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22 Core Platform Services For 6 Gateekepers: The European Commission Issues its Preliminary View on the DMA's Designation Process

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The European Commission has made it in time to designate the economic operators which will be the targets of the Digital Markets Act (DMA). On the 6th of September, the EC issued a press release detailing the different actions it had endeavoured since seven different undertakings had notified their potential status as gatekeepers on 4 July (the undertakings being Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung). Although a few designations were cut clear from the DMA's drafting, the decisions of the Commission have been anything but predictable.

Who's there?

From the seven initial notifications, the Commission has finally designated six different gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft). For the moment, Samsung has been left adrift and has not fallen under the scope of designation and the possibilities abound relating to the possible pathways that the South Korean company may have achieved that. But first, let's deep dive into the actual designation decisions that the Commission has produced in early September.

The designation process encompasses two separate and intricately linked notions: gatekeeper and core platform services. Pursuant to its definition under Article 2(1) DMA, a gatekeeper is an undertaking providing core platform services, which has been designated pursuant to Article 3 of the DMA. Thus, the concept that the regulation streamlines throughout its content is instrumentally connected to the provision of a core platform service (CPS). A gatekeeper cannot exist but if it caters for a core platform service. In turn, there are 10 types of CPS that the regulatory instrument defines under Article 2(2).

However, the catering of a CPS is only one of three criteria that an undertaking shall satisfy to be designated as a gatekeeper. Aside from providing a CPS which is an important gateway for business users to reach end users it also must have "*a significant impact on the internal market*" and "*enjoy an entrenched and durable position, in its operations or it is foreseeable that it will enjoy such a position in the near future* (Article 3(1) of the DMA)".

These three characters of the operator are fleshed out under Article 3 into two main types of designation: i) those stemming from the application of the presumptions contained under Article 3(2), i.e., quantitative; and ii) those relying on the Commission's interpretative criteria away from quantitative thresholds, i.e., qualitative. This is the reason behind the fact that there has been a myriad of actions ranging from the EC's first designation efforts, insofar as not every undertaking satisfied the quantitative thresholds contained under Article 3(2) of the DMA.

As far as we know (and awaiting the publication of the designation decisions in full), the 22 core platform services satisfied the quantitative criteria set out under Article 3(2) in terms of turnover, monthly/yearly active end users and duration. A list of the gatekeepers alongside the core platform service that have been designated can be found in the table below:

Undertaking	Core platform services
Alphabet	1- Google Search: online search engine (VLSE in DSA). 2- YouTube: video-sharing platform service. 3- Android: operating system. 4- Google Chrome: web browser. 5- Google Ads: online advertising service. 6- Google Play: online intermediation service. 7- Google Shopping: online intermediation service. 8- Google Maps: online intermediation service.
Amazon	1- Amazon Marketplace: online intermediation service. 2- Advertising services: online advertising service.
Apple	1- iOS: operating system. 2- App Store: online intermediation service. 3- Safari: web browser.
ByteDance	1- TikTok: online social networking service.
Meta	1- Facebook: online social networking service. 2- Instagram: online social networking service. 3- WhatsApp: number-independent interpersonal communications service. 4- Meta Ads: online advertising service. 5- Messenger: number-independent interpersonal communications service. 6- Facebook Marketplace: online intermediation service.
Microsoft	1- Windows PC OS: operating system. 2- Ads: online advertising service. 3- LinkedIn: online social networking service.

In terms of procedure, however, the most salient and interesting sections of the European Commission's press release are those relating to the second group of designations (qualitative) as well as to the edges and discussions that have unravelled during these summer months. There are two different scenarios to consider in this regard: the Commission's triggering of market investigations under Article 17(3) as well as the first proceedings issued to determine whether the qualitative thresholds contained under Article 3(8) were met via the market investigation procedure under Article 17(4) DMA.

The Commission is not in the clear: market investigations under Article 17(3) of the DMA

In parallel to the completed designations, the Commission will investigate for four different of the gatekeeper's services whether they qualify as gateways or not. From the EC's press release, it

seems like Microsoft and Apple decided to rebut the presumption of falling within the scope of the DMA (Article 3(5) DMA).

Before the rebuttal of the presumption, the Commission can determine whether the arguments put forward by the undertakings are sufficiently substantiated to call into question the application of the presumption. If it considers that to be the case, then the Commission is bound to trigger the market investigation procedure contained under Article 17(3) DMA. This was the case for Microsoft's online search engine (Bing), web browser (Edge) and online advertising services (Microsoft Advertising) as well as for Apple's number-independent interpersonal communications service (iMessages). In particular, it is quite atypical that Bing qualified as a very large online search engine under the Digital Services Act but is not unquestionably designated under the DMA (bearing in mind that both instruments are aimed at different purposes).

On this note, the Commission will conclude its market investigation within five months, but it will have to issue its preliminary findings within three months since the designation (Article 17(3) paragraph two DMA). At that time, the Commission will clarify and expose to the public what arguments will suffice an undertaking to, at least, rebut successfully the presumption under Article 3(2) DMA. The DMA directly excludes that any justification on economic grounds may be sought out by the undertaking, whereas arguments in favour of the rebutting of the presumption may relate to elements "*such as the impact of the undertaking providing the CPS beyond revenue or market capitalisation, such as its size in absolute terms and the number of Member States in which it is present*" (Recital 23). Another completely different tale to tell will follow on whether the 'interim' acceptance of those arguments will come a long way in excluding those services from designation altogether.

On the other side, if the Commission considers that those sufficiently substantiated arguments do not hold, then it can simply reject them and proceed with the designation. At the moment of writing and to my knowledge, the Commission has not given any clues that any other undertaking rebutted the presumption unsuccessfully, irrespective of the fact that the press already reported in July that TikTok disputed its condition as a gatekeeper. Once the Commission's designation decisions are published in full, one might be able to analyse (and comment!) what type of arguments were rejected by the enforcer.

However, in the Commission's own mind, the dichotomy that one has put forward in the preceding paragraphs may be a false one. Apparently, there are other options open to the undertaking at the stage of the designation when rebutting a presumption is involved. The undertakings may provide "*sufficiently justified arguments showing that* (their) *services do not qualify as gateways for their respective core platform services*" (last paragraph of the press release). -Notice the nuance between both concepts: sufficiently justified vs. sufficiently substantiated arguments as per the letter and law of Article 3(5) of the DMA.

This was the case for Alphabet's Gmail, Microsoft's Outlook.com and Samsung's Internet Browser. Even though the services met the thresholds under the DMA (one has to presume under Article 3(2) DMA), the Commission did not decide to perform further investigation via the market investigation mechanism under Article 17(3), irrespective of the fact that it could (and should!) have done so if one analyses closely Article 3(5) DMA.

Therefore, one has to further differentiate two types of defences that the undertakings may put forward when rebutting the presumptions when they surpass the quantitative thresholds: those

relating to matters of law (where sufficiently substantiated arguments suffice under Article 3(5) DMA) and those relating to matters of fact (where sufficiently justified arguments are enough).

Hence, two levels of arguments may be put forward by the undertakings depending on their reasonableness and the discretionary interpretation operating in the hands of the Commission. One can easily see and deduce the reasons behind the fact that e-mail operators Gmail and Outlook.com have not been designated. In my own mind, they do not abide by any one of the categories presented under Article 2(2) as core platform services, and most of the provisions under the regulatory instrument would seem excessive to impose upon such an operator. Nonetheless, one would be right to question whether the Commission engaged with the designation procedure of these services at all (even if in the hypothetical case that the undertakings decided to notify those services too just to secure compliance with the designation process), if they did not fall within the objective scope of the regulatory framework.

A different scenario sets apart Samsung's web browser case from that of Alphabet's and Microsoft's email operators. The former does fall within the scope of Article 2(2)(g) DMA, and the arguments counselling the absence of designation directly fall within the scope of those already presented in Recital 23 that justify the Commission's triggering of a market investigation under Article 17(3) DMA, i.e., the importance of the undertaking's core platform service considering the overall scale of activities of the respective core platform service. That is to say, it is feasible that the Commission decided not to designate Samsung due to the fact that it bears little weight within the wider web browser market vis-à-vis Alphabet's Chrome and Apple's Safari. Nonetheless, the procedure adopted by the EC does not follow this same rationale. Again, if that was to be the case, then the designation pathway should have led the Commission into an investigation under Article 17(3) DMA.

Thus, one can derive an important insight in terms of designation. In spite of the fact that Article 3(5) DMA provides for a pair of possibilities in case the undertaking achieves to rebut the presumption deriving from the application of the quantitative thresholds under Article 3(2), two sets of reasons can be adduced by the undertakings at risk of designation. On one side, the 'sufficiently substantiated arguments' contained under Article 3(5) lead to the Commission's doubts in designating away from a final decision and into a market investigation (which should match up with the same reasons contained in Recital 23). And on the other side, the 'sufficiently justified arguments' that undertakings may provide to avoid designation, even without the need for the Commission to double-check the status in light of its findings under a market investigation.

Although the Commission plans to make available the designation decisions in full in the near future (see the prepared repository here), the publication of those decisions deriving to non-designation would also prove fruitful (especially for the case of Samsung's Internet Browser, given that it overall excluded the undertaking's designation as a gatekeeper) and in line with its strategy to provide for transparent enforcement before the public and third parties -as well as for future undertakings endangered with a looming gatekeeper designation over their heads-.

The first qualitative designation is on its way: iPadOS

Aside from the designation based on the meeting of qualitative thresholds (rebuttable presumption applicable or not), the DMA does provide an alternative manner to designate gatekeepers based on

qualitative criteria under Article 3(8) of the DMA. This was the case for Apple's iPadOS, which did not meet the thresholds but could be designated as a separate core platform service to Apple's generalised iOS on the basis of a number of elements, such as the number of business users using the service, the existence of scale and scope effects or the switching costs imposed upon end users.

As opposed to the market investigation triggered via the rebuttable presumption mechanism (Article 17(3) DMA), designation based on qualitative criteria follows a different path. The Commission must conclude its investigation within 12 months (not 6) from the date of opening of the market investigation and the preliminary findings on the criteria that will be factored into the Commission's decision shall be published within 6 months (and not 5). Within those findings, the Commission "*shall explain whether it considers, on a provisional basis, that it is appropriate for that undertaking to be designated as a gatekeeper*" (Article 17(2) of the DMA).

Once it has received feedback, the designation via qualitative thresholds is one of a kind and the Commission must adopt an implementing act for that purpose, in accordance with the advisory procedure referred to in Article 50(2). That entails additional formality into the factoring out of the service as a CPS with the intervention of the Digital Markets Advisory Committee (different to the High-Level Group contained under Article 40 DMA), which will provide its own conclusions on the EC's preliminary findings and deliver its opinion by a simple majority of its component members (as per Article 4 of Regulation No. 182/2011 to which Article 50(2) DMA refers back).

An additional tenet must be remarked with regards to the market investigation following the path of Article 17(1) DMA insofar as the Commission may choose from two options: i) to designate the undertaking as a fully functioning gatekeeper (that is, asserting that it has a significant impact on the internal market, it provides a CPS which is an important gateway and enjoys an entrenched and durable position based on reasons different to those contained under Article 3(2) of the DMA); or ii) to designate a low-intensity gatekeeper under Article 17(4) DMA. In the latter case, the Commission may designate that gatekeeper but remark that it "*does not yet enjoy an entrenched and durable position in its operations*", but rather that it "*will foreseeably enjoy such a position in the near future*" and only declare applicable those obligations that are "*appropriate and necessary to prevent the gatekeeper concerned from achieving, by unfair means, an entrenched and durable position in its operations*". In principle, the provisions that may apply are those directly addressed in Article 17(4).

It is yet too early to say what iPadOS' fate will be in terms of its qualitative designation, but it will make for an interesting case lying at the edges of the DMA's enforcement. In case it falls under the designation, the reasons that the Commission will have to bring forward must be different to those contained under Article 3(2) DMA but, perhaps, they do not end in being so different to those contained under Recital 23 regarding the arguments relating to the undertaking's rebuttable presumption. However, in case the service does not fall under designation, then a related question arises on whether Apple's iOS will be comprised only of its smartphone-related operations excluding those of tablets or, on the contrary, whether both will be finally amalgamated into the wider definition.

What's next?

The EC's press release in establishing the first gatekeepers and core platform services to fall under

the scope of the DMA's application may seem static in nature, but the designation process is anything but. Even though these first gatekeepers *"shall comply with the obligations laid down in Articles 5, 6 and 7 within 6 months after a core platform service has been listed in the designation decisions"* (Article 3(10) of the DMA), designation decisions and processes have only started.

The designations that may be tabled

The gatekeepers were expected to notify their initial thoughts on their potential gatekeeper status up until July 2023, and some of them did so. However, there might be more to it than the eye can see. Although the Commission has not jumped the gun yet, there might be undertakings that failed to notify their status or that failed to provide sufficient information to handle and decide on gatekeeper designation. In those sets of cases, the Commission is entitled to designate those same undertakings based on information available to it (be that publicly available information or not).

Moreover, the designation process under Article 3 is not stagnant in time. As long as a different undertaking (or the same undertaking via a different CPS to those already designated) surpasses the thresholds set out in the regulatory instrument, it may fall under designation. This seems to be the case, as reported this summer, for Booking.com. At present, it does not meet the thresholds due to the negative impact of COVID-19 on its business, but the thresholds will likely be met at the end of 2023. At that point, it is expected that the OTA will come forward (just as the rest of them did in July) and provide the Commission with the necessary information to decide on the designation.

Finally, the Commission is vested with additional responsibilities related to designation under Article 4 DMA. Every year, it shall examine *ex officio* whether any new undertakings providing core platform services satisfy the requirements set out under Article 3 DMA. Additionally, every 3 years, it must review whether the gatekeepers continue to satisfy the requirements laid down in Article 3(1) or whether the list of core platform services needs to be amended (Article 4(2) DMA). In any case, it may also reconsider, amend or repeal a designation decision if there has been a substantial change in any of the facts on which the designation decision was based or in the case where the designation was based on incomplete, incorrect or misleading information.

What about cloud and virtual assistants?

All of the core platform services listed in the definition under Article 2(2) have been covered by the EC's decisions issued in early September. All of them but two: cloud computing services (Article 2(2)(i) DMA) and virtual assistants (Article 2(2)(h) DMA). The former category includes services such as Google's Cloud, Amazon's Web Services or Microsoft's Azure, whereas the latter encompasses increasingly popular technologies such as Amazon's Alexa or Google's Assistant.

If one takes the example of Amazon's Web Services, the absence of any reference within the designation decisions seems astonishing insofar as the service was long reported to be the most lucrative (and most capital-intensive) of Amazon's offerings. Hence, the lack of reference within the EC's latest press release seems to point to the fact that the cloud computing services are still developing and have not reached the stage of maturity to be captured under the regulatory framework. One would be blind to ignore that the absence comes months after the Commission's decision clearing Microsoft/Activision Blizzard's merger (subject to conditions) and the CMA's

forced turnaround of its own prohibition decision regarding the acquisition, especially with regard to the risks posed in the cloud game streaming services. Depending on their growth and user adoption, both of these core platform services may well be the future of the DMA's enforcement.

Key takeaways

The EC's issued press release comes forward as the first signal of the authority's future enforcement of the DMA, irrespective of the fact that many questions and impending doubts loom at the foreground of their adoption. For instance, how is the rebuttable presumption mechanism to be interpreted in light of the Commission's exercise of discretion and to what extent they can be brought as case studies for future undertakings that may be subject to designation?

These doubts will be resolved with nothing but transparency on the side of the Commission as soon as it publishes the detailed versions of the designation decisions (and hopefully, of the justified reasons that led it to not designate particular core platform services).

For the time being, a few ideas are enshrined and can be derived from the press release:

- 22 core platform services from 6 gatekeepers are on track towards the first compliance landmark set out in March 2024. The obligations under Articles 5, 6 and 7 will apply in that period of time -despite some of the delays contained under Article 7 due to technical reasons-. The obligations under Article 14 DMA and the obligation to set out a compliance function start, however, apply as of the day of designation.
- Enforcement may be delayed by the due course of justice via the Court of Justice. For the next 2 months and 10 days, those undertakings that have been designated may appeal their designation before the CJEU (as some of them have already done in the realm of the DSA).
- Designations are not over. These decisions and the processes triggering them are not stagnant in time nor static in nature. The EC's monitoring of the digital markets will be key to ensure that no one undertaking escapes from regulatory scrutiny.

This entry was posted on Monday, September 11th, 2023 at 8:00 am and is filed under Digital economy, Digital markets, Digital Markets Act
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