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TikTok Raises the Ante Before the General Court: Interim Measures Filed Against its Gatekeeper Designation under the DMA

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TikTok's parent company, ByteDance, is currently bluffing before the EU Courts in the face of its gatekeeper designation decision issued by the Commission last September (the Decision). On 15 November 2023, ByteDance confirmed that it was appealing the Decision before the General Court, and a couple of days after that, the Court of Justice acknowledged that only three companies that had been designated would be pursuing proceedings before the General Court: Apple (Cases T-1079/23 and T-1080/23, see a review of the reasons that Apple could bring forward at court); Meta (Case T-1078/23) and ByteDance (Case T-1077/23).

On 1 December 2023, reports established that ByteDance would seek interim measures before the General Court. In appearance, ByteDance's call demands the imposition of a suspension of the effects of the Decision. The interim proceedings will resemble nothing close to Amazon's own appeals brought before the General Court regarding its designation under the DSA (see a post documenting that development). Amazon successfully managed to convince the General Court that it should grant a suspension of the effects of one of the provisions surrounding the DSA, but the decision did not go any further than that. ByteDance's hand is much bolder: an all-or-nothing bet to paralyse the overall application of the DMA to the only core platform service (CPS) that was caught under the designation: TikTok (see a review of the Commission's first designation decisions here).

TikTok's account of facts – and an analysis of the arguments on their own merits

ByteDance was the only gatekeeper to appeal its designation decision and issue a press release justifying the reasons why it should not have been caught under the scope of application of the DMA. On the undertaking's side, five main points of contention should counsel the General Court to reverse the Commission's designation decision (which would produce, in turn, ByteDance's overall regulatory escape from the regulatory framework since TikTok is the only CPS designated under the Decision):

- TikTok does not hold an entrenched position, i.e., it faces intense competitive pressure from some of the world's largest and most successful companies. Some of these (companies) have

already leveraged their existing market advantage to imitate TikTok's core product experience (think about Instagram's Reels), quickly gaining significant scale that took TikTok years to build. While the DMA is designed to prevent gatekeepers from gaining this type of scale, the European Commission's interpretation of the regulatory instrument will not stop these copy-cat business strategies. Instead, according to the undertaking's own words, the Commission has decided to put these competitive limits on TikTok, whereas it should remain competitive and keep growing.

- TikTok is a challenger, not an incumbent, in the digital advertising market. TikTok argues that the requirement of 'dependency' arising in Article 3(1)(b) DMA can be rarely justified because TikTok's Business proposition was only rolled out in Europe in 2021 and, as such, it is a recent entrant to the digital advertising space. The Decision, therefore, diminishes TikTok's prospects of mounting an effective challenge to the rest of its competitors.
- TikTok does not meet the EEA revenue threshold the DMA has set (the EUR 7.5 billion per year threshold required under Article 3(2) DMA), and it was instead designated based on its global market capitalisation, which does not account for its commercial performance in the region.
- TikTok did not have an opportunity to present its evidence. The undertaking presumes that the European Commission fished out selective information throughout the designation process, whereas other gatekeepers were granted the possibility of rebutting the presumption under Article 3(2) via the market investigation procedure under Article 17(3) DMA.
- TikTok embraces the DMA's relevant obligation because it is a challenger bringing new competition to the digital space, and the Decision is based on a fundamental misunderstanding of TikTok's business model.

At face value, TikTok's arguments in contesting the Decision seem quite simplistic, just as a press release justifying your company's behaviour should be. However, the reasons put forward by TikTok do relate to the core of the designation process enshrined in Article 3 DMA. Although abstract, three of the arguments relate to the substantive interpretation of the terms set out in both Article 3(1) and 3(2): i) the existence of an entrenched position (Article 3(1)(c) DMA); ii) the idea that being a 'challenger' contradicts the terms of Article 3(1)(b), that requires that the core platform service is an important gateway for business users to reach end users (which is also reiterated in the latest reason brought forward by the company on its press release); and iii) the interpretation of the market capitalisation threshold. The remaining argument relates to the selective nature of the Commission's interpretation of the evidence presented to it to decide on the undertaking's designation.

The requirements under Article 3(1): an important gateway for business users to reach end users AND an entrenched and durable position in its operations – reiterated arguments from the designation process

Article 3(1) DMA prompts the requirements that an undertaking must meet to be designated as a gatekeeper: a) that it has a significant impact on the internal market; b) that it provides a core platform service that is an important gateway for business users to reach end users; and c) that it enjoys an entrenched and durable position, or it is foreseeable that it will enjoy such a position in the near future. The undertaking is presumed to satisfy those requirements, subject to the thresholds set out in Article 3(2) DMA, correspondingly: a) the market capitalisation threshold; b) the provision of the core platform service to at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union; and c) when the previous threshold was met in the last three financial years.

In particular, TikTok takes issue with the last two requirements: the 'dependency' of end users concerning its business proposition tools in the advertising market and the lack of an entrenched and durable position since it is, precisely, a challenger that can (and has) stood up to the traditionally known Big Tech GAFAM. For example, TikTok's expansion into search has proved to be challenging for Alphabet, given that Generation Z prefers to perform dedicated and specialised searches directly on TikTok. Moreover, it is also true that Big Tech has replicated TikTok's appealing features on its own platforms to attract large masses of end users. This is nothing new, actually. The most relevant features on Instagram (Reels and Stories) are a replica of those of other companies that came before it (TikTok and Snapchat).

The arguments that ByteDance puts forward are a grapple of those that it already pushed for in its rebuttal of the presumptions under Article 3(2) via the procedure set out in Article 3(5) DMA.

On the side of the argument relating to Article 3(1)(b) DMA, it seems that TikTok's argument is out of focus. The undertaking establishes that "*it is a challenger, not an incumbent, in the digital advertising market*". However, the Decision categorised TikTok as an online social networking service (para 164 of the Decision) The Commission explicitly established that concerns relating to its online advertising service were not relevant to TikTok's designation as an online social networking service, especially because comparing the undertaking's figures to those of Alphabet, Meta, and Amazon is inappropriate and artificial since the online advertising figures for those other platforms relate to a significantly wider scope of services on which ads are being displayed (paras 150-151). Therefore, although TikTok's data operations (and, hence, its ad services) may be influenced by designation, the fact that it is not a challenger in that particular market is not necessarily and automatically relevant. Furthermore, the terms by which gatekeepers may rebut the presumption under Article 3(5) DMA (which I also analysed in a post here) are narrow, if one looks at the letter of the law (in principle, the rebuttal should only relate, according to Recital 23, to the quantitative criteria surrounding the circumstances in which the gatekeeper caters for its services).

Relating to the argument surrounding Article 3(1)(c) DMA, TikTok directly defies its qualification as an entrenched and durable operator, given that it "*faces intense competitive pressure from some of the world's largest and most successful companies*". In the designation process, TikTok already held this same argument on two distinct fronts.

On one side, it argued to rebut the presumption that it did not hold an unassailable position because it operates a single service in the Union without any ability to leverage its position across its own services, whereas incumbents (the category to which it does not belong) entrench their position across different online services by leveraging their far superior user base. In fact, the undertaking remarks that it is 'assailed' by other digital ecosystems that emulate its features by leveraging their large user bases, such as Instagram's Reels and YouTube's Shorts (para 110). The Commission tempers TikTok's rebuttal by explaining that the requirement under Article 3(1)(c) DMA is not necessarily influenced by reference to the presence of an unassailable position (para 156). In fact, its significant scale and growth in terms of its business and end users over the recent years with an upward trajectory further support the finding of its entrenched position (para 158).

On the other hand, TikTok also brought forward the fact that it is a recent entrant and has already been challenged by several established ecosystems because being a challenger and its qualification as a gatekeeper are mutually exclusive positions that cannot be given in one single undertaking. In fact, the undertaking defended that its business users' and end users' switching costs are low and

they are not locked into its ecosystem, whereas other incumbent platforms benefit from the offerings they display on other platforms, which creates a one-stop-shop ecosystem for advertising (para 111). Once again, the Commission shoots down the argument by stating that there is nothing in the DMA contesting that an undertaking may well be a challenger to certain gatekeepers and that it can, simultaneously, be a gatekeeper in its own rights. Moreover, it upholds that TikTok has already grown to half the size of Facebook and Instagram over the last three years and appears to be able to deliver a high engagement rate (para 159). Therefore, it seems questionable that the quality of entrenchment does not apply in this case.

Against the background of the narrow-scope reasons that Article 3(5) provides undertakings to contest their gatekeeper status, TikTok's arguments fall short of contesting the fact that it fulfills the requirements under Article 3(1)(b) and 3(1)(c) of the DMA.

The market capitalisation threshold under Article 3(2)(a) DMA – EEA scope, only?

Article 3(2)(a) DMA sets the presumption for the presence of a "*significant impact on the internal market*" (Article 3(1)(a) DMA) on two alternative thresholds. Any one of them can be given so that the threshold can be interpreted as fulfilled. Either the undertaking should have achieved "*an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year*".

In any case, TikTok is adamant in defending that it "*does not meet the EEA revenue threshold the DMA has set*" and that it was designated instead "*primarily on the performance of business lines that do not even operate in Europe*". The undertaking already formulated the same argument in the designation process by defending that it did not meet the revenue thresholds in the Union (para 98) and that it only meets the threshold on the basis of its global fair market value, which is driven by its China-focused business with no connection to the Union, facing different competitive dynamics, and operating in a distinct regulatory, linguistic, and cultural environment. Thus, in TikTok's own words, the meeting of the global market capitalisation threshold is not indicative of TikTok's current or potential future ability to monetise users in the Union (para 100).

In both cases, the European Commission correctly set out that those reasons cannot justify the rebuttal of the presumption because they do not align with the wording of the DMA. Both formulations are irrelevant because both thresholds are alternative and not cumulative conditions, and the level of ByteDance's Union revenue is not an element related to the impact on the internal market beyond revenue or market capitalisation (para 121). Moreover, fair market value must be analysed as a whole and not concerning a specific geography, insofar as it is aimed at capturing the financial capacity of the undertaking concerned, including its access to financial markets (para 124).

Although it might seem counter-intuitive to think that a non-EEA-based threshold may sustain the basis for the fulfillment of the impact on the internal market requirement, the Commission cannot be criticised for applying the threshold alternatively, even though a broader question arises on whether the text of the DMA engrained a logic within its presumptions that do not necessarily correspond with the market and economic reality.

The selective nature of the evidence considered by the Commission

TikTok puts forward different criticisms of the Commission's actions in assessing the evidence that was presented by the undertaking to rebut the presumption in the terms set out in Recital 23.

First, the undertaking establishes that "*other platforms in a similar situation to TikTok were granted a market investigation by the European Commission (…) and the extensive evidence we provided in our rebuttal submission was not accepted*". It already formulated that same argument in the designation process by stating that the Commission's preliminary assessment of its rebuttal arguments breaches the principles of proportionality and sound administration, as its arguments would have required the EC to open a market investigation under Article 17(3) DMA (para 199). The Commission did not even respond to the criticism, given that they were overtly out of the scope of the arguments that may be brought about in line with Recital 23. Additionally, it seems rational that if not one of the reasons adduced by the Commission was considered to be sufficiently substantiated to contest the presumptions under Article 3(2), then the Commission was in the right to not trigger a market investigation under Article 17(3) DMA. The market investigation procedure is not a right in the hands of the gatekeeper but a tool for the Commission to check against the economic reality whether those already-qualified sufficiently substantiated arguments do call into question the gatekeeper status.

Second, TikTok argues that the result of the designation process is a "*decision based on inaccuracies and errors, to which we were not given the opportunity to fully respond*". This seems to be a new argument on the side of the undertaking, since it did not raise it before the Commission in the designation process, despite the fact that the procedure before the General Court is the ideal instance where the rights to due process can be observed and analysed correspondingly in an assessment of the facts of the case.

Third, TikTok ends up by arguing that it was designated "*on the basis of (…) selective information*". Again, the undertaking did not put forward the argument in the designation process, but this is, perhaps, the better chance that they might have in curtailing and limiting the Commission's powers in enforcing the DMA. The Commission's capacity to analyse, receive, and use information under the regulatory framework is vast. It is true that the undertakings bear the burden of adducing additional evidence to rebut the presumption (Recital 23), but nothing in the DMA prompts at the fact that it cannot rely on evidence that it did not obtain directly from the gatekeeper. In fact, the Commission does that across the rest of its designation decision, by relying on the undertakings' marketing or branding strategies to delineate CPS in one way or another (it did exactly that on Meta's designation decision to delineate Instagram from Facebook) or to make a broader point.

The undertaking's reasons will rarely succeed if they are analysed within the broader background of the benchmark set out by the case law and doctrine surrounding the granting of interim measures before EU courts.

The high threshold for the granting of interim measures before the General Court

Interim measures are not a given when they are asked for at the judicial level. In principle, actions brought before the Court of Justice of the European Union shall not have a suspensory effect. The Court may, however, if it considers that circumstances so require, order that the application of the

contested act be suspended (Article 278 TFEU). To that end, the Court of Justice may, in any case, prescribe any necessary interim measures (Article 279 TFEU).

Interim measures are granted only if three conditions are met: i) the action in the main proceedings must not appear, at first sight, to be without reasonable substance (*fumus boni juris* and admissibility); ii) the applicant must show that the measures are urgent and that it would suffer serious and irreparable harm without them; and iii) the interim measures must take account of the balancing of the parties' interests and of the public interest. The order is provisional in nature and in no way prejudges the decision of the General Court in the main proceedings.

In particular, the two last requirements are particularly salient insofar as they constitute the spearhead of the granting of the interim measures. On one hand, the urgency requirement entails that the applicant must show that the continuation in force of the measure that is challenged in the main action will likely cause serious and irreparable damage to its interests, pending the judgment in the main action. The serious and irreparable damage in question must be such as would result from a refusal to grant the interim measures if the action in the main proceedings was subsequently successful. The seriousness of the damage depends on the nature of the alleged damage and the specific circumstances of the application, and irreparable damage means damage that cannot be remedied by a favourable judgment in the main action or that can be financially compensated. On the other hand, the balancing of interests requires the applicant to show that the granting of the interim measure outweighs the interests involved in the continued operation of the challenged measure.

The strict requirements that are mandated by the EU courts in granting interim measures entail that they are rarely ordered. In the event that ByteDance's interim measures are directly prompted by the arguments set out above through its press release, they will rarely succeed, insofar as it is not even evident that the arguments would overcome the low threshold requirement regarding the presence of *fumus boni juris*, hinting at the possibility that the action is not reasonable from the perspective of its substance.

One would have a completely different account of facts if ByteDance's interim measures petition had been formulated with a narrower goal in mind, i.e., achieving the suspension of those obligations under the DMA that may cause the most damage to the platform's service in the immediate future. In a similar vein to Amazon's petition before the General Court in its appeals surrounding its designation under the DSA, ByteDance could have framed the interim measures to seek relief by suspending the effects of the obligation to audit its consumer profiling techniques under Article 15 DMA, for instance. The action would have merited more of the General Court's attention and dedication, insofar as the obligation is substantive in scope and has not yet crystallised into concrete metrics for the gatekeepers. Although the gatekeepers are expected to demonstrate compliance with the obligation under Article 15 DMA on March 2024, the Commission has not yet confirmed directly what metrics the gatekeepers are expected to apply, insofar as the draft Template for the compliance of the obligation (see its review here) has not yet been finalised by the Commission.

However, at this stage and at the moment of writing, ByteDance's petition resembles a general-purpose claim to contest the decision on its own terms, which cannot be narrowed down to the nuance required by the EU courts to avoid advancing the rationale of their main ruling into the interim measures proceedings.

Food for thought: pending issues from ByteDance's designation decision

Albeit that the ordering of interim measures may not succeed, ByteDance still has ample leeway to present a wide set of arguments that could result in the General Court's overturning of the Commission's decision to designate it as a gatekeeper, even though one would assume that the GC will tread lightly in contradicting the EC's first enforcement actions.

For instance, one of the main points of disagreement between ByteDance and the Commission surrounded the gatekeeper's designation in relation to the catering of an online social network (para 66), as opposed to the undertaking's initial notification that defined its services as those of a video-sharing platform (para 26). Article 2(8) defines a video-sharing platform service concerning the definition of an audiovisual media service of Article 1(1)(aa) of Directive 2010/13/EU, where Article 2(7) defines an online social networking service as a platform enabling end users to connect and communicate with each other, share content, and discover other users and content across multiple devices. The main element of an online social networking service is that it enables end users to connect and communicate with each other.

Following this rationale, ByteDance established that its TikTok services did not qualify as an online social networking service under Article 2(7) because their primary purpose and core function were not that of a social networking service, i.e., to connect end users with friends and family (para 28). Instead, TikTok's core function is to allow users to view content in the form of short, posted videos curated to and aligned with their personal interests based on their interaction with the service (and not on their interactions with other individuals) (paras 29 and 34).

Not according to the Commission: TikTok's video-sharing features are only part of the essential functionality of the broader online social networking service (paras 41 and 42). The communication and connection requirement between end users stems, according to the EC, from the end users' capacity to form networks and interact through various means via videos, photos, text-based posts, likes, comments, content sharing, and hashtags as well as the chat functionality in the platform (para 43). All these features foster a sense of community between the end users and their social interactions, which is, in turn, further supported by how ByteDance describes TikTok in its Terms of Service as a platform to create, view, and interact with and share content, and interact with others (para 44). The Commission rejects the rest of the arguments presented by TikTok in defending that the service is a video-sharing platform service, based on the social networking features being ancillary to the video-sharing functionality (paras 51-54) or based on the fact that TikTok does not display a news feed (similar to the online social networking service designated by the Commission, such as Facebook) (para 56).

The categorisation of TikTok's service will surely be a point that is argued before the General Court in the main proceedings, given that the scenarios that play out in one case (a designation as a gatekeeper as an online social networking service) and another (the same designation but as a video-sharing platform service) are not comparable. The fact that ByteDance is designated as an online social networking service implies that a broader spectrum of its services may be impacted by the DMA. For instance, Article 6(12) that mandates the application of fair, reasonable, and non-discriminatory general conditions of access for business users will be applicable only in the case that TikTok is designated as an online social networking service, which will trigger an all-encompassing discussion with the European Commission about what the FRAND-like obligations

deriving from Article 6(12) mean, expanding on their definition under Article 8(8) DMA (i.e., "*no remaining imbalance of rights and obligations on business users and that the measures do not themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users*"). Moreover, the argument could be made under a designation as a video-sharing platform service that the force of the obligations of the DMA should only touch upon that functionality within TikTok's app, whereas the wider categorisation enables the Commission to adopt a hands-on approach towards enforcement in curbing and fine-tuning TikTok's (un)desired features and functionalities (~~which may be wider to regulation and antitrust, themselves~~).

Key takeaways

The news that ByteDance was filing for interim measures before the General Court took no one by surprise. In the end, ByteDance is the designated gatekeeper with the least to lose and the most to win. If it manages to reverse the Commission's decision before the courts, then it will not be captured by enforcement straightaway via the procedure of quantitative designation under Article 3(2) DMA. Since TikTok is the only CPS captured under the decision, a successful appeal surrounding its gatekeeper status would mean that it escapes the Commission's grip under regulation (just as Samsung did regarding its Internet Browser).

If that were to be the case, however, nothing would stop the Commission from pursuing a distinct approach and a qualitative designation under Article 3(8) DMA, although most of the arguments that the Commission rejected on TikTok's side revolved precisely around the characters and elements that are assessed under the qualitative approach, i.e., network effects or the presence of multi-homing.

For the moment, the interim measures raise the stakes substantially: ByteDance is not asking the General Court to suspend, temporarily and until the main ruling is issued, compliance with one or two obligations under the DMA, but it impinges on its gatekeeper status altogether. Under the lens of the high threshold required for the granting of interim relief, ByteDance's judicial strategy may well be to bluff before the General Court rather than fold and wait for the main ruling which may, on its own, hold some merit, after all.

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