VOLUME 9 ISSUE 1 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/19638

Received: 26 Sept. 2023 | Accepted: 29 Jan. 2024 | Published: 30 May 2024

The Devil is in the Procedure: Private Enforcement in the DMA and the DSA

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ABSTRACT

The regulation of the digital ecosystem is one of the priorities of the European Union, and the Digital Markets Act [hereinafter the DMA] and the Digital Services Act [hereinafter the DSA] are two of the main instruments used in this area. They aim at ensuring contestability, fairness, safety, and transparency in the digital single market by altering the power imbalances that characterised the relations between online platforms and individual and/or business users. In this context, the role of individuals will be paramount to the fulfillment of the obligations of both Regulations and private enforcement will be a crucial tool in this regard.

Against this framework, this paper aims at connecting the well-settled principles of EU law, namely, the principle of effective judicial protection and the *Rewe* principles, with the new developments in the digital atmosphere, specifically in terms of the private means of redress. To that end, this article will first give an overview of the DMA and the DSA, as well as the question of private enforcement under EU law. Second, the possibilities and conditions for individuals to enforce their rights correlative to the obligations laid down in the DMA and the DSA privately will be studied. Finally, this paper will compare the situation regarding private enforcement in both Regulations with the previous rules in this matter through a series of examples that will facilitate an understanding of the rationale behind the introduction of the new legal framework.

KEYWORDS

DMA; DSA; Private Enforcement; Effective Judicial Protection; Rewe Principles

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INTRODUCTION

At the dawn of the Internet, hope was placed on its possibilities to provide more freedom, emancipation, and education.[1] Several decades later, the prevailing feeling seems more pessimistic. The online ecosystem has undeniably had many positive aspects, yet two pernicious trends have operated within it. As De Querol argues, we can observe, first, a centripetal force at the level of the companies that increasingly tend towards concentration and oligopolistic behaviours.[2] Second, from a societal point of view, the forces are diametrically the opposite, and the tendency is rather centrifugal. The Internet has, often, atomised individuals, dissolving some of their inter-personal links between them, and seems to have reinforced their biases and prejudices. The incapability or unwillingness to regulate, and sometimes the failure to adapt, existing norms has played a fundamental role in these processes. At the EU level, competition rules, on the one hand, have not been able to cope with the overconcentration of these markets.[3] On the other hand, sector-specific norms regulating digital services have also failed to give users the tools to claim transparency and accountability.

In this context, in 2022, two milestone pieces of legislation were published in the Official Journal of the European Union: The Digital Markets Act (Regulation (EU) 2022/1925) [Hereinafter the DMA] and the Digital Services Act (Regulation (EU) 2022/2065) [Hereinafter the DSA]. Both of them are part of a regulatory package aimed at limiting the tech firms' market power and making them subject to public authorities' and individual control.[4] To that end, the DMA and the DSA establish a series of obligations that give those firms clear indications as to the boundaries of their conduct vis-à-vis individuals and the economic environment of the EU. On the other side of the economic relationship, the objective of both Regulations is to provide consumers and users, whether individuals or businesses, with the necessary tools to assert their rights more clearly and with greater guarantees.

The content of the obligations of the DMA and the DSA, as well as their relationships with other existing rules, have been the primary focus of existing literature. While this is important from the point of view of the necessity of these rules, the novelty of the context they are called to deal with should not be a hindrance to respecting the principles and mandates of EU law. Among these fundamental norms enshrined in the constitutional core of the Union's legal order, procedural rules seem to

[1] *See* Ricardo de Querol, La gran fragmentación 12 (Arpa eds., 2023).
[2] *Id.*
[3] *Id.*
[4] *See* Peter Pitch, *Private Enforcement for the DSA/DGA/DMA Package*, Verfassungsblog (Sept. 3, 2021) https://verfassungsblog.de/power-dsa-dma-09/.

enjoy a privileged place. Not only because the Treaty on the Functioning of the European Union [hereinafter TFEU] aims at establishing "a complete system of legal remedies and procedures".[5] Also given that the EU is based on values such as the Rule of Law, as established in Article 2 on the Treaty on the European Union [hereinafter the TEU]. This is further specified in the second paragraph of Article 19(1) TEU,[6] that obliges Member States [hereinafter MS] to "provide remedies sufficient to ensure effective legal protection in the fields covered by EU law". It is nonetheless important to conduct a procedural analysis on the interactive nature between these pieces of EU legislation and national legal orders in light of the fundamental Union principles. This is essential to analyse how the latter will be translated into effective remedies at the disposal of individuals and companies that want to assert their rights conferred to them by the DSA and the DMA. The existing literature has not yet studied these procedural issues comprehensively and, especially not in comparison with the situation before the introduction of both Regulations. The analysis of this question is, however, of great importance as effective private enforcement is crucial to give individual and business users the tools to tackle the harmful effects of some of the types of behaviour of large tech companies.

In this context, this article aims at studying the possibilities, legal requirements, and extent of private enforcement of the rights conferred to individuals, correlative to the obligations of the DSA and the DMA,[7] and to analyse whether they are now better positioned to enforce their rights by private means in comparison to the previous legal framework. To that end, the first section gives some introductory remarks by offering an overview of both Regulations, their differences and cross-cutting elements, and an analysis of the conditions and rationale behind private enforcement under EU law. The second section studies, first in relation to the DMA and second to the DSA, the possibilities for individuals to enforce their rights by private means. The third section aims to give some examples that illustrate the differences between the previous rules before the introduction of both Regulations. Finally, this paper presents the results and discusses the limitations of the study.

[5] Case 294/83, Parti écologiste "Les Verts" v European Parliament, ECLI:EU:C:1986:166, ¶23 (Apr. 23, 1986).
[6] Case C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, ¶32 (Feb. 27, 2018).
[7] Note that, for the purpose of this article, "individuals" will refer to both natural and legal persons.

1. FROM DIGITAL MARKETS TO REWE: PRELIMINARY REMARKS

1.1. THE DSA AND THE DMA: TWO SIDES OF THE SAME COIN

A first reading of the DSA and the DMA may suggest that both instruments contain not only different rules but also different targets when it comes to regulating the digital milieu. However, they should not be understood separately, but rather as a comprehensive system of obligations for firms operating in the digital environment, and a double-headed response to the common aim of mitigating the negative externalities and risks derived from their pernicious behaviour online. This is true both for the market structure and for natural and legal persons. Thus, the delimitation of their respective aims appears to be rather blurry.[8]

Both Regulations are harmonisation instruments based on Article 114 of the Treaty of the Functioniong of the European Union [TFEU]. The choice of this legal basis accounts for their objectives of "eliminat[ing] obstacles to the freedom to provide and receive services, including retail services, within the internal market",[9] as well as "safeguard[ing] and improv[ing] the functioning of the internal market [through] a targeted set of uniform, effective and proportionate mandatory rules [. . .] at Union level".[10] Whether they respond to the aim enshrined in this provision, or the meta-objective that is at the basis of their conception pointing to a different direction, is outside of the scope of this paper. However, it is relevant to note that the harmonised character of these rules, aiming at avoiding legal divergences between Member States, should be given special attention when considering the enforcement possibilities offered by both pieces of legislation.

Against this characterisation, the DSA and the DMA follow a similar regulatory model based on *macro-categories to which different obligations,*[11] conduct rules, control systems and penalties are assigned in accordance with their size or impact.[12] Therefore, the use of these sorts of catalogues inspired by sectoral regulation aims, not only at creating an incremental system of obligations and burdens for operators whose systemic

[8] *See* Martin Eifert et al., *Taming the Giants: the DMA/DSA Package*, 58 Common Market Law Review, 987, 989 (2021).
[9] Recital 8 DMA.
[10] Recital 4 DSA.
[11] *See* Antonio Davola, *The Digital Services Act, Published: A Good Start And – Yet – Just A Start*, Kluwer Competition Law Blog (Oct. 19, 2022) https://competitionlawblog.kluwercompetitionlaw.com/2022/10/19/the-digital-services-act-published-a-good-start-and-yet-just-a-start/.
[12] *Id.*

importance is greater but,[13] also to facilitate compliance, enforcement, and implementation.[14]

1.1.1. THE DMA

The DMA focuses in particular on promoting *fairness* and *contestability* in the market by regulating the conduct and power of the so-called gatekeepers.[15] While the rules established by this Regulation draw inspiration from traditional competition rules, the DMA has characteristics pertaining to many other fields (such as consumer law or data protection).[16] It seems therefore that the claim by some authors that the DMA is just a "sector-specific competition law"[17] is inconsistent with the particular objectives, substance, and legal basis of its rules.

The weak contestability of gatekeepers and the multiplication of unfair practices,[18] as well as the fragmented character of the regulatory framework, both horizontally (between different fields of EU law) and vertically (between the Union and its Member States), has led to the adoption of a harmonisation instrument. This instrument coexists with many of the pre-existing rules and has the objective of "ensur[ing] that markets, where gatekeepers are present are and remain *contestable* and *fair*, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market".[19]

Although some articles of the DMA are certainly inspired by past competition cases or Treaty competition rules, the Regulation goes further to establish a number of *ex-ante*, *numerus clausus* and *per se* obligations, with no need to define the conduct as harmful or to identify the relevant market in which the firm operates .[20]

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[13] *See* Matthias Leistner, *The Commission's vision for Europe's Digital Future: Proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act – A critical primer*, 16 Journal of Intellectual Property Law & Practice n.8 778, 779 (2021).

[14] See, among others, Recital 31 DMA and Recital 40 DSA.

[15] According to Article 3 of the DMA, a firm will be designated as a gatekeeper when it has "a significant impact on the internal market", it operates a "core platform service which is an important gateway for business users to reach end users" and "it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in near future" (the latter is the so-called "emerging gatekeeper").

[16] *See* Leistner, *supra* note 13, at 780.

[17] Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12 Journal of European Competition Law & Practice n.7 529, 529 (2021).

[18] Recital 13.

[19] Recital 10.

[20] *See* Assimakis P. Komninos, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, in Eleanor M. Fox Liber Amicorum - Antitrust Ambassador to the World 425, 425 (Nicolas Charbit and Sébastien Gachot ed., 2021); Petit, *supra* note 22, at 538.

Based on the centrality of concepts of *fairness* and *contestability* in the architecture of the DMA, this piece of legislation contains several precise, self-executing obligations in its Articles 5, 6 and 7. For the purpose of this paper, these obligations can be divided *ratione materiae into the categories laid down in Table 1.*[21] Yet, it should be noted that such categories are not watertight compartments but are often interrelated.

Type of Obligations	Articles
Anticompetitive or unfair agreements or practices	Article 5(3), (4), (5), (7), and (8), and Article 6(4), (5), (6), and (12).
Data-related rules	Article 5(2), 6(2), (9), (10), and (11).
Interoperability obligations	Article 6(7), and Article 7.
Transparency and users' empowerment rules	Article 5(6), (9) and (10), and Article 6(3), (8), and (13).
Reporting rules	Articles 14(1) and 15(1).

Figure 1: Categories of the DMA Obligations *Ratione Materiae*

1.1.2. THE DSA

The main objective of the DSA is to enhance consumers' protection and rights and to set clear rules in terms of *transparency* and *accountability.*[22] In the last years, online platforms have experienced an enormous transformation both in terms of their roles,[23] and in terms of the risks linked to their use. Thus the DSA aims at ensuring a "safe, predictable and trusted online environment; addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate"; and that the "fundamental rights enshrined in the Charter are effectively protected and innovation is facilitated".[24]

[21] This categorisation is inspired by Filomena Chirico, *Digital Markets Act: A Regulatory Perspective*, 12 Journal of European Competition Law & Practice n.7 493, 495 (2021). However, this paper regroups them for the aim of this study.

[22] *See* European Commission, *The Digital Services Act: ensuring a safe and accountable online environment*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

[23] *See* Miriam Buiten, *The Digital Services Act: From Intermediary Liability to Platform Regulation*, 12 Journal of Intellectual Property, 5 Information Technology and E-Commerce Law 631, 361 (2022).

[24] Recital 9 DSA.

In this context, the DSA contains two main types of norms: on the one hand, Chapter II lays down a system of liability exemptions, with a similar approach to the E-Commerce Directive (Directive 2000/31/EC, "ECD"),[25] but with more precise rules in terms of how to tackle the presence and removal of illegal content.[26] In a nutshell, departing from the same categories of intermediary services foreseen in the ECD, the DSA establishes the liability exemptions laid down in Table 2.[27]

Type of Service	Example	Exemption of Liability
Mere conduit	WiFi	Always, *even if* notified, as long as it behaves passively in relation to the content transmitted or accessed in it.
Caching	CDN*	Exempted as long as it behaves passively in relation to the content transmitted by it *unless* notified.
Hosting	Social networks	Exempted as long as it behaves passively and *unless* notified of the illegal content.

Figure 2: Liability Exceptions DSA

*CDN[28]

Nevertheless, the real contribution of the DSA is the introduction of the so-called due diligence obligations in Chapter III. These are independent of the system of liability exemptions, where the aim is to ensure that digital services providers are further responsible for their behaviour online.[29]

[25] *See* Martin Husovec and Irene Roche Laguna, *Digital Services Act: A Short Primer*, in Principles of the Digital Services Act 1, 3 (Martin Husovec and Irene Roche Laguna ed., 2023, forthcoming).
[26] *See* Buiten, *supra* note 23, at 363.
[27] Husovec and Roche Laguna, *supra* note 25, at 3.
[28] Content delivery network.
[29] *See* Husovec and Roche Laguna, *supra* note 25, at 4.

Against this background, the DSA lays down a series of norms in relation to the organisational model of digital businesses that materialise into a Matryoshka-looking set of cumulative and incremental due diligence obligations for platforms.[30] They range from those applicable to intermediary services (as set out above, mere conduit services, caching services and hosting services), to additional obligations for online platforms and,[31] finally, to the so-called Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs),[32] as shown by Table 3.

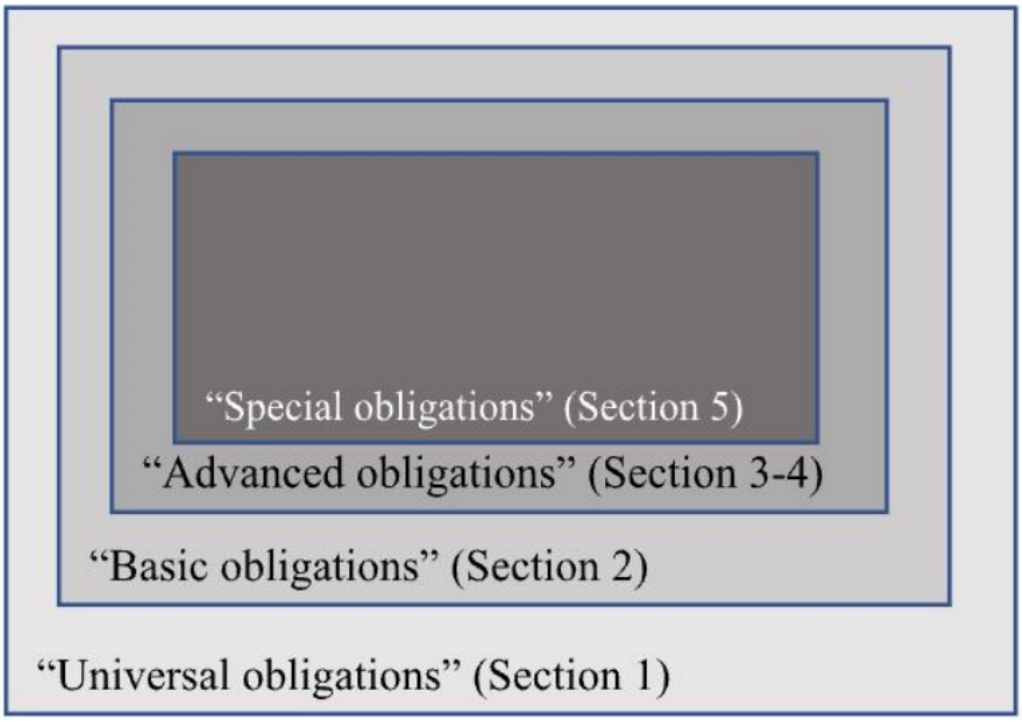

Figure 3: Due diligence obligations in terms of size

"Universal obligations" must be complied with by all firms regardless of their size. Additionally, the DSA establishes some more duties for hosting services ("basic obligations"). The third level ("advanced obligations") applies to providers of services in relation to online platforms and/or online marketplaces (Sections 3 and 4).[33] Finally, the

[30] *See* Eifert et al., *supra* note 8, at 999.
[31] "Hosting service that, at the request of a recipient of the service, stores and disseminates information to the public" (Article 3(g)(i) DSA).
[32] "Online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million" (Article 33(1) DSA).
[33] Articles 19 to 28 and 29 to 32 respectively, notably with an internal complaint-handling mechanism and out of court disputes settlement system, as well as the creation of trusted flaggers and transparency obligations.

seed Matryoshka is formed by the "special obligations" contained in Section 5,[34] applicable to VLOPs.[35]

However, due diligence rules can also be divided *ratione materiae* into the categories shown in Table 4. They take into account not only the general objective of every specific obligation but especially its beneficiary, i.e., the person or entity to which the provision is directed in their relations with the service provider.

Yet, this division is sometimes not as straightforward since some elements undeniably have a cross-cutting nature. Moreover, as this paper will further explain, this does not mean that only the beneficiary of the obligation would always be entitled to enforce it. Still, this table will facilitate the comprehension of the analysis in the following sections of this paper.

<table>
<tr><td>Obligations vis-à-vis the regulator</td><td colspan="2">Articles 11-13 (legal representatives and points of contact), 15 (transparency reporting obligations), 22 (trusted flaggers), 24 (transparency reporting for online platforms) 34-36 (related to risk assessment and mitigation), 37 (independent audit), 40 (data access and scrutiny) and 41 (compliance function for VLOPs), 42 (transparency reporting for VLOPs), 43 (supervisory fee), and 44-47 (standards and codes of conduct).</td></tr>
<tr><td rowspan="2">Obligations vis-à-vis users</td><td>Fighting illegal content and abusive behaviour</td><td>Transparency, data, and algorithms</td></tr>
<tr><td>Articles 16, 17, 18 and 23 (notice and action system, statement of reasons, criminal offences and misuse), 20 and 21 (internal complaint and non-judicial dispute mechanism).</td><td>Articles 14 (terms and conditions), 25 (online interface design and organisation), 26 (advertising on online platforms), 27 (recommender system), 28 (minors), 30-32 (marketplaces), 38 (recommender system in VLOPs), and 39 (transparency obligations for VLOPs).</td></tr>
</table>

Figure 4: Due Diligence Obligations *Ratione Materiae*

[34] Articles 33 to 43, establishing risk management and Audit obligations, more transparency rules and data access and scrutiny.

[35] For the categorisation, see Husovec and Roche Laguna, *supra* note 25, at 4.

1.1.3. COMMON GROUNDS

Notwithstanding their respective objectives and obligations, the mutual conception of the DMA and the DSA gave rise to areas that are both complementary and cross-cutting,[36] to the point where some authors refer to them as "sister" regulations.[37] First, the targeted platforms, by both, are very similar in terms of a big part of their obligations, i.e., as Eifer et al. note, those that enjoy a "regulator-like position".[38] The DMA's main objective is to regulate the conduct of gatekeepers that provide *core platform services*, which include "online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, [or] operating systems [. . .]".[39] The DSA targets *intermediary services*, consisting of mere conduit, catching, and hosting services, categories that englobe, among others, online platforms and search engines.[40] As it has been observed, all the gatekeepers designated by the Commission in 2023 are considered, for some of their core platform services, like VLOPs under the DSA (further examples include: Apple's AppStore, Meta's Facebook and Instagram, or ByteDance's TikTok, among others).

Second, as it has been argued, the setting of *ex-ante* dos and don'ts to avoid the concentration of market power by the DMA is complemented by the DSA's establishment of an *ex-post* liability regime and obligations regarding the responsibility for the behaviour of those firms.[41] In fact, the frontier between the goals pursued by both Regulations is rather blurry. Given its aim of contestability and fairness, the DMA's focus goes beyond the market power of tech giants.[42] While the DSA touches certain aspects, its very nature affects the ability of competitors to contest such market power.[43] From this perspective and, as recognised by the European Commission, both Regulations "aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses".[44] The DMA and the DSA have in mind the protection and empowerment of individuals in the digital milieu by avoiding and regulating certain corporate behaviours.[45]

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[36] *See* Eifert et al., *supra* note 8, at 995-998.
[37] *See* Chirico, *supra* note 21, at 499.
[38] Eifert et al., *supra* note 8, at 998.
[39] Article 2(2) DMA.
[40] Article 3 DSA.
[41] *See* Buiten, *supra* note 23, at 366.
[42] *Inter alia*, Recital 31.
[43] *See* Eifert et al., *supra* note 8, at 996-997.
[44] European Commission, *The Digital Services Act package*, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.
[45] See, among others, Recital 7 DMA and 3 DSA.

It is based on this idea that any procedural analysis on the private enforcement of the DMA and the DSA is better tackled in conjunction. The interplay between both Regulations is crucial for the achievement of their purposes, and their complementarity is the basis of the success of such objectives. Besides, certain practices by the same firm could entail a violation of both the DSA and the DMA and negatively affect the rights of individuals who use their services. It is against this framework that this paper seeks to analyse the private procedural possibilities offered by both Regulations departing from the well-settled principles of EU law. Then, how the latter are still relevant in some of the most contemporary fields of law and contribute to the substantive aims pursued by the DMA and the DSA will further be analysed.

In order to understand the different purposes and effects of private enforcement that would justify its existence in the context of the DMA and the DSA, the following section will approach the legal and purposive reasons, as well as the necessary conditions under EU law, for the possibility of these rules to be enforceable by private means.

1.2. PRIVATE ENFORCEMENT UNDER EU LAW

1.2.1. CONDITIONS FOR PRIVATE ENFORCEMENT UNDER EU LAW

Private enforcement, as opposed to the public one, means the possibility for individuals to seek the enforceability in courts of their rights bestowed by EU law, or of certain obligations that create correlative rights from which they benefit, or redress in the case that they have been violated. However, as a rule, EU law does not provide for explicit judicial remedies and thus, based on the principle of procedural autonomy, they have to be found in the national laws of the Member States as part of the European Union's decentralisation of justice.[46]

The procedural autonomy of MS was originally recognised by the Court of Justice in *Rewe,*[47] where it established that "[. . .], in the absence of Community rules [. . .], it is for the domestic legal system of each Member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law [. . .]".

[46] *See* Takis Tridimas, *Financial regulation and private law remedies: an EU law perspective*, in Financial Regulation and Civil Liability in European Law 48, 49 (Olha O. Cherednychenko and Mads Andenas eds., 2020).

[47] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42, ¶5 (Feb. 20, 1979).

Yet, this notion has to be balanced against the principle of effective judicial protection. According to the Court, the second paragraph of Article 19(1) TEU, which establishes the obligation for MS to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", concretises the fundamental value of the Rule of Law as enshrined in Article 2 TEU.[48] Effective judicial protection has been recognised by the Court to be a general principle of EU law laid down, among others, in Article 47 of the Charter and the constitutional traditions of the MS.[49] Its respect for the purposes of EU law, through a system of judicial remedies, is an obligation arising *inter alia* from "the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU".[50]

Against this background, it is settled case law that, within the framework of their procedural autonomy, national remedies made available by domestic laws have to respect the so-called *Rewe* principles. These include effectiveness,[51] and equivalence,[52] which are of central importance to the complete the system of judicial remedies put in place for the enforceability of EU law. As argued by Tridimas, the Court seems to favour a "hybrid model"[53] where the principles of effectiveness and equivalence have a deep impact on the way national remedies should take place.

As pointed out before, it is mostly the case in EU law that a right (or an obligation from which a right is derived) is established with no reference to the remedies available for its redress. In this situation,[54] the remedy is not inexistent but should be implied from the obligation as a logical expression of the well-established principles of supremacy and direct effect of EU law.[55] However, not all the rights and obligations established under EU law are equally enforceable, and the fullness of their effects, especially the possibility for their private enforcement, will depend on whether certain conditions are satisfied.[56]

In this context, as noted by the Court in *Rewe*, the direct effect of the rules is paramount for the analysis of the enforceability of EU law obligations by private means before national courts. It is settled case law of the Court of Justice since *Van Gend En Loos that,*[57] for a provision of EU law to enjoy direct effect, it must be clear and sufficiently precise. In addition, for an implied right of action to be derived for the benefit of

[48] Associação Sindical dos Juízes Portugueses, *supra* note 6.
[49] *Id.* ¶35.
[50] *Id.* ¶34.
[51] The conditions for the exercise of the remedy "cannot be less favourable than those relating to similar actions of a domestic nature" (*Id.*).
[52] The exercise of the remedy cannot be "virtually impossible or excessively difficult" (Tridimas, *supra* note 46, at 49) for individuals before national courts.
[53] *Id.* at 50.
[54] *See Id.* at 51.
[55] *See* Sacha Prechal, *Community Law in National Courts: the Lessons from Van Schijndel*, 35 Common Market Law Review 3, 686 (1998).
[56] *See* Tridimas, *supra* note 46, at 51.
[57] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R.

individuals, the measure shall have the intention of conferring a right and protecting the legitimate interests of a category of persons in which the claimant is included.[58] Moreover, the violation must have an adverse effect for such rights and interest of the claimant.[59] For the determination of whether the last two requirements are satisfied,[60] several factors are taken into account by the Court, including a teleological interpretation of the provisions and the *effet utile* of EU law.

The legal form of the particular instrument at stake also has implications in as far as such a direct effect and subsequent private enforcement shall be recognised. As Regulations, the DSA and the DMA are, according to Art. 288 TFEU, directly applicable.[61] However, this shall not be confused with the direct effect that some of their provisions can enjoy, as such direct applicability does not represent a sufficient condition for the satisfaction of direct effect.

It should be acknowledged that some scholars consider both terms as synonyms, describing direct effect/applicability as the capacity of the provisions of EU law to bestow individuals with certain rights and obligations. Although, for such rules to be invoked before national courts, certain conditions have to be fulfilled.[62] t is beyond the scope of this paper to highlight the differences between the notions of "direct applicability" and "direct effect". However, it is relevant to clarify that, following Winter's argument, this article uses the former concept to designate "a method of incorporation of (secondary) [Union] Law into the municipal legal order", and the latter "as to when a [Union] provision is susceptible of receiving judicial enforcement".[63] Against this backdrop, the case law of the Court establishes that provided that these conditions are fulfilled, regulations should enjoy both vertical,[64] (in relations between the State and the individual) and horizontal,[65] (in conflicts between individuals) direct effects.

[58] Although it is not necessary that such a protection is the only goal of the measure.
[59] *See* Tridimas, *supra* note 46, at 61.
[60] *See id.* at 62.
[61] That, as pointed out by Tridimas (*Id.* at 61), "partially reflect the conditions discussed by the Advocate General in *Muñoz*".
[62] *See* Rostane Mehdi, *L'effet direct du droit Communautaire*, *in* Juriclasseur Europe (Rostane Mehdi ed., 2008).
[63] Jay Winter, *Direct applicability and direct effect. Two distinct and different concepts in Community law*, 9 Common Market Law Review 4, 425 (1972).
[64] *See* Case 93/71, Orsolina Leonesio v. Ministero dell'agricoltura e foreste, 1972 E.C.R. 5; Case C-237/07, Janece v. Freistaat Bayern, 2008 E.C.R.
[65] *See* Case C-253/00, Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd, 2002 E.C.R. 30 and Opinion of Advocate General Geelhoed, Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd 2001 E.C.R. 55.

1.2.2. PRIVATE ENFORCEMENT AND ITS RAISON D'ÊTRE

Private remedies in the context of EU law come to complement and not to substitute public enforcement and,[66] as established by the Court of Justice in *Skanska,*[67] they are "an integral part of the system for enforcement of those rules". In the words of Nagy, both public and private remedies form a "unitary enforcement system".[68] The existence of public enforcement mechanisms in the context of a provision of EU law does not preclude the possibility of private remedies before civil courts for violations of the rights or obligations protected by that provision.[69]

In this context, private remedies can be used for two aims: either individuals use them as a "sword" against the defendant, taking the form usually of claims for damages or injunctive reliefs, or as a "shield" when, for example in the context of competition law, they question the validity of an agreement.[70] Damage claims (and, in general, "follow-on" actions) have gathered most of the political and legislative attention, but this does not mean they are the only possibility, nor the most interesting one from the point of view of the EU system of judicial governance.[71] One of the roles of private remedies is precisely to empower individuals in the enforcement of EU law and in enabling its *effet utile.*[72] Thus, any analysis of such actions must depart from such an objective.

Nevertheless, the purpose of private remedies is not only to make individuals "integration agents",[73] but also to respect their right to an effective remedy and to a fair trial as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union [hereinafter the Charter].[74] Moreover, the Preamble of the European Declaration on Digital Rights and Principles for the Digital Decade recognises that "The democratic functioning of the digital society and economy should be further strengthened, in full respect of the rule of law, effective remedies and law enforcement".[75] The legal nature of this instrument does not preclude the political importance of the inclusion of such a statement for the teleological interpretation of the pieces of legislation that relate to the

[66] *See* Csongor István Nagy, *What role for private enforcement in EU competition law? A religion in quest of founder*, *in* The Cambridge Handbook of Competition Law Sanction 218, 228 (Tihamer Tóth ed., 2022).
[67] Case C-724/17, Vantaan kaupunki v. Skanska Industrial Solutions Oy and Others, ECLI:EU:C:2019:204, ¶ 45 (Mar. 14, 2019).
[68] Nagy, *supra* note 66, at 227.
[69] *See* Muñoz, *supra* note 59.
[70] *See* Wolfgang Wurmnest & Merlin Gömann, *Comparing Private Enforcement of EU Competition and Data Protection Law*, 13 Journal of European Tort Law 154, 155 (2022).
[71] *See* Rupprecht Podszun, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, 13 Journal of European Competition Law & Practice 254, 254 (2022).
[72] *See* Tridimas, *supra* note 46, at 66.
[73] *Id.*
[74] *See* Nagy, *supra* note 66, at 225.
[75] European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01, O.J. C 23/1.

digital field. Additionally, in the specific context of administrative law, private enforcement can achieve several objectives from compensating for the absence of omnipresence and omniscience of the public administration to more procedural aspects such as the guidance of the proceedings and the assurance of compliance.[76]

From an existential point of view, the question of private remedies has turned whether they should have a deterrence or compensation purpose around (although both objectives are mutually dependent and complementary).[77] In this context, as the Court recognised in *Marshall II,*[78] such remedies "must be such as to guarantee real and effective judicial protection and have a real deterrent effect" – be it through "financial compensation [. . .] adequate [to] enable the loss and damage actually sustained",[79] or actions that help "to discourage violations which are often difficult to detect".[80] But, from the viewpoint of their legitimacy, such remedies are used by individuals to protect their own interests and rights, as opposed to public remedies, which, first and foremost, although not exclusively, seek to protect the public interest.[81] Therefore, it seems that private enforcement serves two main and complementary objectives: first, the respect of fundamental procedural rights protected by the Charter, ensuring the protection of the legitimate interests of individuals who may use them either as swords or shields; second, the effectiveness of EU rules and the empowerment of individuals in the system of EU law.

Taking this into account, the next section will respond to the question at the heart of this study, namely, whether, under which conditions and what provisions of the DMA and the DSA may give rise to private enforcement for individuals who want to access their courts for the protection of their rights. It should be reminded at this point that this article refers to individuals regardless of whether they are natural or legal persons.

[76] *See* Rupprecht Podszun, *The Commission will not be able to do this alone*, Verfassungsblog (Sept. 1, 2021) https://verfassungsblog.de/power-dsa-dma-05/.
[77] *See* Nagy, *supra* note 66, at 218-219.
[78] Case C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, ECLI:EU:C:1993:335, ¶24 (Aug. 2, 1993).
[79] *Id.* ¶26.
[80] Tridimas, *supra* note 46, at 64.
[81] *See* Podszun, *supra* note 71, at 260.

2. WHAT TO EXPECT FROM PRIVATE ENFORCEMENT IN THE DMA AND THE DSA

2.1. PRIVATE ENFORCEMENT OF THE DMA

It must be pointed out as a preliminary note that, notwithstanding the provisions in relation to the allowance of representative actions,[82] the DMA remains silent about specific private actions to enforce its rules. Yet, the possibility of private enforcement before national courts was already advanced by some scholars when commenting on previous versions of the DMA.[83]

This absence means that the present analysis must consider the various relevant elements that allow for the inference of certain implicit procedural rights deriving from EU law that are applicable to the DMA's obligations. This section will therefore study the content of these elements, as well as the fulfilment of the requirements established under EU law for implicit private remedies, and the different possible approaches towards private enforcement of the obligations laid down under the DMA, to finally argue on the most suitable model.

2.1.1. DIRECT APPLICABILITY, DIRECT EFFECT AND PRIVATE ENFORCEMENT OF THE DMA – DIFFERENT BUT INTERRELATED

As pointed out before, the use of a regulation as a legal instrument entails that its rules are directly applicable. This solves many of the problems in terms of effectiveness that the habitual use of directives for harmonising matters in this field used to pose. Yet, as argued in the previous section, while the direct applicability that the DMA certainly enjoys as a regulation allows it to "penetrate directly in the legal order of the Member States",[84] the reading of Art. 288 TFEU should not lead to the conclusion that the provisions of these legal instruments can automatically be enforced before national courts in disputes between individuals. Nor that the obligations of the DMA shall give rise to subsequent rights that individuals can enforce through implied remedies in their domestic jurisdictions. The DMA's articles will have to meet the characteristics discussed above in order for it, first, to enjoy direct effect and, second, to allow for implied remedies under domestic laws.

[82] *See* Arts. 42 and 51 DMA.
[83] *see* Komninos, *supra note* 20, at 427.
[84] Winter, *supra* note 63, at 436.

The core of the debate regarding the private enforcement of the DMA is situated around the question of whether and which of its rules fulfil the conditions for enjoying horizontal direct effect and for their enforceability through private means.

2.1.2. POSSIBILITIES FOR PRIVATE ENFORCEABILITY OF (SOME OF) THE DMA PROVISIONS

Unlike its proposal, the final version of the DMA does explicitly (although briefly) mention the possibility of cooperation between the Commission and national courts for the application of its rules (Recital 92 and Article 39).[85] But, as pointed out before, mentions of individual actions are very succinct.[86] The question, therefore, is whether and for which Articles the conditions for the inference of an implicit right of action are fulfilled. In other words, this subsection will analyse which of the provisions of the DMA are *clear* and *sufficiently precise* (and thus enjoy direct effect) and have the intention of *protecting the rights of certain categories of persons* to which a potential claimant may belong; and which would be *negatively affected* by a violation of those provisions (and therefore may be enforced by private means).

Article 3 of the DMA on the "designation of gatekeepers" contains rules related to the procedure of designation and the substantive characteristics that must be fulfilled for them to be categorised as such.[87] Nevertheless, from the text of this Article, it seems clear that the Commission is the only institution called upon to appoint gatekeepers, leaving out the national authorities, including domestic courts. However, the importance of this Article is paramount, as it is the precondition for the applicability of the other provisions.[88] In other words, for the DMA to be enforceable before national courts, a firm must have been designated as a gatekeeper by the Commission via Article 3. Therefore, private enforcement cannot be used to obtain the designation of undertakings as gatekeepers.

However, as noted *inter alia* by Komninos, Articles 5, 6 and 7 of the DMA seem to fulfill the conditions for their enforceability by private means.[89] The obligations laid down in these Articles generate a correlative right for end-users, consumers, and business users (depending on the specific Article), who are the beneficiaries of these rules. And,

[85] This Article is similar to Article 15 of Regulation 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[86] Save for the allowance of collective actions (see *supra*).
[87] *See* Komninos, *supra* note 20, at 428.
[88] *See id.* at 429.
[89] *See id*.

an eventual violation by a gatekeeper could negatively affect their individual rights and interests.

Yet, the clarity and sufficient precision deserve further analysis – given that it might not be evident for all the rules of the DMA. According to the Regulation, the obligations laid down in Article 6 are "susceptible of being further specified". Notwithstanding the reading of this title, it should not be concluded that implementation is required and therefore its direct effect and the possibility to enforce it by private means are excluded. Articles 8(2) and (3) establish the conditions for the dialogue between gatekeepers and the Commission to guarantee the effectiveness of the measures taken by the former or for the latter to specify the measures that gatekeepers shall take for the effective implementation of Articles 6 and 7. But there seems to be a general agreement that this procedure does not prejudice the fact that the obligations under Article 6 have the same nature as those contained in Article 5.[90] As pointed out by Chirico, the dialogue between the regulator and the regulated firms seeks to increase the efficiency of the rules and does not affect their specificity.[91] In other words, the process of detailing the obligations of Article 6 is only a possibility, but its rules take full effect and must be complied with in the presence or absence of such a process.

From the reading of these Articles, all the requirements for their enforceability by private means are in principle fulfilled. As pointed out before, these obligations generate a correlative right for a variety of beneficiaries (for example advertisers for Article 5(9); competitors for Article 6(2); or individual end users for Article 7(2)(a) – among others). They could access their national courts in the case of a violation that negatively affects their rights.

Although the possibility of private redress seems clear, its extent must be balanced. Therefore, the objectives and legal basis of the DMA, the rationale behind the very existence of private enforcement, and the general requirements under EU law must be taken into account.

First, it seems clear that leaving the Commission with all the work in terms of enforcement is neither desirable nor foreseeable. If one of the main purposes of the regulatory framework, introduced by the DMA, is to avoid the usual undue delays in competition procedures,[92] the overburdening of the Commission with cases would go

[90] *See* Thomas Graf et al., *Digital Markets Regulation Handbook*, Cleary Gottlieb 22 (Dec., 2022) https://www.clearygottlieb.com/-/media/files/rostrum/22092308%20digital%20markets%20regulation%20handbookr16.

[91] Chirico, *supra* note 21, at 495.

[92] *See* European Commission, Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 15 December 2020, [119].

against the effectiveness of its rules.[93] Besides, as pointed out by Franck, in the context of the P2B Regulation (Regulation (EU) 2019/1150), users are, as a rule, better positioned to identify breaches of their obligations by online firms under EU law. And, users are also highly motivated to stop violations.[94] Additionally, if those affected by it are able to sue for damages, they may be indirectly incentivised to notify other potential enforcers, such as public authorities or business associations.[95]

Moreover, beyond the *effet utile*, there is also a democratic argument in favour of the possibility of private enforcement of the obligations in the DMA. First, Article 47 of the Charter establishes the fundamental right of individuals to an effective judicial remedy. While, Article 19(2) of the TEU mandates that MS shall ensure the effective protection of EU law. Such a remedy is, additionally, a way for them to participate and take active part in the protection of the rights that emanate from the obligations laid down in Regulation,[96] and a general democratic mandate for the Declaration on Digital Rights of the EU.

However, some scholars have also expressed concerns that play against, or at least nuance, such a possibility. The fact that the DMA is a harmonising instrument, with Article 114 TFEU as its legal basis, seems to be at odds with the risk of (re)fragmenting the interpretation and application of its provisions by its enforcement in national courts. This would cause some degree of uncertainty for gatekeepers in relation to complying with their obligations under the DMA.[97] This risk cannot be overlooked, not only from the point of view of the novelty of its rules, but also for the sake of consistency between the aims of the DMA and its legal basis.[98]

2.1.3. THE EXTENT OF PRIVATE ENFORCEMENT OF ARTICLES 5, 6 AND 7 OF THE DMA

Considering this, a central question gravitates around the issue of the DMA's private enforcement. While scholars generally agree that an implicit right of action may be derived from the obligations of Articles 5, 6 and 7 of the DMA, and individuals will indeed have the possibility to defend their rights in case of violation before national courts, there is no consensus on the specific extent these private claims should have.

[93] *See* Podszun, *supra* note 76.
[94] *See* Jens-Uwe Franck, *Individual Private Rights of Action under the Platform-to-Business Regulation*, SSRN 1, 23 (2022).
[95] *See id.*
[96] *See* Podszun, *supra* note 76.
[97] *See* Komninos, *supra* note 20, at 435, and Podszun, *supra* note 76.
[98] Article 114 TFEU.

Given the above-mentioned risk of fragmentation, as well as the centralised role of the European Commission, private enforcement could follow a "minimalist" approach[99] and be circumscribed to follow-on actions such as damages claims. In the past, the Court of Justice has claimed that these actions can, by themselves, be suitable for the objectives of private enforcement. For example, in *Courage,*[100] the court noted that "[. . .] actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community [and] [. . .] the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices [. . .]".

In this line, some authors recommend not only that public enforcement by the Commission should enjoy preferential treatment, but also that private enforcement should be restricted to claims against gatekeepers. The likes of which the Commission declares in violation of the obligations laid down in the Regulation having an *erga omnes* nature.[101] This would certainly avoid a high degree of fragmentation, which the DMA and its legal basis seek to avoid, and serve both the compensation and deterrence aims of such claims. Naturally, other private actions are foreseeable in the context of follow-on actions, such as declaratory judgments and claims for restitution or nullity – among others.[102]

Such a restriction of private enforcement could be established either by another legal instrument or through the case law of the Court itself. Recently, it ruled in *DB Station & Service,*[103] in the context of Article 102 TFEU, that national courts shall apply EU law "[. . .] in order to preserve the full effectiveness of Article 102 TFEU and, in particular, in order to guarantee applicants effective protection against the adverse consequences of an infringement of competition law [. . .] that provision in no way precludes, in view of the need for consistent management of the rail network [. . .] the retention, subject to the following considerations, of the exclusive competence of the regulatory body to hear all aspects of the disputes brought before it pursuant to Article 30(2) of Directive 2001/14".

In the context of the Directive at stake in *DB Station & Service*, the Court established the obligation for individuals to challenge alleged violations before the administrative body first before going to the national Court.[104] It also established for the

[99] *See* Rafael Amaro, *Weaving Penelope's Shroud [. . .] Some Comments on the Private Enforcement of the DMA*, 42 Competition Forum 1, 5 (2022).
[100] Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, ECLI:EU:C:2001:465, ¶¶26-27 (Sep. 20, 2001).
[101] *See* Komninos, *supra* note 20, at 438.
[102] *See id.*
[103] Case C-721/20, DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH, ECLI:EU:C:2022:832, ¶¶79-80 (Oct. 27, 2022).
[104] *Id.* ¶81.

latter to "cooperate in good faith" with the former.[105] This decision could be, however, problematic as it is a possible disproportionate circumscription of the power of individuals who are forced to make their claims first before the administration. Only after a decision would they be able to make a claim before their national Court.[106] However, based on the court's ruling in *DB Station & Services*, we can extrapolate the possibility of restricting private claims before national courts to follow-on actions for the consistency of the DMA's rules.

On the other hand, some scholars argue that private enforcement of the DMA cannot be restricted to follow-on actions and that all other private remedies should be available under the national laws in the pursuit of the effectiveness of its obligations.[107] Moreover, had the legislator wanted to preclude or restrict it in any way, this would have been included in the Regulation. From this perspective, private enforcement may also be possible in the form of stand-alone actions even before the European Commission has taken any decision. This would uphold a decentralised system of private enforcement similar to the one in competition law. and thus following a "maximalist" approach.[108] It would also allow for greater effectiveness in achieving the objectives pursued by private enforcement, as well as providing individuals with a greater number of tools to protect their rights and interests before their national courts.

Precisely in the context of competition law, this maximalist approach has been the norm for years. Podszun refers to various cases in which private enforcement of EU law in the form of injunctions before national courts has been very successful and allowed for proceedings that otherwise may have escaped the Commission's knowledge.[109] For example, in the Judgement *NetDoktor.de,*[110] where an injunction was possible on the ground of Article 101 TFEU before the German Courts,[111] the cooperation agreement between the Ministry of Health and Google was found to be anti-competitive. The latter was, thus, forced to cease giving preferential treatment to the former in search results.

However, the cost of the maximalist approach seems clear: it may lead to a fragmented interpretation of the obligations laid down in the DMA. Yet, it should not be forgotten, as noted in Art. 39(3) of the DMA, that the preliminary ruling procedure of

[105] *Id.* ¶83.
[106] *See* Daniel Madrescu, *Case C-721/20 – DB Station & Service – Can Secondary Legislation Limit the Private Enforcement of art. 102 TFEU?*, Lexxion (Nov. 15, 2022), https://www.lexxion.eu/en/coreblogpost/case-c-721-20-db-station-service-can-secondary-legislation-limit-the-private-enforcement-of-art-102-tfeu.
[107] *See* Podszun, *supra* note 71, at 255.
[108] *See id.*
[109] *Id.* at 256.
[110] Cases 37 O 15721/20 and 37 O 15720/20, *NetDoktor.de GmbH gegen die Bundesrepublik Deutschland und Google Ireland Ltd* (Feb. 10, 2021).
[111] *See* Podszun, *supra* note 71, at 256.

Article 267 TFEU aims to ensure a consistent interpretation of EU law and will be relevant to the rules of the DMA.[112]

2.1.4. CONCLUSION

In the final version of the DMA, the introduction of Article 39, as a copy of Article 15 of Regulation 1/2003, seems clearly to point towards a maximalist approach to private enforcement. First, because of its reading: Article 39(1) establishes the possibility for national courts to demand the transfer of information by the Commission "concerning the application of this Regulation", and (paragraph 2) the obligation for MS to send a copy of the judgment of its national courts in the application of the DMA. In order to avoid the risk of fragmentation, apart from the preliminary references to the Court of Justice (referred to in paragraph 5), Article 39(3) also foresees the possibility for the Commission to "submit written [or oral] observations to national courts". Besides, its fifth paragraph establishes the prohibition of national courts to "give a decision which runs counter to a decision adopted by the Commission under this Regulation. They shall also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. To that effect, the national court may assess whether it is necessary to stay its proceedings". This makes the possibility for domestic courts to make decisions explicit – independently from those of the Commission.

Additionally, as pointed out before, the DMA extends the scope of the Directive on Representative Actions (Directive (EU) 2020/1828) to its rules (Article 52), allowing consumer associations to access procedural mechanisms for the protection of their interests under national courts. This also supports the conclusion that this Regulation has followed a maximalist approach towards private enforcement.

Therefore, considering the arguments outlined throughout this section and the text of Article 39 of the DMA, it seems clear that this Regulation advocates for the important role of national courts in the enforceability of its obligations. The obligations laid down in Articles 5, 6 and 7 should lead to an implied right of action before national courts allowing individuals to enforce them by private means at the MS level. This would be in accordance with their national procedural laws but with a maximalist approach, as well as in the light of the *Rewe* principles, with the risks, benefits, and safeguards that have been long debated above.

[112] *See* Amaro, *supra* note 99, at 5.

2.2. PRIVATE ENFORCEMENT OF THE DSA

Unlike the DMA, the DSA system envisions the establishment of Digital Services Coordinators at the national level,[113] who will oversee its enforcement and possess extensive investigative and enforcement powers, as outlined in Article 51. VLOPs, however, are still handled by the European Commission (Article 56(2)) to avoid a hitherto recurrent problem: most of the largest service providers are established in certain MS. The administration of which are sometimes unable, given the size of the countries, or unwilling, for policy reasons, to make a strong application of the rules in this field.[114]

The most relevant rules of the DSA in relation to private enforcement are the so-called due diligence obligations, which some scholars have qualified as a "procedural turn".[115] This is because instead of regulating the substantive content of freedom of speech or of illegal content, which is still a matter pertaining to national law, they lay down a series of mechanisms that platforms must establish, along with information that they shall provide. The nature of these obligations and the redress mechanisms established by the DSA will be studied in this section as a preface to the analysis of the possibilities for enforcing them by private means.

2.2.1. NATURE OF THE DUE DILIGENCE OBLIGATIONS

It is important to remember that these rules are intended to compensate for the liability exception regime through a certain number of obligations that aim at making online service providers responsible for their behaviour online.[116] Under the DSA, even when providers cannot be held liable under Chapter II for the information transmitted, accessed, or stored in them, they can still be responsible for violating the rules laid down in Chapter III. These rules, additionally, do not act as a condition for the exemption of liability,[117] nor do they operate alternatively to them. Under the DSA, a service provider can be held responsible under the due diligence obligations (e.g., because of a breach of their obligation where they are prohibited from targeting minors for advertisements (Art. 28)). And, then the service provider can be liable under national law (e.g., when not acting expeditiously to remove illegal content that has been notified to them as per Art. 6(1)(b) DSA).

[113] Article 49 DSA.
[114] *See* Husovec and Roche Laguna, *supra* note 25, at 12.
[115] Pietro Ortolani, *If You Build it, They Will Come: The DSA "Procedure Before Substance" Approach*, in Putting the DSA into Practice 151, 154 (Joris van Hoboken et al. eds., 2023).
[116] *See*Husovec and Roche Laguna, *supra* note 25, at 4.
[117] *See id.*

More broadly, and in combination with the DMA's role in reducing the economic and regulatory power of online platforms, the DSA contributes to giving more control over online content to the State and, more importantly for the aim of this paper, individuals.[118] Thus, the essence of the DSA, putting "procedure before substance", calls for the empowerment of the platform's end and business users".[119] This is done by means of a series of internal and external instruments of a procedural nature that online platforms shall put in place, without prejudice to the possibility for individuals to enforce some of the obligations by private means, which will be central to the effectiveness of the DSA.[120]

2.2.2. REDRESS MECHANISMS IN THE DSA

The due diligence rules establish obligations for online service providers to set up and allow for certain internal and external mechanisms and to engage in various practices. In this context, the rules aimed at fighting illegal content online are a clear example of internal redress mechanisms. They establish obligatory notice-and-action and appeal mechanisms (Article 16) for the detection of this content and its elimination, with guarantees to both the informant and the addressee of the decision. The mandatory nature of this instrument prevents the service provider from taking refuge in its supposed ignorance of illegal content to avoid its liability under Chapter II of the DSA.[121] Besides, Article 17 obliges providers to furnish the affected users with a statement of reasons in the case of restrictions of content, a part or the entirety of the service, or the service's account. This instrument is crucial in the architecture of the procedural obligations of the DSA, as it allows for a transparent system and provides users with information for potential dispute mechanisms.[122] Moreover, the DSA establishes an internal complaint mechanism (Article 20) built on the experience of the P2B Regulation, which is accessible for service recipients to lodge a complaint against the provider's decisions. However, some scholars complain that they are still not obliged to provide a statement of reasons in case the content is not removed,[123] and that potential victims of it would not have a say in the internal complaint mechanism.[124]

[118] *See* Martin Husovec, *The DSA Newsletter #2*, Tech Notes (Dec. 21, 2022),https://husovec.eu/2022/12/the-dsa-newsletter-2/.
[119] Ortolani, *supra* note 115, at 155.
[120] *See* Davola, *supra* note 11, at 4.
[121] *See* Ortolani, *supra* note 115, at 156.
[122] *See id.*, at 157.
[123] *See e.g.,* Eifert et al., *supra* note 8, at 1019.
[124] *See e.g., id.*

Outside the platforms, Article 21 establishes an out-of-court dispute settlement mechanism conducted by a certified body. While the DSA proposal wanted to bind service providers by their decisions, the published version is rather watered down.[125] This is because it only forces them to provide information in relation to the appeal of this decision and the general requirement of "good faith". This goes against the mechanism's effectiveness, especially, the original aim for it to be able to "absorb escalated issues [and] resolve them in a faster and less resource intensive manner than court proceedings".[126] The result could be that national courts will be overburdened again by the appeals to these decisions. And so, users will avoid such a mechanism and directly institute claims before courts, or, worst-case scenario, users will be discouraged from enforcing their rights at all.

Ultimately, transparency rules (e.g., regarding terms and conditions), although they create procedural obligations of their own, regarding the information that service providers need to make available to users, contribute indirectly to the possibilities for seeking redress. This allows the user to use this information for her complaints.[127]

2.2.3. PRIVATE ENFORCEMENT

Although the possibility of seeking redress for a violation of the obligations laid down in the DSA before national courts is not directly prevented,[128] it should not be inferred from this that all due diligence obligations fulfill the necessary requirements for their enforceability by private means.

As a preliminary note, it must be pointed out that the only clear references to the DSA for private enforcement relate to compensation for damages or losses (Article 54), and the right of collective bodies to lodge representative actions for the protection of the interests of consumers (Article 90, similar to Article 52 of the DMA). Thus, to enforce the DSA's rules by private means, users must rely on their national procedural rules under the conditions established by EU law and the *Rewe* principles.

In this context, while their clarity and preciseness seem, for the DSA, undisputed, it is the beneficiary of its obligations that will be the determining factor for their enforceability by private means. For an implied remedy to be inferred from the

[125] *See* Ortolani, *supra* note 115, at 159.
[126] European Commission, Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, [240].
[127] *See* Eifert et al., *supra* note 8, at 1019.
[128] *See* Ortolani, *supra* note 115, at 160.

rules of the DSA, such rules must intend, although not exclusively, to confer a right derived from the obligation upon an individual.

As explained before, two main categories can be identified as beneficiaries of the due diligence obligations: users and the regulator. Obligations vis-à-vis the latter clearly do not confer a correlative right to individuals. Against this background, risk assessment and mitigation rules, for example, are addressed to VLOPs in their relations with the Commission, and it would be difficult for individuals to infer an individual right from them. Only after a decision of the Commission establishing a violation of these Articles could there be a claim for damages by individuals who, in any case, have suffered a loss as a consequence of such a breach.

Deriving from the users' obligations, however, it is conceivable to find correlative rights that would make them enforceable by private means and would justify implying a remedy for redressing eventual violations. For example, when the DSA establishes in its Article 14 an obligation for intermediary service providers to give information regarding restrictions imposed by their terms and conditions in "clear, plain, intelligible, user-friendly and unambiguous language", a user could claim that such information has not been provided to them and make a claim before their national court.

However, the private enforcement of the DSA being foreseeable is not, in the abstract, the main concern. Instead, the concern is the exact extent of some of its obligations and, subsequently, of the expectations that users can derive from the behaviour of the online service providers.[129]

This issue revolves around the question of whether the due diligence obligations addressed to users are obligations of means (and therefore service providers must implement the mechanisms established under the DSA and do best efforts to achieve the desired result, but without being responsible for the attainment of the outcome), or of result (where users would be entitled to the expectation of a specific result from online service providers, e.g. that all cases regarding the taking down of illegal content should be resolved correctly through the notice-and-action mechanism). In other words, the debate is about whether the DSA establishes a series of procedural tools only, and thus platforms must comply with them but without an expectation of no-fault results. Individual mistakes could be regarded, for some obligations, as a possible margin of error in the mechanism provided for by the online service provider.

Before plunging into this discussion, it must be clarified that, naturally, an outright violation of any of the service providers' obligations (regardless of whether they

[129] *See* Husovec, Martin, *Will the DSA Work? On Money and Effort*, in Putting the DSA into Practice, 19, 31 (Joris van Hoboken et al. ed., 2023).

are of means or result) would allow an individual to enforce their rights privately before national courts. For example, a case where the service provider does not establish any notice-and-action mechanism whatsoever as mandated by Art. 16 DSA.

In addition, the DSA Impact Assessment contains a small but very important reference to this debate in the context of VLOPs. It recognises that "the additional set of enhanced obligations on very large online platforms [...] are obligations of means, without an expectation of no-fault results".[130] While, as this paper noted above, the obligations of VLOPs are more vis-à-vis the regulator than the user (see, for example, those on risk assessment and mitigation of Articles 34 and 35 DSA), this example highlights that the expectations that can be derived from the DSA obligations are variable, and may not always impose no-fault results, as in the case of VLOPs.

Turning to due diligence obligations vis-à-vis users, this debate becomes more important in that, if it is recognised that users are entitled to expect a certain outcome in all cases, this could potentially lead to flooding the courts with claims on the basis of the DSA. For example, in the digital context, decisions by online service providers on illegal content are often made en masse and on the basis of standardised criteria because of the volume of claims they have to deal with. If it is recognised that individual users have a correlative right to the obligations of service providers that legitimises them to privately enforce these rules before their national courts, this could lead to a wave of complaints that would be very difficult for both the courts and service providers themselves to cope with. Therefore, it could be that individual mistakes are not relevant in the constellation of cases, but rather an acceptable error rate as long as the procedural mechanisms established under the DSA are set and complied with. This would be the case if we were to interpret the DSA obligations as only creating an expectation that platforms have to put all means at their disposal to reach the desired outcome, recognising a certain margin of error when all procedural requirements are met, and best efforts are made.

However, if this were the case, it would be very difficult for users to ask not only for compensation but also, sometimes, to lodge an injunction. Especially as their procedural rights outside the platforms could not go beyond the legitimate expectations deriving from the DSA obligations. The Regulation and its Impact Assessment do not answer whether due diligence obligations vis-à-vis users are of means or result, so this question must be analysed in the context of the various mechanisms established by the DSA to seek redress.

In this sense, Recital 147 and Article 82(3) of the DSA highlight the role of the preliminary reference procedure in the framework of the DSA and recognise the

[130] Impact Assessment DSA, *supra* note 126, at 163.

possibility for national courts to take decisions in this area (which cannot run counter a decision of the Commission). Besides, both the internal complaint and the out-of-court mechanisms allow for individual claims, which means that even formally correct decisions generate an expectation of a certain (correct) result. Moreover, Recital 59 points out that "[t]he possibilities to contest decisions of providers of online platforms [. . .] should leave unaffected in all respects the possibility to seek judicial redress in accordance with the laws of the Member State concerned, and therefore should not affect the exercise of the right to an effective judicial remedy under Article 47 of the Charter". Additionally, Art. 17(3)(f), in the context of the content of the statement of reasons that shall be provided for by the online service provider when allegedly illegal content is taken down, establishes that users must receive "clear and user-friendly information on the possibilities for redress available to the recipient of the service in respect of the decision, in particular, where applicable through internal complaint-handling mechanisms, out-of-court dispute settlement and judicial redress". Thus, the right of individuals to seek private enforcement cannot be restricted in any way, and they must be explicitly informed of this possibility.

All these examples point out that all mechanisms (internal complaint, out-of-court settlement, and judicial redress) are complementary and seem to have the same extent. It would be paradoxical to argue that the obligations (and the correlative rights and expectations for users derived therefrom) have a different extent depending on the procedural avenue used by the claimant and that it is the judiciary that should be restrained. All in all, it could be argued that the manner the DSA is constructed, its objectives, and the rationale behind its rules, point to the direction that users are indeed entitled to expect, derived from the obligations of the DSA, not only the establishment of certain procedural mechanisms, but also the correct results in the application of those tools".

2.2.4. CONCLUSION

The due diligence rules of the DSA create obligations vis-à-vis both the regulator and the user. The former is not enforceable by private means, nor is the latter precluded. However, among these obligations, the extent and success of private enforcement will depend on whether they are considered obligations of means or result.

The distinction between obligations of result and of means is crucial. The breach of a due diligence obligation of the former, that confers a correlative right to end or business users, should be understood as generating an expectation of individual

compliance – not just one of systemic correctness. The latter interpretation would not be consistent with a teleological understanding of the DSA, as this Regulation aims at empowering users of online services. This gives them the tools to enforce their rights through a series of procedural mechanisms that allow them to contribute to the creation of a safer online space. Any limitation in this regard would be utterly counterproductive to this aim.

3. A NEW PARADIGM OF PRIVATE ENFORCEMENT

As recognised by the DMA's Impact Assessment,[131] the obligations contained in this Regulation, today, are not entirely strange to EU law. Many aspects have been contemplated before by two sorts of legal bodies: on the one hand, competition law and, particularly, Articles 101 and 102 TFEU,[132] and, on the other, instruments like the GDPR (Regulation (EU) 2016/679), EU Consumer law, and the P2B Regulation. The same applies to the DSA, which has been built on the experience of a plethora of legal instruments targeting specific issues from a sectoral perspective (e.g., content related to terrorist activities, copyright, sexual abuse of minors, etc.). But, while these pieces of legislation were suitable for their own objectives, comprehensive rules that would tackle the responsibility of platforms for all forms of services were lacking.[133]

However, establishing, article by article, which elements the DMA and the DSA are inspired by, regarding specific previous legal instruments, is far from easy. Despite the possibility of drawing parallels with other rules, the exact correspondence cannot be found due to the innovative nature of some of its provisions. And, although, they may be linked to other older instruments, many of the changes introduced by both Regulations have no precedent in EU law.

The current literature has not yet analysed whether the implications derived from the introduction of the DMA and the DSA are likely to serve the purposes mentioned before. These include building a safer and fairer, more contestable, and transparent online environment, while respecting the rights and interests of individuals in more a effective compliance with the old, procedural principles enshrined in EU law. This is precisely where the DMA and the DSA meet: the former aims at circumscribing the ever-growing power of big online platforms, gatekeepers, and so forth. And the latter

[131] Impact Assessment DMA, *supra* note 192, at 114-126.
[132] Although Article 14 DMA relates to mergers, as well.
[133] *See* Impact Assessment DSA, *supra* note 126, at 102-103.

provides the public with tools – be it the State or the individuals – to take back control of the regulation of this ecosystem.[134]

This is why, for the purpose of this paper, some examples will be used to illustrate various situations where changes in the possibilities for private enforcement can be identified, as well as some of the challenges derived from the new system created by both Regulations.

3.1. COMPETITION LAW AND THE DMA'S *PER SE* OBLIGATIONS

Consider the case of *Google Shopping.*[135] What was covered before by competition law, under Article 102 TFEU, can now be found among those obligations prohibiting "Anticompetitive or unfair agreements or practices". And, as stated above, their origin is sometimes also rooted in ongoing or old competition cases before the Court of Justice.[136] Article 6(5) of the DMA, for example, specifically, prohibits self-preferencing.

Article 102 TFEU gives rise to private enforcement before national courts, not only in the form of damages (today harmonised by the Damages Directive (Directive 2014/104/EU)), but also via injunctive reliefs in cases of violations or asking for nullity of anti-competitive agreements.[137] Such enforcement relies on national laws under the principles of equivalence and effectiveness mentioned above.[138] In this sense, the possibilities offered by the DMA are not specifically broader than those that existed under traditional competition rules if a maximalist interpretation is followed.

However, as explained before, the main improvement for private parties between the DMA and traditional competition law is the *ex-ante*, *per se* and *numerus clausus* nature of the regime established by the former. The prohibited practices will be identified from the beginning, with no need for an anticompetitive object or effect of the agreement in question, or for proving the firm's dominant position (and subsequently the abuse).[139] The DMA, thus, reverses the burden of proof.[140] This way, while the abandonment of a case-by-case analysis could lead to an increase in Type-I errors, and therefore certain practices or agreements that could have been a source of competition in the market will be prohibited,[141] a decrease in the length of the procedures is very likely. This was one of

[134] *See* Husovec, *supra* note 118.
[135] Case T-612/17, Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763 (Nov. 10, 2021).
[136] *See* Chirico, *supra* note 21, at 495.
[137] *See* Wurmest and Gömann, *supra* note 70, at 155.
[138] *See id.* at 159.
[139] *See* Impact Assessment DMA, *supra* note 92, at 119.
[140] *See* Leistner, *supra* note 13, at 779.
[141] *See* Pinar Akman, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, 85 European Law Review 1, 17-18 (2022).

the Achilles heels of the existing regime, and some specificities of large digital gatekeepers' behaviour will be better dealt with now. In particular, the abuse by gatekeepers regarding "imbalances in bargaining power that do not affect competition",[142] generally, falls outside the scope of Article 102.

Madrescu has pointed out one problem that may arise regarding private enforcement in the context of damages. If the procedure is not brought by a private person whose rights have been negatively affected by a violation of an obligation of the DMA, but on the contrary, is driven by public enforcement, individuals who could claim damages may have some difficulties in matters of evidence.[143] If the Commission finds an abuse of a dominant platform under Art. 102 TFEU, the Damages Directive allows for follow-on damages claims. As such, the "entire complex of events that resulted in the harm for the claimants is substantiated", thus, allowing "private claimants to rely on [the Commission's] findings in their own claim".[144] These claimants would only need to show that they suffered harm and the causal link. A recent case solved by the DMA however, could mean that "eventual damages claims would have to be done on a stand-alone basis with no additional evidence to rely on" – as pointed out by Madrescu.[145] Doubts arise as to whether the DMA and traditional competition rules can mutually complement each other in terms of enforcement.

3.2. ILLEGAL AND NON-ILLEGAL BUT HARMFUL CONTENT UNDER THE DSA'S NEW TOOLS

Online service provider self-regulation has often been the norm for certain types of content.[146] The problem is not only that such measures enjoy a minimal scale of the issues addressed and their effectiveness, but also, that certain behaviours by providers do not necessarily entail illegal content. Instead, their impact and harm on the public online space are very high. The ECD, as discussed before, only harmonised the regime of liability exemptions but remained silent about the further responsibility of these firms for their behaviour online.

In this context, the possibilities for individuals to enforce their rights are radically different now than they used to be before the introduction of the DSA. This is

[142] Impact Assessment DMA, *supra* note 92, at 121.
[143] *See* Daniel Madrescu, *The DMA and EU competition law: complementing or cannibalizing enforcement?,* Lexxion (Mar. 8, 2022) https://www.lexxion.eu/coreblogpost/the-dma-and-eu-competition-law-complementing-or-cannibalizing-enforcement/.
[144] *Id.*
[145] *Id.*
[146] *See* Impact Assessment DSA, *supra* note 126, at 105.

the outcome of the objectives that led to the adoption of this Regulation, i.e., the responsibility of service providers for their behaviour to enhance the safety of the online space. This, then, ensures the empowerment of users to protect their rights and interests.[147]

To illustrate this idea, consider an online social media platform that qualifies as a VLOP and that would be subject to all the due diligence obligations, including the liability exemptions, contained in the DSA. In such a case, if we were in the presence of illegal content being transmitted through the platform, although the new framework of the DSA maintains the knowledge-based liability regime of the ECD (Article 6 DSA), it would be compensated by the mandatory nature of the due diligence obligations. The likes of which establish the procedural tools to act against illegal content and the safeguards for freedom of speech. As pointed out before, the notice-and-action mechanism is now obligatory for platforms. Additionally, the framework of the ECD generated several problems, as it favoured big online firms acting as regulators taking this power out of the hands of the State or the users themselves.[148]

In the scenario of non-illegal but harmful content being transmitted, the DSA introduces some very interesting novelties that are likely to contribute to improving of relations between users and the online ecosystem. For example, let us consider a scenario which has been of concern for the BEUC for a long time now.[149] Had a minor's data been used in order to profile him/her with certain types of products or ideas), the previous legal regime would have been unable to protect their rights, as it had remained silent about this question.

The system created by the DSA and the DMA changes this situation. As a first barrier, Article 5(2)(a) of the DMA prohibits processing, "for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper" unless consent is given in the sense of the GDPR. Moreover, Article 28 of the DSA explicitly prohibits the targeting of minors, and therefore, although the platform would not be liable for the content, it would have breached its due diligence obligations. And, accordingly, it could not avoid its responsibility for the harm of its behaviour to the online ecosystem. If the person affected by such a violation so wishes, they could, after the entry into force of the DSA, ask for an injunction under their national procedural laws before the MS courts. This is

[147] *See id.* Figure 5 - Intervention logic.
[148] *See* Husovec, *supra* note 118.
[149] Emma Calvert, *Food Marketing to Children Needs Rules with Teeth. A snapshot report about how self-regulation fails to prevent unhealthy foods to be marketed to children*, BEUC (2021).

thanks to the obligation of Article 28 of the DSA which clearly gives a correlative right to individuals that could be enforced by private means.

3.3. AT THE CROSSROADS BETWEEN THE TWO REGULATIONS: THE EXAMPLE OF APPLE'S APP STORE

Finishing the analysis of this paper with the example of Apple's App Store can be very illustrative of the changes in the digital environment brought about by the DMA and DSA, as recently pointed out by Husovec The combined enforcement of both Regulations can radically change the power relations between platforms, business users, and end users. And, private enforcement has a central role in this.

In 2021, the App Store banned the app Parler – a social network created to avoid the moderation of content that some other apps imposed on their users. The turning point for this prohibition was the Capitol riots on January 6th, 2021, along with the tepid adjustments the social network proposed to Apple's core platform service. Parler was also banned later from the Google PlayStore and from Amazon Web Service, which demonstrates the massive impact of corporate on the digital ecosystem.

This situation shows two clear problems in the online space: first, the insufficient number of tools governments and individuals have for tackling hate speech and illegal and harmful content online. As well as the constant bombardment of service providers' users with this type of content, which reinforces their previous biases (the centripetal force mentioned before).[150] And second, the immense power of gatekeepers who act as regulators of this space (i.e., the centrifugal effect).[151]

The DMA and the DSA aim precisely at overcoming these problems. While the intentions of Apple could be judged as positive in this case, business users are at the mercy of large platforms, which can decide on the content they deem appropriate according to their own interests. First, with the DSA, there would be safeguards in the case of the App Store (a VLOP and a gatekeeper) wanting to suspend or restrict content or a user like Parler. Its terms and conditions will have to respect fundamental rights, especially freedom of expression (Article 14(4)). The statement of reasons shall give the procedural tools for affected parties to assert their rights. The result (banning the app) might be the same, but we must not forget that, in democratic societies, those who carry out illegal acts, online or offline, have the right to defend themselves under conditions that ensure their effective judicial protection. Moreover, under the DMA, allowing

[150] *See* De Querol, *supra* note 1, at 12.
[151] *See id.*

side-loading apps will be mandatory for gatekeepers (Article 6(4)), and thus users of Apple products would always be able to download them elsewhere.

But Parler would have to fulfil its DSA obligations according to its size. It would be the people, either in their statal form or as individuals, who would have the power, and especially the tools, to tackle and enforce these obligations in the case of a breach. Especially in terms of illegal content or certain practices that a society, through a democratic process, deems to be harmful. The DSA will allow it not only through public enforcement but also through the myriad of redress mechanisms, among which, as explained before, would be private enforcement before national courts. This case illustrates, as Husovec notes, where both Regulations meet and where the most interesting and radical changes are likely to be seen.

CONCLUSION

The aim of this paper was to show how well-established principles of EU law are still very relevant and present in the newest pieces of legislation in the area of digital regulation. This is especially so regarding those principles relating to the fundamental procedural safeguards that individuals have in order to enjoy effective judicial protection in a legal order characterised by a complete system of judicial remedies. Against this framework, as shown in this paper, the private enforcement of the DMA and the DSA will be paramount for their effectiveness, and for users to assert their rights in the online ecosystem. Several reasons support this conclusion.

First, from the point of view of their *raison d'être*, both Regulations are built on the learnings acquired after years of vacillation and gaps in EU law. These have allowed digital undertakings to acquire a regulator-like nature and to oligopolise the market while leaving individuals with little tools for the protection of their rights. Therefore, their role in enforcing the new rules is crucial to making these firms accountable for their online behaviour and contributing to building a safer, more accountable, contestable, and fairer online space.

Second, for their *effet utile*. Public EU and national entities will need help do the job, especially on time. Time has been a significant concern in online platform cases since their birth. And, as, with the *ex-post* regulatory framework, many practices were considered illegal only after their harmful effects had adverse consequences on markets,

competitors, and consumer welfare. Individuals and national courts are critical elements of the general enforcement of EU law.

Third, in terms of *fundamental rights,* individuals must be able to access courts when the obligations they benefit from have been violated, even without explicit remedies, as is mostly the case in the DMA and the DSA. This is a democratic imperative in the digital society according to the European Declaration on Digital Rights and Principles, and it is also part of the fundamental right to judicial protection under Article 47 of the Charter. Moreover, Article 19(2) of the TEU imposes the obligation of MS to "ensure effective legal protection" of EU law as a translation of the value of the Rule of Law enshrined in Article 2 TEU.

However, not all their articles will be enforceable by private means. It will first depend on their clarity and preciseness and, second, on their objective of protecting the interests of a category of persons by conferring upon them rights correlative to the obligations incurred by digital firms. For the DMA, this can be affirmed for the norms laid down in Articles 5, 6 and 7. For the DSA, the distinction criteria are, on the one hand, considered in terms of whether due diligence obligations correlatively benefit users, or whether they are directed towards the relations between the regulated firm and the regulator. Only the former may be privately enforced. On the other hand, it will depend on whether they are obligations of result or means. Both may be subject to private enforcement, but the expectations that individual and business users may derive from their rights will differ, and therefore the specific breach could be brought before national courts too.

Moreover, private remedies should not be restricted to follow-on actions, and a maximalist approach should guide the practice of domestic courts. Within their national procedural autonomy, and taking due account of the *Rewe* principles, MS should provide for effective remedies of all kinds available under their national laws for individuals to defend their rights and interests.

However, there are some limitations to the analysis carried out by this paper. The DSA and the DMA are barely out of the oven, and only assumptions can be made based on the EU acquis. Yet, it will be the day-to-day practice, as well as the relationships between companies, regulatory agencies, and individuals, that will determine the concrete form of private enforcement. It will be interesting to see the developments in this area in the following years. Additionally, the lack of homogenisation of private remedies at the MS level could lead to different results depending on the country where individuals want to assert their rights. To avoid it, achieving some degree of harmonisation of certain private

actions among MS may be desirable, and not only relying on the indirect homogenising effect of the *Rewe* criteria.

End-users are the weakest part of the online ecosystem. While online platforms are acquiring more and more power, the EU seeks to reinforce its position and the one of its citizens vis-à-vis tech giants. The DMA and the DSA should be another piece of this empowerment strategy and not put more stones in the way of users trying to defend their rights.