

Implementing the DMA: Great Power Requires Great Procedural Safeguards

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tl;dr

Background: In December 2022, the European Commission launched a [public consultation](#) on the [regulation to implement](#) the Digital Markets Act, including how the DMA will be enforced procedurally. Among the issues the regulation covers are parties' rights to be heard, firms' deadlines to submit documents to the Commission, access to those documents and to the Commission's case file, and how confidentiality will be protected.

However... While reasonable people may disagree about the merits of digital-markets regulation, *appropriate* procedural rules that safeguard parties' rights and create legal certainty are essential. The timing, background, and content of the Implementing Regulation, however, all raise legitimate concerns and underscore broader issues in the DMA.

KEY TAKEAWAYS

FEELING THE NEED FOR SPEED

The consultation's timing suggests that the Commission has prioritized swiftness ahead of quality. For firms, the consequences of noncompliance with orders issued under the enormous new powers the DMA grants to the Commission are potential fines of up to 10% of worldwide turnover and the impending threat

of structural and behavioral remedies, up to and including breakups. Wisdom counsels that such expansive powers must be buttressed with appropriate procedural safeguards.

Clearly, in the context of a completely novel legal regime, firms should be given time to understand the nature and scope of their new (and unprecedented) rights and duties and to raise any concerns. But the Commission has scheduled just a one-month consultation, announced just before the Christmas holidays and scarcely [six months](#) before the DMA will enter into full force.

The Commission has made clear that it wants to enforce the DMA as soon as possible, even if that comes at the expense of avoidable judicial errors.

THE DMA ITSELF SHOULD HAVE INCLUDED PROCEDURAL SAFEGUARDS

The decision to launch an 11th hour public consultation might not be so onerous were there just a few points that required further clarity. Instead, the Commission has left the bulk of fundamental procedural aspects to be constructed from the ground up.

Among the matters covered by the draft Implementing Regulation are the form and content of notifications in, e.g., the gatekeeper-designation process and requests for exemptions; "practical arrangements" regarding what noncompliance decisions

should contain and how they should be notified; and how exercise of the right to be heard will be respected.

Still left unanswered by the draft Implementing Regulation are such questions as the precise role of third parties in DMA processes, the role of the advisory committee in decision making, whether the college of commissioners or just one commissioner is the ultimate decision maker, whether national authorities will be able to access data gathered by the Commission, and whether there is a role for the European Competition Network in coordinating and allocating cases between the EU and the member states.

Adding to the problem is that implementing regulations do not require a parliamentary vote and thus do not benefit from the usual legislative checks and balances.

BOLSTERING PROCEDURAL EXPEDIENCY IN THE COMMISSION'S FAVOR

The draft Implementing Regulation makes clear that the Commission [prioritizes](#) procedural effectiveness over procedural fairness. It establishes a “succinct” (short) right to respond to the Commission’s preliminary findings, thereby abridging parties’ right to defense in ways that the Commission is not similarly constrained in issuing its preliminary findings.

Procedural rules exist to protect parties from abuses by the administration, as well as to protect the administration from costly and unnecessary litigation.

There has long been discussion about [defects](#) in the Commission’s decision-making process. Just this past year, two marquee decisions were quashed by the European Court of Justice, at least partially because of procedural irregularities: [Qualcomm](#) and [Intel](#). Unfortunately, the DMA and the Implementing Regulation do little to assuage these concerns, and much to compound them.

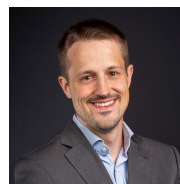
THE IMPLEMENTING REGULATION'S FLAWS REVEAL DEEPER PROBLEMS IN EU LAW

In seeking to achieve its ambitious goals to regulate so-called “Big Tech,” the Commission has often allowed political impetus and [expediency](#) to trump careful consideration of procedural and substantive questions. The risk is not only that economic growth will be gutted and [innovation will be chilled](#), but that important principles of liberal democracy like the right of defense will be sidelined. Administrative abuses and overenforcement threaten to become a political game in which fining companies becomes an end in itself and a misguided barometer of successful policy.

Regardless of whether the DMA’s ultimate goals represent wise and meritorious policy, appropriate procedural safeguards are essential to their implementation. Ultimately, even the European Charter of Fundamental Rights is at stake.

For more on this issue, see ICLE’s recent output on the DMA [here](#) and [here](#), and on the Open Apps Market Act [here](#).

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