

6 REFLECTIONS ON THE RECENT DESIGNATION OF GATEKEEPERS UNDER THE DMA

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Highly anticipated since the DMA came into force late last year, the European Commission last week announced which digital platform services are designated ‘gatekeepers’ under the DMA – in that they have a strong intermediation position (provide an important ‘gateway’) between businesses and consumers in relation to ‘core platform services’. Companies providing core platform services had two months to notify the Commission if they meet the quantitative thresholds, related to turnover/market capitalisation and number of monthly users, to be considered a gatekeeper.¹

Out of seven digital companies that notified the Commission, six digital companies (Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft) and a total of 22 core platform services were designated by the Commission as gatekeepers, see Table 1 for an overview. Only Samsung notified the Commission as a potential gatekeeper but had no core platform services which were ultimately designated. The Commission has also opened several market investigations to further assess whether additional services should be designated as gatekeepers. By March 2024, the designated gatekeepers shall have to comply with the full list of obligations under the DMA² and must submit a compliance report to the Commission, demonstrating effective compliance with each of the obligations.³

¹ According to Art. 3 of the DMA, the quantitative thresholds, to be met in each of the last three financial years, are: 1) achieving “an annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years, or “average market capitalisation or its equivalent fair market value amounting to at least EUR 75 billion in the last financial year” (and providing the same core platform service in at least three Member States) (Art. 3 (2a)); and 2) providing “a core platform service that in the last financial year has 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” (Art. 3 (2b)). (*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)*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>)

² You can find a summary of the obligations: https://digital-markets-act.ec.europa.eu/about-dma_en#what-does-this-mean-for-gatekeepers

³ Some obligations started to apply as of designation. European Commission (6 September 2023), Press Release, Digital Markets Act: *Commission designate six gatekeepers*, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

Table 1
The European Commission designated 6 gatekeepers and 22 of their core platform services

GATEKEEPER / CORE PLATFORM SERVICE	ADS	BROWSER	CLOUD	INTERMEDIATION	N-IICS	OS	SEARCH	SOCIAL NETWORK	VIDEO SHARING	VIRTUAL ASSISTANT
ALPHABET	Google	Chrome		Google Maps Google Shopping Google Play		Google Android	Google Search		YouTube	
META	Meta			Marketplace	WhatsApp Messenger			Facebook Instagram		
APPLE		Safari		App Store		iOS				
AMAZON	Amazon			Amazon Marketplace						
MICROSOFT						Windows PC OS		LinkedIn		
BYTEDANCE								TikTok		
SAMSUNG										

Note: N-IICS (Number-Independent Interpersonal Communication Service) are messaging services. OS (Operating Systems).

Source: Copenhagen Economics based on European Commission (6 September 2023), Press Release, *Digital Markets Act: Commission designate six gatekeepers*, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

In light of these developments and based on the information currently available, we share six initial reflections:

1) **Some services that meet the quantitative thresholds are not yet designated as gatekeepers.**

The Commission has opened a market investigation (with a timeline of 5 months) after Microsoft and Apple have argued that, despite meeting quantitative thresholds, some of their core platform services do not constitute important gateways. This affects Microsoft's search engine (Bing), browser (Edge) and ad service (Microsoft advertising) as well as Apple's N-IICS (iMessage).⁴ If the investigation revolves around market power and (lack of) dominance, this could seemingly reopen the kind of 'economic' discussions that the Commission had aimed to avoid with the DMA, and if the Commission accepts these kind of arguments, it could potentially have more far-reaching consequences relating to the implementation of the obligations.

⁴ European Commission (6 September 2023), Press Release, *Digital Markets Act: Commission designate six gatekeepers*, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

In the cases of Alphabet's Gmail, Microsoft's outlook.com and Samsung's Internet Browser, the Commission has already accepted that they do not qualify as gatekeepers despite meeting the quantitative thresholds.⁵ This leaves Samsung as the only company that filed as a potential gatekeeper (due to meeting the quantitative thresholds) but was not designated as such by the Commission for any service.

2) Some services that do not meet the quantitative thresholds may yet be designated as gatekeepers.

While Apple's iPad OS does not meet the quantitative thresholds, presumably because of too few users, the Commission is further investigating (with a timeline of 12 months), whether the service is a gatekeeper nonetheless.⁶ The Commission will presumably investigate to which extent iPad OS is a gateway between apps and users, similar to iOS.

3) No cloud services were designated as gatekeepers.

Cloud services are not among the designated gatekeeper platform services, presumably because they do not reach the quantitative threshold for the number of active end-users. This is perhaps simply because cloud services do not possess the characteristics of multi-sided platforms connecting different groups of users but instead offer an input to firms in the more traditional sense. The Commission also has not announced a qualitative assessment of cloud services.

Thus, if the Commission wants to potentially regulate cloud services, as it signalled when cloud services were included on the list of core platform services, then the DMA apparently is not the regulatory toolbox to do so. This poses the question of whether the Commission will start a separate market investigation further down the line, or whether the Commission could seek to redefine the thresholds to allow for the regulation of services which do not constitute platforms or gateways. .

This also implies that the EU antitrust complaint on cloud computing services against Microsoft, brought forward by the Cloud Service Providers in Europe (CISPE) trade group in November 2022⁷, will have to continue as a standalone competition case and cannot be addressed via the DMA.⁸

4) No virtual assistants were designated as gatekeepers.

Virtual assistants such as Apple's Siri, Amazon's Alexa, Microsoft's Copilot and Google Assistant are not designated as gatekeepers. With the increased capability of chatbots based on artificial intelligence, virtual assistants may play a bigger role in the future.

⁵ European Commission (6 September 2023), Press Release, *Digital Markets Act: Commission designate six gatekeepers*, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

⁶ European Commission (6 September 2023), Press Release, *Digital Markets Act: Commission designate six gatekeepers*, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

⁷ Reuters (9 Nov 2022), Foo Yung Chee, *Microsoft faces new EU antitrust complaint on cloud computing practices*, <https://www.reuters.com/technology/microsoft-faces-new-eu-antitrust-complaint-cloud-computing-practices-2022-11-08/>

⁸ Note that not all digital services are covered by the DMA. The DMA for instance does not cover collaboration software and thus would not have been a helpful tool to intervene in the investigation into possible anti-competitive practices by Microsoft regarding Teams (https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3991).

5) Sub-services fully integrated into gatekeepers' other services have been designated as separate core platform services.

While Meta's Marketplace is fully integrated into Facebook, the Commission has designated this service as a separate core platform service. For Meta, this will impede compliance with the DMA's obligations as, for example, Article 5 (8) of the DMA stipulates that the "gatekeeper shall not require business users or end users to subscribe to, or register with, any further core platform services listed in the designation decision [...] or which meet the thresholds [...], as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services [...]." Similarly, Google Maps and Google Shopping are often fully integrated into Google Search, and are now designated as separate core platform services, which is likely to complicate compliance with the DMA.

6) Some services have multiple gatekeepers, putting in question the risk of "tipping" in these markets.

Digital markets can face the risk of tipping in favour of a single provider to the detriment of the consumers, which is one of the underlying rationales for regulating such markets via the DMA. As stated in the preamble to the DMA (paragraph 26):

*"A particular subset of rules should apply to those undertakings providing core platform services for which it is foreseeable that they will enjoy an entrenched and durable position in the near future. The same specific features of core platform services make them prone to tipping: once an undertaking providing the core platform service has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position could become unassailable and the situation could evolve to the point that it is likely to become entrenched and durable in the near future. Undertakings can try to induce this tipping and emerge as gatekeeper by using some of the unfair conditions and practices regulated under this Regulation. In such a situation, it appears appropriate to intervene before the market tips irreversibly."*⁹

However, we note that in relation to several core platform services the Commission has designated several digital platforms as gatekeepers. For example, Instagram, Facebook and TikTok are all designated gatekeepers for the core platform service Social Network; Google, Meta and Amazon are designated gatekeepers for Ads; Chrome and Safari are gatekeepers for Browser. The question thus arises whether these markets do in fact bear a risk of tipping, or whether it is another theory of harm that is being addressed (e.g. 'tipping' towards an oligopoly market) – although it must in any case be recognised that the concept of a core platform service is not necessarily equivalent to the economic concept of a relevant market.¹⁰

After the Commission has designated the first set of gatekeepers under the DMA, we will follow with interest how the designated gatekeepers will comply with the DMA's obligations and await the outcome of the four market investigations already opened by the Commission. Going forward, it will

⁹ 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), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>

¹⁰ E.g. Google Maps could be on a separate relevant market from the App Store, despite being considered the same type of core platform service.

also be interesting to see which role the DMA will play in regulating Large Language Models (LLM) and other generative AI services, which are currently not listed as core platform services¹¹. Some of the important questions include whether LLMs will only be indirectly covered by the DMA as they support designated core platform services (e.g. Search)¹², or will eventually become standalone core platform services under the DMA.

¹¹ See Art. 2 (2) under the DMA, *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)*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>

¹² For some thoughts on this, see for example Tech Crunch, Natasha Lomas (April 2023), *Unpicking the rules shaping generative AI*, <https://techcrunch.com/2023/04/13/generative-ai-gdpr-enforcement/?guccounter=1>