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Transparency Unveiled: Access to Information in Digital Markets Act Proceedings

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The Digital Markets Act (DMA) introduced an innovative framework aimed at promoting contestability and fairness in digital markets. In addition to imposing a multitude of substantial obligations on gatekeepers, the DMA incorporates a sophisticated and multi-faceted enforcement system. The European Commission assumes the primary role as the enforcer of the DMA, while the Member States and their national competition authorities (NCAs) play a limited role in the enforcement process. Furthermore, private enforcement of the DMA in national courts has been subject to much discussion.

In this multi-layered enforcement system and similar to the connected enforcement of EU competition law, procedural tools and rights are of considerable importance. In our newest working paper, we discuss how access to information in the context of DMA enforcement works, and want to provide you with a few highlights in the following.

Access to information as a crucial procedural tool in DMA proceedings

In this particular context, the availability of information holds significant importance for stakeholders. For gatekeepers, undertakings, or associations of undertakings involved in DMA procedures, access to information is crucial to safeguard their rights of defense and supplement their right to be heard in relation to the enforcement authority. It also ensures a level playing field when facing opponents in private enforcement proceedings. Third parties may also require access to information in order to comprehend the underlying basis on which decisions are made, which may have an impact on them, or to gather necessary information for private enforcement actions.

Access to information for third parties also aims to address the inherent information imbalance that commonly exists. For third parties who may have potentially suffered harm as a result of DMA violations, access to documents pertaining to investigations conducted under the DMA is essential to establish their claims. Furthermore, this access ensures compliance with the fundamental principle of equality of arms under EU law, which can be derived from Article 6 of the European Convention on Human Rights (ECHR). This principle holds particular significance in the context of private enforcement. In a broader sense, access to information serves the principles of open justice, accountability, and transparency. It fosters a better understanding of DMA enforcement

and enhances public confidence in the process.

Access to information in DMA proceeding provided by the DMA

Access to the file

The DMA and also the DMA Implementing Regulation contain a number of procedural rules that govern access to the file for gatekeepers, undertakings or associations of undertakings concerned, namely Article 34 DMA and Articles 7 and 8 DMA Implementing Regulation. Similar to competition proceedings, the rules connect the right to access to the file with the overall right to be heard as a procedural right of defence in various DMA public enforcement proceedings, such as gatekeeper designation and in the context of Commission decisions on gatekeeper obligations under the DMA. Regarding the procedural obligations of other undertakings or associations of undertakings in the context of DMA public enforcement proceedings, access to the file is granted only if the Commission intends to issue a decision imposing fines for violations of these procedural obligations. Third parties are not undertakings 'concerned' in the sense of the DMA. They may still be affected by proceedings initiated under the DMA if they suffer harm as a result of a violation of DMA obligations. However, they do not have a corresponding right to access the file under the DMA itself. This lack of access prevents them from obtaining likely necessary or at least useful information to initiate and successfully pursue follow-on private enforcement proceedings or seek judicial review against Commission decisions in the European courts.

When it comes to the limits for access to the file, practically most relevant and also explicitly and regulated in Article 34(4) DMA and Articles 7, 8 DMA Implementing Regulation are the limits for confidential information, particularly business secrets and internal documents of the Commission or competition authorities of the Member States. The rules come close to the framework applicable in competition law proceedings, but comparable guidelines and notices by the Commission are missing.

Consultation and publication

Next to the access to the file provisions and specifically relevant for third parties excluded from access to the file under the DMA, various consultation and publication obligations under the DMA can provide a useful source of information. For third parties in particular, this represents a crucial – and often the only – source of information.

The DMA foresees certain consultation obligations during various proceedings. The provisions usually oblige the Commission to 'consult' or third parties 'to provide comments' in the context of specific procedures but not for all procedures in the DMA. This generally is foreseen before the Commission takes a decision involving remedies, commitments, or other measures. In the context of such consultation obligations, the DMA obliges the Commission often but not across to publish a non-confidential summary of the case and a suggestion of measures to be taken.

Moreover, Article 44 DMA includes the general obligation of the Commission to publish the decisions taken under the DMA framework. As known from competition proceedings, the published decisions serve as an important source of information, especially to prepare for any

follow-on private enforcement or to initiate judicial review of the Commission decisions in the EU courts and as a tool to enhance transparency of public enforcement. Outside of explicit publication obligations laid down in the DMA, the Commission generally uses the DMA webpage, https://digital-markets-act.ec.europa.eu/, to update on developments on the DMA and the proceedings.

The DMA does not only oblige the Commission to publish information on DMA enforcement proceedings. Throughout the DMA, one can also find several obligations for the gatekeepers to publish information on their conduct and their compliance with DMA obligations. In the substantive obligations for gatekeepers in Article 6 and 7 DMA, several publication duties connected to other duties of gatekeepers are regulated. Via Article 6(12) DMA, e.g., the gatekeeper is mandated to 'apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services'. Furthermore, Article 11(1) DMA, for example, obliges the gatekeepers to 'provide the Commission with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in Articles 5, 6 and 7 DMA' and publish that report in a non-confidential version as mandated by Article 11(2) DMA. Similarly, according to Article 15(3) DMA, the gatekeeper must make publicly available an overview of the audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services (CPS).

Other EU law to the rescue of third parties?

The lack of access to the file for third parties is not sufficiently compensated for by other EU law tools.

Procedural competition law, namely Regulation 1/2003, Regulation 773/2004 and the corresponding guidelines as well as the rules on *inter-partes* disclosure and disclosure of documents in the file of a competition authority of the Damages Directive do not apply in the context of the DMA enforcement. They are only applicable for competition law and the DMA – without going into detail here – does not constitute competition law.

On the contrary, the EU Transparency Regulation can also be used for the DMA. However, it will be very likely that the European Courts would apply their limiting case law stemming from competition law on the exception in Article 4(2) Transparency Regulation on the protection of commercial interests also in the context of the DMA. For competition law, to foster procedural economy, the *EnBW* jurisprudence has established a far-reaching general presumption that documents in the competition investigation files are not to be disclosed under the Transparency Regulation.

Other EU law rules overlapping with DMA obligations, such as Article 15 GDPR, or disclosure rules applicable to DMA proceedings conducted under the Representative Action Directive framework, are only applicable in their limited context.

Role of Member States access rules

As the DMA itself holds quite limited possibilities for access to information – in particular when it comes to third parties – it is worth taking a closer look at the situation on a national level of the Member States. Looking at two contrarian examples, Germany and Austria, one understands the pivotal role of national rules also in the context of the DMA – a regulatory framework that was supposed to prevent national solo-efforts.

With the recent 11th Amendment of the German competition act, the Act Against Restraints of Competition (ARC), Germany has been the initial EU Member State to integrate infringements against Articles 5, 6, and 7 DMA into its domestic competition law private enforcement system. According to the German ACR amendment, the German rules transposing the Damages Directive apply also to the respective DMA infringements, which offer the widest possible access to information available for third parties. (Possible) claimants (and defendants) for DMA damages proceedings, will have a wide access to information under the Damages Directive disclosure regime and enjoy equivalent rights to parties in competition damages proceedings.

On the contrary, Austrian law does not foresee the applicability of the Damages Directive transposition vis-à-vis the DMA. Other comparable disclosure rules do not exist in Austrian law. General freedom of information rules are also not helpful, as they only applies vis-à-vis Austrian public authorities, which only have a very limited role in the DMA enforcement.

Conclusion

Access to the file is also in the DMA proceedings only seen as a procedural tool for defence. For third parties, access to the file is very limited and basically only provided through the German national application of the Damages Directive disclosure rules which encompass files of, inter alia, the European Commission. Otherwise, for third parties, general consultation and publication obligations are the only major sources of information on DMA proceedings.

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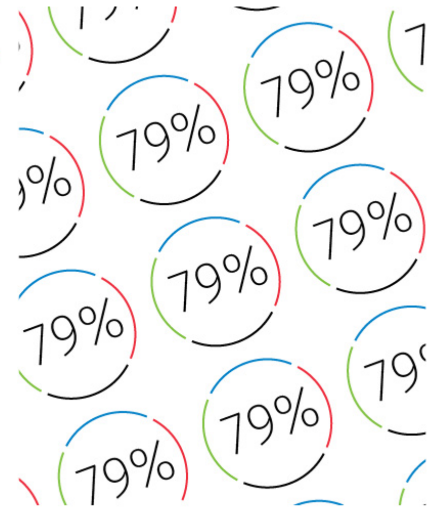

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