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Digital Markets Act – Implementing provisions

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The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Opinion

1. INTRODUCTION

On 1 November 2022, the Regulation (EU) 2022/1925 (hereinafter referred to as "the Digital Markets Act (DMA)") entered into force and will become applicable, for the most part, on 2 May 2023. The DMA empowers the European Commission to adopt implementing acts laying down detailed arrangements on issues identified in Article 46 of the DMA. The Commission now intends to adopt an implementing regulation laying down rules concerning procedural aspects in relation to certain practical arrangements envisaged under Article 46. Thus, it published a draft act on 9 December 2022 (hereinafter referred to as "the Draft of the Implementing Regulation (EU) of the DMA") and invited public comment on it. The German Federal Bar's comments are submitted in this statement.

2. GENERAL COMMENTS

The German Federal Bar proposes a detailed review of the current Draft of the Implementing Regulation (EU) of the DMA. Specifically Recital 2, Article 2, 3, 4, 5, 6, 7, 8, Chapter V as well as Section 3.2 of Annex I of the Draft of the Implementing Regulation (EU) of the DMA may need amendments in order to ensure fair proceedings, legal certainty as well as equality of arms between the European Commission and the addressees of the DMA.

3. RECITAL 2 OF THE DRAFT OF THE IMPLEMENTING REGULATION (EU) OF DMA

Recital 2 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"In the process of preparing a notification pursuant to Article 3(3) of Regulation (EU) 2022/1925 and Article 2 of this Regulation and within a reasonable timeframe before this notification, an undertaking providing core platform services may engage in pre-notification contacts with the Commission."*

It appears desirable to more closely regulate / define these pre-notification contacts. It would be helpful to have further information on the form in which the pre-notification contacts are to be initiated and what period of lead time is considered appropriate in this respect. It may be preferable to add a separate Article in the regulation instead of only mentioning this in a recital.

4. CHAPTER II – NOTIFICATIONS, REQUESTS AND OTHER SUBMISSIONS

4.1 Article 2 of the Draft of the Implementing Regulation (EU) of the DMA – Notifications and submissions of information following Commission request

Article 2 paragraph 8 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"The Commission may, upon reasoned request, exempt an undertaking from the obligation to provide specific documents or pieces of information required for the notification referred to in paragraph 1, where the Commission considers that compliance with those obligations is not necessary for its assessment of the notification pursuant to Article 3(4) of Regulation (EU) 2022/1925."*

It may be helpful to further substantiate the requirements for such a request, especially what kind of document requests may be waived, for which reasons, and within which time period before the notification deadline elapses.

4.2 Article 3 of the Draft of the Implementing Regulation (EU) of the DMA – Effective date of notifications and submissions of information

(a) Paragraph 1

Article 3 paragraph 1 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"Where the information contained in a notification or submission of information referred to in Article 2(1) to (3) of this Regulation is incomplete in any material respect, the Commission shall inform the undertaking concerned or its representatives in writing without delay."*

The regulation should require the Commission to revert by a defined deadline: "without delay and in any event within (…) days" or "without delay or at the latest (…) days". As the notification will be deemed incomplete in this case, and the EC could in theory impose a fine under Art. 30 (3), it will be important for the addressee to know within a set deadline that a notification is considered complete.

(b) Paragraph 3

Article 3 paragraph 3 of the Draft of the Implementing Regulation (EU) of the DMA reads:

> *"The notifying undertaking shall communicate without delay to the Commission the following: (i) any material change in the facts presented in a notification, submission of information or of substantiated arguments referred to in Article 2(1) to (3), coming to light subsequently to the relevant notification or submission, which the undertaking knows or ought to know, and (ii) any new information coming to light subsequently to its notification or submission, which the undertaking knows or ought to know and which would have had to be submitted if known at the time of its notification, or submission."*

As a first point, it appears necessary to specify what is meant by "material change" and what conditions need to be met in order to have "material change".

Further, we consider this type of ongoing self-assessment and reporting obligation too onerous, unless further qualified. The qualification sought would be twofold: (i) a buffer period (applying from first knowledge, e.g. one month – the "next working day" rule in Art 9 (2) being far too short) before the obligation is triggered, and (ii) a closer definition of "ought to know" (who is considered obliged to know – limited to the board or management or chief compliance officer – and by which means – is it e.g. sufficient to establish an active compliance system for the DMA, as undertakings will need to do (Art 29 DMA), and establish reporting lines within it).

Moreover, in the case of incriminating information (e.g. information that would lead to an assessment of non-compliance with the DMA) such an obligation to actively inform the Commission is unlikely to be compatible with the privilege against self-incrimination. The obligation therefore needs to be curtailed in that respect.

Finally, it is unclear what legal consequence should follow if the companies concerned do not comply with the obligation in Article 3 paragraph 3 of the Draft of the Implementing Regulation (EU) of the DMA. If this ongoing self-assessment obligation is to be subsumed under Art 30(3) – correctness and completeness of notification, the above qualifications are all the more necessary to create legal certainty.

4.3 Article 4 of the Draft of the Implementing Regulation (EU) of the DMA – Format and length of documents

Recital 2 of the Draft of the Implementing Regulation (EU) of the DMA reads:

> *"In particular, it is necessary to set out rules as regards the format and maximum length of documents, use of languages and the procedure for the transmission and receipt of documents."*

According to Article 4 of the Draft of the Implementing Regulation (EU) of the DMA

> *„Documents submitted to the Commission under Regulation (EU) 2022/1925 shall comply with the format and page limits set out in Annex II to this Regulation. The Commission may, upon reasoned request, authorize an undertaking or association of undertakings to exceed those page limits where and to the extent that the undertaking or association of undertakings substantiates that it is objectively impossible to deal with particularly complex legal or factual issues within the relevant page limits."*

It would be desirable to regulate such a request more precisely, in particular regarding the timing for such a request before the relevant notification deadline expires and regarding available reasons for extending these page limits. Moreover, the standard of „objectively impossible" appears to be over-engineered (how could anyone prove „objective impossibility"?) and unnecessarily restrictive on the addressees. This standard should be relaxed to a showing of a „reasonable" need for an extension.

5. CHAPTER III ART. 5 OF THE DRAFT OF THE IMPLEMENTING REGULATION (EU) OF THE DMA – OPENING OF PROCEEDINGS

Article 5 paragraph 1 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"The Commission may decide to open proceedings with a view to adopting a decision pursuant to Article 29 of Regulation (EU) 2022/1925 at any point in time, but no later*

than the date on which it issues the preliminary findings pursuant to Article 29(3) of that Regulation."

Article 20 paragraph 1 DMA provides that the Commission *formally* opens a proceeding if it considers to issue a non-compliance decision. Article 20 paragraph 2 DMA deals with investigations taking place before the formal opening of an investigation, which we expect to become the regular approach in DMA cases as well. However, this standard case is not reflected in Article 5 paragraph 1 of the Draft of the Implementing Regulation (EU) of the DMA. In fact, only the formal opening of proceedings is discussed here. This should be clarified in the text, for example by adding the word "formal": "*The Commission may decide to open formal proceedings with a view to adopting a decision*".

6. CHAPTER IV – RIGHT TO BE HEARD AND ACCESS TO THE FILE

6.1 Article 6 of the Draft of the Implementing Regulation (EU) of the DMA – Observations on preliminary findings

Article 6 reads:

"The addressee of preliminary findings pursuant to Article 34(1) of Regulation (EU) 2022/1925 may, within the time-limit set by the Commission pursuant to Article 34(2) of that Regulation, succinctly inform the Commission of its views in writing and submit evidence in support thereof. The Commission is not obliged to take account of written submissions received after the expiry of that time-limit."

This Article is obsolete, because it does not extend beyond Article 34 DMA. To avoid duplication, the provision should be deleted.

6.2 Article 7 of the Draft of the Implementing Regulation (EU) of the DMA – Identification and protection of confidential information

Article 7 of the Draft of the Implementing Regulation (EU) of the DMA contains regulations for the protection of confidential information. Paragraph 4 provides that

"If undertakings or associations of undertakings fail to comply with a request by the Commission pursuant to paragraphs 2 or 3, the Commission may consider that the documents or statements concerned do not contain business secrets or other confidential information."

In this context, it should be noted that the relevant documents and statements may also contain confidential information of third parties. These are not involved in the process of identifying and protecting confidential information. In order to protect such third-party information, the Commission would have to check whether a document contains confidential information of third parties not involved in the procedure before releasing a document. This applies in particular to information that is subject to data protection. The regulation should be amended accordingly ("… *Commission may consider that the documents or statements concerned do not contain business secrets or other confidential information of that party, while the Commission will be required to protect third-party confidential information, if any")*.

6.3 Article 8 of the Draft of the Implementing Regulation (EU) of the DMA – Access to the file

Article 8 paragraph 1 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"[…] Access to the file shall not be granted before the notification of the preliminary findings [before adopting a decision pursuant to Article 8, Article 9 paragraph 1, Article 10 paragraph 1, Articles 17, 18, 24, 25, 29 and 30 and Article 31 paragraph 2].*"

This implies that regarding designation decisions there is no access to the file provided. This limitation is already immanent to the DMA (cf. Article 34 paragraph 1 of the DMA) and may take into account that designation decisions rely on the potential gatekeeper's own information as submitted to the Commission. However, in case of a complaint in the Commission's file, this may be otherwise and therefore access to the file should also be granted where the Commission's file does hold other documents than those of the potential gatekeeper.

Further, in order to protect the rights of defence of the access petitioner, the Commission should not itself make the final decision regarding access to the files. A neutral third party should be involved, such as the EU ombudsman or the hearing officer (with rights extended to DMA proceedings).

Moreover, the restriction placed on this right to access the file, namely only "*to the extent that is necessary to enable it to exercise its right to be heard*" should be more closely defined to narrow the EC's discretion.

7. CHAPTER V – TIME LIMITS

Article 10 paragraph 2 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"Where appropriate and upon reasoned request by the undertakings or associations of undertakings concerned made before the expiry of the time-limit set by the Commission pursuant to this Regulation, time-limits may be extended. In deciding whether to grant such extension, the Commission shall assess whether the reasoned request is sufficiently substantiated and whether the requested extension is liable to endanger the compliance with the applicable procedural time limits laid down in Regulation (EU) 2022/1925."*

This provision grants a large margin of administrative discretion to the Commission, which raises the question of its compatibility with the principle of equality of arms and procedural fairness, especially since the Commission is not subject to page limits in its findings or decisions. Accordingly, this standard should be relaxed and, if necessary, a route to the hearing officer (or similar) be opened.

Furthermore, a provision that states the possibility of the so-called "*restitutio in integrum*" according to the judgment of the CJEU, T-314/10, Cook's, EU:T:2012:329, § 16-17 might be helpful.

8. SECTION 3.2 OF ANNEX I OF THE DRAFT OF THE IMPLEMENTING REGULATION (EU) OF THE DMA I.C.W. ARTICLE 2 (1) OF THE DRAFT OF THE IMPLEMENTING REGULATION (EU) OF THE DMA

Article 2 paragraph 1 of the Draft of the Implementing Regulation (EU) of the DMA states:

> *"Notifications pursuant to Article 3(3), first subparagraph, of Regulation (EU) 2022/1925 shall contain all the information, including documents, requested in the form set out in Annex I to this Regulation."*

According to Section 3.2 of Annex I the undertaking has to provide information as to the *"fair market value"* (FMV) of the undertaking in the last financial year. In the case of unlisted companies, the determination of the FMV may lead to varying results depending on the method used. It would be desirable if the Commission were to comment in more detail on the methods to be used. Otherwise this leads to a lack of legal certainty.

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