BEUC The European Consumer Organisation

The Consumer Voice in Europe

European Commission DMA Team

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Subject: BEUC's input on the draft DMA Implementing Regulation

Dear European Commission DMA Team,

BEUC herewith provides its comments on the draft Commission Implementing Regulation (IR) on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council.

We would like to stress that the effectiveness of the DMA will depend on its implementation and enforcement in which the IR will play an important role. Overall, the IR strikes the right balance between the rights of defence of gatekeepers and the principles of good administration in enforcement and we would therefore call on the Commission to resist pressure from gatekeepers or their legal representatives to undermine the provisions in the draft IR that balance the fairness and efficiency of proceedings.

BEUC's comments are limited to issues of direct interest to consumers, as end users and third parties, under the Digital Markets Act, Regulation 2022/1925 (DMA).

1. Article 4 IR - Length of documents

BEUC supports Article 4 on limiting the length of documents. This idea is in line with the practice of the Court of Justice of the European Union[1] and should therefore be considered legitimate from the point of view of rights of defence.

Furthermore, excessively long documents could be strategically used by gatekeepers to delay and undermine effective DMA implementation and enforcement.

2. Article 8 IR - Gatekeepers' access to file

The DMA is designed to be *ex ante* regulation. One of its significant benefits over competition law enforcement under Articles 101 and 102 TFEU should therefore be speed of application since the European legislator has already decided which specific obligations gatekeepers must abide by. The DMA will nevertheless require implementation and enforcement decisions to be taken by the Commission. These decisions should not, however, be made vulnerable to deliberate delays and game-playing under the guise of rights of defence. Whilst effective rights of defence for gatekeepers must of course be ensured, the Implementing Regulation must minimise delays to DMA implementation to the extent possible. This applies in particular to confidentiality claims under access to file.

BEUC has first-hand experience of how antitrust cases can be slowed down by confidentiality claims – sometimes used strategically - with the result that the finding of an infringement takes an excessively long time, thereby prolonging the harm to consumers. This risk must be minimised in the implementation and enforcement of the DMA. Timely compliance with the DMA by

[1] Rules of Procedure of the Court of Justice, Article 58.

gatekeepers must not be compromised. Consumers (end users) must see the intended benefits to which they have rights under the DMA within an appropriate timeframe.

The Commission's decision-making under the DMA is rightly subject to relatively strict deadlines, several of which are legally binding. Even if gatekeepers should not be able, in these cases, to delay the Commission's decision beyond these binding deadlines, delays in relation to access to the file should be avoided as they could still be instrumentalized to slow down the decision within the deadline period and lead to squeezing the decision-making timeframe post access to the file resulting in sub-optimal decisions due to lack of remaining time before the deadline expires.

Whilst business (and end) users would have no incentive to delay DMA implementation and enforcement, legitimate confidentiality claims by third parties can be imagined in their submissions to the Commission.[2] By contrast, gatekeepers would have an incentive for delay and could, for example, challenge confidentiality claims and thereby undermine DMA implementation and enforcement. Article 7 (4) IR specifies that if an undertaking fails to comply with a request by the Commission to identify and justify confidential information pursuant to Article 7(2) or (3) IR, the Commission may consider that the documents or statements concerned do not contain business secrets or other confidential information. There is, however, no provision in Article 7 IR or in Article 8 IR (other than Article 8(9)) to prevent prolonged debates between parties on confidential treatment. Article 8(9) provides that the Commission may decide to give access to a non-confidential version of a requested document in order to avoid a disproportionate delay or administrative burden. This limited access may in some cases not be appropriate however.

With this in mind, it would seem preferable to use solutions that would preclude delays due to confidentiality disputes between gatekeepers and other parties exercising their right to confidentiality, while respecting the gatekeepers' rights of defence. One such solution could be to give gatekeepers access to the file using "confidentiality rings".

Confidentiality ring options are set out in the Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraphs 95-98 and in DG Competition's Best Practices and Manual of Procedures, paragraphs 107-119. These include negotiated disclosure procedures limiting access to a restricted circle of persons (either within the undertaking concerned or to external advisors) and data rooms to which only external advisors would have access.

Confidentiality rings have also been recommended by the Commission for use by national courts in the "Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law"[3] which sets out the benefits of their use and how they can be organised. Confidentiality ring options have been included in legislation in, for example, Austria[4], Italy[5], Poland[6], France[7], Germany[8]. Confidentiality rings are

[2] There is some ambiguity in recital 4 IR, when compared with Article 7 IR. The former suggests that third parties may only protect their identity while Article 7 makes it clear that other parts of submissions can be redacted for business secrets or other confidential information. Recital 4 could be clarified.

[3] European Commission, Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020/C 242/01), Section C, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0722(01)&from=EN.

[4] Federal Act against Cartels and other Restrictions of Competition (2005, amended last 2021), Disclosure of evidence under § 37j. (6), see https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf.

[5] Legislative Decree 3/2017 implementing the Damages Directive 2014/104/EU, 19 January 2017, Article 3, which implements Article 5 of the Directive.

[6] Act of 21 April 2017 on claims for damages caused by an infringement of competition law implementing the Damages Directive 2014/104/EU, Article 23. Relevant provisions of the Code of Civil Procedure apply as well, see for example Article 153 and Article 479 33 (3), https://www.global-regulation.com/translation/poland/7049655/act-of-17-november-1964%252c-the-code-of-civil-procedure.html.

[7] Similarly to the EC Communication's confidentiality ring, see French legislation (Commercial Code), French Decree No 2018-1126 of 11 December 2018, specifically Article R153-6, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000037802105/#LEGISCTA000037805796.

[8] See the German Patent Act, Section 140c (3). A so-called "Düsseldorf Procedure" concept has been developed in the field of the German intellectual property law, where evidence is examined exclusively by authorised experts and lawyers bound by confidentiality (European Commission, 'Study on Trade Secrets and Confidential Business Information in the Internal Market' (2013).

also used by the former Member State, the UK, in the Competition Appeal Tribunal[9] and the Competition and Markets Authority.[10]

Confidentiality rings may be an option in Commission decisions foreseen under Article 8(5) and (6) IR, however this should be made more explicit. In light of the DMA's intended effect, the Implementing Regulation should set out in which circumstances these forms of access to the file should be considered and indeed potentially made the default, barring exceptional circumstances.[11]

While the DMA can take inspiration from competition law proceedings, it is not competition law but broader internal market regulation. It should therefore not be bound by competition law practices. Rather it should create a "dedicated self-standing procedural framework"[12] in line with its *ex ante* purpose, with the aim of setting out "a rapid and effective investigatory and enforcement process"[13], provided rights of defence are respected. Extensive use of confidentiality rings would make sense in this framework.

3. Third parties' position in the conduct of proceedings

The Commission and the co-legislators have recognised the important role of third parties in the effective implementation and enforcement of the DMA. This should be reflected in the Implementing Regulation (beyond the right of third parties to request confidential treatment of submissions), having regard to Article 46(1) points (b), (d) and (i) DMA.

Remedies in competition cases in the digital sector have not always been successful. Greater involvement of third parties in remedies discussions would likely have avoided some of the problems.

The Implementing Regulation should set out how the Commission intends to involve third parties (whether business users, competitors, end users – including consumer organisations and other civil society organisations, etc) in decisions under Articles 8, 18, 19 and 29 DMA[14], whether this is a Commission discretion (as under Articles 19 and 29) or an obligation (Articles 8 and 18). It would seem preferable to specify how the Commission intends to apply the third party consultation/comment provisions in these four articles in practice, not only for the sake of transparency for third parties, enabling them to best contribute to the Commission's effective decision-making but also so that gatekeepers know what to expect and cannot raise spurious procedural objections in the process of implementation and enforcement of the DMA.

Provisions should be included, for example, on access to information and other procedural issues.

3.1 Access to information

The draft Implementing Regulation only deals with access to the file by gatekeepers and not information rights of third parties under the DMA. These should also be addressed in the interests of good administration and the principle of legal certainty and to ensure fair and efficient proceedings.[15] It is noted that while Articles 8 and 18 DMA set out high level information rights for third parties[16], Articles 19 and 29 DMA do not set out what information the Commission should share with third parties. This could be clarified to promote effective enforcement.

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[9] Competition Appeal Tribunal, Guide to Proceedings, 1 October 2015, point 7.37 of Section 7, https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf

[10] Transparency and disclosure - Statement of CMA's policy and approach, CMA6, paragraph 4.29. See also Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA8, Chapter 11. https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases

[11] See also, recital 3 IR.

[12] Recital 3 IR.

[13] Ibid.

[14] Article 8: Compliance with obligations for gatekeepers; Article 18: Market investigation into systematic non-compliance; Article 19: Market investigation into new services and new practices; Article 29: Non-compliance.

[15] See draft Implementing Regulation, recitals 1 and 2.

[16] Article 8 (5) DMA: "a non-confidential summary of the case and the measures that it is considering taking" and 18(5) DMA: "a non-confidential summary of the case and the remedies that it is considering imposing".

Access to information will be key to third party input into Commission decision-making, including how issues of confidentiality are dealt with.

In relation to confidentiality ring options for access to information by third parties, the Commission should take account of the fact that consumer organisations and other civil society organisations are, first, much less likely than businesses to make confidentiality claims and thus will not have the same negotiating position in terms of reciprocal disclosures in bilateral negotiations on access to documents containing purported confidential information. The imbalance in resources of gatekeepers and third parties may furthermore be used by gatekeepers to drain/exhaust the resources of civil society (and indeed other third parties). Second, as civil society organisations do not compete with gatekeepers or business users, the need to only disclose information to external advisors (which, given the resources of civil society organisations, they are unlikely to be able to afford) is unlikely to arise in order to protect confidentiality.

Third party access to information practices should therefore be adapted accordingly for civil society. For example, if gatekeepers are unreasonably restricting access to essential information for civil society in negotiated disclosure, the Commission should step in to prevent delays and ineffective outcomes. For civil society organisations, rather than restricting disclosure of information to external advisors, the Commission could instead require written confidentiality undertakings to limit information to identified individuals within the civil society organisation and to limit the use to which disclosed information can be put.[17]

3.2 Other rules for third parties

In the interests of legal certainty, the Implementing Regulation should specify the rules on languages and other formalities for third party submissions.[18] In the interests of fairness, the maximum length of third party submissions, could be restricted similarly to gatekeeper submissions.[19] Article 10 IR on setting of time limits and Article 11 IR on transmission and receipt of documents should also apply to third parties.

Yours sincerely,

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[17] See also Article 8 (5(a)) and (8) IR.
[18] See draft Implementing Regulation, recital 2, Article 2(6), (7) for gatekeepers, Annex II (point 1).
[19] See draft Implementing Regulation, Article 4, (7) for gatekeepers, Annex II (point 2).