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Tracing the Silhouettes of Competition Law Private Enforcement in the DMA

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Competition law as a "platform" for the DMA

… looking similar …

- Prohibited practices based on case law in abused matters
- Enforcement structure (fines, penalties…)
- Rights of consumers and consumers' benefits
- "Importance" of private enforcement

…but still different…

- Legal basis - competition
  - Reg. 1/2003 – national courts shall enforce Art. 101 & 102 TFEU
  - Dir. 2014/104/EU – enforcement (Art. 103 TFEU) + harmonization to acheive effectiveness (Art. 114 TFEU)
- Legal Basis – DMA
  - Removal barriers by potentially created by MSs‘ (Art. 114 TFEU)

Consequences of different legal basis and purpose

Enforcement – procedural autonomy – effectiveness - equivalence

- Competition law
  - MSs are obliged to enforce effectively
- DMA
  - European Commission – "a sole enforcer"
  - Removal "contradicting" national legislation
  - MSs are not obliged to introduce additional enforcement rules outside requirements of the DMA
  - No "retroactive" case law of the CJ EU

Explicit private-enforcement rules in the DMA

Far from comprehensive regulation

- Collective redress
  - “collective interests of consumers”
- Art. 39 DMA: Cooperation with national courts

Implicit legal bases for private enforcement of the DMA

Direct-effect provisions: addressees

- end users: Art. 5(2) and 5(5) to 5(8), Art. 6(3), 6(6) and 6(9), Art. 7(2) and 7(3) DMA
- business users: Art. 5(3) and 5(4), Art. 5(6) to 5(8), Art. 6(2), 6(7), 6(10), and 6(12) DMA
- advertisers: Art. 5(9) and Art. 6(8) DMA;
- publishers: Art. 5(10) and Art. 6(8) DMA;
- any third parties: Art. 6(4), 6(5) and 6(8) to 6(11) DMA;
- providers of services and providers of hardware: Art. 6(7) DMA;
- without specific beneficiary: Art. 6(4) and 6(13), Art. 7(1), 7(4) and 7(5) DMA

- Beneficents from the overall functioning of the system
  - (Slovenská sporiteľňa case)

Not so direct …

- Designation decisions
- Exception decisions
- Specification decisions

- Effects – ex nunc/ex tunc?

What else is missing from the competition law framework?

Dir. 2014/104/EU not applicable

- Liability (gatekeeper/undertaking)
- Presumption of damage
- Limitation periods
- Damages estimation

Playing field for private enforcement

- POSSIBLE
  - Private claims/injunctions
    - Stand alone (before non-compliance decision)
    - Follow-on (after non-compliance decision)
- NOT POSSIBLE?
  - Achieve designation of gatekeeper
    - Preliminary reference – annulment of designation
  - Request injunctions contrary to specification/exemption decision
    - Preliminary reference – annulment of specification/exemption decision

DMA under-designed for private enforcement

Filling holes in public enforcement and creating new ones in private enforcement

- Different purpose and basis
  - DMA/competition
- Different effects (ex tunc/ex nunc)
- Almost no rules on the EU level

- Again, the same scenario?
  - Comp.: Courage/Crehan, Manfredi, Pfleiderer => Dir. 2014/104/EU
  - Public procurement: INGSTEEL => ????
  - DMA: ???? => ????

Thank you for your attention

"Power of truth is invincible if it is armed with the light of knowledge"

Johannes Amos Comenius

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