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The Requisite Legal Standard of the DMA's Designation Process: The European Commission's Discretionary Powers Explained

Alba Ribera Martínez (Deputy Editor) (University Carlos III of Madrid, Spain) · Tuesday, January 16th, 2024

In September 2023, the European Commission (EC) issued its first designation decisions under the Digital Markets Act (DMA) (see the quick-fire reaction to those decisions here). It sets under the regulatory framework's scope of application six different gatekeepers for twenty-two core platform services. At first glance, the designation decisions seemed straightforward enough: the European Commission followed the procedural and substantive safeguards of the designation process enshrined in Article 3, and the designation exercise applied in a quasi-automatic manner. Upon a thorough examination of the designation decisions, however, a completely different narrative seems to apply to the European Commission's enforcement actions.

I have explored the fully-fledged implications of the designation process as performed by the European Commission in a paper that seeks to respond to the question of whether it surpassed the degree of discretion that the DMA confers on it. Aside from the implications drawn in the paper, this post strives to elucidate some of the most salient conclusions derived from the reading of the criteria applied by the EC through each one of the designation decisions.

The letter of the law: Article 3 DMA

The DMA applies to undertakings that are designated as gatekeepers. Once the undertaking's core platform services (CPS) are listed under a designation decision, the obligations set out in the regulatory instrument start to apply within six months after the CPS was first listed. The concept of gatekeeper is, in turn, defined as an undertaking providing core platform services designated pursuant to the process established under Article 3 DMA. CPS are not defined in the regulatory instrument but rather listed with relation to the digital services that the legislator comprised under the DMA's scope of application.

Article 3(1) establishes the cumulative requirements for an undertaking to be designated as a gatekeeper: substantiality, criticality, and durability (the categorisation of the requirements into these groups was established first by Petit). Substantiality entails that the undertaking must have a significant impact on the internal market. Criticality implies that the undertaking provides a CPS, which is an important gateway for business users to reach end users. Durability means that the

undertaking enjoys an entrenched and durable position (or it is foreseeable that it will enjoy such a position) in its operations. The cumulative requirements are presumed to be met if the thresholds set out under Article 3(2) are surpassed by the undertaking.

Undertakings that surpass those thresholds only have the capacity to dodge the designation by rebutting the presumption with sufficiently substantiated arguments that demonstrate, due to the circumstances in which the relevant core platform service operates, that it does not manifestly satisfy the substantiality requirement listed under Article 3(1)(a) DMA. The terms of the rebuttal of the presumption are narrow, both as a possibility open to the undertaking and as an obligation to administer a satisfactory answer on the part of the Commission. The Commission may consider whether those arguments are sufficiently substantiated or not. If it does, the Commission may open a market investigation under Article 17(3) DMA to verify whether those arguments are of such a nature that the CPS is not comprised under the designation decision. If it does not, then the rebuttal of the presumption will have been rejected outright by the Commission.

The alternative to the quantitative designation is that of the qualitative designation set out under Article 3(8) DMA, which factors into the mix the analysis of several elements that the regulatory instrument deems problematic under the lens of competitive dynamics in the digital arena, such as the undertaking's size, network effects, or data-driven advantages.

Despite that the designation process might seem like a trivial exercise to perform from the outset, it is key to understanding the functioning of the DMA. Most of the substantive obligations imposed on the gatekeepers under Articles 5, 6, and 7 are defined under the lens of the scope of a particular CPS (for instance, Article 6(3) is directly addressed to operating systems, virtual assistants, and web browsers) or the obligation applies across the gatekeeper's CPSs and the rest of its services (for example, the prohibition of processing, combining, and cross-using personal data across CPSs and with the gatekeeper's third-party services under Article 5(2), as presented in a paper here).

The out-of-scope procedural pathways orchestrated by the European Commission

Bearing in mind the procedural safeguards under Article 3 DMA, one would have expected that the designation decisions would have adhered to these same terms. However, two main exercises were artificially incorporated into the designation process by the European Commission. Instead of the direct designation of the gatekeepers and their core platform services via quantitative thresholds, the EC incorporated the delineation exercise as the first stepping stone to designating a core platform service. After that, the EC calibrated whether the quantitative thresholds were surpassed by the core platform services according to the thresholds under Article 3(2). Finally, the EC considered the arguments that the undertakings presented to escape designation via the rebuttal of the presumption of the fulfilment of the quantitative thresholds under Article 3(5), albeit the underlying criteria that it applied were not entirely coordinated across the designation decision.

The delineation exercise

According to the EC, the criteria to delineate the CPSs are those that the Annex to the DMA establishes for the purpose of calculating the number of active end users and business users under the quantitative presumption (for example, see Alphabet's designation decision, para 15 or

Amazon's designation decision, para 10), despite that Section D of the Annex establishes that the methodology should be applied only for the latter purpose. The underlying rationale for the delineation exercise lied within the consideration of a core platform service's purpose, to determine whether two different services were to be considered distinct or the same.

However, the EC did not provide a tractable metric of what a CPS' 'purpose' meant in the context of the delineation exercise. This was made particularly evident if one observes the different instances where the EC performed the delineation exercise. The table below presents them with reference to the distinct types of analysis that were brought forward by the EC under the unifying theme of delineation:

	Delineation between different categories of CPSs	**Hardware delineation**	**Delineation with complementary services**	**Qualification**
Alphabet	1. Google Play/Shopping and Maps v. Google Search/Google Ads. 2. Google Search v. Google Ads. 3. YouTube v. Google Ads.	Google Android on smartphones and tablets v. Android Automotive OS, Android TV, Chrome OS, Cast OS and Fuchsia OS.		
Amazon	Amazon Marketplace v. Amazon Ads.		Amazon Ads v. Attribution and Marketing Cloud.	
ByteDance				Video-sharing platform and online social networking services.
Apple		1. iOS v. iPadOS, macOS, watchOS and tvOS 2. iOS App Store v. iPadOS 3. App Store, macOS App Store, tvOS App Store and watchOS App Store		
Meta	1. Meta Ads v. Facebook/Instagram. 2. Facebook v. Instagram.		Facebook v. Facebook Dating, Facebook Gaming Play, Messenger and Marketplace.	
Microsoft		Windows PC OS v. x86 and x64 instruction set and DaaS/Azure Virtual Desktop	1. LinkedIn v. Learning and Jobs features 2. Microsoft Ads v. Sales Navigator and Marketing Solutions	

Regarding the first group, the EC delineated different categories of CPSs from each other. The

analysis of these services was not unified and indicated that delineation is specific and idiosyncratic depending on each category of the CPSs that is concerned. For instance, different criteria for defining a CPS's purpose applied when the EC delineated an online advertising service from an online social networking service (such as in the case of Meta's Ads vis-à-vis Facebook and Instagram, see para 114 of Meta's designation decision) and when the EC delineated an online advertising service from an online intermediation service (for example, delineating Google Ads from Google Shopping or Maps, see paras 78 and 91 of Alphabet's designation decision). Despite that the only common thread relating to delineation relied on a CPS-specific analysis, the EC failed to apply those criteria consistently since in some instances it barred the fact that the interpretative provisions could have an impact on the exercise, whereas in other instances it interpreted them to influence the task.

A similar narrative can be derived from the second set of delineations performed around the gatekeeper's CPSs with relation to the different types of devices on which the CPS was presented to both business and end users. The discussion was particularly outstanding with respect to the delineation of the undertakings' operating systems. Both Android and iOS were evaluated under this same light. For instance, Alphabet submitted that Google Android should only comprise the deployment of the operating system on smartphones and tablets, whereas Apple presented the argument that iOS should only be considered to comprise the deployment of the operating system on Apple's smartphone, the iPhone. The Commission did apply a uniform legal standard and agreed with the undertakings on both fronts. designation decisions interpreted the definition under Article 2(10) of operating systems from what the Commission termed a 'technological perspective' (for a critique of this viewpoint, see here). This perspective entailed that services should be delineated bearing in mind the hardware and software 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. Thus, the delineation of operating systems should consider the type of device for which they were designed because they, in principle, affect the purpose of the operating system running that device. The same rationale, however, did not apply to delineating Microsoft's operating system for personal computers, where the technological perspective was not even considered under the definition in Article 2(10) DMA. Instead, the focus of the exercise was centred on accounting for the fact that the delineation should be processor- and technologically neutral (Microsoft's designation decision, paras 29-32).

Regarding the third category of delineation of the CPS with its complementary services, the Commission defended that the level of integration between different services pre-empted the conclusion that they belonged to a single service and distanced itself from the underlying criteria of the CPS's purpose. For instance, the fact that users had to create a specific profile to access Facebook Dating by explicitly consenting to the activation of the dating feature via a dedicated interface from the social networking site implied that both services were clearly identifiable and distinct services, aside from the fact that they serve different purposes (Meta's designation decision, paras 59-62). Ironically, the Commission formulated that same idea in reverse to uphold that Facebook Gaming Play was a distinct service from the social networking service. Despite the fact that the default settings of the service share the user's Facebook profile and consent with Gaming Play by default, the fact that the end user can voluntarily tailor the service's settings operated in favour of their differentiation (Meta's designation decision, paras 71-73).

The last category of the table concerns the EC's covert application of the delineation exercise to define a CPS into one category or another one based on the list under Article 2(2) DMA. This was the case for the Commission's assessment of whether ByteDance's platform, TikTok, should be

classified as a video-sharing platform service or an online social networking service. a CPS into one category or another one based on the list under Article 2(2) DMA. The EC did not argue that TikTok was not a video-sharing platform service. It agreed with the undertaking that its essential functionality is devoted to user-generated videos. However, the EC added that TikTok fulfils, simultaneously, the definition of an online social networking service and that this notion reflects best the characteristics and breadth of the platform's features and functionalities. The sharing of videos, which the Commission upheld, is only one functionality of the platform within its broader context (ByteDance's designation decision, paras 42-43, 48 and 50-52).

Against this background, the requisite legal standard of the delineation exercise remains an elusive concept to grasp. Different underlying criteria are instrumentalised to reach the conclusion that the purpose of a CPS is distinct from that of another service, whereas, in some instances, entirely distinctive benchmarks are streamlined to perform the same task.

The rebuttal of the presumption of the application of the quantitative thresholds

Article 3(5) allows the undertakings to sufficiently present substantiated arguments to demonstrate that, exceptionally, due to the circumstances in which the relevant CPS operates, it does not satisfy the requirements listed in Article 3(1) to categorise an undertaking as a gatekeeper. Recital 23 puts forward that the evidence and arguments that an undertaking may formulate are those relating to the quantitative criteria set out in the thresholds under Article 3(2). According to the letter of law, the arguments presented by the undertaking may have one nature or another after the EC's consideration: they are sufficiently substantiated because they manifestly call into question the presumptions, or they are not. If they are, then the EC may open a market investigation pursuant to Article 17(3) DMA. If they are not, then the EC can directly reject the arguments and designate the undertaking as a gatekeeper.

The requisite legal standard that the EC applied quite consistently was that the arguments had to manifestly call into question the presumptions under Article 3(2) to be considered by the EC at face value. The arguments presented to the Commission must plainly and unmistakably point to the fact that the gatekeeper's CPS should not fall under the DMA's scope. From a semantic perspective, thus, all those arguments that relate to quantitative evidence contesting the application of the presumptions under Article 3(2) that fall beneath the threshold of certainty or quasi-certainty should be discarded from being appraised by the European Commission. This is the reason behind the fact that only five out of the eleven CPSs that were rebutted have successfully passed onto the next phase of the market investigation procedure under Article 17(3) DMA.

However, instead of this two-pronged analysis that Recital 23 and Article 3(5) present before the undertaking (that of sufficiently presenting substantiated evidence that manifestly calls into question the rebuttal of the presumption), the Commission established an additional procedural track for particularised scenarios (this same idea I already formulated in a previous post here). The EC added that in those situations where it considers that the submitted evidence is sufficient to demonstrate that the requirements laid down in Article 3(1) are not fulfilled, it may accept the rebuttal without opening a market investigation.

These scenarios crystallised in relation to Alphabet's and Microsoft's email services, Gmail and Outlook.com. According to the European Commission's own words, the arguments they presented

manifestly called into question the presumption. Simultaneously, those same grounds also clearly and comprehensively demonstrated that the requirement of the CPSs constituting an important gateway was not fulfilled. The second threshold was added on by the EC via its designation decision to fabricate the possibility of the undertakings succeeding in their rebuttal without the need to trigger a market investigation (see Alphabet's designation decision, para 150, and Microsoft's designation decision, para 134).

As opposed to the delineation exercise, the rebuttal of the presumptions performed by the undertakings held closer to the terms of the regulatory framework, but still, some deviations from the legal standard were established by the European Commission with reference to the regulation of some of the CPSs. In this regard, one can establish more clearly the legal standard needed to satisfy the requirements for succeeding in the rebuttal of the presumption under Article 3(2).

Key takeaways

In the context of the thorough scrutiny of both aspects of the designation process and their legal standards, three main elements explain the European Commission's efforts in devising an effective enforcement strategy to capture the addressees to the DMA:

- The discretionary powers that the European Commission envisions ascribe to both the notions introduced by the regulation as well as to the procedural pathways that the regulatory framework establishes for the EC and the undertaking to follow. The delineation exercise is the most salient example of the latter, whereas the interpretation of the reasons that an undertaking may adduce to rebut the presumption of designation demonstrates the former point.
- The Commission's discretion should not be uniquely regarded under the lens of the premises, provisions, and principles set out in the DMA, but in light of the plasticity of the EC's interpretation of the legal instruments at its disposal.
- The dichotomy between enforcement in EU competition law and the regulatory instrument is not entirely evident, despite the legislator's aspiration to keep both fields of law separate. This point is particularly remarkable when one observes the requirements that the European Commission has adopted in interpreting the purpose of the CPSs for the delineation exercise. As pointed out by commentators to the gatekeeper's appeals of some of the designation decisions, *de facto*, the EC applied mimetic criteria to that required for the distinction of separate products in the realm of tying and bundling practices. The delineation exercise constitutes a conscious return to the values and rationale underlying EU competition law in these types of practices.

It is against this background that the degree of discretion enjoyed by the EC in interpreting and applying the provisions of the DMA should be considered, especially in relation to the standard of review that the EU Courts will apply when reviewing the first enforcement actions of the Commission. The General Court has been called to resolve the legality of the designation decisions issued with respect to Apple, ByteDance, and Meta. The abovementioned analysis hints at the idea that the disconnect between the requisite legal standards of the DMA vis-à-vis those in EU competition law should hold only in those cases where the EC does not apply the regulatory framework so extensively that it surpasses the margin of appreciation as a matter of its discretionary powers. In those cases where the EC deliberately chooses to imitate EU competition law, perhaps the same underlying criteria should apply for the sake of clarity and proportionality.

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