

## LEGAL ALERT

# PRIVATE ENFORCEMENT OF THE DIGITAL MARKETS ACT

The Digital Markets Act (DMA), approved by [Regulation \(EU\) 2022/1925 of the European Parliament and of the Council of 14 September 2022](#) on contestable and fair markets in the digital sector, which has the purpose of contributing “to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers” (see Recital (7) of the DMA), shall apply from 2 May 2023.

Under the DMA, public enforcement has been entrusted to the European Commission, meaning that the Commission has an exclusive competence to apply the DMA (i.e., to designate gatekeepers, adopt findings of non-compliance, impose interim measures or apply fines).

Although there is no explicit reference to private enforcement in the DMA (i.e., the enforcement by private parties, such as companies or end users, of the legal obligations incumbent on gatekeepers), the DMA implicitly relies on private enforcement for its overall effectiveness.

Assuming that the provisions stipulating prohibitions and proactive obligations for gatekeepers in Articles 5, 6 and 7 of the DMA are sufficiently precise and unconditional to create rights for individuals, and may thus be considered to have direct effect, they may be relied upon by these individuals in claims brought against gatekeepers in national courts.

In fact, the DMA explicitly grants various rights to business users and end users: the DMA requires gatekeepers to provide access and use options for business users; there are specific prohibitions, for example with regard to the use of data; various provisions also address the structuring of contractual relationships between gatekeepers and business users.

Article 39 of the DMA also suggests that business users or end users of core platform services will be empowered to submit claims against gatekeepers at any stage and regardless of prior intervention by the Commission.

In Portugal, private enforcement of the DMA is guaranteed on the basis of national law.

Following the implementation of [Directive 2014/104/EU](#) (the “Private Enforcement” Directive) into Portuguese law, the right to submit claims seeking compensation for damages resulting from competition law infringements (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the Portuguese Competition Act, approved by [Law no. 19/2012, of 8 May](#)) is regulated by [Law no. 23/2018, of 5 June](#) (the “Private Enforcement Law”).

To date, however, no attempt has been made, or is anticipated, to extend the scope of this national statute and any of its specific rules (access to evidence, presumed damages, evidentiary value of infringement decisions, etc.) to cover also, in addition to claims resulting from competition law infringements, claims pertaining to breaches by gatekeepers of DMA obligations. Therefore, currently, private enforcement of the DMA in Portugal is subject to the general rules of law, notably on civil procedure, and not to the specific (substantive and procedural) regime for private enforcement of the competition rules.

Even though the Private Enforcement Law is not applicable to the enforcement of DMA obligations, the following general mechanisms are available for business users or end users against gatekeepers: actions for compensation of damages (on the basis of Article 483(1) of the [Civil Code](#))

and injunction actions to prevent serious and potentially irreparable harm to the rights based on the DMA (as provided for by Article 362(1) of the [Civil Procedure Code](#)).

It seems also possible that for some of the obligations laid out in Articles 5, 6 and 7 of the DMA (the ban on self-preferencing contained in Article 6(5) for instance), alternative providers of digital services seeking to compete with a gatekeeper may be able to rely on the legal prohibition of unfair competition.

In addition to individual claims that apply equally to business users and to individual end users (notably consumers of digital services), collective redress mechanisms, or representative actions, are also an available mechanism to enforce the DMA, but are only available to end users.

In fact, even though the implementation of [Directive \(EU\) 2020/1828](#) – expressly mentioned in Article 42 of the DMA and therefore applicable to representative actions brought against gatekeepers that breach their obligations under the DMA and, in doing so, harm or may harm the collective interests of consumers – has not yet occurred in Portugal, the general procedure and framework for bringing representative actions set out in the Law on the participation in administrative proceedings and collective action ([Law no. 83/95, of 31 August](#) – “Collective Action Act”) applies to all areas and sectors of the law, including the DMA.

Article 42 of the DMA expressly admits representative actions brought against infringements by gatekeepers that harm or may harm the collective interests of consumers, but there is no similar provision for business users or business associations. Similarly, according to the Collective Action Act, a collective action may be brought by any citizen, in the exercise of his/her civil and political rights, and legal associations or foundations, regardless of their own direct interest in the proceedings, but not by companies or professionals. It is therefore clear that, under the current regime, business users cannot bring representative actions against gatekeepers. There is no provision, however, regarding their representation in general, so business associations should not be necessarily excluded.

One final comment to clarify that, at least for the time being, Portuguese law does not provide for any specialized courts to handle claims arising from potential non-compliance with the DMA. As such, and with the possible exception of claims based on unfair competition, the Portuguese common civil courts will be competent to adjudicate on claims based on the DMA, whether these are brought by business users, competing service providers or end users.

All in all, private enforcement looks certain to play a major role in the context of the DMA: individual and collective legal action options are available to users of platforms to control the market power of gatekeepers.

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