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The First Implementing Regulation of the DMA: 2 May 2023, Designation Day

Alba Ribera Martínez (Deputy Editor) (University Carlos III of Madrid, Spain) · Monday, April 17th, 2023

Last 9 December, the European Commission issued its [first draft implementing regulation for the DMA](#) setting out the practical details surrounding the procedures around the gatekeeper's designation (see the overview of the draft [here](#)). The feedback period surrounding the draft finished on 9 January 2023. On 14 April, the European Commission made public the first [Implementing Regulation for the DMA](#) alongside its two Annexes (on [Form GD](#) and on the [Format and Length of Documents](#)).

This brief comment is aimed at tracking the changes between both versions, as well as at documenting the developments of the Implementing Regulation (IR herein) in its current state. The red-lined versions of the [draft](#) and the [final version](#) are available for their comparison.

The substantive changes of the first Implementing Regulation

The final version of the Implementing Regulation has considered and expanded the provisions surrounding the most salient problems that were voiced out in the feedback period, namely the right to access the file under Article 34(4) DMA and the notification of the potential designation as a gatekeeper as set out by Article 3(3) of the DMA.

Article 8 of the Implementing Regulation: comprehensive access to the file

As opposed to the draft version of the Implementing Regulation, the right to access the file has been majorly reworked in the final version of the Implementing Regulation. In line with the DMA's unfettered right to access the file pursuant to Article 34(4) in favour of the gatekeepers, Article 8 of the Implementing Regulation does not condition the exercise of the right to access the file to the necessity of the undertaking to exercise its right to be heard anymore. In this same vein, the Implementing Regulation has eliminated all of the limitations that were imposed on the right to access the file by the draft version, namely the need to duly substantiate why the access is necessary to exercise its right to be heard.

Instead, the Implementing Regulation recognises an *omnibus* right to access the file (albeit upon prior request to the European Commission) when the EC addresses any type of preliminary finding against it, namely in those scenarios where DG Comp or DG Connect detect a lack of compliance

with the DMA's substantive provisions (Article 8(1) IR).

In contrast with the narrow scope of documents which were comprised under the draft version of the Implementing Regulation (“*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*”), the right to access the file has been substantively expanded in terms of scope, as set out in Articles 8(2) and (3) IR:

- When providing access to the file, the Commission will provide the addressee of the preliminary findings of all of the documents which are mentioned therein, subject to the terms of disclosure previously set out by the EC (Article 8(2) IR).
- The Commission shall also provide access to all documents on its file, without any redactions, under the terms of disclosure to be set out in a Commission decision (Article 8(3) IR).

Thus, the Implementing Regulation has overcome the hurdle of forcing the future-to-be gatekeepers to scrutinise the list of the documents contained in the Commission’s comprehensive file looking for the most relevant pieces of information. In this sense, the DMA’s wish for speed has coped to bring together the effective exercise of the gatekeeper’s rights of defence, too.

Moreover, Articles 8(3) to (5) IR introduce the factors that will influence the EC’s decision on the terms of disclosure of the right to access the file, by taking stock of the extent of the actors involved in that same access. For instance, the European Commission demonstrates an inclination in favour of providing access to those documents to only a limited number of specified legal and economic counsel and external technical experts engaged by the addressee (Article 8(3)(a) IR).

Annex on the Form for Gatekeeper Designation (Form GD): subsidiary-parent relations

Annex I attached to the Implementing Regulation (Form GD) has prevailed setting into stone the undertaking’s obligation to provide an exhaustive list of all core platform services (CPS) and a detailed explanation of the theoretical boundaries between each of them (Section 2 of Annex I). The criticism surrounding the disconnect between this provision and the spirit of Article 3(3) DMA when it comes to the designation process still stands, given that the latter only requires notification including the “*relevant information (...) for each of the core platform services*”.

However, the sole amendment performed on Annex I has directly addressed the question of underenforcement. In the draft version of the annexe, core platform services were directly concerned in the notification, regardless of the organisational structure and subsidiary-parent company relations between a gatekeeper’s core platform services.

To address this issue, Section 1.1.2. of Annex I has introduced the obligation upon the notifying undertaking to provide a description of the corporate structure of the notifying undertaking, namely the identity of the entities that operate each of the core platform services and the entities solely or jointly controlling, directly or indirectly, the former entities. According to the annexe, the definitions of undertaking and control follow Articles 2(27) and (28) which, in turn, refer back to:

- The wide concept of undertaking applicable under competition law (“*entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, including all linked enterprises or connected undertakings that form a group through the direct or indirect*”)

control of an enterprise or undertaking by another“); and

- The possibility of exercising decisive influence on an undertaking within the meaning of Article 3(2) of Regulation n° 139/2004.

By this token, the Implementing Regulation embraces the approach towards the designation process based on core platform services, but without the risk of fragmenting enforcement in line with the different subsidiaries providing CPS in larger parent companies.

The pending issues and some cosmetic changes

Notwithstanding that substantive changes have been introduced in the Implementing Regulation’s final version, a range of conflicting issues still prevail, especially in relation to the addressees’ capacity to intervene in the Commission’s procedures when adopting its decisions.

An article-by-article explanation is contained in the table below acknowledging the meagre changes operated by the final version alongside their impact as well as those provisions which have remained, in form and spirit, the same:

| Provision | Draft Implementing Regulation | Implementing Regulation (final version) | Changes operated by the current text |
|--|--|---|--|
| Article 1: Subject matter and scope | <i>Remained equivalent but for linguistic changes</i> | | |
| Article 2: Notifications and submissions of information following Commission requests | <i>Remained equivalent but for linguistic changes</i> | | |
| Article 3: Effective date of notifications and submissions of information | Date of the effectiveness of the submission of information/substantiated arguments: when complete information is received by the Commission | Clause added for both cases: or on the date on which the Commission informs the undertaking concerned that the information requested is no longer necessary | – Not substantive, more leeway for the gatekeepers when submitting information |
| Article 4: Format and length of documents | Obligation of documents submitted to comply with format in Annex II | Introduction of possibility of the EC to request to put documents in order | – More effective enforcement, given smaller burden of processing information on the Commission |
| Article 5: Opening of proceedings | <i>No changes</i> | | |
| Article 6: Observations on preliminary findings | The conclusion of preliminary findings follows the deadline for the gatekeeper to provide written comments and evidence – time limit discretionary (from 15 days or as long as two months) | Conclusion of preliminary findings follows time-limits to provide written views and evidence – time limit (up to 14 days) – Interviews and requests of information are introduced into the documents listed in the EC’s file (as well as any document spontaneously submitted to the Commission) | – Prevails: no similar instrument to a statement of objections. – New: reduction of time limit to submit comments and evidence. |
| Article 7: Identification and protection of confidential information | Regime of confidentiality of the documents and files in the Commission’s power containing business secrets or other confidential information | – In case of divergence on criteria of disclosure with gatekeeper: information that EC will disclose information unless the undertaking comes forward with objections within one week | – More legally sound in terms of procedure – Additional right to present observations regarding confidentiality of information |

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|--|---|---|--|
| Article 8: Access to the file | Restricted access to the file, subject to the EC's discretion, and not even on every document contained in the EC's files | <ul style="list-style-type: none"> – Expansion of the scope of documents comprised of access and unfettered access to the file – Introduction of elements to be considered in terms of disclosure – Possibility to use the documents accessed through access to the file also in the context of judicial proceedings concerning the application of the DMA | <ul style="list-style-type: none"> – Expansion of effective exercise of rights to defence – Recognition of private enforcement of the DMA and terms of disclosure in those proceedings |
| Article 9: Beginning of time periods | Calculation of time limits in accordance with Regulation n° 1182/71 | Suspension of the time limits until the document is put in order | Reinforces mechanism of EC request under Article 4(3) of the Implementing Regulation |
| Article 10: Setting of time limits | <i>Remained equivalent but for linguistic changes</i> | | |
| Article 11: Transmission and receipt of the documents | <i>Remained equivalent but for linguistic changes</i> | | |
| Article 12: Entry into force | <i>Remained equivalent but for linguistic changes</i> | | |
| Annex I: Form relating to the notification pursuant to Article 3(3) of the DMA for the purposes of gatekeeper designation (Form GD) | <i>Introduction of 1.1.2. in Section 2</i> | | |
| Annex II: Format of documents to be submitted under the DMA | Format of documents according to their style and length | <ul style="list-style-type: none"> – Annexes to the documents submitted do not count for page limits (provided that they are purely evidential and instrumental function and proportionate in number and length) – Information concerning thresholds must follow Form GD – Raises page limit from 25 to 30 for substantiated arguments under Article 3(5) of the DMA – Proportionate number of pages to the preliminary findings in replies to them | More leeway granted to gatekeepers within the constraints and more legally sound |

Next steps: the designation process may start

Following the issue of this first Implementing Regulation by the European Commission, all is now prepared for the notifying undertakings to get to work and notify their potential designation to the EC, which will start as soon as May up until July 2023. Given that the DMA's rules will start to apply on the 2nd of May, and the regulatory instrument provides a timeframe of two additional months to notify, the first decisions concerning gatekeeper designation will be issued as early as September 2023.

However, this first step, i.e., the issuing of the first Implementing Regulation is only the straw for the making of the initial bricks to the DMA's effective implementation. Judicial challenges are expected as soon as designation processes will be completed. And then, the regulatory instrument will start to be at odds with its wish to deliver on its promises in a speedy and diligent manner.

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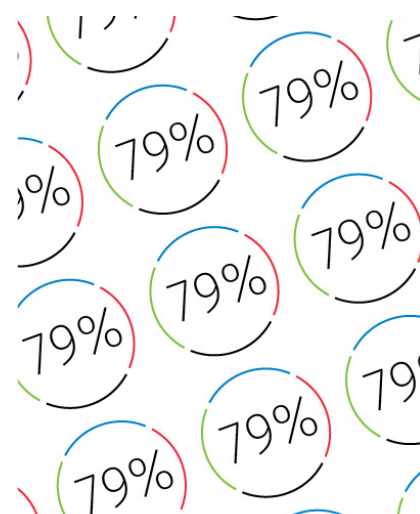
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