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A Three-Ring Template: How to Get Away with Exemption, Suspension and Specification under the DMA

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On 9 October 2023, the European Commission (EC) issued four templates on its official website pertaining to the Digital Markets Act (DMA). Each of them deals with a different provision enshrined in the regulatory framework. First of all, the European Commission published its updated Template for Reporting pursuant to Article 11 of the DMA following its public consultation period which does not diverge substantively from the draft version that was initially presented (see the review of the draft version here). Second, the EC released three additional templates on the expected information that gatekeepers shall disclose to 'activate' the suspension, exemption and specification procedures enshrined in Articles 9, 10 and 8(3) of the DMA. This last group of templates did not merit public consultation and was published by the European Commission directly in light of their necessary and immediate application given that they will exclude compliance from particular provisions of the DMA, upon their request via the procedures set out in these templates.

The specification procedure: a reasoned request – but not every specification decision

Under the legal basis provided by Article 46(1)(d) DMA that confers the power upon the Commission to adopt an implementing act laying down detailed arrangements on the form and content of the reasoned request pursuant to Article 8(3), the EC issued its corresponding Template. Article 8(3) of the DMA establishes the possibility that a gatekeeper may request the Commission to engage in a process to determine whether the measures that it intends to implement ensure compliance with Articles 6 and 7 are effective in achieving the objective of the relevant obligation, bearing in mind the specific circumstances of the gatekeeper. This procedure may not only be triggered upon the gatekeeper's request but also by the EC on its own initiative (Article 8(2) of the DMA).

However, the Template only touched upon the form and details relating to the gatekeeper's reasoned request for specification. Under the terms of Article 8(3), that request shall provide a "*reasoned submission to explain the measures that it intends to implement or has implemented*". Once the gatekeeper has submitted the request, the EC is conferred discretion on whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration. When exercising its discretion, the Commission should provide the main reasons

underlying its assessment to accept or reject the request, including any enforcement priorities that it might have applied in the interim (Recital 65). If the EC finally decides to accept the request, then it will open proceedings pursuant to Article 20 DMA to adopt an implementing act where the measures to be implemented by the gatekeeper will be specified (Article 8(2) of the DMA).

The Template, hence, is not directly concerned with the detailed arrangements surrounding the specification procedure as is, but rather with the procedural path leading to the Commission's decision accepting or refusing to engage in a regulatory dialogue with the gatekeeper for descending compliance with Articles 6 and 7 in fleshing out implementation measures.

In this regard, the Template is centred on establishing the details of the request for specification (Section 2). The EC sets out that eight items must be included in the request so that it can be, at least, appraised by it on the basis of its discretionary power to trigger the procedure under Article 20. In a similar vein to previous templates, the Commission expands on the original provision. In essence, the Template requires that the gatekeeper discloses the specific measures that it will implement based on the issues/questions that it may want to address during the specification process (Sections 2.1 and 2.2 of the Template). Notwithstanding, the Template enshrines that the gatekeeper shall detail: i) how those specific measures may interact with other measures to ensure compliance with other obligations (Section 2.3); ii) the expected time that will be needed to implement them (Section 2.4); iii) how the undertaking plans to monitor compliance with the obligation in particular (Section 2.5); and iv) whether any alternative measures were considered by the gatekeeper and why they were considered insufficient to ensure effective compliance with the relevant obligation (Section 2.6).

The fallacy of self-executing obligations

The *corpus* of the regulatory framework is embodied by Articles 5, 6 and 7 of the DMA. Officials and academics have pushed the narrative and differentiation between these articles into two main groups: self-executing provisions (Article 5) and those susceptible to being further specified under Article 8 (Articles 6 and 7). In fact, *stricto senso*, only Article 6 is directly described in the DMA as such. In contrast, Article 7 was later added to the specification procedure due to its complexity (one must remember that Article 7 was not introduced until one of the latest stages of the legislative process and, thus, was artificially included under the scope of Article 8).

Deriving from this narrative, one could imagine that the provisions in Article 5 are 'easier to apply' than those set out in Articles 6 and 7 – thus their self-executing nature-. In fact, EC officials are adamant in defending that all of the provisions contained in the DMA are pretty straightforward and should be immediately understood by the gatekeepers as such (see the latest of the Commission's officials statements in this direction here).

However, nothing seems to make that argument more plausible once one starts to devise the measures and changes that gatekeepers are compelled to comply with if they wish to be found compliant with the DMA. This point was already formulated in the context of the data-related provisions contained under the regulatory instrument (for a review of the fourth workshop held by the Commission on this particular topic, see here). For instance, even if Article 5(2) prohibiting the processing, cross-using and combining of data across core platform services (CPS) is systematically placed under the scope of Article 5, it is not an easy provision to implement in

reality. Thus, one would imagine that 'informal' specification procedures are already taking place between the gatekeepers and Commission in concretising whether particular measures would satisfy the requirements established by the obligations set out in Article 5. No implementing acts will be issued by the Commission as a result, but it is, without doubt, assumed that some of the obligations under Article 5 are not immediately translatable into the business models of the gatekeepers.

Despite the artificial categorisation of the articles in this way by Article 8, the timeframe established for compliance with the DMA once a gatekeeper is designated seems to point to the contrary, too. The gatekeeper shall comply with the obligations laid down in Articles 5, 6 and 7 within 6 months after a CPS has been listed in the designation decision (Article 3(10) of the DMA), even though particular obligations set out in Article 7 delay compliance further on in time. If one were to assume that the specification procedure would play a relevant role in attaining effective compliance and, thus, determine each of the provisions' distinct nature, then they would have been provided with a different timeframe of expected compliance directly by the legislator. This is not the case, in spite of the fact that the implementing acts deriving from the triggering of the specification procedure will be delayed for 6 months after the opening of proceedings (once the EC decides to accept or refuse the reasoned request), even though it is yet unclear whether the triggering of the specification procedure will produce a suspensory effect on expected compliance with the particular obligation.

A comedy of objectives: contestability, fairness and the objectives pursued by the DMA's obligations

The Template requires that the gatekeeper brings forward upfront the "*issue or question the undertaking would like to address during the specification process*" (Section 2.1.2 of the Template). Contrary to the nature of Article 8(3) of the DMA, the Template does not necessarily involve an iterative process between the gatekeeper and the Commission to determine whether the measures are effective in achieving the objectives of the relevant obligation that is concerned.

Instead, the Template poses the process in a completely different light: that of the gatekeeper taking issue with a particular measure as a consequence of its doubts in relation to how to carve effective compliance with the DMA. This move on the side of the European Commission opens up the scope of the specification process. It is no longer a space of discussion and regulatory dialogue relating to concrete measures and ways to implement one of the regulatory instrument's provisions. Rather, it is an opportunity open to the gatekeeper to stall compliance on the grounds of its looming doubts about the regulatory instrument in itself, its broader objectives and its benchmarks.

It is clear that the DMA cannot be framed exclusively under the lens of contestability and fairness to seek compliance on the side of the gatekeeper. Two levels of objectives co-exist within the regulatory framework: the objectives of the wider DMA and the objectives that are pursued per obligation (I present this same argument in a recent paper available here). This same idea is implicitly recognised in Article 8(1) establishing that "*the measures implemented by the gatekeeper to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligation*". Pursuant to the specification process the gatekeepers could, theoretically, pose the issues/questions that they have over the wider objectives of the DMA (i.e., contestability and fairness) and how to interpret them and how to descend them into reality in

the context of the particular provisions under Articles 6 and 7. By this same means, the gatekeeper could also enquire the Commission directly about the concrete objective that is pursued per obligation (if it is unclear from the regulatory's text) and how that objective should be reconciled with the wider objectives of the regulatory instruments -which should be at the top of the EC's list in monitoring effective enforcement altogether.

Against this background, although short, the Template on the reasoned request that gatekeepers may formulate under Article 8(3) expands the procedure's scope that may trump the first wave of expected compliance set out by the Commission on the 7th of March 2024.

Suspension and exemption: not the same, but yet similar templates

The Commission has also exercised the possibility that Article 46(1)(e) of the DMA enshrined in establishing the detailed arrangements related to the form and content of the reasoned requests pursuant to Articles 9 and 10. Two different templates have been issued as a result: the Template relating to suspension under Article 9 of the DMA and the Template relating to exemption under Article 10 of the DMA. Although both templates are quite alike in terms of their structure, they differ in terms of substance, given that they establish different pathways that the gatekeeper might follow when avoiding compliance with particular obligations set out in the regulatory instrument.

Similar to the specification process under Article 8(3), exemption under Article 10 may be granted upon reasoned request or on the Commission's own initiative, whereas suspension under Article 9 may only be awarded as a consequence of the gatekeeper's reasoned request. As in the case of the Template under Article 8(3), both templates address the scenario where the gatekeepers direct a reasoned request to the Commission and not those cases where it acts on its own initiative.

Article 9 of the DMA: suspension and the numerus apertus clause

The suspension of a specific obligation under Article 9 of the DMA can only be granted on the grounds of exceptional circumstances beyond the gatekeeper's control in the case that compliance with any of the provisions laid down in Articles 5, 6 and 7 would endanger the undertaking's economic viability of its operations in the European Union. The suspension only applies with relation to the specific obligations and for particular CPS. Those exceptional circumstances have to be fleshed out by the gatekeeper and, in any case, limited to the extent and duration that are deemed necessary to enable the gatekeeper to address such a threat (Article 9(1) of the DMA). The rationale underlying the provision is that of ensuring proportionality when the DMA's provisions start to apply regarding the gatekeeper's CPSs (Recital 66).

The exceptional circumstances that may be put forward by the gatekeeper are not reduced to a single subject. The legislator provides an example of such a situation, "*such as as an unforeseen external shock that has temporarily eliminated a significant part of end-user demand for the relevant core platform service*" (Recital 66). Thus, the gatekeeper may demonstrate that its economic viability is endangered due to a myriad of reasons, that are not narrowed down by Article 9. The Template requires the gatekeeper to provide a detailed explanation of these circumstances (Section 2.3 of the Template).

Due to its exceptional nature, the suspension of the obligation is reviewed, at least, every year (unless a shorter interval is specified in the suspension decision) by the European Commission to check whether those circumstances still apply (Article 9(2) of the DMA). Different to the overall suspension of the obligation, the EC, in cases of urgency, may provisionally suspend the application of a specific obligation to one or more individual CPSs already prior to the decision (Article 9(3) of the DMA).

In its assessment, the European Commission must consider the impact of the obligations on the gatekeeper's economic viability as well as on third parties, in particular SMEs and consumers. As a consequence of this analysis, the suspension may be granted subject to conditions and further obligations to be defined by the Commission to ensure a fair balance between those interests and the objectives of this Regulation (Article 9(4) of the DMA). A balancing exercise is required of the EC in assessing the specific obligations' impact, and the Template compels the undertaking to inform about the impact that continued compliance would have on itself as well as on third parties (Section 2.4 of the Template). However, the definition of third parties in the Template is expanded as opposed to Article 9(4). In the Template, competitors, business users and end users are comprised under the category of third parties, whereas the regulatory instrument only included SMEs and consumers (Section 2.4.(ii) of the Template).

The balancing exercise is pre-empted into a different perspective. Under Article 9(4), one could argue that the Commission could have balanced out the impact that the DMA's provisions will have on the economic viability of both gatekeepers and SMEs. Thus, the balancing exercise would be one of comparing the direct impact on the economic viability of their operations and assessing whether the gap between them was sufficient to categorise the gatekeeper's losses in terms of exceptional circumstances that endanger its overall viability in the market. The result would then have to be assessed against the measure of attaining a fair balance between both impacts. In the terms set out by the Template, the balancing exercise is not observed under this perspective, but under the generic and abstract perspective of the correlation between suspending the obligation and the impact born by each of the third parties concerned. The impact of the provision on the economic viability of the gatekeeper is, hence, measured against the impact that the overall suspension would have on each of these agents.

Article 10 of the DMA: the public health and public security exemption

The exemption of an obligation differs from its suspension via Article 9 in that the reasons underlying its granting are much narrower, i.e., it can only be observed on the grounds of public health and/or public security (Article 10(3) of the DMA). Public morality as grounds for exempting the application of a provision was first enshrined in the draft DMA proposed by the European Commission in 2020, but the reference later disappeared with the evolution of the legislative process. The Template requires the gatekeeper to establish what ground is instrumentalised for requesting the exemption and what impact would compliance have relating to those same grounds (Sections 2.4 and 2.5(ii) of the Template).

According to the regulatory instrument, these grounds are already laid down in Union law and have been (widely) interpreted by the Court of Justice (Recital 67). In this sense, they are borrowed from the existing case law of the Court of Justice, but both of the concepts have been particularly salient as exceptions from all four freedoms under the Union's primary rules. Despite the DMA's

assurance in asserting that they are both recognised concepts in EU law, that may not always hold (regarding the concept of public health, see Greer and Jarman, whereas for the concept of public security see Koutrakos).

On the side of public health, one of the foundational decisions -that may ring a bell with most- is *Cassis de Dijon* (Case 120/78) where the public health exception was brought forward by a Member State in banning the products of another Member State based on public health grounds. It was rejected by the Court of Justice and paved the way for mutual recognition of standards in different Member States. The legal basis of public health is set out under Article 168 TFEU setting out the primary responsibility for health protection and healthcare systems lying with the Member States. The Treaty provision is particularly aimed at improving public health, preventing and managing diseases, mitigating sources of danger to human health, and harmonising health strategies between Member States (see the European Parliament's review here). Its appraisal as an exception to the four freedoms has been exceptional. For instance, one of the Union-wide applications for the exception was given before the COVID-19 crisis in closing the external borders of the Union with third countries and the imposition of travel restrictions, notwithstanding the existing clash between the measures and the principle of proportionality in applying them (see Goldner Land for further explanation on the particular example).

On the side of public security, it has been closely defined as the core of the Member States' national sovereignty, from the perspective of both internal and external sovereignty. The seminal *Campus Oil* (Case 72/83) case set out that, for the public security exception to apply, a balancing exercise should be performed between the discretionary implemented by the Member State based on the grounds of national security vis-à-vis the procedural and substantive conditions which EU law requires the Member States to meet. As in the case of the public health exception, the concept of public security is tempered down through the lens of proportionality. Only its narrow application can be understood to converge with the four freedoms of the Union.

Furthermore, the Template establishes that the gatekeeper shall also address on its reasoned request the impact that it will have on any other obligation provided under the DMA (the applicable provisions) as well as the measures that the undertaking proposes to adopt to mitigate the effect of the exemption (Sections 2.7 and 2.8 of the Template). The Template, thus, shifts the burden on the gatekeeper of not only requesting the exemption but also of counter-acting the risks posed by the lack of application of the provision (because it has been exempted by the Commission) via the mitigation of the effects of the exemption.

Key takeaways

Gatekeepers will be keen on avoiding the application of (at least) some of the obligations imposed upon them under the DMA. The specification, suspension and exemption procedures enshrined under Articles 8(3), 9 and 10 are provided in the regulatory instrument to temper the effects of the regulatory framework without destabilising, to a great extent, the operations of the gatekeepers.

However, their nature is quite distinct one from another. The specification procedure is aimed at reconciling the doubts that the gatekeepers might have when applying Articles 6 and 7 of the DMA into reality, whereas the suspension and exemption processes seek to 'mask' compliance until it is viable for the gatekeeper, bearing in mind matters of economic viability, public health and security.

Nothing stops gatekeepers from submitting reasoned requests via the three procedures simultaneously. For instance, a suspension decision might support the effectiveness of a future specification decision via its suspensory effects.

The Templates presented by the Commission in this instance follow the path of expanding the DMA's contours into an overarching corpus of implementing provisions that impose further burdens on the gatekeepers when disposing of the regulatory instrument's tools for engaging with the EC. The Commission shrinks the gatekeepers' chances to find missing gaps in their efforts towards compliance, whilst the principle of proportionality still crumbles beneath it all.

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