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EU Digital Economy:
general framework (DSA/DMA) and specialised regimes

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Section 1: National institutional set-up

Question 1

The main provisions regarding the implementation of the DSA were adopted by Law Decree No. 123 of 15 September 2023, subsequently converted and amended by Law no. 159 of 13 November 2023 (Law Decree).

Article 15 designates the Italian Communications Regulatory Authority (AGCOM) as the Digital Services Coordinator (Article 49 DSA). The same Article mandates that the Italian Competition Authority-Autorità Garante della Concorrenza e del Mercato (hereinafter "ICA" or "AGCM") and the Data Protection Authority (Garante per la protezione dei dati personali), along with any other competent authorities, shall cooperate with AGCOM to support its role as Digital Services Coordinator. To this end, the authorities may conclude memoranda of understanding. However, the Decree does not specify how the task and responsibilities are divided among those authorities.

It is not entirely clear whether the Italian government intended to assign a new competence to ICA and the Data Protection Authority regarding the DSA enforcement, or whether it intended to state that these authorities should apply the DSA in their preexisting area of competence, similar to other national regulations.

As for the interaction among others national sector-specific regulators, it has to be underlined that AGCOM is also competent on communication services, which include electronic communications, audio-visual, press, postal services and digital platform, while ICA is competent regarding competition law and consumer protection.

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*** Pietro Manzini reported on questions related to DSA. Gabriella Muscolo reported on questions related to the DMA.The rapporteurs thank Maria Buquicchio, Lawyer and Ph.D. in Public Law, and Anna Vicinanza, Ph.D. candidate, for their accurate work of research as the basis for this report.

Cases on potential overlapping competences between DSA and Consumer legislation

A recent position taken by AGCOM on 30.4.2024 (Delibera 110/24/CONS) has already demonstrated potential overlapping of competences among national authorities.

AGCOM's position originated from a request for an opinion submitted by ICA in a case regarding unfair commercial practices performed by Meta (specifically, Meta Platforms Inc. and Meta Platforms Ireland Limited). In this context, Meta was accused of various practices, including failing to provide exhaustive explanation for the interruption of its services on Facebook and Instagram, which limited the recipients' right to defence.

Since the contested unfair commercial practice was disseminated through telecommunications services, the Italian Consumer Code (Article 27.6) required ICA to obtain an opinion from AGCOM. However, AGCOM refused to provide such opinion, arguing that the practices charged to Meta did not constitute a violation of consumer law but rather a breach of the DSA, whose enforcement fell within its competence. In particular, Articles 17 and 23 of the DSA were deemed relevant, as they require platforms to provide a statement of reasons to recipients when imposing restrictions.

Despite receiving this negative opinion, ICA decided to proceed, considering that the DSA does not affect consumer law, as stated in the Article 2 DSA. Therefore, consumer law should remain applicable even in the areas covered by the DSA. This procedure resulted in ICA imposing a fine of 3,500,000 € on Meta. However, it remains unclear whether AGCOM could impose another sanction for the same behaviour in light of the DSA, potentially leading to a collision with the ne bis in idem principle.

Another Italian case presented similar issues. ICA opened a case against TikTok (specifically, TikTok Technology Limited, TikTok Information Technologies UK Limited e TikTok Italy S.r.l.) for unfair commercial practices. The case concerned the spread of harmful content among minors due to recommender systems, affecting consumers' self-determination and creating addiction. In this case, TikTok submitted an allegation arguing that ICA lacked competence since the supervision of VLOPs is assigned by the DSA to different institutions (namely, the European Commission). This allegation was dismissed by ICA, following the same reasoning as above on the basis of Article 2 DSA.

Furthermore, in this case ICA also argued (§54) that, following Article 27.1bis of the Italian Consumer Code, the competence of other authorities can only exist when the contested behaviour does not also constitute an unfair commercial practice (recalling a jurisprudence by the Court of Justice).

Moreover, AGCOM was required to provide an opinion, which it refused on the basis of its exclusive competence in audiovisual services, as well as in the capacity of digital services coordinator (Delibera 325/23/CONS, 20.12.2023). In fact, a procedure for the same behaviour had been initiated by AGCOM but was dismissed when TikTok accepted to remove the harmful videos.
In any case, ICA ultimately imposed a joint fine of 10,000,000 € to TikTok Technology Limited, TikTok Italy S.r.l. e TikTok Information Technologies UK Limited for unfair commercial practices.

In another case, AGCOM explicitly mentioned the division of competences with ICA. In this context, AGCOM had been required to issue an opinion on the request of ICA on an unfair commercial practice operated through a website and social media ("Hot Chip Challenge" case). AGCOM issued a positive opinion but stated (Delibera n. 33/24/CONS) that it would reserve the right to assess whether the same behaviours are also related to a lack of protection for minors by audiovisual services providers or a violation of guidelines on influencers. However, it is not entirely clear if it intended to state that the same behaviours could be addressed, or those operated by different subjects (e.g., audiovisual service providers like TikTok).

Question 2

The aforementioned Article 15 of the Decree requires the Communications Regulatory Authority to define, by its own regulation, the conditions, procedures and operational modalities for exercising the powers and functions vested in it as Digital Services Coordinator, pursuant to Regulation (EU) 2022/2065. The Authority must carry out the related tasks in an impartial, transparent and timely manner.

Paragraph 5 of Article 15 establishes an increase in AGCOM staff by 23 units, specifically distributed as follows: 1 manager, 20 officers, and 2 operational personnel. The regulation also provides for the temporary use of existing administrative staff until the completion of the open competition procedures.

Furthermore, an allocation of 4,005,457 euros is provided for 2024, with the following allocations for subsequent years:

2025	4,125,590 €
2026	3,903,136 €
2027	4,081,636 €
2028	4,267,375 €
2029	4,527,751 €
2030	4,737,357 €
2031	4,971,989 €
2032	5,434,808 €
2033 and onwards	5,694,052 €

These resources will be financed from a contribution (i.e., supervisory fee) of 0.135 per thousand of the turnover resulting from the last approved balance sheet of intermediary services providers established in Italy. The Authority may revise the fee in subsequent years up to a maximum of 0.5 per thousand of turnover.

In accordance with Article 15 of the Decree, the Authority, in cooperation with the National Statistics Institute (ISTAT) and the Revenue Agency (Agenzia delle Entrate), should identify the list of entities liable to pay the contribution. The instructions for paying the contribution were issued on 10 July 2024 (Delibera 270/24/CONS). The payment was due within 30 days of the Delibera's publication, meaning by 4 October 2024, and had to be made by completing the online form available at impresainungiorno.gov.it. Entities with a taxable income of €500,000 or less, companies in a state of crisis with suspended activity, in liquidation, or subject to insolvency proceedings, as well as companies that began their activity in 2023, are exempt from paying the contribution.

Furthermore, the law establishing AGCOM (Law no. 249 of 31 July 1997) was amended to include the possibility of imposing sanction on supervised entities for violation of certain DSA provisions.

Question 3

No mapping exercise has been conducted by the competent authorities. However, AGCOM has already taken some initiatives in order to implement the DSA at national level.

On 14 February 2024, through Delibera 41/24/CONS, AGCOM initiated a preliminary analysis aimed at defining the procedure for filing complaints under Article 53 of the DSA. The conclusion of this analysis was delayed by Delibera 89/24/CONS due to the need for coordination with DSCs in other Member States, as indicated in the AGCOM's Annual Report for 2024.

On 8 march 2024 AGCOM issued three notices regarding: (i) the modalities for communicating contact points by intermediary services providers in line with Article 11 DSA; (ii) the modalities for communicating the designation of legal representatives by intermediary services providers in line with Article 13 DSA; (iii) the modalities for communicating the number of active recipients in line with Article 24(2) DSA.

On the 24th of July 2024, following a public consultation started on 14th of February 2024, AGCOM has adopted 2 Decisions: (i) the first on the procedures for certifying out-of-court dispute resolution bodies under Article 21 DSA, and (ii) the second on the procedure to certify "trusted flaggers" under Article 22 DSA. Both Decisions entered into force on the 15th of September 2024.

While the initiatives of 14 February and 8 March are merely preparatory or containing simple practical arrangements, Decisions adopted on the 24th of July deserve further analysis.

A. Procedural rules for the certification of out-of-court dispute resolution bodies ("ADR" bodies) between service recipients and online platform providers under Article 21 DSA (Delibera 282/24/CONS)

The regulation outlines: (i) eligibility criteria (Article 3), (ii) application submission and certification process (Articles 3, 4 and 5), (iii) voluntary withdrawal from certification by the ADR (Article 6), (iv) revocation of the status of ADR (Article 7), (v) certified ADR bodies mandatory reports (Article 8).

i) Eligibility criteria.

The eligibility criteria are defined by the DSA, and the AGCOM's decision strictly follows the requirements provided for by it.

These requirements are further specified in Annex 1 of the Decision. Since the DSA does not specify the legal nature of eligible ADR bodies, Annex 1 stipulates that any entity – regardless of its legal status, whether public or private – established on a permanent basis and engaged in dispute resolution through an ADR procedure is eligible. If the applicant is certified as an ADR bodies in another sector, such as consumer law, this must also be communicated.

ii) Application Submission and Certification Process.

The application should be submitted using the form published on AGCOM's website and transmitted by certified electronic email or, potentially, online.

The certification procedure involves two AGCOM bodies: the Directorate of Digital Services, responsible for investigative tasks, and the AGCOM Council, which holds decision-making power.

If the application is not submitted in accordance with the required procedures, the Directorate may dismiss it. In any other case, after reviewing the application the Directorate will forward a reasoned proposal, either recommending rejection or approval, to the Council. The entire procedure must be completed within 60 days (with some exceptions). Afterwards, the Council will issue a decision to either award or deny the certification. The Directorate will notify the applicant of the outcome and will publish it on AGCOM's website.

The certification is valid for five years and can be renewed upon the certified ADR body's request. Renewal is contingent upon the continued fulfilment of all requirements and compliance with relevant obligations.

AGCOM must publish on its website the updated list of the certified ADR entities, indicating for each the date of certification, the areas of competence and the languages available. AGCOM also publish a link on its website to the list of certified ADR bodies published by the Commission, pursuant to Article 21(8) of the DSA.

iii) Voluntary withdrawal from certification by the ADR.

If a certified ADR body wishes to withdraw from the list and relinquish its certification, it must notify AGCOM via certified email, expressly stating that it has no pending procedures initiated pursuant to Article 21 of the DSA.

iv) Revocation of the status of ADR .

The Directorate, either on its own initiative or based on information provided by any interested party, may determine that a certified ADR body no longer meets the required criteria.

The Council will decide whether to revoke the certification or dismiss the proceedings.

v) Certified ADR bodies' mandatory reports.

The Decision also details the obligation of certified ADR bodies concerning transparency reports in accordance with Article 21(4) of the DSA.

B. Procedural rules for the recognition of the status of "trusted flaggers" under Article 22 DSA Delibera 283/24/CONS)

The Decision for certifying trusted flaggers essentially follows the same structure as the out-of-court dispute resolution bodies Decision illustrated above. It outlines (i) the eligibility criteria (Article 3), (ii) application submission and certification process (Articles 3, 4 and 5), (iii) Voluntary withdrawal from certification by the trusted flagger (Article 6), (iv) revocation of the status of trusted flaggers (Article 7), (v) trusted flaggers mandatory reports (Article 8).

i) Eligibility criteria

The eligibility criteria are defined by the DSA, and the AGCOM's decision strictly follows the requirements provided for by it. To qualify, an applicant must be an organization established in Italy complying with the following conditions:

1) must be an organization with specific expertise in identifying and reporting illegal content on online platforms;
2) must be independent of any platform service provider;
3) must have the capability to operate in a diligent, accurate, and objective manner.

The application must detail the areas of competence for which the certification is sought and provide evidence demonstrating specific capabilities in these areas.

The above-mentioned requirements are further specified in Annex 1 of the Decision.

Annex 1 firstly stipulates that only organizations – not natural persons – are eligible for certification. Eligible organizations can be public or private, including for example (a) professional or industrial associations, professional orders, and trade unions; (b) fact checking bodies; and (c) NGOs, such as consumer associations or organisations for the protection of human rights, the environment, or animals.

The decision also includes an Annex 2 identifying by way of example and not exhaustively, 14 areas of competence for exercising the functions of a trusted flagger.

ii) Application Submission and Certification Process

The procedures for obtaining certification are the same as those described above for ADR.

In this case, the certification is valid for three years

iii) Voluntary withdrawal from certification by the trusted flagger

If a trusted flagger wishes to withdraw from the list and relinquish its certification, it must notify AGCOM via certified electronic email. The withdrawal may also concern only specific areas of recognized competence.

iv) Revocation of the status of trusted flaggers

The procedure for revoking trusted flagger certification is the same as that for ADR certified bodies. The only difference is that, in this case, if the procedure is initiated based on information received from an online platform provider, the Directorate will also suspend the trusted flagger status until the conclusion of the procedure.

v) Trusted flaggers' mandatory reports

The Decision also details the obligation of trusted flaggers concerning transparency reports.

Question 4

In implementation of Article 38(7) of the DMA, the Italian legislator has enhanced synergies between EU and national legislation for the digital sector, by adopting internal rules specifically aimed at implementing some provisions of the DMA into the Italian legal order.

The key provision is Article 18 of Law No. 214/2023 (Annual Law on Competition and Market 2022), entitled "Measures for the implementation of Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022."

Paragraph 1 of Article 18 establishes the ICA as the entity responsible for enforcing the DMA in Italy.

Paragraph 2 of Article 18 confirms that the ICA serves as the primary contact point for the Commission and the network of authorities in fulfilling the obligations set out in the DMA, including various forms of coordination and cooperation (e.g., for purposes of performing inspections).

Paragraphs 3 and 4 of Article 18 clarify that the ICA, in performing its functions under the DMA, enjoys the same investigation powers and can impose the same sanctions provided for by Law No. 287/90, (hereinafter, "Italian Antitrust Law").

There are, however, limitations on the use of information collected during DMA investigations, aligning with the EU regulatory framework.

Paragraph 6 enables the ICA to use the information it collects through investigations carried out in application of the DMA for more general purposes as well, as long as this is compatible with the relevant EU legislation. In particular, the ICA is allowed to use this kind of information in the enforcement of the provisions concerning agreements restricting competition, abuse of dominant position, abuse of economic dependence and merger control.

Finally, Article 18 also underlines the role of the Italian Data Protection Authority, to which general supervisory and control powers are conferred, particularly concerning personal data protection and confidentiality. This safeguard clause aims to prevent conflicts, overlapping of competences, and excessive administrative burdens on private entities under the supervision of the relevant authorities.

In general terms, the provision adopted by the Italian legislator to implement the DMA in the Italian legal order is clear and exhaustive from the perspective of public enforcement.

Furthermore, pursuant to Article 18, following a public consultation and by resolution dated July 23, 2024, the ICA adopted the "Regulation on Forms of Collaboration and Cooperation."

The ICA is thus expressly authorized to conduct investigations into non-compliance with the DMA in close cooperation with the European Commission. The Regulation stipulates that all ICA activities related to the DMA, including investigations under Article 38(7) of the DMA, must be carried out in coordination with the Commission to ensure overall consistency.

In this context, as specified in Article 5 of the Regulation, the ICA must inform the Commission before initiating an investigation. The investigation begins with a specific resolution that is communicated to the gatekeepers and to those who have filed complaints or petitions relevant to the investigation. The ICA has the same powers for DMA investigations as it does for antitrust enforcement, including the ability to request information, hold hearings, and conduct inspections. During the investigation, participating parties (i.e., gatekeepers and other interested parties) may submit pleadings and have the right to access documents.

The rules for document access follow those applicable to antitrust proceedings; however, it should be noted that, given the specifics of the DMA,

"documents whose disclosure might hinder the Commission's investigatory powers or the adoption of implementing acts are excluded from access" (Article 12).

Once the evidence-gathering phase is complete, the ICA will decide on the investigation's outcome and forward the case to the European Commission for any actions within its purview.

The gatekeepers' right of defence will therefore significantly impact the Commission's potential proceedings.

Finally, the ICA has entered into an administrative agreement with the European Commission to enhance collaboration on DMA-related issues of mutual interest.

Question 5

According to para. 7 of Article 18 of the abovementioned Law, the ICA must perform its tasks with the resources available to it under existing legislation, which means that, in principle, no additional resources will be granted as a result of the new provisions concerning the implementation of the DMA.

However, the ICA undertook an internal reorganization effective January 1, 2023. As part of this reorganization, a new Digital Platforms and Communications Directorate was established within the Competition Department 1.

This new Directorate not only absorbed the responsibilities of the former Communications Directorate but also focused specifically on digital platforms in light of the DMA. The Directorate is responsible for both traditional antitrust enforcement and the implementation of the DMA, within the limits prescribed by the DMA.

Question 6

Since the DMA came into force, ICA has been cooperating closely with the Commission in various forms, including:

- Participation in the DMAC (i.e., the Digital Market Advisory Committee under Art. 50 DMA) and the High Level Group under Art. 40 DMA;
- Cooperation in the ECN network;
- Informal exchanges on common topics of interest that may represent points of intersection between the DMA and antitrust enforcement.

Section 2: Use of national legislative leeway under the DMA/DSA

Question 1

The problem with possible pre-emption effect of DSA has not been explicitly addressed. Overlapping pre-existing national law has not been modified.

Question 2

Italy did not map the national rules on illegality of on-line content. No change of this content has been made recently. However, some provisions of criminal law may be relevant for illegal online content:

(a) Defamation (Article 595 c.p. meaning "a communication with several persons offending the reputation of others"), which may be aggravated if motivated by ethnic, national, racial, religious discrimination or hatred;
(b) Propaganda and incitement to crime on the grounds of racial and religious discrimination (Article 604 bis c.p.), introduced in 2018;
(c) Illicit dissemination of sexually explicit images or videos (Article 612ter c.p.), concerning the publication of sexual content without the consent of the person involved, introduced in 2019.

Question 3

Four pieces of national legislation may be considered related to DSA, given that they regulate the content transmission online and its possible restrictions.

1. Article 41, Para. 7, TUSMA (Testo unico Servizi media audiovisivi, implementing the Directive on Audio-visual Services[1]).

This provision establishes that the free movement of programs, or user-generated video or audio-visual communications whose provider is established in another Member State, and which are directed to the Italian public, may be limited, by an order issued by AGCOM, to: (a) protect minors from content that may harm their physical, psychological or moral development; (b) combat incitement to racial, sexual, religious or ethnical hatred and violations of human dignity; (c) protect consumers, including investors.[2]

[1] Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[2] To be noted that the violation of Article 42 TUSMA may result in the imposition of a fine in line with its Article 67.9. This provision is explicitly "without prejudice to the provisions of Article 74 of Regulation (EU) 2022/2065 for violations of the provisions recited by the same European Regulation."

As established by paragraph 9 of Article 41 TUSMA, AGCOM defined a procedure Delibera AGCOM n. 298/23/CONS (issued on 22 November 2023) for the restricting the free movement of programs which was notified to the European Commission. Due to potential overlap with Article 9 of the DSA, AGCOM's Delibera was modified in order to avoid inconsistency.

2. Decreto Caivano (quoted): rules to protect minors online and age verification systems

The above-mentioned Decreto Caivano introduced some provisions regarding the protection of minors online.

In particular:

(i) Article 13 imposes an obligation to producers of electronic devices (as defined in the same Article) and to internet service providers (as defined by the Directive on electronic commerce 2000/31/EC) to allow the installation of parental control applications (free of charges) and to inform users on the possibility and benefits of installing such systems.

(ii) Article 14 prohibits access to pornographic content by minors. To this end, website operators and video sharing platform providers that distribute pornographic images and videos in Italy are required to verify the age of majority of users. To this end, AGCOM issued a report to identify different age verification mechanisms and launched a public consultation. As a result, AGCOM approved on the 24.9.2024, the draft regulation regarding the modalities for ascertaining the age of majority of users, which is explicitly considered in line with Article 28 of the DSA. The draft regulation has been notified to the European Commission for final consideration.

3. Rules on Copyright Protection

The Decreto Caivano, Article 15ter, also contains relevant provisions regarding the role and powers of the AGCOM in the fight against the illegal dissemination of content protected by copyright through electronic communication networks. In this context, the Authority has the power to require to internet service providers to disable access to illicit content, even as a provisional measure (Law No. 93 of 14 July 2023, Article 2).

4. Guidelines on influencers

Another act, however non legislative, that may be linked to DSA are the Guidelines on influencers adopted by AGCOM *Delibera AGCOM n. 7/24/CONS,* (adopted 10th January 2024) regarding the application of the regulation on audio-visual media services (D.Lgs. no. 208, 8 November 2021 implementing the Directive (UE) 2018/1808, "Testo Unico dei Servizi Media Audiovisivi").

To be precise, DSA is applicable to the intermediary services providers and not to the "influencers" who are simple recipients. However, some obligations imposed by the Delibera to "influencers" echo those provided for in DSA.

The key points of the Delibera are: the (1) definition of "influencer" based on the number of followers, their activity and the engagement rate; (2) identification of the provisions of TUSMA applicable to influencers; (3) necessity of adopting codes of conduct; (4) institution of a technical board to define any further measures.

Question 4

The Italian legislator has implemented a number of specific measures governing the conduct of players in digital markets: some pre-date the adoption of the DMA, while others were adopted subsequently.

Law No. 118/2022 (Annual Market and Competition Law 2021) has introduced an amendment to the provision on the abuse of economic dependence (Article 9 of Law No. 192/1998),[3] providing for a rebuttable presumption of economic dependence for digital platforms with a decisive role in reaching customers or suppliers.

The purpose of the amendment was to facilitate NCAs' application of the prohibition in specific sectors where large digital platforms enjoy significant market power.

More in details, plaintiffs still meet the burden of proving that the defendant platform plays a "decisive role in reaching end users or suppliers."

As for the presumption of economic dependence, that reverses the burden of proof, it is a rebuttable one, and, hence, it can always be overcome by offering evidence to the contrary. In this case, the defendant must prove the actual market position of that undertaking and the concrete absence of bargaining subservience to it.

In this context, it remains to be clarified what the provision means by the words "decisive role," leading some authors to argue that the presumption may apply automatically to the so-called GAFAMs (Google, Amazon, Facebook, Apple, Microsoft).

On the one hand, the recent Italian reform is part of a broader trend to bolster the use of national rules on the abuse of economic dependence, which are generally easier to enforce than the rules prohibiting abuses of dominant position.

[3] The text of Article 9 of Law No. 192/1998 was supplemented with three new sentences.

On the other hand, the presumptive technique in particular is often used, by both the Italian and the European legislators, to rebalance the information asymmetry typically suffered by injured parties as a result of an antitrust violation.

The reform at issue provides that the Presidency of the Council of Ministers, in agreement with the Ministry of Justice and after having consulted the ICA, "may adopt special guidelines aimed at facilitating the application of the provisions set forth in paragraph 1, in accordance with the principles of European law, also for the purpose of preventing litigation and promoting good market practices in the field of competition and the free exercise of economic activity."

However, the entry into force of the new rules is not conditional on the publication of such guidelines, the adoption of which is a simple faculty (and not a duty) of the Presidency of the Council of Ministers. Until now, no guidelines of this kind have been adopted.

A closer look at the overall structure of the DMA and the feature of the Italian reform reveals that some differences between the two sets of rules may serve to limit the areas of potential overlap, at least in part.[4]

At the same time, some overlap may be possible. In particular, in the event that such abuse (relevant pursuant to the Italian provisions) was carried out by a gatekeeper. In such a case in principle the Italian rules on the abuse of economic dependence, can be enforced, notwithstanding the entry into force (and full applicability) of the DMA, provided that they do not "affect the obligations imposed on gatekeepers under [the DMA] and their uniform and effective application in the internal market."[5]

Furthermore, the Decree-Law No 104 of 10 August 2023, converted with amendments by Law No. 136 of 9 October 2023 (so called "Asset Decree"), attributed to the ICA new powers to adopt, at the outcome of market enquiries under Article 12 of the Antitrust Law " any structural or behavioral measure proportionate […] in order to eliminate distortions of competition," in compliance with the principles of the European Union's legal system and after consulting the market,[6] as a part of a series of provisions on the protection of competition and consumers in the aviation sector.

[4] See, in particular, V. Bachelet, *Il rafforzamento del contrasto agli abusi di posizione "non dominante" delle piattaforme digitali*, cit., p. 76 ff.; M. Libertini, *La presunzione di dipendenza economica nei mercati digitali*, cit., p. 13 ff.

[5] Recital 10.

[6] See Article 1(5) of Decree-Law No 104 of 10 August 2023, converted with amendments by Law No. 136 of 9 October 2023.

In a note on November 2023, the ICA had requested an opinion from the Council of State ("CoS") as to the scope of application of these powers, asking, in particular, whether they should be considered limited to a particular sector or product area or could be applied without restrictions.[7]

With its opinion[8] published on 29 January 2024, the CoS ruled on the scope of application of the new powers of the Authority, granted by the Asset Decree, affirming that they relates to every sector of the market that needs very incisive corrective measures – both behavioural and structural – even outside the traditional investigation procedures.

Subsequently, on 13 May 2024, the Authority adopted a Communication on the procedural rules for the exercise of the powers introduced by the Decree, in the context of fact-finding investigations (hereinafter the Communication).[9]

In defining the structure of the relevant procedure, the Communication distinguished between a first phase, which substantially follows the typical fact-finding investigation always carried out by the ICA, and a second phase, of a remedial nature, aimed at identifying necessary and proportionate measures to eliminate any distortions of competition identified in the first phase.

The adoption of remedial measures will be "primarily oriented" to cases where consumer detriment is "significant and persistent."[10]

The most recent doctrine defines the new rules as "new competition tool" and divides on their very nature.

Most of scholars identify it not as a *lex specialis* but as a subsidiary system rule that complements Articles 101 and 102 TFEU and Articles 2 and 3 of Italian Antitrust Law, introducing a paradigm shift: the rule allows binding intervention on undertakings even in the absence of the legal prerequisites of Articles 101 and 102 TFEU.

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[7] By note prot. 97737 of 23 November 2023, the Italian Competition Authority requested an opinion on the scope of application of Article 1, paragraphs 5 and 6, of Decree-Law No. 104 of 10 August 2023 (containing "Urgent provisions for the protection of users, in the field of economic and financial activities and strategic investments"), as converted by Law 9 October 2023, No. 136.

[8] Cons. of State, Sec. First, Plenary Meeting, deal no. 01388/2023. https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=consul&nrg=202301388&nomeFile=202400061_27.html&subDir=Provvedimenti

[9] Communication on the application of article 1, paragraph 5, of decree-law no. 104 of 10 august 2023, converted with amendments by law no. 136 of 9 october 2023 provision no. 31190.

[10] In fact, paragraph 15 of the Communication states that "Where the Authority considers that the commitments are appropriate to eliminate the distortions or obstacles to competition indicated in the DRC, it shall make them binding in the measure closing the fact-finding investigation, after having obtained the opinion of the sectoral regulatory authority competent for the markets or sectors concerned by the fact-finding investigation, indicating to the latter a deadline for replying. If it deems it appropriate, the Authority may acquire the observations of other public entities."

A second doctrinal strand has pointed out that it would not be a classic repressive instrument since it would not be aimed at repressing unlawful conduct, but lawful behaviour, and does not provide for sanctioning powers: the possible remedial consequence is limited to a warning for the future, representing a sort of penalty without the market offence.

The similarities with the *ex ante* regulatory approach of sectoral regulators lead the nature of this instrument back to that of non-sector-specific regulation.

Section 3: Vertical and horizontal public enforcement-related cooperation under DSA/DMA

Question 1

As it is well known, the EU Commission has adopted on 20.10.23 a Recommendation on coordinating responses to incidents in particular arising from the dissemination of illegal content, ahead of the full entry into application of the DSA. Following this Recommendation AGCOM, signed a collaboration agreement with the Commission whose aim is to define a procedural framework to exchange information, data, methodologies, technical system and tool to help the European Commission to identify systemic risks in which VLOPs and VLOSEs may incur.

As for the relation with other national Digital services coordinator, AGCOM started to attend the meetings of the European Board for Digital services organized by the European Commission.

Question 2

For more in general, on the gap in Italy in adoption of rules on private enforcement of the DMA and the absence of cases, see Section 4.

However, the principle of coordination between the Commission and National Courts is enshrined in the system. It was already envisaged by the directly applicable provisions contained in Articles 15 and 16 of Regulation (EC) No 1/2003 (hereinafter also referred as "Regulation 1/2003"), titled "Cooperation with national courts" and "Uniform application of Community competition law" respectively.[11]

[11] REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty. Article 15 "Cooperation with national courts."

More in particular, Article 15 para. 1 and para. 3 of Regulation 1/2003 expressly provided the possibility for National Competition Authorities (hereinafter, "NCAs") or the European Commission to act on the Court's request or *ex officio* as *amicus curiae* in private antitrust litigation.

This mechanism, rarely applied in the past, has been revitalized by the ICA.[12]

Within Article 39 of the DMA, directly applicable rules on Cooperation with National Courts, in particular, para. 1[13] expressly provides that national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the DMA and paragraph 3 that the Commission, acting on its own initiative, may submit written observations to national courts, as well as, with the permission of the court in question, it may also make oral observations.

Furthermore, paragraph 4 adds that for the purpose of the preparation of their observations only, the Commission may request the relevant national court to transmit or ensure the transmission of any documents necessary for the assessment of the case.

Therefore, the *amicus curiae* mechanism, in its articulations, has been extended by the European legislator also to the DMA private litigation, and, although it has not been frequently applied, the Italian Courts are already familiar with it, as demonstrated by the quoted case.

In addition, a very special *amicus curiae* intervention is set forth by Article 17 of the Directive 2014/104/EU of the European Parliament and of the Council ("Directive"), implemented by Article 14, para. 3 of the Legislative Decree no. 3/2017 (hereinafter also referred as the "Legislative Decree"), and is that contained in the chapter dedicated to the "Quantification of harm."

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[12] Notably, on 6th of April 2017, the District Court of Rome, on the basis of Law no. 21/1992, granted interim measures aimed at blocking UberBlack services in Italy. Thus, the Italian Competition Authority decided to intervene in the UberBlack appeal considering its previous advisory activity on the issues at stake. The decision was reversed on the 26th of May, taking also into account in the Court's reasoning the position held by the Italian Antitrust Authority on these issues. It is interesting to consider that in this case the Italian judges highlighted that: "The act by which the Authority submits written observations to the Court fulfils the need for cooperation between the Authority and the Court; it complies with the protection of a public interest and doesn't support any Party of the proceedings." The Court deemed that both the submission of written observations and the debate in the hearing doesn't require the obligation of technical representation. For a complete view about the case: DESANA, RIGANTI, *Über Alles or not? the Italian Perspective on the "Uber Case*," 2020. https://link.springer.com/chapter/10.1007/978-981-15-7035-3

[13] Article 39, par. 1 provides: "1. In proceedings for the application of this Regulation, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of this Regulation."

It provides that a Competition Authority may, upon request of National Court and subject to the discretion of the Competition Authority, assist the national court in the calculation of the harm, in the event that such assistance is appropriate.[14]

This provision is consistent with the Guidance Document and its Practical guide on the quantification of harm – that is, a non-binding recommendation directed to courts which provides guidance criteria within the different econometric models to be applied in the quantification of harm.
It has already been applied in some cases.[15]

Although this declination of the *amicus curiae* intervention has not been specifically provided by Article 39, the analogies between damages actions following antitrust and DMA enforcement, with particular reference to the asymmetric position of the parties, makes it appropriate the application of this cooperation mechanism in the DMA private litigation. Furthermore the mechanisms of cooperation envisaged by the Directive are especially relevant for the access to the evidence phase.

First, Article 6 para. 7 of the Directive – implemented in Italy by Article 4, para. 5, of the Legislative Decree – allows the claimant to present a reasoned request that a national court access the evidence referred to in points (a) or (b) of paragraph 6.

In such assessment, National Courts may request assistance only from the competent Competition Authority.[16]

[14] Article 17 "Quantification of harm" provides: "1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. 2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption. 3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate."

[15] AGCM A428C, 26310, 21 December 2016.

[16] Article 6 "Disclosure of evidence included in the file of a competition authority" disposes: "1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this article applies in addition to article 5. 2. This article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001. 3. This article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities. 4. When assessing, in accordance with article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following: (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority

Secondly, Article 6, para. 11 of the Directive – implemented by Article 4, para. 7, of the Legislative Decree – establishes the right of competition authorities to submit observations to the national court before which a disclosure order is sought.

This mechanism represents a declination of the faculty to present observations as *amicus curiae* already provided by Art. 15 of Regulation 1/2003 to which reference is made at recital 30 of the Directive.[17]

Article 39 of the DMA does not provide for mechanisms of cooperation related to the collection of evidence: however, the already underlined analogies between the two private litigations makes it appropriate to extend the application of the two mentioned norms to actions for compensation of damages caused by the DMA infringement.

Article 16 is an important mechanism of coordination already envisaged by Regulation 1/2003. Indeed, this article provides for the binding effect of the decision adopted by the European Commission towards national courts and NCAs.[18]

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or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and (c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law. 5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings: (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn. 6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions. 7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence. 8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this article. 9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this article may be ordered in actions for damages at any time, without prejudice to this article. 10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence. 11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought."

[17] See note above.

[18] This principle whereby national courts should avoid rulings that conflict with Commission decisions finds its origins in the Delimitis (Case C-234/89) ruling, in which the Court of Justice underlined that the Commission "is responsible for defining and implementing the orientation

As for article 16, this primacy accorded by case-law to administrative proceedings over national court proceedings had no precedent in our legal system and raised some criticisms of its incompatibility with the Italian Constitution.

In response to these criticisms, it has been argued that article 16 does not impose a positive binding effect but a "negative duty of abstention" on national courts, which retain the possibility to have recourse to a preliminary ruling on validity under article 267 TFEU and the Courts are, therefore, "positively" bound only by decisions of the EU courts.

However, what is important to underline is that Italian Courts seem to have ignored this debate by accepting article 16 of Regulation 1/2003 as a superior rule in antitrust enforcement without raising constitutional issues.[19]

Article 9 of the Directive, implemented by article 7 of the Legislative Decree, provides that (i) a final infringement decision of a national competition authority should have a "binding effect" in follow-on proceedings before the courts in the same Member State where the infringement has been ascertained and that (ii) before courts of other Member States, it should constitute at least *prima facie* evidence of such infringement.[20]

Unlike article 16 of Regulation 1/2003, which refers to the Commission decision,[21] even if this decision has not been already subject to judicial review, article 9 of the Directive refers to an infringement decision irrefutably established by a final decision of an NCA or by a review court; it applies only when

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of Community competition policy" and that, in a system of parallel competences, in order not to breach the general principle of legal certainty, national courts must avoid issuing decisions that would conflict with a decision contemplated by the Commission. See for full decision: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0234&from=IT

[19] In such respect see European Court of Justice – Case C–508/11 – Eni S.p.A. v Commission, Judgment of 8 May 2013.

[20] Article 9 of the Directive "Effect of national decisions" provides: "1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under article 101 or 102 TFEU or under national competition law. 2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties. 3. This article is without prejudice to the rights and obligations of national courts under article 267 TFEU."

[21] The Tribunal of Milan the Court, in the recent case no. 9759/2018, affirmed that decision which have this binding effect are also those decisions which conclude the proceeding through a settlement agreement with the parties (possibility provided for by Regulation no. 622/2008). According to the Tribunal such decisions have indeed a decisory nature and can be appealed by the parties involved.

the administrative decision becomes *res judicata,* even if the "*res judicata* effect" stems from the fact that the decision has not been appealed.[22]

That said, the scope of article 9 of the Directive and therefore also of article 7 of the Legislative Decree has been largely debated.[23]

However it also important to recall that article 7 of the Legislative Decree has a special and derogatory nature within the Italian legal system, but is not an exceptional norm, because, despite the differences that I have underlined, it finds its relevant precedent in article 16 of Regulation 1/2003.

This clearly carries important consequences in terms of interpretation of the norm and might open the doors to its applicability also in private enforcement following the DMA violation.

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[22] Before the Directive, in Italy, as a result of a series of damage claims originating from a decision adopted by the Italian Competition Authority (ICA), it is now settled caselaw that findings in ICA decisions have the status of "privileged evidence" of the facts assessed therein, which means that the findings of the ICA are presumed to be true. The presumption is in principle rebuttable, but is one that deserves very high consideration by the court. The scope of the presumption was first limited by the Italian Supreme Court to infringement findings and later the scope was progressively extended to all assessments and findings contained in a ICA decision.

[23] The literature is very wide, see, for example: MUSCOLO*, Il nuovo assetto istituzionale del private antitrust enforcement in Italia e nell'Unione europea*, in BENNACCHIO, CARPAGNANO, *L'applicazione delle regole di Concorrenza in Italia e nell'Unione europea,* Naples, 2018; BRUZZONE, SAIJA, *Private e public enforcement dopo il recepimento della direttiva. Più di un aggiustamento al margine? (Private and Public Enforcement in the Aftermath of the Transposition of the Damages Directive)*, *Mercato concorrenza regole*, 1/2017; COMOGLIO, *Note a una prima lettura del d.lgs. n. 3 del 2017. Novità processuali e parziali inadeguatezze in tema di danno antitrust*, *Riv. trim. dir. e proc. civ.*, 3/2017; CHIEPPA, *Il recepimento in Italia della Dir. 2014/104/UE e la prospettiva dell'AGCM*, *Dir. Ind*., 4/2016; RORDORF, *Il ruolo del giudice e quello dell'Autorità nazionale della concorrenza e del mercato nel risarcimento del danno antitrust*, *Società*, 7/2014; SIRAGUSA, *L'effetto delle decisioni delle ANC nei giudizi per il risarcimento del danno: la proposta della Commissione e il suo impatto nell'ordinamento italiano*, *Concorrenza e Mercato*, 1/2014; FRIGNANI, *La difesa disarmata nelle cause follow-on per danno antitrust*, *Mercato Concorrenza e Regole*, 3/2013; GIUSSANI, *Direttiva e principi del processo civile italiano*, *AIDA*, 1/2015; CAIAZZO, *L'azione risarcitoria l'onere della prova gli strumenti processuali* ai sensi del diritto italiano, in PACE, *Dizionario sistematico del Diritto della Concorrenza*, Naples, 2013; PARDOLESI, *Il Libro Bianco sul danno antitrust: l'anno che verrà*, *Mercato Concorrenza e Regole*, 2/2008. In foreign literature, see: MARCOS, RODGER, *Promotion And Harmonization Of Antitrust Damages Claims By Directive Eu/2014/104?*, in RODGER, FERRO, MARCOS, *The EU Antitrust Damages Directive: Transposition in the Member States*, Oxford, 2018; WILS, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future Wouter*, *World Competition: Law and Economics Review*, 3/2016; WRIGHT, *The Ambit of Judicial Competence After the EU Antitrust Damages Directive, Legal Issues of Economic Integration*, 2016; JONES, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, in BERGSTROM, IACOVIDES, *Harmonising EU Competition Litigation: The New Directive and Beyond*, London, 2016; NAZZINI, *The effect of decisions by Competition Authorities in the European Union*, *Italian Antitrust Review*, 2/2015; PEYER, *The Antitrust Damages Directive – much ado about nothing? in Litigation and Arbitration, EU Competition Law*, Chentelham, 2015; FRESE, *Harmonisation of Antitrust Damages Procedures in the EU and the Binding Effect of Administrative Decision*, *Review of European Administrative Law*, 7/2015; RIFFAULT, *The binding effect of National Competition Authorities decisions – Observations on Article 9 of the Commission proposal of directive on antitrust damages*, *Concorrenza e Mercato*, 3/2014.

The extension of binding effects of the Commission's decision in the DMA application is expected to be one of the main open issues in follow-on actions in private litigation.

Question 3

The answer to this question is intertwined with the last part of the answer to Question 1 of Section 3. The cases on digital markets recently decided or pending before the ICA (see below) that may interfere with the DMA application, also show up the areas in which the NCA in its enforcement action more frequently detects an issue of no compliance with the DMA that shall be transferred to the EC in the framework of cooperation mechanisms.

The already mentioned challenges related to such interference may affect also the phase of the exchange of information and the issue shall be handled in the cooperation fora quoted above.

The above-mentioned cases show some possible areas of interference between antitrust enforcement and the DMA regulation.

The Amazon Case – A528

In December 2021, the ICA fined Amazon over EUR 1 billion for abusing its dominant position in e-commerce to unfairly promote its own logistics services, specifically Fulfillment by Amazon (FBA). The ICA found that Amazon's practices, which tied access to essential platform features to the use of FBA, harmed third-party sellers and distorted competition in both e-commerce and logistics markets.

The case is relevant to the Digital Markets Act (DMA), particularly Article 6(5) which addresses "self-preferencing." This provision prohibits gatekeepers from favouring their own services over those of third parties. The DMA also requires gatekeepers to apply fair and transparent conditions to avoid harming competitors.

However, the case is a pure self-preferencing one; the question remains whether these rules will adequately cover hybrid practices that mix exclusionary and exploitative elements. The ongoing interpretation and implementation of these regulations will determine how effectively they address such practices.[24]

[24] By resolution n. 17965 dated 15 November 2023, the Regional Administrative Court (TAR), before which the fine has been challenged, has suspended the judgment pending the European Court of Justice's ruling on the question of the time limit applicable to the commencement of the investigation phase for proceedings within the jurisdiction of the ICA.

The Google Consumer Case – A552

On 14 July 2022, the ACI launched an investigation into Google for allegedly abusing its dominant position by restricting data portability to other operators. The issue is related to Article 20 of Regulation (EU) 2016/679 (GDPR), which guarantees users the right to transfer their data between online services, thereby promoting competition and improving user control.

In response to the ICA's investigation, Google proposed three commitments that were deemed sufficient by the ICA to address the competition concerns, as they simplify data export procedures and improve interoperability.

The case highlights the importance of the DMA, which in Article 5.2 contains provisions against self-reference and ensures fair data processing practices, in line with the issues raised by ICA in this case and the commitments proposed by Google to improve data export processes.

The Booking Case – A558

Another particularly relevant case in the context of the DMA is the Booking case, initiated by the ICA on potential anti-competitive practices by Booking.com, a major player in the online travel agency market.

The ICA's investigation focused on the price parity clauses applied by Booking.com. These clauses required hotels to maintain the same prices and conditions on their websites as Booking.com. The ICA expressed concern that these practices limited hotels' pricing flexibility, potentially leading to inflated prices and fewer choices for consumers, contrary to the principles of fair competition that the DMA seeks to promote.

In response to the ICA's investigation, Booking.com committed to addressing the problems identified. To date, Booking's commitments are still subject to acceptance by the ICA.

Nevertheless, the Booking A558 case underscores the principles outlined in the DMA, which aims to create a level playing field in digital markets and contributes to a broader regulatory framework aimed at empowering consumers and promoting fair competition.

Section 4: Private enforcement of DMA/DSA

Question 1

Until now no cases of private litigation on the DMA have been brought by private parties before Italian Courts, neither follow on nor stand alone actions.

However the gap in adoption of specific rules on the private enforcement of the DMA-in particular on the point of the competence of specialised Court to deal with damages actions for the DMA infringement (see point 4) results in more difficulties also in detecting pending cases.

Question 2

It is possible to envisage that the main causes of action under DSA will be two: (1) actions directed to oblige the intermediary service provider to comply with the DSA obligations; (2) actions directed to recover the damage caused by failure to comply with the DSA obligation. These two actions may be brought jointly before the national judge.

Most probably there will be follow up actions, that is to say actions brought by private parties following an assessment by the public supervisory authority regarding a DSA violation. In particular, while an individual action can be always foreseen (for instance in case of defamation), it may be possible that the more relevant actions will be lodged by association or organization whose aim is to protect class rights. To this regard, Article 840 bis of the Italian civil procedure code, recently introduced, provides that a non-profit organisation or association whose statutory objectives include the protection of homogeneous individual rights, or any member of a class may bring an action against the author of the infringing conduct for the establishment of the liability and for an order to pay damages and restitution. These class action can be instituted only provided that the author of the infringement is an undertaking or an entity managing public services.

Question 3

Italy is currently witnessing an enhanced development of private antitrust litigation, although antitrust enforcement is still centered on public enforcement.[25] In particular, the contribution of stand-alone cases to the overall volume of private antitrust damages litigation has been relatively small.

[25] See ASHURST, *Study on the conditions of clamais for damages in case of infrigiment of EC antitrust rules*: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

Indeed in the continental jurisdictions the systems of competition law enforcement still seem geared towards achieving deterrence more through the initiative of public enforcers, rather than compensating private plaintiffs.

However the goal of the Directive and of the Legislative Decree is to increase the level of the overall effectiveness of antitrust enforcement, by making antitrust damages actions more effective in the EU and in Italy.[26]

What has been envisaged is a two-pillar system, where public and private enforcement work as complementary tools. At the same time, the Directive is intended to prevent possible abuses of litigation and avoid undermining the effectiveness of public enforcement.[27]

As private enforcement related to the DMA is not yet regulated in Italy on the one hand (see Question 4) and actions for compensation of damages caused by the DMA infringement have not yet been brought before Italian Courts on the other hand (see Question 1), at this stage it seems at least incertain to foresee future developments in the DMA private litigation and to envisage a trend analogue to the already developed antitrust private litigation.

Question 4

It must be noted that the Italian legislator has remained completely silent on private enforcement of the DMA.

First of all, no provision has been adopted on the preliminary issue of competence when private parties bring actions against the gatekeepers designated under the DMA to seek injunctions, interim measures, and/or compensation for damages.

In particular, the legislator did not include a provision like the one in the Legislative Decree which concentrates the competence for the private enforcement of competition law (Articles 101 and 102 TFEU, as well as Articles 2 and 3 of national antitrust law) on only three Courts (and Courts of Appeal) for Enterprises in Milan, Rome and Naples.

The silence of the Italian legislator in this respect has drawn criticism, particularly because it could create inconsistencies between the private enforcement

[26] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=IT*

[27] EUROPEAN COMMISSION, *White Paper on Damages actions for breach of the EC antitrust rules*, COM (2008) 165 of 2 April 2008. For an excellent summary and analysis of the various specific proposals contained in this White Paper, see BULST, *Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law,* Bucerius Law Journal 81, 2008.

of the DMA, on one side, and of competition law on the other, despite the analogies between the two sets of rules.

It is worth noting that the Associazione Italiana Giuristi Europei (AIGE) has taken an initiative on the matter, addressing all competent public institutions with a request to represent the opportunity to adopt measures aimed at including among the disputes falling within the exclusive jurisdiction of the specialized sections of Milan, Rome and Naples, also those relating to the infringement of the DMA. AIGE has argued that, like those in competition matters, cases relating to the DMA present a high degree of technicality and economic relevance.

Therefore, even if it cannot be excluded that several disputes may fall within the jurisdiction of the specialised enterprise sections already on the basis of the current provisions contained in Article 3 of Legislative Decree, it appears necessary, also for reasons of legal certainty and systematic consistency, to entrust their decision to judges who have already matured a specific professionalism in the related matter of competition.

In addition, the concentration of expertise and the advantage of the opportunity of the specialized judges to dialogue with European colleagues in the network of the Association of European Competition Law Judges (AECLJ) would minimise the risk of clashes in case law and the consequent fragmentation of markets, and would speed up the time taken to decide disputes.

The resulting impact would be positive in terms of the smooth functioning of the economy's justice system and consequently increase the competitiveness of the companies involved.

More uncertain is the section that will be competent for actions based on DSA.

Question 5

It is possible for civil society organisations to intervene in an ongoing procedure through the mechanism of the voluntary intervention ("Intervento volontario di terzo" in accordance with Article 105 of the Code of Civil Procedure), as repeatedly affirmed by the jurisprudence.

Section 5: General questions

Question 1

No specific national rules have been adopted to ensure that the injunctions judicial authorities may issue against intermediary services providers comply

with Articles 9 and 10 of the DSA. However, AGCOM appears to comply with the requirements of these Articles when issuing injunctions (see the injunctions against Google Ireland Limited in Delibera n. 50/24/CONS).

Question 2

I am not aware of any services of legal representatives being provided in Italy according to Article 13 DSA.

Question 3

As explained above, the regulation on the submission of complaints under Article 53 is still under internal review. No details regarding its scope of application are available insofar.

Question 4

The adoption of the DMA and DSA implementing regulation was not subject to any substantial political controversy. However, as for the DSA, from a formal point of view the utilization of an emergency instrument such as the Decreto Legge, have been criticised.

Question 5

AGCOM's procedural rules for the certification of out-of-court dispute resolution bodies *under Article 21 DSA* (Delibera 282/24/CONS) mention the possibility that an applicant body may already be certified as an ADR body in another sector, such as consumer law. The list of such entities is maintained by the Italian Ministry of Enterprises, which also establishes the procedure for the creation of Joint Conciliation Committees. Consequently, it is possible that these types of entities may also be accredited for the implementation of the Digital Services Act. There is no knowledge to date of any initiatives supporting the creation of trusted flaggers, DMA/DSA-focused consumer organizations, or data access requests by researchers.

Question 6

Not per our knowledge.

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