not offer specific guidelines on the process of accessing the file otherwise. Consequently, the Commission retains discretion in determining how access to the file will be granted. In considering the principle of good administration, as outlined in Article 41 CFR, and the objective of access to file rules, aimed at providing a foundation for defence against Commission allegations, it is essential to keep in mind various factors. These factors include the nature of the DMA proceeding, the volume of information involved and the necessary protective measures. As a result, the methods of access may vary from case to case. Potential methods for accessing the file can include electronic access or access at the premises of the European Commission. The decision on the specific method will depend on the unique circumstances of each DMA proceeding, taking into account the amount of information involved and the protective measures required to ensure confidentiality. The Commission will exercise discretion in determining the appropriate method of granting access to the file, keeping in mind the principles of good administration and the objective of facilitating a robust defence against Commission allegations.

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[65] Cf Case C-407/04 P *Dalmine v Commission* EU:C:2007:53, para 60; Case T-655/11 *FSL and Others v Commission* EU:T:2015:383 paras 50 and 91–97, upheld on appeal in Case C-469/15 P *FSL and Others v Commission* EU:C:2017:308, paras 39–50.

[66] Article 15(1) of Regulation 773/2004.

[67] Cf, for competition proceedings, Wils and Abbot (n 16) 283–285.

2.1[g] Use

Article 8(8) DMA IR limits the use of documents obtained through access to the file to the purpose of the proceedings within which access to the documents was given but also administrative or judicial proceedings concerning the application of the DMA related to those proceedings. The accessed documents can thus be used to fully defend oneself from allegations in DMA proceedings. That includes the DMA proceedings at the Commission in which access was given. 'Judicial proceedings' on the application of the DMA related to those proceedings also include judicial review proceedings in the European courts against a final decision following the Commission proceedings. Since the term 'judicial proceedings' is not limited to EU proceedings, also any usage in connected (private enforcement) proceedings in national courts are covered.

For external advisors participating in the mentioned confidentiality rings, Article 8(3)(d) DMA IR particularly clarifies that they 'shall not disclose any of the documents provided or their content to any natural or legal person that is not bound by the terms of disclosure and shall not use any of the documents provided or their content other than for the purposes referred to in Article 8(8) below'. Their obligation is therefore specifically manifested and includes the binding obligation to not pass on the information disclosed to them to the addressees themselves.[68]

2.2 PUBLICATIONS

Next to the access to the file provisions and specifically relevant for third parties excluded from access to the file under the DMA, various publication obligations under the DMA can provide a useful source of information. For third parties in particular, this represents a crucial - and often the only - source of information, but at the same time also enables their right to take a stand in certain cases. Publications will also be relevant for granting general transparency of DMA proceedings.

2.2[a] Publications in the context of consultations

The DMA foresees certain consultation obligations during various proceedings. The provisions usually oblige the Commission to 'consult' or third parties 'to provide comments' in the context of specific procedures but not for all procedures in the DMA. This generally is foreseen before the Commission takes a decision involving remedies, commitments, or other measures. In the context of such consultation obligations, the DMA often obliges the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. This should allow third parties to effectively provide comments and help the Commission in the effective and practical enforcement of the DMA. However, these publications can provide an important source of information on the proceedings, problematic conduct and possible gaps in Commission enforcement, particularly for third parties, e.g. those wanting to venture on private enforcement endeavours on national level. The publications will be relevant for parties beyond those involved in the consultation, since

[68] See, on the exclusion of the addressees themselves, above at 2.2[d].

the provisions oblige the Commission to (openly) publish and not simply provide consulted companies with the information. In that sense, the provisions also serve transparency.

In three instances in the context of consultations, the DMA obliges the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. First, the Commission must conduct such a publication before adopting a decision specifying the 'measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7' according to Article 8(6) DMA. Second, Article 18(5) DMA mandates the Commission to publish a non-confidential summary of case and possible remedies in order to allow 'interested third parties to effectively provide comments' when concluding a market investigation into systemic non-compliance and envisaging imposing remedies on the gatekeeper. Third, also in the context of systemic non-compliance, the Commission must publish a non-confidential summary of case and the main content of possible commitments before adopting a decision on systemic non-compliance according to Article 18(6) DMA. In the context of other market investigations or decisions of the Commission, neither a publication nor a consultation with third parties is warranted by the DMA.

In the three mentioned cases, the publication concerns 'a non-confidential summary of the case', not any preliminary findings the Commission has to provide to the gatekeepers concerned. In the context of the obligation specification under Article 8(6) DMA, the Commission can further publish a non-confidential version of the gatekeeper's reasoned submission 'to explain the measures that it intends to implement or has implemented' to ensure compliance with Articles 6 and 7 DMA. Beyond that, the intended measures that the Commission must publish with the summary further differ. In the context of the obligation specification under Article 8(6) DMA, the publication concerns the measure that the Commission is considering taking, i.e. the specification of the obligations under Articles 6 and 7 DMA or that it considers the gatekeeper to take to comply with the specifications. In the context of the market investigation into systemic non-compliance, the publication includes either the envisaged remedies to be imposed by the Commission per Article 18(1) DMA or the commitments offered by the gatekeeper and envisaged to make binding by the Commission per Article 25(1) DMA.

Further consultation obligations under the DMA do not warrant the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. During a market investigation into new services and practices under Article 19 DMA, the Commission may 'consult third parties, including business users and end users of services within the digital sector that are being investigated and business users and end users who are subject to practices under investigation'. Moreover, the Commission 'may consult third parties' before adopting a non-compliance decision according to Article 29(4) DMA. Even though there is no publication obligation, the Commission will need to make information available during the consultation on the conduct investigated in order to allow meaningful responses. While the provisions do not specify the kind of information to be provided to the consulted parties, the information needed to warrant any such meaningful responses will likely be information on the parties, conduct and envisaged measures. Contrary to the publication procedures discussed above, since there is no publication obligation, this information does not need to be made publicly available and may only be submitted to the

parties consulted. Consequently, it will not provide a source of information for other than the parties consulted and will not increase the general transparency of DMA proceedings.

The comments provided under any of these consultation obligations become part of the Commission file. As discussed above,[69] even though they are included to the file after the Commission has sent out preliminary findings and the undertakings concerned have granted access to the file, should the Commission rely on the comments provided in the final decision, the undertakings must have had an opportunity to have access to these documents and defend themselves against the accompanying allegations. Such a possibility is underlined by the fact that Article 7(7) DMA IR foresees the possibility to make the comments publicly available. These published comments may provide for another publicly available important source of information on DMA proceedings. Generally, Article 7(7) DMA IR considers the comments provided as non-confidential but allows the redaction of the 'author's or sender's name or other identifying information'. In the absence of any other rules on redaction, the above discussed[70] rules for redaction pursuant to Articles 7(3) and (4) DMA IR apply.

2.2[b] Publication of Commission decisions

Article 44 DMA includes the general obligation of the Commission to publish the decisions taken under the DMA framework. As known from competition proceedings, the published decisions serve as an important source of information, especially to prepare for any follow-on private enforcement or to initiate judicial review of the Commission decisions in the EU courts[71] and as a tool to enhance transparency of public enforcement.[72] Similarly for the DMA, such decisions could serve as a basis for third parties in order to contemplate filing follow-on private enforcement cases in national courts or judicial review of the decisions in the EU courts.

Article 44(1) DMA lists the decisions that the Commission must publish:

- Article 3 and 4 DMA on gatekeeper designation;
- Article 8(2) DMA on specification of the obligations;
- Article 9 DMA on suspension;
- Article 10 DMA on exemptions;
- Article 16 DMA on opening of market investigations;
- Articles 17–20 DMA on the decisions the Commission can take in the context of the various market investigations;
- Article 24 DMA on interim measures;
- Article 25(1) DMA in case the Commission wants to make proposed commitments binding, Article 29 DMA on non-compliance;
- Article 30 DMA on fines; and

[69] See above at 2.1[a].
[70] See above at 2.1[d] ('Confidentiality, in particular business secrets').
[71] *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* (n 6) para 115; Kati Cseres and Laurens de Korte, 'The role of third parties in the public enforcement of the Digital Markets Act' (forthcoming).
[72] Wouter Wils, 'Publication of Antitrust Decisions of the European Commission' (2020) 4 Concurrences 93 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701604> accessed 15 April 2024.

- Article 31 DMA on periodic penalty payments.

Article 44(1) DMA also determines the minimum content of such publications: the names of the parties and the 'main content of the decision, including any penalties imposed'. The Commission can go beyond that but must have 'regard to the legitimate interest of gatekeepers or third parties in the protection of their confidential information' per Article 44(2) DMA. Due to the explicit mentioning of the 'names of the parties' in Article 44(1) DMA, the identity of the parties of any decision cannot be redacted for confidentiality reasons.

Beyond that, the protection of confidential information is further laid out in Article 7(3) DMA IR, with the further rules on redaction set out in Article 7 DMA also being applicable in the context of redactions of decisions. Similar to the provisions on access to the file discussed above,[73] Article 7(3) DMA IR also places the obligations on the persons claiming confidentiality in the context of the publication of possible confidential information. According to Article 7(3) DMA IR, the Commission can oblige the persons claiming confidentiality to identify the parts of a Commission decision which may contain confidential information and set a time-limit for this. Thus, the administrative burden of the Commission is again mitigated and rather placed on the persons concerned. They can propose redactions of the confidential information in line with the rules set out in Article 7 DMA IR. However, as also warranted by Article 339 TFEU, the ultimate obligation to protect confidential information in published decisions, lies with the Commission. Article 7(5) DMA IR further mitigates this by allowing the Commission to consider parts of the decision as non-confidential, in case the natural or legal person has not reacted in the time-limit set by the Commission.

The rules do not contain any further specification on timeline when decisions need to be published after being taken and the format, including the venue of such publications. Regarding the already published first decisions on the designation of gatekeepers according to Articles 3 and 4 DMA in 2023, for example, the Commission published a press release on the same day,[74] a summary of the decisions in the Official Journal of the EU,[75] and the full decisions after some time, redacted for confidential information on the dedicated website on the DMA.[76] Confidentiality protection is provided for by confidential information being replaced by a non-confidential summary in square brackets or otherwise shown as "[…]".[77]

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[73] See above at 2.1[a].

[74] European Commission, 'Digital Markets Act: Commission designates six gatekeepers' (*European Commission Press Release IP/23/4328*, 06 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 15 April 2024.

[75] European Commission, Summary of Commission Decision of 5 September 2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector [2023] OJ C/2023/548.

[76] European Commission, 'Gatekeepers' (2024) <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 30 March 2024.

[77] Eg Summary of Commission Decision of 5 September 2023 designating Apple as a gatekeeper (n 75) para 34.

2.2[c] Other Commission publication obligations

The DMA contains several other obligations for the Commission to publish information in the context of its DMA enforcement proceedings. Other more general publication obligations also exist when it comes to implementing[78] and delegated acts;[79] as they are not so much connected to enforcement of the DMA obligations and be used as a source of information for gatekeepers or third parties as described in the introduction, they will not be discussed further. Similarly, albeit containing more information on the substance of the DMA application and enforcement, the report on the implementation of the regulation and the progress on its objectives per Article 25(3) DMA will not be discussed further.

Apart from this, there are several publication obligations for the Commission throughout the DMA, which serve the general transparency, but which can also be used by third parties, e.g. in the context of parallel or follow-on private enforcement. Generally, Article 5(2) DMA IR obliges the Commission to make public the opening of any proceedings but leaves the form, place and context to the Commission, which will likely recourse to its DMA website.[80] In the context of gatekeeper status of undertakings, outside of publishing the decisions on designation themselves as set out by the discussed Article 44(1) DMA, Article 4(3) DMA mandates the Commission to publish and update a list of gatekeepers and CPS on an on-going basis. Outside the 'on-going basis', the publication venue and timelines are not further specified. With regard to the first designation decisions, the Commission has undergone the mentioned multiple publications via press releases, summary decisions and publications of the decisions on the website.[81] The latter dedicated webpage[82] on gatekeepers and their CPS will likely also contain any future updated list. At all events, for information subject to mandatory publication, the responsible institution is required to make use of the Official Journal of the EU.[83]

Connectedly, per Article 14(4) DMA, the Commission should publish a list of acquisitions by gatekeepers of which the gatekeepers have informed the Commission under Article 14(1) DMA. Here, the timing, annual publications, is specified. Further, it is specifically mentioned that the Commission 'shall take account of the legitimate interest of undertakings in the protection of their business secrets'. Since no further explanation is given on the latter, the mentioned general rules on protection of confidential information of Article 7 DMA IR apply,[84] which focus on redactions and providing non-confidential versions. The Commission uses the dedicated webpage on gatekeepers to update on their acquisition, where it

[78] Article 46(3) DMA.
[79] Article 49(3) DMA.
[80] European Commission, 'Digital Markets Act' <https://digital-markets-act.ec.europa.eu/> accessed 30 March 2024.
[81] See above at 2.2.
[82] European Commission, 'Gatekeepers' (2024) <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 30 March 2024.
[83] Decision (EC Euratom) 2009/496 of the European Parliament, the Council, the Commission, the Court of Justice, the court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union [2009] OJ L168/41, Article 4(2).
[84] See above at 2.1[d] ('Confidentiality, in particular business secrets').

> publishes a non-confidential summary of the information submitted by the gatekeeper pursuant to Article 14 DMA, together with the date of notification of such information to the Commission and the identity of the undertakings concerned. The Commission publishes this information on a rolling basis not earlier than four months after receipt of the information.[85]

In the context of market investigations, other publication requirements, outside of the ones already mentioned,[86] apply. With regard to the market investigation into new services and practices, Article 19(3) DMA warrants the Commission to 'publish its findings in a report within 18 months since the date' of the opening of the market investigation. The location is not provided and a publication on the DMA-homepage of the Commission[87] is likely. Next to providing transparency on the market investigation, the information provided in the report could be useful for third parties to see if a gatekeeper's new services and practices might affect them and if they want to follow up on the market investigations, i.e. with private enforcement in national courts.

In the context of other market investigations, i.e. market investigations for designating gatekeepers per Article 17 or market investigations into systemic non-compliance per Article 18 DMA, the Commission is not under the obligation to publish such a general report. Rather, if the market investigation for designating gatekeepers results in the designation of another gatekeeper or further CPS, the just-mentioned obligation to publish and update a list of gatekeepers and CPS on an on-going basis per Article 4(3) DMA applies. Similarly, in the context of the market investigation into systemic non-compliance per Article 18 DMA, the above-mentioned consultation and publication provisions are relevant.[88] However, in case of a request for market investigation by Member States according to Article 41(1)-(3) DMA, the Commission must publish its results of the assessment whether there are 'reasonable grounds' to open a market investigation. Such information can be useful to national authorities in the context of competition investigations of conduct that could fall under the DMA and (national) competition law,[89] or for private parties if they want to enforce problematic conducts in national courts.

In the context of the Commission's decision-making powers, a Digital Markets Advisory Committee is advising the Commission. The final Commission decisions are issued as an implementing act within the meaning of Article 291 TFEU in the form of a decision.[90] The procedure is based on the so-called Comitology Regulation.[91] By choosing an implementing decision and applying the Comitology Regulation, the Member States, which are otherwise hardly involved in the DMA enforcement,[92] can in principle be included in the

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[85] European Commission, 'List of Acquisitions' <https://digital-markets-act-cases.ec.europa.eu/acquisitions> accessed 23 January 2024.
[86] See above at 2.2[a] and 2.2[b].
[87] European Commission, 'Digital Markets Act' <https://digital-markets-act.ec.europa.eu/index_en> accessed 23 January 2024.
[88] See above at 2.2[a] and 2.2[b].
[89] See on this below at 3.
[90] Compare with competition proceedings, Wils and Abbot (n 16) 288.
[91] Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55/13 (Regulation 182/2011).
[92] See below at 3.

decisions via the comitology procedure, in this case through the DMA Advisory Committee.[93] According to Article 50(4) DMA, the opinion of the Committee should not only be communicated to the addressee but also made 'public together with the individual decision, having regard to the legitimate interests of the protection of professional secrecy'. Such opinions, particularly if contrary to the Commission decision, can constitute an important source of information for third parties equally disagreeing with the Commission or the gatekeepers for judicial review actions.

2.2[d] Commission publication of news items and DMA homepage

Outside of explicit publication obligations laid down in the DMA, the Commission generally uses the DMA webpage (https://digital-markets-act.ec.europa.eu/) to update on developments on the DMA and the proceedings. On the webpage, information on proceedings, consultations, legislative developments, templates, and cases etc. can be found and are regularly updated. Consequently, this webpage provides for important information on the DMA and its enforcement, useable also for third parties, for example.

The press releases and other news items of the Commission constitute a further crucial source of information.[94] Similar to competition law proceedings, the European Commission uses press releases, news announcements, and news articles to inform the public about on-going developments surrounding the DMA.[95] These can frame an important source of information about current developments. Given the experiences from competition proceedings, quite some time can pass between the publication of a press release on a specific enforcement case and the publication of a non-confidential version of a decision.[96] In the meantime, third parties wanting to file for judicial review of a Commission decision or follow-on private enforcement in national courts become aware of the decision and can already familiarize themselves with the case content, the parties and the problematic conduct and prepare any court or out-of-court action.

2.2[e] Publication obligation of the gatekeepers

The DMA does not only oblige the Commission to publish information on DMA enforcement proceedings. Throughout the DMA, one can also find several obligations for the gatekeepers to publish information on their conduct and their compliance with DMA

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[93] Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* EU:C:1983:158, para 35; Case T-19/91 *Vichy v Commission* EU:T:1992:28, para 39; *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* (n 6) para 149.

[94] Christian Rauh, 'Clear messages to the European public? The language of European Commission press releases 1985–2020' (2022) 45(3) Journal of European Integration 683.

[95] European Commission, 'Latest news' <https://digital-markets-act.ec.europa.eu/latest-news_en> accessed 15 April 2024.

[96] Eg Decision C/2017/4444 of the Commission of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping) (Decision C/2017/4444) [2018] OJ C9/11 <https://competition-cases.ec.europa.eu/cases/AT.39740> accessed 15 April 2024; European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (*European Commission Press Release IP/17/1784*, 27 June 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 15 April 2024. The latter was published on 27 June 2017 while the former, despite occurring on the same day, was only published on the website on 18 December 2017. .

obligations. In the substantive obligations for gatekeepers in Article 6 and 7 DMA, several publication duties connected to other duties of gatekeepers are regulated. Via Article 6(12) DMA, e.g. the gatekeeper is mandated to 'apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services'. In that context, Article 6(12) DMA also warrants the gatekeeper to 'publish general conditions of access, including an alternative dispute settlement mechanism'. Similarly, according to Article 7(4) DMA the 'gatekeeper shall publish a reference offer laying down the technical details and general terms and conditions of interoperability with its number-independent interpersonal communications services, including the necessary details on the level of security and end-to-end encryption. The gatekeeper shall publish that reference offer within the period laid down in Article 3(10) and update it where necessary'. These publication obligations allow for third parties, the Commission and the general public to check the compliance with the substantive obligations, or the reporting obligations serve to achieve fair and contestable digital markets.

Connected to these objectives, Article 11(1) DMA obliges the gatekeepers to 'provide the Commission with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in Articles 5, 6 and 7 DMA' and publish that report in a non-confidential version as mandated by Article 11(2) DMA. The Commission has published a template for drafting the compliance report.[97] Article 11 DMA gives the gatekeeper 6 months to do so and update the report annually. A first batch of reports have been published already.[98] In terms of content, Article 11 DMA only obliges the gatekeeper to provide a 'detailed and transparent' report but does not go beyond that. The gatekeeper has large discretion here. These reports specifically will allow not only the Commission to check if the gatekeepers follow their obligations and commence non-compliance investigations[99] but will also be crucial for third parties and their private enforcement endeavours.

Similarly, and also with regard to the DMA's connection to the GDPR as described below,[100] according to Article 15(3) DMA the gatekeeper must make publicly available an overview of the audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its CPS. The Commission has also published a template for reporting on consumer profiling techniques and the independent audit of such reports.[101] While the audited description itself does not need to be published, the gatekeeper must make an overview of it available. Further clarifications on content, style or length are not provided. Although the gatekeeper will be careful in drafting these reports under Articles 11 and

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[97] European Commission, 'Template form for reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act) (Compliance Report)' (*European Commission*, date of last update 09 October 2023) <https://digital-markets-act.ec.europa.eu/document/download/904debdf-2eb3-469a-8bbc-e62e5e356fb1_en?filename=Article%2011%20DMA%20-%20Compliance%20Report%20Template%20Form.pdf> accessed 15 April 2024.

[98] European Commission, 'Compliance Report' <https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports> accessed 15 April 2024.

[99] European Commission, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act' (*European Commission Press Release IP/24/1689*, 25 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689> accessed 15 March 2024.

[100] See below at 5.1.

[101] Commission, 'Template form for reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (n 97).

15 DMA, they could point the Commission, the general public, and third parties to DMA infringements and infringement of other EU law rules, e.g. data protection law, as discussed below,[102] especially in case of borderline legal opinions.

3 APPLICATION OF EU PROCEDURAL COMPETITION LAW?

Given the relatively limited access to the file rights under the DMA, the question arises if the procedural competition law rules apply, mainly Regulation 1/2003, Regulation 774/2003 and the corresponding guidelines and, most importantly, the rules on inter-partes disclosure and disclosure of documents in the file of a competition authority of the Damages Directive[103] in the context of the DMA enforcement.

However, these rules are only applicable for competition law and the DMA does not constitute competition law. Without going into detail on this discussion,[104] with regard to the applicability or transferability of the competition law rules on the DMA, it is necessary to look at the *ratio* as well as at the concept of enforcement of both the DMA and competition law. One significant difference lies in the nature of the respective provisions. Even if EU jurisprudence has provided for more and more specification of EU competition rules, in particular Articles 101 and 102 TFEU, these rules still remain rather general in nature and therefore must be applied in a case-by-case way.[105] In the context of digital markets, this proceeding, accompanied by the establishment of the 'more economic approach', required even more complex analyses of effects.[106] Articles 5 to 7 of the DMA do not contain any general rules but provide for very specific and differentiating set of obligations for conduct or injunction of gatekeepers. An assessment of relevant markets, market power and effects is not warranted under the DMA.[107] The requirements of the DMA must be complied with by the addressed gatekeepers, regardless of such prior considerations and therefore are applicable *per se*.[108]

Particularly, the prohibition of abuse of market power under Article 102 TFEU can indeed go at times hand in hand with a breach of duty by the DMA, as the gatekeeper status may also go hand in hand with a position of market power. The relationship between the DMA and traditional competition law is also explicitly addressed in Articles 1(5) and (6) DMA, which takes notice of the fact that both regimes are also aimed at anticompetitive behaviour in the broader sense. Accordingly, both legal regimes are considered to be

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[102] See below at 4.

[103] Francisco Marcos, 'Access to evidence: the "disclosure scheme" of the Damages Directive' in Barry Rodger, Miguel Ferro, and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 265, 265 et seq.

[104] Beems (n 30); Niamh Dunne, *Competition Law and Economic Regulation* (Cambridge University Press 2015); Josef Drexl et al, 'Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)' (2023) 72(9) GRUR International 864.

[105] Rupprecht Podszun and Andreas Schwab in Rupprecht Podszun (ed), *Digital Markets Act: Gesetz über digitale Märkte* (Nomos 2023) Art 5 no 1, para 8.

[106] Zelger, *Restrictions of EU Competition Law in the Digital Age. The Meaning of 'Effects' in a Digital Economy* (Springer 2023) passim; for the difficulties digital markets impose on the established competition legal tools see Jaques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, 'Competition Policy for the Digital Era' [2019] 3 <https://data.europa.eu/doi/10.2763/407537> accessed 15 April 2024.

[107] Beems (n 30).

[108] Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] ZEuP 503, 530.

complementary to each other and can generally applied in parallel. Even in cases of overlap, however, as clearly stated in recital 11 DMA, both the notions, the thrust and the mechanism of the two concepts still differ, and the DMA enforcement does not constitute competition enforcement.

In turn, the procedural competition provisions do not apply. The Damages Directive itself clarifies in Article 1(1) that it is applicable only for harms derived from violations of *competition law*. Therefore, the private enforcement scheme of the Damages Directive, including the disclosure regime, cannot be used as a legal basis for damages claims arising from violations of the DMA.[109] Further rules on access to the file or transparency obligations under Regulation 1/2003 and Regulation 774/2003 and their guidelines[110] equally only apply to traditional competition law.

4 TRANSPARENCY REGULATION

Similar to its usage in the context of competition proceedings,[111] the EU Transparency Regulation[112] can also be used for the DMA. This includes a very general right, which is not only reserved for certain parties. At the same time, the requirements for the protection of business secrets in particular set considerable limits on the scope of the information that can be accessed. To this end, I will explain what this means specifically in the context of the DMA.

4.1 NATURE

The Transparency Regulation covers public access to documents held by EU institutions, including the Commission, and it lays down the principles, conditions, limits and procedures to such public access. Generally, the Transparency Regulation must be applied in accordance with overall internal Commission rules for the application of the Transparency Regulation.[113] It includes general transparency obligations of the Commission, not dedicated to DMA proceedings and not equated with the specific access to the files under the DMA (or in competition proceedings); yet, access to files in DMA public enforcement proceedings is not excluded from its scope, and the specific rules do not have primacy over the Transparency Regulation.[114] Contrary to the access to the file rules under the DMA, the documents and information obtained through the Transparency Regulation are not restricted in its subsequent use and enter the public domain,[115] thus creating transparency on Commission DMA proceedings. Moreover, they could be used for, inter alia, DMA private enforcement

[109] Drexl et al (n 104) 874ff.
[110] On these obligations, see Access to File Notice (n 14).
[111] See Lena Hornkohl, 'Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht' (2018) 12 Wirtschaft und Wettbewerb 607.
[112] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (Transparency Regulation).
[113] Annex to the European Commission, Commission's rules of procedure that was added by Commission Decision 2001/937/EC, ECSC, Euratom of 5 Dec. 2001 amending its rules of procedure [2001] OJ L345/94.
[114] For competition proceedings, see Wils and Abbot (n 16) 265.
[115] Case T-447/11 *Catinis v Commission* EU:T:2014:267, para 62; Case T-221/08 *Strack* EU:T:2016:242, para 128.

in national courts or judicial review actions of Commission public enforcement decisions on EU level.

4.2 GENERAL ACCESS

Under Articles 2(1)-(3) Transparency Regulation, any natural or legal person can request public access. Consequently, anyone could ask for access to documents in the file of the Commission on DMA public enforcement proceedings, including third parties not covered by the discussed access to the file provisions of the DMA.[116] Moreover, any party interested in Commission DMA proceedings can request access under the Transparency Regulation.

4.3 LIMITS, IN PARTICULAR PROTECTION OF COMMERCIAL INTERESTS

Conversely, Article 4 Transparency Regulation contains exceptions according to which the institution can refuse access to a document, where disclosure would undermine, for example, the protection of public security, personal data or commercial interest. For the latter, which can be crucial in the context of DMA proceedings, Article 4(2) Transparency Regulation warrants that the Commission must balance the protection of commercial interests, such as business secrets, with the public interest in disclosure.

In the realm of competition law, prior to the implementation of the EU Damages Directive, the Transparency Regulation was employed as a means to acquire access to documents within the Commission file.[117] This was particularly relevant for affected third parties seeking to file damages claims, often referred to as 'follow-on' claims. In the context of competition law, there have been several disputes that have arisen regarding the granting of access to the Commission file.[118] Specifically, these disputes have focused on the applicability of the exception outlined in Article 4(2) Transparency Regulation, which pertains to the protection of commercial interests. These disputes contained mainly access to leniency information and information connected to leniency.[119] Since the DMA public enforcement proceedings does not have a leniency procedure, any protection of leniency will not be an issue for access to information under the Transparency Regulation in the context of the DMA.[120] Nevertheless, the protection of confidential information and business secrets as part of Article 4(2) Transparency Regulation will equally be relevant for the DMA, as also indicated above.[121] For competition law, to foster procedural economy, the *EnBW* jurisprudence has established a far-reaching general presumption that documents in the competition investigation files are not to be disclosed under the Transparency Regulation.[122] The applicant can demonstrate that a given document is not covered by that general

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[116] See above at 2.1[a].
[117] Hornkohl, 'Zugang zu Dokumenten' (n **Fel! Bokmärket är inte definierat.**) 607.
[118] Case C-365/12 P *Europäische Kommission v EnBW Energie Baden-Württemberg AG* EU:C:2014:112; Cases T-437/08 *CDC Hydrogene Peroxide v Europäische Kommission* EU:T:2011:752; Case T-2/03 *Verein für Konsumenteninformation v Kommission der Europäischen Gemeinschaften* EU:T:2005:125; Case C-404/10 P *Kommission v Éditions Odile Jacob Case* EU:C:2012:393, para 121; Case T-611/15 *Edeka-Handelsgesellschaft Hessenring mbH v Europäische Kommission* EU:T:2018:63.
[119] *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118).
[120] See above at 2.1[d].
[121] See above at 2.1[d] ('Confidentiality, in particular business secrets').
[122] *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118) para 93.

presumption, or that there exists an overriding public interest justifying the disclosure of the document.[123] For competition proceedings, the ECJ has held that the general intention to claim damages is not sufficient to rebut the presumption, as not all parts of the file are necessary for the assertion of damages, but the applicant must make it clear that a certain part of the file is necessary for the effective enforcement of the claim for damages.[124]

It is likely that the court will create a similar presumption for denying access to the DMA files under Article 4(2) Transparency Regulation, which will either widely limit access or at least make this option for access to documents extensively burdensome. The ECJ has transferred the presumption from other areas of EU law[125] to competition proceedings and a further transfer from competition to DMA proceedings is therefore probable. Furthermore, the ECJ argued that access under the Transparency Regulation should not undercut the special rules on access to documents in EU competition law, which are limited for third parties.[126] Such reasoning can equally be applied vis-a-vis the DMA public enforcement proceedings with dedicated and even more limited access to the file rules.[127] Moreover, for competition law, the ECJ mainly created the presumption due to procedural economy reasons equally applicable in the context of DMA proceedings, i.e. preventing the overburdening of the European Commission with individual, time-consuming assessments on which aspects of a public enforcement file might be confidential or where overriding aspects argue in favour of disclosure. Rather the presumption creates a reversal of the burden of proof for applicants, who, according to the ECJ are better equipped and should bear the burden if they want the corresponding access. Similar to competition law, the reversal of the burden of proof and identifying which documents for which specific reasons should be disclosed for overriding reasons, might pose certain difficulties for applicants to precisely identify documents in files, as they have very limited knowledge on the public enforcement proceedings.[128] In general, applying this ECJ jurisprudence to the DMA as well would lead to a far-reaching limitation on access to documents under the Transparency Regulation, particularly for third parties with limited other opportunities for access to information.

5 OTHER EU LAW

Apart from EU law regimes such as the Transparency Regulation, inter alia, which are either worth looking at due either to their material proximity[129] to the DMA or their purpose of providing transparency,[130] there are also certain provisions within EU legal acts that provide for possibilities for getting access to information. In case a violation of GDPR provisions constitutes a DMA-infringement at the same time, the toolset of third parties' rights is also applicable in terms of DMA obligations. When it comes to rights of third parties and private

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123 ibid paras 100-105.
124 ibid paras 106, 107.
125 Cases C-39/05 P und C-52/05 P *Königreich Schweden und Maurizio Turco v Council* EU:C:2008:374, para 50; Case C-139/07 P *Europäische Kommission v Technische Glaswerke Ilmenau GmbH* EU:C:2010:376, para 54; Case C-477/10 P *Europäische Kommission v Agrofert Holding a.s.* EU:C:2012:394, para 57; Case C-514/11 P and C-605/11 P *Liga para a Protecção da Natureza (LPN) and Republik Finnland v Commission* EU:C:2013:738, para 45.
126 *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118).
127 See above at 2.1[d].
128 Hornkohl, 'Zugang zu Dokumenten' (n **Fel! Bokmärket är inte definierat.**) 608.
129 EU Competition law, see above 3.
130 Transparency regulation, see above 4.

enforcement it is also worth looking at the RAD, which contain a specific provision that aims for third parties' information rights. The scope and applicability of these provisions will be analysed.

5.1 ARTICLE 15 GDPR

Obligations for disclosure can also be found within the General Data Protection Regulation (GDPR). Without going into detail here, there are certain overlaps between DMA and GDPR provisions regarding the use of data (at least as far as it concerns personal data).[131] Consequently, DMA obligations can be indirectly enforced by the GDPR and access to information provided particularly by Article 15 GDPR.

5.1[a] General scope and nature

Article 15 GDPR lays down the right for data subjects 'right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data'. Consequently, access can only be granted by the controller or processor. Access to information granted through Article 15 GDPR is only an option if this requested information represents personal data, not other information. Besides, the right to request this information under Article 15 GDPR is limited to the data subject. When it comes to the request regarding the question of *whether* a controller processes data of the requesting person, there is – naturally – no need for being personally affected (this is also called 'negative request for information' (Article 4 No 1 GDPR). Further, the question of whether Article 15 GDPR covers an interest to information that is not related to data protection has been affirmed by the ECJ.[132] While this option cannot be considered as special procedural rules, it can at least act as a basis for private damage claims of data subject pursuant to Article 82 GDPR.[133] In principle, the ECJ acknowledges the right to use data which is collected for other purposes, i.e. also under Article 15 GDPR, within civil procedures to assert civil law claims with reference to the in ECHR-case law established principle of equality of arms.[134] At the same time though, it points out the necessity of civil courts to apply the principle of proportionality. In any case, the courts are also obliged to meet the requirements set out in Art 5 GDPR which also reflect the principle of proportionality.[135]

5.1[b] Applicability in the context of the DMA

Due to Article 8(1) DMA, the measures the gatekeeper has to take in order to fulfil the obligations imposed by Articles 5–7 DMA have to be in line with the standards set out in the GDPR. Consequently, the DMA explicitly refers to the GDPR and declares the

131 Hornkohl and Ribera Martínez (n 18).
132 Case C-307/22 *FT (Copies du dossier médical)* EU:C:2023:811 para 51.
133 Lena Hornkohl, 'Überwindung von ungewissen Sachverhalten – Ist die Zeit reif für eine allgemeine Offenlegung von Beweismitteln im deutschen Zivilprozess?' (2021) 2 Zeitschrift für das gesamte Verfahrensrecht – GVRZ 17, 26.
134 Case C-268/21 *Norra Stockholm Bygg* EU:C:2023:145, para 52; ECtHR, *Zayidov v. Azerbaijan (No 2)* (n 7) para 87.
135 *Norra Stockholm Bygg* (n 134) paras 53–55.

applicability of these rules 'without prejudice'. As the DMA also provides for rules that shall restrain the use of personal data by the gatekeeper, these overlapping obligations can make for the subject of private enforcement tools laid down in the GDPR. According to Article 5(2) DMA for example, the processing, cross-use and combination of personal data across the gatekeeper's CPS is prohibited unless the end user gives her consent to the processing.[136] Compared to the DMA, the GDPR contains a fairly extensive toolbox for private enforcement. For cases in which the violation of a DMA regulation also constitutes a violation of GDPR regulations, this toolbox stands open for enforcing DMA obligations.[137]

5.2 ARTICLE 18 REPRESENTATIVE ACTIONS DIRECTIVE

The DMA also provides for a possibility to collectively claim damages out of DMA-infringements that (potentially) harm the collective interests of consumers. For this purpose, Article 42 together with Article 52 DMA declares the Representative Actions Directive (RAD) to be applicable also for DMA-infringements.[138] On the one hand, however, this raises the question of which group of beneficiaries are eligible for RAD. On the other hand, it should also be noted that – despite the deadline for implementation having already passed – there are still considerable differences with regard to implementation at national level in the individual member states.

5.2[a] Disclosure under the RAD

According to Article 18 sentence 1 RAD, Member States must ensure that where a 'qualified entity'

> has provided reasonably available evidence sufficient to support a representative action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court or administrative authority is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law, subject to the applicable Union and national rules on confidentiality and proportionality.[139]

The same applies equally to the defendant under Article 18 sentence 2 RAD. Similarly to the disclosure rules of the Damages Directive,[140] this mechanism intends to compensate for any information asymmetries.[141] However, contrary to the Damages Directive, disclosure under the RAD is limited by a decisive factor and reference to national law. The right for disclosure is limited as it can only be ordered 'in accordance with national procedural law'. Consequently, Article 18 RAD does not mandate Member States to create new or other

[136] Rupprecht Podszun, 'Should Gatekeepers Be Allowed to Combine Data? Ideas for Art. 5(a) of the Draft Digital Markets Act' (2022) 71(3) GRUR International 197; Damien Geradin, Konstantina Bania, and Theano Karanikioti, 'The interplay between the Digital Markets Act and the General Data Protection Regulation' (2022) <http://dx.doi.org/10.2139/ssrn.4203907> accessed 20 January 2024.
[137] Rupprecht Podszun, Philipp Bongartz, and Alexander Kirk, 'Digital Markets Act Neue Regeln für Fairness in der Plattformökonomie' (2022) NJW 3249.
[138] Hornkohl and Ribera Martínez (n 18).
[139] Article 2(2) RAD.
[140] See above at 3.
[141] Recital 68 RAD.

disclosure rules other than those already laid down in national procedural law. This leaves the door open for national procedural differences, as the DMA is thereby lacking specific tools that could provide for harmonization or at least a minimum standard.[142] To ensure an effective enforcement of the obligation for the defendant to disclose (rightfully) requested evidence, Member States have to provide for rules for sanctioning the refusal of doing so. In addition to fines, procedural consequences may also be imposed as possible sanctions.[143]

5.2[b] Applicability in the context of the DMA

Because Articles 42 and 52 DMA declare the RAD mechanism to be applicable to DMA infringements, rules transposing the disclosure obligations of Article 18 RAD will equally apply in the context of collective actions for DMA infringements. Consequently, qualified entities filing representative actions for DMA infringements and gatekeepers defending such actions will have access to the national disclosure rules in the context of their actions. This regime is already very limited by virtue of EU law, as the personal scope only covers qualified entities and defendants, not other third parties or the general public. Access to information under this regime is therefore specific and rather restricted. The available disclosure measures will further depend on the transpositions of Article 18 RAD on national level and due to the mentioned reference to the national procedural standard on disclosure, the variety of (pre-existing) disclosure rules on EU Member State level.

Without assessing national disclosure rules in detail here, disclosure of evidence in civil procedure, and also for collective actions, differs a lot in the various EU Member States.[144] While some have quite far-reaching disclosure regimes, others have no or very limited disclosure rules applicable in the context of the DMA. The general disclosure rules in civil procedural law in Germany and Austria, for example, are rather limited.[145] At least in Germany, which has, contrary to Austria,[146] already transposed the RAD into national law, the general civil procedural disclosure rules described below apply to RAD actions and also for DMA collective representative actions.[147] Delimitation issues can arise here, since Germany also added the DMA to the national regime for competition law damages actions, including the dedicated rules on disclosure of documents.[148] Ultimately, the special competition rules on disclosure should also be applicable to DMA representative actions

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[142] Fernando Gascón Inchausti, 'A new European was to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 2 GPR, para 61.
[143] Recital 69 RAD.
[144] European Commission, Directorate-General for Competition, Quantifying antitrust damages towards non-binding guidance for courts [2009] <https://data.europa.eu/doi/10.2763/36577> accessed 15 April 2024; European Commission, Directorate-General for Competition, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative and economics reports [2004] <https://op.europa.eu/en/publication-detail/-/publication/38de282a-fdda-4f30-91be-2a2ef2019a59> accessed 15 April.
[145] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.
[146] Florian Scholz-Berger and Antonia Hotter, 'Umsetzung der Verbandsklagen RL: Status quo in den Mitgliedstaaten' (2023) 20 ecolex 40.
[147] Section 6 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 [2020] OJ L 409/01, refers to Section 142 Code of Civil Procedure.
[148] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.

under the RAD transposition, as these rules are specifically designed to also facilitate damages actions under the DMA and align with the broader objective of the RAD transposition in Germany to strengthen collective redress.[149]

6 CONCLUSIONS

Access to information has an importance that should not be underestimated. On one hand, it makes a decisive contribution to private enforcement, which, together with public enforcement, ensures the effective application of EU law. On the other hand, it can guarantee procedural principles enshrined in EU law, particularly the Charter of Fundamental Rights.

As this article shows, the DMA and also the DMA IR contain a number of procedural rules that govern access to the file for gatekeepers, undertakings or associations of undertakings concerned. It also takes into account the protection requirements for business secrets, which play an important role in the context of the DMA. However, particularly when it comes to legal certainty, the adoption of further guidelines or manuals, which can be found in competition law proceedings, for example, would be desirable.

Whilst it provides the basic tools for procedural rights of addressees of the DMA, third parties' rights of access to files are very limited. There are no dedicated provisions allowing third parties access to the Commission file in DMA proceedings. They must take recourse to other information access tools. To this end, various publication obligations under the DMA can provide a useful source, as this often represents the only possibility to get access to required information. Publications will also be relevant for granting general transparency of DMA proceedings. Facing this quite limited possibilities for access to the file, the question arises as to the applicability of procedural competition law, which is at least obvious due to the material proximity of both regimes. However, DMA enforcement does not constitute competition enforcement. Consequently, the procedural competition provisions, including the disclosure scheme of the Damages Directive do not apply.

In addition to the special procedural provisions, there are also a number of alternative options within EU law. The Transparency Regulation covers general public access to documents held by EU institutions, including the Commission, and it lays down the principles, conditions, limits, and procedures to such public access. It is likely that the jurisprudence from competition law, particularly on the limits, will apply *mutatis mutandis* for access requests under the DMA.

Obligations for disclosure can also be found within the GDPR. Due to certain overlaps between DMA and GDPR provisions regarding the use of data (at least as far as it concerns personal data), some DMA obligations can also be indirectly enforced by the GDPR, and access to information provided particularly by Article 15 GDPR can be made use of. In case DMA-infringements (potentially) harm collective interests of consumers, the DMA explicitly declares the RAD to be applicable in order to collectively claim damages resulting from the infringement. As a limiting factor however, one has to mention that not every group is eligible for collective actions. This does, however, raise the question of which group of

[149] Lena Hornkohl, 'Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)' [2024] Journal of European Competition Law & Practice 15 (forthcoming).

beneficiaries are eligible for RAD. The implementation of the Directive is still differing between the individual Member States.

To sum it up: the DMA itself contains certain possibilities for access to the file and information overall. The gatekeepers, undertakings or associations of undertakings concerned have the widest possibilities for access to information. Third parties mainly have to take recourse to general procedural rules which are limited (particularly compared to competition law) and also still highly differing between member states. In this regard, considerable room for improvement exists.

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TRANSPARENCY UNVEILED: ACCESS TO INFORMATION IN DIGITAL MARKETS ACT PROCEEDINGS AT MEMBER STATE LEVEL – THE GERMAN AND AUSTRIAN EXPERIENCE

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Access to information is essential in order to guarantee fundamental procedural rights under EU law – in particular in order to make full use of the right of defence. At the same time, access to information ensures the greatest possible transparency for all parties and stakeholders. As another key point, access to information is also crucial in order to strengthen private enforcement, which is the second essential pillar of the effective enforcement of EU law in competition law. This article outlines the options provided for accessing information in the context of the new DMA in selected Member States, namely Austria and Germany. This article is part 2 on the issue of 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings'.

1 INTRODUCTION

The Digital Markets Act[1] contains a novel framework to ensure contestability and fair digital markets. Next to a plethora of substantive obligations for the so-called 'gatekeepers', the Digital Markets Act (DMA) provides for a sophisticated multi-layered enforcement system. The Commission constitutes the core enforcer of the DMA, with the Member States and their national competition authorities (NCAs) only having limited roles.[2] Furthermore, private enforcement of the DMA in national courts has been subject to much discussion.[3]

In this multi-layered enforcement system, and similarly to the related enforcement of EU competition law, procedural tools and rights are of considerable importance. In this context, access to information is decisive for stakeholders. For gatekeepers or undertakings or associations of undertakings concerned by DMA procedures, access to information is

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[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 and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (DMA).

[2] Eg NCAs must inform the Commission when initiating investigations against gatekeepers under national competition law according to Articles 38(1), (2), (3), (5) DMA and once the Commission opens an investigation, the respective NCA must close its own and also report on the status of its investigations according to Article 38(7) DMA. See also Alexandre De Streel et al, 'Effective and Proportionate Implementation of the DMA' (2023) Centre on Regulation in Europe (CERRE) <https://ssrn.com/abstract=4323647> accessed 15 April 2024.

[3] Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13(4) Journal of European Competition Law & Practice 254.

crucial to: protect the rights of the defence, complement the right to be heard vis-à-vis the enforcement authority and guarantee equality of arms vis-à-vis opponents in private enforcement proceedings.[4] Third parties may require access to information in order to understand the basis on which decisions that may affect them are being made or to gather information necessary for private enforcement actions. Rules that enable third parties to access information intend to compensate for the information asymmetry that usually exists.[5] For third parties that potentially suffered from harm caused by violations of the DMA-provision, access to documents referring investigations under the DMA are vital to establish their claim in the first place.[6] Moreover, it ensures that the fundamental principle of equality of arms under EU law is complied with, which can be derived from Article 6 ECHR[7] and which particularly plays an important role when it comes to private enforcement.[8] In general, access to information more broadly serves the principle of open justice, accountability, and transparency, fostering the general understanding and public confidence in DMA enforcement and public confidence.[9]

This article deals with access to information in the context of DMA enforcement from a perspective of national level applicable in the context of the DMA. For this purpose, we have chosen diverging approaches on Member State level, namely from the perspective of both Austrian and German law, respectively. As the DMA itself[10] holds quite limited possibilities for access to information – in particular when it comes to third parties – it is worth taking a closer look at the situation on a national level of the Member States. It poses the question of which instruments for access to information are provided by national civil procedural law. Due to the substantive proximity to competition law, it is also necessary to clarify whether the applicable procedural rules of the Member States are also applicable in connection with the DMA. This is particularly worthwhile due to the associated applicability of the Damages Directive and the differentiated regulatory regime for the disclosure of information contained therein.

2 GERMANY

In order to gain an overview of the legal regime for access to information, both competition law and civil procedural possibilities are analysed in this section. In Germany, the DMA is not only materially close to the DMA but also close in a technical sense. Therefore, it is worth looking at the scope and limits of the respective provisions concerning access to information

[4] OECD, 'Access to the case file and protection of confidential information – Background Note' (2019), 6 <https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf > accessed 15 April 2024.
[5] For competition law see comparably recital 15 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 (Damages Directive).
[6] For competition law see comparably joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* EU:T:2006:151
[7] *Zayidov v Azerbaijan (No 2)* App no 5386/10 (ECtHR, 24 June 2022) para 87.
[8] For competition law see comparably Recital 15 Damages Directive.
[9] Marios Costa, 'Accountability through Transparency and the role of the Court of Justice' in Ernst Hirsch Ballin, Gerhard van der Schyff, and Marteen Stremler LLM (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (T.M.C. Asser Press The Hague 2019).
[10] As Hornkohl provided in her paper (Lena Hornkohl, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level', in this issue).

which are held by national (procedural) competition law. Subsequently, the implementation of the Representative Actions Directive (RAD)[11] as well as civil procedural law in general and, lastly, the possibilities held by the Freedom of Information Act are also examined.

2.1 DISCLOSURE RULES IN GERMAN COMPETITION LAW

The DMA – explicitly[12] – does not constitute competition law, even though there are certain overlaps in terms of aim and purpose.[13] As the Damages Directive can only be applied with regards to infringements of competition law,[14] its disclosure rules do not apply to the DMA by virtue of EU law.[15] However, with the recent 11th Amendment of the German competition act, the Act Against Restraints of Competition (ARC), Germany has been the first EU Member State to integrate infringements against Articles 5, 6, and 7 DMA into its domestic competition law private enforcement system.[16] According to the German ARC amendment, the German rules transposing the Damages Directive apply also to the respective DMA infringements, which offer the widest possible access to information available. Prospective claimants and defendants for DMA damages proceedings will have a wide access to information and enjoy equivalent rights to parties in competition damages proceedings.

2.1[a] Overview of the German disclosure rules

When transposing the Damages Directive, Germany included special rules on disclosure which are applicable in the context of competition private enforcement proceedings in its ARC, which will only be discussed in an overview here.[17] The German competition disclosure rules can be found in Section 33g and Sections 89b – 89e ARC. They apply to all proceedings relating to damages actions under Section 33a ARC, including those for the mentioned infringements of Articles 5, 6, and 7 DMA. The German competition disclosure framework follows the Chapter 2 Damages Directive impetus but also goes a bit beyond it. Section 33g ARC foresees a substantive disclosure claim that can be filed pre-trial and independently from any competition damages proceedings.[18] Sections 89b – 89e ARC include the provisions for claiming disclosure and antitrust damages within the same proceedings.[19] Under these rules, disclosure is available for both the (future) claimant and defendant. Disclosure can be requested of anyone in possession of evidence or information. Competition authorities are not covered by this understanding, but there is a dedicated

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[11] 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 (2020) OJ L409/1.
[12] Recital 11 DMA.
[13] Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2022) 19(1) European Competition Journal 1.
[14] Article 1(1) Damages Directive.
[15] Lena Hornkohl, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level', in this issue.
[16] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze, BGBl. 2023 I Nr. 294 vom 06.11.2023.
[17] Lena Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021) 187–227.
[18] Daniel Higer, *Offenlegung von Beweismitteln nach der 9. GWB-Novelle* (LIT Verlag 2020) 134.
[19] Gerhard Klumpe and Thomas Thiede, 'Auskunftsklagen nach der GWB-Novelle – Gedankensplitter aus der Praxis' (2016) 4 Neue Zeitschrift für Kartellrecht 471.

provision allowing disclosure from the file of competition authorities in Section 89c ARC, which is, however, not available pre-trial.[20] Disclosure ensures that the evidence necessary for the assertion of a claim for damages or to defend against such a claim is available to the beneficiary. The prerequisite for such disclosure is that the party credibly demonstrates that it has such a claim, or a claim is being asserted against it. The evidence needed must be specified as precisely as possible on the basis of reasonably available facts, which includes categories of evidence.[21] The German disclosure provisions include the black list for leniency statements and settlement submissions, which can never be disclosed, as well as the grey list for certain documents not disclosable during the public enforcement proceedings.[22] Furthermore, proportionality of disclosure constitutes an important limitation.[23] Section 89b(7) ARC further specifically mandates that confidential information needs to be protected.[24]

2.1[b] Applicability in the context of the DMA

The described German ARC rules provide for the widest possibilities of access to information for DMA enforcement. In the context of DMA damages proceedings and pre-trial, (possible) claimants and defendants can ask for disclosure of necessary evidence and information, i.e. if said party specifies the evidence as precisely as possible on the basis of reasonably available facts and restrained by the above-mentioned limitations according to Sections 33g, 89b et seq. ARC. This includes inter-partes disclosure and also disclosure of documents in the file of the competition authority. Consequently, under the German provisions, (possible) claimants and defendants for DMA damages proceedings will have a wide access to information and enjoy equivalent rights to parties in competition damages proceedings.

At the same time, the application of the ARC disclosure regime is necessarily limited. Disclosure is only given in the context of DMA damages proceedings. It cannot be obtained for purposes other than proceedings, even in the context of other types of private enforcement actions outside of damages proceedings. Thus, disclosure to access information, e.g. for judicial review against DMA enforcement decisions, is not covered. Furthermore, disclosure necessary for other types of private enforcement actions, such as injunctions (per Section 33 ARC), i.e. actions so that the gatekeeper refrains from infringing the DMA, are not covered by the ARC regime. Injunctions might be particularly relevant when it comes to the private enforcement of the DMA, as private parties affected by DMA violations will be particularly interested in stopping infringements in national courts, which at the same time

[20] Thomas Lübbig and Roman A Mallmann, 'Offenlegung von Beweismitteln gemäß dem Kabinettsentwurf für das 9. GWB-Änderungsgesetz' (2016) 4 Neue Zeitschrift für Kartellrecht 518, 521.
[21] Albrecht Bach and Christoph Wolf, 'Neue Instrumente im Kartellschadenersatzrecht – Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung' (2017) 5 Neue Zeitschrift für Kartellrecht 285, 289.
[22] See on the different categories Case C-57/21 *RegioJet* EU:C:2023:6.
[23] Rupprecht Podszun and Stephan Kreifels, 'Kommt der Ausforschungsanspruch? – Anmerkungen zum geplanten § 33 g GWB' (2017) GWR 67, 69.
[24] Lena Hornkohl, 'Die neue Mitteilung der EU-Kommission über den Schutz vertraulicher Informationen in Kartellschadensersatzklagen und ihre Anwendung im deutschen Recht' (2020) 22 Europäische Zeitschrift für Wirtschaftsrecht 957.

supplements the Commission enforcement of such non-compliance.[25] Yet, the disclosure rules under the ARC are only relevant for third party enforcement in the form of damages actions. Not every infringement of the DMA might even cause damages of third parties or might lead to damages suitable for private enforcement actions, e.g. quantifiable damages.[26]

The ARC rules will be most relevant to obtaining disclosure in the inter-partes relationship, where much evidence and information will be available in the hands of the gatekeepers or third parties relevant for third party damages actions. Given the mitigated specification obligations under the ARC rules as compared to normal German civil procedural disclosure rules,[27] broad categories of relevant evidence and information are accessible. Similar to competition damages actions, for DMA damages actions the regime will be particularly useful for obtaining evidence on the occurrence and amount of any harm inferred on third parties through DMA infringements, as will information on internal calculations, market position, purchasing behaviour, which is required for the concrete calculation of damages and which usually lies in the hands of the gatekeeper or other third parties and not as much in the hands of the competition authorities.[28]

However, the ARC regime cannot overcome the general lack of access to the file of the Commission in its capacity as the main DMA enforcement authority. Section 89c ARC covers disclosure of documents in the file of a competition authority. According to Section 48 ARC, the 'competition authorities' in the scope of the ARC are constituted only of the Federal Cartel Office (Bundeskartellamt), the Federal Ministry for Economic Affairs and Energy, and the supreme Land authorities competent according to the laws of the respective Land. Whenever the ARC refers to the European Commission as a competition authority, it specifically refers to the European Commission next to where it mentions the competition authorities, such as in Section 33b ARC. National competition authorities are only involved to a limited extent, e.g. they must be informed if sanctions are imposed on gatekeepers under national competition law.[29] Conversely, NCAs must also inform the Commission when initiating investigations against gatekeepers under national competition law.[30] Once the Commission opens an investigation, the respective NCA has to close its own and also report on the status of its investigations.[31] The DMA therefore pursues a semi-centralistic approach and thus deviates from the prevailing enforcement tradition of EU law. This makes perfect sense in the digital economy, as online platforms generally operate across borders and there are not particular specifications or peculiarities within the respective national markets of

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[25] Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' (November 19, 2023) <http://dx.doi.org/10.2139/ssrn.4637661> accessed 15 April 2024 with reference to Rolf Albrecht, 'Digital Markets Act kommt – Regulierung von Plattformen und Auswirkungen auf Unternehmen' (2022) Gesellschafts- und Wirtschaftsrecht 181, 182.

[26] Kati Cseres and Laurens de Korte, 'The role of third parties in the public enforcement of the Digital Markets Act' (forthcoming).

[27] See below at 2.2[a].

[28] For competition law see Lena Hornkohl, 'Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht' (2018) 12 Wirtschaft und Wettbewerb 607, 612.

[29] DMA Article 38(1). See also Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19 (1) European Competition Journal 57, 65.

[30] DMA Article 38(1), (2), (3), (5).

[31] DMA Article 38(7).

Member States.[32] In contrast, the enforcement of traditional competition rules –in particular, Articles 101 and 102 TFEU – is clearly decentralized, as it is carried out by the individual member state's NCAs.[33] However, given the limited involvement of national authorities in the enforcement of the DMA, access to their files is less relevant.

2.2 OTHER DISCLOSURE AND TRANSPARENCY RULES IN GERMAN LAW

Given the limits of the specific disclosure regime under the ARC, German law offers two pathways for further access to information, albeit being themselves limited in scope: the general civil procedural disclosure rules of the German Civil Procedure Code,[34] which also apply in the context of the RAD implementation,[35] and the German Freedom of Information Act.[36] For this purpose, it will be explained for which cases these two approaches are appropriate in connection with the DMA and to which requirements a disclosure is linked in this case, such as the extent of the substantiation requirement.

2.2[a] German Civil Procedure Code

The German Civil Procedure Code contains limited disclosure rules,[37] which are applicable in the context of the DMA but only offer limited access to information.

Most prominent is the rule in Section 142 Civil Procedure Code, the order to produce documents within the framework of the court's conduct of proceedings.[38] According to Section 142(1) Civil Procedure Code, the court can order a party or a third party to produce the documents in his or her possession and other documents to which a party has referred. Section 142(1) Civil Procedure Code generally can be used in all private DMA enforcement proceedings outside of the dedicated ARC provisions described above.[39] Therefore, the lack of disclosure for injunctions of the ARC disclosure regime can be filled with the (more limited) provision of Section 142(1) Civil Procedure Code.

There are strict limits to the production of documents under this provision. For example, Section 142(1) Civil Procedure Code is not suitable for obtaining information per se, only evidence. Furthermore, the provision only offers inter-partes disclosure, not disclosure from the file of authorities. Most importantly, the document must further be sufficiently explicitly or implicitly specified and be based on the existence of a conclusive submission by the party relating to specific facts.[40] Consequently, this order does not help parties with a lack of information and who therefore wish to use Section 142(1) Civil

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[32] Ranjana Andrea Achleitner, 'Das Durchsetzungsregime im Digital Markets Act: Private Enforcement unerwünscht?' (2023) ZöR 287, 295.
[33] 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 [2003] OJ L1/1 (Regulation 1/2003) Article 5.
[34] Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781).
[35] § 12 Verbraucherrechtedurchsetzungsgesetz.
[36] Informationsfreiheitsgesetz vom 5. September 2005 (BGBl. I S. 2722).
[37] Verena Dorothea Kern, *Urkundenvorlage bei Kartellschadensklagen* (Mohr Siebeck 2020) chapter 1.
[38] Lena Hornkohl, 'Überwindung von ungewissen Sachverhalten – Ist die Zeit reif für eine allgemeine Offenlegung von Beweismitteln im deutschen Zivilprozess?' (2021) 2 Zeitschrift für das gesamte Verfahrensrecht – GVRZ 17, paras. 4 - 5.
[39] See above at 2.1[a].
[40] BGH of 16 March 2017 - I ZR 205/15, NJW 2017, 3304; BT-Drs. 14/6036, 121.

Procedure Code for the purpose of obtaining information to access their enforcement options.[41] Particularly in the case of information asymmetries possible in the context of DMA infringements, if an asserted claim is sufficiently probable and the necessary documents have been designated as precisely and accurately as possible, but cannot be precisely designated, a disclosure for such documents would be preferable in order to satisfy the interest in information. Generally, Section 142 Civil Procedure Code is limited to disclosure in proceedings, hence it is not available outside of DMA private enforcement proceedings pre-trial or for other purposes. Lastly, the order is generally issued *ex officio* and not at the request of a party, which accordingly has no right to such a request.[42]

2.2[b] Freedom of Information Act

While the German Freedom of Information Act, similar to the Transparency Regulation, follows the different *ratio legis* of guaranteeing transparency of public conduct, it can be used in order to obtain information and evidence for DMA private enforcement or other actions of third parties and has been used so for competition law in the past.[43] Section 89c ARC on disclosure of evidence from the file of the competition authority does not exclude the rules of the Freedom of Information Act.[44] The Freedom of Information Act works very similar to the Transparency Regulation and is therefore only discussed briefly here. The Freedom of Information Act gives access to official information from the authorities of the Federal Government.[45] Sections 3–6 Freedom of Information Act limit this access, e.g. in order to protect special public interests or business secrets, similar to the discussed limitations of the Transparency Regulation on EU level.[46]

In the context of DMA damages proceedings, the inter partes disclosure rules of the ARC will be superior, as they can be used to obtain information on the harm itself.[47] The Freedom of Information Act might still be relevant for DMA stand-alone actions, pre-trial access to German authorities files and outside of damages actions, particularly for injunctive actions, where the ARC regime is not applicable.[48] But even then, in the context of the DMA, the Freedom of Information Act is only very partially useful, given the discussed limited involvement of national authorities for DMA enforcement.[49] It only covers access to official information from the authorities of the Federal Government of Germany, not the Commission or other Member States.

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[41] BGH of 27 May 2014 - XI ZR 264/13, NJW 2014, 3312; see also BGH of 14 June 2007 - VII ZR 230/06, NJW-RR 2007, 1393.
[42] Critical Raphael Koch, *Mitwirkungsverantwortung im Zivilprozess* (Mohr Siebeck 2013) 350.
[43] Konstantin Seifert, 'Informationsbeschaffung für Kartellschadensersatzverfahren – Kommen Geschädigte (noch) an die Akte des Bundeskartellamtes?' (2017) Neue Zeitschrift für Kartellrecht 512, 517.
[44] Hornkohl, 'Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht' (n 28) 612.
[45] Section 1 Freedom of Information Act.
[46] Lena Hornkohl, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level', in this issue, 4.3.
[47] See above 2.1[b].
[48] ibid.
[49] ibid.

3 AUSTRIA

To this end, it will examined here whether the Austrian legal system allows any special disclosure regime to be applicable with regards to the DMA. It is also explained whether a system for procedural competition law comparable to the German legal system is conceivable. In addition, the extent to which the Austrian Code of Civil Procedure allows access to information will be examined. In connection with official transparency, the recently enacted Freedom of Information Act is also examined in more detail.

3.1 (NO) SPECIAL DISCLOSURE RULES FOR DMA PRIVATE ENFORCEMENT IN AUSTRIA

Several possibilities for private enforcement of the DMA exist in Austria, which are discussed briefly in the following sections. The applicability of national disclosure rules depends on the extent to which private enforcement is possible in the Austrian legal system. The possibilities for disclosure within competition law in the broader sense are therefore reviewed, namely competition law and unfair competition law, which are regulated in two different legal acts.

3.1[a] Competition law

Prior to the amendment of the Austrian competition act, the Cartel Act,[50] disclosure in competition procedure was limited to the right of third parties to demand access to court files, which could even be denied if the parties refuse to give their consent.[51] Since the implementation of the Damages Directive, however, the Cartel Act provides for specific disclosure rules. The rules for disclosure under national competition law represent an extension of the general disclosure rules of the Code of Civil Procedure discussed below[52] and provide for a specific disclosure regime with regard to competition infringements.[53]

Nevertheless, this highly differentiated disclosure regime for private enforcement of competition law is not accessible for DMA-violation private enforcement. The respective provisions are particularly created to transform the Damages Directive into national law, which as described above, does not apply to the DMA regime.[54] Contrary to Germany, Austria has not included the DMA in its national competition damages regime. As described above, even though competition law violations can go in hand with DMA violations and are applied in parallel, the DMA is not competition law, and a violation of the DMA does not equate to a competition law violation.[55]

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[50] Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005) BGBl I Nr 61/2005.

[51] The reliance of access to information from the consent of the parties led to an (ongoing) discussion, whether this very provision is in line with EU law. See Matthias Ranftl and Natalie Harsdorf-Borsch, '§ 39 KartG 2005' in Alexander Egger and Natalie Harsdorf-Borsch (eds), *Kartellrecht* (Linde Verlag Wien 2022) para 31.

[52] See below at 3.2[a].

[53] Alexander Egger and Christian Gänser, '§ 37j KartG 2005' in Alexander Egger and Natalie Harsdorf-Borsch (eds), *Kartellrecht* (Linde Verlag Wien 2022) para 3.

[54] See above at 2.1.

[55] See above at 2.1[b].

Nevertheless, private enforcement of the DMA remains possible under both the Unfair Competition Act[56] and general tort law.

Section 1(1) Unfair Competition Act provides for the possibility to claim damages that result from unfair business practices. An unfair business practice in the sense of Section 1(1) Unfair Competition Act first requires conduct that violates legal acts that aim to grant fair competition. These legal acts can either be national law or EU law, including EU secondary law.[57] The second condition for Section 1(1) Unfair Competition Act is that the violation cannot be based on an unreasonable legal opinion.[58] Due to the *telos* of the DMA – which is above all to prevent users from unfair practices of gatekeepers[59] – the DMA can be considered as legal act aiming to grant fair competition in the sense of Section 1(1) Unfair Competition Act.[60]

Moreover, tort law provision Section 1311 Austrian General Civil Code[61] foresees a claim of damages that derive from the infringement of certain provisions. These provisions must be of protectionary nature, i.e. a provision particularly aiming to prevent violations of the legal interests of an individual or a specific group of people.[62] Competition law is considered to be of protectionary nature,[63] since it also aims to directly or indirectly prevent harm to market participants.[64] A comparable purpose is reflected in Articles 5–7 DMA, which also provide for gatekeepers' obligations with respect to third parties (namely business users and end users), hence why a protective nature can be attributed to those provisions.[65] Private enforcement – namely raising damages claim – could therefore be based on Section 1311 Austrian General Civil Code.

However, neither the Unfair Competition Act, nor the Austrian General Civil Code provide for disclosure rules or other rules on access to information dedicated specifically to the context of DMA private enforcement. Therefore, the general rules discussed in the following section have to be used.

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[56] Bundesgesetz gegen den unlauteren Wettbewerb, BGBl. Nr. 448/1984.
[57] Andreas Frauenberger et al, '§ 1' in Andreas Wiebe and Georg E Kodek (eds), *UWG* (2nd edn, MANZ Verlag Wien 2023) para 865.
[58] Andreas Frauenberger et al, '§ 1' in Andreas Wiebe and Georg E Kodek (eds), *UWG* (2nd edn, MANZ Verlag Wien 2023) para 871.
[59] Recital 7 DMA.
[60] Achleitner, 'Das Durchsetzungsregime im Digital Markets Act' (n 32) 291.
[61] Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811 (latest version: BGBl. I Nr. 182/2023).
[62] Judith Schacherreiter, '§ 1311' in Andreas Kletečka and Martin Schauer (eds) *ABGB-ON*[1.09] para 9 (Stand 1.1.2023, rdb.at); also Friedrich Harrer, '§ 1311' in Michael Schwimann and Georg E Kodek (eds), *ABGB Praxiskommentar*[4] (4th edition, LexisNexis Verlag Österreich 2017) para 7.
[63] OGH 4 Ob 46/12m pt 4.3. See also Georg Stillfried and Peter Stockenhuber, 'Schadenersatz bei Verstoß gegen das Kartellverbot des Art 85 EG-V' (1995) wbl 301, 345.
[64] Case C-312/21 *Tráficos Manuel Ferrer* EU:C:2023:99 para 42.
[65] Achleitner, 'Das Durchsetzungsregime im Digital Markets Act' (n 32) 290, with reference to Henner Schläfke and Immo Schuler, '§ 13 DMA als Gegenstand von Private Enforcement' in Jens Peter Schmidt and Fabian Hübener (eds), *Das neue Recht der digitalen Märkte: Digital Markets Act* (Nomos 2023) 164.

3.2 OTHER DISCLOSURE AND TRANSPARENCY RULES IN AUSTRIAN LAW

As shown above, procedural competition law is not applicable outside competition law in the narrower sense. However, private law enforcement can very well take place by way of private law infringement of competition law in the broader sense. No specific procedural rules are provided in this context, which mandates recourse must to civil procedural law. In addition, particular attention should be paid to the recently adopted Freedom of Information Act at national level in Austria, as it is designed to provide for more administrative transparency.

3.2[a] Austrian Civil Procedure Code

Section 303 Austrian Civil Procedure Code[66] lays down the possibility for a party to an action to ask for the disclosure of documents held by the opposing party or even by a third party. The rationale behind this rule is one hand to strengthen the procedural fact finding and on the other hand to meet the requirements of the EU-law principle of equality of arms, which can be derived from Article 6 ECHR.[67]

Similar to the German provision,[68] in the application for disclosure the demanding party has to state that the requested documents contain information which is necessary for their individual line of evidence.[69] In addition, the request for disclosure must include the exact name of the requested document so that the obligor knows which document he has to submit. This is intended to reflect the fact that Section 303 is particularly not intended to serve as a basis for discovery evidence.[70] This is – due to national case law – also still in line with the requirements of Article 6 ECHR.[71]

Disclosure of these documents can either be refused due to the obligation of confidentiality, for reasons of professional secrecy or for other 'equal reasons' that would justify a denial of disclosure.[72] Also, disclosure of (necessary) procedural documents is deemed a general procedural obligation for parties to collaborate. Consequently, it does not depend on whether it can also be qualified as a material claim.[73]

When it comes to access to documents held by authorities, Section 303 is not applicable, as it only provides for disclosure inter partes. Section 219, however, provides for access to court files for the parties involved as well as for third parties. While the parties

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[66] Zivilprozessordnung, RGBl. Nr. 113/1895.
[67] Georg E Kodek, 'III/1 § 303 ZPO' in Hans W Fasching and Andreas Konecny (eds), *Zivilprozessgesetze* (3rd edn, MANZ Verlag Wien 2023) para 12.
[68] See above 2.2[a].
[69] See e.g. Kodek (n 67) para 1.
[70] 2 Ob 987, 988/52 SZ 26/42.
[71] 7 Ob 354/62; [71] Georg E Kodek, 'III/1 § 303 ZPO' in Hans W Fasching and Andreas Konecny (eds), *Zivilprozessgesetze* (3rd edn, MANZ Verlag Wien 2023) para 12.
[72] Alexander Wilfinger, '§ 306 ZPO' in Martin Spitzer and Alexander Wilfinger (eds), *Beweisrecht* (MANZ Verlag Wien 2020) para 1; Helmut Ziehensack, '§ 306' in Johann Höllwerth and Helmut Ziehensack (eds), *ZPO Praxiskommentar* (LexisNexis Wien 2019) para 1.
[73] Alexander Wilfinger, '§ 303 ZPO' in Martin Spitzer and Alexander Wilfinger (eds), *Beweisrecht* (MANZ Verlag Wien 2020) para 4.

involved have to be granted unconditional[74] access to the procedural file as a whole[75], third parties' access depends on either the consent of all[76] parties involved or their legal interest. As this provision should not serve an interest of mere expedition of information, this legal interest needs to be sufficiently substantiated.[77] Besides, the claim for access to evidence according to section 219 requires an existing court file and therefore an ongoing process.[78]

3.2[b] Freedom of Information Act

After a long time, and facing low performance on international rankings on transparency,[79] the Austrian legislator has now addressed the tension between official secrecy on the one hand and the official duty to provide information on the other. The Austrian Freedom of Information Act[80] was passed on 15 February 2024[81] and will enter into force on 1 September 2024. This legal act intends to make governmental action more transparent for each individual. It also serves to complement the constitutionally enshrined guarantee for access to information.[82]

The legal term 'information' in the sense of Section 2(1) Freedom of Information Act will cover any record created for the purpose of official or entrepreneurial uses. Information of public interest according to Section 2(1) Freedom of Information Act should be made openly accessible by the responsible authority proactively, whereas any other information is subject to a specific request. The latter can be carried out in any form. Furthermore, the existing rules for access to files from the General Administrative Procedure Act[83] can be applied analogously.[84]

Similar to the German Freedom of Information Act, the Freedom of Information Act also only applies vis-à-vis Austrian public authorities according to Section 1, not the European Commission.[85] In so far as national authorities enforce the DMA or are included in the enforcement of the DMA, which is, as already mentioned[86] very limited, the Freedom of Information Act will also apply on access to information on DMA proceedings. Consequently, the Freedom of Information Act in connection to the DMA will only lead to

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[74] 6 Ob 11/78; 4 Ob 115/14m.
[75] Apart from certain documents, such as internal reports, minutes of internal discussions or drafts of judgments. See Edwin Gitschthaler, '§ 219' in Walter H Rechberger and Thomas Klicka (eds), *Kommentar zur ZPO* (5th edn, Verlag Österreich 2019) para 5.
[76] Gitschthaler (n 75) para 3/1.
[77] 9Ob237/98p; see also Johann Höllwerth, '§ 219' in Johann Höllwerth and Helmut Ziehensack (eds), *ZPO Praxiskommentar* (LexisNexis Wien 2019) para 9; Gitschthaler (n 75) para 3/2.
[78] Martin Trenker, '§ 219' in Georg E Kodek and Paul Oberhammer (eds), *ZPO-ON* (as per 9.10.2023, rdb.at) para 1.
[79] Legislative commentary 2238 on Governmental Proposal, 1 <https://www.parlament.gv.at/dokument/XXVII/I/2238/fname_1587266.pdf> accessed 15 April 2024.
[80] Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Informationsfreiheitsgesetz erlassen wird, BGBl. I Nr. 5/2024.
[81] See Parliamentary correspondence, no. 124 from 15.02.2024, <https://www.parlament.gv.at/aktuelles/pk/jahr_2024/pk0124#XXVII_I_02238> accessed 15 April 2024.
[82] Legislative commentary 2238 on Governmental Proposal (n 79).
[83] Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG, BGBl. Nr. 51/1991.
[84] Legislative commentary 2238 on Governmental Proposal (n 79) 10.
[85] ibid 5.
[86] See above 2.1[b].

limited access to information and at the same time limited transparency vis-à-vis the general public in Austria.

Moreover, similar to the Transparency Regulation on EU level or the German Freedom of information act, this right is not to be granted unconditionally, as there are several limitations that should face the opposing right to privacy. Most importantly, the authority subject to inquiry can oppose confidentiality reasons when it comes to disclosure information but needs to apply a proportionality test when justifying a refusal.[87]

4 CONCLUSION

Access to information has an importance that should not be underestimated. On the one hand, it makes a decisive contribution to private enforcement, which, together with public enforcement, ensures the effective application of EU law. On the other hand, it can guarantee procedural principles enshrined in EU law, particularly the Charter of Fundamental Rights.

As Germany has incorporated the DMA-articles referring to DMA-infringement into its domestic competition law private enforcement system, the German rules transposing the Damages Directive can be applied. This enables the widest possible access to information available. As a limiting factor, disclosure is only given in the context of DMA damages proceedings and cannot be used, e.g. for judicial review against DMA enforcement decisions. The possibilities within the German Civil Procedure Code are limited to disclosure within proceedings and is therefore not applicable e.g. in pre-trial stages. The German Freedom of Information Act only covers access to official information from the authorities of the Federal Government of Germany, not the Commission or other Member States. Consequently, in the context of the DMA, the Freedom of Information Act is only very partially useful.

Contrary to Germany, Austria has not included the DMA in its national competition damages regime. The provisions for disclosure in competition law (namely the Cartel Act) are particularly created to transform the Damages Directive into national law, and therefore the disclosure regime for private enforcement of competition law is not accessible for DMA-violations. There are no specific procedural rules provided for this, which is why recourse must be made to civil procedural regulations. Similar to the German Freedom of Information Act, the Austrian Freedom of Information Act also only applies vis-à-vis Austrian public authorities, not the European Commission. Therefore, this provision is only applicable where the national authorities are involved in the enforcement of the DMA.

To sum it up: the DMA itself contains certain possibilities for access to the file and information overall. The gatekeepers, undertakings or associations of undertakings concerned have the widest possibilities for access to information. Third parties mainly have to take recourse to general procedural rules which are limited (particularly compared to competition law) and also still highly differing between member states. In view of the relevance of private enforcement and its dependence on access to information for third parties, considerable room for improvement exists.

[87] § 6 öIFG, see also Legislative commentary 2238 on Governmental Proposal (n 79) 8.

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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.

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[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 Bonifaci 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 Fruiticola 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]

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[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

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[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

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[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 Campenhout & 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 Campenhout & 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

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[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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EU COMPETITION LAW, FUNDAMENTAL RIGHTS AND THE PRINCIPLE OF TRANSPARENCY – AN EVOLVING RELATIONSHIP

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Faced with the challenges posed by gatekeepers, EU competition law is undergoing a period of significant change. I attempt to show in this article that one can understand this change as a shift in the relationship between EU competition law and fundamental rights. More precisely, I show that the initial relationship between these two factors has been operational, in the sense that fundamental rights have been relied upon to operationalize the substance of competition law. In the operational relationship, the right to a fair trial has been deployed by the European Commission to create and expand its quasi-judicial arm. This long-standing operational relationship has recently evolved into an informative one, where the rights to privacy and data protection have informed the European Commission's merger assessments involving gatekeepers. Finally, I argue that, in light of the Meta/Facebook case and recent EU legislation, the relationship between EU competition law and fundamental rights can be called foundational. Indeed, it appears that both the CJEU and EU legislators intend to inject fundamental rights into the foundations of EU competition law. I also highlight how the principle of transparency has played an important role in these developments as an enabler and magnifier. These changes are significant and will impact the work of competition authorities, data protection authorities and other public bodies in the EU.

1 INTRODUCTION

The European Commission stated in the 2030 Digital Compass that its ambition is 'to pursue digital policies that empower people and businesses to seize a human centered, sustainable and more prosperous digital future'.[1] To achieve this vision of empowered citizens and businesses, the strategy informed a program of policy reform which led to the adoption of the Digital Services Act (DSA)[2] – aiming to create a single market for digital services – and the Digital Markets Act (DMA)[3] – a regulation aiming to establish contestable and fair markets in the digital sector and to define behavioural rules for the gatekeepers to these markets. According to Article 3 of the DMA, the European Commission may designate as gatekeeper an undertaking that fulfils, cumulatively, the following criteria: (1) it has a significant impact on the internal market; (2) it provides a core platform service which is an

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[1] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '2030 Digital Compass: the European way for the Digital Decade' COM (2021) 118 final, 1.

[2] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

[3] 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) [2022] OJ L265/1.

important gateway for business users to reach end-users; and (3) it enjoys a durable and entrenched position in its operations or it is foreseeable that it will enjoy such a position in the near future.

In light of this, EU competition law is entering a period of significant change during which its tools and procedures will be tested against challenges stemming from digital markets. An ensuing debate in the literature addresses the goals of EU competition law. The proponents of this debate argue that EU competition law should not only focus on consumer welfare but pursue other values as well, such as democracy and the rule of law.[4] Other authors have suggested that EU competition law and competition officials should also take into account privacy – guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union (Charter)[5] – and data protection – guaranteed by Article 8 of the Charter[6] and the General Data Protection Regulation (GDPR)[7] – in their assessments.

In this article, I propose a different viewpoint and submit that one can only understand the changes affecting EU competition law through its relation to fundamental rights. I propose, therefore, to show that the relationship between EU competition law and fundamental rights has evolved from *operational* to *informative* and is currently evolving from *informative* to *foundational*. The principle of transparency has accompanied these evolutions as an enabler and magnifier. To expand these arguments, I first focus on the early days of EU competition law and describe the *operational* relationship between EU competition law and fundamental rights. Second, I turn to the impact of privacy and data protection in a few well-known merger cases to describe the *informative* relationship between EU competition law and fundamental rights. Third, I highlight the growing *foundational* relationship between EU competition law and fundamental rights. Indeed, it appears that the current regulatory wave in the EU cracks open the foundations of EU competition law and injects fundamental rights – privacy and data protection in particular – into its substance. I draw my conclusions from the case law of the Court of Justice of the European Union (CJEU), the practice of the European Commission and recent EU legislation.

2 THE OPERATIONAL RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The Sherman Act was the first antitrust law in the world and was adopted in the United States (US) in order to protect democracy.[8] EU competition law, on the other hand, has been adopted and enforced as a market regulation tool. As Advocate-General Ad Geelhoed

[4] Viktoria HSE Robertson, 'Antitrust, Big Tech, and Democracy: A Research Agenda' (2022) 67(2) The Antitrust Bulletin 259. Also, Nathaniel Persily, 'Can Democracy Survive the Internet?' (2017) 28(2) Journal of Democracy 63.

[5] Article 7 of the Charter provides that 'everyone has the right to respect for his or her private and family life, home and communications'.

[6] Article 8 of the Charter provides that 'everyone has the right to the protection of personal data concerning him or her'.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

[8] Eleanor M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317.

argued, EU law has mainly been public economic law 'aimed at the establishment and proper functioning of the internal market' and that EU economic law was 'characterized not so much by ethical preferences, but by choices of a more instrumental nature'.[9] This initial arrangement has had numerous consequences. One such consequence has been the widely shared belief that competition law is special and that it should, therefore, remain sealed away from exogenous influences. As Gerber noted,

> a central feature of European competition law tradition has been the idea that competition law is special and that using law to protect competition moves outside law's normal domain. In this view, competition law is a new type of law which deals with problems for which traditional legal mechanisms are inappropriate, and thus it requires correspondingly non-traditional methods and procedures.[10]

This idea can be traced back to the early days of the EU. A review of the first Reports on the Activity of the European Community for Coal and Steel (ECCS) shows that competition policy was considered an integral part of the construction of the Common Market. In these early reports, competition policy was the only policy covered, other than the development of the Common Market.[11]

The first Competition Policy Reports of the ECCS highlight the early emphasis placed on competition policy in somewhat self-aggrandizing statements. For example, the first Competition Policy Report highlighted that

> competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, *competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society*.[12]

In the same vein, the early Annual Competition Reports of the ECCS assign the consumer as the main beneficiary of the Commission's work in the field of competition. The Commission stated that its competition policy

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[9] Ad Geelhoed, 'The expanding jurisdiction of the EU Court of Justice' in Deirdre Curtin, Alfred E Kellermann, and Steven Blockmans (eds), *The EU Constitution: The Best Way Forward* (TMC Asser Press 2005) 403.

[10] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001) 12.

[11] European Community for Coal and Steel, 'Summary of the Second General Report on the Activities of the Community (April 13, 1953-April 12, 1954)' (1954) 4 Bulletin <http://aei.pitt.edu/50821/1/B0220.pdf> accessed 01 June 2024.

[12] Commission of the European Economic Community, *First Report on Competition Policy* (Luxembourg: Office for Official Publications of the European Communities 1972) 11 (emphasis added).

> encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the *consumer*. In this respect, the Commission is not only concerned with increasing by means of the rules of competition the quantity of goods available for consumption, but is also taking action to promote better information for *consumers*.[13]

This difference in wording is significant. Shrubsole thus noted that the use of the word 'consumer' has steadily grown during the 20th century, slowly replacing the word 'citizen' in books, media and policy documents.[14] Another author found that 'unlike the citizen, the consumer's means of expression is limited: while citizens can address every aspect of cultural, social and economic life […], consumers find expression only in the marketplace'.[15]

The early focus on consumers in EU competition law might explain its indifference to citizens and their fundamental rights. This indifference is well captured by what some scholars call a 'silo approach' wherein fields of law remain sealed off from exogenous influence, rather than communicating with each other.[16] An early example of the separation and distance imposed by a silo approach to fundamental rights can be observed in the case of *Asnef/Equifax*.[17] In this case, the CJEU was called to rule on the relevance of privacy and data protection for competition law assessments. More precisely, the CJEU was asked to give guidance on whether Article 101 of the Treaty on the Functioning of the European Union (TFEU) prevented financial institutions from setting up a credit information system that would allow them to exchange solvency and credit information on individual customers through the computerized processing of data. The CJEU ruled that this type of agreement neither had the object of restricting competition nor was it likely to have such an effect. It added, however, that any possible issues relating to the sensitivity of personal data were not, as such, a matter for competition law because they could be resolved on the basis of the relevant provisions governing data protection.[18] This line of argument was accepted by the European Commission and remained predominant because it aligned with its interpretation of EU competition rules as protecting consumer welfare in the economic sense of the term. Namely, consumer welfare was primarily defined in terms of price, output, quality and innovation,[19] with no consideration for fundamental rights, such as the rights to privacy and data protection.

In fact, as I have shown previously, the only relationship that EU competition law had with fundamental rights was with respect to the right to a fair trial.[20] The European Commission relied on the right to be heard to build its quasi-judicial arm and to ensure the transparency and predictability of its procedures. Thus, Article 19 of the first implementing

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[13] Commission of the EEC, *First Report on Competition Policy* (n 12) 12 (emphasis added).
[14] Guy Shrubsole, 'Consumers Outstrip Citizens in British Media' (*Open Democracy*, 05 March 2012) <https://www.opendemocracy.net/en/opendemocracyuk/consumers-outstrip-citizens-in-british-media/> accessed 01 June 2024.
[15] Justin Lewis, Sanna Inthorn, and Karin Wahl-Jorgensen, *Citizens or Consumers: What the Media Tell Us about Political Participation: The Media and the Decline of Political Participation* (Maidenhead: Open University Press 2005).
[16] Eleanor M Fox, 'Blind Spot: Trade and Competition Law—the Space Between the Silos' (2023) 24(1) German Law Journal 269.
[17] Case C-238/05 *Asnef-Equifax* EU:C:2006:734.
[18] ibid para. 63.
[19] European Commission, 'Guidelines on the application of Article 81(3)' [2004] OJ C101/97, recital 24.
[20] Cristina Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Brill/Nijhoff 2021).

regulation of Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) recognized that the undertakings concerned by the Commission's investigations should have the right to be heard.[21] Other than this provision, the rest of Regulation 17/62 is dedicated to establishing the Commission's powers of investigation. One can thus argue that the initial relationship between EU competition law and fundamental rights has been *operational* in the sense that fundamental rights have been relied upon to operationalize the substance of competition law. The principle of transparency plays an important role in this relationship. Acting as an enabler of the right to a fair trial, the principle of transparency accompanies the exercise of the right to be heard and contributes to the legal certainty needed for the delivery of justice.

3 THE INFORMATIVE RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The process of digitalization has led to the emergence of gatekeepers that may threaten not only the process of competition but also fundamental rights.[22] Two legal regimes in the EU, however, offer stringent protections in favour of fundamental rights in a digitized society. The first is the Charter of Fundamental Rights of the European Union, and the second is the General Data Protection Regulation (GDPR). Whereas the Charter offers a broad and holistic approach to the protection of fundamental rights in a democratic society, the GDPR safeguards, in particular, the right to the protection of personal data.

Aware of the challenges posed by gatekeepers both to market competition and to fundamental rights, EU competition law has shifted its approach to attempt to integrate the latter. A number of merger cases involving gatekeepers speak of the progress towards an *informative* relation between EU competition law and fundamental rights. In these cases, the European Commission has addressed privacy and data protection concerns in its assessments by integrating these concepts into its theory of harm.

First, in the *Facebook/WhatsApp* decision, one of the theories of harm formulated by the European Commission concerned the possible merging of Facebook's and WhatsApp's datasets after the unification of these companies.[23] This theory of harm addressed the potential data protection risk of the merger. Despite the potential negative data protection repercussions, the Commission took the position that '[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of data protection rules'.[24]

The fact that the European Commission included data protection in its theory of harm was an important step towards the informative relation between EU competition law and fundamental rights. Post-Facebook/WhatsApp mergers have deepened this relationship. Thus, in the assessment of Microsoft's acquisition of LinkedIn, the Commission's theory of

[21] Regulation (EEC) 17/62 of the European Council of 21 February 1962 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.
[22] Spencer W Waller, *Antitrust and Democracy* (2019) 46(4) Florida State University Law Review <https://ir.law.fsu.edu/lr/vol46/iss4/2> accessed 01 June 2024.
[23] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision of 3 October 2014.
[24] ibid para 164.

harm reflected the empirical findings of the market investigation which showed that privacy was an important parameter of competition and a driver of customer choice in the market for professional social networks.[25]

In *Google/Fitbit*,[26] the European Commission went a step further. Acknowledging that Fitbit was a company active in the health and fitness sector, the European Commission took into account the data protection issues in relation to the sharing of Fitbit's unique datasets – including biometric data such as health and emotions – with Google. The approved merger thus included, among other considerations, 'ads commitments' which consisted of Google agreeing not to use the health and wellness data collected by Fitbit's devices for Google Ads and to store Fitbit's data in a 'data silo' which required the technical separation of Fitbit's user data. In addition, users' consent would be required for Google to be able to use the health and wellness data for other non-advertising services, such as Google Search, Google Maps, Google Assistant or YouTube.[27]

The informative relationship between EU competition law and data protection law in *Google/Fitbit* had an institutional element as well. This was the first case in which the European Data Protection Board (EDPB) adopted an official statement.[28] The EDPB expressed concerns about the possible further combination and accumulation of sensitive personal data that could entail a high level of risk to fundamental rights to privacy and to the protection of personal data.[29] The EDPB also urged both companies to conduct, transparently, a full assessment of the data protection requirements and privacy implications of concerned mergers.

These cases relied on a few innovations that form the core of the informative relationship between EU competition law and fundamental rights, in particular privacy and data protection. The European Commission included for the first time privacy and data protection in its theory of harm. As Witt observed, before these cases, the European Commission had never considered the investigated transaction's impact on privacy a relevant factor. Instead, the European Commission focused exclusively on the conduct's impact on competition in terms of market shares, market concentration, barriers to entry and foreclosure effects.[30] Even though the European Commission cleared the mergers described above, this change was an important departure from its consumer welfare standard developed previously. In addition, the European Commission sent a signal to the private sector concerning its willingness to engage with privacy-related concerns flowing from increased concentration of data. In other words, the European Commission appears to have taken a stance in favour of fundamental rights informing its competition law assessments. Finally, the EDPB's intervention in this case signalled not only its interest in institutional cooperation but also its intent to guard and orient privacy assessments during merger proceedings. Its decision to intervene and inform EU competition law signals a new

[25] *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision 14 October 2016.
[26] *Google/Fitbit* (Case COMP/M.9660) Commission Decision of 17 December 2020.
[27] ibid paras 964-73.
[28] EDPB, 'Statement on Privacy Implications of Mergers' (19 February 2020) <https://www.edpb.europa.eu/our-work-tools/our-documents/statements/statement-privacy-implications-mergers_en> accessed 01 June 2024.
[29] ibid.
[30] Anne C Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60(3) Common Market Law Review 625.

ownership arrangement of competition law in the EU which is more inclusive and transparent.

To conclude, the informative relationship between EU competition law and fundamental rights is concerned not only with consumers' interests but also with citizens' rights. This is a significant departure from the operational relation concerned mainly with undertakings and competition authorities. What is more, whereas in the operational relationship, fundamental rights are peripheral to the substance of EU competition law, the informative relationship relies on brief fundamental rights incursions allowed into the substance of competition law. Such incursions have not affected the substance of EU competition law. They have, however, paved the way towards the foundational relation between competition law and fundamental rights.

4 THE FOUNDATIONAL RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The relationship between EU competition law and fundamental rights has not remained simply informative. On the contrary, this relationship is evolving into a foundational one as fundamental rights – particularly privacy and data protection – become integral parts of the foundations of EU competition law. Unlike the previous two relationships described above, the foundational relationship moves fundamental rights from the periphery into the substance of EU competition law. The protection of the rights of the citizen thus plays a crucial role in this relationship. As shown below, this evolution stems both from case law and legislative action.

4.1 *META/FACEBOOK* CASE

The case originated in Germany, where the Federal Cartel Office (FCO)[31] issued an infringement decision against Facebook for exploiting consumers through excessive data collection under German competition law.[32] The decision relied on an innovative theory of harm in which an abuse of a dominant position was inferred from the fact that Facebook had violated the GDPR.

Meta filed an appeal against this decision questioning the authority of the national competition authority to enforce data protection rules under EU competition law. The appeal led to a preliminary ruling request under Article 267 TFEU. The question the CJEU had to answer was whether a national competition authority could investigate and sanction an infringement of the GDPR as a violation under Article 102 TFEU.

The CJEU highlighted that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, 'it may be necessary for the competition authority of the member state concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law'.[33]

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[31] Bundeskartellamt in German.

[32] Bundeskartellamt, Decision no B6-22/16 of 6 February 2019. An English translation is available at: <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4> accessed 01 June 2024.

[33] Case C-252/21 *Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)* EU:C:2023:537, para 48.

Here, the CJEU enunciated what appears to be the debut of the foundational relationship between EU competition law and data protection law. More precisely, the CJEU highlighted that access to personal data and the possibility to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, the CJEU held that an exclusion of the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position 'would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union'.[34]

In what appears to be the most important part of its judgment, the CJEU noted that 'the interests and fundamental rights of the data subject may, in particular, override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect such processing'.[35]

The CJEU stated that even if the operator of an online social network holds a dominant position on the social network market, this 'does not, as such, prevent the users of that social network from validly giving their consent'.[36] To be clear, the CJEU recognizes that the existence of a dominant position may create a 'clear imbalance […] between the data subject and the controller, that imbalance favouring, inter alia, the imposition of conditions that are not strictly necessary for the performance of the contract'.[37]

The CJEU has analysed the institutional aspect of the foundational relationship between EU competition law and fundamental rights as well. In particular, it noted that where a national competition authority identifies an infringement of the GDPR in the context of the finding of an abuse of a dominant position, this does not replace the role of the data protection supervisory authorities. In particular, the CJEU held that the national competition authority 'neither monitors nor enforces' the application of the GDPR.[38]

Additionally, the CJEU imposes a duty on the competent national data protection supervisory authority of sincere cooperation with the national competition authority.[39] Graef recognizes this to be 'a remarkable and less expected' outcome of the case.[40] Indeed, the duty of sincere cooperation appears to be broad. It includes an obligation to respond to a request for information or cooperation within a reasonable period of time and to announce any intention to consult other concerned data protection authorities or the lead supervisory authority under the consistency mechanisms of the GDPR. If no answer is provided or if the data protection authority does not have any objections, the competition authority may proceed with its own investigation of the relevant data protection law.[41]

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[34] *Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)* (n 33) para 51.
[35] ibid para 112.
[36] ibid para 147.
[37] ibid para 149.
[38] ibid para 49.
[39] ibid para 54.
[40] Inge Graef, '*Meta Platforms*: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment' (2023) 30(3) Maastricht Journal of European and Comparative Law 325.
[41] *Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)* (n 33) paras 58-59.

4.2 THE DSA AND DMA

The foundational relationship between EU competition law and fundamental rights is also nourished by recent EU legislation, in particular the DMA and the DSA. Intended to lay the groundwork for a digital single market, this legislation is similar to previous efforts to create a single market, but different in its focus on citizenship and fundamental rights.

First, the DMA recognizes in recital 35 that the obligations imposed on gatekeepers are necessary to safeguard public order and privacy. Second, the DMA highlights that privacy and data protection should be taken into account by competition authorities when assessing the effects of collecting large amounts of data from users. Third, to ensure a minimum level of effectiveness of the transparency obligation, gatekeepers must provide an independently audited description of the basis upon which profiling is performed. The Commission is tasked with transferring the audited description to the EDPB to inform the enforcement of EU data protection rules. In addition, the Commission is empowered to develop the methodology and procedure for the audited description, in consultation with the European Data Protection Supervisor (EDPS), the European Data Protection Board, civil society and experts.

Although the DSA is not a competition law tool, it does contain provisions steering the behaviour of some of the undertakings designated as gatekeepers under the DMA. In addition, since the DSA applies to all providers of intermediary services in the EU, it will affect the behaviours and strategies of most undertakings doing business with gatekeepers. It is important thus to understand the fundamental rights provisions in this regulation.

First, the DSA addresses the *consumer vs. citizen dilemma* in favour of the citizen. The DSA recognizes that responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing EU citizens and other persons to exercise their fundamental rights.[42] Article 34 of the DSA operationalizes this idea by obliging providers of Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) to identify, analyse and assess systemic risks in the European Union. Article 34 (1)(b) provides that VLOPs and VLOSEs must analyse

> any actual or foreseeable negative effects for the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter.

The DSA thus imposes important duties to safeguard fundamental rights in the EU on gatekeepers and, indirectly, on undertakings in their ecosystems. As gatekeepers adapt to

[42] DSA recital 3.

comply with the DSA, the European Commission will increasingly be called to include a fundamental rights analysis in its competition law assessments as well.

Transparency plays an important role in the foundational relationship between EU competition law and fundamental rights. The DMA highlights, in this sense, that to achieve contestability of core platform services, gatekeepers must ensure an adequate level of transparency.[43] The DMA relies on the GDPR to show that 'transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale'.[44]

In the same vein, the risk assessment demanded by Article 34(1)(b) of the DSA is an exercise in transparency requiring undertakings to disclose information that has not been disclosed before. This, in turn, will allow other undertakings to better operate in the digital environment. In addition, these provisions will empower citizens to understand how their rights are being protected in the digital space. Lastly, both the DMA and the DSA clarify the duties of EU and domestic institutions in relation to gatekeepers and other undertakings.

The transparency regime required by the DSA and the DMA thus appears to answer, first and foremost, the needs of *homo economicus*, the perfectly rational economic human. As Buijze noted, the principle of transparency requires that 'legislation is clear, obvious and understandable, without room for ambiguities'.[45] In addition, the principle of transparency aims to enhance the functioning of the internal market by 'facilitating effective decision-making by economic actors, and as a safeguard against undesirable market interferences by allowing *homo economicus* to defend his rights and to ensure that public authorities act in accordance with the law'.[46] From this point of view, the DSA and the DMA are transparency tools, regulating the relation between big undertakings and public authorities in the EU. At the same time, the transparency regime required by the DSA and the DMA place *homo dignus* – with his/her many fundamental rights – at the centre of their preoccupations. From this point of view, the DSA and the DMA are tools to protect fundamental rights in the EU.

5 CONCLUSION

Faced with the challenges posed by gatekeepers, EU competition law is undergoing a period of significant change. I have attempted to show in this article that one can understand this change as a shift in the relationship between EU competition law and fundamental rights. More precisely, I have shown that the initial relationship between EU competition law and fundamental rights was operational. In the operational relationship, the right to a fair trial was deployed by the European Commission to create and expand its quasi-judicial arm. This long-standing operational relationship has recently evolved into an informative one, as the rights to privacy and data protection have informed the European Commission's merger assessments involving gatekeepers. Lastly, I have argued that, in light of the *Meta/Facebook*

[43] DMA recital 72.
[44] ibid.
[45] Anoeska Buijze, *Transparentiebeginsel in Het Recht van de Europese Unie* [The Principle of Transparency in EU Law] (Uitgeverij BOXPress 2013) 269.
[46] ibid.

case and recent EU legislation, the relationship between EU competition law and fundamental rights can be called foundational. Indeed, it appears that both the CJEU and the EU legislator intend to inject fundamental rights into the foundations of EU competition law.

Witt rightly noted that 'thinking and acting in disciplinary and institutional silos is not helpful when it comes to regulating digital platforms whose business models require the collection and use of personal data'.[47] The cases and legislation described in this paper show that the period of disciplinary and institutional silos may be reaching its end in EU competition law. Instead, the foundational relationship between EU competition law and fundamental rights requires substantive and institutional cooperation. The principle of transparency plays an important role in this development as it allows clarity and certainty about the applicable rules. It answers the needs of *homo economicus* and places *homo dignus* at the centre of all publicly-funded endeavours.

The main question that remains is how the foundational relationship between EU competition law and fundamental rights will be operationalized to integrate other fundamental rights such as freedom of thought or the right to a healthy environment. Considering fundamental rights consistently during competition law assessments is a challenging task that will require consideration for all the rights guaranteed by the Charter.

[47] Witt (n 30).

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