# The Requisite Legal Standard of the Digital Markets Act's Designation Process

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ABSTRACT

Away from the effects-based approach of the thresholds set out in EU competition law, the Digital Markets Act[1] seeks to introduce renewed requisite legal standards distinct from traditional and probabilistic standards of proof. In principle, this same idea should characterise the European Commission's first enforcement actions.

In challenging this idea on its own merits, the paper thoroughly considers the legal standards that the European Commission streamlined in the first set of designation decisions that it issued. To do that, the paper identifies two of the most substantial exercises performed by the European Commission: the appraisal of the delineation of core platform services and the consideration of the undertakings' rebuttal of the presumption of a gatekeeper position deriving from the application of the quantitative thresholds. The paper demonstrates the European Commission's understanding of the DMA's plasticity against the backdrop of the exercise of its discretionary powers.

KEYWORDS: Digital Markets Act; European Commission; Designation; Discretion; Legal Standards; Gatekeepers

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[1] 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) [2022] OJ L265/1 ("DMA").



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## 1. Introduction

Competition policy has substantially moved to an effects-based approach to assess conduct under Articles 101 and 102 TFEU[2]. There is no denying that it has[3]. The shift has not come without its backlash, especially in the European Commission's (EC) deployed enforcement in relation to the competitive dynamics of digital markets[4]. The slow permeation of the more-economic approach era followed the rethinking of the instruments at the competition authorities' disposal to apply solutions and remedies efficiently, quickly, and effectively to digital markets.

In the European Union, those efforts crystallised into the Digital Markets Act (DMA), which will start to apply in March 2024. Stemming from the flexible and open-textured nature of Articles 101 and 102 TFEU, the European Commission has a long-standing tradition of interpreting those prohibitions in the fashion of expanding the contours of EU competition law and introducing new theories of harm[5] and overarching concepts[6] to the competition law *acquis*[7].

In principle, however, the DMA is not based on standard-like legal commands[8]. At least, that was not the initial intention of the European Union legislator. The obligations imposed on the addressees of the regulation cannot be justified based on efficiencies, nor can they present economic effects to dodge their designation as gatekeepers under the

[2] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Articles 101 and 102.

[3] A brief overview of the most salient research on the topic includes Jacques Bourgeois and Denis Waelbroeck (eds), *Ten years of effects-based approach in EU competition law: state of play and perspectives* (Bruylant 2012); Luc Peeperkorn and Katja Viertiö, 'Implementing an effects-based approach to Article 82' (2009) 1 Competition Policy Newsletter 17; Wouter Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37 World Competition 405.

[4] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era (Special Advisers' Report*) (2019)

[5] For instance, the most recent one revolves around the ecosystems-driven theory of harm introduced by the European Commission in its Booking/eTraveli prohibition, see 'Mergers: Commission prohibits proposed acquisition of eTraveli by Booking' (25 September 2023) IP/23/4573.

[6] The Court of Justice demonstrates this same motion, for instance, by bringing general principles of EU law into conversation with the framework of competition law, see Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* (Extended Composition of the Ninth Chamber of the General Court of the European Union, 10 November 2021), para 155.

[7] Pablo Ibáñez Colomo, *The New EU Competition Law* (Hart Publishing 2023).

[8] The general differentiation between rules and standards derives from the seminal work of Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal, 557-629, despite that a fully-fledged transposition of this same framework was finely established by Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67(2) The Antitrust Bulletin, 302-340.



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regulatory framework[9]. Despite that the obligations imposed under Articles 5, 6, and 7 are based on competition law experience and case law[10], the European Commission's officials have been adamant in defending that their interpretation and application are straightforward[11]. Instead, their main preoccupation lies with the undertakings' capacity to undermine the regulatory instrument's effectiveness by performing conduct lying at the margins of the DMA's regulatory capture[12]. For instance, in the context of gatekeeper designations, the anti-circumvention clause under Article 13 DMA prohibits the undertaking from artificially segmenting, diving, or splitting its services through contractual, commercial, technical, or any other means to circumvent the quantitative thresholds laid down in Article 3(2) DMA.

The paper seeks to challenge whether those statements are true, considering a thorough analysis of the first enforcement actions issued by the European Commission: the designation decisions. The choice of performing the analysis in detail of the DMA's designation process stems from its key relevance to the application of the regulatory framework. Designation lies at the core of the application of the DMA. Without it, one could not fathom to imagine how the prescriptive obligations will apply in practice nor to whom they would apply. The designation process determines the DMA's scope of application, both subjectively in terms of the addressees of the regulation that are captured and substantively in relation to the services that are embedded within them. Given that the regulatory instrument applies to core platform services (CPSs), their depiction is essential to follow through to the transformation of the business models of digital platforms that will apply as a consequence of compliance with the mandates under Articles 5, 6 and 7.

[9] DMA (n 1), Recitals 10 and 23. The concept of gatekeeper is a novel notion in terms of legal terminology, see Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenger to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' (2021) 3 Zeitschrift für europäisches Privatrecht, 505.

[10] An overview of the interplay between the antitrust experience and the mandates contained under the DMA can be consulted in Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68(2) The Antitrust Bulletin, 282-283.

[11] Alberto Bacchiega, Let's talk competition – It's soon time for DMA Compliance (28 September 2023, Brussels); Olivier Guersent, Keynote speech at the Annual CRA Brussels Conference (6 December 2023, Brussels).

[12] Lewis Crofts, 'Big platforms have 'tangible' changes to make ahead of gatekeeper enforcement, EU's Guersent says' (*Mlex*, 6 December 2023) <https://mlexmarketinsight.com/news/insight/big-platforms-have-tangible-changes-to-make-ahead-of-gatekeeper-enforcement-eu-s-guersent-says> accessed 18 December 2023.



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To perform this analysis in detail, the paper first presents the letter of the law surrounding the designation process as contained under Article 3 (Section 2.1). This is the legal framework that the Commission should hold its enforcement accountable for. Although the designation process, *prima facie*, seems straightforward, the paper engages directly in contesting that idea by considering two of the most salient exercises performed by the EC: delineation and the rebuttals of the quantitative presumption under Article 3(2) DMA.

Section 2.2 presents the EC's fabrication of the task of CPS delineation as an additional step to designating a gatekeeper under the lens of the selected criteria to perform the analysis. Two categories of delineation are observed: the first, that distinguishes different categories of CPSs (Section 2.2.1.1) and those setting apart CPSs from different types of elements to those contained under the underlying premises of the DMA (Section 2.2.1.2). As a result, Section 2.2.2 presents the findings and shortcomings of their clustered analysis to set out the requisite legal standard for delineation. Despite the paper's efforts, this legal standard is not evident from the first designation decisions, and it presents the EC's enforcement with substantive frictions in practice. Section 2.3 presents the same analysis applied to the EC's appraisal of the rebuttals to the quantitative presumption formulated by the undertakings before the public authority. The requisite legal standard is clearer in this instance, even though a fine thread of deficiencies is discovered in Sections 2.3.2.1 and 2.3.2.2.

The paper finally observes these legal standards under the lens of the EC's discretionary powers vis-à-vis the standard of review that the EU Courts will apply to its enforcement actions. Away from sticking to the letter of the law, the EC transposes the flexibility from competition law enforcement to the plasticity in its enforcement of the DMA's provisions and procedures (Section 3)[13].

[13] Agreeing with this same point find, Pablo Solano Díaz, 'Of Core Platform Services, Fairness and Contestability – Competition law through the Hall of Mirrors' (*EuLawLive's Competition Corner*, 30 November 2023) <https://eulawlive.com/competition-corner/op-ed-of-core-platform-services-fairness-and-contestability-competition-law-through-the-hall-of-mirrors-by-pablo-solano-diaz/> accessed 18 December 2023.



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## 2. The European Commission's exercise of its discretionary powers: the designation process

The first wave of designation decisions issued by the EC in September 2023 captured six gatekeepers and twenty-two core platform services under the DMA's scope of application[14]. Several informal dialogues between those designated gatekeepers and the EC consequently are paving the way to compliance starting in March 2024[15].

Notwithstanding, the EC's interpretation of the designation process does not strictly stay within the boundaries of the letter of the law[16]. Instead, the account of the six different designation decisions is one of idiosyncratic and responsive discussions with the undertakings, and of the exercise of a wide margin of discretion.

[14] The Commission published those decisions in Commission Decision of 5.9.2023 designating Alphabet 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) 6101final ("Alphabet's designation decision"); Commission Decision of 5.9.2023 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 ("Amazon's designation decision"); Commission Decision of 5.9.2023 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 ("Apple's designation decision"); Commission Decision of 5.9.2023 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 ("ByteDance's designation decision"); Commission Decision of 5.9.2023 designating Meta 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) 6105 final ("Meta's designation decision"); Commission Decision of 5.9.2023 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 ("Microsoft's designation decision").

[15] Confirmation of those regulatory dialogues can be found in Antonie Babinet and Katarzyna Sadrak, 'DMA Enforcement: Setting the Scene for Effective Compliance' (*EULawLive's Competition Corner*, 18 December 2023) <https://eulawlive.com/competition-corner/op-ed-dma-enforcement-setting-the-scene-for-effective-compliance-by-antoine-babinet-and-katarzyna-sadrak/> accessed 18 December 2023. The Director-General of the Directorate General for Competition confirmed that up to 150 files had been opened to reaching DMA compliance, Guersent (n 11).

[16] In fact, some of the designated gatekeepers have appealed those decisions before the General Court, see Case T-1079/23 *Apple v Commission* and Case T-1080/23 *Apple v Commission;* Case T-1077/23 *Bytedance v Commission*; and Case T-1078/23 *Meta Platforms v Commission*.



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## 2.1 The letter of the law

The DMA applies to undertakings that are designated as gatekeepers. Once the undertakings' core platform services are listed under a designation decision, the obligations set out in the regulatory instrument start to apply within six months[17].

The concept of gatekeeper is defined as an undertaking providing core platform services designated pursuant to the process established under Article 3 DMA[18]. CPSs are not defined in the regulatory instrument but rather listed in relation to the digital services that the legislator comprises under the DMA's scope of application[19]. Recital 14, however, stresses that the definition of the CPSs should be technologically-neutral and encompass those services provided on or through various means or services.

Article 3(1) establishes the cumulative requirements for an undertaking to be designated as a gatekeeper: substantiality, criticality, and durability[20]. Substantiality entails that the undertaking must have a significant impact on the internal market (Article 3(1)(a) DMA). Criticality implies that the undertaking provides a CPS, which is an important gateway for business users to reach end users (Article 3(1)(b) DMA). 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 (Article 3(1)(c) DMA).

These cumulative requirements are presumed to be met if the undertaking surpasses the thresholds set out under Article 3(2)[21]. The quantitative appraisal of those elements

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[17] DMA (n 1), Articles 3(9) and (10). All the obligations do not apply to all the CPSs due to their nature, and those undertakings that do not have an entrenched and durable position, but it is foreseeable that they will have it in the near future may also have their obligations tempered in line with Recital 27. On the nuanced approach towards the capturing of the CPSs under the DMA, Assimakis Komninos, 'Habemus Gatekeepers – The EC Has Now Adopted Its First DMA Designation Decisions' (International Law Talk, 14 September 2023).

[18] DMA (n 1), Article 2(1).

[19] DMA (n 1), Article 2(2) lists the CPSs, which include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services. Those same services are later on defined under Articles 2(5) to (13), aside from online advertising services, which include any advertising networks, exchanges and intermediation services provided by an undertaking that provides any CPS listed under Article 2(2). The fact that the CPS are left undefined in the DMA was presented by Solano Díaz (n 13).

[20] The requirements were first categorised into these three broad concepts by Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice, 533

[21] DMA (n 1), Recital 16, mentions a "*fast designation process*" to take place via quantitative designation. The methodology for identifying and calculating the criticality of the undertaking as an important gateway for business users to reach end users is contained in the Annex to the DMA. EC officials have also confirmed this same approach in Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12(7) Journal of European Competition Law & Practice, 494.



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requires the EC's intervention via a designation decision, produced on a quasi-automatic basis if the thresholds are met[22].

Undertakings that surpass those thresholds only can dodge the designation by rebutting the presumption with sufficiently substantiated arguments that demonstrate, due to the circumstances in which the relevant CPS operates, that it does not manifestly satisfy the substantiality requirement listed under Article 3(1)(a) DMA[23]. The terms under which the rebuttal of the presumption operates 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[24]. The EC may consider whether the arguments presented by the undertakings are sufficiently substantiated or not. If they are, the EC 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[25]. If they are not, then the rebuttal of the presumption will be outright rejected[26].

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 the competitive dynamics in the digital arena, such as an undertakings' size, network effects, or data-driven advantages[27].

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[22] DMA (n 1), Article 3(4).

[23] Despite that gatekeepers that have rebutted the presumption under Article 3(2) have attempted to present arguments about all the requirements under Article 3(1), Recital 23 directly recognises that the undertaking can "*rebut the presumption that the undertaking has a significant impact of the internal market (…)*".

[24] The same argument was formulated in Alba Ribera Martínez, 'Rebuttal and Designation: Walking the Fine Line of Article 3(5) DMA' (*EULawLive's Competition Corner*, 22 November 2023) <https://eulawlive.com/competition-corner/rebuttal-and-designation-walking-the-fine-line-of-article-35-dma-by-alba-ribera-martinez/> accessed 18 December 2023.

[25] Most of the already designated gatekeepers are in this situation, given that some of the CPS that they notified to the European Commission are subject to verification via market investigations under Article 17(3) DMA, see Commission decision 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 (Decision accepting iMessage rebuttal); Commission decision opening a market investigation 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) 6078 final (Decision accepting Bing, Edge and Microsoft Ads rebuttals).

[26] DMA (n 1), Article 3(5), para II. This was the case for a few designated gatekeepers, which were unsuccessful in rebutting the presumption, see ByteDance's designation decision (n 14), paras 96-163; and Meta's designation decision (n 14), paras 209-233 and 287-308.

[27] At the moment of writing, the European Commission only triggered one process for qualitative designation against Apple's iPadOS, Commission decision opening a market investigation pursuant to Articles 16(1) and 17(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C(2023) 6076 final. Thus, the legal standard could still resemble that of the rebuttal of the presumption, as pointed out earlier by Alexandre de Streel, Marc Bourreau, Sally Broughton Micova, Richard Feasey, Amelia Fletcher, Jan Krämer, Giorgio Monti and



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### 2.2 Article 3 in practice: core platform delineation and designation

The EC's designation decisions have not come without some friction in terms of their deviation from the strict limits set out under Article 3. The first stepping stone to pave the way for descending designation into reality started with the EC's Implementing Regulation[28], which lays down detailed procedural arrangements to trigger the DMA's application. Aside from the dedicated procedural rules that apply to the proceedings opened by the EC in general, the Implementing Regulation set out the rules on the information to be included by the undertaking when preparing its notification to the EC to be designated as a gatekeeper[29]. The EC's adoption of those detailed arrangements in relation to designation is coherent with the limitations imposed under Article 3, given that they mainly rely on the information provided by the undertakings to designate them via the proceedings set out under Article 3[30]. Article 46 legitimises the Commission's adoption of implementing provisions for that same purpose[31]. The Implementing Regulation imposed that the undertakings for each relevant category of CPS should provide a detailed explanation of their boundaries as well as a potential (and alternative) delineation of each of them[32].

Following this same motion, to determine whether a service provided by an undertaking is a CPS because it meets the criticality requirement (under Article 3(1)(b) DMA), the EC put forward in its first designation decisions, that it should, as a preliminary step, proceed

Martin Peitz, 'Effective and Proportionate Implementation of the DMA' (2023) Centre on Regulation in Europe, 42-43.

[28] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council [2023] OJ L102/6 ("Implementing Regulation").

[29] According to DMA (n 1), Article 3(3), the undertaking meeting all the thresholds in Article 3(2), shall notify the Commission without delay and in any event within 2 months after those thresholds are met and provide it with the relevant information of the thresholds. For instance, the first undertakings to be designated as gatekeepers notified the EC on 4 July 2023, 'Potential gatekeepers notified the Commission and provided relevant information' (*European Commission*, 4 July 2023) <https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en> accessed 2 January 2024.

[30] Implementing Regulation (n 28), Recital 2.

[31] DMA (n 1), Article 46(1)(a) establishes the Commission's powers to adopt implementing acts laying down detailed arrangements on the form, content and other details of notifications and submissions pursuant to Article 3.

[32] Implementing Regulation (n 28), Section 2.1.1 and 2.1.2 of Annex I (Form relating to the notification pursuant to Article 3(3) of Regulation (EU) 2022/1925 for the purposes of gatekeeper designation) ("Form GD").



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to the delineation of the undertaking's services[33]. Before the actual designation of the gatekeeper, the European Commission upheld the need for delineation, despite that the exercise was not completely evident from the letter of the law, both stemming from the substantive content under Article 3 or the Implementing Regulation. Regardless of the detachment, the delineation of the CPSs is not a pre-requisite that the European Commission must fulfil in the abstract, but it directly refers to the fulfilment of the criticality requirement. This is made apparent throughout the designation decisions, insofar as the criteria to delineate the CPSs are those that the Annex to the DMA establishes to calculate the number of active end users and business users under the quantitative presumption corresponding to this same requirement[34]. Throughout the designation decisions, the EC's efforts elucidated the fulfilment of the criticality requirement, but it did so in a fragmented way.

The EC outlined in its designation decisions two sets of rules to perform the delineation exercise: those phrased in the positive and those worded in the negative. On one hand, the European Commission set forth those considerations that it will not take into account when performing the delineation exercise. For instance, the services belonging to the same category of CPSs will not be segmented as distinct only on the fact that they are provided using different domain names. On the contrary, those services that are offered in an integrated way will not automatically be deemed as a single CPS, either.

On the other hand, the European Commission sets forth two fundamental analyses that it may perform to determine whether two different services may fall within the scope of only one CPS. The first one is quite straightforward. If two services are used for the same purpose from both an end user and a business user perspective, they may constitute a single CPS, unless they belong to different categories of CPSs under the list displayed in Article 2(2). The second process is more complex. It starts with asking whether the services belong to the same category of CPSs. If they do not, then they will be automatically deemed distinct. If they do, then the EC will check whether they are used for the same purpose. If they are used for distinct purposes, they remain distinct CPSs. If

[33] The European Commission repeated this same argument in all of its designation decisions, see, for instance, Alphabet's designation decision (n 14), para 15; Amazon's designation decision (n 14), para 10; or Apple's designation decision (n 14), para 13.

[34] DMA (n 1), Section D, paragraph 2 of the Annex.



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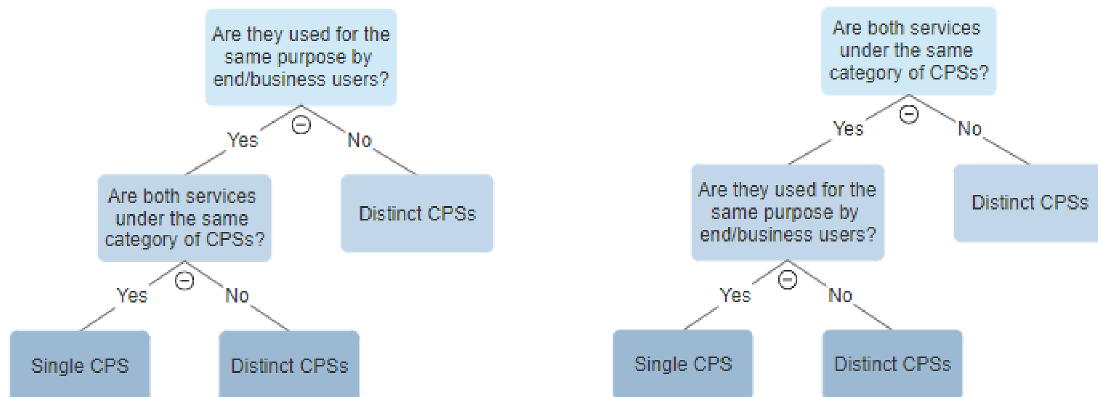
they are used for the same purpose, then they may be delineated as a single CPS[35]. The two decision trees below illustrate the rationale underlying each one of the assessments:




Throughout its first designation decisions, the Commission chose the pathway of the second of the analyses. In all of its decisions, it first establishes what category of CPS the service satisfies (qualification) and, after that, it engages in the question of the purpose that the service satisfies for business and end users (delineation).

This second tenet of the analysis aligns with the overall objective of delineating CPSs to assess whether the criticality requirement is fulfilled, insofar as the undertaking's role of intermediation is placed at the forefront of the discussion. The criticality requirement is not only observed in relation to the size of the undertaking's user base but other elements are factored into the EC's analysis.

However, the standard and threshold for determining whether the purpose of use of a service deviates from that of another service from the business user and end user perspective is not elucidated by the EC when deciding on the delineation of CPSs. This is the case due to two fundamental reasons. The first one revolves around the fact that, in some instances, the undertakings' notifications and the EC's views are aligned in terms of the delineation of CPSs. In those particular cases, the EC did not provide much justification regarding the criteria that it uses to determine whether one service should

[35] The same criteria are touched upon in the preliminary considerations of each of the designation decisions issued by the European Commission, see, for instance, Apple's designation decision (n 14), paras 14-15; ByteDance's designation decision (n 14), paras 11-12.



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remain separate from another one[36]. The second is more intricate in nature. Despite that the categories of CPSs are not listed under Article 2(2) in hierarchical order[37], the broader exercise of delineation took many different forms. At face value, this choice was not completely evident since there is no indication in the text of the DMA pointing towards this multi-faceted delineation of services. However, the EC intensified its efforts against the background of the different nature of each regulatory dialogue that it held with each undertaking. The patchwork of criteria used by the EC was as wide and nuanced as the delineations that were performed.

### 2.2.1 The requisite legal standard in delineation: a different meaning for each core platform service

Based on these same grounds, the EC did not point to a common legal standard to consider whether a service was used for the same purpose as opposed to another one[38]. Instead, those standards were established on the basis of each category and each of the relationships that posed some type of question in terms of delineation. Market definition precedents from competition law cases had no bearing whatsoever on the exercise, due to the fact that the DMA consciously departs from them[39].

Four different types of delineations were performed throughout the first designation decisions. Not all of the manifestations concerned *stricto senso*, the task of delineating one service from another, but more intricate analytical exercises were performed under the guise of delineation.

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[36] For instance, that was the case in the European Commission's finding that LinkedIn remained distinct from LinkedIn's job features and LinkedIn Learning features, Microsoft's designation decision (n 14), para 143.

[37] The European Commission recognises as much in Meta's designation decision (n 14), para 133.

[38] Those doubts were also established by Amelia Fletcher, Jacques Crémer, Paul Heidhues, Gene Kimmelman, Giorgio Monti, Rupprecht Podszun, Monika Schnitzer, Fiona Scott Morton and Alexandre de Streel, 'The Effective Use of Economics in the EU Digital Markets Act' (2023) Yale Tobin Center for Economic Policy, Policy Discussion Paper No. 8 <https://dx.doi.org/10.2139/ssrn.4526050> accessed 28 December 2023.

[39] That view was fleshed out by the European Commission in ByteDance's designation decision (n 14), para 65. Other similar proposals in the world to the DMA have also adopted this same criterion, see Deutscher (n 8), 330.



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#### 2.2.1.1 The delineation between different categories of core platform service

Different categories of CPSs were set apart from each other in the designation decisions. The most salient example of the exercise is the delineation of the undertaking's services vis-à-vis their advertising services[40]. The European Commission adopts a wide interpretation of the definition of online advertising services under Article 2(2)(j) DMA[41]. Even though the definition does not provide an exhaustive definition of such services, in the EC's words, it does include examples, including advertising networks, exchanges, and any other advertising intermediation service. Thus, the EC terms the definition as an expansive concept, which supports the inclusion of different services, interfaces, features, functionalities, and tools that may be used for online advertising[42]. The ultimate purpose of an advertising service is to expose end users to advertisements[43]. Thus, this is the legal benchmark for performing delineation concerning online advertising services, away from the EC's decisional practice in antitrust that separates the relevant markets for online search advertising and online display advertising[44].

On Alphabet's designation decision, the Commission considers that the display of an ad in the gatekeeper's CPS is also an integral part of the other service on which the end users view the advertisement. However, the fact that the display of an ad is part of the online advertising service does not exclude the fact that the act of displaying an advertisement

[40] The delineation of Alphabet's online search engine Google Search, video-sharing platform YouTube and online intermediation services Google Play, Google Shopping and Google Maps in relation to Alphabet's advertising services was particularly addressed, see Alphabet's designation decision (n 14), paras 38, 59, 78, 91 and 115. A similar argument was formulated in Meta's designation decision (n 14), paras 110-116 in relation to the delineation of its advertising services concerning its online social networking services. The same applied rationale applied to Amazon's delineation of its online intermediation service Amazon Marketplace from its advertising services, see Amazon's designation decision (n 14), paras 29 and 48-51 as well as to the delineation operation between Microsoft's online advertising services and its online social networking service LinkedIn, see Microsoft's designation decision (n 14), paras 83-84.

[41] Article 2(2)(j) of the DMA reads as follows: "*online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)*".

[42] The statement can be found in Alphabet's designation decision (n 14), para 207 and it is reproduced in Meta's designation decision (n 14), para 116.

[43] The statement derives from Meta's designation decision (n 14), para 113.

[44] The Commission steers away from that criteria, differentiating between offline and online advertising, search and non-search, based on the platform, between online display ads on social networks or off social networks or between online display video and non-video advertising, see Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, C(2014) 7239 final, paras 74-79; Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, C(2016) 8404 final, paras 159-161; Commission Decision of 6.9.2018 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.8788 – Apple/Shazam), C(2018)5748 final, paras 133-135; and Commission Decision of 17.12.2020 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.9660 – GOOGLE/FITBIT), C(2020)9105 final, paras 148-155.



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is also part of the undertaking's other services. In turn, this fact does not necessarily alter the fact that they remain distinct services for delineation, given that even if they are provided in an integrated fashion, they belong to different categories of CPSs. On one hand, the display of an ad on another service is limited to the incident of exposing that advertisement on that online interface, and, on the other hand, the notion of display is restricted to that communication act via the other service's interface[45].

Even though Meta's designation decision built on this same conclusion, it upheld that Meta Ads should remain separate from Meta's social networking service Facebook because it is not a service provided exclusively to place ads on that same social network. Instead, the single auction process optimises and delivers ads across Meta Ads' surfaces and on third-party mobile applications via the Audience Network[46]. The same argument played a part in the reverse of Microsoft's designation decision, given that the Commission considers that Xandr's full integration into the Microsoft Advertising Platform entails that it should be comprised in the broader category of the CPS[47].

On top of this argument, the EC discards that the interpretative provision surrounding the obligation enshrined in Article 6(8) DMA should apply for delineating two different services of the same undertaking. Recital 58 recognises that online advertising services may be fully integrated with other CPSs. According to the EC, the rule of thumb of the delineation exercise overrides that possibility, and the integration of the services does not preempt the conclusion that two services must be considered as a single CPS[48]. This is particularly surprising since the EC does not shy away from instrumentalising the meaning and implications borne into the same obligation to suggest that advertising performance measurement tools are part of online advertising services when deciding whether Google Analytics should be included in the wider scope of Alphabet's online advertising services CPS[49].

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[45] Alphabet's designation decision (n 14), paras 220-223. The same argument was reproduced in Meta's designation decision (n 14), para 113 and Amazon's designation decision (n 14), paras 50 and 51.

[46] Meta's designation decision (n 14), para 114.

[47] Microsoft's designation decision (n 14), paras 84 and 87-88. In the case of the delineation between Microsoft Ads and LinkedIn Marketing Solutions, the latter bears the purpose of targeting LinkedIn members for business-to-business marketing.

[48] Meta's designation decision (n 14), para 115.

[49] Alphabet's designation decision (n 14), para 209.



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Under this same category of delineation, the Commission differentiated online intermediation services such as Alphabet's Google Play, Shopping[50], and Maps from its online search engine. Due to the fact that the services concerned were different, the legal standard for considering their purposes was also distinct.

As opposed to the delineation of the undertaking's services vis-à-vis its online advertising services, it did consider directly the interpretative provisions of the self-preferencing prohibition in Article 6(5) DMA to set apart the search results that contain and rank services that are distinct or additional to those of an online search engine. The fact that the interpretative provision referred exclusively to the obligation did not alter the finding that it was also relevant to the delimitation exercise, from the Commission's point of view. In particular, the EC put forward the fact that Recital 51 of the DMA explains that services distinct or additional to an online search engine may be displayed along with, ranked in, or embedded in the results of that search engine. Recital 51 specifically refers to a situation in which a gatekeeper provides its online intermediation services through an online search engine[51]. It follows from that statement that three different types of products or services can be distinguished from the results displayed on the online search engine. First, the ranking of results communicated by the online search engine. Second, those services that are partly or entirely embedded in the online search engine results. Third, those services displayed alongside the results of an online search engine. When the results of an online intermediation service are presented in any of those three ways, then they cater for a distinct service from that of the online search engine[52].

An additional layer of complexity is added when delineation is not performed between two distinct categories of CPSs but rather to two services that fall within the same category. This was one of the most salient discussions deriving from Meta's designation since the undertaking proposed that both online social networking services Facebook and Instagram should be included in a single CPS[53]. In this particular case, the EC's analysis

[50] According to the Commission, Google Shopping's purpose is to allow end users to engage with the product offers of business users as displayed on the service, see Alphabet's designation decision (n 14), para 36.
[51] Although the conclusion is the same as the definition of the relevant market, the criteria are different, as spelled out in Commission Decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 – Google Search (Shopping)), C(2017) 4444 final, paras 154-250.
[52] The explanation was presented in Alphabet's designation decision (n 14), paras 95 and 96, and the European Commission also followed it in Microsoft's designation decision (n 14), para 49.
[53] This was Meta's view in Meta's designation decision (n 14), para 30.



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was based on the supply of both services stemming from Meta. For instance, it supported their differentiation based on their distinct branding, marketing strategies, registration and log-in processes and terms of service[54]. On the side of the business and end users' stated use of the service, the EC highlighted their features' differences, remarking that Facebook's functionalities were broader than those available on Instagram[55]. Additionally, the Commission pinpointed the services' differences in their target user bases[56].

This first category is the only one to comprise the delineation task as it was elucidated by the EC in the terms presented at the start of each of the designation decisions. The rest of the exercises are *de facto* delineations of the CPSs because they are based on the same methodology pointed out in Section 2.2, but they bear a different nature since they do not substantively engage with the CPS terminology. The common denominator between them is that in every one of them, the EC pursued the key criteria of determining the purpose of the service for business and end users to tell apart whether a particular element should be left inside or outside of the scope of the exercise.

#### 2.2.1.2 *De facto* delineation: three additional scenarios

Three additional scenarios took place under the guise of the delineation exercise as a response to the way in which the undertakings presented their notifications towards designation. The three categories and the CPSs concerned are underlined in Table 1 below:

*Table 1. Three categories of de facto delineation*

| | **Hardware delineation** | **Delineation with complementary services** | **Qualification** |
|---|---|---|---|
| **Alphabet** | Google Android on smartphones and tables v. Android Automotive OS, Android TV, | | |

[54] Meta's designation decision (n 14), para 44.
[55] The purpose of Facebook was that of allowing end users to post a broader set of content on other users' profiles, while on Instagram end users are limited to leaving comments and likes on other users' content, see Meta's designation decision (n 14), para 47. From the perspective of business users, Instagram enabled them to share more limited information focused on the sharing of visual content and a short bio, whereas Facebook allowed them, on top of that, to provide end users with more detailed and text-based information to communicate with their customers as part of their customer services, see Meta's designation decision (n 14), paras 50 and 52.
[56] Meta's designation decision (n 14), paras 46-50.



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| | Chrome OS, Cast OS and Fuchsia OS. | | |
|---|---|---|---|
| **Amazon** | | Amazon Ads v. Attribution and Marketing Cloud. | |
| **ByteDance** | | | Video-sharing platform and online social networking services. |
| **Apple** | iOS v. iPadOS, macOS, watchOS and tvOS<br>iOS App Store v. iPadOS<br><br>App Store, macOS App Store, tvOS App Store and watchOS App Store | | |
| **Meta** | | 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 | LinkedIn v. Learning and Jobs features<br>Microsoft Ads v. Sales Navigator and Marketing Solutions | |

#### 2.2.1.2.1 Hardware delineation

The EC assesses delineation concerning the CPSs' characteristics vis-à-vis the different types of devices on which the CPSs are presented to both business and end users. The discussion was particularly outstanding concerning the delineation of the undertakings' operating systems. Both Android and iOS were evaluated in this same light. For instance, Alphabet submitted that Google Android should only comprise the deployment of the operating system on smartphones and tablets[57], whereas Apple presented the argument that iOS should be considered to comprise the deployment of the operating system on Apple's smartphone, iPhone[58]. The Commission applies a uniform legal standard and agrees with the undertakings on both fronts[59].

Both designation decisions interpret the definition under Article 2(10) of operating systems from what the Commission terms a 'technological perspective'[60]. This viewpoint

[57] Alphabet's designation decision (n 14), paras 154-158.
[58] Apple's designation decision (n 14), paras 72-79.
[59] The Commission's decisional practice in competition law found that smartphone OS and tablet OS belong to the same product market based on the same criteria, see Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android), C(2018) 4761 final, paras 231-233.
[60] Article 2(10) DMA defines an operating system as "*a system software that controls the basic functions of the hardware or software and enables software applications to run on it*". A discussion on the technological perspective may be found in Alba Ribera Martínez, 'Apple Seeks to Challenge its Designation Under the DMA: Part and parcel of its Closed Ecosystem' (*Kluwer Competition Law Blog*, 14 November 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/11/14/apple-seeks-to-



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entails 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 are designed because they, in principle, affect the purpose of the operating system running that device. The EC went into detail regarding the steps for the manufacturer's development to accommodate an operating system for a particular device. The difference between both undertakings lies in the fact that Alphabet rarely sells its smartphones and tablets directly, as opposed to Apple's direct manufacturing of its devices. Due to this reason, Apple's development process for its devices was particularly considered in light of the different functionalities that the undertaking engrained in each device[61].

The same rationale, however, does not apply to delineating Microsoft's operating system for personal computers, where the technological perspective was not even considered, despite that the definition in Article 2(10) DMA applied to qualify Microsoft's Windows PC OS as an operating system. Instead, the focus of the exercise was centred on accounting for the fact that the delineation should be processor- and technologically-neutral[62]. The application of this approach meant that the EC took an expansionist view of the delineation of the CPS and comprised all the different formats it caters to the public.

Similar criteria applied to delineating Apple's software application store, App Store, in relation to the different devices where it is available, even though it is categorised as an intermediation service[63]. The purpose of software application stores was elucidated in that instance, namely, to intermediate the distribution of applications. However, the EC steers away from the technological perspective that it applied with respect to Apple's operating system, iOS, as a consequence of the fact that the definition of software application stores does not contain any reference to operating systems[64]. Even though it recognises that the same arguments play out in favour of differentiating the App Store into the different types

challenge-its-designation-under-the-dma-part-and-parcel-of-its-closed-ecosystem/> accessed 21 December 2023. In the same sense, see Valeria Caforio, 'Apple's Appeal Against Gatekeeper's Designation: Device-Specificity or Neutrality?' (*Medialaws*, 18 December 2023) <https://www.medialaws.eu/apples-appeal-against-gatekeepers-designation-device-specificity-or-neutrality/> accessed 21 December 2023.

[61] Apple's designation decision (n 14), paras 86-90.

[62] Microsoft's designation decision (n 14), paras 29-32.

[63] Although software application stores are addressed transversally in the context of the DMA, they are not listed under Article 2(2) as core platform services.

[64] Apple's designation decision (n 14), paras 39 and 42.



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of devices given that developers of apps programme, adapt, and optimise their services differently depending on the device they want their apps embedded in, the EC rejects that those elements are relevant to perform the delineation exercise. That analysis relates to the nature, function, and usage of the different devices on which the App Store could be accessed and related user experience, rather than on the online intermediation service that the App Store provides. Thus, these factors cannot alter the common purpose that the App Store serves across all Apple devices on which it is available[65]. Instead, for the aim of establishing that common purpose in relation to app stores, the EC considers Apple's application of the same or very similar rules and policies with regard to app developers and end users on the App Store across the different devices[66] as well as the fact that Apple provides the same or very similar services on all of its devices in relation to the distribution of apps, for example, through its support services[67]. To round the argument up, the Commission confirms that Apple refers to the CPS in its official publications as one single service[68].

The delineation exercise with respect to the relationship of CPSs with the devices they run on also stemmed from the interpretation of the definition of operating systems under Article 2(10). As opposed to the criteria applied to delineation *stricto sensu*, that interpretation does not directly hold with the terms of the definition (just as in the case of online advertising services described in Section 2.2.1.1.), but its roots lie within the wider sense of the relationship between hardware and software. The EC, however, does not transversally apply the rationale, and idiosyncratic criteria are employed to perform this same type of delineation for the case of software application stores.

#### 2.2.1.2.2 Delineation with complementary services

The delineation exercise applies to the delimitation of services that are factually embedded within the gatekeeper's core product or service. Delineation does not relate to the CPS but rather to the boundaries of the services that fall within its scope. Despite their nature being less prominent in principle in their relation to the DMA's obligations, the EC still goes to great lengths to delineate CPSs from their secondary services. This was

[65] Apple's designation decision (n 14), paras 39-41.
[66] *ibid* paras 43-47.
[67] *ibid* paras 48-56.
[68] *ibid* paras 57 and 58.



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the case for Amazon's online intermediation services Marketplace, Meta's online social networking service Facebook, as well as Microsoft's online social networking service LinkedIn.

The EC presents the assertion that those services should be considered distinct on the basis that they serve a different common purpose, in the abstract and without further justification, in the context of Amazon's and Microsoft's designation decisions[69]. A distinct legal standard applies when the EC delineates Facebook Dating, Facebook Gaming Play, Messenger, and Marketplace from Facebook's social networking service and finally finds that they constitute separate services from the social network.

Even though the EC is eager to defend that the level of integration between different services does not pre-empt the conclusion that they belong to a single service, it precisely uses that same argument to delineate those services[70]. For instance, the fact that users must 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 implies that both services are identifiable and distinct services, aside from the fact that they serve different purposes[71]. At the same time, however, the EC denies that same point by establishing that the interdependencies and integrated features between both services are not directly correlated to their purpose[72].

Ironically, the Commission formulates that same idea in reverse to uphold that Facebook Gaming Play is 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 operates in favour of their differentiation[73]. A similar argument plays a part in setting apart the social network from its chat functionality, Messenger. All communications on Messenger take place between users who have Facebook accounts

[69] Amazon's designation decision (n 14), paras 27, 28 and 53; Microsoft's designation decision (n 14), paras 142-144.
[70] This conclusion is directly extracted from the EC's statements, described in Section 2.2.
[71] Those arguments were presented in Meta's designation decision (n 14), paras 59-62. The Commission defined the purpose of Facebook Dating as that of matching users for dating purposes based on a dating profile.
[72] Meta's designation decision (n 14), paras 64-66.
[73] Meta's designation decision (n 14), paras 71-73. A similar argument was formulated to advocate in favour of the delineation between Facebook and Instagram since linking both accounts was purely optional for the user, see Meta's designation decision (n 14), para 55. The Commission defined the purpose of Facebook Gaming Play as that of playing and distributing games, whereas it defined an online social networking service to connect and communicate with other users or share and discover a wide array of content.



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because of the current design of the social network. Thus, all of Messenger's users must have a Facebook account via their unique Facebook ID to access the service. However, the fact that users can use Messenger irrespective of whether their Facebook account is activated topples the sense of integration between both services[74].

In principle, the delineation exercise relates to assessing the fulfilment of the criticality requirement[75]. Notwithstanding, the EC considers the question of the CPSs' permanence in time to address delineation. For instance, for delineating Messenger from Meta's social network, it considers the long-standing evolution of both services within the platform, bearing in mind the time span since Messenger was first launched in 2011[76]. The complete opposite holds for the case of Facebook's Marketplace since the EC adopts a narrow interpretation of the circumstances of its integration by establishing that it can only take into consideration information from the last three financial years before designation (that is, 2020, 2021, and 2022). Thus, for delineation, it cannot factor into its analysis that Facebook no longer supports the ability for all sellers to create listings for vehicles and property in January 2023[77]. That element, which would have advocated for their separation, falls outside of the scope of the EC's analysis[78].

The integration of services plays a key role in assessing whether secondary services of the undertaking can be delineated from the wider categories of CPSs, despite that the EC explicitly contradicts that same idea when setting out its main guidelines to perform the delineation exercise. In this context, the EC also imperils the delineation exercise's nature by factoring into the analysis the secondary service's permanence and, thus, bringing the locus of the analysis towards the durability requirement enshrined in Article 3(1)(c) DMA.

[74] Meta's designation decision (n 14), para 182.
[75] Even though the letter of the law of the DMA does not explicitly frame delineation or the link with the criticality requirement, the conclusion is derived from the EC's interpretation, as set out in Section 2.2.
[76] Meta's designation decision n (14), para 177 and footnotes 144-150.
[77] The Commission did establish, however, that discovering, inter alia, content, products, websites, information or software applications is common to numerous services that fall within very different categories of CPSs, Meta's designation decision (n 14), para 252.
[78] Meta's designation decision (n 14), paras 251, 256 and 259-260. The Commission defined the purpose of the Marketplace as that of allowing users, including business users, to list goods or services to other users, to facilitate the initiating of direct transactions between those users, irrespective of whether such transactions finally take place online or offline or take place at all.



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#### 2.2.1.2.3 Qualification

The Commission covertly applies the delineation exercise not to tell apart two services from one another but rather to define a CPS into one category or another 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. Surprisingly, the Commission chose the latter, regardless of the fact that ByteDance stressed that the features and functionality of the platform led one to categorise it as the former[79]. The EC does not argue that TikTok is not a video-sharing platform service. It agrees with the undertaking that its essential functionality is devoted to user-generated videos[80]. However, the EC adds 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, the Commission upholds, is only one functionality of the platform within its broader context[81]. Additionally, the Commission also considers the functioning of TikTok's algorithm to establish that the purpose of the platform is not only to discover content in the form of videos but also to discover other users who create content. Thus, the enabling of the end user's existing circle, which is another characteristic of an online social networking service, is also met for ByteDance's platform in driving its user engagement and interactions[82].

As other undertakings attempted to argue, ByteDance relied on Recital 51 to distinguish between the distribution of videos through a video-sharing platform service and the display of information in the newsfeed, which characterises an online social networking service. The EC does not allow the argument, but not because the interpretative provision falls outside the scope of delineation[83]. Instead, it stresses that there is nothing in Recital 51 explaining that an online social networking service should have a newsfeed to be classified as such. Furthermore, even though the concept of a newsfeed is not even

[79] ByteDance's designation decision (n 14), paras 66 and 25-37.
[80] *ibid* para 42.
[81] *ibid* paras 43, 48 and 50-52.
[82] *ibid* paras 45 and 51-55.
[83] This was the argument formulated in Section 2.2.1.1 when delineating two distinct CPSs, namely online advertising services.



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referenced or defined in the DMA, a newsfeed can be understood as a feed that displays news in a video format such as the one displayed by TikTok[84].

### 2.2.2 The multi-faceted meaning of a core platform service's purpose

The identification of patterns and common criteria in the Commission's first designation decisions concerning the delineation exercise comes as a hard task to perform for three reasons.

First, because the Commission does not explicitly detail what a core platform service's purpose entails or what type of characteristics should be factored into the rationale of setting apart a purpose from another one, despite that a CPS's purpose is the main cornerstone of the analysis. Although the Commission hints at the fact that the purpose of a CPS may be assessed under the lens of the service's nature, function and usage, those criteria are not applied transversally to the undertakings' services[85]. The exhaustive analysis of the elements considered by the Commission in Sections 2.2.1.1 and 2.2.1.2 demonstrates that the application of the concept belongs to a wider matter-of-fact analysis[86], which is flexible in nature. This feature of the exercise demonstrates that the task of delineation is not necessarily influenced by a by-default expansive or narrow interpretation of the regulatory instrument's terms. The outcomes of it depend on the CPSs concerned and the complexity of the regulatory dialogue between the undertaking and the EC.

Second, the EC prefers to define the common purpose of some of the CPSs for business users and end users and not others. The large majority of the CPSs' common purposes for business and end users remain undefined (six out of the ten CPSs listed). In some of the

[84] ByteDance's designation decision (n 14), para 56.
[85] Only two references in the first six designation decisions issued by the EC hinted at the potential weight of these elements. The first, in Apple's designation decision (n 14), para 41 points out the fact that purpose and nature may be distinct, whereas in Apple's designation decision (n 14), para 32 the Commission discarded that the nature, function and usage of the different devices on which the App Store can be accessed cannot be factored into the analysis of the purpose of the App Store because those consideration belong to the devices and not the purpose catered by the App Store on each one of them. Inductive analysis leads one to think by reversing the argument that the nature, function, and usage of the App Store could have been factored into the analysis.
[86] This idea converges with official declarations of judges in the General Court, see Tono Gil, 'Big Tech DMA appeals focus on 'relatively narrow' issues, EU judge says' (*Mlex*, 5 December 2023) <https://mlexmarketinsight.com/news/insight/big-tech-dma-appeals-focus-on-relatively-narrow-issues-eu-judge-says> accessed 19 December 2023.



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services concerned, those definitions provide for all-encompassing notions of those purposes that do not add much to the definitions of the services already listed under Article 2(2) DMA insofar as they bear common elements between them and scarce differences[87]. For instance, according to the EC, the common purpose of online social networking services is to connect and communicate with other users or to share and discover a wider array of content. This common purpose mimics the definition of the service under Article 2(7) DMA. Concerning other services, such as web browsers, the explicit purpose of the service is more useful since it deviates from the definition under Article 2. The purpose of web browsers is defined by the actions performed by the business users and end users, i.e., allowing users to offer, access and interact with web content[88], whereas the definition under Article 2(11) DMA refers back to the elements of the CPS (a software application that enables end users to access and interact with web content hosted on servers that are connected to networks such as the Internet). In this same vein, the EC recognises that the purpose of discovering content, products, website information or software applications stores underscores the purpose sought by several CPSs[89]. Thus, the EC argues, that instrumentalising this definition, and particularly the idea of 'content discovery', cannot serve as a determinant factor to tip the scales of delineation in one fundamental way or another. In sum, in the absence of unified criteria transversally applying throughout the designation process, the EC does not establish tractable and workable concepts depending on the core platform service concerned.

Third, the EC lightly uses the concept of a CPS's purpose, but the notion is used in two completely distinct contexts: that of the common purpose of a CPS regarding business and end users and the concretisation of that same purpose. It is, however, not entirely clear that both of those concepts can be (or should be) interchangeably used by the EC. The former concept defines the wide-spanning purpose that a CPS has with relation to its prominence as an important gateway for business users to reach end users, which

[87] Throughout its first designation decisions, the Commission defines the purposes of online advertising services, online social networking services, software application stores, dating services, intermediation services and web browsers, whereas the rest of CPS' purposes are not defined, despite that they directly engage with the delineation task, see Meta's designation decision (n 14), paras 60, 71 and 113; Apple's designation decision (n 14), para 39 and 110; Microsoft's designation decision (n 14), para 65; Alphabet's designation decision (n 14), para 177.

[88] Microsoft's designation decision (n 14), para 65; Alphabet's designation decision (n 14), para 177; Apple's designation decision (n 14), para 110.

[89] The statement is produced in the context of the delineation between Facebook and Marketplace, so that online intermediation services and online social networking services would, at least, be included, see Meta's designation decision (n 14), para 252.



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underscores the criticality requirement under Article 3(1)(b) DMA, whereas the latter speaks to the matter-of-fact considerations that concretise that same common purpose. The EC's analysis is not systematic in this aspect. Even though one could have expected a sequential consideration of both concepts, i.e., the EC's inquiry on the common purpose of a CPS in the abstract followed by its concretisation, the reality of the designation decisions encompasses a fragmented account of both concepts. Not one of the delineation exercises is performed considering both elements, and most of them address one or the other, whilst their consequences remain completely distinct in nature and form.

In the absence of a clear-cut rationale to unpack the notion of a CPS's purpose, some commentators have argued that the review of the delineation exercises performed by the EC bears some similarity with the discussions in the antitrust experience regarding tying and bundling practices where one must first differentiate if there are two products involved or not[90]. The traditional approach towards measuring that two products are distinct in assessing this type of conduct under Article 102 TFEU is to analyse customer demand[91]. That is to say, in the absence of tying, whether a substantial number of consumers would acquire the tying product without the tied product from the same supplier[92]. This demand test, however, must be separately performed for each product and not based on the conduct's definition of the relevant market[93]. The key understanding is that two separate products are catered to in the market if there is stand-alone production for both the tying and the tied product[94]. Direct evidence of this circumstance is not necessarily required[95]. The analysis does not entail, however, proving whether the tying product was, in practice, regularly offered without the tied product[96].

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[90] Gil (n 86). The origins of the requirement to distinguish two separate products stems from Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR I-3461, para 98.

[91] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ 45/7, para 51.

[92] Daniel Mândrescu, 'Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices' (2021) 40 Computer Law & Security Review, 15.

[93] Renato Nazzini, 'The evolution of the law and policy on tying: A European perspective from classic leveraging to the challenges of online platforms' (2017) 27 Journal of Transnational Law and Policy, 29.-30.

[94] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, paras 917, 921 and 922.

[95] *ibid* paras 919-923.

[96] *ibid* paras 917 and 919. For instance, even when the tying of two products is consistent with commercial usage or when there is a natural link between two products, the tying of products may nonetheless constitute an abuse, see para 942 and Case C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-5951, paras 36 and 37.



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Aside from direct evidence demonstrating this same point, a range of factors are relevant to the assessment, including the nature and technical features of the products concerned[97] or the history of the development of the products concerned[98]. Even complementary products can constitute separate products because customers may wish to obtain them together, but from different sources[99]. For instance, in *Google Android*, the EC considered that the Play Store and Google Search app were distinct products based on their different functionalities and the provision by independent suppliers of one of the services without the tie. The description of the service's functionalities resembles that of the definition of the purpose for the delineation of CPSs under the DMA, given that the EC established their common purpose from the end user viewpoint[100]. In a similar vein to the arguments presented by the EC regarding delineation, the General Court confirmed that the technical integration of one product does not necessarily entail that two products are no longer distinct for the finding of abuse[101]. In other words, even if the two items are functional complements, that is, when one of them is useless without the other, that does not necessarily imply that they form a single product[102].

Those arguing in favour of the convergence of both analyses are right. The EC used the blueprint of one of the requirements needed to establish the presence of bundling and tying to its first designation decisions issued in applying the DMA. Despite the fact that the decisions point in this direction, the fact that the EC must assess the same key criteria when applying the prohibition under Article 102 TFEU and when deciding on a CPS's scope is, at least, objectionable. The DMA explicitly departs from the concepts used in EU competition law[103]. In the context of delineation, the gap between both fields of law is evident: no economic considerations or precedent in market definition may be held

[97] For instance, the product's technical features were considered in Commission Decision of 20.12.2012 relating to a proceeding under Articles 101 and 102 of the Treaty on the Functioning of the European Union and Articles 53 and 54 of the EEA Agreement in Case COMP/39230 – Rio Tinto Alcan, C(2012) 9439 final, paras 62 and 102.
[98] Mândrescu (n 92), 15-16; Mateusz Musielak, 'The Evolution of Classical Evaluation Standards in Competition Law: The Legal Assessment of Tying in view of Challenges Raised by Digital markets' (2021) 3(35 Studia Prawa Publiznego, 121. Case T-201/04 (n 94), para 925.
[99] Case T-201/04 (n 94), para 922.
[100] Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android), C(2018) 4761 final, para 757. The definition of the Play Store's functionality mimics its definition in Alphabet's designation decision (n 14), para 56. A similar analysis was presented in the Microsoft case, see Case T-201/04 (n 94), para 926.
[101] Case T-201/04 (n 94), para 935.
[102] Case COMP/39230 – Rio Tinto Alcan (n 97), footnote 28.
[103] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12(7) Journal of European Competition Law & Practice, 572.



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against the rationale introduced via the Commission's designation process[104]. The EC is, thus, unconstrained by the limits of those criteria. However, when performing its delineation exercise, which it fabricates from an expansive interpretation of the designation process, the EC chose to re-introduce the underlying criteria for distinguishing products and services in tying[105]. Then, one can naturally derive that if the EC chose to rely on these criteria, then the limitations of competition law are reestablished and the designation decisions may be held accountable against this benchmark, albeit that the Commission cannot be held to produce new and innovative administrative criteria out of thin air[106].

### 2.3 Rebuttal of the quantitative presumptions for designation

The EC exercised its discretion beyond the DMA's boundaries not only in the positive by establishing idiosyncratic criteria per CPS in its delineation exercise but also in the negative via the analysis of the arguments presented by the undertakings to rebut the quantitative presumption set out under Article 3(2) via the procedure established under Article 3(5) DMA.

The terms of the rebuttal as set out by the regulatory instrument are quite narrow: Article 3(5) allows the undertakings to present sufficiently 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). Recital 23 delves into the threshold of sufficiency in substantiating those arguments by adding that the rebuttal of the presumption relates to the scope of the substantiality requirement. That is to say, the rebuttal of the presumption must engage with the discussion of whether the undertaking has a significant impact on the internal market. Due to this same reason, the reasons that the undertaking may adduce before the EC are also narrowly formulated.

[104] The DMA's steering away from market definition when defining its scope of application may also be a replicate of the separate products test for tying and bundling, see Thomas Graf and David R. Little, 'Tying and Bundling'. Francisco Enrique González-Díaz and Robbert Snelders (eds.), *EU Competition Law Volume V: Abuse of Dominance Under Article 102 TFEU* (Edward Elgar 2013), 535-539 and for the link of both, see Bostoen (n 10), 273-274.

[105] The two-step analysis was introduced despite that some scholars defined designation as a one-step procedure, see Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti and Marshall Van Alstyne, 'The EU Digital Markets Act' (2021) Publications Office of the European Union, 9.

[106] This same point is revisited in Section 3.



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They may only concern evidence and arguments relating to the quantitative criteria set out in the thresholds[107], namely the impact of the undertaking providing the CPS on the internal market beyond revenue or market capitalisation. Those factors include, in an exemplary fashion, metrics for the assessment of substantiality (the CPS' size in absolute terms and the number of Member States in which it is present), criticality (by how much the actual business user and end user numbers exceed the quantitative thresholds as well as the importance of the undertaking's core platform service considering the overall scale of activities of the respective core platform service), and durability requirements (the number of years for which the thresholds have been met).

Even though the rebuttal concerns the assessment of the substantiality requirement, some of the components of the thresholds contained in Article 3(2) relating to criticality and durability cross-fertilise the arguments that the undertakings may bring forward to rebut the presumptions[108]. In fact, in the eleven instances where the undertakings presented their arguments, they provided reasons for not being designated based on a variety of elements relating to the requirements enshrined in Articles 3(1) and 3(2)[109].

### 2.3.1 Article 3(5) in practice: rebuttal of the presumption and quantitative evidence

In the same style as the EC's definition of the delineation exercise, it also included in the first considerations of the designation decisions the applicable procedural pathways to the rebuttal of the presumption. The EC confirms that the undertakings may rebut the presumption, presenting arguments that should directly relate to the quantitative criteria laid down in the presumptions under Article 3(2).

[107] The statement was repeated in ByteDance's designation decision (n 14), para 161.
[108] On the lack of a tractable standard to this 'sufficiency' in the DMA, see Torsten Körber, 'Lessons from the hare and the tortoise: Legally imposed self-regulation, proportionality and the right to defence under the DMA' (2021) Neue Zeitschrift für Kartellrecht, 9.
[109] The eleven CPSs concerned with the procedure of the rebuttal of the presumptions under Article 3(2) were Alphabet's Gmail NIICS contained in Alphabet's designation decision (n 14), paras 126-150; Apple's NIICS iMessage as presented in Apple's designation decision (n 14), paras 132-158 and Decision accepting iMessage rebuttal (n 25); ByteDance's online social networking service TikTok, see paras 98-162; Meta's NIICS Messenger and online intermediation service Facebook Marketplace, see Meta's designation decision (n 14), paras 209-230; Microsoft's online search engine Bing, web browser Edge, online advertising services Microsoft Ads and NIICS Outlook.com, see Microsoft's designation decision (n 14), paras 45-102 and Decision accepting Bing, Edge and Microsoft Ads rebuttals (n 25); and Samsung's web browser Internet Browser, see Letter concerning Samsung's notification under Article 3(3) of Regulation (EU) 2022/1925, C(2023) 6103 final (Letter concerning Samsung's gatekeeper notification).



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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 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.

However, instead of this two-pronged analysis that Recital 23 and Article 3(5) present before the undertaking, the Commission establishes an additional procedural track[110]. The EC adds 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[111]. The nuance between the three scenarios lies within the provisions that they refer to. The sufficiency in the undertaking's substantiation relates to arguments manifestly contesting the presumptions under Article 3(2), whereas the sufficiency in the arguments presented in the latter case bears upon the requirements laid down in Article 3(1). The difference between both is minute but substantive, insofar as the EC's predisposition to accept arguments of a different nature morphs with the change of setting surrounding the provision concerned.

### 2.3.2 The requisite legal standard in rebutting the presumption of a gatekeeper CPS' position: 'to manifestly call into question'

For a rebuttal of the presumption under Article 3(2) to be successful, the arguments presented to the EC have to manifestly call into question those same presumptions. That is to say, the legal standard for the EC to decide whether it should open a market investigation to determine whether to accept the rebuttal or not is set at its highest[112]. 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[113].

[110] This idea was already presented in Ribera Martínez (n 24).

[111] Most designation decisions contain this statement, for instance, Alphabet's designation decision (n 14), para 27; Apple's designation decision (n 14), para 25; Microsoft's designation decision (n 14), para 22; and Letter concerning Samsung's gatekeeper notification (n 109), para 19.

[112] The Commission recognises that this is the legal standard in Meta's designation decision (n 14), para 217.

[113] The conclusion derives from the literal interpretation of 'manifestly', stemming from definitions contained in the Cambridge, Merriam-Webster and Collins Dictionaries.



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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 EC[114]. This is the reason behind the fact that only five out of the eleven CPSs that were rebutted have successfully gone through to the next phase of the market investigation procedure under Article 17(3) DMA[115].

The most salient argument that the European Commission was keen to accept was that of the CPS's limited scale compared to the overall scale activity in the relevant CPS category and other undertakings providing similar services in the Union[116]. In all the cases where the EC accepted the rebuttal due to this reason, the CPS's presence in the market vis-à-vis its competitors accounted for less than 10% of the general service's activity, and it did not compare to the position of its competitors[117]. Even though the percentage of usage of the CPS is a good indicator to measure its presence in the market, the undertaking's relevance related to that of its close competitors also plays a part in the EC's balancing exercise. For instance, the Commission rejects Meta's number-independent interpersonal communication service (NIICS) Messenger rebuttal because it is the second most widely used messaging service across the Member States and even the most used in some of the Member States[118]. In all the instances where the Commission accepts the rebuttal on these grounds, it moves the CPS's inquiry to the market investigation phase under Article 17(3) so that it can verify, for a longer period, the arguments that the undertaking presented to

[114] Translating those same terms to EU competition law, plausibility and likelihood would be deemed insufficient against this benchmark, see Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17(2) Journal of Competition Law & Economics, 360. For critics of the heavy burden of proof imposed on the gatekeeper, see Natalia Moreno Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (2023) 48(4) European Law Review, 401 and for a more accommodating view of the deliberately high standard, see Fletcher, Crémer, Heidhues, Kimmelman, Monti, Podszun, Schnitzer, Scott Morton and de Streel (n 38), 11.

[115] These CPSs are Apple's iMessage, Microsoft's Bing, Edge, and Microsoft Ads, as well as Samsung's Internet Browser, which fell outside of the scope of the DMA altogether.

[116] Decision accepting iMessage rebuttal (n 25), paras 4, 5, and 11; Decision accepting Bing, Edge and Microsoft Ads rebuttals (n 25), paras 4, 7, 10, and 15; Letter concerning Samsung's gatekeeper notification (n 109), para 10.

[117] For instance, for iMessage, the undertaking demonstrated that only 2,5% of Union-based citizens use iMessage as their main messaging service and it does not appear on the lists of the most relevant messaging services in Germany, see Decision accepting iMessage rebuttal (n 25), footnote 5; for Bing, it accounts for 3,6% of the overall activities of online search engine services and it is 25 times smaller than the largest operator in the CPS category of online search engines, whereas its greatest presence lies on desktop search engine service usage accounting for 9,9%, or Microsoft Ad's global revenue accounting for less than 3% of combined revenues of the seven most significant players in 2022 and 19 times smaller than Google Ads, see Decision accepting Bing, Edge and Microsoft Ads rebuttals (n 25), footnotes 4 and 17.

[118] Meta's designation decision (n 14), footnote 193.



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it and determine whether, despite fulfilling the thresholds under Article 3(2), the requirements under Article 3(1) do not apply to them[119].

#### 2.3.2.1 The particular case of email services as important gateways: qualitative evidence and an additional threshold

The EC does not remain consistent with applying the high threshold of 'manifestly calling into question' the presumption under Article 3(2). Rather, the EC applies two subsequent sets of thresholds when considering the rebuttals of Gmail and Outlook.com. According to the EC's words, the arguments they presented manifestly called into question the presumption. Simultaneously, those same grounds also clearly and comprehensively demonstrate that the requirement of the CPS constituting an important gateway is not fulfilled[120]. The second threshold is added on by the EC via its designation decision to fabricate the possibility of the undertakings to succeed in their rebuttal without the need to trigger a market investigation under Article 17. In the particular case of Gmail and Outlook.com, both quantitative and qualitative evidence was presented for that particular purpose, despite that Recital 23 explicitly upholds that quantitative evidence alone should be considered by the EC in this context.

Following the argument about the presence of the CPS in the market, both service providers proved that only 0-5% of the email messaging traffic directly corresponded to emails sent from recipients and senders belonging to their CPS[121]. Thus, the rest of the volume of the messages sent online did not directly depend on them as important gateways for business users to reach end users in the sense of Article 3(1)(b) DMA. Moreover, both undertakings also submitted that their CPSs were configured based on open standards, which meant that the undertakings could not control, constrain, or influence the operations of their business and end users[122].

[119] Even though the DMA does not flesh out the purpose of the market investigation explicitly, the EC has confirmed that this is their main objective, see Decision accepting Bing, Edge, and Microsoft Ads rebuttals (n 25), para 12; and Decision accepting iMessage rebuttal (n 25), para 16.
[120] Both legal standards were mimetically adopted in Alphabet's designation decision (n 14), para 150; and Microsoft's designation decision (n 14), para 134.
[121] Alphabet's designation decision (n 14), paras 137 and 144; Microsoft's designation decision (n 14), paras 122 and 128.
[122] Alphabet's designation decision (n 14), para 136; Microsoft's designation decision (n 14), para 121.



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This second argument was particularly surprising, insofar as it covertly argues against the undertakings' gatekeeper position since they already comply with the targeted obligations for NIICS under Article 7, which mandates interoperability across messaging services.

Given that those obligations are already fulfilled by both service providers, they argued that there was no point to their designation. The EC saw through this same idea and upheld that this fact does not necessarily entail that the undertaking does not satisfy the conditions listed in Article 3(1)[123]. Instead, however, it redirects attention to determining whether the undertakings could be said to constitute an important gateway. To do that, the EC relies on the rationale underlying Recital 20 describing the criticality requirement and the fact that the gatekeeper must influence the operations of a substantial portion of business users to its advantage to constitute an important gateway for business users to reach end users[124]. If that influence is lacking[125], then the undertaking cannot be classified as a gatekeeper, although quantitatively, the number of end users and business users of the CPSs surpassed the threshold by far[126].

#### 2.3.2.2 Arguments that fall outside of the scope of the rebuttal: the ambivalence of multi-homing

Following the example of Gmail and Outlook.com, several gatekeepers sought to rebut the presumption since they could not be characterised as important gateways for business users to reach end users. Aside from the open standards-based contention, none of those arguments fulfilled the requirement of manifestly calling into question the presumption under Article 3(2), and, thus, the EC does not even consider whether they clearly and

[123] Alphabet's designation decision (n 14), para 141.

[124] This argument follows the idea of a gatekeeper position, from an economic perspective to that of an essential facility, see John Davies, Valérie Meunier, Gianmarco Calanchi and Angelos Stenimachitis, 'A Missed Opportunity: The European Union's New Powers over Digital Platforms' (2022) 67(4) The Antitrust Bulletin, 508-509; K. Sabeel Rahman, 'Infrastructural Regulation and the New Utilities' (2018) 35 Yale Journal on Regulation, 911-938; and Philipp Hornung, 'The Ecosystem Concept, the DMA, and Section 19a GWB' (2023) Journal of Antitrust Enforcement, 17-21.

[125] That influence is not adjectivised in the DMA, as opposed to the decisive influence relating to the rebuttable presumption to the parental liability doctrine, see Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECR I-8237, para 60.

[126] Alphabet's designation decision (n 14), paras 145 and 146; Microsoft's designation decision (n 14), paras 129 and 130. The same did not apply to ByteDance's TikTok service and Meta's Messenger and Marketplace services, since the EC argued that the fact that the number of end users and business users exceeded by far concerning the threshold was an indicator that the undertakings were important gateways for business users to reach end users, see ByteDance's designation decision (n 14), para 126 and Meta's designation decision (n 14), paras 220 and 296.



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comprehensively impinged upon the CPS's characterisation around the criticality requirement.

Surprisingly, the main explanation that the EC provides to curtail the undertakings' capacity to rebut the presumption under this means is to defend that the rebuttal of the presumption can only be based on quantitative evidence. ByteDance's designation decision is a good example of the EC's stance since the undertaking put forward a vast range of different reasons to try to ensure that its online social networking service TikTok would not fall under the scope of the regulatory framework. For instance, it did not have an ecosystem to leverage across other services or its character as a challenger to the incumbent digital platforms, which questioned its position within the market[127].

Despite the Commission's reluctance to accept qualitative arguments to allow the gatekeeper to rebut the presumption under Article 3(2), the argument of the presence of multi-homing in the CPS held an ambivalent effect depending on the party that is alleging it amid the designation process. Most of the gatekeepers presented that element as a reason for acting against the presumption that the CPS constituted an important gateway for business users to reach end users[128]. The EC holds that the existence of multi-homing (or the lack of network effects) is not necessarily an indication that a CPS does not constitute an important gateway for business users to reach end users[129]. Weak contestability and unfair practices are not precluded by the presence of multi-homing. That is to say, the presence of multi-homing does not necessarily entail that a gatekeeper

[127] Those reasons were presented in ByteDance's designation decision (n 14), paras 127-128 and 144-145. For a fully-fledged explanation of the rationale underlying TikTok's arguments, see Kai-Uwe Kühn and Domilė Butkevičiūtė, 'Rebutting Gatekeeper Presumptions: How to Disprove Lock-in from Ecosystem and Network Effects' (2023) CCP Perspectives on Competition and Regulation Working Paper 23-02 <competitionpolicy.ac.uk/publications/rebutting-gatekeeper-presumptions-how-to-disprove-lock-in-from-ecosystem-and-network-effects/> accessed 2 January 2024. These are the reasons that ByteDance presented before the General Court for its appeal, for a review of the merits of those arguments, see Alba Ribera Martínez, 'TikTok Raises the Ante Before the General Court: Interim Measures Filed Against its Gatekeeper Designation under the DMA' (*Kluwer Competition Law Blog*, 6 December 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/12/06/tiktok-raises-the-ante-before-the-general-court-interim-measures-filed-against-its-gatekeeper-designation-under-the-dma/> accessed 2 January 2024.

[128] For instance, this was the case of Alphabet's designation decision (n 14), para 138; ByteDance's designation decision (n 14), paras 103 and 104; Meta's designation decision (n 14), paras 212 and 289; and Microsoft's designation decision (n 14), para 123. These arguments follow some voices in academia that proposed to temper the DMA's application when users on both sides of the platform multi-homed, see Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act' (2021) <https://dx.doi.org/10.2139/ssrn.3788152> accessed 28 December 2023. On the impact of multi-homing on the likelihood of market tipping, see Davies, Meunier, Calanchi and Stenimachitis (n 124), 506-507.

[129] Alphabet's designation decision (n 14), para 142; ByteDance's designation decision (n 14), paras 135 and 136; Meta's designation decision (n 14), para 300; Microsoft's designation decision (n 14), para 126.



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cannot influence the operations of its business users, nor is it a strong indicator of that conclusion. To the contrary, however, the lack of multi-homing is relevant to assessing the existence of a gateway position, although its impact may vary across the different categories of CPSs and even within an individual category of CPS[130]. Even if the argument in reverse confers additional power to the EC to justify its assessment under Article 3(1), the idiosyncratic characteristics of each category of CPSs may entail that a distinct degree of multi-homing will be relevant to characterising a CPS as an important gateway[131]. For instance, concerning NIICS, the presence of multi-homing reinforces, rather than mitigates, the issues arising around contestability and fairness that have led these services to be included under the list of categories in Article 2[132]. Thus, the weight of multi-homing (or the lack of it) held ambivalent effects in the designation process, and it did not project the same impact on the analysis depending on the tool triggered by the undertaking.

## 3. Discretion and the DMA's standard of review

Every decision adopted by the European Commission involves three elements: the finding of facts, the settling of the standards or criteria on which the decision is based and applying those same standards to the facts[133]. The analysis performed in Sections 2.2.2 and 2.2.3 in determining the requisite legal standard of the DMA in its designation process is, thus, not a completely trivial exercise. If one does not know the legal standard to apply to a set of facts, then rarely can one analyse whether a decision is lawful in the context of the secondary legislation it was passed on and whether it will prevail against the court's standard of review[134]. The requisite legal standard[135] is key to the Commission's enforcement of the DMA since it should guide the principles by which it applies the

[130] ByteDance's designation decision (n 14), para 135; Meta's designation decision (n 14), para 229; Microsoft's designation decision (n 14), para 126.
[131] This same analysis holds for the legal standards presented in Section 2.2.1.
[132] Meta's designation decision (n 14), para 230. The same rationale underlines Chirico (n 21), 494.
[133] Wouter P.J. Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34(3) World Competition, 358.
[134] This idea is central to enforcement, as elucidated by Directorate for Financial and Enterprise Affairs Competition Committee, 'The standard of review by courts in competition cases – Background Note' (2019) DAF/COMP/WP3(2019)1.
[135] The concept is also referenced as the standard of proof, for instance, in Bo Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) European Competition Journal, 3-33.



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regulatory instrument. The standard of review is the level of intensity that the enforcement decision receives, which may be concerned with the analysis of the lawfulness of the application of the legal standard[136].

However, it may well be the case that the requisite legal standard does not directly derive from the legislation that the decision was adopted on. This is the case of the EC's decisions that apply the procedural safeguards surrounding the designation process under Article 3 DMA. The silence of the regulatory framework can be interpreted in the sense that the EC has a certain margin of discretion to establish the standards that govern its decisions under the DMA[137].

Discretion is a matter of degree, and it may be narrower or wider depending on the secondary legislation's provisions. The DMA is based on the main objective of ensuring contestable and fair markets in the digital sector across the Union[138]. Notwithstanding, in the context of the designation process, the DMA does not exclude certain courses of action for the Commission to pursue nor prohibits that certain elements should or should not be considered in its decision-making[139]. The two legal principles that are explicitly fleshed out under the regulatory instrument that apply generally to the whole set of decisions issued by the Commission are the principles of proportionality and necessity[140].

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[136] Tony Reeves and Ninette Dodoo, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law' (2005) 29(5) Fordham International Law Journal, 1034-1067.

[137] If that same idea is paired up with the few instances that the European Commission is explicitly conferred the possibility to exert prioritisation on its enforcement, discretion is not entirely evident, see for extensive analysis of the EC's prioritisation capacity under the DMA in Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' (2023) <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4637661_code4711857.pdf?abstractid=4637661&mirid=1&type=2> accessed 28 December 2023.

[138] DMA (n 1), Article 1(1). The meaning of those objectives, however, may not be exactly clear, see Alba Ribera Martínez, 'The DMA's Ithaca: Contestable and Fair Markets' (2023) 46(4) World Competition, 429-458.

[139] Wils (n 133), 357.

[140] The conclusion derives from the interpretation of DMA (n 1), Recitals 27 and 28 and generally, from Article 5(4) TFEU which provides that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. A good example of the consideration of these principles is presented in Dirk Auer and Lazar Radic, 'Enforcing the DMA is Easier Said Than Done: Evidence From the Commission's Draft Template for DMA Compliance Reports' (*Truth on the Market*, 5 July 2023) <https://truthonthemarket.com/2023/07/05/enforcing-the-dma-is-easier-said-than-done-evidence-from-the-commissions-draft-template-for-dma-compliance-reports/?_gl=1*yn0vgc*_ga*ODU0Mjc5NjIwLjE3MDQyMDMyMDg.*_ga_R1FRMJTK15*MTcwNDIwMzIwOC4xLjAuMTcwNDIwMzIwOC4wLjAuMA> accessed 2 January 2024.



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One could argue that the DMA provides the legal basis for the Commission's decisions to opt for distinct courses of action[141], and the first designation decisions could be, thus, subject to a wide margin of discretion. Stemming from this wide margin of discretion, the standard of review performed by the EU Courts would adjust accordingly[142]. The opposite argument can also be formulated. The absence of tractable rules surrounding the legal standards to apply the DMA's designation process does not automatically entail that discretion is conferred upon the Commission. Complexity in the EC's legal assessment does not necessarily produce discretion as an automatic consequence[143]. Discretion means that there are several valid decisions surrounding the legal appraisal of the same set of facts, and there are, thus, decisions that lie outside of the legally valid alternatives[144]. Notwithstanding, the analysis of the delineation exercise and the rebuttals of the presumption under Article 3(2) does not make it entirely evident that the Commission opts for valid alternatives, both substantively and procedurally, within its margin of discretion.

In principle, Article 45 confers unlimited jurisdiction to review the decisions by which the Commission has imposed fines or periodic penalty payments[145]. Thus, the standard of review that the General Court will apply in its review of the first designation decisions is not cut clear, since they do not fall within the scope of the decisions fining the addressees of the regulation. The decisions are particularly targeted to declare what the scope of the regulation is.

Given that the unlimited jurisdiction standard of review is reserved for fines imposed by the Commission, judicial review will follow the control of legality deriving from Article 261 TFEU. The control of legality involves a close examination of facts, law, and evidence[146]. However, the same standard does not apply if one is before a review of findings of fact or a review of findings of law, even though they may constitute two faces

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[141] George Gryllos, 'Discretion and judicial review in EU Competition Law: A technical analysis on sources of discretion, judicial review and implications for the litigants' (2016) <https://dx.doi.org/10.2139/ssrn.3742299> accessed 28 December 2023.
[142] On the correlation between the standard of proof and standard of review, see Reeves and Dodoo (n 136), 1037.
[143] Wils (n 133), 358; Gryllos (n 141), 3.
[144] Gryllos (n 141), 4.
[145] The standard of review adopts the form of that of Article 261 TFEU.
[146] For the General Court, the review of the legality of a decision by the Commission will be limited to grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU or any rule of law relating to its application, or misuse of powers, whereas the Court of Justice will only review decisions by the General Court on points of law.



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of the same coin[147]. In the case of the former, they are reviewed less intensively to establish whether the evidence substantiating the decision is sufficient, conclusive, and suitable[148]. Regarding the findings of law, the Court reviews both the assessment of the points of law and their application to the facts as to allow the control of administrative decisions in all aspects (for example, whether the EC acted *ultra vires*[149] or whether it misused its powers[150], by the principle of sound administration[151]). It is, however, unclear whether the General Court will defer to the Commission, similarly to its stance in EU competition law regarding the assessment of complex economic and technical issues[152].

Commentators have highlighted that the discussion around the designation process relates to factual elements[153]. Against the background of the analysis of Sections 2.2.2 and 2.2.3, that does not seem to be the case. Although each of the CPSs is delineated according to a different set of facts and circumstances, that does not make the delineation exercise less of a finding of law. Delineation is the primary finding that will trigger legal repercussions for the addressees of the regulation when inserted into the broader spectrum of the designation decisions. The same applies to the rebuttal of the presumption. The Commission's *de facto* wide margin of discretion in interpreting the reasons that may sustain a CPS falling outside of the scope of the DMA lies in the core of the regulatory framework and its addressees. In the context of the thorough scrutiny of both aspects of

[147] Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2010) TILEC Discussion Paper No. 2011-008 <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1698342_code517200.pdf?abstractid=1698342&mirid=1&type=2> accessed 28 December 2023.
[148] Directorate for Financial and Enterprise Affairs Competition Committee (n 134), 48.
[149] José Carlos Laguna de Paz, 'Understanding the limits of judicial review in European competition law' (2014) 2(1) Journal of Antitrust Enforcement, 208.
[150] For instance, the Court of Justice reviewed a public authority's misuse of powers in Joined cases C-186/02 P and C-188/02 P *Ramondín SA and Ramondín Cápsulas SA and Territorio Histórico de Álava - Diputación Foral de Álava v Commission of the European Communities* [2004] ECR I-10653, para 44 and on the particular case of competition law, see Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* [2008] ECR II-477, para 271.
[151] The EU Courts must examine carefully and impartially all the relevant aspects of an individual case, following, for instance, Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, para 14; Case T-44/90 *La Cinq SA v Commission of the European Communities* [1992] ECR II-1, para 86.
[152] Nicholas Hirst, 'DMA litigation will be a different beast to antitrust appeals, Kramler says' (*Mlex*, 14 September 2023) <https://mlexmarketinsight.com/news/insight/dma-litigation-will-be-a-different-beast-to-antitrust-appeals-kramler-says> accessed 28 December 2023. The judicial standard of review would rely on the Court's previous case law in competition law in Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECR I-987, para 39 and Case C-389/10 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECR I-13125, para 121; regarding state aid, see Case C-525/04 P *Kingdom of Spain v Commission of the European Communities* [2007] ECR I-9947, paras 56 and 57.
[153] Gil (n 86).



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the designation process and their legal standards, three main elements explain the EC's efforts in devising an effective enforcement strategy to capture the addressees to the DMA.

First, 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.

Despite the DMA's lack of any indication concerning how the CPSs should be set apart from one another, the EC does not only expand the terms of the existing procedure under Article 3, but it concocts an additional step within its analysis, borrowing the dedicated terms and methodology of its Annex. One can accept that the EC may hold a wide margin of appreciation for interpreting and enforcing the DMA. However, discretion does not mean that every alternative course of action is lawful. This is especially the case if one takes at face value the strict limits that the regulatory instrument places on its procedural tools[154]. In the case of the designation process, the Commission already decided on its initiative to adopt an implementing provision following the procedure set out in Article 46(1)(a) DMA, which crystallised in the First Implementing Regulation to the DMA. Thus, it is counterintuitive that the EC needs to expand any further details on the rationale underlying the distinction between CPSs. If one takes a close look at the panorama of idiosyncratic designation decisions issued by the Commission, delineation operates to a greater extent against the establishment of a requisite legal standard than in its favour. Even if one were to define the methodology for delineation per each CPS, the exercise performed in Section 2.2.2. points towards the fact that no unified and workable criterion can be applied in practice.

Second, 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.

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[154] For example, the criteria that the EC used to unpack a CPS' purpose is borrowed from Section D(2) of the Annex, which reads "*for the purpose of calculating the number of active end users and active business users*". Petit (n 20), 533 also established that the potential exercise of administrative discretion was limited due to the procedural and substantive safeguards of the DMA.



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On the side of the delineation exercise, for instance, the malleability of the regulatory dialogue with the undertakings prompts the Commission to define their chances of success when proposing alternative delineations of the CPSs in the narrowest sense possible. In some instances, the EC presents that two CPSs should be distinct following the terms of an interpretative provision supporting one of the mandates in Articles 5, 6, and 7, whereas on other occasions, it curtails that same capacity from the undertaking by stating that the interpretative provision should only cause an impact within the scope of the mandate that it supports.

On the part of rebuttals, the EC was sufficiently flexible to enable a couple of gatekeepers to present qualitative evidence so that their CPSs fell outside of the scope of application of the DMA. At the same time, though, it bars the rest of the undertakings from presenting qualitative arguments to contest their gatekeeper position concerning one of their CPSs and narrows down their possibilities to rebut the presumption to quantitative evidence. The plasticity of the EC's exercise of its discretionary powers points to one of two conclusions. Either the DMA is so vague in its terms that it provides ample leeway in its interpretation so that the EC can decide based on a criterion in one instance and in another instance based on the complete opposite benchmark. This conclusion is not as outrageous as it would first seem, given that the different scenarios presented to the public authority may have counselled that different (and even contradictory) criteria are used in the first designation decisions issued by the Commission[155]. Or the EC incurs a gross contradiction in applying the terms of the designation process and fails to streamline a consistent approach throughout the different designation decisions.

Third, 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[156]. This point is particularly remarkable when one observes the requirements that the EC adopts in interpreting the purpose of the CPSs for the delineation exercise. As pointed out by commentators to the gatekeepers' appeals of some of the designation decisions, *de facto*, the EC applies mimetic criteria to those required for the distinction of

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[155] An extreme conclusion to reach would be that of defending that the designation process was crafted by the legislator for the operators that were to be captured and the EC's enforcement actions follow this same idea, see Mario Mariniello and Catarina Martins, 'Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma' (*Bruegel*, 14 December 2021) <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma> accessed 28 December 2023.

[156] For instance, DMA (n 1), Articles 1(5) and 1(6) make it entirely apparent that both are separate and remain complementary in terms of enforcement.



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separate products in the realm of tying and bundling practices. In this instance, the delineation exercise constitutes a conscious return to the values and rationale underlying EU competition law for these types of practices.

The main point of contention lies, however, in the fact that the same logic should apply to both areas of enforcement. The DMA's explicit departure from the thresholds and legal standards required through sanctioning proceedings relating to the prohibitions under Articles 101 and 102 TFEU suggests that different legal standards should apply. The designation process performed through the application of the quantitative thresholds is designed to be a fast-paced process that does not involve economic discussions surrounding the definition of relevant markets and the allegation of efficiencies in the gatekeeper's conduct. In this context, it seems reasonable that the criteria in EU competition law should be tempered to accommodate the need for effectively enforcing the DMA. The degree of the lowering of the demands to the legal standard is, however, not self-evident considering the EC's interpretation of the delineation exercise.

Alternatively, the EC's deliberate choice of the same requisite legal standard could be interpreted in the sense that, in some instances, it may consciously determine that the same legal standards apply to those in EU competition law. Against this background, it would be counter-intuitive to hold the EC's enforcement of the DMA to a lower legal standard by default if the Commission intentionally applies the same requisite legal standard to that of an analysis of EU competition law. If one observes the rationale underlying the EC's analysis of the rebuttals of the presumption presented by the undertakings, the return to EU competition law is certainly not apparent. The alignment of both standards does not apply as a result, in line with the logic of the DMA to depart from the punitive framework. A different discussion entirely arises with relation to the EC's capacity to steer away from the DMA's intrinsic more alleviated forms of analysis with less substantive requirements to the already-rich acquis of antitrust decisional practice and case law.

It is against this background that the degree of discretion enjoyed by the EC is to 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. Under the assumption that the regulatory instrument provides for the Commission to apply the DMA flexibly, the EC's exercise of discretion on its designation decisions should be benchmarked against the legally valid alternatives in decision-making it had at its disposal. The question



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is, thus, whether the expansion and flexibilisation of the procedural and substantive safeguards set out by the legislator entail a departure from this blueprint, with the result of undermining the principles of proportionality and necessity.

## 4. Conclusions

Designating the addressees to the DMA is straightforward if one observes the process set out under Article 3. A thorough analysis of the European Commission's first designation decisions presents a completely different picture. The paper explores the most substantive aspects of these designation decisions, namely the delineation of different core platform services and the Commission's consideration of the undertakings' rebuttal of the presumption applicable to the quantitative designation. Both hold significant relevance in defining the scope of application of the regulatory instrument, so setting out the requisite legal standard for each one of them is key to understanding the functioning of the EC's enforcement actions as well as the way it exercises its discretionary powers.

The comparison of the EC's delineation exercise in the different designation decisions exhibits two main ideas. First, the Commission does not consistently apply the terms of the DMA across the addresses of the regulation or the categories of CPSs. Second, the EC does not shy away from borrowing the terms of EU competition law to draw up the operable requisite legal standard for delineating the gatekeepers' CPSs. In the absence of a legal standard, the Commission's discretionary powers and its appraisal from the perspective of the Court's standard of review are the cornerstones for explaining the plasticity of the regulatory instrument. The same comparison is provided in relation to the rebuttal of the presumption, and the background of the discussion is more nuanced. The Commission *de facto* expands the terms presented by the regulatory instrument, but the analysis remains consistent throughout the designation decisions, but for a particular core platform service.

The Commission's discretionary powers in applying the DMA must be appraised under the lens of both exercises, given that they place at the forefront of the discussion the fundamental question surrounding the regulatory instrument's departure from the legal standards presented in EU competition law. In the absence of one, it is yet unclear whether the EC can fabricate one, although it did just that in the delineation exercise.



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Alternatively, in the presence of a legal standard set out in the regulatory instrument, just as in the rebuttals, the EC shows great restraint in contouring its powers according to a narrow margin of discretion. Against the backdrop of these countervailing forces, the EU Courts are called to resolve the conundrum in one way or another: either each dedicated procedure in the DMA is to be observed under a different benchmark (be that the same or distinct from that already provided in EU competition law) or the DMA's enforcement can only be sanctioned when gross misinterpretations of fact or law are produced, bearing in mind that the EC bears great powers and responsibility in defining its enforcement.



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