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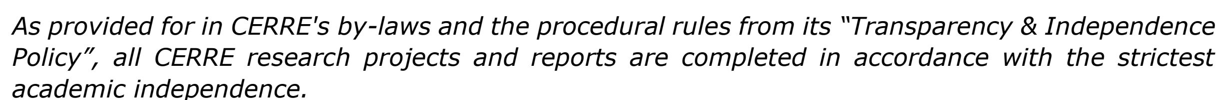
GATEKEEPER DEFINITION AND DESIGNATION



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1 Introduction

This paper focuses on the scope and the gatekeeper definition and designation in the DMA.

The paper is divided into four sections: after this introduction, Section 2 summarises the process to determine the gatekeeper platforms which are subject to regulation. Then, Section 3 deals with the scope of the DMA, i.e. the definition of the Core Platforms Services. Afterwards, Section 4 elaborates on the criteria and the indicators to designate the gatekeeper of those Core Platforms Services.

The proposals contained in this paper arise from discussions amongst CERRE academics and are intended to promote debate between participants at the private seminar series organised by CERRE.

2 Trigger for intervention in the DMA

The **DMA Proposal foresees the following steps to determine the digital services and firms which are subject to the obligations and prohibitions** foreseen in the Act.

First, the scope of the DMA is limited to eight types of digital services or business models, named ***Core Platforms Services*** (CPS). [1] They are often (but not always) intermediation services and, according to the Commission, share the following characteristics: extreme economies of scale and scope, important network effects, multi-sidedness, possible user lock-in and absence of multi-homing, vertical integration and data driven advantages. Those characteristics are not new in and of themselves, but when they apply cumulatively, they lead to market concentration, as well as dependency and unfairness issues which cannot be addressed effectively by existing EU laws. The boundaries of those services determine the scope of the DMA and, at the same time, the trigger of intervention *at the services level*. Those boundaries are defined legally directly in the DMA (or other EU laws) and, therefore, litigations regarding those boundaries should be resolved through a legal interpretation of those definitions.

Second, the trigger of intervention *at the firms level* is determined by the more economic concept of ***gatekeepers***. As explained below, gatekeeper power is based on three cumulative criteria: (i) a significant impact on the EU internal market; (ii) control of an important gateway for business users to reach end-users; and (iii) entrenched and durable position. This gatekeeper position is presumed to be held when a CPS provider has an important financial and geographical size for all its operations (CPS and other services alike) and when many EU end-users and business users are relying on the CPS. However, as size does not necessarily give gateway power, the CPS provider may rebut the presumption with several quantitative and qualitative indicators and show that, although it is big and with many users, business users are not dependent on it to reach end-users.

On the one hand, the gatekeeper designation is made on an individual firm and individual CPS basis: it only concerns the CPS(s) for which the firm meets the three criteria test to be designated as gatekeeper, to the exclusion of other CPSs offered by the same firm and *a fortiori* of other digital services outside the CPS list. [2] For instance, if Facebook holds a gatekeeper position for social network services, that does mean that Facebook will also be designated as a gatekeeper for its marketplace services. On the other hand, the gatekeeper designation covers all the commercial services with are included in the legal CPS for which a designation has been made. However, we think that the Commission should be able to exclude some commercial services within a CPS in an Article 7 specifications decisions.

It is instructive to contrast this DMA process to determine the trigger of intervention with the process used in other economic laws whose objectives are close to those of the DMA (see Table 1

[1] Indeed, those types of digital services are also referred by the Commission as 'business models': Commission Staff Working Document of 25 May 2016, Online Platforms, SWD(2016) 172. Such concept is similar to the concept of Areas of Business (AoB) proposed by BEREC: BEREC Response of September 2020 to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR (20) 138, p.19.
[2] DMA Proposal, Art.3(7) and rec 29.

below). In its advice for a new pro-competition regime for digital markets, the **Digital Markets Taskforce of the UK CMA** proposes the following steps.[3] The new rules should apply to ***digital activities*** defined as "collections of products and services supplied by a firm that has a similar function or which, in combination, fulfil a specific function".[4] Then, the trigger at the firms level is determined by the economic concept of ***Strategic Market Status*** (SMS) based on two criteria: (i) substantial, entrenched market power in at least one digital activity (ii) providing the firm with a strategic position because the market power is particularly widespread or significant (for more, see the annex of this issues paper).

The **EU telecommunications regulatory framework** applies to two categories of digital services, electronic communications networks and services. [5] For the asymmetric economic regulation, the trigger of intervention at the services level is determined by ***relevant antitrust markets which meet a three-criteria test*** indicating that competition law is not effective to solve market power issues identified on those markets.[6] Then, the trigger for intervention at firms' level is determined by the presence of ***Significant Market Power*** (SMP) which is equivalent to dominance in competition law.[7]

Finally, the scope of **competition law** covers all economic activities. The trigger for intervention at the services level is determined by the definition of the ***relevant markets*** based on the SSNIP economic methodology.[8] Then, the trigger for intervention at the firms level is determined by the presence of a ***dominant position*** on those relevant markets which is defined as a position of economic strength affording the firm the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.[9]

	DMA Proposal	**CMA Advice**	**EU Telecommunications Regulation**	**EU Competition law (Art. 102 TFEU)**
Scope	8 Core Platforms Services (CPS)	Digital activities	Electronic networks and services	All economic activities
Trigger for intervention: services level	*Idem scope*	*Idem scope*	- Relevant market - Susceptible to ex-ante regulation : three criteria test	Relevant market
Trigger for intervention: firms level	Gatekeeper position	Strategic Market Status (SMS)	Significant Market Power (SMP)	Dominant position

Table 1: Comparing the intervention trigger of the DMA with other economic laws

Interestingly, the **DMA** (and the CMA Advice) **rely on economic analysis to determine the gatekeeper power** (or the SMS status) **without being constrained by the rigidities of**

[3] CMA, Advice of the Digital Markets Taskforce on a new pro-competition regime for digital markets, December 2020.
[4] *Ibidem*, para. 4.15.
[5] For an interesting comparison between the DMA and the EU telecommunications regulation, see P. Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, January 2021, available at SSRN.
[6] Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36, art.64 and Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ [2020] L 439/23. The three criteria test are: (i) high and non-transitory structural, legal or regulatory barriers to entry are present; (ii) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry; (iii) competition law alone is insufficient to adequately address the identified market failure(s).
[7] EECC, art. 63 and Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1.
[8] Commission Notice on the definition of the relevant market for the purposes of Community competition law, O.J. [1997] C 372/5
[9] Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings O.J. [2009] C 45/7.

competition law methodologies.[10] In particular, a relevant market definition can introduce an element of rigidity that might impair the effectiveness of the DMA: it results in a snapshot view of markets, and the EU practice tends to define narrow markets. Competitive phenomena that might occur outside of or beyond the relevant market(s) have proven difficult to introduce into the analysis at the market assessment stage.[11]

This is all the more critical as the DMA deals with structural competition problems in dynamic markets, where part of the competitive game involves reshaping markets through disruptive innovation, for instance.[12] Indeed, the very rationale for the DMA is to bridge gaps in the coverage of competition law, some of which arise as a consequence of rigidities induced by relevant market definition.[13]

3 Services susceptible to ex-ante regulation: Core Platform Services

3.1 The Commission's proposal

The scope of the DMA proposal covers the following closed list of eight (seven principal and one accessory) digital services which are named "Core Platforms Services" (CPS):[14]

- ***Online B2C intermediation services*** which are defined as "information society services[15] that "(i) allow business users to offer goods or services to consumers, with a view to (ii) facilitating the initiating of direct transactions between business users and consumers regardless of whether the transaction is finally concluded offline or online and which (iii) provide services to business users, based on contractual relationships between the platform and the business user."[16] As the first part of the definition refers to consumers (and not end-users), intermediation services do not include B2B intermediation services. This type of CPS includes:
    - ***Marketplaces*** which are defined as "information society services allowing consumers and/or traders to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace";[17] given this broad definition, it seems to include general marketplaces like Amazon and specialist marketplaces like Apple Books;

[10] On the difficulties of applying competition law methodologies to the platform economy, see for instance J.U. Franck and M. Peitz, *Market definition and market power in the platform economy*, CERRE Report, 2019.
[11] By way of example, see how the relevant market definition exercise prevents the Commission from perceiving what is truly at stake in *Facebook/WhatsApp*, namely the acquisition of one of the most likely springboards for disruptive innovation by the very powerful platform: Decision of the Commission of 3 October 2014, Case M.7217 *Facebook/WhatsApp*. See also LEAR, Ex-post Assessment of Merger Control Decisions in Digital Markets (2019) Study for the Competition and Markets Authority; Fletcher, Chapter 8 cautioning against the reliance on rigid market definition in the digital sectors.
[12] P. Larouche, Platforms, Innovation and Competition on the market, *Competition Policy International* 2020.
[13] In that respect, one could argue that the DMA would merely follow the trend already underway in merger control, where the horizontal guidelines in both the US and the EU put forward analytical methods that reduce the need for market definition to carry out a conclusive assessment in cases of monopolistic competition (markets with significant product differentiation amongst competitors).
[14] DMA Proposal, art.2(2) and Impact Assessment, pp.39-45. In its Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR (20) 138, p.19, BEREC had identified 5+1 digital services: (i) app stores, (ii) e-commerce, (iii) general search, (iv) operating systems and (v) social media and advertising services.
[15] An Information Society Services a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient: Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ [2015] L 241/1.
[16] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55, art.2(2).
[17] Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1, art.4(17).

- ***App stores*** which are defined as "a type of online intermediation service, which is focused on software applications as the intermediated product or service";[18] they include Apple App store or Google Play store.

- ***Online search engines*** which are defined as "information society services allowing users to input queries to perform searches of, in principle, all websites, or all websites in a particular language, based on a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found"; [19] they include for instance Google search or Microsoft Bing. Given that the definition refers to searches of all websites, this CPS seems to exclude specialist searches.
- ***Online social networks*** which are defined as "platforms that enable end-users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations";[20] they include for instance Facebook.
- ***Video-sharing platform services*** which are "services where the principal purpose or an essential functionality is the provision of programmes and/or of user-generated videos to the general public for which the platform does not have editorial responsibility but determines the organisation of the content";[21] they include for instance YouTube.
- ***Number-independent interpersonal communication services*** which are defined as "services that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons (whereby the persons initiating or participating in the communication determine its recipient) and which does not connect with publicly assigned numbering resources;"[22] they include for instance WhatsApp, Skype or Gmail.
- ***Cloud computing services*** which are defined as "information society services that enable access to a scalable and elastic pool of shareable computing resources"; [23] presumably include Software as a Service (SaaS), IaaS and Platform as a Service (PaaS).
- ***Operating systems*** which are defined as "systems software which control the basic functions of the hardware or software and enables software applications to run on it"; [24] they include for instance Google Android, Apple iOS or Microsoft Windows. It remains to be clarified whether this CPS includes the OS underpinning browsers.
- ***Advertising services*** which are an accessory CPS because it will only be regulated when offered by a provider of any of seven principal CPS mentioned above, it includes ad networks, ad exchanges and any ad intermediation services such as Google Ads.

As explained above, the Commission selects those eight digital services because they have characteristics which lead to market concentration, as well as dependency and unfairness issues.[25] Based on such selection criteria, the Commission did not select:[26]

- ***Video streaming and video-on-demand services*** such as Netflix because of the lack of multisidedness,

[18] DMA Proposal, art.2.12.
[19] Network Information Security Directive, art.4(18).
[20] DMA Proposal, art.2.12.
[21] Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ [2010] L 95/1, as amended by Directive 2018/1808, art.1(1aa).
[22] EECC, art. 2(5) and (7).
[23] Network Information Security Directive, art.4(19).
[24] DMA Proposal, art.2.10.
[25] In her Advice the CMA Digital Markets Taskforce recommends to initially prioritise the following 7 digital services: online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services.
[26] See DMA Impact Assessment, paras. 128-130.

- Nor ***B2B industrial platforms*** because of the absence of strong bargaining power asymmetry which could lead to unfairness.

Moreover, the Commission did not select for regulation some **ancillary services** such as payment services, nor identification services.[27] However, the DMA proposal prohibits anti-steering towards ancillary services which compete with those of the gatekeeper as well as bundling between CPS and some ancillary services (such as identification services),[28] thereby promoting contestability for ancillary services provision. The DMA Proposal also grants access and interoperability rights to the providers of ancillary services, thereby contributing to their contestability.[29]
To ensure the resilience of the law in an economic sector which is fast-moving, the DMA proposal contains a **built-in dynamic mechanism** which allows the European Commission, after a so-called market investigation, to propose to the EU legislative bodies that the DMA be amended to include new digital services in the list of CPSs.[30] By implication, the list of CPSs is therefore considered to form an essential element of the DMA, since it can only be expanded through a legislative act (and not a delegated act as foreseen for the expansion of the obligations).[31] In the end, that market investigation mechanism to expand to the CPS list does not add much to the right of legislative initiative already entrusted to the Commission by the TFEU.[32] If anything, it constrains such right as it imposes to the Commission to do a market investigation before making the legislative proposal.

3.2 Recommendations

3.2.1 General definition and characteristics of Core Platform Services

Core Platform Services are not defined in the DMA proposal which merely contains a list of types of digital service, many of which are defined in other EU instruments. On the positive side, the DMA proposal seeks to build on existing legislative definitions and therefore avoids reinventing the wheel. Furthermore, the proposal does not rely on an antitrust market definition which may prove too rigid to deal with holistic issues in very dynamic sectors. On the negative side, these definitions were elaborated over many years, in instruments that are not always entirely consistent with one another: throwing them in the "core platform services" basket may not provide much guidance.

As already mentioned, **a general characterization of CPS can be found in the recitals of the proposal: core platform services feature economies of scale, negligible marginal costs, strong network effects, multi-sidedness, user dependency, lock-in, lack of multi-homing, vertical integration and data-driven competitive advantages.[33] This general definition could be included directly in Article 2 as a chapeau to the list**. Also, this general definition could focus more on the intermediation of the platform.[34]

3.2.2 The list of the Core Platform Services

Not all CPSs are two-sided and perform an intermediation function. **Some CPSs are inherently single-sided**. This is the case for number-independent interpersonal communication services as well as cloud computing services. Moreover, those two CPS are already subject to existing EU law that may address some of the concerns of the Commission. Number-independent interpersonal communication services are covered by the EECC and subject to transparency and interoperability obligations.[35] Cloud services are covered by the Free Flow of Data Regulation which encourages

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[27] DMA Proposal, art.2.14 and 2.15.
[28] DMA Proposal, resp. art.5(c) and art.5(e).
[29] DMA Proposal, art.6.1(f).
[30] DMA Proposal, Art.17(a).
[31] Indeed Art. 290 TFEU provides that delegation is only possible for non-essential elements of the legislative act.
[32] TEU, Art.17(1)
[33] DMA Proposal, recitals 2 and 12
[34] OECD defines intermediation platform as "an information society service provider that facilitates interactions between two or more distinct sets of users (whether businesses or individuals) who interact through the service via the Internet": https://www.oecd.org/innovation/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation-53e5f593-en.htm
[35] BEREC Opinion of 11 March 2021 on the European Commission's proposal for a Digital Markets Act: For a swift, effective and future-proof regulatory intervention, BoR (21) 35, section 1.1; BEREC Draft Report, p.12.

codes of conducts to facilitate the porting of data and the switching between cloud providers.[36] Therefore, we **recommend that number-independent interpersonal communication services and cloud computing services should be treated in the same manner as advertising services. They should be considered as accessory CPS and be regulated only when they are provided by a digital platform which also provides another principal CPS**.

Besides, it seems that **several CPSs are in themselves essentially one-sided** because the other 'side' comprises another CPS. For instance, the other 'side' of a search engine are the websites that are crawled and that are presented alongside advertising services. A platform with both search and advertising functions can be seen as two-sided, and will have both multiple end users and multiple business users. But it is less obvious that this is true of each function considered in isolation. This may also be the case for social networks, video sharing platform services and operating systems.

4 Criteria and indicators to designate gatekeeper of Core Platform Services

4.1 The Commission's proposal

The DMA constitutes asymmetric regulation: its obligations do not apply to all providers of Core Platform Services, but only to those providers which have been designated as gatekeepers. Such designation is done by the European Commission based on a **cumulative "three criteria test"**, namely:

- *significant impact* on the EU internal market;
- control of an *important gateway* for business users to reach end-users;
- and *entrenched and durable* position.[37]

To facilitate and speed up the designation process, the DMA proposal establishes a **rebuttable presumption that the three-criteria test is met when a provider of CPS is above several size thresholds for a certain period** (in general 3 years). Those thresholds are the following:

- for the undertaking to which the CPS provider belongs, an annual turnover in the EEA equal or above €6.5bn or market capitalization of at least €65bn *and* the presence in at least three of the 27 Member States of the EU;
- and for the provided CPS, a reach of more than 45 million monthly active end-users in the EU (which represent 10% of the EU population)[38] as well more than 10,000 active business users on an annualised basis.[39]

The Commission will adopt a delegated act to specify the methodology for determining whether those quantitative thresholds are met and to regularly adjust them to market and technological developments.[40] In practice, a CPS provider should self-assess whether it meets those size thresholds and, when it does, it should notify the Commission, providing all the relevant information within three months.[41] On that basis, within two months the Commission designates this CPS provider as a gatekeeper, unless the provider tries to rebut the presumption.[42] The Commission

[36] Regulation 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ [2018] L 303/59, art.6.
[37] DMA Proposal, Art.3.1.
[38] The same criterion is proposed to designate the Very Large Online Platforms which are subject to additional obligation and a more Europeanised oversight under the DSA: DSA Proposal, art.25.2.
[39] DMA Proposal, art. 3.2 and rec. 23. The Commission could, in a delegated act, clarify the methodology to measure the size thresholds in order to ensure legal predictability and could also adjust the thresholds: DMA Proposal, art. 3.5.
[40] DMA Proposal, art.3(5).
[41] DMA Proposal, art.3(3).
[42] DMA Proposal, art.3(4) and art.15(3).

services Impact Assessment indicates that the use of those thresholds could result in the identification of 10 to 15 CPS providers but does not give any explanation for this range number.[43]

Indeed, as the size thresholds do not necessarily indicate a gatekeeper position, a **CPS provider which meets the thresholds can present sufficiently substantiated arguments to rebut the presumption** and demonstrate that the three-criteria test is not fulfilled.[44] Such rebuttal must rely on an open list of quantitative and qualitative indicators such as financial and commercial size, number of users, entry barriers, scale and scope effects, user lock-in and "other structural market characteristics". [45] Conversely, if based on the same indicators, a CPS provider does fulfil the three-criteria test despite falling under the presumptive thresholds, the Commission may designate that provider as a gatekeeper.[46]

Table 2 below summarises the three-criteria test to define gatekeeper power, the size thresholds for the gatekeeper presumption and the quantitative and qualitative indicators that can be used to rebut the presumption or to designate gatekeepers which are below the thresholds.

Three criteria test	Presumptive size thresholds	Quantitative and qualitative gatekeeper indicators
1. Significant impact on the internal market	***Financial and geographical size (at firm level)*** - Annual EEA Turnover (last 3 years) > € 6.5bn *or* Market cap (last year) > € 65 bn - *and* currently provides one CPS in at least 3 Member States	***Size, operation and position*** - Very high turnover derived from end-users of a single CPS - Very high market capitalisation - Very high ratio of equity value over profit - High growth rates, or decelerating growth rates read together with profitability growth
2. Important gateway to reach end-users	***User size (at CPS level)*** - Monthly EU active end-users > 45m - *and* yearly EU active business users > 10 000	***Number and type users*** - Number of end-users - Number of dependent business users - End-users or business users lock-in, lack of multi-homing
3. Entrenched and durable position	CPS user size is kept over the last three years	***Entry barriers*** - Network effects, data-driven, analytics capabilities - Economies of scale and scope (incl. from data) - Vertical integration
		Other structural market characteristics

Table 2: Criteria, thresholds and indicators to designate gatekeeper

Next to existing gatekeepers, the Commission may also designate an **emerging gatekeeper** when a CPS provider meets the two first criteria (i.e., significant impact and important gateway) and the

[43] Impact Assessment, para.148. Caffarra and Scott Morton calculated on a preliminary basis that the thresholds "will capture not only (obviously) the core businesses of the largest players (GAFAM), but perhaps also a few others. Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure. Conversely Twitter, Airbnb, Bing, LinkedIn, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Byte dance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others": https://voxeu.org/article/european-commission-digital-markets-act-translation. However, Oracle and SAP do not appear to offer CPS as they do not operate B2C platforms and do not have separate business users and end-users.
[44] DMA Proposal, art.3(4).
[45] DMA Proposal, Art.3(6) and rec 25.
[46] DMA Proposal, Art.3(6) and Art.15. Three or more Member States may request the Commission to proceed with such designation.

fulfilment of the third criterion is foreseeable.[47] In this case, the emerging gatekeeper is subject to a subset of the obligations imposed on existing gatekeepers to prevent market tipping.

Contrary to the CMA Advice, the **three-criteria test does not explicitly mention market power nor dominant position**. There is thus no need to define an antitrust relevant market or to prove a dominant position to find a gatekeeper power. However, the second and third criteria implicitly include the presence of market power and several indicators to rebut the presumption are also linked to market power. This the case in particular for user lock-in or, more generally, the different types of entry barriers. It is also worth noting that the Commission could designate several gatekeepers providing the same CPS. Therefore, the competition law rationale that there is only one single dominance per market does not necessarily apply in the context of the DMA. On the one hand, a CPS is not necessarily a relevant market (e.g. operating system may include different relevant markets).[48] On the other hand, a gatekeeper power does not necessarily coincide with a dominant position (e.g., while a search engine may be one relevant market, two providers of large search engines meeting the thresholds may have a gatekeeper power while both may not have a dominant position).[49]

4.2 Recommendations

4.2.1 The three criteria test to define gatekeeper power

There is no clear **definition of gatekeeper** in EU law, although the concept has motivated antitrust and regulatory intervention. One example relates to access to technical services for digital TV which constituted a key capability for media firms. In *NewsCorp/Telepiu*, the Commission considered the merging parties would have been "the *gatekeeper* of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels" and imposed compulsory access to those technical services as a condition to clear pay-TV merger .[50] To complement antitrust law, ex ante rules were also adopted to force the providers of Conditional Access Systems (CAS) from which broadcasters depend to reach any group of potential viewers to offer to broadcasters, on a FRAND basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers.[51] Another example relates to interoperability. The EECC imposes on providers of number–independent interpersonal communications services the obligations to render their services interoperable if those providers reach a significant level of coverage and user up-take.[52] A definition of gatekeeper is given by Caffara and Scott Morton as "an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid."[53] The gatekeeper concept is also linked to different other concepts[54] such as:

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[47] DMA Proposal, art.15(4), rec 27 and 63.
[48] In Google Android Decision, the Commission considered that Android and iOS are part of two different relevant markets.
[49] In practice, when there are two gatekeepers for the same CPS, this will often imply that the CPS is made of several separate antitrust relevant markets. For instance, this may the case for app stores (Apple and Google), marketplaces (eBay and Amazon) or social networks (Facebook and LinkedIn).
[50] Decision of the Commission of 2 April 2003, Case M.2876 *NewsCorp/Telepiu*, paras 198 and 225. When those access commitments could not have been obtained, mergers have been prohibited: Decisions of the Commission of 27 May 1998, Case M.993 *Beterlsmann/Krich/Premiere* and Case M.1027 *Deutsche Telekom/BetaResearch*. The merger was prohibited because it would have resulted in BetaDigital and BetaResearch having a dominant position on the German market for the supply of technical services for pay-TV, besides Premiere strengthening its dominance on the pay-TV market and Deutsche Telekom strengthening its dominance on the cable networks.
[51] EECC, art.62(1) and Annex II, Part I.
[52] EECC, art.61(2c).
[53] https://voxeu.org/article/european-commission-digital-markets-act-translation.
[54] P. Alexiadis and A. de Streel, *Designing an EU Intervention Standard for Digital Platforms*, EUI Working Paper-RSCAS 2020/14, pp.2-9; Geradin D. (2021), What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?, available on SSRN, pp.4-11.

- **Bottleneck power** which is "a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly".[55]
- **Unavoidable trading partner**, in the digital online platform context, the Cremer Report has already considered that classification as an unavoidable trading partner is usually associated with the existence of intermediation power.[56]
- **Economic dependency** which occurs "if and to the extent that the business faces a high cost from switching away from the platform to a substitute. Such switching costs can arise for instance if a business has made significant platform-specific investments, such as building its technology to be compatible with the platform's specification; these investments would have to be written down ("sunk costs") and new investments made if the business were to switch to a substitute. Switching costs can also arise from the fact that any substitutes are far inferior, such as when a single platform is a gatekeeper to a given market or market segment, and there are few other means of reaching that market or segment".[57]

The **three-criteria test proposed in the DMA are in line with the concept of gatekeepers or associated concepts** such as bottleneck, unavoidable trading partner or economic dependency. However, the test **may risk being over-inclusive**. This in turn may strain the monitoring and the enforcement process as well as negatively impact the relevance and the strengths of the prohibitions and obligations. In the CERRE Recommendation,[58] we had proposed the introduction of a fourth criteria consisting of the orchestration of an ecosystem.[59] We explained that this additional criteria could be assessed with the following indicators: presence in multiple markets or business areas which could be 'tightly' connected in the same vertical value chain or more 'loosely' connected, control of ecosystems as a web of interconnected and to a large degree interdependent economic activities carried out by different undertakings to supply one or more products or services which impact the same set of users. Under the current proposal, the orchestration of an ecosystem may play a role in the gatekeeper designation as it may increase the size of the platform (first criterion), its gateway power (the second criterion) or the entrenchment of such power (third criterion).[60] However, this may not be enough.

During the preparation of the proposal, the Commission services envisaged a **stricter test which would require the gatekeeper to provide at least two CPSs** (instead of merely one, as finally proposed).[61] This additional condition would have led to a more limited number of regulated platforms, estimated to be between 5-7 (instead of 10-15 under the DMA proposal). Such additional requirement has the advantage of focusing the DMA (and the limited resources for its enforcement) on the most obvious and pressing contestability issues. Indeed, as recognised in the DMA proposal: "as gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem to which third-party providers of such ancillary services do not have access, at least not subject to equal conditions, and can link the access to the core platform service to take-up of one or more ancillary services, the gatekeepers are likely to have an increased ability and incentive to leverage their gatekeeper power from their core platform services to these ancillary services, to the detriment of choice and contestability of these services".[62] However, some big platforms which are only

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[55] F. Scott Morton, Bouvier, P., Ezrachi, A., Jullien, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, Stigler Center for the Study of the Economy and the State, 2019, p.105.
[56] J. Crémer, Y-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era*, Report to the European Commission, March 2019. The ACCC Report refers to Google and Facebook as "unavoidable trading partners" for a significant number of media businesses, in the sense that they are important channels through which consumers access news, with many news businesses being dependent on them as key sources of referral traffic.
[57] Expert Group for the Observatory on the Online Platform Economy, Measurement & Economic, Indicators, 2020, p.17.
[58] CERRE Recommendation DMA, p.101.
[59] On the concept of ecosystem, see M.G. Jacobides, C.Cennamo and A.Gawer, "Towards a theory of ecosystems", *Strategic Management Journal* 39(8), 2018, 2255–2276; M.G. Jacobides and I. Lianos, Ecosystems and Competition Law in Theory and Practice, UCL Centre for Law, Economics and Society *Research Paper Series: 1/2021.*
[60] DMA Proposal, rec.3.
[61] DMA Impact Assessment, paras.148 and 388.
[62] DMA Proposal, rec.14.

providing one CPS will then escape regulation even though they may have the possibility to leverage their gatekeeper power on one CPS to other related services.

4.2.2 The thresholds to establish the gatekeeper presumption

The **reliance on size thresholds, which are relatively easy to determine for the Commission, as a rebuttable presumption for the meeting of three criteria test will incentivise the digital platforms to disclose** the quantitative and qualitative indicators for gatekeeper power that they know better than the Commission. However, it should be clear that **such presumption is only based on size and that size is not directly linked to gatekeeper power**. This is why it should be reasonably possible to rebut the presumption. In that regard the wording of the Impact Assessment which mentions that the gatekeeper presumption could only be rebutted in very exceptional circumstances is unfortunate.[63]

Another issue is that, in the Commission Proposal, the user threshold should be assessed at the CPS level and not at the firm level. As this threshold relates to end-users and business users, it may be difficult to apply in isolation to a CPS which is inherently single-sided (as noted above, number-independent interpersonal communication services and cloud computing services) because it is not a gateway between end-users and business users.[64] This double threshold may also be difficult to apply to a CPS which is essentially one-sided (as noted above, search engine social networks, video sharing platform services, operating Systems and advertising services). To deal with such difficulty, the **calculation of the end users and business users could be done for all the CPS in combination**. For the CPS which are accessory to principal CPS (such as advertising services in the Commission proposal and also communications services and cloud services in our recommendation), the user threshold should be calculated on the combination of principal and accessory CPSs.

4.2.3 The indicators to rebut the gatekeeper presumption

The list of quantitative and qualitative indicators that can be used to rebut the presumption – or to designate as gatekeeper firms that fall below the presumptive thresholds – are sound and broadly reflect the (admittedly limited) economic literature on gatekeepers or associated concepts. However, some improvements to the list are possible. One of the key indicators to assess the second criterion (*important gateway*) is **whether the platform controls a termination monopoly or a competitive bottleneck.[65] This depends on the ability and the incentive of the business users and the end users to multi-home across several competing platforms**.[66] Thus, it is regrettable that the absence of multi-homing is only mentioned in a recital (25) of the DMA Proposal and not in Article 3(6). Also to assess this second criterion, the **relative size of the platforms** compared to the other platforms providing the same CPS is an important indicator to look at.

One of the key indicators to assess the third criterion (*power entrenchment*) should be the presence of **entry barriers**. However, the different types of entry barriers could be clarified. **The first type is the entry barriers to existing services and will vary according to the business models of the digital platforms**. An important entry barrier consists of cross-group externalities and network effects which tend to be amplified by big data and AI technologies and increase with the development and the maturation of the markets. **A second type is entry barriers to future services and is related to the control of innovation capabilities**. In the digital economy, they may consist in control over data, key platform elements, risky and patient capital, specific data, and computer skills.[67]

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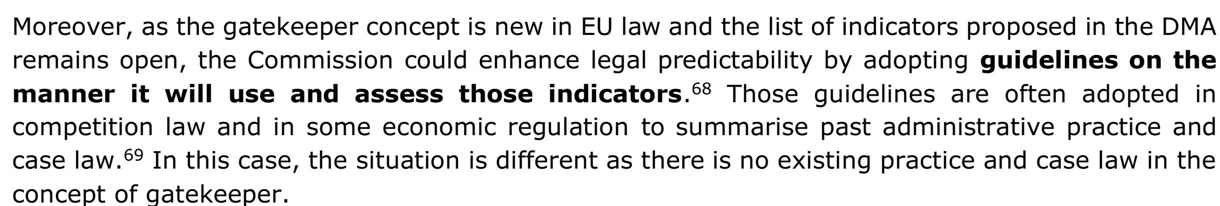
[63] DMA Impact Assessment, para.389.
[64] Note that DMA Proposal rec.13 *in fine* notes that: "In certain circumstances, the notion of end users should encompass users that are traditionally considered business users, but in a given situation do not use the core platform services to provide goods or services to other end users, such as for example businesses relying on cloud computing services for their own purposes."
[65] M. Armstrong, 'Network Interconnection', *Economic Journal* 108, 1998, 545-564; J.-J. Laffont and J. Tirole, *Competitions in Telecommunications*, MIT Press, 2000.
[66] Geradin, 2021; Cabral L., J. Haucap, G. Parker, G. Petropoulos, T. Valletti, M. Van Alstyne (2021), The EU Digital Markets Act A Report from a Panel of Economic Experts, Joint Research Center of the European Commission. PPMI et al., Multi-homing: obstacles, opportunities, facilitating factors, Study on "Support to the Observatory for the Online Platform Economy", 2021.
[67] CERRE Recommendation DMA, p.101.



Moreover, as the gatekeeper concept is new in EU law and the list of indicators proposed in the DMA remains open, the Commission could enhance legal predictability by adopting **guidelines on the manner it will use and assess those indicators**.[68] Those guidelines are often adopted in competition law and in some economic regulation to summarise past administrative practice and case law.[69] In this case, the situation is different as there is no existing practice and case law in the concept of gatekeeper.

4.2.4 Review cycle

A review cycle of two years for gatekeeper designation is very short given the logistical and fact-finding pressures it imposes upon the Commission (especially in the absence of assistance from national authorities) and the fact the timeline for potential competition assessment in antitrust is generally three years. **The cycle could be longer, for instance, five years** as it is provided for in the EU telecommunications regulation[70] or as it has been proposed in the CMA Advice to balance sufficient time for the effect of regulation to be observed, with the need to ensure the designation remains appropriate.[71]

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[68] Also, Draft BEREC Report of 11 March 2021 on the *ex-ante* regulation of digital gatekeepers, BoR (21) 34, p.16.
[69] See for instance, Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1.
[70] EECC, art.67.5.
[71] CMA Advice, para.4.28.

Annex: Laws and proposals to the designation of digital platforms at national level

Next to the DMA, several countries have adopted or proposed trigger to impose additional obligations of the largest digital platforms.

Germany

The recently adopted 10th amendment to the Act against Restraints of Competition introduces the threshold of ***paramount significance*** determined based on five criteria:

- a *dominant* position on one or more markets;
- financial strength or access to other *resources*;
- vertical *integration* and activities on otherwise related markets;
- access to *data* relevant for competition;
- and importance of activities for *third parties' access* to supply and sales markets and related influence on third parties' business activities.[72]

France

The Autorité de la Concurrence proposed to introduce a threshold of ***structuring digital platforms*** defined as

- a company that provides online *intermediation* services for exchanging, buying or selling goods, content or services,
- which holds *structuring market power* because of its size, financial capacity, user community and/or the data that it holds,
- enabling it to *control access* to or significantly affect the functioning of the market(s) in which it operates with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their economic activity.[73]

The French telecommunications regulator ARCEP proposed a threshold of ***systemic digital platforms***, defined based on

- three main criteria: (i) the existence of *bottleneck* power; (ii) a certain *number of users* in the EU - or as a proxy, sufficiently high EU turnover; and (iii) the existing of integration of that firm into an *ecosystem* enabling leverage effects;
- which are complemented by four secondary criteria: (i) *gatekeeper* position; (ii) access to many high quality *data*; (iii) market shares for *online advertising*; and (iv) the *market value* of the platform.[74]

[72] See Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets. A non official English translation is available at: https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf
[73] Autorité de la concurrence's contribution of 19 February 2020 to the debate on competition policy and digital challenges available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf
[74] ARCEP, *Systemic digital platforms*, December 2019.

United-Kingdom

The Advice of the Digital Market Taskforce of the CMA[75] proposes to regulate the firms with ***Strategic Market Status (SMS)*** which have

- *Substantial, entrenched market power* in at least one digital activity;
- providing the firm with a *strategic position* because the market power is particularly widespread or significant. This strategic position could be determined based on the following criteria: (i) firm has achieved *very significant size or scale* in an activity, for example where certain products are regularly used by a very high proportion of the population or where the value of transactions facilitated by a specific product is large; (ii) the firm is an *important access point to customers* (a gateway) for a diverse range of other businesses or the activity is an *important input* for a diverse range of other businesses; (iii) the firm can use the activity to *extend market power* from one activity into a range of other activities and/or has developed an '*ecosystem*' of products which protects a firm's market power; (iv) the firm can use the activity to *determine the rules of the game***,** within the firm's ecosystem and also in practice for a wider range of market participants; or (iv) the activity has significant impacts on markets that may have *broader social or cultural importance*.

[75] CMA, Advice of the Digital Markets Taskforce on a new pro-competition regime for digital markets, December 2020, paras. 4.7 to 4.24 and Appendix B: The SMS regime: designating SMS firms.

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