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DMA & DSA JUDICIAL REVIEW: LITIGATING THE IMPLEMENTATION?

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Aymeric de Moncuit (Partner, Mayer Brown, Brussels) moderated the discussion.

He outlined three types of judicial review likely to arise from the DMA and the DSA:

- The «constitutional judicial review», focusing on the legal (Treaty) basis of the new rules;
- The judicial review of designation decisions; and
- The judicial review of the implementation of the DMA.

In terms of 'constitutional judicial review,' Aymeric de Moncuit raised the question of the appropriateness of Article 114 TFEU as a legal basis for the DMA (approximation of national law provisions) versus Article 352 TFEU (creation of a new set of rules to achieve one of the objectives set out in the treaties).

Regarding the judicial review of designation decisions, Aymeric de Moncuit inquired about the following procedural aspects

- Allocation of cases at the General Court (possibility of a specialised chamber).
- Entities likely to challenge the DMA (addresses, business users, trade associations, etc.) and locus standi.
- Nature of the judicial review to be exercised in digital cases.
- Risk of potential 'Commission deference' due to the technical complexity of the facts at hand.
- Standard of proof for interlocutory measures, considering the novelty of the obligations and the uncertainties they entail.
- Expected timeline for the interim measures procedure and judgement on the merits.

Aymeric de Moncuit also raised questions related to the substantive aspects of the designation judicial review

- The notion of 'Core Platform Services' (CPS), what is included and what is not?
- Assessment of CPS that engage in dual activities (i.e., online service platform and video sharing service).
- Potential claims of discrimination and the challenge of ensuring equal treatment for all CPS.
- The absence of designation of virtual assistant and cloud services providers.

Concerning the judicial review of DMA implementation, Aymeric de Moncuit inquired about the likely forms of judicial review for compliance decisions adopted under Article 8 of the DMA. He has also contemplated the potential decentralisation of DMA litigation through private actions at the national level and questions referred by national courts to the European Court of Justice via the preliminary ruling procedure. Furthermore, he has raised questions about which obligations are most likely to be subject to enforcement at the national level.

*Marie de Monjour drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

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The designation phase of the DMA implementation

- It started with the quantitative designation: based on the presumption that if you are above the thresholds of the DMA as a company, you are designated as a gatekeeper for your relevant Core Platform Services (CPS).
- Six gatekeepers have been designated with 22 CPS that have gatekeeping status.
- One debate raised is in which appropriate category of core platform service a specific service falls in (eg. social networks and video sharing).
- One of the issues is the calculation of end users and business users in the DMA. This calculation method can be subject to litigation (e.g., Zalando case in the context of the DSA).
- Another issue is how to deal with integrated services (e.g., Google shopping case, on the distinction between search and specialised search).

Three possible outcomes in a rebuttal scenario

- Article 3(5) in the DMA sets a very high legal standard for rebuttal. It means that the only way to rebut is to overcome the legal threshold. (e.g., The rebuttal for Samsung's internet browser was accepted, as it does not fulfil the definitions of Article 3 DMA).
- The second outcome is the opening of a market investigation by the Commission to verify the rebuttal claims of a company. In terms of judicial review, a comparison can be drawn to opening of investigations or proceedings in antitrust cases.
- The third possible outcome is the acceptance of the rebuttal. The question arises to whether third parties could appeal this rebuttal decision.

The compliance phase of the DMA

- Six months after designation (7 March 2024), gatekeepers will have to be in full compliance with all of the obligations under the DMA.
- Compliance decision can only be taken after the 7th of March.
- The compliance decisions that can be taken and that can also be subject to judicial review, are non-compliance decisions (article 29 of the DMA).
- Gatekeeping companies can ask for specifications in Article 8.

The expected nature of the disputes and their comparison to antitrust or merger litigation

- Disputes on the law through indirect challenges following a decision based on Article 277 of the Treaty if a company is faced with an adverse decision.
- Disputes on the Commission's interpretation of the law. Disputes about the relevant market will not be relevant and there is no effects analysis in the DMA. Moreover, there could be litigation on the wording (e.g., interpretation of the term "goals of the DMA" in the context of remedies in light of Article 81).
- Disputes on the proportionality of the Commission's measures.

Steven Verschuur

Judge, General Court of the European Union, Luxembourg

The allocation DMA and DSA cases within the General Court

- There will not be specialised chambers for these kinds of cases.
- The normal case allocation system will be followed, which is basically based on rotation.
- Rotation will not necessarily apply to every case. If a new case is related to a previous one, it will be allocated to the same chamber because of the expertise and experience built up and also for a need for consistency between cases.
- Workload is another factor to deviate from rotation.
- Within the chamber to which the case has been allocated, the President will allocate the case to a specific reporting judge in a formation of three, which can be extended to a formation of five in cases raising novel and complex issues.

The interested parties authorised to challenge the General Court's decision

- Gatekeepers, or alleged gatekeepers.
- Third parties such as business users who want to make use of the services of the platform of the gatekeeper. Those parties would have to assess their direct and individual concern. However, for interventions, the parties would have to show an interest in the outcome of the case, a lower bar to clear than direct an individual concern.

The timing expected by the courts to close its decisions

- The legislator and the Commission have moved quickly. In this context, everyone expects the courts to move quickly as well.
- Complex new issues brought to the court for the first time takes time to analyse and debate within the formation and with the parties at the hearing.
- There's a minimum time the courts can't aim to go below, as it would compromise quality. Case duration is also influenced by parties' behaviour.
- The delay in translation slows down the rendering of the decision because the court's working language is French and most cases are brought in English.
- Interventions often lead to extensive confidentiality discussions. This takes up a lot of resources and time, and causes considerable delays in some of the most important antitrust cases we have seen.
- The average duration of cases before the General Court is currently around 20 months.

The review made by the General Court for these types of cases

- The role of the General Court is to review whether the Commission has come to its conclusion in a lawful way.
- The General Court is supposed to review both issues of fact and issues of law. Then there is the possibility of an appeal to the Court of Justice only on issues of law.
- The intensity of the Court's review depends on the wording, purpose and spirit of the law. In some cases, there may be less discretion for the Commission (e.g., the questions of calculation of users will be made in light of the dedicated annex; the definition of a CPS will also be a matter of interpreting the law). The exception might be the interpretation of the qualitative criteria for being a gatekeeper, which may imply a bit more discretion for the Commission.
- As far as compliance decisions are concerned, a large part of the discussions will revolve around proportionality.
- Regarding penalties, clarity in the provision for punitive sanctions, like fines, is crucial. In cases where broadly-framed obligations might lack operational clarity, the Commission could consider adopting more specific obligations.
- The President of the General Court can suspend, at the request of the applicant, a Commission's decision in whole or in part pending the proceedings before the General Court.

Mette Alfter

Director, Frontier Economics, Brussels

Potential litigation scenarios at national level

- One potential scenario is standalone actions for injunctive relief or rectification where you want behaviours to change. These actions are expected first in particular in the context of data access, either directly or indirectly mandated by the DMA interoperability.
- The second one is standalone damages claims on suspected DMA violations.
- The third one is follow-on damages claims where the Commission has issued a decision finding that a designated gatekeeper has infringed its obligations under the DMA.
- In the last two scenarios there is a high probability for claims around conduct that claims to kill off a potential future rival which could be resolved with injunctive relief or rectification. Damage components could be added.

Germany's national law on the implementation of the DMA

- Germany is updating their competition law and transposing the DMA into it.
- Specific proposals for private enforcement of the DMA are added. For example, the legal basis for injunctive relief rectification and damages claims for competition law infringements are expanded to include or to cover infringements against Articles 5 to 7 of the DMA.
- The provision on disclosure would also be applicable to damage action for infringements of the DMA. That means that claimants as well as gatekeepers could ask for disclosure of information that they need to be able to either make their claim or defend themselves against that.

The difficulty to prove harm in DMA litigation cases

- Regarding damage claims, the practice for normal competition law infringements can be used (e.g., abuse of dominance or cartel damages claims).
- Regarding standalone damages claims or very early follow-on damages claims, there is a lack of competitive benchmark against which to assess the effect of a DMA infringement. Indeed, there is no after-infringement period, thus no infringement-free period that could be used as a competitive benchmark to be able to quantify the damage.
- Causality can be proved through comparators, product or geographic, as in normal cartel cases. However, in the context of the DMA, there are other workarounds such as forecasts from the businesses, but it leads to questioning how realistic and how robust those industry forecasts are.

Challenges raised by FRAND related issues

- Depending on what kind of access you're looking into, the theory of harm or the concern that you have is probably slightly different. Therefore, the analysis or the positioning of it is going to be a bit different.Taking the example of access to app stores, the FRAND infraction could be regarding excessive pricing, opening to an already-existing framework - price cost tests or comparator analysis.
- A meaningful cost benchmark would need to be defined, taking into account the wider ecosystem of the products, and that its value of the product stems mainly from intangible assets.
- A margin for the gatekeeper to put on top of the benchmark would need to be defined as well. This means defining the authorised adequate prices, taking into account the risks incurred because of R&D and innovation.
- A comparator analysis raises the issue of finding adequate comparators as well.

Remaining questions

- One is around the risk of fragmentation of analysis and findings, especially given the possibility of standalone claims where the Commission has not yet issued an investigation.
- There is also the question of fragmentation of powers and therefore approach with the Commission having overlapping but different antitrust and DMA/DSA powers.
- Lack of clarity as to the relevant burden of proof might also create legal challenges going forward.
- The last one is about when to expect litigation based on Article 6 obligations, because there is a discussion around the dos and don'ts not being clear enough.