ISSN 2384-9169
Fascicolo n. 3 - 2024
rivista.eurojus.it

The Digital Markets Act in action: analysis of the early practice of the Commission.

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1. Introduction

In recent years, the fast development of companies operating digital platforms quickly demonstrated the difficulty of competition law in ensuring competitiveness and the maintenance of an open market structure in the digital sector[1]. The peculiar characteristics of digital platforms, such as strong network effects, extreme scale economies and massive use of data, led to unprecedented market-power related issues,

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[1] European Commission, Directorate-General for Competition, J. CRÉMER, Y. DE MONTJOYE, H. SCHWEITZER, *Competition policy for the digital era (Report)*, in *Publications Office*, 2019.

which competition law was unable to control[2]. To face these problems, Member States begun adopting national measures, thus leading to a fragmentation of the different regulatory requirements throughout the Union[3]. As a consequence to the weak contestability and the spread of unfair business practices across the EU, in December 2020 the European Commission launched a proposal for the adoption of a package of regulatory measures, namely the Digital Services Act package. These new pieces of legislation, the Digital Services Act (DSA) and the Digital Markets Act (DMA), aim respectively at safeguarding users rights and at creating a fairer and more contestable digital environment[4].

More specifically, with regard to the Digital Markets Act[5], the EU institutions reached an agreement on its adoption in May 2022. This new Regulation tackles contestability[6], i.e. the ability of undertakings to overcome entry and expansion barriers[7], and fairness in the digital market[8]. In order to ensure these characteristics, the DMA provides the legal framework to identify those "Big Tech" entities which, because of their considerable importance within digital markets, risk jeopardising the fairness and contestability therein. It then lists a series of obligations to which these undertakings, the

[2] R. PODSZUN, *From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act*, in *Economics*, 2023, p. 20220037 ss. For example, the scope of competition law provisions, such as Articles 101 and 102 TFEU is only limited to certain market-power related issues, such as dominance on specific markets and anticompetitive behaviour.

[3] European Commission, Commission Staff Working Document of 15 December 2020, *Executive Summary of the Impact Assessment Report Accompanying the document "Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, SWD(2020) 364 final.

[4] European Commission, *The Digital Services Act package*, Shaping Europe's digital future. See also: A. REYNA, *DMA and DSA Effective Enforcement – Key to Success*, in *Journal of Antitrust Enforcement*, 2024, p. 320 ss.

[5] 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. OJ 2022/L 265/1.

[6] Because of the peculiar characteristics of CPSs operating in the digital sector (such as network and lock-in effects, strong economies of scale, …) their contestability has been strongly limited. See: A. C. WITT, *The Digital Markets Act – Regulating the Wild West*, in *Common Market Law Review*, 2023, p. 625 ss.

[7] Recital (32), Regulation (EU) 2022/1925.

[8] The purpose of the DMA is expressly provided by Article 1(1).

so-called gatekeepers[9], have to comply so as to avoid the exclusion of competitors from the digital markets[10] and any harm to consumers[11].

The European Commission holds a crucial position over the enforcement of the DMA, competence which is shared with national jurisdictions[12] and, to a limited extent, with national antitrust authorities. In general, the Commission has the ability to designate an undertaking as a gatekeeper and then to supervise over its compliance with the respective DMA obligations. This paper analyses the early practice of the Commission, by examining how it has exercised its powers and, by these means, how it is contributing to shape the new legal framework. The overall objective is to shed more light on how the DMA is applied and, on this basis, identify possible lines of future developments. In particular, after a brief overview of the provisions regulating the designation as a gatekeeper, the article focuses on the institution's response to the arguments raised by an undertaking in a challenge to its potential designation. First, it analyses the practice of the Commission as to the claim that what is considered a single core platform service consists of different services for the purposes of the Regulation. Second, the paper explores the institution's *modus operandi* with regard to the rebuttals submitted by the potential gatekeepers pursuant to Article 3(5) DMA.

2. The designation as a gatekeeper and the Commission's interpretation of the relevant DMA provisions

Pursuant to Article 3(1) DMA, an undertaking is to be considered a gatekeeper when it meets the following qualitative criteria: (a) it has a significant impact on the internal market; (b) it provides a core platform service (also referred to as CPS) which is an important gateway, namely access point, for business users to reach end users; and (c)

[9] Article 3(1), Regulation (EU) 2022/1925. The term will be further analysed throughout the paper. In general, it refers to those undertakings holding an important position within the internal market in relation to their impact and to the number of their business and end users.

[10] D. M. MANESCU, *Legislation Comment: Considerations on the Digital Markets Act, the Way to a Fair and Open Digital Environment*, in *European Business Law Review*, 2024, p. 289 ss.

[11] T.C. MARSDEN, I. BROWN, *App stores, antitrust and their links to net neutrality: A review of the European policy and academic debate leading to the EU Digital Markets,* in *Internet Policy Review*, 2023, n. 1, p. 1 ss.

[12] In this regard, Article 39 puts forward the possibility for the DMA to be enforced before national courts. More specifically, it regulates the cooperation mechanisms between the Commission and national courts, these latter having to respect the decisions adopted – or even just contemplated – by the former (See in this regard: F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in L. CALZOLARI, A. MIGLIO, C. CELLERINO, F. CROCI, J. ALBERTI (edited by) *Public and private enforcement of EU competition law in the age of big data*, Torino, 2024, p. 233 ss). Moreover, Article 42 refers to the possibility to raise consumers collective claims concerning DMA infringements, before national courts. Lastly, after an undertaking has been designated as a gatekeeper, Articles 5, 6 and 7 have a direct effect in its respect and are thus enforceable before national courts (See in this regard: A. P. KOMNINOS, *Private Enforcement of the DMA Rules before the National Courts*, in *White & Case LLP*, 2024, p. 1 ss.).

it enjoys, or it is foreseeable that it will enjoy in the near future, an entrenched and durable position in its operations[13]. These criteria capture not only the size of the undertaking, which of course plays an important role in the designation, but also, and most importantly, the very essence of the platform. The *rationale* is that with great size comes also great harm, and thus greater responsibility.

These characteristics are presumed to be fulfilled if the quantitative thresholds laid down in the following paragraph of the same provision of the DMA are met. In particular, an undertaking is presumed to have a significant impact on the internal market if it exceeds the threshold laid down in Article 3(2)(a) DMA, relating to either its annual EU's turnover, its average market capitalisation, or its equivalent fair market value. Secondly, the CPS is presumed to be an important gateway if the thresholds relating to the average active end and business users are met[14]. Finally, if these latter thresholds were met in the last three financial years, the undertaking is presumed to enjoy an entrenched and durable position within the meaning of Article 3(1)(c)[15]. These criteria are to be considered cumulative, as demonstrated also by Article 3(3) DMA which refers to "*all the mentioned thresholds*".

The DMA adopts a proactive approach, putting the initial burden of proof on the potential gatekeeper[16]. Indeed, under Article 3(3) of Regulation (EU) 2022/1925, undertakings shall notify the Commission, when they meet *all* the thresholds laid down in Article 3(2) in relation to one or more of their CPSs. On this ground, the institution has the competence to designate the undertaking as a gatekeeper in relation to that CPS[17], after, if need be, analysing the additional arguments presented together with the notification.

On September 6, 2023, the European Commission designated six gatekeepers, namely Alphabet, Amazon, Apple, Bytedance, Meta and Microsoft[18], to which followed a second, recent designation, of Booking on May 13, 2024[19]. To determine whether to designate an undertaking as a gatekeeper, the Commission carries out a detailed assessment of the circumstances of both the undertaking and the service at stake. First, it establishes whether this latter constitutes a CPS within the meaning of Article 2 DMA,

[13] Such a concept is indented to capture the low contestability of the position of the undertaking in question, as well as the stability of that position over time (General Court, 17 July 2024, T-1077/24, *Bytedance v. Commission*, ECLI:EU:T:2024:478, paragraph 297).
[14] Article 3(2)(b), Regulation (EU) 2022/1925.
[15] Article 3(2)(c), Regulation (EU) 2022/1925.
[16] F. BOSTOEN, *Understanding the Digital markets Act*, in *The Antitrust Bulletin*, 2023, pp. 263 ss.
[17] Article 3(4), Regulation (EU) 2022/1925.
[18] European Commission – Press release of 6 September 2023, *Digital Markets Act: Commission designates six gatekeepers*.
[19] European Commission – Press release of 13 May 2023, *Commission designated Booking as a gatekeeper and opens a market investigation into X*.

and, if yes, which category laid down therein it belongs to[20]. Indeed, the Commission shall identify and list all relevant CPSs provided by that undertaking which have the capacity to affect such a large number of users so as to constitute, on their own, important gateways for business users to reach end users. Secondly, the Commission controls whether the thresholds are effectively met by that undertaking in relation to that service. If in the affirmative, it designates the undertaking as a gatekeeper in relation to that particular core platform service.

Even though this is the usual practice of the Commission, in most cases it is challenged by undertakings trying to avoid their designation through the submission of certain arguments. More specifically, these latter either contend that what is considered a single CPS encompasses instead different services, which individually do not exceed the thresholds of Article 3(2); or they consist in a rebuttal pursuant to Article 3(5). The following paragraphs will focus on the Commission's interpretation of the relevant DMA provisions so as to give the undertakings an answer on the arguments submitted. This notwithstanding, it is worth pointing out that pursuant to Article 263(4) TFEU, an undertaking will always have the ability to challenge its designation decision before the Court of Justice of the European Union[21].

3. The Commission's early practice on the claim that a core platform service provided by one undertaking consists of different services

A first way to contest the gatekeeper designation is through the so-called "narrowing the gatekeeper status" practice[22]. The undertaking may indeed argue that what is thought to be a single CPS consists of different services, each to be individually considered for the purposes of calculating the thresholds under Article 3(2) DMA.

In this regard, the relevant legal framework is only provided by Section D, paragraph 2 of the Annex to Regulation (EU) 2022/1925. In particular, under this provision, services belonging to the same category shall not be considered as distinct merely because they are provided using different domain names or because they are

[20] Article 2(2) of the DMA provides for a list of categories of core platform services, namely: *(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services (NIICS); (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services*.

[21] Under Article 263(4) TFEU, *any natural or legal person may institute proceedings before the Court of Justice against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*. Indeed, designation decisions under the DMA are specifically addressed to the undertakings at stake. Hence, these latter are entitled to bring an action for annulment before the judicial body of the Union, and, in particular, before the General Court.

[22] D. MANDRESCU, *Rebutting the gatekeeper status – what does it take?* in *Lexxion*, 2023.

offered in an integrated way[23]. On the contrary, when the services do not pursue a common purpose, they shall be separately considered, even if they belong to the same category or are offered in an integrated way[24]. Additionally, Article 13(1) DMA, referred to as the "anti-circumvention rule"[25], prohibits any practices consisting in segmenting, dividing, subdividing, fragmenting or splitting the services so as to circumvent the quantitative thresholds of Article 3(2).

The "narrowing the gatekeeper status" argument may seem an understandable claim from an undertaking's point of view. The potential gatekeeper aims at limiting the scope of its designation by splitting up one or more of its services. Indeed, the fewer the services concerned, the lower the costs and the number of changes that need to be implemented to comply with the DMA. However, these claims may also be a loophole to escape the gatekeeper status by pushing artificial delineations of core platform services[26]. Accordingly, and due to the non-exhaustive provisions on the matter, the Commission has been careful in assessing on these claims, tending to reject them in most cases[27].

In particular, the institution has established, in compliance with Section D, paragraph 2(a) of the Annex to the Regulation, that core platform services provided by the same undertaking and belonging to the same category of CPS shall not be considered as distinct, notwithstanding the existence of different domain names[28]. This is what happened in the case of Amazon Marketplace, where the Commission pointed out that under Article 1(2) DMA, the Regulation applies to all CPSs provided or offered by gatekeepers to business and end users established and/or localised in the Union, irrespective of the place of establishment or residence of the gatekeeper. Hence, the use of different domains accordingly with the respective localisation is irrelevant for the purposes of implementing the Regulation[29].

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[23] Section D, paragraph 2(a) and (c), Annex to Regulation (EU) 2022/1925.

[24] It is the case when the service's business users, end users or both pursue different purposes, notwithstanding of the fact that these services may have the same business users and end users (Section D, paragraph 2(b) and (c)(ii), Annex to Regulation (EU) 2022/1925).

[25] R. PODSZUN, *From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act*, in *Economics*, 2023, p. 20220037 ss..

[26] D. MANDRESVU, D., *Rebutting the gatekeeper status – what does it take?* in *Lexxion*, 2023.

[27] See in this regard: Recital (16), European Commission, Decision of 9.5.2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6100 final. Recital (13), European Commission, Decision of 9.5.2023 designating Microsoft as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6106 final.

[28] Recital (30), European Commission, Decision of 9.5.2023 designating Amazon as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6104 final.

[29] Recital (31), European Commission, Decision designating Amazon as a gatekeeper, C(2023) 6104 final.

In other instances, in order to assess on the "narrowing the gatekeeper status" claims, the Commission has to interpret the notion of "common purpose", eventually shared by the different services at stake. Indeed, if this latter were to be the case, the Commission would need to qualify them as a single CPS, accordingly with Section D, paragraph 2 (b) of the Annex to the DMA. The Commission has adopted a rather broad understanding of the concept of "common purpose", aiming at including large number of services within the same CPS. In particular, the institution identifies the purpose of a specific service in that pursued by all CPSs belonging to that category, consisting in the definition of the category provided by Article 2 DMA. On these grounds, it becomes almost impossible to argue that different services provided by the same undertaking and belonging to the same CPS category pursue different purposes and are thus to be separately considered. In this regard, the Commission consistently holds that mere differences in nature, function and usage do not imply different purposes[30]. For example, in the App Store and the Google Shopping cases, the Commission identified the purpose in the intermediation of the distribution of apps and in-app digital content between business users and end users, consistently with the definition of online intermediation service provided by Article 2(5) DMA[31]. The fact that a CPS is offered on different devices or using different technologies, does not affect the common purpose, notwithstanding the different configurations of the service[32]. The same holds true with respect to the "web browser" category, whose purpose has been identified in the provision to end and business users of a tool to offer, access and interact with web content[33]. For instance, in the Safari case, the different configurations of the service according to the device upon which it runs, are mere differences in nature, usage and function which do not alter the common purpose[34]. Furthermore, accordingly with Section D, paragraph 2(c)

[30] Recital (110), European Commission, Decision designating Apple as a gatekeeper, C(2023) 6100 final.
[31] Article 2(5) of Regulation (EU) 2022/1925 refers to the definition of online intermediation service provided by Article 2(2) of Regulation (EU) 2019/1150: 'online intermediation services' are those services that (a) constitute information society services; (b) allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.
[32] Recital (41), European Commission, Decision designating Apple as a gatekeeper, C(2023) 6100 final. Recital (36), European Commission, Decision of 9.5.2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on the contestable and fair markets in the digital sector, C(2023) 6101 final.
[33] Article 2(11), Regulation (EU) 2022/1925: "*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*".
[34] Recitals (112) - (113), European Commission, Decision designating Apple as a gatekeeper, C(2023) 6100 final.

of the Annex, the Commission adds that Safari shall be considered a single CPS as it is provided throughout the Apple devices in an integrated way[35].

The Commission's restrictive approach is further highlighted by the broad interpretation it gives to the definitions of the CPS categories laid down in Article 2 DMA. This entails the inclusion within the same CPS of services that, even if offered in an integrated way, do not fulfil the definition of that specific category. For example, Google Analytics has been considered to form part of the Alphabet's online advertising services, as its purpose is that of facilitating and optimising their functionalities. In this regard, the Commission considers that Article 2(2)(j) DMA allows for the inclusion of services which aim at enhancing the functionalities of the CPS, without expressly fulfilling that definition[36].

The practice of rejecting these arguments finds one exception, namely with regard to operating systems. In particular, their purpose is intrinsically linked to the hardware, that is the device, on which they operate, since it consists in controlling the basic functions of such hardware[37]. Accordingly, in cases such as Apple iOS or Alphabet's Android OS, the Commission concludes that such operating systems consist of different services[38], each pursuing the aim of exclusively operating the respective device upon which they run[39].

In conclusion, the Commission usually rejects the "narrowing the gatekeeper status" claims, unless the purpose is evidently different or the services at stake do not belong to the same category[40]. In all other cases, it concludes that the service is to be considered a single one for the purposes of calculating the thresholds laid down in Article 3(2) DMA.

In case of rejection, an undertaking may bring an action for annulment before the General Court. This was the case of Apple, which has challenged its designation decision, alleging misinterpretation and misapplication of the DMA and material and factual errors in concluding that its five App Store are a single core platform service[41]. Even though the approach that the General Court will follow is not certain yet, some assumptions may already be drawn. Indeed, due regard shall be given to the overall objective of the DMA,

[35] Recitals (110) - (114), *Ibidem*.

[36] Recitals (206) to (214), *Ibidem*.

[37] Article 2(10), Regulation (EU) 2022/1925.

[38] iOS for iPhone, iPadOS, macOS, watchOS and tvOS.

[39] Recitals (83) to (91), European Commission, Decision designating Apple as a gatekeeper, C(2023) 6100 final. Recital (162), European Commission, Decision designating Alphabet as a gatekeeper, C(2023) 6101 final.

[40] This is for example the case of Amazon Marketplace, which is considered a distinct CPS from Amazon Retail and Fulfilment by Amazon, as these latter two do not fulfil the definition of online intermediation services. This approach is in line with Section D, paragraph 2(c)(i) of the Annex to Regulation (EU) 2022/1925.

[41] Action brough on 16 November 2023, *Apple v. Commission*, Case T-1080/23, C/2024/563.

that is fostering contestability and fairness in the digital sector. The Commission is called to identify those "Big Tech" entities which put at risk these characteristics in the digital market. As for the "narrowing the gatekeeper status" claim, the impact of its acceptance or rejection would be minimal, if not even undetectable, compared to the importance the gatekeeper has within its digital market. To split up a service in different ones is to make an *in abstracto* difference of the categorisation of the service. The numbers of the users are *in concreto* still the same, thus the impact the gatekeeper has on competitiveness remains more or less the same. Furthermore, since no provision within the DMA expressly refers to this possible argument, it will be hard for undertakings to maintain it before the General Court. It seems therefore possible to assume that the General Court will more or less follow the Commission's approach, keeping a restrictive eye on these arguments. Lastly, it is worth noticing that the "narrowing the gatekeeper status" is not the sole way for undertakings to challenge their designation. Actually, and more importantly, they may submit a rebuttal, option which is expressly provided by the DMA.

4. The Commission's early practice on the rebuttal arguments submitted by the undertakings pursuant to Article 3(5) DMA

As a second way to contest the gatekeeper designation, an undertaking may present a rebuttal pursuant to Article 3(5) DMA. This submission aims at demonstrating that, although the CPS meets the gatekeeper thresholds, the requirements listed in Article 3(1) DMA are not fulfilled. Since these latter criteria are cumulative conditions[42], it is sufficient to demonstrate that one of them is not fulfilled in order to avoid the gatekeeper designation.

Article 3(5) DMA establishes a set of criteria, on the basis of which the Commission is called to decide on the admissibility of the rebuttal. In particular, the arguments presented need to be sufficiently substantiated so as to manifestly call into question the presumption under paragraph 2 of that same article. Moreover, they shall relate to the specific circumstances in which the CPS in question operates, thus requiring an *in concreto* assessment.

Furthermore, crucial guidance on the matter is given by Recital (23) of the Regulation, as to possible arguments that may be submitted and to how the Commission must carry out its assessment. The Recital establishes that, first, it is for the undertaking to provide the necessary evidence proving that in those specific circumstances the presumption shall not apply. Second, when assessing the rebuttals, the Commission should only consider elements directly relating to the quantitative criteria. In this regard, it lists a series of examples of relevant arguments, such as the importance of the CPS in relation to the overall scale of its activities and the years for which the thresholds have been met; how far the users' thresholds are exceeded; and the impact of the undertaking

[42] See in this regard paragraph 2 *supra*.

in the internal market, in relation to its size in absolute terms and the number of Member States in which it operates[43].

According to Article 3(5) DMA, the analysis of the Commission may reach two possible outcomes. Indeed, it can either reject the rebuttal or open a market investigation in its regard, according to whether the arguments presented are sufficiently substantiated so as to manifestly call into question the presumption. The width of the Commission's discretion power has been the object of discussions before the beginning of the DMA implementation. Some scholars argued that the institution did not enjoy a great margin of appreciation, and should therefore accept only those rebuttals purely relating to quantitative factors[44]. Others contented that the institution enjoyed a wide margin of discretion, since Recital (23), which is not bounding by nature, only affirms that it "should" analyse rebuttals in light of the quantitative elements adduced[45]. The Commission's early implementation of the DMA shows an approach which lays in between these diverging views.

The Commission has indeed added a third option to the two provided by Article 3(5) DMA. In particular, when it considers that the evidence adduced not only manifestly calls into question the presumption, but also demonstrates that the criteria under Article 3(1) are not met, it may accept the rebuttal, without opening a market investigation[46]. The Commission opts for this most permissive route when the arguments submitted expressly refer to those elements indicated in Recital (23) and are well supported by data. This was the case for Samsung Internet Browser (SIB), whose rebuttal pointed out, accordingly with Recital (23), that that service was not a significant web browser, both in absolute and in relative terms, as compared to web browsers provided by other undertakings[47]; and, that the users' thresholds were exceeded by a relatively small margin. In order to support Samsung's non-designation as a gatekeeper[48], the Commission put forward other ecosystem-based arguments. In particular, it contended that Samsung could not act as a gatekeeper, since it was dependent on Alphabet's services, namely Alphabet Blink[49] as

[43] Recital (23), Regulation (EU) 2022/1925.

[44] N. HIRST, *DMA litigation will be a different beast to antitrust appeals, Kramler says*, in *MLex Market Insigjt*, 2023.

[45] A. RIBERA MARTÍNEZ, *Rebuttal and Designation: Walking the Fine Line of Article 3(5) DMA*, in *EU Law Live*, 2023, p. 1 ss..

[46] Recital (19), European Commission, Case DMA.100038 – SAMSUNG – WEB BROWSER. Letter of 5.9.2023 concerning Samsung's notification under Article 3(3) of Regulation (EU) 2022/1925, C(2023) 6103 final.

[47] Such as Google Chrome by Alphabet and Safari by Apple.

[48] Since SIB was the only service meeting the thresholds under Article 3(2) DMA, its non-designation as a gatekeeper CPS entailed the comprehensive non-designation of Samsung as a gatekeeper.

[49] Recital (45), European Commission, Case DMA.100038 – SAMSUNG – WEB BROWSER. Letter of 5.9.2023 concerning Samsung's notification under Article 3(3) of Regulation (EU) 2022/1925, C(2023) 6103 final.

web browser and Google Android OS[50] as operating system; and since no other service either met the thresholds under Article 3(2) DMA or fulfilled the criteria of Article 3(1) DMA[51].

The most permissive option applies also when it is evidently clear that the "important gateway" condition is not fulfilled. In this regard, according to Recital (20) of the DMA, when a very high number of business users depends on a CPS to reach a very high number of end users, the undertaking providing that service influences the operations of a large part of its business users and is thus to be presumed to be an important gateway with regard to that service. In the Outlook.com and Gmail cases[52], the Commission deemed the respective undertakings' rebuttals to have proved that the "important gateway" position was not fulfilled. In particular, it welcomed the argument that the open configuration of these NIICS[53], allowing for seamless communications with both users and non-users of the two services, indicated that the respective undertakings lacked the "influence on the operations" condition pursuant to Recital (20) DMA. Indeed, since they could not control operations with third parties[54], they lacked the ability to impose a certain degree of dependency for end and business users to reach each other and thus they could not constitute important gateways. It follows that their respective undertakings shall not be designated as gatekeepers in their relation[55]. It is worth noticing that, even though the Commission opted for the non-designation of these services, it did not analyse any other argument submitted by them which did not relate to quantitative elements.

In light of the foregoing arguments, it can be inferred that the Commission chooses this most permissive option when it is "clearly and comprehensively" demonstrated that the requirements laid down in Article 3(1) DMA are not satisfied[56]; thus, the rebuttal is so incontestable that it can only succeed[57].

As for the possible rebuttal arguments, the Commission only considers those relating to quantitative elements, coherently with Recital (23). It does however exercise

[50] Recital (46), *Ibidem*.
[51] Recitals (45) to (48), *Ibidem*.
[52] CPSs provided respectively by Microsoft and Alphabet.
[53] Number-independent interpersonal communication service, which pursuant to Article 2(9) of Regulation (EU) 2022/1925 is *an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans*.
[54] Operations with third parties amount in these cases to about 90-100% of the operations.
[55] Recitals (124) to (135), European Commission, Decision designating Microsoft as a gatekeeper, C(2023) 6106 final. Recitals (143) to (147), European Commission, Decision designating Alphabet as a gatekeeper, C(2023) 6101 final.
[56] Recitals (150), European Commission, Decision designating Alphabet as a gatekeeper, C(2023) 6101 final. Recital (134), European Commission, Decision designating Microsoft as a gatekeeper, C(2023) 6106 final. Recital (50), European Commission, Letter concerning Samsung's notification, C(2023) 6103 final.
[57] A. RIBERA MARTÍNEZ, *Rebuttal and Designation: Walking the Fine Line of Article 3(5) DMA*, in *EU Law Live*, 2023.

a margin of discretion when it puts forward certain ecosystem-based arguments in order to support its findings. Furthermore this "inflexibility" of the quantitative character of the rebuttals is also compensated by the possibility to open a market investigation. In particular, when the Commission believes that the arguments submitted, even if manifestly calling into question the presumptions, need to be further evaluated, it opens a market investigation pursuant to Article 17(3) DMA[58]. This was the case for iMessage provided by Apple and for Microsoft Advertising, Bing and Edge provided by Microsoft. More specifically, the undertakings' arguments pointed out the relatively low scale of usage of these services compared to the overall scale of activities within their respective categories and with regard to similar services provided by other undertakings[59]. These arguments, even if supported by evidence such as external data, internal estimates, study reports and public statistics, raised certain doubts which, for the Commission, required further analysis[60]. On February 12th, 2024, the Commission closed the market investigations it had opened into these CPSs and accepted their rebuttals[61]. In particular, it argued that, due to the specific circumstances in which the CPSs operate, the respective undertakings shall not be designated as gatekeepers in relation to these services; and hence, these latter shall not be listed as relevant CPSs in their undertakings' designation decisions[62].

In light of these foregoing arguments, it can be inferred that the Commission has leaned towards a more permissive approach on rebuttals, as long as they are presented consistently with the relevant DMA legal framework. A rejection may only occur when those submissions do not relate to the quantitative elements as required by Recital (23); when they are not supported by sufficient data, such as estimates and studies; or, finally, when the thresholds are exceeded by a significantly large amount. Specifically on these grounds, the rebuttals presented by Bytedance for TikTok, and Meta for Messenger were rejected. First, the arguments were too abstract in nature, as they related to multi-homing and lock-in or network effects, elements which are useful to assess the existence of a

[58] The procedure may only begin with the adoption of a separate decision, as required by Article 16(1) DMA, containing the Commission assessment on the need to open the investigation.

[59] Recitals (14) and (15), European Commission, Decision of 9.5.2024 opening a market investigation pursuant to Article 16(1) and 17(3) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on fair and contestable markets in the digital sector [Microsoft], C(2023) 6078 final. Recital (11), European Commission, Decision of 5.9.2023 opening a market investigation into Apple's iMessage pursuant to Articles 16(1) and 17(3) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6077 final.

[60] For example Microsoft had submitted that the three services alone considered could not be "important gateways" as they were dependent on one another. The Commission considered that this circumstance required further analysis.

[61] European Commission, DG for Competition, DG for Communications Networks, Content and Technology, *Commission closes market investigation on Microsoft's and Apple's services under the Digital Markets Act*, in: *Digital Markets Act (DMA)*, 13 February 2024.

[62] Even when a rebuttal is accepted, the respective undertaking may still be designated as a gatekeeper in relation to other core platform services meeting the thresholds.

gateway position[63], but their presence or absence is neither required by the DMA, nor does it imply that the CPS is or is not an important gateway. Second, both the market's thresholds under Article 3(2)(a) DMA and the users thresholds pursuant to letter (b) of that same provision were exceeded by a far too significant amount[64]. Lastly, with regard to Bytedance, the additional arguments put forwards, namely that its designation was contrary to the core objective of the DMA[65], did not in any way relate to the quantitative thresholds, as instead indicated by Recital (23).

When the rebuttals are rejected, the undertakings still have the chance to challenge their designation pursuant to Article 263(4) TFEU before the General Court. Accordingly, Bytedance launched an action for annulment in November 2023, alleging that the Commission had infringed Articles 3(1), 3(5) and 17(3) DMA in rejecting its rebuttal and designating it as a gatekeeper in relation to TikTok. The General Court had first adopted an order in relation to the application for interim measures presented by Bytedance together with its action. In particular, in this instance, the judges excluded the need for interim measures arguing that the obligations deriving from the designation did not cause any serious or irreparable damage to the applicant[66]. From this conclusion, it could already be assumed that the General Court would have leaned towards a similar, if not even identical, approach to that of the Commission. On July 17, 2024, the judgement was delivered. In particular, the General Court confirmed the Commission's approach, by considering Bytedance's designation in relation to TikTok to have rightfully occurred. In this regard, the judges considered that the rebuttal arguments were not sufficiently substantiated for the purposes of Article 3(5) DMA; and that, in any case, they did not relate to the quantitative thresholds as indicated instead by Recital (23)[67]. It can thus be inferred that the judicial body of the Union followed the same approach adopted by the Commission, competent body for the implementation of the DMA itself[68].

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[63] Recital (1) and (2), Regulation (EU) 2022/1925.

[64] Recitals (120) to (126), European Commission, Decision of 9.5.2023 designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6102 final. Recital (220), European Commission, Decision of 9.5.2023 designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1926 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6105 final.

[65] In particular, Bytedance argued that it was a challenger, and not a gatekeeper, already in an unstable position within the internal market; consequently, the gatekeeper obligations deriving from its designation would impose a too significant effort on the undertaking, leading it to an even more unstable position.

[66] Order of the President of the General Court, 9 February 2024, Case T-1077/23, *Bytedance v. European Commission*, ECLI:EU:T:2024:94.

[67] General Court, 17 July 2024, Case T-1077/23, *Bytedance v. Commission*, ECLI:EU:T:2024:478.

[68] *Ibidem*, paragraph 71. In its judgement, the General Court points out two elements of relevance. First, it does not exclude *a priori* the possibility of Bytedance (and of undertakings in general) to rebut their designations. However, that can only occur if the undertaking puts forward sufficiently substantiated arguments (which was not the case for TikTok - paragraph 90). Furthermore, the Court highlights the

5. Conclusion

The previous paragraphs have analysed the early practice of the Commission on the implementation of the DMA. In particular, they have focused on the different approaches adopted by the institution according to the arguments presented by potential gatekeepers.

As for the "narrowing the gatekeeper status" claim, the Commission seems to adopt a restrictive approach. In this respect, it shall first be observed that no article expressly refers to the possibility of splitting up a service in different ones because of functional or structural differences. Actually, and on the contrary, the sole provision concerning this practice, Article 13 DMA, explicitly prohibits any such sort of differentiation. Only Section D of the Annex to the Regulation refers to possible distinction between services, but in clear, precise and strict terms[69]. The Commission has leaned towards a strict interpretation of the few relevant DMA provisions, most likely because of the lack of an express legal basis and legal framework for these arguments; but also, and most importantly, because of the risk of mere circumvention of the thresholds and of the other DMA provisions concerning the designation procedure.

As for the second set of claims, namely rebuttal arguments, the Commission seems to adopt a more permissive approach. In particular, Article 3(5) DMA and the relevant legal framework pursuant to Recital (23) give the Commission a more set context within which to exercise its power. In this regard, the institution leans towards a more flexible interpretation, considering the importance of at least analysing all rebuttals submitted in compliance with the DMA requirements. Accordingly, whenever the elements adduced seem to respect the DMA indications, the Commission either immediately accept the rebuttal or at least it opens a market investigation.

In conclusion, the approach of the Commission seems to perfectly fall within the overall objective pursed by the DMA, namely ensuring fair and contestable markets in the digital sector where the *gatekeepers* are present[70]. These latter indeed are those undertakings which, because of their importance, risk jeopardising the fair competition in the digital sector. Hence, when implementing the Regulation, the Commission shall tackle those and only those undertakings which actually hold such an important position so as to endanger fair competition.

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importance of presenting rebuttal arguments together with the notification to the Commission pursuant to Article 3(3) DMA. Indeed, the presumptions laid down in Article 3(2) shall only be rebuttable at certain specific and strict conditions, both with regard to the standard of proof and to the procedural requirements. Accordingly, an undertaking launching an action for annulment before the General Court against its designation decision and, more specifically, against the rejection of its rebuttal, cannot bring forward for the first time arguments or evidence which it did not submit in its rebuttal, together with its notification.

[69] When the services have a different purpose or when they belong to a different category.

[70] Article 1, Regulation (EU) 2022/1925.