

The Consumer Voice in Europe

## REASONS TO ADD THE DIGITAL MARKETS ACT TO THE REPRESENTATIVE ACTIONS DIRECTIVE



**Contact: Vanessa Turner and Agustin Reyna - [competition@beuc.eu](mailto:competition@beuc.eu)**

**BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND**

Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • [www.twitter.com/beuc](https://www.twitter.com/beuc) • [www.beuc.eu](http://www.beuc.eu)  
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## Why the Digital Markets Act (DMA) should be enforceable under the Representative Actions Directive

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The Representative Actions Directive (RAD)<sup>1</sup> was adopted in November 2020 to strengthen consumers' ability to collectively enforce their rights under EU legislation across multiple sectors, both through injunctive and collective redress measures.<sup>2</sup>

Enabling the DMA to be enforced under the RAD<sup>3</sup> would, first of all, **consistently with the Digital Service Act** for which this is proposed, contribute significantly to realising one of **the European Union's priorities** – making the digital age work for European citizens.<sup>4</sup> There is no reason to distinguish between these two proposals which are part of the same package.

Not including the DMA in the RAD - recently adopted flagship legislation for citizens - would send the wrong message to Europe's 450 million consumers, risks undermining the value of the RAD and would stand in contradiction to **Article 12 TFEU**.<sup>5</sup>

Second, enabling the DMA to be enforced under the Representative Actions Directive (RAD) would have multiple benefits in **ensuring the effectiveness of the DMA**:

- It would maximise **deterrence against non-compliance** with the DMA to the benefit of business users and end users (consumers). The threat of representative actions would be a further reason for gatekeepers to ensure compliance with the DMA.
- It would ensure that **consumers under the DMA can exercise their rights** in relation to the obligations imposed on gatekeepers, not only for redress measures but also for injunctive measures to ensure gatekeeper compliance. This would **empower consumers** and their representatives to stop illegal practices and obtain compensation where they have suffered harm where gatekeepers have broken the law.
- There is no doubt that the **DMA creates consumer rights** in the sense of the RAD (similar to telecoms law<sup>6</sup>). As a consequence of the gatekeeper obligations, for example, end users have:

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<sup>1</sup> Representative Actions Directive (Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27.)

<sup>2</sup> The RAD obliges all EU countries to introduce procedures for representative actions, and to give legal standing to bring these actions to non-for-profit entities (in particular consumer associations), complying with certain criteria. Once designated, these entities will be able to represent consumers in court or in front of administrative authorities and to bring domestic and cross border actions seeking injunctions or redress.

<sup>3</sup> The scope of the RAD is defined in its Annex I, which includes a wide list of European legislation, spanning from the directives on unfair contract terms and practices, to financial services, to medical devices, telecoms, energy and many more. This list is intended to be supplemented by new EU legislation, which is relevant for the protection of collective interests of consumers (see RAD, recital 17).

<sup>4</sup> State of the Union 2021 Letter of Intent: [state of the union 2021 letter of intent en.pdf \(europa.eu\)](#)

<sup>5</sup> Article 12 TFEU: "Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities."

<sup>6</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ([OJ L 321, 17.12.2018, p. 36](#)): Articles 88 and 98-116 and Annexes VI and VIII.

- The right to agree, or not, to data combination by gatekeepers
- The right to install software applications
- The right to uninstall software applications
- The right to switch software applications and services
- The right to portability of data.

The co-legislators are furthermore considering amendments to strengthen consumer (end user) rights under the DMA further.

- Where the regulator must focus its resources on the most serious infringements of the DMA, the RAD would **enable complementary enforcement through injunctive measures**, contributing to greater enforcement overall to clean up the market.
- In the absence of adding the DMA to the RAD Annex 1, consumers would have **no way of exercising the rights collectively** as afforded to them by the DMA. If consumers are prevented from switching apps/porting their data, choices will be denied, including privacy friendly alternatives offered by other companies for example.
- Consumers **cannot use the competition law Damages Directive** to enforce the DMA obligations or obtain redress for breaches of the DMA. It is wholly unrealistic for individual consumers to bring legal actions in court against gatekeepers, the most powerful and wealthy companies in the world. **Collective redress would be the only possibility.**
- **Public and private enforcement must go hand in hand** and complement each other.

## Arguments against enforceability of the DMA under the RAD are not persuasive

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- *The DMA is not pure consumer protection legislation and cannot therefore be included in the RAD.*

It is true that the DMA is not **only** concerned with consumer protection. But this is true of other legislation included in Annex 1 to the RAD, which lists for example:

- The GDPR<sup>7</sup>
- Passenger rights<sup>8</sup> – flight operators provide services to businesses as well as consumers
- The Energy Efficiency Directive<sup>9</sup> - which concerns both consumers and business users

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<sup>7</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>8</sup> Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ L 285, 17.10.1997, p. 1); Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

<sup>9</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1): Articles 9-11a.

- The Tyre Regulation.<sup>10</sup>

The DMA clearly includes consumer rights and the fact that it goes beyond this is demonstrably not a bar to its inclusion in the RAD Annex. The DMA provisions which do not concern consumer rights would not be subject to the RAD.

- *It is not possible to add the DMA to the RAD in the text of the DMA.*  
There are plenty of examples where one piece of legislation can add to another. For example, Regulation (EU) No 524/2013 amended the Annex of Regulation (EC) No 2006/2004; or Directive (EU) 2019/770 amended the Annex of Regulation (EU) 2017/2394; or Directive (EU) 2019/771 amended the Annex of Directive 2009/22/EC. Furthermore, the proposed Digital Services Act foresees exactly this in Article 72.
- *The DMA should only be subject to public enforcement as private enforcement is complex.*  
Private enforcement can be complex (multiple plaintiffs and quantifications of damages, for example). But if one accepted this argument, the RAD should not exist. Competition law enforcement is more complex for national courts to enforce than the clear directly applicable obligations in the DMA.

The following must therefore be added to the DMA:

<b>DMA proposal</b>	<b>BEUC proposed amendment</b>
<i>New article</i>	<p>In the Annex I to Directive (EU) 2020/1828 of the European Parliament and of the Council (<sup>11</sup>), the following point is added:</p> <p>'(67) Regulation (EU) 20XX/XXXX of the European Parliament and of the Council of DD MMM YYYY on contestable and fair markets in the digital sector.'</p>
<i>New recital</i>	<p>Recital XX Consumers shall be entitled to enforce their rights in relation to the obligations imposed on gatekeepers under this Regulation through representative actions in accordance with Directive (EU) 2020/1828.</p>

<sup>10</sup> Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters (OJ L 342, 22.12.2009, p. 46): Articles 4-6.

<sup>11</sup> OJ L 409, 4.12.2020, p. 1.



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