Discussion Paper Series – CRC TR 224

Discussion Paper No. 671
Project B 05

Damages Actions Against Digital Gatekeepers for Breaches of EU Antitrust Law and the DMA: A German Perspective

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March 2025

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Support by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation) through CRC TR 224 is gratefully acknowledged.

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09 March 2025

ABSTRACT

This paper examines actions for damages against digital gatekeepers for breach of EU antitrust law or the Digital Markets Act (DMA) from a German perspective. It provides insights into private antitrust litigation against digital gatekeepers before German courts. While the pending damages actions are still at an early stage, a number of injunction actions have been decided, providing some insight into the effectiveness of private antitrust enforcement against digital gatekeepers. The role of damages actions as an instrument of corrective justice and of enforcement in the context of DMA infringements is discussed. The conceptual choice to include DMA infringements in the German antitrust damages law is considered in the light of the EU principles of effectiveness and equivalence.

Keywords: damages actions, injunction actions, antitrust law, digital gatekeepers, digital platforms, DMA

JEL classification: K21, K23, K41, K42

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I. Introduction

Private rights of action are meant to play a crucial role in ensuring the effectiveness of EU law. These rights of action encompass claims for damages awarded to injured parties, serving the purpose of both enforcement – understood essentially as the deterrence of infringements – and the restoration of corrective justice. This is well established in relation to EU antitrust law (Articles 101 and 102 TFEU) and does not seem to be controversial, at least as a matter in principle, in relation to the Digital Markets Act (DMA).[1]

In this paper, taking a German perspective, I look at damages actions against digital gatekeepers for infringement of EU antitrust law or the DMA. What I have in mind here as 'digital gatekeepers' are the operators of (digital) platforms that are essential for business users to reach end users and have therefore been designated under the DMA and/or section 19a of the German Competition Act[2] (the '19a tool'), which can be seen as the regulatory equivalent of the DMA under German law.[3] Taking a 'German perspective' means that I will focus on lawsuits that are pending or prepared to being filed before the courts in Germany. I will also focus on legislative activities in Germany that relate to the topic. International observers may be particularly interested in the fact that DMA violations have been incorporated into the private antitrust enforcement regime under the German Competition Act.

This paper has two main parts. The first main part (Section II) provides insights into private antitrust litigation against digital gatekeepers before German courts. As we shall see, all antitrust damages actions are at an early stage, so that only cautious observations can be made. It is noteworthy that there are different categories of pending or prepared cases: individual and bundled claims; claims for damages based on abuse of dominance and vertical anticompetitive agreements; classic follow-on actions; and those that do not follow a binding decision but still benefit from prior public enforcement. In addition, several actions for injunctions have been brought and decided. It is useful to also analyse these cases with a view to actual or potential damages claims, as they provide some insights into how and why private antitrust enforcement against digital gatekeepers can be effective.

The second main part (Section III) deals with damages actions for breaches of DMA obligations. It is organised as follows. First, it explains how, in the context of the DMA, damages actions can be relevant as instruments for restoring corrective justice on the one hand and for effective and efficient enforcement on the other. With regard to the latter, it explores their potential added value in terms of deterrence. Furthermore, I will argue that the ECJ's *DB Station* judgment[4] does not provide a sound basis for limiting stand-alone actions

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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).

[2] Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition). An English version of the Competition Act is available at https://www.gesetze-im-internet.de/englisch_gwb/index.html.

[3] See FRANCK, J.-U., 'Abuse Proceedings against Digital Gatekeepers under Section 19a of the German Competition Act: Taking Stock of Early Results', in J. I. Ruiz Peris and C. Estevan de Quesada (eds), *New European Competition Trends in Digital Markets*, Atelier, Barcelona, 2024, 23, 25–32.

[4] ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832.

for breach of the DMA. Finally, possible reasons for public underenforcement are identified, including political considerations in the transatlantic relationship. Second, I will discuss the implementation of damages claims for DMA infringements under German law. I will argue that the inclusion of DMA infringements in the antitrust damages regime should be regarded as a wise step to do justice to the principles of effectiveness and equivalence, even though it may not be crystal clear how far the arm of these EU principles reaches into national law. Finally, I will explain in detail which provisions of the German (and, indirectly, the EU) law on antitrust damages are applicable to infringements of the DMA and which are not.

Section IV concludes this paper by highlighting three sensitive issues in German antitrust damages law: access to evidence; the bundling of claims and financing of litigation; and the availability of spirited judges with practical experience in handling antitrust damages actions. It is argued that these weaknesses may prove to be particularly problematic in the context of legal action against digital gatekeepers.

II. Private Antitrust Enforcement against Digital Gatekeepers before German Courts

In October 2024, the Tribunal de Commerce de Paris ordered Google to pay EUR 26.5 million in damages to Equativ, its French online advertising competitor.[5] The claim followed a 2021 decision by the Autorité de la Concurrence, the French Competition Authority ('Google AdX'), which found Google guilty of an antitrust infringement and fined the company EUR 220 million.[6] In the lawsuit filed in 2022, Equativ had sought EUR 369.1 million in damages from Google. The court's decision limited the damages to the losses incurred in France. Unfortunately, the judgment has not yet been published, so we can only speculate as to the reasons given. It is possible that the court held that an infringement had not been proven regarding the damage outside France. In this respect, the plaintiffs could not benefit from the binding effect of the decision of the Autorité de la Concurrence. Owing to its limited jurisdiction, the French Competition Authority could not rule on antitrust infringements outside France.

This look at the Paris Commercial Court illustrates what I cannot report from Germany: as far as I can tell, the German courts have not yet handed down a single judgment in an antitrust damages case against a digital gatekeeper. However, according to media reports and announcements by law firms, economic consultants and 'special purpose vehicles' (SPVs) set up to pool damages claims, several cases are pending before the regional courts (the Landgerichte), and others are being prepared.

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[5] The judgment has been reported in the media. See https://www.capital.fr/entreprises-marches/google-condamne-une-entreprise-francaise-va-toucher-26-millions-deuros-1504601 and https://www.pymnts.com/cpi-posts/paris-court-orders-google-to-pay-e26-5-million-to-equativ-in-, advertising-dispute/. However, it does not appear to have been published in any database.

[6] Autorité de la concurrence, 7.7.2021, 21-D-11, *Google AdX/Google DoubleClick for Publishers*, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-06/21d11_0.pdf. See HÖPPNER, T., VOLMAR, M., and WESTERHOFF, P., 'The French Competition Authority fines a Big Tech company €220 million for abuse of a dominant position through self-preferencing in the ad tech industry (Google AdX / Google DoubleClick for Publishers)', *Concurrences, e-Competition News Issue June 2021*, N°102324.

A. Damages Actions before the German Courts

The following three examples provide an insight into the antitrust damages actions against digital gatekeepers that are pending or in preparation before German courts.

1. *A 'Google Search (Shopping)' follow-on action:* Idealo v Google

A prime example of an individual damages action is the case of the German price comparison site Idealo against Google, which has been pending before the Berlin Regional Court since 2019.[7] This is an action for damages following the European Commission's decision to fine Google for abusing its dominant position in the online search market by engaging in self-preferential behaviour that foreclosed competitors to Google Shopping such as Idealo.[8] The damages claimed by Idealo were originally estimated at around half a billion euros (including interest).[9] In February 2025, the firm announced that it had expanded its claim for damages to EUR 3.3 billion.[10] The proceedings before the Berlin Regional Court were stayed while the appeal against the Commission's decision was pending before the European courts. Since the ECJ's final decision,[11] the case has been resumed, but a hearing will presumably not take place before the end of 2025.

2. *The fallout from Booking.com's 'Dutch Torpedo': hotels claim damages for the platform's use of best price clauses*

In March 2021, the German Hotel Association reported[12] that around 2,000 hotels had filed antitrust damages claims with the Berlin Regional Court against Booking.com. The lawsuits follow a December 2015 decision by the Bundeskartellamt,[13] which found Booking.com's use of best price clauses to be illegal and which was ultimately upheld by the Bundesgerichtshof, the German Federal Court of Justice, in May 2021.[14] The hotels maintain that competitive pressure from competing online travel agencies and from the hotels' direct sales channel on Booking.com has been significantly weakened by the imposition of best price clauses, allowing the platform to charge excessive fees. According to its press release,[15] the German Hotel Association has bundled the interests of the hotels and has concluded agreements with litigation funds, ensuring that the hotels do not bear any cost risks.

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[7] The case number is 16 O 195/19.

[8] European Commission, 27.6.2017, Case AT.39740, *Google Search (Shopping)*.

[9] See Idealo's press release from 12.4.2019 https://www.idealo.de/unternehmen/pressemitteilungen/idealo-verklagt-google-auf-schadensersatz-wegen-missbrauchs-seiner-marktbeherrschenden-stellung.

[10] Press release of 19.2.2025, 'Idealo expands its claim for damages against Google before the Berlin District Court to 3.3. billion euros', https://www.idealo.de/unternehmen/pressemitteilungen/idealo-is-expanding-its-claim-for-damages-against-google.

[11] ECJ, 10.9.2024, Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:C:2024:726

[12] Deutscher Hotelverband (IHA), Press Release, 31.3.2021, 'IHA unterstützt Sammelklage von rund 2.000 Hotels gegen Booking.com beim Landgericht Berlin', https://www.hotellerie.de/fileadmin/user_upload/PM_2021-03-31_Schadensersatz_fuer_kartellrechtswidrige_Bestpreisklauseln_IHA_unterstuetzt_Sammelklage_von_2.000_Hotels_gegen_Booking_beim_Landgericht_Berlin.pdf.

[13] Bundeskartellamt, 22.12.2015, B9-121/13, *Booking.com*.

[14] The Bundeskartellamt's decision was initially successfully challenged by Booking before the Düsseldorf Higher Regional Court (4.6.2018, Kart 2/16(V), Juris) but was ultimately upheld by the Bundesgerichtshof, the Federal Court of Justice (19.5.2021, KVR 54/20, Juris).

[15] Deutscher Hotelverband (IHA) (n 12).

These actions before the Berlin Regional Court were preceded[16] by a 'Dutch torpedo' launched by Booking.com: the platform operator had filed negative declaratory actions against 66 German hotels[17] before the Rechtbank (District Court) Amsterdam in October 2020 – apparently during ongoing settlement negotiations. It has been reported that some (German) hotels have joined the Amsterdam proceedings and filed counterclaims for damages.[18] Booking.com's aim appeared to be to persuade the Rechtbank Amsterdam to make a preliminary reference to the ECJ, thereby potentially undermining the decision of the Bundesgerichtshof,[19] which had upheld the Bundeskartellamt's finding of an infringement of Article 101 TFEU without referring the matter to the ECJ. If the ECJ had now decided, on referral by the Amsterdam court, that the Bundesgerichtshof had based its judgment on an incorrect interpretation of Article 101 TFEU, the German courts would also have been bound by these findings, in particular by Article 4(3) TFEU, and the binding effect of the Bundesgerichtshof's final judgment establishing the infringement would have been invalidated.[20]

Booking.com's manoeuvre, as far as it can be said at this stage, has only been half successful: the Amsterdam court did refer the matter to Luxembourg, but the ECJ rejected the 'ancillary restraints' argument put forward by Booking.com. The ECJ was certain that best price clauses could not be considered objectively necessary for the offering online intermediation services by Booking.com. While the Court acknowledged that the parity clauses may help to avoid free-riding, it noted that this was merely a question of the profitability of the services offered or possibly also a question of efficiencies within the meaning of Article 101(3) TFEU. However, these effects did not justify the application of the ancillary restraints doctrine under Article 101(1) TFEU.[21]

Booking.com can still invoke the (then applicable) Vertical Block Exemption Regulation 330/2010[22] and Article 101(3) TFEU to justify its price parity policy. It remains to be seen

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[16] According to the press release from the German Hotel Association. The ECJ judgment states that the German Hotel Association filed a lawsuit with the Berlin Regional Court 'in 2020' and that Booking.com filed a lawsuit with the Rechtbank Amsterdam on 23 October 2020. The sequence of the statements in the judgment suggests (probably incorrectly) that the German Hotel Association filed the lawsuit first. ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 21 and 23.

[17] See Deutscher Hotelverband (n 12).

[18] HEINZ, S., 'Dutch Torpedo at Work – AG Collins' Opinion in the Booking Case', *Kluwer Competition Law Blog* 27.6.2024, p. 2.

[19] See Article 9(3) of the 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 (in the following referred to as 'Competition Damages Directive'). OJ L 349, 5.12.2014, pp. 1–19.

[20] In any case, as far as the identical facts and the identical final decision of a competition authority or court are concerned, this is an *acte clair*. Therefore, a national court before which an action for damages is brought is bound by an ECJ judgment without the need for a separate preliminary reference to the ECJ.

[21] ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, paras 72–75.

[22] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (no longer in force). In this regard, the ECJ merely reiterated that 'the definition of the relevant market for the purposes of the application of the market share thresholds provided for in [the Regulation] requires a concrete examination of the substitutability, from a supply and demand point of view, between online intermediation services and other sales channels.' ECJ, 19.9.2024, Case C-264/23, *Booking.com and Booking.com (Deutschland)*, ECLI:EU:C:2024:764, para. 91.

whether the Rechtbank Amsterdam will indeed come to a different conclusion from the Bundesgerichtshof on this point. This is not inconceivable[23] but it would be surprising, because the Dutch court would then have to directly challenge the findings and assessments on which the Bundesgerichtshof based its decision.

3. Damages claims on behalf of publishers against Google

German legal services provider adClaim, set up as an SPV in conjunction with a well-known plaintiffs' law firm, has been procured to pool claims for damages from online publishers that have generated revenues from the sale of online advertising space between 2014 and 2022 and who may have been harmed by Google's abusive conduct in online advertising.[24] This procurement of antitrust damages claims follows the standard scenario of pooling claims on the basis of the 'assignment model',[25] which is the best available functional equivalent of a class action for business plaintiffs under German law.[26] AdClaim has stipulated that, if no out-of-court settlement can be reached with Google, a lawsuit for damages will be filed. Statements made by adClaim indicate that litigation is planned in German courts, with potential plaintiffs apparently having been recruited from across the EEA.[27] So far, there has been no public disclosure of the size of the claims that have been captured.

The alleged abuse of a dominant position through self-preferencing in the ad tech industry is primarily based on the aforementioned decision of the French Competition Authority in *Google AdX/Google DoubleClick for Publishers*, dated 7 June 2021.[28] Moreover, in a Statement of Objections issued on 14 June 2023, which essentially concerns the same activities of Google, the European Commission maintains that Google continues to infringe Article 102 TFEU.[29]

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[23] Pursuant to Article 9(2) of the Competition Damages Directive, Dutch law must (at least) give prima facie weight to the finding of an infringement of Article 101 TFEU by the final decision of the Bundesgerichtshof in the *Booking.com* case. As far as can be seen, although this is not explicitly stated in Dutch law, it is recognised that final decisions of other Member States' competition authorities can be submitted as rebuttable evidence of an infringement. See MEIJER, R., and ZIPPRO, E.-J., 'Private Enforcement in the Netherlands', in F. Wollenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 143, 153.

[24] See AdClaim, 'AdTech and Google's Abuse of Dominance – Damage Recovery for European Publishers' https://www.ad-claim.eu/en/home.

[25] See AdClaim, FAQ, https://www.ad-claim.eu/en/faq. In particular, it explains the commissions charged ('success fees'): 'Participating in our assignment model will leave you without any cost risk. We bear all costs, for example for the economic expert opinion, the lawyers and the court. After we have successfully enforced your damage claims, you will receive the recovered amount minus a success fee, which will be as follows: 17.5 % (or 15 % for members of media associations) if a settlement is reached before the action is filed; 27.5 % (or 25 % for members of media associations) if the proceedings are concluded within 3 years of the filing of the action; 30 % (or 27.5 % for members of media associations) if the proceedings continue for more than 3 years after the action has been filed.'

[26] See below sub IV and ECJ, Case C-253/23, *ASG 2,* ECLI:EU:C:2025:40.

[27] See AdClaim (n 24) ('Hausfeld's lawyers will prepare a "class action" for European online publishers by way of an assignment model which has recently been declared permissible by the German Federal Court of Justice. Publishers that have suffered damages may pursue their claims against Google in German civil courts without any cost risk').

[28] Autorité de la concurrence (n 6).

[29] European Commission, Press release of 14.6.2023, 'Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology' https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

4. A few preliminary observations

The proceedings described are all at such an early stage that it is not yet possible – at least for uninvolved observers – to draw any trends or even reliable conclusions about the effectiveness and possible practical challenges of damages actions against digital gatekeepers. Some observations can at least be made about possible scenarios for such lawsuits.

The alleged antitrust violations by big tech companies are often abuses of market dominance – *Google Search (Shopping)* is probably the archetypal case here, but the *Booking.com* case shows that antitrust damages claims against digital gatekeepers can in practice also be based on alleged (vertical) anticompetitive agreements.

These actions for damages against Google and Booking.com are classic follow-on actions: they follow a decision by an antitrust authority – namely the European Commission (*Google Search (Shopping)*) and the German Bundeskartellamt (*Booking.com*) – that has become final after an unsuccessful appeal, and the plaintiffs are seeking damages within the jurisdiction of the respective authority, thus relying on binding findings by the competition authority (and/or the courts that had to hear appeals) to establish the infringement.

The situation is different with regard to the lawsuits that appear to be in preparation and that will be based on an antitrust infringement by Google in the area of online advertising to the detriment of online publishers in particular: although there is a final finding of infringement in the form of the decision of the Autorité de la Concurrence in the *Google AdX/Google DoubleClick for Publishers* case, these findings relate only to France. However, claims for damages are pooled across the European Economic Area, so the findings of the French Competition Authority are not binding as far as Google's conduct with effects outside France[30] is concerned. Therefore, to the extent that the conduct is de facto identical, the French decision may have a certain indicative effect, but a different assessment by the German courts is possible.

While Idealo, as a competitor of Google Shopping, is suing on its own for damages caused by Google's abuse, the other two examples illustrate cases where claims are bundled. In the Booking.com case, the initiative appears to have come from the hotel association IHA, which bundled the claims of hotel operators. In the cases against Google for abusive behaviour in the online advertising markets, the bundling is carried out by a SPV, apparently initiated by a well-established plaintiffs' law firm. In both cases, litigation funders are involved.

Finally, despite the fact that all three cases are at an early or incipient stage, it is unlikely that they will be settled or decided quickly. It is possible that several years will elapse between

[30] If a plaintiff brings an action for damages before a German court and the plaintiff bases its claim on conduct by the defendant that the French Competition Authority has found to be in breach of Article 101 or 102 TFEU (because it had effects in France), then these findings are binding. This is because in this respect section 33b of the German Competition Act goes beyond Article 9(2) of the Competition Damages Directive 2014/104/EU, which requires that these findings can 'be presented before … national courts as at least prima facie evidence that an infringement of competition law has occurred'. See FRANCK, J.-U., 'Vorb §§ 33–34a' to '§ 33h GWB' [German Antitrust Damages Law], in T. Körber, H. Schweitzer and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2, 7th ed., C.H. Beck, Munich, 2024, § 33b GWB para. 6 (at p. 1502).

the preparation of the claims and a judgment at first instance. Without going into detail on the reasons for this – which may also vary from case to case – it is clear that it takes deep pockets and patience to be a successful plaintiff in such cases.

B. Damages Actions before the UK's Competition Appeal Tribunal and in Amsterdam Appear to Be Leading the Way

Looking at the rather modest (publicly known) activity in damages actions, one gets the impression that developments in Germany are somewhat lagging. In the UK, the Competition Appeal Tribunal (CAT) already has a double-digit number of class actions pending against big tech companies. According to a review provided by a law firm,[31] there are four cases pending against each of Alphabet (Google),[32] Amazon[33] and Apple,[34] and one case pending against Meta.[35] For example, as a counterpart to the aforementioned Google AdTech lawsuit, which is being prepared in Germany, a collective action against Google on behalf of all UK-based publishers was registered with the CAT on 30 November 2022 for alleged abuse in its activities in the online advertising market.[36]

Within the EU, it appears that the Dutch courts could establish themselves as an important forum for (collective) antitrust damages actions against digital gatekeepers. For instance, regarding Google's alleged abusive conduct in online advertising, a lawsuit was filed on 28 February 2024 with the District Court of Amsterdam on behalf of more than 30 European media organisations from 17 countries, seeking damages of approximately EUR 2.1 billion.[37] From a German perspective, it is particularly noteworthy that Axel Springer[38] and Hubert Burda Media, two of the country's largest publishing houses, have joined the action. It is not entirely clear from the publicly available information whether the claimed damages could also

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[31] See Simmons Simmons LLP, Tracking Collective Proceedings in the UK (as at 4.11.2024), https://www.simmons-simmons.com/en/publications/clhhkaalg000uuao03fozem4r/collective-proceedings-issued-in-the-uk-s-competition-appeal-tribunal.

[32] Case no. 1673/777/24, *Professor Barry Rodger v (1) Alphabet Inc.; (2) Google LLC; (3) Google Ireland Ltd; (4) Google Asia Pacific Pte Ltd; (5) Google Commerce Ltd; (6) Google Payment Limited; and (7) Google UK Limited* (registered on 23.8.2024); 1606/7/723, *Nikki Stopford v Google* (7.9.2023); 1572/7/7/22 and 1582/7/7/23, *Ad Tech Collective Action LLP v Alphabet Inc. and Others* (30.11.2022/29.3.2023); 1408/7/7/21, *Elizabeth Helen Coll v Alphabet Inc. and Others* (29.7.2021).

[33] Case no. 1644/7/7/24, *Professor Andreas Stephan v (1) Amazon.com, Inc., (2) Amazon Europe Core S.À.R.L., (3) Amazon Services Europe S.À.R.L., (4) Amazon EU S.À.R.L, (5) Amazon U.K. Services Ltd, and (6) Amazon Payments U.K. Limited* (registered on 28 June 2024); 1641/7/7/24, *BIRA Trading Limited v (1) Amazon.com, Inc., (2) Amazon Europe Core S.À.R.L., (3) Amazon EU S.À.R.L, (4) Amazon Services Europe S.À.R.L., (5) Amazon U.K. Services Ltd., and (6) Amazon Payments U.K. Limited*; 1595/7/7/23, *Robert Hammond v Amazon Inc., and others* (7.6.2023); 1568/7/7/22, *Julie Hunter v Amazon.com, Inc. and others* (15.11.2022).

[34] Case no. 1602/7/7/23, *Christine Riefa Class Representative Limited v Apple Inc. & Others* (registered on 1.8.2023); 1601/7/7/23, *Dr Sean Ennis v Apple Inc and Others* (25.7.2023); 1468/7/7/22, *Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited* (17.6.2022); 1403/7/7/21, *Dr. Racheal Kent v Apple Inc. and Apple Distribution International Ltd* (11.5.2021).

[35] Case no. 1433/7/7/22, *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. & Others* (14.2.2022).

[36] Case no. 1572/7/7/22 and 1582/7/7/23, *Ad Tech Collective Action LLP against (1) Alphabet Inc; (2) Google LLC; (3) Google Ireland limited; and (4) Google UK Limited*. On 5 June 2024 the Tribunal issued its judgment granting the class representative's application for a collective proceedings order ([2024] CAT 38). See https://www.catribunal.org.uk/cases/15727722-15827723-ad-tech-collective-action-llp.

[37] See 'European news media file €2.2 billion ad tech claim against Google'. See https://adtechclaim.eu/press-release/.

[38] Note that Axel Springer is also the majority shareholder of Idealo. See https://www.br.de/nachrichten/wirtschaft/darum-will-sich-der-springer-konzern-aufspalten,UOp7xcU.

have been sued for before the German courts. However, it seems quite possible. In this case, the fact that the claim was brought before the Amsterdam court can be seen as an indication that the legal and institutional framework in the Netherlands was considered preferable.

C. Actions for Injunctions before the German Courts

Looking beyond damages claims, a significant number of actions for injunctive relief have been filed. This shows that this aspect of private antitrust enforcement against digital gatekeepers is indeed of considerable practical importance in Germany.

1. Overview of court cases

Of particular note are a number of preliminary injunction proceedings before German courts in which digital gatekeepers have been involved:

- The Frankfurt District Court has issued a preliminary injunction against Amazon for banning a retailer's products from Amazon Marketplace, in fulfilment of its so-called 'brand-gating' agreement with Apple.[39]
- The operator of a health portal has obtained an injunction against Google from the Munich Regional Court I because of the preferential treatment of a health portal of the German Federal Ministry of Health in Google's search results list.[40]
- The Regional Court of Hamburg has rejected an application to include a sports app in the Google Play Store. The latter had refused access because the app had contained advertising for betting providers.[41]
- There have been three successful applications for injunctions in relation to Google Ads, challenging the suspension of accounts and the suspension or rejection of certain ad campaigns.[42] In another case, the application for interim measures was rejected because the court considered that the urgency of the matter had not been sufficiently demonstrated.[43]
- We may note five lawsuits for interim injunctive relief resulting from the suspension of accounts on Amazon Marketplace for alleged violations of Amazon's terms of service.[44] The courts granted an interim injunction in only one case[45] and denied four requests.[46]

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[39] LG Frankfurt, 12.2.2019, 3-06 O 94/18, Juris.
[40] LG München I 10.2.2021, 37 O 15721/20, Juris – *netdoctor / Google*.
[41] LG Hamburg, 5.7.2016, 408 HKO 54/16, Juris.
[42] LG Hamburg, 27.12.2022, 415 HKO 84/22, Juris; OLG Hamburg, 21.8.23, 15 U 18/23 Kart, Juris; LG Frankfurt a. M., 5.5.2022, 2-03 O 58/22, Juris.
[43] LG Hamburg, 29.4.2024, 315 O 300/23, Juris.
[44] See FRANCK, J.-U., 'Individual Private Rights of Action under the Platform-to-Business Regulation', *European Business Law Review* 34 (2023), 525, 530–537.
[45] LG Hannover, 22.7.2021, 25 O 221/21, Juris.
[46] OLG Brandenburg, 16.7.2020, 6 W 66/20, Juris; LG Stuttgart, 22.4.2021, 11 O 10/21, Juris; LG München I, 12.5.2021, 37 O 32/21 – *Amazon Kontensperrung II*, Juris; LG München I, 30.9.2021, 37 O 9343/21, Juris.

- An application by the operator of an app (the 'Bliq app') that enables transport service drivers to manage requests from various ride-hailing platforms, such as Uber and FreeNow, was unsuccessful. The application was based on an alleged antitrust right to access the application programming interfaces of the ride-hailing platforms.[47]

In addition to these proceedings for interim relief, there are judgments in main proceedings relating to injunctions against digital gatekeepers:

- In a case decided by the Berlin Regional Court, German press publishers tried unsuccessfully to challenge Google's contractual requirement to make snippets and thumbnails available to the public free of charge.[48]
- In a recent ruling, the Düsseldorf Regional Court ordered Meta to stop blocking the Facebook page of a filmmakers' association that regularly organises events, without giving specific reasons and without giving the association the opportunity to comment.[49]

2. A few preliminary observations

The above-mentioned court cases give us some insights into how and why private enforcement can be effective against digital gatekeepers.

a. Exploiting private incentives and information about infringements

Business users of digital platforms, such as sellers on online marketplaces and app developers seeking distribution in app stores, will often be the first to know or suspect that the platform operator is infringing competition law. In many cases, through their long-term relationship with the platform, business users will develop a good understanding of the platform's incentives and strategies – including deliberate or accepted infringements. If their own economic interests are threatened by this behaviour, they have an incentive to use this private information. The most direct way to do this is to use private rights of action for injunctive relief. Seeking an injunction in an interlocutory procedure is undoubtedly the swiftest way for business users or other market participants to avoid being harmed by the anticompetitive behaviour of digital platforms.

b. Business users are not (necessarily) afraid to take big tech companies to court

Private antitrust enforcement against digital gatekeepers with their superior resources and overwhelming bargaining power can be seen as an uphill battle: aggrieved parties that go to court may expect to be outgunned in litigation and fear retaliation. However, the above court cases show that individual private rights of action can still play an important role in enforcing competition law against big tech companies. What are the reasons for this?

Certainly, when a digital gatekeeper's monetisation model is challenged through litigation, fierce resistance is to be expected. However, this is not necessarily the case with private antitrust litigation, such as when individual users invoke antitrust law to regain access to their Amazon Marketplace, Google Ads or Facebook accounts, and the platforms refuse, arguing

[47] LG Berlin, 7.9.2023, 16 O 49/23 Kart – *Ride Hailing Apps*, Juris.
[48] LG Berlin 19.2.2016, 92 O 5/14 Kart, Juris.
[49] LG Düsseldorf 18 April 2024, 14d O 1/23 – *Filmwerkstatt Düsseldorf*, Juris.

that the users have, for example, sold counterfeit products, used inappropriate advertising slogans and so on.

Admittedly, the situation is different if, for example, an Apple retailer banned from Amazon Marketplace successfully sued its way back onto the platform by claiming that the branding agreement between Amazon and Apple violates antitrust law.[50] At that point, Amazon would certainly have to worry about the legal validity of a key business strategy and would therefore have an incentive to play hardball. For its part, the business user may have little to lose and will take every opportunity to challenge the platform ban. Moreover, when it comes to access to its essential distribution channel, the business user may have an incentive to exhaust its (limited) financial resources in order to obtain legal protection.[51]

Moreover, while the big tech companies may be able to afford a take-it-or-leave-it attitude towards (almost) all their business users, there are also users who generate revenue on such a scale that it would be unwise to lose them, and who therefore have at least some countervailing power including pockets deep enough not to shy away from litigation because of the costs involved. Nevertheless, it should not be underestimated that, for fear of retaliation, even relatively big companies, such as large publishing houses, are wary of suing big tech firms for breach of competition law or the DMA.

c. The law protects business users as weaker parties

The law provides some protection for weaker parties, including to some extent in relationships between businesses and platform operators, thereby facilitating the ability of business users to contribute to private enforcement. For example, following the Bundeskartellamt's intervention, Amazon agreed to amend the terms and conditions for its European marketplaces and to abandon the exclusivity of Luxembourg as the place of jurisdiction for Europe.[52] This was a key factor[53] in allowing Amazon's German-based business users to bring private antitrust claims against Amazon in German courts in the above cases, even though the platform operator is based in Luxembourg and Amazon had included an exclusive forum clause in its contractual terms designating the court of Luxembourg City.

The Spanish competition authority's decision in July 2024 to fine Booking.com could have a parallel effect by allowing hotels based in Spain to bring private antitrust actions in Spanish

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[50] See above note 39 and accompanying text.

[51] See FRANCK (n 44), 552.

[52] Bundeskartellamt, 17.07.2019, Case B2 – 88/18, *Online Sales ('Amazon Marketplace')*, Case Summary, p. 2. See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html. In principle, however, exclusive choice-of-court clauses are effective in B2B contracts. See Article 25 of the Brussels I Regulation (recast). ECJ, 24.10.2018, Case C-595/17, *Apple Sales International and Others*, ECLI:EU:C:2018:854. For more on the need and how EU legislation could do more to protect dependent business users against exclusive forum provisions, see FRANCK (n 44), EBLR 34 (2023), 525, 553–556.

[53] Another decisive factor is the ECJ's ruling that jurisdiction in 'matters relating to tort, delict or quasi-delict' under Article 7(2) of the Brussels I Regulation (recast) also applies where a private antitrust action based on an alleged abuse of a dominant position is directed against conduct occurring in the context of a contractual relationship. See ECJ, 24.11.2020, Case C-59/19, *Wikingerhof*, ECLI:EU:C:2020:950.

courts. The authority considered it an exploitative abuse for the platform to impose a clause on Spanish hotels giving the courts in Amsterdam exclusive jurisdiction over disputes.[54]

Given that German sellers on Amazon's marketplace and Spanish hotels using Booking.com's intermediary service are mostly small or medium-sized enterprises, the cost savings of not having to sue these platform operators in Luxembourg City or Amsterdam but instead in German or Spanish courts must be seen as a significant lowering of the barriers to the exercise of private rights of action.

III. Fundamental Conceptual Choice: Aligning Rules on DMA Infringements with Antitrust Damages Law

The obligations set out in Articles 5, 6 and 7 of the DMA, including the related anticircumvention provisions in Article 13(4) and (6) of the DMA,[55] confer implicit rights on those affected by a breach. This is because these obligations satisfy the general requirements of direct effect. Moreover, the availability of private rights of action is inherent in the regulatory concept of the DMA.[56] As I have argued this in detail elsewhere,[57] and as it does not appear to be disputed in essence and is recognised in particular by the European Commission,[58] I will take it as my starting point here.

Member States are obliged to protect these (implicit) individual rights under the general principle of sincere cooperation set out in Article 4(3) TEU. They must provide the necessary instruments under national law to enable parties affected by an infringement to bring actions for injunctive relief and damages. In doing so, Member States must observe the principles of equivalence and effectiveness. At this point, we can refer, for example, to well-known statements of the ECJ in *Courage v Crehan* related to private rights of action implicit in Article 101 TFEU:

> [I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[59]

Thus, *equivalence* requires that the national rules governing private rights of action for breach of the directly effective DMA obligations are no less favourable than those governing

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[54] Comisión Nacional de los Mercados y la Competencia, 29.07.2024, S/0005/21 *Booking*, para. 277 ('Any disputes arising out of or relating to this Agreement shall be exclusively referred to the competent courts in Amsterdam, the Netherlands'), paras 556–566 and 584–598.

[55] See FRANCK, J.-U., and PEITZ, M., 'The Digital Markets Act and the Whack-A-Mole Challenge', *Common Market Law Review* 61 (2024), 299, 305–306.

[56] See in particular Article 13(6) ('rights … laid down in Article 5, 6 and 7 [DMA]'). See also Articles 39 and 42 DMA.

[57] See FRANCK (n 30), Vorb §§ 33–34a GWB paras 36–47 (at pp 1404–1409).

[58] See European Commission, 6.9.2023, Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets ('The DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers').

[59] ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 29.

similar domestic actions and *effectiveness* requires that the exercise of the rights implicitly conferred by the DMA is not rendered impossible or excessively difficult. While in the above passage the Court referred to national 'procedural rules' that must comply with the principles of equivalence and effectiveness, this does not only refer to rules on jurisdiction, time limits, burden of proof and so on. As is clear from the case law of the ECJ, the same standard applies, for example, to the concept of 'causality' between the breach of the law and the damage suffered,[60] and therefore to any substantive conditions for damages claims, such as the requirement of fault or the concepts of foreseeability or remoteness of the damage.

Remarkably, to comply with these requirements of EU law, the German legislator opted to extend the scope of the provisions on private antitrust enforcement to infringements of the DMA. Before examining this concept in more detail, it is worth pointing out the possible practical significance of damages actions as a complement to, or substitute for, public enforcement of the DMA by the European Commission.

A. The Importance of the Availability of Damages Claims alongside Public Enforcement: Corrective Justice and Deterrence

There is good reason to believe that damages actions for breach of the DMA may have important potential both in terms of the pursuit of corrective justice and as a reinforcing or stand-alone mechanism for sanctioning, thus deterring, breaches of the DMA.

1. Pursuit of corrective justice

Damages actions can remedy the harmful effects of a breach of the DMA by putting the victims, ideally, in an economic position that they would have been in but for the breach. The award of damages can thus be said to serve the pursuit of corrective justice: 'the idea that liability rectifies the injustice inflicted by one person on another'.[61] In this respect it complements the Commission's enforcement activities. This is because the latter does not have any powers to confiscate the illegal proceeds from the infringers and to return them to the injured parties. In this context, the 'fairness' objective[62] underlying the DMA deserves particular emphasis: it justifies the need to grant damages, on the basis of a corrective justice rationale, not only to the platform operator's consumer users but also to its business users.

The DMA responds to concerns about distributive justice: its obligations on digital gatekeepers are intended to bring about a 'fairer' distribution of the economic rents

[60] ECJ, 13.7.2006, Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461, para. 64 ('In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed').

[61] WEINRIB, E. J., 'Corrective Justice in a Nutshell', *Toronto Law Journal* 52 (2002), 349. See also COLEMAN, J., *Risks and Wrongs*, Oxford, Oxford University Press, 1992, reprinted 2003, 191 ('liability … rectifies a wrong done, and does not right it').

[62] See recital 7 to the DMA ('[T]he purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular').

generated throughout the digital value chain.[63] In recital 33 to the DMA, this is stressed with regard to the business partners who depend on the provision of core platform services:

> Market participants, including business users of core platform services and alternative providers of services provided together with, or in support of, such core platform services, should have the ability to adequately capture the benefits resulting from their innovative or other efforts. Due to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services or services provided together with, or in support of, their core platform services.

The protection of the economic interests of the business users, in fact a 'fairer' distribution of the gains from trade in their favour, is described in this passage as an essential objective of the DMA. This is an important difference from (general) antitrust enforcement practice. The latter is usually[64] indifferent to the distribution of economic rents across the value chain – if consumer welfare is not affected. It is therefore difficult to derive from the notion of corrective justice which market participants (other than consumers[65]) affected by an antitrust infringement should be compensated and, in particular, to decide where to draw the line between damages for which compensation is mandatory in terms of corrective justice and damages for which compensation may be excluded under legal doctrines such as remoteness, proximate causation, directness of harm, and the like.[66] In the case of compound products, for example, the only argument that can be made from a corrective justice perspective for suppliers who have suffered losses as a result of the reduction in volume imposed by a downstream cartel is a coherence argument: if the direct customers (that generate the compound product) are compensated as this is viewed as being just and fair, the same should apply to suppliers and separate sellers of complements.[67]

The situation is obviously different with the DMA, because, as we have seen, a primary objective of the DMA is to protect the economic interests of the business users of the core platform services through the obligations imposed on digital gatekeepers, and to do so by redistributing economic rents. The DMA therefore contains clear value judgments in this respect, on the basis of which the pursuit of corrective justice through damages actions necessarily requires that not only consumers but also the said business users be compensated for the damages they suffer as a result of DMA violations.

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[63] FRANCK and PEITZ (n 55), 310.

[64] This is not to deny that, in some cases, antitrust law has been deliberately used to the advantage of individual producer groups, such as farmers or newspaper publishers, for specific political reasons. See FRANCK, J.-U., and PEITZ, M., 'Digital Platforms and the New 19a Tool in the German Competition Act', *Journal of European Competition Law & Practice* 12 (2021), 513, 524.

[65] At its core, it is arguably undisputed that the essential objective of antitrust law is to protect consumers (including intermediate buyers) from harm. What remains controversial is the operationalisation of this goal.

[66] See FRANCK, J.-U, and PEITZ, M., 'Suppliers as Forgotten Cartel Victims', *NYU Journal of Law and Business* 15 (2018), 17, 46–49; FRANCK, J.-U, and PEITZ, M., 'Cartel Effects and Component Makers' Right to Damages', *World Competition* 43 (2020), 209, 237–238.

[67] FRANCK and PEITZ, 'Suppliers as Forgotten Cartel Victims' (n 66), 48–49; FRANCK and PEITZ, 'Cartel Effects and Component Makers' Right to Damages' (n 66), 238.

2. *Effective and efficient deterrence of breaches of the DMA*

Under EU law, there is a well-established tradition of private rights of action being created with a mission that goes beyond their role as an instrument of corrective justice. They are understood and conceptualised as a tool for the effective enforcement of obligations imposed by EU law. In other words, private rights of action are derived and established precisely to ensure the implementation of EU law.[68] Indeed, liability for damages has a deterrent effect: the prospect of being held liable for the damage caused will help to prevent breaches of the law, including the obligations enshrined in the DMA. This deterrent function can be substitutive ('stand-alone') or complementary ('follow-on') to the Commission's enforcement activities. When they follow a mere cease-and-desist order, damages actions can ensure that there is a deterrent effect. If they follow a decision to impose a fine, they reinforce the deterrent effect of the latter.

a. *Damages actions' potential for added value in deterrence*

Several factors need to be taken into account when assessing the effectiveness and efficiency of the threat of liability in deterring infringement. These include, in particular, the relevance of private information about infringements, the incentives for injured parties to sue, the social costs of litigation, and the amount of damages an infringer must expect to pay if caught. These factors can be operationalised to flesh out and assess the details of liability for damages from a deterrence perspective.[69] This is not our concern here. However, these factors are also important to better recognise and more generally acknowledge the potential added value of the availability of damages actions as a deterrent mechanism in the context of the DMA.

As already mentioned in relation to the right to injunctive relief, market participants and in particular the business partners of platform operators may often have private information about DMA infringements or at least be aware of suspicious facts. Granting them a right to damages thus creates a mechanism for exploiting this information.[70] The resulting indirect strengthening effect of public enforcement should not be underestimated: if aggrieved parties have a right to damages, this may act as an incentive to provide private information about possible infringements to public authorities in the expectation of benefiting from their subsequent enforcement action, as damages may ultimately be more easily obtained based on a finding of infringement by the public authority.[71]

A glance at the ongoing antitrust damages actions against digital gatekeepers shows that these can reach enormous sums. Even if a gatekeeper has already been fined by the European Commission, it may be that only the threat of (additional) damages claims will have a sufficient deterrent effect.

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[68] This is the quintessence of a long line of case law that goes back to the ECJ's seminal judgment in *Van Gend en Loos*. See ECJ, 5.2.1963, Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1, 12.

[69] See FRANCK and PEITZ, 'Suppliers as Forgotten Cartel Victims' (n 66), 38–45.

[70] FRANCK, J.-U., 'Private Enforcement versus Public Enforcement', in F. Hofmann and F. Kurz (eds), *Law of Remedies. A European Perspective*, Intersentia, Cambridge, 2019, 107, 122–123.

[71] FRANCK (n 44), 552; FRANCK and PEITZ, 'Suppliers as Forgotten Cartel Victims' (n 66), 38–39.

In addition, it is likely that damages claims for breach of the DMA will also be brought as stand-alone actions, thereby substituting for possible fines in their deterrent function. Unlike cartels, DMA infringements, although often not obvious or easy to prove, are by their nature not clandestine. It is therefore quite possible that they may be sufficiently substantiated in civil proceedings without prior public enforcement, although the legal systems of EU Member States do not typically provide for effective pre-trial discovery procedures.

b. Stand-alone DMA actions: why the DB Station *restrictions are not significant*

With regard to stand-alone actions for damages for an (alleged) breach of the DMA, it is being considered[72] whether national civil courts could be bound by the restrictions or similar requirements for a first intervention by the European Commission as developed by the ECJ in the *DB Station* ruling. They are not, as will be briefly explained here.

To put it in a nutshell, the *DB Station* judgment was based on the following scenario: railway undertakings using Deutsche Bahn's rail infrastructure brought an action before a civil court claiming that charges paid in the past had been in breach of Article 102 TFEU and should therefore be reimbursed to the extent that they were abusively excessive.

The ECJ ruled that this action is not precluded by the fact that a railway regulatory body supervising the Deutsche Bahn is responsible for assessing the fairness of charges; this may be done ex officio or following a complaint by a railway undertaking. In the latter case, the Court found, the 'railway undertakings may [also] invoke, before the regulatory body, an infringement of Article 102 TFEU'.[73]

However, the Court imposed two restrictions on the civil courts in dealing with these actions: a prior decision by the regulatory body and cooperation in good faith between the regulatory body and the civil court. The regulatory body must therefore be consulted first and be able to decide on the legality of the fees before the court can decide on the action. The court is then not bound by that decision and does not have to wait until any appeal against the regulator's decision has been decided (for example, in parallel proceedings before the administrative courts). However, the court must take into account the decision of the regulatory body and the findings and legal considerations on which it is based when deciding whether there has been an infringement of Article 102 TFEU.[74]

The scenario decided by the ECJ in *DB Station* differs in crucial respects from the situation where a court is seized with a DMA infringement without the European Commission having ruled on the matter beforehand. In *DB Station*, the legality of the charges is assessed on the basis of two different regulatory regimes: on the one hand, the sector-specific provisions of railway regulatory law and, on the other hand, Article 102 TFEU. By imposing restrictive conditions on direct recourse to the civil courts for review on the basis of Article 102 TFEU,

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[72] See the blogpost by ELKERBOUT, R., and MERENLAHTI, S., 'Looking Ahead at Private Enforcement of the DMA and Why the DB Station Judgment Does Not Hinder Standalone Damages Claims', 31.1.2025, where this position is attributed to A. Komninos. See https://theplatformlaw.blog/2025/01/31/looking-ahead-at-private-enforcement-of-the-dma-and-why-the-db-station-judgment-does-not-hinder-standalone-damages-claims/.

[73] ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 68.

[74] ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, paras 81 to 85.

the ECJ wanted to ensure that the yardstick of sector-specific regulation was not simply overlooked.[75] To use the Court's own words, it wanted to ensure that, 'when a claim based on Article 102 TFEU is brought before the national courts', 'the task of the regulatory body and, hence, the practical effect of Article 30 of Directive 2001/14'[76] are not 'called into question'.[77]

The Court's reference to the 'task of the regulatory body' also implicitly points to something else: because of its involvement in the enforcement of railway regulation, the authority has particular expertise in cost structures, necessary investments, return on equity, and so on, which is helpful in assessing charges. The ECJ appears to avoid this expertise remaining completely unused due to the direct involvement of the civil courts under Article 102 TFEU.

Regardless of whether one believes that the judgment of *DB Station* was correct or not,[78] the reasoning behind it obviously does not apply to DMA stand-alone actions. There is only one regulatory regime at stake here: that of the DMA. The judgment in *DB Station* was based on a different scenario, which was crucial to the approach developed there. There is no reason to consider applying these restrictions to stand-alone DMA actions.

It may be that the direct involvement of courts in DMA infringements carries the risk of inconsistent interpretation across the EU. It may also be that the expertise acquired by the Commission through DMA enforcement remains unused. However, this is the natural consequence of the direct effect of the DMA obligations. In this respect, the enforcement of the DMA is not fundamentally different from, for example, the enforcement of Articles 101 and 102 TFEU. Ultimately, it is the ECJ that can and must ensure consistent interpretation in both cases.

c. DMA-specific risks of public underenforcement: political restraint as a major concern

Several reasons come to mind underlining why there may be a need for deterrence in the form of damages claims to reinforce or even replace public enforcement. There are the well-known general factors that can limit effective public enforcement: limited human resources (lawyers, economists, IT staff etc.) and technical equipment, and imperfect incentives on the part of the bureaucrats responsible for law enforcement, which can lead to inefficient use of available resources and insufficient commitment to adapting enforcement strategies and integrating innovative methods and technologies. This should not lead to premature judgements about the inferiority of public versus private enforcement.[79] However, there are certainly starting points for recognising the benefits of private enforcement in parallel with public enforcement.

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[75] ECJ, 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 83 ('in particular, concerning the application to case at issue of the relevant sectoral rules').

[76] Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (no longer in force).

[77] ECJ 27.10.2022, Case C-721/20, *DB Station & Service*, ECLI:EU:C:2022:832, para. 84.

[78] For a critical account, see MONTI, G., 'Mismanaging the Relationship between Railway Regulation and EU Competition Law: *DB Station*', Working Paper, 30.1.2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342530.

[79] See FRANCK (n 70), 121–128.

In addition to these general limitations of public enforcement, there also appear to be DMA-specific risks of underenforcement that need to be considered. On the one hand, there may be certain DMA obligations that, for technical, procedural or other institutional reasons, are not in the focus of the European Commission, which, however, has a monopoly on public enforcement of the DMA.[80] For example, (competition) authorities tend to avoid making statements about what prices should be considered 'fair' (or not). The necessary procedures are resource-intensive, methodologically demanding, vulnerable to attack and therefore sensitive. This is one reason why exploitative abuse proceedings are rare. As Article 6(12) of the DMA requires access to app stores on FRAND terms, this raises the question of the fairness of the fees. If the Commission does not engage in proceedings to assess the fairness of these prices, business users may step in and seek clarification directly from the courts based on claims for damages.

On the other hand, it may be that the future will show that political considerations will lead to a reluctance to enforce the DMA in general. Former Commissioner Margrethe Vestager saw the enforcement of antitrust rules and the DMA against digital gatekeepers as her legacy. Effective enforcement of the DMA was a clear policy priority in the last years of her mandate. Whether this will remain the case under the new commissioner, Teresa Ribera, remains to be seen. In responding to the EP's questionnaire in November 2024, the then commissioner-designate stated that it would be one of her priorities 'to make sure that new tools like the Digital Markets Act … are effectively enforced and deliver real added value for EU consumers and businesses'[81] and that she was committed to ensure an 'effective antitrust enforcement … hand in hand with the vigorous enforcement of the Digital Markets Act, to ensure that European tech start-ups have a real shot at success on these markets'.[82]

However, it is in the nature of things (and politics) that new developments require new policy priorities. Remarkably, in the mission letter from Commission President von der Leyen to the new commissioner of 1 December 2024, the enforcement of the DMA appears only as the penultimate of 12 tasks in competition policy.[83] Moreover, with Donald Trump as the new US president and the influential role of big tech tycoons such as Elon Musk, Mark Zuckerberg, Tim Cook and Jeff Bezos, it is foreseeable that the Commission's enforcement of EU regulation of digital gatekeepers will come under political pressure from Washington. During the election campaign, Trump generally spoke in favour of deregulation. US tech giants will be happy to seize on this as the antithesis of the EU's regulatory approach. It was therefore not surprising to see press reports in January 2025 that the European Commission was re-

[80] See Article 38(7) of the DMA ('to support the Commission in its role as sole enforcer of this Regulation'); see also recital 91 to the DMA ('The Commission is the sole authority empowered to enforce this Regulation'). It is true that national authorities are given a supporting role in various contexts, for example in dawn raids and interviews (Article 22 of the DMA) or in the conduct of market investigations (Article 38(6) of the DMA). However, supportive involvement of national authorities in these contexts requires a request from the Commission. They are not allowed to act on their own initiative.

[81] Questionnaire to Commissioner-Designate Teresa Ribera, executive vice-president for the Clean, Just and Competitive Transition, https://commission.europa.eu/document/download/b936d64a-6bdd-4fab-8440-ce3b365c599b_en?filename=Ribera-EP-questionnaire.pdf, Question 13, at p. 13.

[82] Questionnaire (n 81), Question 10, at p. 11.

[83] European Commission, 1.12.2024, Mission Letter, Ursula von der Leyen, President of the European Commission, https://commission.europa.eu/document/download/33d74e86-3a17-472c-ba93-59d1606bbc20_en?filename=mission-letter-ribera_0.pdf&prefLang=de.

evaluating DMA enforcement in this new light. The report made it sound as if DMA infringement proceedings were now being handled at a 'technical level', but that a 'political level' was being added to this, in which final decisions would be taken on rulings and, in particular, the imposition of fines.[84] While the European Commission was quick to dismiss these reports,[85] MEPs who negotiated the DMA, as well as industry and NGO stakeholders, still seem genuinely concerned.[86] According to media reports from 22 February 2025, US President Trump has threatened to respond with tariff retaliation to EU digital gatekeeper regulation that restricts US firms.[87] This will certainly have been the subject of internal discussions within the Commission.

Only time will tell whether and to what extent US pressure will have a dampening effect on DMA enforcement. But the current debate is a reminder that, one way or another, the stringency of government enforcement is always dependent on political backing, be it through the provision of resources, guidance or other means of more direct influence. So, where public enforcement shirks, private enforcement can step in and fill enforcement gaps.[88]

B. Damages Actions for DMA Infringements: Implementation under German Law[89]

With the 11th amendment to the German Competition Act, which entered into force on 7 November 2023, the German legislature introduced private law claims for breach of obligations under the DMA. The key conceptual decision taken was to integrate these rights into the existing private antitrust enforcement regime. However, this regime under sections 33 to 34a of the Competition Act has not been declared applicable en bloc.

This regulatory approach raises two fundamental questions which I will address below: what reasons led the legislature to adopt this regulatory approach and what role did EU law considerations play in it? Which provisions of antitrust damages law have been declared applicable to DMA violations (and which have not)?

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[84] See ESPINOZA, J., and FOY, H., 'EU Reassesses Tech Probes into Apple, Google and Meta', Financial Times, 14.1.2025, https://www.ft.com/content/2c1b6bfd-ce73-451d-8123-0df964266ae8.

[85] See JOHN, B., 'EU Denies Slowing DMA Enforcement', Global Competition Review, 14.1.2025, https://globalcompetitionreview.com/article/eu-denies-slowing-dma-enforcement.

[86] See DATTA, A., 'Widespread Alarm over Commission's Hesitant DMA Enforcement', Euractiv, 30.1.2025, https://www.euractiv.com/section/tech/news/widespread-alarm-over-commissions-hesitant-dma-enforcement/.

[87] See DATTA, A., 'Trump Threatens to Launch Tariff Attack on EU Tech Regulation', Euractiv, 22.2.2025, https://www.euractiv.com/section/tech/news/trump-threatens-to-launch-tariff-attack-on-eu-tech-regulation/.

[88] However, Article 39(5), second and third sentences, of the DMA may preclude or delay private enforcement as long as a Commission infringement procedure is pending.

[89] I was invited as an expert to the public hearing of the Economic Committee of the Deutsche Bundestag on the 11th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen) on 11 June 2023. In my written submission to this hearing, which is available at https://www.bundestag.de/dokumente/textarchiv/2023/kw24-pa-wirtschaft-11-gwb-novelle-951258, I essentially supported the government's approach to the implementation of private remedies for DMA violations under German law.

1. Why were DMA infringements included in the private antitrust enforcement regime?

The German government's explanatory memorandum states that the inclusion of DMA infringements in the established legal regime of private antitrust enforcement will strengthen the private enforcement of DMA obligations and ensure the 'practical effectiveness' of the DMA 'in terms of the European principle of effectiveness'.[90] More specifically, it was stipulated that:

> Convergence with the competences under antitrust law lends itself … to concentrate expertise in this complex and technical area, which is at least very similar to antitrust law in its basic considerations.[91]

Indeed, in seeking to promote the 'contestability' of digital markets, the DMA wants to enable:

> undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.[92]

In this respect,[93] the DMA pursues a regulatory objective that is not only consistent with antitrust law but also capable of being understood as procompetitive (ex ante) regulation for the digital sector: the DMA and antitrust law overlap and complement each other in that they share the same goal of keeping markets open, but they use different regulatory approaches and techniques.

Against this background, the inclusion of DMA violations in the private antitrust enforcement regime allowed the German legislature to ensure compliance with its obligation to provide effective and equivalent protection of the (implicit) private rights enshrined in the DMA obligations.

To avoid misunderstandings: I do not want to claim that this approach was the only option in order to meet the requirements of the principles of 'effectiveness' and 'equivalence'. However, from the point of view of the German legislature, it was certainly a sensible approach to ensure compliance with these principles of EU law and to avoid ongoing debates about possible conflicts with them.

a. Principle of effectiveness

The standard of effectiveness against which national rules on liability for DMA infringements and the procedural law applicable are to be measured is derived from the ECJ's judgments in *Rewe* and *San Giorgio*. In the former judgment, the Court stipulated that national limitation periods for bringing actions must not render it 'impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed.'[94] Subsequently, in *San Giorgio*, a case concerning the burden of proof applicable to the repayment of charges levied in breach of Community

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[90] Deutscher Bundestag, Drucksache 20/6824, 16.5.2023, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze ('Regierungsbegründung'), 17 and 44.

[91] Regierungsbegründung (n 90), 44.

[92] Recital 32, 1st sentence, to the DMA.

[93] Insofar as it is (also) one of the main objectives of the DMA to ensure a 'fairer' distribution of economic rents between operators of core platform services and their business partners, the DMA differs from (general) antitrust enforcement practice. See above notes 63 and 64 and accompanying text.

[94] ECJ, 16.12.1976, Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para. 5.

law, the Court added that national provisions that make it 'excessively difficult' to enforce rights deriving from Community law are also contrary to the principle of effectiveness.[95] Since then, the Court has combined the two statements.[96]

The uncertainty surrounding this standard is a major challenge for national legislators and courts. The inclusion of DMA infringements in national antitrust damages regimes helps to address this challenge: national antitrust damages provisions have repeatedly had to prove their worth before the ECJ. Since the landmark judgment in *Courage*, in which the Court of Justice put an end to the strict application of the English common law defence of 'unclean hands' against damages claims for breach of Article 101 TFEU,[97] there has been a growing body of case law testing various elements of national antitrust damages law against the EU effectiveness principle: on rules on limitation periods,[98] on the bearing of costs for unsuccessful actions,[99] and on the evidential value of final decisions of national competition authorities.[100]

First, this certainly does not mean that national antitrust damages law always meets the standard of effectiveness set by EU law. However, even leaving aside the ECJ's specific pronouncements on a particular national legal system on the basis of a preliminary reference from a national court, there are usually lively debates about what adjustments need to be made when interpreting national law on the basis of the principle of effectiveness, taking into account the Court's jurisprudence.

In addition, Member States must have implemented the EU Competition Damages Directive (which does not apply to DMA infringements[101]) in their antitrust damages laws. As a secondary EU law measure, the Competition Damages Directive must satisfy the requirements of the ECJ's principle of effectiveness, at least as far as infringements of Articles 101 and 102 TFEU are concerned.[102] Admittedly, it is not always clear whether this is the case. In Germany, for example, there is a debate as to whether primary law does not require a limitation of the passing-on defence if – for example in the case of dispersed damage – it is not to be expected that indirect purchasers will claim damages.[103] In essence, however, it can be assumed that, where national law correctly transposes the Directive,[104] it also meets the effectiveness requirements of EU law.

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[95] ECJ, 9.11.1983, Case C-199/82, *Amministrazione delle finanze dello Stato v San Giorgio*, ECLI:EU:C:1983:318, para. 14.

[96] See, eg, ECJ, 11.11.2015, Case C-505/14, *Klausner Holz Niedersachen,* ECLI:EU:C:2015:742, para. 40.

[97] ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 28.

[98] See, e.g., ECJ, 28.3.2019, Case C-637/17, *Cogeco Communications*, ECLI:EU:C:2019:263, para. 53; ECJ, 12.7.2022, Case C-267/20, *Volvo and DAF Trucks*, ECLI:EU:2022:494, paras 50–57.

[99] ECJ, 16.2.2023, Case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:2023:99, paras 39–48.

[100] ECJ, 20.4.2023, Case C-25/21, *Repsol Comercial de Productos Petrolíferos*, ECLI:EU:C:2023:298, paras 59–64.

[101] See Article 1 in conjunction with Article 2(1), (2) and (3) of the Competition Damages Directive.

[102] FRANCK, J.-U., 'Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm', *European Law Review* 43 (2018), 837, 846–849 and 851–853. For a contrasting view, see ROTH, W.-H., '*Courage* and Directive 2014/104/EU', *Common Market Law Review* 59 SI (2022), 61, 66–73.

[103] See FRANCK (n 30), § 33c GWB para. 14c (at p. 1531).

[104] Note the growing body of ECJ case law on the Competition Damages Directive, eg ECJ, 12.1.2023, Case C-57/21, *RegioJet*, ECLI:EU:C:2023:6.

Second, the standard of effectiveness for a breach of DMA obligations need not necessarily be the same as for a breach of Articles 101 and 102 TFEU. To give an example, the fact that the main objective of the DMA is (also) fairness in commercial relations between core platform service providers and their business users suggests that the guiding principle of seeking corrective justice through the right to damages argues in favour of compensating business users for the harm caused by a breach of the DMA. As explained above,[105] the argument cannot be made in the same way for infringements of Articles 101 and 102 TFEU. In practice, however, this does not make any difference, at least in the example given, because since *Courage* the ECJ has granted 'any individual' the right 'to claim damages for loss … by conduct liable to restrict competition'[106] and, on this basis, has also considered indirectly caused damage to be compensable, i.e. categories of damage that are often considered as too remote under national law.[107]

We can therefore conclude that, although the application of national antitrust damages law to DMA infringements does not guarantee compliance with the effectiveness principle, such an approach serves the effectiveness principle well, in the vast majority of cases certainly better than leaving it to the application of general (national) tort law.

b. Principle of equivalence

Does the EU principle of equivalence require that national rules on damages claims and actions for DMA infringements be at least as favourable to claimants as those for antitrust infringements? The ECJ has so far been reluctant to develop detailed (general) criteria for determining whether certain national rules and the sanctions, including claims for damages, resulting from their breach can indeed be considered as a reference system under the principle of equivalence. For example, in the field of antitrust damages law, the ECJ has stated in *Manfredi* that:

> in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to *similar* actions founded on domestic law.[108]

We are familiar with this kind of focus on 'similarity' from other judgments.[109] With regard to the sanctioning of breaches of EU law required by national law, the ECJ stipulated that:

> [T]he national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing *corresponding* national laws.[110]

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[105] See above notes 62 to 64 and accompanying text.

[106] ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 26.

[107] See ECJ, 5.6.2014, Case C-557/12, *Kone*, ECLI:EU:C:2014:1317, paras 31–34 (on so-called 'umbrella pricing'); ECJ, 12.12.2019, Case C-435/18, *Otis*, ECLI:EU:C:1069, paras 33–34 (inflated subsidies as a result of cartelisation).

[108] ECJ, 13.7.2006, Case C-295/04, *Manfredi*, ECLI:EU:C:2006:461, para. 93 (emphasis added).

[109] ECJ, 20.9.2001, Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465, para. 29 ('provided that such rules are not less favourable than those governing similar domestic actions'); ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, ECLI:EU:C:1997:351, para. 32 ('similar domestic claims').

[110] ECJ, 21.9.1989, Case C-68/88, *Commission v Greece*, ECLI:EU:C:1989:339, para. 25 (emphasis added).

As the Court bases its decision on 'similarity' and 'correspondence', this may not be particularly precise, but it does make it clear that there is a certain margin of deviation, that is, that the reference materials under national law do not have to be (approximately) identical in terms of the factors relevant to the comparison. These relevant factors can be deduced from the case law: the 'objective' pursued[111] and the 'essential characteristics'[112] of the obligations the breach of which entails certain legal consequences under national law.[113]

The *Draehmpaehl* judgment is an illustration of the ECJ's willingness to have a broad view of similarity. The Court held that:

> It follows … that provisions of domestic law which, unlike other provisions of domestic civil law and labour law, prescribe an upper limit of three months' salary for the compensation which may be obtained in the event of discrimination on grounds of sex in the making of an appointment do not fulfil those requirements.[114]

Thus, the ECJ assumed that there was no objective reason to treat a job applicant's claim for damages for breach of the prohibition of discrimination less favourably than claims for damages for other breaches of labour and civil law. In particular, the Court did not limit this consideration of equivalence to a comparison with liability for other breaches of the prohibition of discrimination under national law.

With regard to damages claims based on breaches of the DMA, the question therefore arises: are the obligations imposed by the DMA so similar to antitrust law in terms of their 'objectives' and 'essential characteristics' that domestic antitrust damages law[115] must also apply to DMA violations? As we have seen, the objectives of the DMA – in short, the contestability and fairness of digital markets – and antitrust law are not identical but overlap.[116] Moreover, while both sets of rules address forms of economic power that permit anticompetitive behaviour that restricts competition and exploits other market participants, they differ in the way they identify their addressees and in the way they specify and impose resulting obligations.

Whether the ECJ would indeed find a sufficient degree of 'similarity' in this respect for the principle of equivalence to apply seems uncertain, but it is certainly conceivable: a national government would find it difficult to explain to the Court in Luxembourg what differences there are between the DMA and Article 102 TFEU (or corresponding provisions of national competition law) that could justify national rules on damages claims or actions for damages in the case of (alleged) violations of the DMA being less favourable to injured parties than in

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[111] ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, paras 34 and 36.

[112] ECJ, 10.7.1997, Case C-261/95, *Palmisani v INPS*, para. 38.

[113] With regard to the sanctioning of EU law in general, the Court stated that 'whilst the choice of penalties remains within [the Member States'] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.' ECJ 21.9.1989, Case C-68/88, *Commission v Greece*, ECLI:EU:C:1989:339, para. 24.

[114] ECJ, 22.4.1997, Case C-180/95, *Draehmpaehl v Urania Immobilienservice*, ECLI:EU:C:1997:208, para. 30.

[115] In view of the objective underlying the principle of equivalence and the limited regulatory powers of the EU, provisions of national law that are entirely determined by EU law should arguably not be regarded as adequate reference material. This may be the case, for example, with national law on antitrust damages to the extent that it transposes (fully harmonising) provisions of the Competition Damages Directive.

[116] See above notes 91 to 93 and accompanying text.

the case of (alleged) abuse of a dominant position. This is particularly the case because the core of the obligations set out in Articles 5 and 6 of the DMA can be seen as the crystallised or desired outcome of completed or pending[117] but also of only anticipated or planned abuse proceedings against digital gatekeepers by the European Commission or Member State competition authorities.

On the other hand, owing to the clandestine nature of cartels, it can reasonably be argued that information asymmetries regarding an infringement are typically less pronounced in the case of DMA violations (and also in the case of abuse of a dominant market position) than in the case of cartels, which may justify more favourable provisions in favour of parties allegedly harmed by cartelisation.[118] It is therefore reasonable to conclude that equivalence does not require that provisions of national antitrust damages law that apply only to cartels (and not to all types of antitrust infringements) must also apply to DMA infringements.

There is also a special feature of German antitrust law that makes equal treatment of DMA violations and antitrust violations with regard to damages particularly urgent from the point of view of equivalence: the abuse proceedings under section 19a of the German Competition Act (the so-called '19a tool'), which apply specifically to digital gatekeepers. If the Bundeskartellamt has imposed an obligation on a designated digital gatekeeper pursuant to section 19a of the Competition Act, the general provisions on private enforcement, including antitrust damages pursuant to sections 33 et seq. of the German Competition Act, apply in the event of a breach.[119] This is a strong argument for applying the same to breaches of DMA obligations, as the 'objectives' and 'essential characteristics' of obligations under section 19a of the Competition Act are particularly close to the DMA's approach, in the following ways.[120]

First, this instrument applies only after a designation decision by the Bundeskartellamt, deciding that a platform operator qualifies as an undertaking of 'paramount significance for competition across markets'. In essence, section 19a of the Competition Act is aimed at firms that provide key intermediation services and thus control an interface between markets. While the actual criteria used in the provision do not limit the scope of the instrument to digital business models (however precisely defined), the '19a tool' is clearly aimed at the digital gatekeepers. So far, the Bundeskartellamt has designated Amazon,[121] Meta,[122] Alphabet,[123] Apple[124] and Microsoft[125] as '19a firms'. Amazon and Apple have appealed

[117] See the overview provided by CRÉMER, J., et al., 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust', *Journal of Antitrust Enforcement* 11 (2023), 315, 331, Table 1.

[118] See Recital 47 to the Competition Damages Directive 2014/104/EU and Article 17(2) of the Directive. As regards the relevance of the determination of national law by EU law and the application of the principle of equivalence, see note 115 above.

[119] FRANCK, J.-U., and PEITZ, M. (n 64), 514; SCHWEITZER, H., '§ 19a GWB' [Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets], in T. Körber, H. Schweitzer and D. Zimmer (eds), *Immenga and Mestmäcker, Wettbewerbsrecht*, vol 2, 7th ed., C.H. Beck, Munich, 2024, § 19a GWB para. 249 (at p 829).

[120] For an overview of the key features of the '19a tool' see FRANCK, J.-U. (n 3), 25–32.

[121] Bundeskartellamt, 5.7.2022, B2-55/21.

[122] Bundeskartellamt, 2.5.2022, B6-27/21.

[123] Bundeskartellamt, 30.12.2021, B7-61/21.

[124] Bundeskartellamt, 3.4.2023, B9-67/21.

[125] Bundeskartellamt, 27.9.2024, B6-26/33.

against their designation and Amazon's appeal was rejected.[126] The German '19a tool' therefore applies – at least for the time being – only to companies that have also been designated by the European Commission as DMA gatekeepers.[127]

Second, the Bundeskartellamt can prohibit the designated undertaking from engaging in conduct falling within any of seven categories listed in the provision (ranging from self-preferencing by vertically integrated firms to charging disproportionate compensation to business customers). If a certain conduct of a firm designated under section 19a of the Competition Act falls into one of these categories, it is presumed to be abusive. While this is a notable tightening of the law compared to traditional abuse proceedings, there remain significant differences from the DMA's approach. The imposition of obligations on '19a firms' is not automatic. The latter may invoke objective justification and, even if they do not provide convincing evidence in this respect, the authority must exercise its discretion in making an abuse decision, which requires an assessment of the economic and legal context of each individual case.[128] Nevertheless, section 19a of the Competition Act shares some of the basic principles of the DMA in which it differs from traditional abuse proceedings. In view of the special features of digital markets, the Bundeskartellamt must give special weight to the long-term objectives associated with the new instrument – limiting economic power, keeping markets open and protecting the competitive process – as opposed to short-term efficiency gains for the benefit of the users of the platform operators. In particular, attention must be paid to lowering market entry barriers and increasing (potential) competitive pressure in markets dominated by digital gatekeepers, even if this results in some short-term welfare losses.[129] Consequently, the intervention threshold under section 19a of the Competition Act is significantly lower than in traditional abuse control.

Third, although 'fairness' is not a prime guiding principle of the German '19a tool' in the same way as it is of the DMA, clear shifts in this direction can be observed. This is particularly evident from the fact that pursuant to section 19a(2) of the Competition Act the Bundeskartellamt may intervene where a '19a firm' is 'demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand'.[130] The rule is inspired by a specific antitrust provision in German law, which is designed to address the abuse of buyer power by dominant firms – particularly retailers in the agri-food supply chain – who demand 'unjustified advantages from suppliers'.[131] Like the latter provision, it should therefore be understood as based on a hybrid theory of harm:[132] on the one hand, it is true that it serves 'contestability' by protecting the interests of platform operators, who, owing to their weaker economic power, are not in a position to impose as

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[126] BGH, 23.4.2024, KVB 56/22 – *Amazon*.

[127] See the Commission's designation decisions of 5.9.2023 on Alphabet (Cases DMA.100011 and others), Amazon (Cases DMA.100018 and DMA.100016), Apple (Cases DMA.100013, DMA.100025, and DMA.100027), Meta (Cases DMA.100020 and others), and Microsoft (Cases DMA.100017, DMA.100023, and DMA.100026).

[128] FRANCK (n 3), 28–31.

[129] FRANCK (n 3), 31–32.

[130] Section 19a(2), 1st sentence, no 7 of the Competition Act.

[131] Section 19(2) no 5 of the Competition Act (addressing market-dominant firms). The provision is also applicable to 'undertakings in relation to [other] undertakings which depend on them'. Section 20(2) of the Competition Act.

[132] FRANCK, J.-U., and PEITZ, M. (n 64), 520; SCHWEITZER (n 119), paras 218–224 (at pp 821–823).

favourable conditions on their business users as the digital gatekeepers can. On the other hand, the economic interests of the business users of the digital gatekeepers should be protected from exploitation based on the imbalance of economic power in favour of the digital gatekeepers. The aim here, therefore, is to achieve a fair distribution of economic rents between gatekeepers and their business users – in line with the DMA and in contrast to the standard approach[133] in antitrust law.

In summary, the '19a instrument' departs in its procedure and content from traditional abuse control and approaches the role of a regulatory instrument aimed at the digital platform industry. It can be seen as the functional equivalent of the DMA under German law. The fact that the '19a instrument' is thus even closer to the DMA than standard antitrust law in terms of its objectives and regulatory approach argues all the more for the application of the principle of equivalence and the imposition of the same consequences under private law in the event of an infringement.

Against this background, even if it is not crystal clear how far the arm of the EU equivalence principle reaches, it appears to be a wise step on the part of the German legislature to include DMA infringements in the regime of antitrust damages law. It clarifies the status quo under German law and avoids ongoing debates before the courts on the scope of the EU equivalence principle in cases of DMA infringements.

2. *Which provisions of the German private antitrust enforcement regime apply to DMA violations (and which do not)?*

Claims for injunctive relief or damages for antitrust infringements are governed by sections 33 to 33h of the Competition Act. These provisions have not been declared applicable en bloc to DMA infringements. However, most – but not all – of them will apply by direct or indirect reference to DMA infringements.

a. How is the integration of DMA infringements technically implemented?

DMA violations were integrated into section 33(1) of the Competition Act, which now reads (emphasis added):

> Section 33. Claim for Injunction and Rectification. (1) Whoever violates a provision of this Part [of the Competition Act, scil. sections 1 to 47l] or Article 101 or Article 102 [TFEU] or *Article 5, 6 or 7 of Regulation (EU) 2022/1925* (infringer) or whoever violates a decision issued by the competition authority shall be obliged to the person affected to rectify the harm caused by the infringement and, where there is a risk of recurrence, to desist from further infringements.

Subsequently, section 33a(1) of the Competition Act provides the legal basis for damages and follows on from this, stating that '[w]hoever intentionally or negligently commits an infringement pursuant to Section 33(1) shall be liable to pay damages for any harm arising from the infringement'. In fact, most of the provisions on antitrust damages law are declared applicable to DMA infringements, either directly by including them in the provision or – as in the case of section 33a(1) of the Competition Act – indirectly by declaring the respective provision applicable to an 'infringement pursuant to section 33(1)' of the Competition Act.

[133] See above note 64 and accompanying text.

b. Which provisions of the antitrust damages law apply to DMA infringements?

The following rules of antitrust law on damages therefore apply to infringements of the DMA:

Pursuant to section 33a(3) of the Competition Act, the lower ***standard of proof*** under Section 287 of the Code of Civil Procedure applies to the ***quantification of the damages*** to be compensated.

The provision on ***interest*** pursuant to section 33a(4) of the Competition Act applies.

The ***binding effect*** of the European Commission decisions on national courts under section 33b of the Competition Act (which transposes Article 9 of the Competition Damages Directive) has been extended to cover both decisions to designate DMA gatekeepers under Article 3 of the DMA and decisions to find a breach of DMA obligations.[134] However, as Article 39(5) of the DMA provides that national courts may not take decisions that conflict with Commission decisions, and, as this already has a binding effect in the context of follow-on damages,[135] this provision is arguably only declaratory in nature.[136]

Such a declaratory transposition of a provision laid down in an EU regulation into national law is challengeable under EU law (Article 4(3) TEU) because it may obscure the Union law character of the underlying rule and undermine the ECJ's role of its ultimate interpreter.[137] However, the Court has recognised that the reproduction of an EU provision that is already directly applicable cannot be considered a violation of EU law where, for example, the effectiveness of the EU provisions depends on the interaction and combination of national and EU provisions and the repetition of certain elements of an EU regulation is useful 'for the sake of coherence and in order to make them comprehensible to the persons to whom they apply'.[138] In our context, the German provision can be considered reasonable because Article 39(5) DMA does not explicitly provide for a binding effect for follow-on actions and its interpretation is not free from doubt owing to the lack of relevant ECJ case law. The inclusion of DMA infringements in section 33b of the Competition Act thus avoids uncertainty or speculation that the German legislator intended no binding effect or only a weaker binding effect than for antitrust infringements.[139] However, German courts should not overlook the fact that Article 39(5) of the DMA applies alongside section 33b of the Competition Act and may have a broader binding effect in various scenarios (e.g. non-final Commission decisions, actions for injunctions or for the nullity of a contract based on a violation of the DMA, or findings going beyond the violation itself).[140]

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[134] FRANCK (n 30), § 33b para. 12b.

[135] In the context of Article 16(1) of Regulation 1/2003, on which Article 39(5) of the DMA is modelled, this is clear from ECJ, 6.11.2012, Case C-199/11, *Otis and others*, ECLI:EU:C:2012:684, para. 51.

[136] FRANCK (n 30), § 33b para. 8a.

[137] ECJ, 10.10.1973, Case C-34/73, *Fratelli Variola Spa v Amministrazione delle finanze dello Stato*, ECLI:EU:C:1973:101, para. 11 ('Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it').

[138] ECJ, 28.3.1985, Case C-272/83, *Commission v Italy*, ECLI:EU:C:1985:147. para. 27.

[139] FRANCK (n 30), § 33b para. 8a.

[140] FRANCK (n 30), § 33b para. 8b.

The ***passing-on defence*** under section 33c(1) of the Competition Act (which implements Article 13 of the Competition Damages Directive), including the lower standard of proof for quantifying the passing-on effect under section 33c(5) of the Competition Act, also applies to DMA infringements.

In principle, the ***joint and several liability*** provisions of section 33d(1) and (2) of the Competition Act[141] are also applicable, as this provision applies to all 'infringements within the meaning of Section 33a(1)' of the Competition Act, which in turn refers to section 33(1) of the Competition Act, which includes DMA infringements. However, given the essentially unilateral nature of DMA infringements, it is not clear what practical relevance this could have. The same can be said for the provision on the ***'effect of consensual settlements'*** pursuant to section 33f of the Competition Act, which transposes Article 19(1) to (3) of the Competition Damages Directive.

The ***rights of disclosure*** and provision of information under sections 33g, 89b and 89c of the Competition Act also apply to (possible) DMA infringements.

The rules on ***limitation periods*** under section 33h of the Competition Act apply to claims for damages arising from violations of the DMA in the same way as to claims for damages under competition law. In particular, section 33h(6) no. 3 of the Competition Act provides that the limitation period is suspended if the European Commission or an authority of a Member State within the meaning of Article 38(7) of the DMA takes investigative measures in respect of a DMA infringement.

DMA infringement actions are subject to the same ***jurisdictional rules*** as antitrust actions under sections 87 and 89 of the Competition Act. This means that the advantages of a concentration of jurisdiction in certain regional courts and a certain specialisation of judges also apply to actions based on DMA infringements.

Finally, under section 90 of the Competition Act the ***Bundeskartellamt*** may also participate as ***amicus curiae*** in DMA civil litigation, and under section 90a of the Competition Act the authority has the same function as a hinge for the flow of information between national courts and the Commission as in antitrust proceedings.

c. Which provisions of the antitrust damages law do not apply to DMA infringements and why?

Provisions of antitrust damages law that specifically refer to 'cartels' do not apply to DMA infringements. For example, Article 17(2) of the Competition Damages Directive provides that '[i]t shall be presumed that cartel infringements cause harm'. This (rebuttable) presumption, including the definition of a 'cartel',[142] has been transposed into German law by section 33a(2) of the Competition Act, which, however, will not apply to DMA infringements. The reason for this is that infringements of the DMA are in fact to be regarded as conduct corresponding to the (unilateral) abuse of market power. It was therefore considered

[141] Transposing Article 11(1) and (5) of the Competition Damages Directive.
[142] Article 2 no. 14 of the Competition Damages Directive defines which infringements are to be considered 'cartels'.

inappropriate to apply to DMA infringements provisions that are specifically related to the prohibition of cartels or other forms of illegal coordination.

Similarly, the privileges granted to immunity recipients and to small and medium-sized enterprises (SMEs) in the case of joint and several liability[143] do not apply to DMA infringements, as they seem pointless from the outset: DMA infringers cannot benefit from leniency rules and, by definition, are not SMEs.

The situation is different with regard to section 33c(2) and (3) of the Competition Act, which implements Article 14(2) and (3) of the Competition Damages Directive, according to which, under certain conditions, indirect purchasers claiming pass-on (as a 'sword') are entitled to a presumption that the direct purchasers have passed on to them the damage caused by an antitrust infringement. While this presumption also applies in abuse of dominance cases, it does not apply to infringements of the DMA. It appears, thus, that the German legislature considered the presumption to be rather far-reaching – in particular as it applies to indirect customers or suppliers at all market levels[144] – and therefore wanted to limit its scope to what is required by the Competition Damages Directive.

IV. Concluding Remarks

The seeds of antitrust damages actions against digital gatekeepers seem to have been sown. But will the seedlings be able to grow? Looking at the relevant institutional framework in Germany, it is very much in the eye of the beholder whether the proverbial glass is half full or half empty: while there is certainly considerable room for improvement, the conditions are for the most part neither specifically obstructive nor conducive to antitrust damages actions.[145] Three sensitive issues should be highlighted: access to evidence; the bundling of claims and financing of litigation; and the availability of spirited judges with expertise in antitrust damages cases.

First, German procedural law does not provide for pre-trial discovery, as is typical in US-style civil litigation. Whether and to what extent the rights to disclosure of evidence as they result from Article 5 of the Competition Damages Directive and its transposition into national law[146] constitute an effective equivalent seem uncertain. In any event, as far as can be seen, competition damages actions are either follow-on actions or actions based to a significant extent on the results of investigations by the Commission or a national antitrust authority.

Second, German procedural law does not provide for class actions. The Consumer Rights Enforcement Act (Verbraucherrechtedurchsetzungsgesetz), which came into force in October 2023, provides for a possibility of legal action that has some features of an opt-out class action. The Act applies (only) to claims by (end) consumers and small businesses. In

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[143] See Article 11 of the Competition Damages Directive, as transposed in section 33d(3) to (5) and in section 33e of the Competition Act.

[144] FRANCK (n 30), § 33c paras 33 to 37.

[145] That was my observation five years ago and I think it is still true today. See FRANCK, J.-U., 'Private Enforcement in Germany', in F. Wollenschläger, W. Wurmnest and T. M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law*, Wolters Kluwer, Alphen aan den Rijn, 2020, 77, 99.

[146] Section 33g of the Competition Act.

principle, it applies to all private law disputes and therefore also to claims for damages for breach of competition law[147] or breach of the DMA.[148] Whether this form of collective action will be effective in practice for antitrust damages actions or DMA damages actions remains to be seen. In particular, the restrictions on third-party funding give cause for scepticism: third parties may only be promised a maximum of 10 per cent of the damages recovered.[149]

Given the lack of a class action instrument, the so-called 'assignment model' has been established in Germany for several years:[150] antitrust claims are assigned to SPVs that have been set up for the sole purpose of pooling claims. The assignees do not then bear the costs of the litigation but must agree to a fee, which is known to be between 20 and 50 per cent of the amount of damages ultimately obtained from the infringer.[151] While, thus, the risk of default remains essentially with the assignor, it is established case law that the assignee is entitled to bring an action against the infringer. Without going into detail at this point, it can be assumed that antitrust (or DMA) damages claims can be bundled via the assignment model, so that there is also a stable basis for the involvement of litigation funds. However, so far there has been no precedent-setting ruling by the Bundesgerichtshof specifically on antitrust damages claims, so there remains a degree of uncertainty. Moreover, the bundling of claims through the assignment model is in any case cumbersome and costly. It is not a viable option for the bundling of scattered and low-value claims, as is typical in the case of antitrust damages suffered by end consumers.

Third, the German law on the organisation of the courts allows for a certain degree of specialisation of the judges dealing with antitrust cases at trial court level.[152] Although there are nowadays specialised chambers for antitrust cases before the regional courts throughout Germany, the potential for developing expertise is often not fully exploited. One of the reasons for this may be the fact that the judges in the (specialised) chambers in charge of the case are apparently subject to frequent changes. Moreover, empirical evidence gathered by academics[153] and anecdotal evidence from lawyers suggests that the expertise and enthusiasm with which courts handle antitrust damages cases varies considerably. In response, plaintiffs strategically seek to exploit the procedural leeway afforded by local jurisdiction and bring antitrust damages claims in courts where they expect to find an experienced judge with a hands-on approach.[154] However, this only seems to go part way towards overcoming the major obstacle that judges have no incentive to bring antitrust damages cases before their chambers; on the contrary, avoiding such cases can be good for their careers. The reason for this is the system used to measure the performance of judges. A key parameter is the number of cases completed within a given time frame. As antitrust

[147] Note that the 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, does not apply to infringements of competition law. In this respect, there has been a widening of the scope of the Directive by the German legislator in the transposition of its provisions.
[148] See Article 42 of the DMA.
[149] Section 4(2) no. 3 of the Act.
[150] See FRANCK (n 145), 115–116.
[151] See, e.g., above n 25.
[152] See FRANCK (n 145), 101.
[153] See BECHTOLD, S., FRANKENREITER, J., and KLERMAN, D., 'Forum Selling Abroad', *Southern California Law Review* 92 (2019), 487, 538–544.
[154] BECHTOLD, FRANKENREITER and KLERMAN (n 153), 538.

damages cases tend to be exceptionally large and complex, their handling should be highly rewarded. However, this is not the case.[155] This could be changed by the *Länder*, the German states, which are responsible for the rules governing the administration of justice, but there does not seem to be any significant interest in attracting antitrust damages litigation.[156]

These three issues are certainly relevant to all types of antitrust damages claims. However, plaintiffs in actions against digital gatekeepers may be particularly sensitive in this respect. The relevant antitrust violations may be complex and require a willingness on part of the courts to familiarise themselves with the technological and economic particularities of the business models of two-sided (digital) platforms. This may be particularly important because – in contrast to standard damages actions following on fined hardcore cartels – there is considerable potential for stand-alone actions or actions based (only) in part on an authority's findings but without a binding finding of an infringement. Moreover, effective access to evidence is key to the success of such actions. In addition, digital gatekeepers have deep pockets and can therefore use all available mechanisms to make litigation burdensome, lengthy and expensive. This type of litigation therefore requires a large up-front investment, especially when it comes to stand-alone actions and the bundling of a large number of claims.

What is generally true of antitrust damages actions is therefore even more true of actions against digital gatekeepers: There is a great sensitivity to the institutional framework. There is a strong need for clear procedural and substantive rules and for independent and competent judges with a practical approach who are committed to getting this complex litigation off the ground and bringing it to a speedy and efficient conclusion. Uncertainty about these institutional factors is a major cost. Against this background, it remains to be seen how the German courts will develop as a venue for antitrust (and possibly DMA) damages claims against digital gatekeepers.

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[155] BECHTOLD, FRANKENREITER and KLERMAN (n 153), 542–543.
[156] BECHTOLD, FRANKENREITER and KLERMAN (n 153), 543–544.

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