

# CLOSED GATES

Open questions on the  
designation of gatekeepers

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## THE FINAL TEXT OF THE DMA STILL LEAVES QUESTIONS ON THE DESIGNATION OF GATEKEEPERS

The European Commission (EC), Parliament and Council have now agreed on the final text of the EU's ex-ante regulatory tool for enhancing digital competition, the Digital Markets Act (DMA).<sup>1</sup> The DMA will take a novel approach towards deciding which firms should be subject to regulation. In a significant departure from the concept of dominance under competition law (and the concept of Significant Market Power in the telecoms sector), the DMA will largely determine which firms should be subject to regulation (called gatekeepers) based on a range of quantitative thresholds.

The final DMA text has made some amendments to the rebuttal process (such as the type of evidence that can be presented) for any firm which wants to argue that they are not a gatekeeper for a particular core platform service (CPS) despite meeting the DMA's quantitative thresholds. In most cases, firms that meet these thresholds seem to have a limited ability to rebut the gatekeeper presumption due to the DMA's strong wording. However, there may be room for debate in some cases where firms are clearly behind the market leader(s). These 'edge cases' could be a key area where the DMA will be tested when it is first implemented.

Aside from the rebuttal procedure, other changes to the gatekeeper designation process in the final DMA text include the ability for firms to split their CPSs into distinct services, under certain circumstances, when determining whether their user numbers meet the quantitative thresholds. The final DMA text also includes an annex setting out how the number of users should be measured for different CPSs. Further, the DMA has also expanded the list of obligations for the lighter "emerging gatekeeper" category: firms designated as gatekeepers that don't yet satisfy the criterion of having an "entrenched and durable position", but may do so in the near future. Also, the DMA now allows for the removal of CPSs and gatekeeper obligations (rather than just their addition).

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<sup>1</sup> Available via the [Council's website](#)

Even now that the DMA text has been finalised, there is still some uncertainty as to which companies and services will be designated as gatekeepers. The quantitative criteria eventually adopted suggest that beyond the usual Big Techs such as Apple and Google, companies such as travel site Booking.com could potentially also be named as gatekeepers. Moreover, the Big Techs could be designated as gatekeepers for some CPSs where they are not particularly strong, given that it is possible for a firm to be a gatekeeper under the DMA even if it is not the market leader.

## A CHANCE OF PUSHING BACK IN EDGE CASES?

In general, companies will most likely find it challenging to rebut the gatekeeper presumption if they meet the DMA's quantitative thresholds. These thresholds have been set at €7.5bn for EU turnover and €75bn for market cap (or fair market value) - higher than the EC's initial proposal, but lower than the Parliament's subsequent draft. This is unlikely to impact the decision on whether to designate the Big Techs as gatekeepers for a given CPS as they are all expected to be well above these thresholds. However, the increase in the quantitative thresholds could make a difference for smaller firms that are close to reaching these thresholds, for example Booking.com and Airbnb.

There are various reasons why a successful rebuttal may be challenging. First, the final DMA text indicates that rebuttal can only occur "exceptionally"<sup>2</sup>. Second, during the rebuttal process, companies can now only refer to "those elements which directly relate to the quantitative criteria" and not the more extensive list of elements that are relevant for a more complete assessment of competition in digital markets, such as network effects and switching costs<sup>3</sup>. Lastly, the final text also explicitly rules out relying on market definition or referring to efficiencies during the rebuttal process<sup>4</sup>.

Having said this, not all CPSs are the same in terms of their market structure. Whilst the EC will not consider arguments related to market definition, it may agree to take market shares into account given that it is willing to bear in mind "the importance of the core platform service provided, considering its overall scale of activities"<sup>5</sup>. It seems likely that there will be 'edge cases' when designating gatekeepers, namely CPS providers that meet the quantitative thresholds but have relatively limited market power. This could particularly be the case for providers of CPSs that are just over the 45m user threshold (about 10% of the EU's population), and/or for CPSs with extensive multi-homing. For such undertakings, a firm could meet the formal quantitative criteria despite having a relatively low market share in a conventionally defined market.

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<sup>2</sup> See Article 3(5): "The undertaking providing core platform services may present, with its notification, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in paragraph 2, due to the circumstances in which the relevant core platform service operates, it does not satisfy the requirements listed in paragraph 1".

<sup>3</sup> To argue for a rebuttal, firms can now refer to (see Recital 23): "those elements which directly relate to the quantitative criteria, namely the impact of the undertaking providing core platform services on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the core platform service provided, considering its overall scale of activities; and the number of years for which the thresholds have been met." They can no longer refer to the list under Article 3(8), formerly Article 3(6) in an earlier draft of the DMA, which is now only relevant in the case of a market investigation.

<sup>4</sup> See Recital 23: "Any justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded, as it is not relevant to the designation as a gatekeeper."

<sup>5</sup> See Recital 23.

Take Microsoft's Bing as an example. The EC could designate Microsoft as a gatekeeper for search if it has more than 45m monthly active end users, which could well be the case (Microsoft should easily meet the revenue/market cap thresholds). For search, the DMA sets out that a monthly active user will be defined as someone who uses a given search engine at least once per month. It is therefore possible that many consumers would count as active monthly users for both Google Search and Bing because Bing is often the default search engine on many desktops.

This means that, even though Bing is reported to have a market share of 3.7% for search services in Europe<sup>6</sup>, it may not escape designation if it cannot argue against it on the basis of its market share/importance.

While this is an illustrative example, it highlights the problem of relying on a relatively low fixed user threshold for CPSs while applying the revenue/market cap thresholds at the company level (which can typically be met by companies providing a range of different services). Requiring such CPS providers to face largely the same set of obligations as companies with much higher market shares could hinder their ability to compete and expand.

## SPLITTING CORE PLATFORM SERVICES INTO DISTINCT SERVICES

Some of the CPSs are broad and will encompass different services. For example, online intermediation services will include online marketplaces, app stores, travel sites, payment services and others. Cloud computing services also cover a range of services, such as IaaS (Infrastructure as a Service), PaaS (Platform as a Service) and SaaS (Software as a Service).

The DMA now allows CPS providers, when comparing their number of users with the quantitative thresholds, to split CPSs into distinct services or, in effect, 'narrower CPSs' if the services "are used for different purposes by either their end users or their business users, or both, even if their end users and business users may be the same"<sup>7</sup>. This should therefore allow, for example, a provider of online intermediation services, which includes an online marketplace and an app store, to argue that it should not be designated as a gatekeeper if the two businesses do not meet individually the quantitative thresholds (even if they do when aggregated). It also means that a gatekeeper for online marketplaces may not necessarily be a gatekeeper for app stores and vice versa. This could, for example, be relevant for Google: it will likely be a gatekeeper for app stores, but maybe not for online marketplaces.

Unlike conventional market definition, where the wider the market the lower the likelihood of identifying a company with market power/in a dominant position, the key quantitative threshold under the DMA is the *absolute* number of active monthly users: hence, a narrower definition of a CPS could reduce the chances of being above this threshold. The text clarifies that one cannot use this as a simple get out of jail card, as providers of CPSs cannot artificially split their services to circumvent the relevant quantitative thresholds.

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<sup>6</sup> Market share for Europe in May 2022 according to StatCounter: [Search Engine Market Share Europe | StatCounter Global Stats](#). Other sources show a higher but still low market share, see e.g. page 323 of the following DMA impact assessment, where Bing is shown with a 7.1% market share globally for 2020: [Digital Markets Act - Publications Office of the EU \(europa.eu\)](#)

<sup>7</sup> See the section under point D(2)b in the Annex added to the DMA text.

The DMA also specifically notes that CPSs should be defined in a technology-neutral way, and says this could mean that the same CPS is provided across different devices. In some cases, this may leave room for debate, for example whether desktop and mobile operating systems should be in the same CPS.

## EMERGING GATEKEEPERS: HANDLE WITH CARE

The DMA also considers an ‘emerging gatekeeper’ category - companies that don’t yet have an “entrenched and durable position” but are likely to have one in the foreseeable future. This is seemingly motivated by the DMA’s concerns over market tipping: that is, that a firm could build an unassailable competitive advantage over time by relying on its lead over its rivals *today*. According to the DMA, firms can facilitate this process by engaging in “some of the unfair conditions and practices” regulated by the DMA. Hence the legislation seeks to reduce such risks by regulating gatekeepers at an early stage<sup>8</sup>.

Recognising this - and perhaps the potential dangers of premature intervention in dynamic sectors - the EC will only impose obligations on emerging gatekeepers that are necessary to prevent them from gaining an “entrenched and durable” position<sup>9</sup>. The EC notes that these are likely to be the obligations that prevent leveraging, and facilitate user switching and multi-homing.

As most, if not all, CPSs are expected to have (at least) one designated gatekeeper, naming additional companies as emerging gatekeepers could under certain circumstances hinder their ability to challenge more established gatekeeper(s).

Given the dangers both from insufficient and excessive regulation, the EC needs to consider a balanced approach towards the designation of emerging gatekeepers. While taking into account that the market may start tipping in favour of emerging firms, the EC also needs to pay attention to the potential impact of regulating these firms too early, or too harshly.

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<sup>8</sup> See Recital 26.

<sup>9</sup> See Recital 27.

## CONCLUSION

The DMA is a significant piece of legislation with potentially wide-ranging implications for the digital economy. While the publication of its final text adds clarity and suggests that it is not only the Big Techs that will be designated as gatekeepers, the eventual gatekeeper list is still far from clear.

This is partially the result of the DMA's quantitative criteria used for designation: firms will have to decide on the most appropriate way of identifying their user numbers that they will compare with the relevant threshold for a given CPS. And that will depend on whether they can or cannot split these numbers into 'narrower CPSs'. Beyond these thresholds, the rebuttal process could also play a role in the eventual designation decision. It is unlikely that the Big Techs will be able to use this route to escape designation for their main services – as the DMA was written with them in mind – but this route may be relevant for some of the Big Techs' other services and/or the services of other providers. The EC will need to be careful in their designation decisions in these edge cases where a firm satisfies the relevant quantitative criteria but does not have material market power.

The designation of emerging gatekeepers also calls for a careful approach. The EC understandably wants to limit the likelihood of the market tipping in favour of a single firm (or limited number of firms), yet it is important to keep in mind the pro-competitive impact that innovative, emerging firms can have on contestability in sectors with strong incumbents. Contestability is, after all, one of the key aims of the DMA.

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