TRANSPARENCY UNVEILED: ACCESS TO INFORMATION IN DIGITAL MARKETS ACT PROCEEDINGS ON EU LEVEL

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Access to information is essential in order to guarantee fundamental procedural rights under EU law – in particular in order to make full use of the right of defence. At the same time, access to information ensures the greatest possible transparency for all parties and stakeholders. Furthermore, access to information is also crucial in order to strengthen private enforcement, which is the second essential pillar of the effective enforcement of EU law in competition law. This article outlines the options provided for accessing information in the context of the new DMA on EU level. This article is part 1 on the issue of 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings'.

1 INTRODUCTION

The Digital Markets Act[1] contains a novel framework to ensure contestability and fair digital markets. Next to a plethora of substantive obligations for gatekeepers, the DMA provides for a sophisticated multi-layered enforcement system. The Commission constitutes the core enforcer of the DMA, with the Member States and their national competition authorities (NCAs) only having limited roles.[2] Furthermore, private enforcement of the DMA in national courts has been subject to much discussion.[3]

In this multi-layered enforcement system, and similarly to the related enforcement of EU competition law, procedural tools and rights are of considerable importance. In this context, access to information is decisive for stakeholders. For gatekeepers or undertakings or associations of undertakings concerned by DMA procedures, access to information is crucial to protect the rights of the defence, complement the right to be heard vis-a-vis the

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[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/01 (DMA).

[2] Eg NCAs must inform the Commission when initiating investigations against gatekeepers under national competition law according to Articles 38(1), (2), (3), (5) DMA and once the Commission opens an investigation, the respective NCA must close its own and also report on the status of its investigations according to Article 38(7) DMA. See also Alexandre De Streel et al, 'Effective and Proportionate Implementation of the DMA' (2023) Centre on Regulation in Europe (CERRE) <https://ssrn.com/abstract=4323647> accessed 30 March 2024.

[3] Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13(4) Journal of European Competition Law & Practice 254.

enforcement authority and guarantee equality of arms vis-a-vis opponents in private enforcement proceedings.[4] Third parties may require access to information in order to understand the basis on which decisions that may affect them are being made or to gather information necessary for private enforcement actions. Rules that enable third parties to access information intend to compensate for the information asymmetry that usually exists.[5] For third parties that potentially suffered from harm caused by violations of the DMA-provision, access to documents referring investigations under the DMA are vital to establish their claim in the first place.[6] Moreover, it ensures that the fundamental principle of equality of arms under EU law is complied with, which can be derived from Article 6 ECHR[7] and which particularly plays an important role when it comes to private enforcement.[8] In general, access to information more broadly serves the principle of open justice, accountability, and transparency, fostering the general understanding and public confidence in DMA enforcement and public confidence.[9]

This article deals with access to information in the context of DMA enforcement. It covers access to information in the broader sense, including access to public enforcement files (discussed in-depth), inter-partes disclosure, publications of press releases, summaries and decisions. It delves into multiple angles of DMA enforcement procedures, from the Commission enforcement proceedings to Member States involvement and private enforcement proceeding in national courts. It does not deal with Commission-Member State cooperation in the context of the DMA, e.g. the obligation to inform Member States of acquisitions per Article 14(4) DMA. In addition, the applicability of other existing procedural rules at EU law level will be examined in more detail. Due to the regulatory proximity to competition law, a special focus will be placed on the possible applicability of the disclosure regime of the Damages Directive. In addition, a closer look is also taken at other EU substantive laws applicable in the periphery of the DMA, namely the GDPR[10] and the Representative Actions Directive (RAD).[11] It will be analysed whether and the therein containing regulations regarding access to information. A member state perspective will be provided in Helminger's article.[12]

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[4] OECD, 'Access to the case file and protection of confidential information – Background Note' (2019), 6 <https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf > accessed 30 March 2024.

[5] For competition law, see recital 15 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/01 (Damages Directive).

[6] For competition law, see Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* EU:T:2006:151.

[7] *Zayidov v Azerbaijan (No 2)* App no 5386/10 (ECtHR, 24 June 2022) para 87.

[8] For competition law, see Recital 15 Damages Directive.

[9] Marios Costa, 'Accountability through Transparency and the role of the Court of Justice' in Ernst Hirsch Ballin, Gerhard van der Schyff, and Marteen Stremler LLM (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (T.M.C. Asser Press The Hague 2019).

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/01 (GDPR).

[11] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/01 (RAD).

[12] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.

The DMA and the DMA Implementing Regulation (DMA IR)[13] provide access to the file only to the gatekeepers, undertakings and associations of undertakings under investigation and is limited by confidentiality considerations. Yet, third parties as well as the general public benefit from several publication obligations which are held by the DMA. Third parties in theory can also claim access to the Commission file under the Transparency Regulation, but the restrictive jurisprudence of competition law is likely to spill over to the DMA. EU procedural competition law, particularly the Damages Directive does not apply, as it is specific to competition law proceedings. While the GDPR and the RAD offer some access to documents under the respective disclosure regime, the applicable rules are very limited.

2 DMA AND DMA IMPLEMENTING REGULATION

The DMA and the DMA IR itself contain several rules on access to information in various DMA enforcement proceedings, which constitute an important source of information. To this end, the possibilities for gaining access to the Commission's files within the framework of the DMA are examined here. Moreover, it is also explained which decisions, resolutions or other information in connection with the DMA must be made publicly accessible.

2.1 ACCESS TO THE FILE

In the context of Commission proceedings, the Charter of Fundamental Rights (CFR) provides fundamental provisions regarding access to the file. Specifically, Articles 41(1) and (2)(b) of the CFR establish that individuals have the right to access their respective files, while taking into account the legitimate interests of confidentiality as well as professional and business secrecy. Moreover, these fundamental guarantees are typically reinforced by additional legal provisions, including those found in the DMA. The principal regulation governing access to the Commission file is outlined in Article 34 DMA, which is complemented by recital 88 DMA. To provide further clarity, more detailed provisions on access have been stipulated in Articles 7 and 8 DMA IR, which have been formulated in accordance with Article 46(1)k DMA. Contrary to competition law proceedings,[14] further guidelines or manuals have not been adopted yet but are likely.[15] The provisions concerning access to the files give detailed rules on access provided to the addressees of preliminary findings, not third parties. They contain rules on confidentiality and protection of internal documents.

2.1[a] Applicable DMA proceedings

Similar to competition proceedings, Article 34(4) DMA and Article 8 DMA IR connect the

[13] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 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 [2023] OJ L 02/06 (DMA Implementing Regulation).
[14] Eg European Commission, Commission notice on the rules of access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C325/8 (Access to File Notice).
[15] See Article 47 DMA.

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.[16] Especially Article 34(4) DMA mentions the rights of defence at the outset of the rules on access to the file. According to Article 34(4) DMA and Article 8(1) DMA IR, access to the file is given to addressees of preliminary findings pursuant to Article 34(1) DMA. Article 34(1) of the DMA mandates the Commission to provide the gatekeeper, or the undertaking or association of undertakings concerned with the preliminary findings of the Commission's investigation, including possible measures, in an exhaustive list of procedures, on which they may express their views in writing in accordance with Article 6 and Annex II of the DMA IR.

Accordingly, access to the file following the submission of preliminary findings by the Commission applies to different kinds of DMA proceedings. Access to the file is in a limited amount available in the gatekeeper designation procedure. Next to the fining decisions for procedural non-compliance in the context of gatekeeper designations discussed below, the Commission must grant access to the file after conducting a market investigation under Article 17 DMA in order to determine whether an undertaking providing core platform services (CPS) should be designated as a gatekeeper pursuant to Article 3(8) DMA, or in order to identify the CPS to be listed in the designation decision pursuant to Article 3(9) DMA. Access to the file is also given in the context of other market investigations, albeit only for market investigations for systemic non-compliance under Article 18 DMA, not for market investigations into new services and practices under Article 19 DMA.

Moreover, access to the file is given in the context of Commission decisions on gatekeeper obligations under the DMA. On the one hand, this concerns the possibility for the Commission under Article 8(2)-(9) DMA to specify the implementing measures for gatekeepers, in order for them to comply with the obligations in Articles 6 and 7 DMA. On the other hand, decisions on the suspension of obligations according to Article 9(1) DMA or on exemptions according to Article 10(1) DMA are covered. Furthermore, when it comes to non-compliance with DMA obligations, access to the file needs to be given before adopting an interim decision pursuant to Article 24 DMA or final decisions, either commitment decisions pursuant to Article 25 DMA or non-compliance decisions pursuant to Article 26 DMA, including the respective corresponding fining decisions under Article 30(1) DMA.

When it comes to procedural obligations of gatekeepers but also other undertakings or association of undertakings in the context of DMA public enforcement proceedings, access to the file is not provided in the context of any initial decision to conduct a procedural investigation mechanism, for example, to request information under Article 21 DMA or conduct inspections under Article 23 DMA. However, if the Commission plans to adopt a decision imposing fines for violation of any of these procedural obligations under Article 30(2) DMA, access to the file needs to be given. This does not only concern Commission investigatory measures, such as requests for information or inspections but also other procedural errors, e.g. in the context of the designation procedure, such as a failure to notify the Commission according to Article 3(3) DMA. Furthermore, fining decisions for

[16] For similar worded provisions in competition proceedings, see Wouter Wils and Henry Abbot, 'Access to the File in Competition Proceedings Before the European Commission' (2019) 42(3) World Competition 255, 260.

errors in the context of the specific notification obligations on gatekeepers for concentrations per Article 14 DMA or consumer profiling techniques per Article 15 DMA, for non-introduction of a compliance function under Article 28 DMA and errors in the context of access to the file under Article 34(4) DMA itself warrant the Commission to first provide a preliminary finding and (again) grant access to the file. The same applies in the context of decisions for setting the definitive amount of periodic penalty payment for different kinds of procedural violations for gatekeepers and other undertakings or associations of undertakings set out in Article 31(2) DMA.

2.1[b] Beneficiaries

Under Article 34(4) DMA, only the gatekeepers, undertakings or associations of undertakings concerned have access to the Commission files. Article 8 DMA IR defines the gatekeepers, undertakings or associations of undertakings 'concerned' as those to which the Commission has addressed its preliminary findings pursuant to Article 34(1) DMA, the so-called addressees. As a result, only addressees of envisaged decisions mentioned in Section 2.1[a] have a right to access to the file. Again, this limitation of the beneficiaries shows that access to the file in DMA proceedings is used in the context of rights of defence, i.e. in order to obtain information and prepare for the defence.

As stated clearly in Article 8(1) DMA IR, the Commission must only grant access to the file upon request. Ergo, the Commission does not have to act on its own initiative and grant access the file proactively. This also indicates that a beneficiary is free not to request access, can waive the right to access and cannot claim later on that its procedural access rights have not been respected.[17]

Hence, third parties have very limited access to the file under this DMA framework. They only have access insofar they can be considered undertakings 'concerned' in the sense of Article 34(4) DMA, as addressees of preliminary findings pursuant to Article 34(1) DMA and Article 8(1) DMA IR. Generally, the addressees of preliminary findings are gatekeepers or possible gatekeepers in proceedings mentioned in Section 2.1[a], such as decisions in market investigations under Articles 17 DMA for designating gatekeepers or under Article 18 DMA for systematic non-compliance. Outside of gatekeepers, undertakings and associations of undertakings would be the only addressees in proceedings mentioned in Section 2.1[a] in a case where the Commission plans to adopt a decision imposing fines for procedural violations under Article 30(2) DMA or setting the definitive amount of periodic penalty payment under Article 31(2) DMA for errors concerning investigatory measures mentioned in both Articles 30(2) and 31(2) DMA. Consequently, third parties are considered addressees, and they must receive preliminary findings and corresponding access to the file in cases where the Commission wants to adopt a decision concerning the third party's failure:

- to provide access to data, algorithms or information about testing in response to a request made pursuant to Article 21(3) DMA;

[17] For similar worded provisions in competition proceedings, see Cases T-145/89 *Baustahlgewebe v Commission* EU:T:1995:66 paras 23, 25, 26, 28 and 30; Case T-23/99 *LR AF 1998 v Commission* EU:T:2002:75, paras 173–185; Case T-376/10 *Mamoli Robinetteria v Commission* EU:T:2013:442 para 42; Case T-472/09 and T-55/10 *SP v. Commission* EU:T:2014:1040, paras 292–294.

- to supply the information requested within the time limit fixed pursuant to Article 21(3) DMA or supply incorrect, incomplete or misleading information or explanations that are requested pursuant to Article 21 DMA or given in an interview pursuant to Article 22 DMA;
- to rectify within a time limit set by the Commission, incorrect, incomplete or misleading information given by a representative or a member of staff, or fail or refuse to provide complete information on facts relating to the subject-matter and purpose of an inspection, pursuant to Article 23 DMA;
- to submit to an inspection pursuant to Article 23 DMA.

Other third parties are not undertakings 'concerned' in the sense of Article 34(4) DMA, as addressees of preliminary findings pursuant to Article 34(1) DMA and Article 8(1) DMA IR. They could be concerned by proceedings under the DMA, e.g. in case a violation of a DMA obligation causes harm on their part.[18] However, they have no corresponding access to the file under the DMA itself, which would allow them to access likely necessary or at least useful information to be able to initiate and successfully conduct, for example, follow-on private enforcement proceedings or judicial review against Commission decisions in the European courts. This regulatory decision is not contrary to Articles 41(1) and (2)(b) CFR, as those rights to be heard and access to the file also only apply for the addressee or object of the respective investigation,[19] not third parties.[20] Contrary to competition proceedings where at least complainants whose complaint the Commission intends to reject have access to the file,[21] such right is not given in the context of the DMA. Albeit third parties are free and even encouraged under Article 27 DMA to submit information to the Commission or national competition authorities, the DMA lacks a formal complaints procedure where complainants have certain rights as known from competition and state aid law.[22] Such a regulatory approach seems to be the trend in contemporary competition-akin regulation.[23] Accordingly, there is also no procedure to reject complaints under the DMA and no corresponding access to the file.

[18] Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' (November 19, 2023) <http://dx.doi.org/10.2139/ssrn.4637661> accessed 15 April 2024.
[19] Eg Case C-301/87 *France v Commission* EU:C:1990:67, para 29.
[20] Eg Case T-65/96 *Kish Glass v Commission* EU:T:2000:93, para 33.
[21] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003) Article 7; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/01 (Regulation 773/2004) Articles 7 and 8; Joined Cases T-108/07 and T-354/08 *Diamanthandel A. Spira v Commission* EU:T:2013:367, para 65; Case T-699/14 *Topps v Commission* EU:T:2017:2 para 30; Case T-574/140 *EAEPC v Commission* EU:T:2018:605, para 93.
[22] Kati Cseres and Laurens de Korte, 'The role of third parties in the public enforcement of the Digital Markets Act' (forthcoming).
[23] Lena Hornkohl, 'The Role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review, and Private Enforcement' (2023) 8(1) Competition Law & Policy Debate 30.

2.1[c] Scope

The scope of the access rights under Article 34(4) DMA and Article 8 DMA IR relates to the Commission file. In competition proceedings, paragraphs 8 and 9 of the Access to File Notice,[24] in accordance with case law,[25] define the notion of 'Commission file'. In competition proceedings, this covers 'all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation' of the anti-competitive conduct as defined in line with the broad discretion of the Commission in terms of subject matter.[26] There are no clear-cut definitions in the DMA or DMA IR, and neither does there exist a specific notice or case law on the notion of file for DMA proceedings. Article 34(4) DMA simply mentions the file, without going into detail further. Article 8(2) DMA IR connects the right of access to the file to 'all documents mentioned in the preliminary findings', while Article 8(3) DMA IR goes beyond that by mentioning 'all documents' on the Commission's file. Furthermore, recital 3 DMA IR specifies that 'while the addressee of the preliminary findings should always have the right to obtain from the Commission the non-confidential versions of all documents mentioned in the preliminary findings, it should additionally be provided with access to all documents on the Commission's file, [...]'.

In the absence of any express guidance, the notion of file needs to be interpreted taking into account specifically the aim of the access provisions as an instrument that should facilitate the rights of defence, particularly the right to be heard. Article 34(4) DMA is regulated in the context of the rights of defence, particularly the right to be heard and mentions the rights of defence from the outset. Recital 3 DMA IR further underlines that aim. Furthermore, several provisions mention that 'all' documents of the file are covered by the access right, which shows a rather broad understanding. Although the question whether the EU competition law procedural framework should be applied by analogy to DMA proceedings will be discussed at a later stage,[27] the interpretation of general procedural principles conducted in the context of competition proceedings can at least serve as an indication for DMA proceedings. Taking all this into account, the notion of file and extent of the file must connect to the subject matter of the DMA proceedings as conducted by the Commission. As a defence instrument, the right to access must cover everything in the possession of the Commission connected to the subject matter and the scope of the respective investigation necessary to allow a defence against the Commission allegations. The form of the documents, tangible or not, cannot play a role.

Naturally, documents which are neither in the possession of the Commission nor considered in the Commission investigation cannot be subject to access to the file rights.[28] Furthermore, documents elsewhere in the possession of the Commission are not covered by

[24] Access to File Notice (n 14).
[25] Eg Case T-7/89 *Hercules v Commission* EU:T:1991:75 para 54; Case T-30/91 *Solvay v Commission* EU:T:1995:115 para 84; Case T-38/02 *Groupe Danone v Commission* EU:T:2005:367, paras 34 and 39; Case T-286/09 *Intel v Commission* EU:T:2014:547 para 351; *Topps v Commission* (n 21) para 30.
[26] On prioritisation and discretion see Or Brook and Kati Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' [2021] <http://dx.doi.org/10.2139/ssrn.3930189> accessed 30 March 2024.
[27] See below at 3.
[28] See 2.2 on possible inter-partes disclosure obligations.

the right to access to the file.[29] This might be particularly relevant in cases where a specific conduct could constitute both a competition law infringement and DMA violation.[30] In case the Commission uses documents from competition law investigations also in the context of the covered DMA proceedings, the documents concern the subject matter of the DMA investigation and are covered by the notion of file under Article 34(4) DMA. Yet, other documents in the possession of the Commission elsewhere are neither subject to the investigation nor subject to the allegations that the beneficiary seeks to defend itself against, and they are therefore not covered by the access to the file. Rules on further access to those documents have not been regulated in the context of DMA proceedings.[31]

2.1[d] Limitations

Ultimately based on Articles 41(1) and (2)(b) CFR, the right to access to the file is not an absolute right, but subject to limitations, as charter rights can be limited according to Article 52(1) CFR.[32] Practically most relevant and also explicitly regulated in Article 34(4) DMA and Articles 7 and 8 DMA IR are the limits for confidential information, particularly business secrets, and internal documents of the Commission or competition authorities of the Member States.

Confidentiality, in particular business secrets

General principles and procedures - In the context of access to the file[33] and disclosure of documents overall,[34] the protection of confidential information and business secrets plays a decisive limiting role. Contrary to competition proceedings, its further intertwining with leniency policy[35] does not play a role in the context of DMA proceedings due to the absence of leniency policy for the DMA. Generally, for competition law proceedings, the Commission has published a few detailed notices, templates and guidelines on confidentiality protection, such as the mentioned Access to File Notice, the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU,[36] the

[29] Cf for competition proceedings, Wils and Abbot (n 16) 281–282.
[30] Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2023) 19(1) European Competition Journal 57, 78; Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2022) 19(1) European Competition Journal 1, 17; Alba Ribera Martínez, 'An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement' (2022) 19(1) European Competition Journal 86, 91.
[31] Cf for competition proceedings, Articles 3(7) and 7(1) of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L275/29; Access to File Notice (n 14) para 47.
[32] Cf for competition proceedings, Wouter Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay Between EU Law, National Law, the CFR of the EU and the European Convention on Human Rights' (2011) 34(2) World Competition 189.
[33] OECD, 'Access to the case file and protection of confidential information' (n 4).
[34] Lena Hornkohl, 'The Protection of Confidential Information and Disclosure in EU Private Enforcement of Competition Law' (2023) 16 GCLR 47; Lena Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021).
[35] Philipp Kirst and Roger Van den Bergh, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2016) 12(1) Journal of Competition Law & Economics 1.
[36] European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/06.

Guidance on confidentiality claims during Commission antitrust procedures,[37] the DG Competition's Guidance on Antitrust Confidentiality Rings,[38] or the DG Competition's Guidance on Data Room Procedures.[39] Such detailed framework does not exist for DMA proceedings. Yet, Article 34(4) DMA and Articles 7 and 8 DMA IR catch the essence and the principles of the confidentiality protection proceedings present in access to the file in competition law proceedings[40] and mandated by Article 339 TFEU. Further guidelines or extending the competition guidelines is nevertheless preferable for legal certainty.

Article 34(4) DMA only mentions that the access to the file is subject to 'the legitimate interest of undertakings in the protection of their business secrets' and access to the file 'shall not extend to confidential information'. Confidentiality and business secrets are tackled by Articles 7 and 8 DMA IR in greater depth. While business secrets, which could be algorithms of gatekeepers used for their CPS,[41] will play a huge role in the context of the DMA, other confidential information, such as privacy rights of individuals, can also become relevant, e.g. concerning proceedings for the non-compliance with privacy related provisions of the DMA such as Article 5(2) DMA.[42] Generally, neither the DMA nor the DMA IR contain any definition of what constitutes business secrets or confidential information. According to Article 7(7) DMA IR, 'any comments by third parties on a publication or consultation [...] shall be treated as non-confidential'. Beyond that, it will be essential to depend on established definitions derived from comparable case law[43] and other Union instruments.[44]

Proportionality and balancing – Otherwise, Article 34(4) DMA and Articles 7 and 8 DMA IR set out the rules, principles and procedures taken in case access to the file concerns confidential information and business secrets. They provide for a graded approach based on the principle of proportionality and balancing placed on the Commission in line with Article 339 TFEU as well as the objective of the access to the file in the context of the defence rights. The general rule of Article 34(4) sentence 4 DMA and Article 7(1) DMA IR is that business secrets and other confidential information cannot be disclosed unless otherwise provided for. Access to such information is otherwise provided for by Articles 7 and 8 DMA IR. Under these rules, access should be given in principle to all the documents, including confidential information. Thus, for DMA proceedings, a classic clash of rights or interests

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[37] European Commission, Communication on the protection of confidential information by national courts. in proceedings for the private enforcement of EU competition law [2020] OJ C242/01.
[38] European Commission, 'The use of confidentiality rings in antitrust access to file proceedings' <https://competition-policy.ec.europa.eu/document/download/1808bf30-2c83-40c9-a61f-69cdb246481f_en?filename=conf_rings.pdf> accessed 30 March 2024.
[39] European Commission, 'Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' <https://competition-policy.ec.europa.eu/document/download/4997fca8-af9e-4f7f-919f-e2bf5521a5df_en?filename=bp_disclosure_information_data_rooms_en.pdf> accessed 30 March 2024.
[40] Wils and Abbot (n 16) 271.
[41] Olga Kokoulina, 'Transparency of algorithmic decision-making: Limits posed by IPRs and trade secrets' in Jens Schovsbo (ed), *The Exploitation of Intellectual Property Rights* (ATRIP Intellectual Property series 2023) 28.
[42] Zsófia Maka, 'The Interrelation between Privacy and Competition Law with Special Regard to the Obligations under the Digital Markets Act' (2022) 2 ELTE Law Journal 17.
[43] Eg Case 53/85 *AKZO v Commission* EU:C:1986:256 para 28.
[44] Most notably, Article 2 No 1 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/01 (Directive 2016/943).

familiar to competition law[45] arises: access to information vs. protection of confidential information.

The DMA and DMA IR solve this issue itself by providing for different measures and steps to be taken. Furthermore, giving access to the file and protecting confidential information in case of disagreement should be governed by terms of disclosure set out in a Commission decision.[46] Consequently, the Commission can set the modalities for confidentiality protection on a case-by-case basis taking into account the specifics of each individual case and their general obligations under Article 339 TFEU. According to Article 7(2) DMA IR, the possibility to grant access to confidential information must be notified to persons submitting information based on requests for information or during interviews and by subjecting to these measures they also generally agree to their access under the conditions set out under Article 8 DMA IR.

Generally, both denying access to the file based on Article 34(4) sentence 4 DMA and Articles 7(1) and 8(4) DMA IR due to confidentiality reasons and giving access to confidential information in the file without any protective measures based on Articles 7(6) and 8(1) DMA IR should be the last resort after balancing the respective interests. The balancing test is explicitly only mentioned in Articles 7(6) ('overriding interest') or 8(4) DMA IR ('on balance, outweigh') as a step taken before granting access without confidentiality protection or denying access to information because of confidentiality considerations. However, overall, the balancing of interests under a proportionate approach is a general principle in the context of the clash of access and confidentiality.[47] Applying this approach indicates that access to confidential information with protective measures should be the norm, as long as the rights of defence of the parties may be effectively exercised on the basis of such protective measures. Such protective measures could be either redactions according to Articles 8(2) and 7(3)–(5) DMA IR or confidentiality rings according to Articles 8(3) and (4) DMA IR.

Redactions – One measure to protect confidential information when granting access to the Commission file in DMA proceedings is the redaction of confidential information as warranted by Article 8(2) DMA IR. Redaction means the removal of the confidential information in copies of the relevant piece of evidence.[48] Redaction can also include a non-confidential summary of the confidential content in square brackets.[49] Articles 7(3)–(6) DMA IR lay down detailed rules on the procedure surrounding redactions in the context of DMA proceedings. Importantly, the rules largely put the burden of claiming confidentiality, identifying confidential documents and passages thereof, as well as providing for the redactions on the originators of the respective documents. This relieves the Commission in this respect and involves the companies, which often have more resources and a greater interest in defending their confidentiality matters, on a large scale. While the Commission is in a general obligation to protect confidential information per

[45] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 49.
[46] Article 43(4) sentence 3 DMA; Article 8(3) DMA IR.
[47] Comparably for competition proceedings Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (n 34) 121–134.
[48] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 51.
[49] See, as an example of such practice in the context of the DMA, Decision C/2023/6100 of the European Commission of 5 September 2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector [2023] OJ Series C, para 34.

Article 339 TFEU, they can pass on such practical obligations to the undertakings concerned.[50] Generally, and against the background of confidentiality rings discussed in the next section, redactions might be particularly useful and create procedural efficiencies in case of small numbers of confidential documents. Giving access to the file based on non-confidential redacted versions is usually the proportionate approach as long as the undertaking requesting access is effectively exercising the rights of defence on that basis.[51]

In detail, Article 7(3) sentence 1 DMA IR mandates that the originators of documents in the file need to identify documents or parts thereof, which might contain business secrets. In case the originators do not identify such information, the Commission is in principle free to grant access to such information according to Article 8 DMA IR. The burden of claiming confidentiality is thus clearly on the originator; the Commission is, in line with Article 339 TFEU, under no obligation to check documents for confidential information upon their own motion without clear indications otherwise. The Commission can set a time-limit per Article 7(4)(a) DMA IR to further substantiate the confidentiality claim for any document or part thereof. This should allow the Commission to either grant access only to a redacted version due to confidentiality reasons per Article 8(2) DMA IR or to take the decision per Article 7(6) DMA IR to allow access to the confidential information without any redaction, because the Commission either considers the information to be non-confidential or the interest of giving access to the information is overriding the confidentiality considerations following the mentioned balancing test. In the latter case, the access to the confidential information, Article 7(6) DMA IR mandates the Commission to inform the concerned person and give the person a week to object. In case of objection, the Commission can adopt a reasoned decision to grant access to such information.

The Commission can further set a time-limit to provide the redactions per Article 7(4)(b) DMA IR. The person concerned must consequently submit a confidential and non-confidential version to the Commission. Confidentiality cannot be claimed vis-a-vis the Commission but only against access to the file or other types of disclosure of the information. The wording of Article 7(4)(b) DMA IR 'of the documents or statements' that should be redacted indicates that the documents must be available to the Commission in an unredacted version. This is further supported by the wording of the general Article 7(1) DMA IR, according to which rules on confidentiality protection apply towards 'information or documents collected or obtained by the Commission', i.e. the Commission must have full knowledge of the confidential information. Nevertheless, Article 7(4)(b) DMA IR also means that the originators of the respective documents claiming confidentiality must provide for the redaction and not the Commission, which lowers the authority's obligations. Still, the Commission must guarantee effective access to the file under the named balancing approach. Such redaction must be made 'in a clear and intelligible manner'. This pinpoints to the general principle of proportionality and balancing applicable also in this context, so that redaction depends on the degree, nature and extent that redaction is necessary for the protection of confidentiality as well as the comprehensibility of the redacted document.[52] In case of

[50] Marcel Nuys and Florian Huerkamp, in Rupprecht Podszun (ed), *Digital Markets Act: Gesetz über digitale Märkte* (Nomos 2023) Article 36.
[51] Cf for competition proceedings, Commission, 'Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation' (n 39) para 9.
[52] Hornkohl, 'The Protection of Confidential Information and Disclosure' (n 34) 52.

dispute, per Article 339 TFEU, it falls on the Commission when exercising the balancing approach, if these conditions have been met.

Moreover, the Commission can set a time-limit per Article 7(4)(c) DMA IR to provide 'a concise, non-confidential and clear description of each piece of redacted information'. Although not explicitly set-out, together with the generally applicable balancing and proportionality-approach, this might indicate that, for disputes on access to such redacted information, the Commission might also be able to grant only access to this description as a middle ground for giving full access to confidential information or such description could be provided under the subsequently discussed Articles 8(4) or (5) DMA IR when giving the addressee of the preliminary finding partly access to the documents. In case the person misses the deadline for any of these obligations, the Commission can consider the documents to be non-confidential per Article 7(5) DMA IR.

Confidentiality rings and data rooms – Instead of providing access to redacted documents, according to Article 8(3) DMA IR, the Commission can also grant access to a limited number of specified persons as determined by the terms of disclosure set out in a Commission decision. A procedure which only grants access to specific kinds of specified persons under certain conditions is usually called confidentiality rings, with the data room being a special form of confidentiality ring in connection to quantitative and qualitative data provided in electronic form.[53] The basic rules on the design of such confidentiality rings are laid down in Article 8(3)–(5) DMA IR but should further be determined by the mentioned terms of disclosure or future guidelines.

Interestingly, and against other procedures governed by EU law involving confidentiality rings, the confidentiality rings in DMA proceedings per Article 8(3) DMA IR are generally limited to *external* legal or economic counsel or technical advisors, each not in an employment relationship with the addressee. This means that according to Article 8(3) DMA IR, the addressees of preliminary findings and their employees, including members of legal departments are excluded from DMA confidentiality rings. On the contrary, the EU Trade Secrets Directive, for example, warrants that a confidentiality ring in trade secret procedures always 'shall include, at least, one natural person from each party'.[54] While confidentiality rings excluding parties but with external advisors are also the favoured option suggested by the Private Enforcement Confidentiality Communication of the Commission,[55] the Communication also allows to involve party representatives if necessary.[56]

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[53] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 36); European Commission, DG Competition's Guidance on Antitrust Confidentiality Rings <https://competition-policy.ec.europa.eu/document/download/1808bf30-2c83-40c9-a61f-69cdb246481f_en?filename=conf_rings.pdf> accessed 15 April 2024; European Commission, DG Competition's Guidance on Data Room Procedures <https://competition-policy.ec.europa.eu/document/download/f94afeca-0fa8-49e1-8a11-59cbb9dc136a_en?filename=data_room_rules_en.pdf> accessed 15 April 2024.

[54] Article 9(2) subpara 2 Directive 2016/943; Jochen Schlingloff, 'Geheimnisschutz im Zivilprozess aufgrund der "Know-how-Schutz"-Richtlinie' (2018) 64 Wettbewerb in Recht und Praxis 666.

[55] European Commission, Communication on adopting guidance for national courts when handling disclosure of confidential information [2020] OJ C242/1; Konstantina Strouvali and Efstathia Pantopoulu, 'Balancing Disclosure and the Protection of Confidential Information' (2021) 12(5) Journal of European Competition Law & Practice 393.

[56] European Commission, Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law [2020] OJ C242/1 para 67; Lena Hornkohl, 'Die neue Mitteilung der EU-Kommission über den Schutz vertraulicher Informationen in

The intentional exclusion of access to the file in DMA proceedings serves the purpose of safeguarding confidentiality,[57] while still enabling the addressees to participate in the process to the greatest extent possible. This participation is primarily facilitated through the engagement of external advisors, allowing them to comprehensively grasp the proceedings and exercise their rights of defense. The latter is specifically ensured by Article 8(5) DMA IR. The external advisors can ask (exceptionally, within one week) for access to a specific document of the confidentiality ring being made available in a non-confidential version to (a member of) the addressee (or an extension of the confidentiality ring towards other external legal, economic or technical advisors) itself, when this is 'indispensable for the proper exercise of the addressee's right to be heard'. In that instance, the addressee only gets access to a non-confidential version, i.e. a redacted version pursuant to Articles 7(3)–(6) DMA IR that the party that submitted the documents must provide per Article 8(7) DMA IR, not the confidential version itself. Should the party that submitted the document not agree to such a procedure, the Commission must adopt a reasoned decision per Article 8(7) DMA IR. In any case, the addressee is not fully added to the confidentiality ring, where access is given, in principle, without any redactions to the external advisors. Access to confidential information for the addressee can thus only be provided outside of the application of a protective measure, such as the confidentiality ring, which is a last resort case as previously described.

Moreover, Article 8(3) DMA IR sets out detailed procedural rules on the confidentiality obligations of the external advisors participating in the confidentiality ring, including if they enter into an employment relationship with any addressee.[58] Article 8(3)(e) DMA IR opens the door for electronic organisation of confidentiality rings, which is specifically relevant for data rooms.[59] Generally, members of the confidentiality ring have access to the full confidential versions of the documents in the file. However, Article 8(4) DMA IR allows not to grant access or to grant access to partly redacted documents if the Commission 'determines that the harm that the party that submitted the documents in question would likely suffer from disclosure under those terms would, on balance, outweigh the importance of the disclosure of the full document for the exercise of the right to be heard'. For procedural efficiency reasons, Article 8(9) DMA IR paves the way back to redactions, which can be used in confidentiality rings or instead of them 'on order to avoid a disproportionate delay or administrative burden'.

Internal and sensitive documents

Further limits to access to the file can be provided by internal documents of the Commission or other sensitive documents. Such are covered by both Article 34(4) sentence 4 and 5 DMA and Article 8(4) sentence 2 DMA IR. The rules are at least on the outset modelled on very similar rules for competition proceedings.[60] For competition proceedings, the rules have been

Kartellschadensersatzklagen und ihre Anwendung im deutschen Recht' (2020) 22 Europäische Zeitschrift für Wirtschaftsrecht 957, 961.

[57] For private enforcement of competition law, see Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (n 34) 262–283.

[58] Article 8(3)(c) DMA IR.

[59] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (n 36); DG Competition's Guidance on Antitrust Confidentiality Rings (n 53); DG Competition's Guidance on Data Room Procedures (n 53).

[60] Cf Wils and Abbot (n 16) 278–281.

backed by the European courts in order to guarantee the functioning of the competition proceedings.[61]

Contrary to confidential information and business secrets, there are fewer rules on the limitation provided by these kinds of documents. Various types of documents can fall in this category. Article 34(4) sentence 4 DMA mentions 'internal documents of the Commission or the competent authorities of the Member States'. Article 34(4) sentence 5 DMA underlines the correspondence between the Commission and the competent authorities of the Member States as particularly protectable. Article 8(4) sentence 2 DMA IR further mentions correspondence with public authorities of the Member States or third countries and 'other types of sensitive documents', which is much broader. Neither the DMA nor the DMA IR provide for definitions of these types of documents. Taking into account the jurisprudence on the right of defence from competition proceedings,[62] such defence rights can also not be circumvented by the public authorities in DMA proceedings by declaring a document internal. Ergo, internal and sensitive documents can neither be incriminating or exculpatory.

According to Article 34(4) sentence 4 DMA and Article 8(4) sentence 2 DMA IR for such internal and sensitive documents a balancing test applies, similar to the procedure on confidential information and business secrets. While Article 34(4) sentence 4 DMA underlines that internal information should generally not be disclosed, Article 8(4) sentence 2 DMA IR clarifies that such a decision can be taken following a balancing approach, i.e. if on balance the interest in protecting internal documents would not 'outweigh the importance of the disclosure of the full document for the exercise of the right to be heard'. Should access concern the correspondence between the Commission and the competent authorities of the Member States, Article 34(4) sentence 5 DMA clarifies that the balancing should usually result in denying access to such documents. Consequently, access to such documents is possible ('shall') but unlikely. Contrary to competition proceedings,[63] instead of non-disclosure of such internal documents, Article 8(4) sentence 2 DMA IR also allows the (partial) redaction of such documents as a mitigated approach compared to the full non-disclosure. Equally, contrary to competition proceedings,[64] this obligation to redact the documents then generally falls on the originator of such documents per Article 7(3) DMA IR, which constitutes the Commission, (competent) national authority, or third state authority. Confidentiality rings are generally not foreseen for internal and sensitive documents.

2.1[e] Timing

Article 34(4) DMA and Article 8(1) DMA IR give the right to access to the file to the addressees of preliminary findings pursuant to Article 34(1) DMA. Consequently, access to

[61] Eg Joined Cases T-25/95 et al *Cimenteries CBR and Others v Commission* EU:T:2000:77, para 420; Case T-62/99 *Sodima v Commission* EU:T:2001:53, paras 22 and 23; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* EU:T:2003:245, para 394; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* EU:T:2004:118, para 40; Case T-410/03 *Hoechst v Commission* EU:T:2008:211, para 165.

[62] See, e.g., Case T-44/00 *Mannesmannröhren-Werke v Commission* EU:T:2004:218, paras 54 and 56; Case T-210/01 *General Electric v Commission* EU:T:2005:456, paras 668–672; Case T-758/14 *Infineon Technologies v Commission* EU:T:2020:307, paras 56 and 79.

[63] *Mannesmannröhren-Werke v. Commission* (n 62) para 53.

[64] ibid.

the file can only be provided after the preliminary findings have been sent, in order to guarantee that the Commission can investigate the problematic behaviour without any interference by the addressee.[65] Article 8(1) sentence 2 DMA IR expressly provides that access shall not be given before the notification of the preliminary findings. In that sense, DMA proceedings are similar to competition proceedings.[66]

Further timelines, e.g. on the duration of access to the file, are not set out expressly in the provisions. However, Article 34(2) DMA and Article 6 DMA IR state that the Commission sets a time-limit for the addressees of the preliminary findings to respond in accordance with the procedural requirements laid down in article 6 DMA IR. Consequently, when determining the time limit to submit the observations, the Commission needs to take into account, that the addressee must have sufficient time to access the file and prepare the observations.[67] Since the right to be heard and access to the file relates to the allegations set out in the preliminary findings, the duration of the access itself depends on the magnitude of the file and allegations and must be sufficient in order to properly prepare a defence.

When it comes to documents included in the file after the preliminary findings have been sent to the addressees, access must be given to such documents if the Commission wants to rely on such documents in the final decision. According to Article 34(3) DMA, the Commission can only base its decisions on matters on which possible addressees have been able to comment on.

2.1[f] Procedure

In contrast to competition proceedings, which entail comprehensive notices and guidelines, the DMA and DMA IR lack detailed provisions regarding the procedure for accessing the file. While the DMA and DMA IR do address confidentiality protection through specific disclosure terms, they do not offer specific guidelines on the process of accessing the file otherwise. Consequently, the Commission retains discretion in determining how access to the file will be granted. In considering the principle of good administration, as outlined in Article 41 CFR, and the objective of access to file rules, aimed at providing a foundation for defence against Commission allegations, it is essential to keep in mind various factors. These factors include the nature of the DMA proceeding, the volume of information involved and the necessary protective measures. As a result, the methods of access may vary from case to case. Potential methods for accessing the file can include electronic access or access at the premises of the European Commission. The decision on the specific method will depend on the unique circumstances of each DMA proceeding, taking into account the amount of information involved and the protective measures required to ensure confidentiality. The Commission will exercise discretion in determining the appropriate method of granting access to the file, keeping in mind the principles of good administration and the objective of facilitating a robust defence against Commission allegations.

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[65] Cf Case C-407/04 P *Dalmine v Commission* EU:C:2007:53, para 60; Case T-655/11 *FSL and Others v Commission* EU:T:2015:383 paras 50 and 91–97, upheld on appeal in Case C-469/15 P *FSL and Others v Commission* EU:C:2017:308, paras 39–50.

[66] Article 15(1) of Regulation 773/2004.

[67] Cf, for competition proceedings, Wils and Abbot (n 16) 283–285.

2.1[g] Use

Article 8(8) DMA IR limits the use of documents obtained through access to the file to the purpose of the proceedings within which access to the documents was given but also administrative or judicial proceedings concerning the application of the DMA related to those proceedings. The accessed documents can thus be used to fully defend oneself from allegations in DMA proceedings. That includes the DMA proceedings at the Commission in which access was given. 'Judicial proceedings' on the application of the DMA related to those proceedings also include judicial review proceedings in the European courts against a final decision following the Commission proceedings. Since the term 'judicial proceedings' is not limited to EU proceedings, also any usage in connected (private enforcement) proceedings in national courts are covered.

For external advisors participating in the mentioned confidentiality rings, Article 8(3)(d) DMA IR particularly clarifies that they 'shall not disclose any of the documents provided or their content to any natural or legal person that is not bound by the terms of disclosure and shall not use any of the documents provided or their content other than for the purposes referred to in Article 8(8) below'. Their obligation is therefore specifically manifested and includes the binding obligation to not pass on the information disclosed to them to the addressees themselves.[68]

2.2 PUBLICATIONS

Next to the access to the file provisions and specifically relevant for third parties excluded from access to the file under the DMA, various 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, but at the same time also enables their right to take a stand in certain cases. Publications will also be relevant for granting general transparency of DMA proceedings.

2.2[a] Publications in the context of consultations

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 often obliges the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. This should allow third parties to effectively provide comments and help the Commission in the effective and practical enforcement of the DMA. However, these publications can provide an important source of information on the proceedings, problematic conduct and possible gaps in Commission enforcement, particularly for third parties, e.g. those wanting to venture on private enforcement endeavours on national level. The publications will be relevant for parties beyond those involved in the consultation, since

[68] See, on the exclusion of the addressees themselves, above at 2.2[d].

the provisions oblige the Commission to (openly) publish and not simply provide consulted companies with the information. In that sense, the provisions also serve transparency.

In three instances in the context of consultations, the DMA obliges the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. First, the Commission must conduct such a publication before adopting a decision specifying the 'measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7' according to Article 8(6) DMA. Second, Article 18(5) DMA mandates the Commission to publish a non-confidential summary of case and possible remedies in order to allow 'interested third parties to effectively provide comments' when concluding a market investigation into systemic non-compliance and envisaging imposing remedies on the gatekeeper. Third, also in the context of systemic non-compliance, the Commission must publish a non-confidential summary of case and the main content of possible commitments before adopting a decision on systemic non-compliance according to Article 18(6) DMA. In the context of other market investigations or decisions of the Commission, neither a publication nor a consultation with third parties is warranted by the DMA.

In the three mentioned cases, the publication concerns 'a non-confidential summary of the case', not any preliminary findings the Commission has to provide to the gatekeepers concerned. In the context of the obligation specification under Article 8(6) DMA, the Commission can further publish a non-confidential version of the gatekeeper's reasoned submission 'to explain the measures that it intends to implement or has implemented' to ensure compliance with Articles 6 and 7 DMA. Beyond that, the intended measures that the Commission must publish with the summary further differ. In the context of the obligation specification under Article 8(6) DMA, the publication concerns the measure that the Commission is considering taking, i.e. the specification of the obligations under Articles 6 and 7 DMA or that it considers the gatekeeper to take to comply with the specifications. In the context of the market investigation into systemic non-compliance, the publication includes either the envisaged remedies to be imposed by the Commission per Article 18(1) DMA or the commitments offered by the gatekeeper and envisaged to make binding by the Commission per Article 25(1) DMA.

Further consultation obligations under the DMA do not warrant the Commission to publish a non-confidential summary of the case and a suggestion of measures to be taken. During a market investigation into new services and practices under Article 19 DMA, the Commission may 'consult third parties, including business users and end users of services within the digital sector that are being investigated and business users and end users who are subject to practices under investigation'. Moreover, the Commission 'may consult third parties' before adopting a non-compliance decision according to Article 29(4) DMA. Even though there is no publication obligation, the Commission will need to make information available during the consultation on the conduct investigated in order to allow meaningful responses. While the provisions do not specify the kind of information to be provided to the consulted parties, the information needed to warrant any such meaningful responses will likely be information on the parties, conduct and envisaged measures. Contrary to the publication procedures discussed above, since there is no publication obligation, this information does not need to be made publicly available and may only be submitted to the

parties consulted. Consequently, it will not provide a source of information for other than the parties consulted and will not increase the general transparency of DMA proceedings.

The comments provided under any of these consultation obligations become part of the Commission file. As discussed above,[69] even though they are included to the file after the Commission has sent out preliminary findings and the undertakings concerned have granted access to the file, should the Commission rely on the comments provided in the final decision, the undertakings must have had an opportunity to have access to these documents and defend themselves against the accompanying allegations. Such a possibility is underlined by the fact that Article 7(7) DMA IR foresees the possibility to make the comments publicly available. These published comments may provide for another publicly available important source of information on DMA proceedings. Generally, Article 7(7) DMA IR considers the comments provided as non-confidential but allows the redaction of the 'author's or sender's name or other identifying information'. In the absence of any other rules on redaction, the above discussed[70] rules for redaction pursuant to Articles 7(3) and (4) DMA IR apply.

2.2[b] Publication of Commission decisions

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[71] and as a tool to enhance transparency of public enforcement.[72] Similarly for the DMA, such decisions could serve as a basis for third parties in order to contemplate filing follow-on private enforcement cases in national courts or judicial review of the decisions in the EU courts.

Article 44(1) DMA lists the decisions that the Commission must publish:

- Article 3 and 4 DMA on gatekeeper designation;
- Article 8(2) DMA on specification of the obligations;
- Article 9 DMA on suspension;
- Article 10 DMA on exemptions;
- Article 16 DMA on opening of market investigations;
- Articles 17–20 DMA on the decisions the Commission can take in the context of the various market investigations;
- Article 24 DMA on interim measures;
- Article 25(1) DMA in case the Commission wants to make proposed commitments binding, Article 29 DMA on non-compliance;
- Article 30 DMA on fines; and

[69] See above at 2.1[a].
[70] See above at 2.1[d] ('Confidentiality, in particular business secrets').
[71] *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* (n 6) para 115; Kati Cseres and Laurens de Korte, 'The role of third parties in the public enforcement of the Digital Markets Act' (forthcoming).
[72] Wouter Wils, 'Publication of Antitrust Decisions of the European Commission' (2020) 4 Concurrences 93 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701604> accessed 15 April 2024.

- Article 31 DMA on periodic penalty payments.

Article 44(1) DMA also determines the minimum content of such publications: the names of the parties and the 'main content of the decision, including any penalties imposed'. The Commission can go beyond that but must have 'regard to the legitimate interest of gatekeepers or third parties in the protection of their confidential information' per Article 44(2) DMA. Due to the explicit mentioning of the 'names of the parties' in Article 44(1) DMA, the identity of the parties of any decision cannot be redacted for confidentiality reasons.

Beyond that, the protection of confidential information is further laid out in Article 7(3) DMA IR, with the further rules on redaction set out in Article 7 DMA also being applicable in the context of redactions of decisions. Similar to the provisions on access to the file discussed above,[73] Article 7(3) DMA IR also places the obligations on the persons claiming confidentiality in the context of the publication of possible confidential information. According to Article 7(3) DMA IR, the Commission can oblige the persons claiming confidentiality to identify the parts of a Commission decision which may contain confidential information and set a time-limit for this. Thus, the administrative burden of the Commission is again mitigated and rather placed on the persons concerned. They can propose redactions of the confidential information in line with the rules set out in Article 7 DMA IR. However, as also warranted by Article 339 TFEU, the ultimate obligation to protect confidential information in published decisions, lies with the Commission. Article 7(5) DMA IR further mitigates this by allowing the Commission to consider parts of the decision as non-confidential, in case the natural or legal person has not reacted in the time-limit set by the Commission.

The rules do not contain any further specification on timeline when decisions need to be published after being taken and the format, including the venue of such publications. Regarding the already published first decisions on the designation of gatekeepers according to Articles 3 and 4 DMA in 2023, for example, the Commission published a press release on the same day,[74] a summary of the decisions in the Official Journal of the EU,[75] and the full decisions after some time, redacted for confidential information on the dedicated website on the DMA.[76] Confidentiality protection is provided for by confidential information being replaced by a non-confidential summary in square brackets or otherwise shown as "[…]".[77]

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[73] See above at 2.1[a].

[74] European Commission, 'Digital Markets Act: Commission designates six gatekeepers' (*European Commission Press Release IP/23/4328*, 06 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 15 April 2024.

[75] European Commission, Summary of Commission Decision of 5 September 2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector [2023] OJ C/2023/548.

[76] European Commission, 'Gatekeepers' (2024) <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 30 March 2024.

[77] Eg Summary of Commission Decision of 5 September 2023 designating Apple as a gatekeeper (n 75) para 34.

2.2[c] Other Commission publication obligations

The DMA contains several other obligations for the Commission to publish information in the context of its DMA enforcement proceedings. Other more general publication obligations also exist when it comes to implementing[78] and delegated acts;[79] as they are not so much connected to enforcement of the DMA obligations and be used as a source of information for gatekeepers or third parties as described in the introduction, they will not be discussed further. Similarly, albeit containing more information on the substance of the DMA application and enforcement, the report on the implementation of the regulation and the progress on its objectives per Article 25(3) DMA will not be discussed further.

Apart from this, there are several publication obligations for the Commission throughout the DMA, which serve the general transparency, but which can also be used by third parties, e.g. in the context of parallel or follow-on private enforcement. Generally, Article 5(2) DMA IR obliges the Commission to make public the opening of any proceedings but leaves the form, place and context to the Commission, which will likely recourse to its DMA website.[80] In the context of gatekeeper status of undertakings, outside of publishing the decisions on designation themselves as set out by the discussed Article 44(1) DMA, Article 4(3) DMA mandates the Commission to publish and update a list of gatekeepers and CPS on an on-going basis. Outside the 'on-going basis', the publication venue and timelines are not further specified. With regard to the first designation decisions, the Commission has undergone the mentioned multiple publications via press releases, summary decisions and publications of the decisions on the website.[81] The latter dedicated webpage[82] on gatekeepers and their CPS will likely also contain any future updated list. At all events, for information subject to mandatory publication, the responsible institution is required to make use of the Official Journal of the EU.[83]

Connectedly, per Article 14(4) DMA, the Commission should publish a list of acquisitions by gatekeepers of which the gatekeepers have informed the Commission under Article 14(1) DMA. Here, the timing, annual publications, is specified. Further, it is specifically mentioned that the Commission 'shall take account of the legitimate interest of undertakings in the protection of their business secrets'. Since no further explanation is given on the latter, the mentioned general rules on protection of confidential information of Article 7 DMA IR apply,[84] which focus on redactions and providing non-confidential versions. The Commission uses the dedicated webpage on gatekeepers to update on their acquisition, where it

[78] Article 46(3) DMA.
[79] Article 49(3) DMA.
[80] European Commission, 'Digital Markets Act' <https://digital-markets-act.ec.europa.eu/> accessed 30 March 2024.
[81] See above at 2.2.
[82] European Commission, 'Gatekeepers' (2024) <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 30 March 2024.
[83] Decision (EC Euratom) 2009/496 of the European Parliament, the Council, the Commission, the Court of Justice, the court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union [2009] OJ L168/41, Article 4(2).
[84] See above at 2.1[d] ('Confidentiality, in particular business secrets').

> publishes a non-confidential summary of the information submitted by the gatekeeper pursuant to Article 14 DMA, together with the date of notification of such information to the Commission and the identity of the undertakings concerned. The Commission publishes this information on a rolling basis not earlier than four months after receipt of the information.[85]

In the context of market investigations, other publication requirements, outside of the ones already mentioned,[86] apply. With regard to the market investigation into new services and practices, Article 19(3) DMA warrants the Commission to 'publish its findings in a report within 18 months since the date' of the opening of the market investigation. The location is not provided and a publication on the DMA-homepage of the Commission[87] is likely. Next to providing transparency on the market investigation, the information provided in the report could be useful for third parties to see if a gatekeeper's new services and practices might affect them and if they want to follow up on the market investigations, i.e. with private enforcement in national courts.

In the context of other market investigations, i.e. market investigations for designating gatekeepers per Article 17 or market investigations into systemic non-compliance per Article 18 DMA, the Commission is not under the obligation to publish such a general report. Rather, if the market investigation for designating gatekeepers results in the designation of another gatekeeper or further CPS, the just-mentioned obligation to publish and update a list of gatekeepers and CPS on an on-going basis per Article 4(3) DMA applies. Similarly, in the context of the market investigation into systemic non-compliance per Article 18 DMA, the above-mentioned consultation and publication provisions are relevant.[88] However, in case of a request for market investigation by Member States according to Article 41(1)-(3) DMA, the Commission must publish its results of the assessment whether there are 'reasonable grounds' to open a market investigation. Such information can be useful to national authorities in the context of competition investigations of conduct that could fall under the DMA and (national) competition law,[89] or for private parties if they want to enforce problematic conducts in national courts.

In the context of the Commission's decision-making powers, a Digital Markets Advisory Committee is advising the Commission. The final Commission decisions are issued as an implementing act within the meaning of Article 291 TFEU in the form of a decision.[90] The procedure is based on the so-called Comitology Regulation.[91] By choosing an implementing decision and applying the Comitology Regulation, the Member States, which are otherwise hardly involved in the DMA enforcement,[92] can in principle be included in the

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[85] European Commission, 'List of Acquisitions' <https://digital-markets-act-cases.ec.europa.eu/acquisitions> accessed 23 January 2024.
[86] See above at 2.2[a] and 2.2[b].
[87] European Commission, 'Digital Markets Act' <https://digital-markets-act.ec.europa.eu/index_en> accessed 23 January 2024.
[88] See above at 2.2[a] and 2.2[b].
[89] See on this below at 3.
[90] Compare with competition proceedings, Wils and Abbot (n 16) 288.
[91] Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55/13 (Regulation 182/2011).
[92] See below at 3.

decisions via the comitology procedure, in this case through the DMA Advisory Committee.[93] According to Article 50(4) DMA, the opinion of the Committee should not only be communicated to the addressee but also made 'public together with the individual decision, having regard to the legitimate interests of the protection of professional secrecy'. Such opinions, particularly if contrary to the Commission decision, can constitute an important source of information for third parties equally disagreeing with the Commission or the gatekeepers for judicial review actions.

2.2[d] Commission publication of news items and DMA homepage

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. On the webpage, information on proceedings, consultations, legislative developments, templates, and cases etc. can be found and are regularly updated. Consequently, this webpage provides for important information on the DMA and its enforcement, useable also for third parties, for example.

The press releases and other news items of the Commission constitute a further crucial source of information.[94] Similar to competition law proceedings, the European Commission uses press releases, news announcements, and news articles to inform the public about on-going developments surrounding the DMA.[95] These can frame an important source of information about current developments. Given the experiences from competition proceedings, quite some time can pass between the publication of a press release on a specific enforcement case and the publication of a non-confidential version of a decision.[96] In the meantime, third parties wanting to file for judicial review of a Commission decision or follow-on private enforcement in national courts become aware of the decision and can already familiarize themselves with the case content, the parties and the problematic conduct and prepare any court or out-of-court action.

2.2[e] Publication obligation of the gatekeepers

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

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[93] Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* EU:C:1983:158, para 35; Case T-19/91 *Vichy v Commission* EU:T:1992:28, para 39; *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* (n 6) para 149.

[94] Christian Rauh, 'Clear messages to the European public? The language of European Commission press releases 1985–2020' (2022) 45(3) Journal of European Integration 683.

[95] European Commission, 'Latest news' <https://digital-markets-act.ec.europa.eu/latest-news_en> accessed 15 April 2024.

[96] Eg Decision C/2017/4444 of the Commission of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping) (Decision C/2017/4444) [2018] OJ C9/11 <https://competition-cases.ec.europa.eu/cases/AT.39740> accessed 15 April 2024; European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (*European Commission Press Release IP/17/1784*, 27 June 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 15 April 2024. The latter was published on 27 June 2017 while the former, despite occurring on the same day, was only published on the website on 18 December 2017. .

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'. In that context, Article 6(12) DMA also warrants the gatekeeper to 'publish general conditions of access, including an alternative dispute settlement mechanism'. Similarly, according to Article 7(4) DMA the 'gatekeeper shall publish a reference offer laying down the technical details and general terms and conditions of interoperability with its number-independent interpersonal communications services, including the necessary details on the level of security and end-to-end encryption. The gatekeeper shall publish that reference offer within the period laid down in Article 3(10) and update it where necessary'. These publication obligations allow for third parties, the Commission and the general public to check the compliance with the substantive obligations, or the reporting obligations serve to achieve fair and contestable digital markets.

Connected to these objectives, Article 11(1) DMA 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. The Commission has published a template for drafting the compliance report.[97] Article 11 DMA gives the gatekeeper 6 months to do so and update the report annually. A first batch of reports have been published already.[98] In terms of content, Article 11 DMA only obliges the gatekeeper to provide a 'detailed and transparent' report but does not go beyond that. The gatekeeper has large discretion here. These reports specifically will allow not only the Commission to check if the gatekeepers follow their obligations and commence non-compliance investigations[99] but will also be crucial for third parties and their private enforcement endeavours.

Similarly, and also with regard to the DMA's connection to the GDPR as described below,[100] 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 CPS. The Commission has also published a template for reporting on consumer profiling techniques and the independent audit of such reports.[101] While the audited description itself does not need to be published, the gatekeeper must make an overview of it available. Further clarifications on content, style or length are not provided. Although the gatekeeper will be careful in drafting these reports under Articles 11 and

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[97] European Commission, 'Template form for reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (Digital Markets Act) (Compliance Report)' (*European Commission*, date of last update 09 October 2023) <https://digital-markets-act.ec.europa.eu/document/download/904debdf-2eb3-469a-8bbc-e62e5e356fb1_en?filename=Article%2011%20DMA%20-%20Compliance%20Report%20Template%20Form.pdf> accessed 15 April 2024.

[98] European Commission, 'Compliance Report' <https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports> accessed 15 April 2024.

[99] European Commission, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act' (*European Commission Press Release IP/24/1689*, 25 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689> accessed 15 March 2024.

[100] See below at 5.1.

[101] Commission, 'Template form for reporting pursuant to Article 11 of Regulation (EU) 2022/1925 (n 97).

15 DMA, they could point the Commission, the general public, and third parties to DMA infringements and infringement of other EU law rules, e.g. data protection law, as discussed below,[102] especially in case of borderline legal opinions.

3 APPLICATION OF EU PROCEDURAL COMPETITION LAW?

Given the relatively limited access to the file rights under the DMA, the question arises if the procedural competition law rules apply, mainly Regulation 1/2003, Regulation 774/2003 and the corresponding guidelines and, most importantly, the rules on inter-partes disclosure and disclosure of documents in the file of a competition authority of the Damages Directive[103] in the context of the DMA enforcement.

However, these rules are only applicable for competition law and the DMA does not constitute competition law. Without going into detail on this discussion,[104] with regard to the applicability or transferability of the competition law rules on the DMA, it is necessary to look at the *ratio* as well as at the concept of enforcement of both the DMA and competition law. One significant difference lies in the nature of the respective provisions. Even if EU jurisprudence has provided for more and more specification of EU competition rules, in particular Articles 101 and 102 TFEU, these rules still remain rather general in nature and therefore must be applied in a case-by-case way.[105] In the context of digital markets, this proceeding, accompanied by the establishment of the 'more economic approach', required even more complex analyses of effects.[106] Articles 5 to 7 of the DMA do not contain any general rules but provide for very specific and differentiating set of obligations for conduct or injunction of gatekeepers. An assessment of relevant markets, market power and effects is not warranted under the DMA.[107] The requirements of the DMA must be complied with by the addressed gatekeepers, regardless of such prior considerations and therefore are applicable *per se*.[108]

Particularly, the prohibition of abuse of market power under Article 102 TFEU can indeed go at times hand in hand with a breach of duty by the DMA, as the gatekeeper status may also go hand in hand with a position of market power. The relationship between the DMA and traditional competition law is also explicitly addressed in Articles 1(5) and (6) DMA, which takes notice of the fact that both regimes are also aimed at anticompetitive behaviour in the broader sense. Accordingly, both legal regimes are considered to be

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[102] See below at 4.

[103] Francisco Marcos, 'Access to evidence: the "disclosure scheme" of the Damages Directive' in Barry Rodger, Miguel Ferro, and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 265, 265 et seq.

[104] Beems (n 30); Niamh Dunne, *Competition Law and Economic Regulation* (Cambridge University Press 2015); Josef Drexl et al, 'Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)' (2023) 72(9) GRUR International 864.

[105] Rupprecht Podszun and Andreas Schwab in Rupprecht Podszun (ed), *Digital Markets Act: Gesetz über digitale Märkte* (Nomos 2023) Art 5 no 1, para 8.

[106] Zelger, *Restrictions of EU Competition Law in the Digital Age. The Meaning of 'Effects' in a Digital Economy* (Springer 2023) passim; for the difficulties digital markets impose on the established competition legal tools see Jaques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, 'Competition Policy for the Digital Era' [2019] 3 <https://data.europa.eu/doi/10.2763/407537> accessed 15 April 2024.

[107] Beems (n 30).

[108] Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] ZEuP 503, 530.

complementary to each other and can generally applied in parallel. Even in cases of overlap, however, as clearly stated in recital 11 DMA, both the notions, the thrust and the mechanism of the two concepts still differ, and the DMA enforcement does not constitute competition enforcement.

In turn, the procedural competition provisions do not apply. The Damages Directive itself clarifies in Article 1(1) that it is applicable only for harms derived from violations of *competition law*. Therefore, the private enforcement scheme of the Damages Directive, including the disclosure regime, cannot be used as a legal basis for damages claims arising from violations of the DMA.[109] Further rules on access to the file or transparency obligations under Regulation 1/2003 and Regulation 774/2003 and their guidelines[110] equally only apply to traditional competition law.

4 TRANSPARENCY REGULATION

Similar to its usage in the context of competition proceedings,[111] the EU Transparency Regulation[112] can also be used for the DMA. This includes a very general right, which is not only reserved for certain parties. At the same time, the requirements for the protection of business secrets in particular set considerable limits on the scope of the information that can be accessed. To this end, I will explain what this means specifically in the context of the DMA.

4.1 NATURE

The Transparency Regulation covers public access to documents held by EU institutions, including the Commission, and it lays down the principles, conditions, limits and procedures to such public access. Generally, the Transparency Regulation must be applied in accordance with overall internal Commission rules for the application of the Transparency Regulation.[113] It includes general transparency obligations of the Commission, not dedicated to DMA proceedings and not equated with the specific access to the files under the DMA (or in competition proceedings); yet, access to files in DMA public enforcement proceedings is not excluded from its scope, and the specific rules do not have primacy over the Transparency Regulation.[114] Contrary to the access to the file rules under the DMA, the documents and information obtained through the Transparency Regulation are not restricted in its subsequent use and enter the public domain,[115] thus creating transparency on Commission DMA proceedings. Moreover, they could be used for, inter alia, DMA private enforcement

[109] Drexl et al (n 104) 874ff.
[110] On these obligations, see Access to File Notice (n 14).
[111] See Lena Hornkohl, 'Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht' (2018) 12 Wirtschaft und Wettbewerb 607.
[112] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (Transparency Regulation).
[113] Annex to the European Commission, Commission's rules of procedure that was added by Commission Decision 2001/937/EC, ECSC, Euratom of 5 Dec. 2001 amending its rules of procedure [2001] OJ L345/94.
[114] For competition proceedings, see Wils and Abbot (n 16) 265.
[115] Case T-447/11 *Catinis v Commission* EU:T:2014:267, para 62; Case T-221/08 *Strack* EU:T:2016:242, para 128.

in national courts or judicial review actions of Commission public enforcement decisions on EU level.

4.2 GENERAL ACCESS

Under Articles 2(1)-(3) Transparency Regulation, any natural or legal person can request public access. Consequently, anyone could ask for access to documents in the file of the Commission on DMA public enforcement proceedings, including third parties not covered by the discussed access to the file provisions of the DMA.[116] Moreover, any party interested in Commission DMA proceedings can request access under the Transparency Regulation.

4.3 LIMITS, IN PARTICULAR PROTECTION OF COMMERCIAL INTERESTS

Conversely, Article 4 Transparency Regulation contains exceptions according to which the institution can refuse access to a document, where disclosure would undermine, for example, the protection of public security, personal data or commercial interest. For the latter, which can be crucial in the context of DMA proceedings, Article 4(2) Transparency Regulation warrants that the Commission must balance the protection of commercial interests, such as business secrets, with the public interest in disclosure.

In the realm of competition law, prior to the implementation of the EU Damages Directive, the Transparency Regulation was employed as a means to acquire access to documents within the Commission file.[117] This was particularly relevant for affected third parties seeking to file damages claims, often referred to as 'follow-on' claims. In the context of competition law, there have been several disputes that have arisen regarding the granting of access to the Commission file.[118] Specifically, these disputes have focused on the applicability of the exception outlined in Article 4(2) Transparency Regulation, which pertains to the protection of commercial interests. These disputes contained mainly access to leniency information and information connected to leniency.[119] Since the DMA public enforcement proceedings does not have a leniency procedure, any protection of leniency will not be an issue for access to information under the Transparency Regulation in the context of the DMA.[120] Nevertheless, the protection of confidential information and business secrets as part of Article 4(2) Transparency Regulation will equally be relevant for the DMA, as also indicated above.[121] 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.[122] The applicant can demonstrate that a given document is not covered by that general

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[116] See above at 2.1[a].
[117] Hornkohl, 'Zugang zu Dokumenten' (n **Fel! Bokmärket är inte definierat.**) 607.
[118] Case C-365/12 P *Europäische Kommission v EnBW Energie Baden-Württemberg AG* EU:C:2014:112; Cases T-437/08 *CDC Hydrogene Peroxide v Europäische Kommission* EU:T:2011:752; Case T-2/03 *Verein für Konsumenteninformation v Kommission der Europäischen Gemeinschaften* EU:T:2005:125; Case C-404/10 P *Kommission v Éditions Odile Jacob Case* EU:C:2012:393, para 121; Case T-611/15 *Edeka-Handelsgesellschaft Hessenring mbH v Europäische Kommission* EU:T:2018:63.
[119] *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118).
[120] See above at 2.1[d].
[121] See above at 2.1[d] ('Confidentiality, in particular business secrets').
[122] *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118) para 93.

presumption, or that there exists an overriding public interest justifying the disclosure of the document.[123] For competition proceedings, the ECJ has held that the general intention to claim damages is not sufficient to rebut the presumption, as not all parts of the file are necessary for the assertion of damages, but the applicant must make it clear that a certain part of the file is necessary for the effective enforcement of the claim for damages.[124]

It is likely that the court will create a similar presumption for denying access to the DMA files under Article 4(2) Transparency Regulation, which will either widely limit access or at least make this option for access to documents extensively burdensome. The ECJ has transferred the presumption from other areas of EU law[125] to competition proceedings and a further transfer from competition to DMA proceedings is therefore probable. Furthermore, the ECJ argued that access under the Transparency Regulation should not undercut the special rules on access to documents in EU competition law, which are limited for third parties.[126] Such reasoning can equally be applied vis-a-vis the DMA public enforcement proceedings with dedicated and even more limited access to the file rules.[127] Moreover, for competition law, the ECJ mainly created the presumption due to procedural economy reasons equally applicable in the context of DMA proceedings, i.e. preventing the overburdening of the European Commission with individual, time-consuming assessments on which aspects of a public enforcement file might be confidential or where overriding aspects argue in favour of disclosure. Rather the presumption creates a reversal of the burden of proof for applicants, who, according to the ECJ are better equipped and should bear the burden if they want the corresponding access. Similar to competition law, the reversal of the burden of proof and identifying which documents for which specific reasons should be disclosed for overriding reasons, might pose certain difficulties for applicants to precisely identify documents in files, as they have very limited knowledge on the public enforcement proceedings.[128] In general, applying this ECJ jurisprudence to the DMA as well would lead to a far-reaching limitation on access to documents under the Transparency Regulation, particularly for third parties with limited other opportunities for access to information.

5 OTHER EU LAW

Apart from EU law regimes such as the Transparency Regulation, inter alia, which are either worth looking at due either to their material proximity[129] to the DMA or their purpose of providing transparency,[130] there are also certain provisions within EU legal acts that provide for possibilities for getting access to information. In case a violation of GDPR provisions constitutes a DMA-infringement at the same time, the toolset of third parties' rights is also applicable in terms of DMA obligations. When it comes to rights of third parties and private

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123 ibid paras 100-105.
124 ibid paras 106, 107.
125 Cases C-39/05 P und C-52/05 P *Königreich Schweden und Maurizio Turco v Council* EU:C:2008:374, para 50; Case C-139/07 P *Europäische Kommission v Technische Glaswerke Ilmenau GmbH* EU:C:2010:376, para 54; Case C-477/10 P *Europäische Kommission v Agrofert Holding a.s.* EU:C:2012:394, para 57; Case C-514/11 P and C-605/11 P *Liga para a Protecção da Natureza (LPN) and Republik Finnland v Commission* EU:C:2013:738, para 45.
126 *Europäische Kommission v EnBW Energie Baden-Württemberg AG* (n 118).
127 See above at 2.1[d].
128 Hornkohl, 'Zugang zu Dokumenten' (n **Fel! Bokmärket är inte definierat.**) 608.
129 EU Competition law, see above 3.
130 Transparency regulation, see above 4.

enforcement it is also worth looking at the RAD, which contain a specific provision that aims for third parties' information rights. The scope and applicability of these provisions will be analysed.

5.1 ARTICLE 15 GDPR

Obligations for disclosure can also be found within the General Data Protection Regulation (GDPR). Without going into detail here, there are certain overlaps between DMA and GDPR provisions regarding the use of data (at least as far as it concerns personal data).[131] Consequently, DMA obligations can be indirectly enforced by the GDPR and access to information provided particularly by Article 15 GDPR.

5.1[a] General scope and nature

Article 15 GDPR lays down the right for data subjects 'right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data'. Consequently, access can only be granted by the controller or processor. Access to information granted through Article 15 GDPR is only an option if this requested information represents personal data, not other information. Besides, the right to request this information under Article 15 GDPR is limited to the data subject. When it comes to the request regarding the question of *whether* a controller processes data of the requesting person, there is – naturally – no need for being personally affected (this is also called 'negative request for information' (Article 4 No 1 GDPR). Further, the question of whether Article 15 GDPR covers an interest to information that is not related to data protection has been affirmed by the ECJ.[132] While this option cannot be considered as special procedural rules, it can at least act as a basis for private damage claims of data subject pursuant to Article 82 GDPR.[133] In principle, the ECJ acknowledges the right to use data which is collected for other purposes, i.e. also under Article 15 GDPR, within civil procedures to assert civil law claims with reference to the in ECHR-case law established principle of equality of arms.[134] At the same time though, it points out the necessity of civil courts to apply the principle of proportionality. In any case, the courts are also obliged to meet the requirements set out in Art 5 GDPR which also reflect the principle of proportionality.[135]

5.1[b] Applicability in the context of the DMA

Due to Article 8(1) DMA, the measures the gatekeeper has to take in order to fulfil the obligations imposed by Articles 5–7 DMA have to be in line with the standards set out in the GDPR. Consequently, the DMA explicitly refers to the GDPR and declares the

131 Hornkohl and Ribera Martínez (n 18).
132 Case C-307/22 *FT (Copies du dossier médical)* EU:C:2023:811 para 51.
133 Lena Hornkohl, 'Überwindung von ungewissen Sachverhalten – Ist die Zeit reif für eine allgemeine Offenlegung von Beweismitteln im deutschen Zivilprozess?' (2021) 2 Zeitschrift für das gesamte Verfahrensrecht – GVRZ 17, 26.
134 Case C-268/21 *Norra Stockholm Bygg* EU:C:2023:145, para 52; ECtHR, *Zayidov v. Azerbaijan (No 2)* (n 7) para 87.
135 *Norra Stockholm Bygg* (n 134) paras 53–55.

applicability of these rules 'without prejudice'. As the DMA also provides for rules that shall restrain the use of personal data by the gatekeeper, these overlapping obligations can make for the subject of private enforcement tools laid down in the GDPR. According to Article 5(2) DMA for example, the processing, cross-use and combination of personal data across the gatekeeper's CPS is prohibited unless the end user gives her consent to the processing.[136] Compared to the DMA, the GDPR contains a fairly extensive toolbox for private enforcement. For cases in which the violation of a DMA regulation also constitutes a violation of GDPR regulations, this toolbox stands open for enforcing DMA obligations.[137]

5.2 ARTICLE 18 REPRESENTATIVE ACTIONS DIRECTIVE

The DMA also provides for a possibility to collectively claim damages out of DMA-infringements that (potentially) harm the collective interests of consumers. For this purpose, Article 42 together with Article 52 DMA declares the Representative Actions Directive (RAD) to be applicable also for DMA-infringements.[138] On the one hand, however, this raises the question of which group of beneficiaries are eligible for RAD. On the other hand, it should also be noted that – despite the deadline for implementation having already passed – there are still considerable differences with regard to implementation at national level in the individual member states.

5.2[a] Disclosure under the RAD

According to Article 18 sentence 1 RAD, Member States must ensure that where a 'qualified entity'

> has provided reasonably available evidence sufficient to support a representative action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court or administrative authority is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law, subject to the applicable Union and national rules on confidentiality and proportionality.[139]

The same applies equally to the defendant under Article 18 sentence 2 RAD. Similarly to the disclosure rules of the Damages Directive,[140] this mechanism intends to compensate for any information asymmetries.[141] However, contrary to the Damages Directive, disclosure under the RAD is limited by a decisive factor and reference to national law. The right for disclosure is limited as it can only be ordered 'in accordance with national procedural law'. Consequently, Article 18 RAD does not mandate Member States to create new or other

[136] Rupprecht Podszun, 'Should Gatekeepers Be Allowed to Combine Data? Ideas for Art. 5(a) of the Draft Digital Markets Act' (2022) 71(3) GRUR International 197; Damien Geradin, Konstantina Bania, and Theano Karanikioti, 'The interplay between the Digital Markets Act and the General Data Protection Regulation' (2022) <http://dx.doi.org/10.2139/ssrn.4203907> accessed 20 January 2024.
[137] Rupprecht Podszun, Philipp Bongartz, and Alexander Kirk, 'Digital Markets Act Neue Regeln für Fairness in der Plattformökonomie' (2022) NJW 3249.
[138] Hornkohl and Ribera Martínez (n 18).
[139] Article 2(2) RAD.
[140] See above at 3.
[141] Recital 68 RAD.

disclosure rules other than those already laid down in national procedural law. This leaves the door open for national procedural differences, as the DMA is thereby lacking specific tools that could provide for harmonization or at least a minimum standard.[142] To ensure an effective enforcement of the obligation for the defendant to disclose (rightfully) requested evidence, Member States have to provide for rules for sanctioning the refusal of doing so. In addition to fines, procedural consequences may also be imposed as possible sanctions.[143]

5.2[b] Applicability in the context of the DMA

Because Articles 42 and 52 DMA declare the RAD mechanism to be applicable to DMA infringements, rules transposing the disclosure obligations of Article 18 RAD will equally apply in the context of collective actions for DMA infringements. Consequently, qualified entities filing representative actions for DMA infringements and gatekeepers defending such actions will have access to the national disclosure rules in the context of their actions. This regime is already very limited by virtue of EU law, as the personal scope only covers qualified entities and defendants, not other third parties or the general public. Access to information under this regime is therefore specific and rather restricted. The available disclosure measures will further depend on the transpositions of Article 18 RAD on national level and due to the mentioned reference to the national procedural standard on disclosure, the variety of (pre-existing) disclosure rules on EU Member State level.

Without assessing national disclosure rules in detail here, disclosure of evidence in civil procedure, and also for collective actions, differs a lot in the various EU Member States.[144] While some have quite far-reaching disclosure regimes, others have no or very limited disclosure rules applicable in the context of the DMA. The general disclosure rules in civil procedural law in Germany and Austria, for example, are rather limited.[145] At least in Germany, which has, contrary to Austria,[146] already transposed the RAD into national law, the general civil procedural disclosure rules described below apply to RAD actions and also for DMA collective representative actions.[147] Delimitation issues can arise here, since Germany also added the DMA to the national regime for competition law damages actions, including the dedicated rules on disclosure of documents.[148] Ultimately, the special competition rules on disclosure should also be applicable to DMA representative actions

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[142] Fernando Gascón Inchausti, 'A new European was to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 2 GPR, para 61.
[143] Recital 69 RAD.
[144] European Commission, Directorate-General for Competition, Quantifying antitrust damages towards non-binding guidance for courts [2009] <https://data.europa.eu/doi/10.2763/36577> accessed 15 April 2024; European Commission, Directorate-General for Competition, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative and economics reports [2004] <https://op.europa.eu/en/publication-detail/-/publication/38de282a-fdda-4f30-91be-2a2ef2019a59> accessed 15 April.
[145] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.
[146] Florian Scholz-Berger and Antonia Hotter, 'Umsetzung der Verbandsklagen RL: Status quo in den Mitgliedstaaten' (2023) 20 ecolex 40.
[147] Section 6 Directive (EU) 2020/1828 of the European Parliament and of the council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/01, refers to Section 142 Code of Civil Procedure.
[148] Julia Helminger, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on Member State Level – The German and Austrian Experience', in this issue.

under the RAD transposition, as these rules are specifically designed to also facilitate damages actions under the DMA and align with the broader objective of the RAD transposition in Germany to strengthen collective redress.[149]

6 CONCLUSIONS

Access to information has an importance that should not be underestimated. On one hand, it makes a decisive contribution to private enforcement, which, together with public enforcement, ensures the effective application of EU law. On the other hand, it can guarantee procedural principles enshrined in EU law, particularly the Charter of Fundamental Rights.

As this article shows, the DMA and also the DMA IR contain a number of procedural rules that govern access to the file for gatekeepers, undertakings or associations of undertakings concerned. It also takes into account the protection requirements for business secrets, which play an important role in the context of the DMA. However, particularly when it comes to legal certainty, the adoption of further guidelines or manuals, which can be found in competition law proceedings, for example, would be desirable.

Whilst it provides the basic tools for procedural rights of addressees of the DMA, third parties' rights of access to files are very limited. There are no dedicated provisions allowing third parties access to the Commission file in DMA proceedings. They must take recourse to other information access tools. To this end, various publication obligations under the DMA can provide a useful source, as this often represents the only possibility to get access to required information. Publications will also be relevant for granting general transparency of DMA proceedings. Facing this quite limited possibilities for access to the file, the question arises as to the applicability of procedural competition law, which is at least obvious due to the material proximity of both regimes. However, DMA enforcement does not constitute competition enforcement. Consequently, the procedural competition provisions, including the disclosure scheme of the Damages Directive do not apply.

In addition to the special procedural provisions, there are also a number of alternative options within EU law. The Transparency Regulation covers general public access to documents held by EU institutions, including the Commission, and it lays down the principles, conditions, limits, and procedures to such public access. It is likely that the jurisprudence from competition law, particularly on the limits, will apply *mutatis mutandis* for access requests under the DMA.

Obligations for disclosure can also be found within the GDPR. Due to certain overlaps between DMA and GDPR provisions regarding the use of data (at least as far as it concerns personal data), some DMA obligations can also be indirectly enforced by the GDPR, and access to information provided particularly by Article 15 GDPR can be made use of. In case DMA-infringements (potentially) harm collective interests of consumers, the DMA explicitly declares the RAD to be applicable in order to collectively claim damages resulting from the infringement. As a limiting factor however, one has to mention that not every group is eligible for collective actions. This does, however, raise the question of which group of

[149] Lena Hornkohl, 'Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany)' [2024] Journal of European Competition Law & Practice 15 (forthcoming).

beneficiaries are eligible for RAD. The implementation of the Directive is still differing between the individual Member States.

To sum it up: the DMA itself contains certain possibilities for access to the file and information overall. The gatekeepers, undertakings or associations of undertakings concerned have the widest possibilities for access to information. Third parties mainly have to take recourse to general procedural rules which are limited (particularly compared to competition law) and also still highly differing between member states. In this regard, considerable room for improvement exists.

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