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Apple Seeks to Challenge its Designation Under the DMA: Part and Parcel of its Closed Ecosystem

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Next 16 November 2023, the deadline for the designated gatekeepers on the 5th of September 2023 to appeal the Commission's decisions will come to an end (for a review of the decisions, see here). Up until this moment, reporting has only documented that Apple would be considering challenging the Commission's decisions and is prone to finalise the claim in the coming days. According to the news, Apple's challenge directed at the General Court would be especially centred on the EC's designation of its online intermediation service (App Store) and its scrutiny over its number-independent interpersonal communication service (iMessage).

The expected challenge provides a good foreground to address the Commission's rationale in designating Apple's core platform services (CPS), insofar as the process was completely idiosyncratic and can be precisely set apart from those designation decisions that applied to the rest of the five gatekeepers.

The Commission's designation decisions – a regulatory strategy per each gatekeeper

At the moment of writing, the European Commission has published the complete designation decisions as gatekeepers for Alphabet's, Apple's, ByteDance's and Microsoft's CPSs. The EC's designation decisions over Amazon's and Meta's CPSs are only available in the format of non-confidential summaries. Given that the burden of triggering the designation process did not solely lie on the Commission since the undertakings had to, first, notify the Commission of those services that met the thresholds set out in Article 3(2), the narrative around each designation decision was completely localised per each gatekeeper.

In this sense, the Commission concretised each of its discussions with the gatekeepers according to the notifications they issued as set out by Article 3(3) DMA. For instance, the discussion regarding Alphabet's designation decisions was particularly focused on the delineation of its CPSs with respect to its online advertising service (Google Ads – which was also designated-) and whether the ads delivered within their end user-facing services should fall within their scope or whether they should be accounted for only with respect to Alphabet's overall online advertising services' operations (for the discussion, see paras 199-202, 210, 222 of Alphabet's designation decision). In ByteDance's case, the CPS delineation was not so relevant for the undertaking and it was not

overtly contested throughout the administrative procedure. However, ByteDance put forward a wide range of arguments to successfully rebut the presumption of its designation under Article 3(2) (for the comprehensive account of the reasons that the undertaking established to rebut the presumption see paras 98-108), insofar as the rebuttal would equate to the fact that it would not have been designated as a gatekeeper at all, since only its TikTok online social networking service met the thresholds for designation.

In Apple's case, the whole discussion with the European Commission was designed around the undertaking's submissions in early July 2023. In Apple's view, the three main core platform services that it recognised met the quantitative thresholds set out in Article 3(2) had to be further delineated according to the devices in which they operated (para 1 of Apple's full designation decision). Furthermore, Apple sought to rebut the presumption of designation for its fourth core platform service (iMessage).

Neutrality in terms of the device-specific versions of Apple's CPSs

Apple submitted that the first three of its core platform services qualified as:

- An operating system, in the sense of Article 2(2)(f) DMA for iOS, but that it had to be separated into five distinct CPSs, namely iOS for iPhones, iPadOS for iPads, macOS for laptops, watchOS for its wearable devices and tvOS for its connected TVs (paras 72-74 of Apple's designation decision).
- An online intermediation service in the sense of Article 2(2)(a) DMA for the App Store, which also had to be segmented into five software application marketplaces, notably those for iPhones, iPads, macOS, watchOS and tvOS (paras 27-28 of Apple's designation decision).
- A web browser in the sense of Article 2(2)(g) DMA for Safari, which had to be divided into three distinct web browsers, notably those catered on iOS, iPadOs and macOS (paras 101-103 of Apple's designation decision).

The grounds for the sub-division of these CPSs were basically the same for all of them. First, the features for each of the CPSs in their different versions are tailored for each device and are, thus, closely inseparable and idiosyncratic making their designation under only one CPS procedurally and substantially inefficient, insofar as the technical implementation of the DMA's provisions will be completely different across devices (paras 30, 31, 76 and 106).

Second, each of the versions catered for a completely different purpose for their end users. For example, with relation to the operating system, iPhones are suitable for on-the-go use whereas iPads are mostly used by consumers in a seated position (paras 77 and 78); with regards to the App Store, they service different end user demands in terms of the types and number of apps that are available and downloaded by them, especially in the type of content (para 31); and finally, regarding Safari, they are typically used for browsing different content in different situations and with different intensity of use (para 107).

Third, each of the versions serves a different purpose from a business user perspective. The argument was particularly articulated in the case of Apple's online intermediation service, where it defended that all of the five app stores vary in their relevance for end users so that different tools are provided to app developers for targeting each device's use cases and targeting different groups of end users -such as marketing and performance tracking tools- as well as for their development

via different systems-specific optimisation (para 32).

In principle, the Commission generally established that the delineation of those CPS that could be considered distinct would follow the lines of Section D, point 2(c)(i) of the Annex to the DMA, which establishes that distinct core platform services would be those "*which the relevant undertaking offers in an integrated way, but which: (i) do not belong to the same category of core platform services pursuant to Article 2, point (2); or (ii) are used for different purposes by either their end users or their business users, or both, even if their end users and business users may be the same and even if they belong to the same category of core platform services pursuant to Article 2(2)*" (para 14). Thus, the main criteria for separating distinct CPSs from each other is the purpose that each one of them realises in the market from the end user and business user viewpoint (para 15).

The results of delineating those CPSs delivered distinct results, despite they were based on the same set of circumstances: it was deemed successful for iOS, whereas the same criterion did not apply for the App Store and Safari. Thus, the obligations imposed upon Apple's online intermediation service App Store and its web browser Safari will apply irrespective of the device on which it is offered (paras 60 and 129).

Aside from asserting that the different versions did not pursue different purposes for business and end users (paras 39-41, 48-55 and 112-117), the Commission supported its all-encompassing definition of these CPSs on the fact that Apple applied similar rules and policies to developers and end users across devices (despite their functional differences) on which the App Store is offered, such as the App Store Review Guidelines for the acceptance and review of apps on the App Store and the Apple Developer Program License Agreement and Apple Developer Agreement (paras 43-45) and the same set of privacy and security rules and features for Safari (para 118). Moreover, the Commission remarked that Apple, in its official publications, addressed its own App Store as one service, for instance, Apple's Trademark List contained only one specific trademark for the App Store (paras 57-59). Thus, the Commission exercised its discretion in expanding the arguments that it used to support its finding that Safari and App Store had to fall into the category of only one category.

The same did not hold for the case of the devices' operating systems. In essence, the Commission agreed with Apple's view that the different versions of the operating system constituted distinct CPSs (para 82). The difference with the analysis that the EC performed lay upon the definition of the CPS in Article 2(10) which, in the EC's words "*should be assessed from a **technological perspective** taking into account that the notion of 'operating system' is intrinsically linked to the hardware or software (e.g., the device) whose basic functions the operating system is specifically designed to control and on which that operating system is intended to enable the functioning of applications*" (para 83) (emphasis added).

Therefore, as opposed to the definitions contained under Article 2(5) for online intermediation services and under Article 2(11) for web browsers, the definition under Article 2(10) points to this technologically informed interpretation, but one cannot quite grasp the full extent of the Commission's argument. Article 2(10) defines an operating system as "*a system software that controls the basic functions of the hardware or software and enables software applications to run on it*". For reference, web browsers are defined as "*a software application that enables end users to access and interact with web content hosted on servers that are connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated or embedded in*

software or similar" (Article 2(11) DMA).

The argument could be made that the 'technological perspective' that the Commission points at in para 83 of Apple's designation decision basically translates to the fact that hardware can be directly factored into the mix and, as such, that the legislator opened the door to the EC to delineate operating systems based on device-specific circumstances. In fact, this is precisely the line of reasoning followed by the Commission, which starts off by establishing that "*each of its operating systems is tailored to a specific Apple device and is not intended to run on other Apple devices or on devices of other manufacturers*" (para 84). These distinct functionalities presume the fact that different purposes are served from an end user and business user perspective (para 86).

By this token, the Commission draws two great groups within Apple's operating systems: those that are operated by macOS, watchOS and tvOS vis-à-vis those operated by iOS and iPadOS. The difference in purposes served to business and end users justify this first differentiation, for instance, based on the distinct battery life needed for each group or the specificities of programmes and applications required for each one of them (para 87). Within the latter group, the Commission further distinguishes iOS from iPadOS due to the fact that the gatekeeper customises them for smartphones and tablets respectively, "which contributes to the different purposes" served to business users and end users (para 88). Apple provided data to support the findings. For example, it provided data on use time, number of downloads and application activations that demonstrated distinct use cases for each one of them as well as additional information on the technical measures that a developer must consider to adapt its applications specifically to one type of operating system or another one (paras 89 and 90).

Those reasons, which did not deviate to a great extent from those already put forward by Apple with regard to its App Store or Safari, succeeded in demonstrating that only iOS was to be directly designated as a CPS given that its catering surpassed the quantitative thresholds under Article 3(2) (para 100). Although it was distinct from iOS, iPadOS did not escape scrutiny from the Commission, since it now follows the path of its qualitative designation via Article 3(8) (para 2 of the EC's decision triggering the market investigation under Article 17(1) of Apple's iPadOS). According to the Commission's preliminary view, the service benefits from strong network effects as well as scale and scope effects as part of the Apple ecosystem (paras 8 and 9).

iMessage: NIICS or rebuttal

Despite that Apple also notified that iMessage met the quantitative thresholds set out in Article 3(2), the undertaking contested its designation since it notified the circumstance back in July 2023 via three different pathways: i) arguing that it does not qualify as a number-independent interpersonal communication service (NIICS) in the sense of Article 2(9) DMA; ii) it is not designed for B2C communication and, therefore, does not fall within the definition of Article 3(1)(b) of a "*gateway for business users to reach end users*"; and iii) putting forward a range of argument to rebut the presumption via the means of Article 3(5) DMA.

On the side of the definition of the service as a NIICS, Apple argued that it did not provide its service for remuneration, which is one of the elements required under the definition. Instead, iMessage is catered for free and it is not monetised via fees, the sale of hardware devices and/or the

processing of personal data (para 133 of Apple's designation decision). The Commission tempered Apple's reasoning by asserting that the definition stood, even if the remuneration element did not literally apply to the service, since the definition of NIICS should encompass those services catered via direct payment for the service itself but also through other forms of indirect remuneration (para 139). This indirect remuneration took place via the sale of the devices were it is pre-installed (basically, smartphones) since it is an important element to the expansion of Apple's ecosystem involving hardware and the purchases of apps and digital content which can be performed via the app (paras 140-141).

Regarding the fact that the service does not intermediate service between a business user and an end user, the Commission upholds that this circumstance does not preclude it altogether from being characterised as a gateway for business users to reach end users (para 143). The argument is not very convincing, insofar as most of the DMA is assembled upon the idea of levelling the playing field in favour of business users and most of the provisions revolve around providing them with more chances to compete in these markets, by eliminating the leveraging component in the gatekeeper's conducts. The weakness of the Commission's criteria is later evidenced by the fact that it highlights that iMessage caters for a seamless experience for business and end users as it advertises it (para 146), whereas it recognises that CRM solutions and the creation of specific business accounts are not provided for in the service directly to business users (para 144).

These same arguments that are instrumentalised by the Commission to defend iMessage's character as a CPS are replicated by the undertaking in formulating its arguments to rebut the presumption under Article 3(2) DMA, such as the fact that it is not generally perceived as an important communication channel for business users in the Union (para 7 of the Commission's decision triggering the market investigation under Article 17(3) by accepting its rebuttal under Article 3(5) DMA). Furthermore, the most salient argument proposed by Apple to rebut the presumption was to present that it is an unimportant messaging service in the European Union as opposed to its main competitors WhatsApp and Facebook Messenger (para 5), following the terms and scope of Recital 23, establishing that the quantitative presumption may be rebutted on the basis of quantitative evidence.

Key takeaways

Against this background, Apple's appeal of its designation decision may prove substantive and challenging for the General Court, although the discussion between the undertakings and the Commission seems to be one of discretionary finesse as opposed to one of drawing out concepts that were not initially drawn out in the text of the regulatory instrument. Although the Commission is the sole enforcer of the regulation, that does not come with the legitimate power to interpret its terms at its own discretion and without ascribing to the principles of proportionality and necessity in its enforcement actions.

From Apple's designation decision one can decisively observe that the Commission is keen on introducing an expansive interpretation of the DMA, which may not always converge with the interpretation of the letter of the law. In this regard, the two most striking assertions on the side of the Commission seem to be those relating to the interpretation of Articles 2(10) and 3(1)(b) DMA. On one side, it is surprising to watch that the Commission is compelled to apply 'a technological interpretation' only when it decides how to delineate an operating system, and not other CPSs.

Isn't the DMA a technologically-driven piece of regulation, in the end? On the other side, the argument upholding that a gatekeeper can be defined even if business users do not reach end users within the CPS seems to contravene the whole exercise that the legislator introduced when defining what a gatekeeper is.

On both these fronts and those that may be presented in court, we must all wait and see the degree of discretion that the General Court defers to the Commission in interpreting the DMA. Designation decisions will only be the start to the long metering of Commission's overpowering force in fine-tuning the DMA's enforcement (and content).

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