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Private enforcement of the Digital Markets Act in Germany

Introduction

The obligations for gatekeepers under the Digital Markets Act (DMA) became effective on 7 March 2024. The gatekeepers designated by the European Commission in September 2023 are now obliged to comply with the requirements of the DMA to ensure that the digital markets in which they operate stay or become contestable and fair (see also *Digital Markets Act: Die Kommission benennt Torwächter*).

The impact of the DMA obligations on the gatekeepers' offers are visible. For example, users of core platform services are now asked by the gatekeepers to decide whether they want to combine data across different services of the gatekeeper (Art. 5 (2) DMA). Instagram, for example, is therefore no longer automatically linked to a user's Facebook account. This also applies, for example, to the detachment of a Facebook account from the Facebook Messenger. The core features of the messenger service, such as private messages and chats as well as voice and video calls, are still available.

Nevertheless, there are voices complaining about the (allegedly) inadequate implementation of the DMA obligations by some gatekeepers. This raises the question of the enforcement of the DMA, which in principle can be carried out by the Commission (public enforcement) as well as by the business and end users of the gatekeepers' core platform services (private enforcement). Private enforcement has long been established in competition law. It therefore seems likely that the objectives of the DMA (which is nothing else than a competition law-related regulation of gatekeepers) will also be pursued by way of private enforcement in the future.

In the following, we would like to take a closer look at the private enforcement of the DMA in general and in particular at the set-up for the private enforcement of the DMA in Germany (for the private enforcement on the basis of the Consumer Rights Enforcement Act see also *Effektive Durchsetzug von Schadensersatzansprüchen wegen Kartellrechts- und DMA-Verstößen durch das VRUG?*).

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Starting point

Looking at the provisions of the DMA (see also *Kartellrechtsnahe Regulierung von Gatekeepern – der Digital Markets Act*)**, the EU legislator seems to assume that the enforcement of the DMA is primarily to be carried out by the Commission** (the competition authorities of the Member States only have a supporting role, see also The Digital Markets Act – how will it impact national competition authorities?)**. However, this does not exclude private enforcement of the DMA. Accordingly, the DMA implicitly presupposes the possibility of private enforcement. For example, Art. 39 DMA provides for a cooperation mechanism between the Commission and national courts for a coherent (parallel) application of the DMA.**

The challenge of a coherent enforcement of the DMA

The German Federal Court of Justice has made statements regarding the role of private enforcement in the realm of competition law, specifically in cases related to cartel damages.

According to the court, private enforcement serves two purposes: firstly, it aims at the effective enforcement of competition rules, and secondly, it provides a means for compensation. The enforcement aspect in follow-on cartel damages cases works on a preventive principle. Essentially, the idea is that if companies anticipate that they will have to make payments for cartel damages as a likely result of violating competition law, they will be deterred from such violations in the first place. This deterrent effect, highlighted in the court's decision on 10 February 2021 (case KZR 63/18, para. 36 – *Schienenkartell VI*), underscores the indirect yet preventive nature of private enforcement in cartel damages cases.

In contrast to this, the private enforcement of the DMA will initially focus on the gate-keepers' compliance with their obligations. Courts will therefore have to make a substantive legal assessment as to whether a DMA infringement has occurred at all. Of course, this parallel application of the DMA by national courts entails the risk of a divergent interpretation of the DMA. This is all the more so as there is not yet any case law from the ECJ on the interpretation of the DMA obligations to which the national courts could refer.

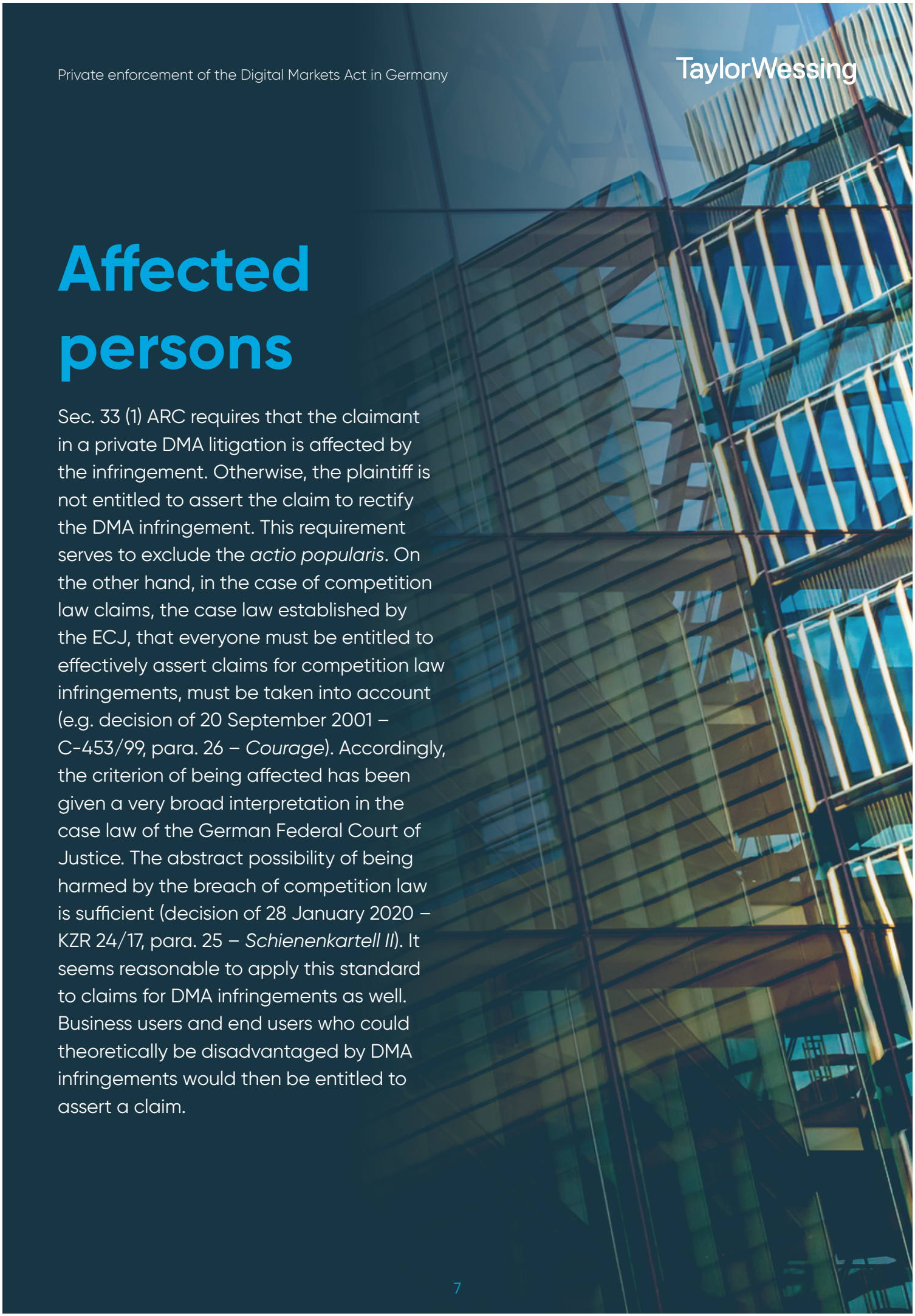
On the other hand, the DMA also serves to enforce the behavioral obligations to achieve competitive markets more quickly than was previously possible under the traditional competition law framework. Particularly in view of the highly dynamic nature of markets for digital offerings, fast proceedings appear important in order to achieve the objectives of the DMA. Private enforcement can serve this purpose. Moreover, Art. 39 DMA is intended to ensure that the decisions of the national courts do not conflict with decisions taken or contemplated by the Commission. To make this possible, Art. 39 DMA provides for a mechanism for the exchange of information between the Commission and national courts and a possibility for the Commission to intervene in Member State court proceedings as amicus curiae. Furthermore, according to Art. 39 (5) DMA, the national court shall not issue a decision that runs counter to a decision already taken or contemplated by the Commission. In addition, national courts can request a preliminary ruling under Article 267 TFEU.

Private enforcement in Germany

The German legislator, who has recently adopted the 11th Amendment to the Act against Restraints of Competition (ARC) embedded the private enforcement of the DMA obligations in the ARC. In order to promote effective private enforcement of the DMA, the German legislator has made infringements of Art. 5 to 7 DMA the subject of claims under Sec. 33 (1) ARC: "Whoever violates (...) Article 5, 6 or 7 of Regulation (EU) 2022/1925 (...) shall be obliged to the person affected to rectify the harm caused by the infringement (...)." In addition to the claims under Sec. 33 (1) ARC, the reference in Sec. 33a (1) ARC to Sec. 33 (1) ARC also entitles to claims for damages.

Jurisdiction of the chambers for competition law disputes

Pursuant to Sec. 87 ARC, the competition law chambers of the regional courts have jurisdiction over private law disputes relating to Art. 5 to 7 DMA. The legislator justified the reform of Sec. 87 ARC by stating that proceedings relating to the DMA should be heard by the competition courts, as this would allow their expertise in the field of competition law to be utilized for the enforcement of the DMA. The jurisdiction of the chambers for competition law disputes is convincing, because many of the prohibitions of the DMA are based on Art. 102 TFEU (or equivalent national competition laws on the abuse of a dominant position) proceedings against gatekeepers by competition authorities.



Affected persons

Sec. 33 (1) ARC requires that the claimant in a private DMA litigation is affected by the infringement. Otherwise, the plaintiff is not entitled to assert the claim to rectify the DMA infringement. This requirement serves to exclude the *actio popularis*. On the other hand, in the case of competition law claims, the case law established by the ECJ, that everyone must be entitled to effectively assert claims for competition law infringements, must be taken into account (e.g. decision of 20 September 2001 – C-453/99, para. 26 – *Courage*). Accordingly, the criterion of being affected has been given a very broad interpretation in the case law of the German Federal Court of Justice. The abstract possibility of being harmed by the breach of competition law is sufficient (decision of 28 January 2020 – KZR 24/17, para. 25 – *Schienenkartell II*). It seems reasonable to apply this standard to claims for DMA infringements as well. Business users and end users who could theoretically be disadvantaged by DMA infringements would then be entitled to assert a claim.

Burden of proof

An important aspect of private enforcement is the burden of proof. In principle, each party bears the burden of proof for the existence of facts in its favor. Thus, in principle, the plaintiff bears the burden of proof for the breach of the DMA obligations and any resulting damage. At the same time, an information asymmetry between the plaintiff and the gatekeeper exists, which makes it more difficult for the plaintiff to enforce his rights.

However, there are also possible remedies and facilitations for the plaintiff in this respect:

- The position of the defendant as gatekeeper and thus the applicability of the DMA follows from the binding effect of the designation decision pursuant to Sec. 33b sentence 1 ARC.
- A key question will be who bears the burden of proof for the infringement of (or compliance with) the requirements of Art. 5 to 7 DMA. According to Art. 8 (1) sentence 1 DMA, the gatekeeper must ensure and prove compliance with the obligations arising from Art. 5 to 7 DMA. Plaintiffs will argue that Art. 8 (1) sentence 1 DMA leads to a reversal of the burden of proof on the gatekeepers. Accordingly, it would no longer be the task of the plaintiffs to demonstrate and prove any conduct that is incompatible with the requirements of the DMA; instead, the gatekeeper must prove that his conduct is legally compliant.
- Sec. 33g (1) ARC provides for information and disclosure claims for evidence necessary for the assertion of a claim for damages. This provision shall enable the plaintiff to overcome the existing information asymmetry.
- In addition to this right to information under Sec. 33g (1) ARC, there is also an alleviation of the burden of proof. If a plaintiff who is obliged to present evidence is outside the course of events to be presented by him and has no more detailed knowledge of the relevant facts, he may admissibly submit a general assertion and it is then for the defendant, who has the knowledge and who can reasonably be expected to provide more detailed information, to present evidence in this respect.

Damages due to DMA infringements

In claims for damages due to DMA infringements, the plaintiff must prove his damage due to the DMA infringement. In this respect, the lower standard of proof under Sec. 287 of the German Code of Civil Procedure applies, i.e. a predominant probability of a damage is sufficient. However, this does not release the plaintiff from the obligation to present basic facts that make it possible for the court to estimate the damage.

In cartel damages cases, there is case law of the Federal Court of Justice that the prices achieved within the framework of a cartel are higher on average than those that would have been formed without the cartel (e. g. decision of 29. November 2022 – KZR 42/20, para. 44 – *Schlecker*). In addition to this case law, Sec. 33a (2) ARC provides for a rebuttable presumption that a cartel results in a damage.

However, an application of the presumption in Sec. 33a (2) ARC to DMA infringements is not convincing. The presumption does not apply to infringements of the prohibition of abuse (Art. 102 TFEU, Sec. 19, 20 ARC) either and the German legislator did not adapt the provision for the DMA accordingly in the 11th amendment to the ARC.

The extent to which damages typically occur in the case of DMA infringements and to what extent damages are indicated in this respect is likely to depend on the specific prohibitions at issue. For example, in the case of an infringement of the prohibitions of anti-steering (Art. 5 (4) DMA) or self-preferencing (Art. 6 (5) DMA), the assumption of a damage might be more likely than in the case of an infringement of the prohibition of data combination under Art. 5 (2) DMA.

Conclusion

The German legislator has paved the way for private enforcement of the DMA in Germany and national competition courts can apply the new law on the know-how gained from many years of private competition law enforcement. It is therefore likely that business users and end users will seize the opportunity to enforce the legal positions that the DMA confers on them themselves.

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Taylor Wessing statistics published are correct as of March 2024.