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The (First) Draft of the DMA's (First) Implementing Regulation from Scratch: Succinct Rights of Defence v. Expediency

Alba Ribera Martínez (Deputy Editor) (University Carlos III of Madrid, Spain) · Monday, January 16th, 2023

The European Commission has begun the process of creating implementing provisions to ensure the effective enforcement of the Digital Markets Act (DMA). Implementing provisions plague the DMA's functioning, but the EC has started to fulfil the first of its tasks: to lay down the form, content and other details of notification and submissions pursuant to the designation process, under Article 46(1)(a) DMA. This is only a start to the great challenge ahead of the EC when applying the DMA and ensuring its compliance. However, the first Draft of the Implementing Regulation (DI) issued in early December by the EC has not gotten off to a good start, at least when it comes to the reaction it has received on its concluded feedback period on the side of different stakeholders.

The Disputed Provisions: Rights of Defence Imperilled

The DI comprises a draft version of 12 articles that set out the "*self-standing procedural framework*" of the DMA's designation process. However, it does establish the broader practical arrangements of non-compliance proceedings as well as for exercising rights to be heard, for the terms of disclosure and regarding time limits. The text is then paired up with two Annexes: Annex I includes the so-called "Form GD" (for gatekeeper designation) and the information it should include, whereas Annex II consider the format and length of documents to be submitted under the provisions of the DMA in general. Thus, Annex II applies to the broad range of interactions taking place between the designated gatekeepers and the EC throughout the implementation of the DMA.

The DMA aims to address the challenges that past competition law proceedings faced when dealing with competition issues in the digital realm, such as speediness and providing fully-fledged solutions for complex competitive problems. The Draft Implementing Regulation is intended to "*set out a rapid and effective investigatory and enforcement process* (…) *with a view to reconciling the efficiency and effectiveness of the procedure, on the one hand, and the possibility to exercise the right to be heard, on the other*" (Recital 3).

A string of the provisions of the draft version of the DMA's first Implementing Regulation has raised the concern of the stakeholders at large, especially when it comes to the clash between the rights of defence and the eagerness for succinct procedures within the DMA's procedural

framework (see here and here in this regard). Moreover, the feedback received from a range of public stakeholders to the EC's public consultations has also pointed the finger towards the moon dangers posed by Articles 3, 6 and 8 DI.

According to the text of the current DI, the designation process would follow: (i) the submission of information from the addressees of the DMA to the EC through Form GD (Articles 2 and 3); (ii) the EC would refer the preliminary findings on the designation followed by a "*succinct*" period for the addressee to perform observations of the EC's preliminary assessment (Article 6 of the DI and Article 3(5) DMA); (iii) and the EC shall designate as a gatekeeper, at the latest within 45 working days after receiving the complete information (Article 3(4) DMA).

The EC has planned that it will have received all of the data towards notification, at the latest, on 3 July 2023, and the designation will be complete in early September. Starting in March 2024, the obligations of the DMA will start applying.

Article 3: Effective date of notifications and submissions of information

Similar to the existing procedural background surrounding merger control proceedings, Article 3 of the DI highlights the obligation of the addressees to submit the information regarding the quantitative and qualitative thresholds set out in Article 3(2) DMA.

To that end, the gatekeeper must include an exhaustive list of all core platform services (CPS) listed in Article 2 DMA and a detailed explanation of the theoretical boundaries between each of the CPS. Some stakeholders have already raised that this exhaustive explanation of the CPS' and their delineations, as indicated by Section 2 of Annex I (Form GD) is not coherent with the spirit of Article 3(3) DMA, which only requires notification including the "*relevant information* (…) *for each of the core platform services*".

Moreover, the DI turns its back completely towards organisational structure and subsidiary-mother company relations, i.e., the wide concept applicable under competition law. In this regard, a subsidiary of an undertaking providing a core platform service could be subject to notification to the Commission (and, thus, to be designated as a gatekeeper) according to the quantitative thresholds under Article 3(2) of the DMA. Given that the DMA applies based on CPS and not undertaking, this type of designation would not reflect the real problems that the regulatory instrument wants to address regarding contestability and fairness. On the contrary, the subsidiary-designated gatekeeper would segment the whole picture over the gatekeepers' (mother-company) operations with regard to a severed implementation of the DMA, depending on the subsidiary concerned.

Article 6: Observations on preliminary findings

Although Recital 3 DI comprehends the duty of the Commission to establish a fully-fledged manifestation of the right to be heard, the same does not derive from the content of the right in practice. According to Article 6 DI, after the European Commission has concluded with its preliminary findings, it will establish a deadline for the "*gatekeeper*" to provide written comments and evidence regarding the preliminary findings or any actions the Commission plans to take. This

is in accordance with the general right to be heard outlined in Article 34(1) DMA. Mimicking the requirements of written pleadings before the Court of Justice, Annex II establishes a predetermined length of the documents which can be submitted, depending on their nature. For instance, the notification of each CPS may not exceed 50 pages, whilst substantiated arguments to rebut the undertaking's designation as a gatekeeper may not go further than 25 pages long.

The DMA states that the time limit for submitting written observations and evidence should not be less than 14 days. However, Article 6 DI gives the European Commission discretion to set the time limit for as short as 15 days or as long as two months. This time limit applies to observations that undertakings may provide in response to a statement of objections. If needed, the extension of those time limits is also left to the discretion of the Commission, ex Article 10 DI.

In this sense, several stakeholders have also raised their concern regarding the fact that once the European Commission emits its preliminary findings on any issue (not just the designation process), there is no similar procedural instrument similar to the statement of objections. In short, once the preliminary finding is issued, the Commission will have to promptly resolve definitely on a substantive aspect of the DMA's implementation, i.e., designation. Although this mechanism does work in the case of procedures before the Court of Justice, the same would seldom apply in an administrative procedure not subject to the adversarial system based on written pleadings (and a later oral hearing).

Article 8: Access to the file

Following the law and letter of the DMA, an unfettered right to access the file applies to the undertakings, only "*subject to the legitimate interest of undertakings in the protection of their business secrets*" (Article 34(4) DMA). On the contrary, Article 8 DI proposes an unqualified right to access to the file limited by the European Commission's discretion in a myriad of ways.

First, the right to access the file to the addressee of the preliminary findings will only be granted by the Commission on the condition that it is necessary to enable it to exercise its right to be heard. It is not hard at all to think about an instance where the right to be heard can only be preceded by access to the file containing the relevant documents for the proceeding at stake, i.e., the documents and evidence supporting the designation of a gatekeeper.

Second, even if the right is granted it does not pre-emptively entail that the addressee will have access to the full scope of the documents available to the Commission. Instead, the right is provided for access to a "*non-confidential version of at least all documents mentioned in the preliminary findings as well as a list of all documents in the Commission's file*" (Article 8(2) DI).

Once the addressee has accessed the list of all documents available in the EC's file, then it shall request, once again -and under the obligation to "*duly substantiate why access (…) is necessary to exercise its right to be heard*"-, to the Commission to grant it access to those documents which have not been provided or to the redacted parts of the documents provided (Article 8(3) DI). Whether this due substantiation will also extend to not only substantive documents but also to exculpatory documents is a question which has been raised by several stakeholders and that the Commission must attend to when it reviews its DI.

And finally, even in the latter case when documents have been identified as containing business

secrets or other confidential information, the exercise of the right is circumscribed to a particular modality of disclosure and within a time limit indicated by the Commission (Article 8(5) and (6) DI).

The Missing Spaces of the Draft Implementing Regulation

On top of the instances where the DI's provisions have gone too far in terms of emphasising the Commission's discretion in favour of effective enforcement at the cost of due process, the public stakeholders have repeatedly raised the point that the self-standing procedural framework does not stand as self-sufficient as expected.

First, the DI does not provide for the intervention of a Hearing Officer nor does it establish a right to be heard, that is, through an oral hearing. As pointed out earlier in relation to Article 6 DI, the addressees of the DI only can succinctly submit their observations and evidence in writing.

Second, the intervention of third parties in the form of complainants has equally gone unnoticed as it did with the final text of the DMA. In this regard, the regulatory instrument did only provide for their intervention through the "*use of lawfully complaints-handling mechanisms*" other than the DMA to raise the issue of non-compliance (Article 5(6) of the DMA).

Third parties are relegated in the DMA to the role of commentators who can give provide suggestions for the Commission's decision-making regarding compliance (Article 8(5) DMA), systematic non-compliance examined through market investigation (Articles 18(5) and (6) DMA), market investigations for the examination of new services and practices (Article 19(2) DMA) and towards the adoption of a non-compliant decision (Article 29(4) DMA). This pre-assigned role as spectators to the DMA's enforcement excludes them from any substantive action towards contribution to more effective enforcement, insofar as the DI immediately precludes their right to access the file.

Third, in line with the lack of procedural instruments available to the parties to participate (and defend themselves from) in the Commission's decision-making through the submission of enlightening evidence, the DI lacks a substantive body of best practices and/or manual or procedures to guide the undertakings into the rabbit hole of the DMA's enforcement. Several stakeholders advocate for the future issuing from the side of the European Commission of a set of instruments to guide the undertaking's actions in this regard.

(Still) A Long Way to Go but a First Step

The DI lacks clarity and trumps the rights of defence and due process in its current state, although change is prone to manifest, and the Commission will take due note of the stakeholder's feedback on its first draft version. Although the DMA's objective to speed up the enforcement -even though not strictly competition law proceedings- to address contestability and fairness is laudable, it must not come paired up with an indiscriminate margin of discretion in the hands of the European Commission to tailor the rights of defence up to the DMA's requirements. Instead, more speediness should be reinforced with a higher threshold of procedural safeguards and exquisite regard towards procedural fairness and substantive rights of administrative due process.

Bearing in mind mainly its faults, the DI is the first step to a long-drawn process concerning the DMA's rocky enforcement. To deter any further criticism, the second (or definite) draft of this first Implementing Regulation should advocate in favour of due process to gain legitimacy and trust on the side of end users, but also on the side of other enforcers who have also started this same journey towards regulating digital companies.

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