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NOTE ON DESIGNATION OF GATEKEEPERS IN THE DIGITAL MARKETS ACT

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TABLE OF CONTENTS

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1. DMA GATEKEEPER DESIGNATION MECHANISMS

The purpose of the designation process is to identify those firms and services that will be subject to the obligations of the DMA.

The first step is to identify the firms providing services that are regulated, who are referred to as gatekeepers (Art 3(1)). A firm will be presumed to be a gatekeeper if it meets or exceeds the following **quantitative thresholds**:

- it has yearly European revenues (from all activities) of over €7.5bn in each of the last 3 years, or an average market cap of €75bn over the last 3 years (Art 3(2)(a) and (c));
- it provides a Core Platform Service (CPS) that has had 45 million monthly active end users in the EU and 10,000 average yearly active business users in each of the last 3 years (Art 3(2)(b) and (c)).

Firms must notify the European Commission within 2 months of meeting these thresholds and the Commission must designate them as a gatekeeper no later than 45 days after this (Art 3(3)). If firms fail to notify then the Commission can still designate on the facts available to them.

Firms must adopt the **definitions of active users and the methodology** for reporting them that is specified in Annex A of the DMA. This states, amongst other things, that different CPSs that are provided and consumed together by users should be assessed separately (that is, active end users for the purposes of Art 3(2)(b) should be counted separately for each CPS, even if they are the same individuals in each case) and that the different commercial services that form part of the same CPS and which may be consumed by the same users should also be assessed separately provided that they are 'used for different purposes' (that is, active end users for the purposes of Art 3(2)(b) should be counted separately for each commercial service).

There is also an **'anti-circumvention' provision** (Art 13) which prohibits firms from configuring or reconfiguring their services to evade the quantitative thresholds. The Commission can request information to investigate this and can still designate the firm as a gatekeeper of a regulated CPS if it considers circumvention has been attempted.

The European Commission must **review existing designations** of gatekeepers and CPSs every 3 years and consider whether to add new gatekeepers every year (Art 4(2)).

Firms can submit 'sufficiently substantiated' arguments as to why, despite meeting all of the quantitative thresholds under Art 3(2), they are **not a gatekeeper** (Art 3(5)). If these are accepted by the Commission within 45 days as 'manifestly questioning' the presumption, then the Commission will have a further 5 months to assess the merits of the case in a market investigation (Art 15(3)) and designate or not designate as a result.

The **Commission can designate as gatekeepers firms that do not meet the presumptive thresholds** following a market investigation which must not last more than 12 months (Art 3(8)) and Art 15). The criteria to be applied by the Commission in making such a designation are wide ranging, but the gatekeeper must satisfy each of the three qualitative criteria in Article 3(1) – significant impact on the

internal market, important gateway for business users to reach to consumers (thereby excluding B2B), and entrenched market position. Three or more Member States can also request such an investigation. One circumstance in which the Commission could do this is if the firm in question meets the thresholds but has only done so for a period of less than 3 years and it is expected to meet them in future. In these circumstances the Commission can apply a sub-set of the obligations (Art 17(4)). The Commission could designate on other grounds as well.

The European Commission can, at any time, propose to add or remove services from the list of CPS (as well as adding or removing obligations which will apply to regulated CPS) (Art 19).

2. ISSUES TO BE CLARIFIED

2.1 One Gatekeeper Designation of Multiple Designations?

The DMA defines a gatekeeper as a firm that provides a CPS which has been designated as such (Art 2(1)). **One interpretation is that this means a single firm can be designated as a gatekeeper multiple times, with each designation corresponding to a specific CPS or commercial service that the firm provides**. In this case, a firm may not be a gatekeeper in relation to CPS or commercial service X, but would be a gatekeeper in relation to CPS or commercial service Y. This is implied by Article 3(1), which refers to a firm being designated as a gatekeeper in relation to the provision of a (singular) CPS.

The alternative interpretation is that, once a firm is designated as being a gatekeeper in relation to one CPS or service, there will then be a further and separate question as to which of the various other CPS that the gatekeeper provides should be regulated and added to the list. On this view, the addition of new CPS to the list would not involve a new designation (since the act of designation appears to relate to a decision on whether a firm is a gatekeeper rather than to a decision as to whether aparticular CPS should be regulated). Evidence for this approach is:

- The definition of a gatekeeper as a singular undertaking providing core platform services (plural) in Article 2(1), Article 3(8) – which says a firm will be designated as a gatekeeper (singular) but may have a number of CPSs (plural) which are then to be listed pursuant to Article 3(9) –, and Article 15(1).
- Article 4(2), which suggests that the European Commission should review gatekeeper and CPS decisions independently of each other (rather than a review of a gatekeeper designation necessarily involving a particular CPS).
- Articles 5 and 6, which require a gatekeeper to comply with the obligations in respect of each of the CPS listed in the designation decision.

This ambiguity is unhelpful. On the first interpretation, the Commission would need to make a gatekeeper designation each time it wishes to include a new CPS or service within the scope of regulation. On the second interpretation, the existing gatekeeper designation would apply and any new CPS which the Commission wished to regulate would then be added to (or removed from) the list. More substantively, it may affect the implementation of Article 17(4) in cases where a firm is already an 'entrenched' gatekeeper supplying a CPS and subject to the full set of obligations and then designated as an 'emerging gatekeeper' in relation to another CPS. Article 17(4) refers to a sub-set of obligations then applying 'to that gatekeeper' rather than to a specific CPS, whereas the intention is clearly that the sub-set of obligations would apply only to the specific CPS which met the 'emerging gatekeeper' criteria and not to other CPSs which that firm may supply and which are already regulated.

We would therefore recommend that the text make it clear (e.g. in Articles 3(8), 3(9), 4(2), 15(1) and 17(4)) that **every decision to regulate a CPS requires a designation that the undertaking in question is a gatekeeper in relation to the provision of that specific service**. This is consistent with the idea that firms will have market power in relation to the provision of a specific service and that market

power with respect to one service does not automatically mean that a firm will also have market power in relation to another. It would also mean that the number of 'active users' under Article 3(2)(b) will refer to the users of the specific CPS which is being designated and not to any CPS the firm in question might supply. It would also mean that an undertaking may be the subject of multiple gatekeeper designations, with each being applicable in respect of a different service andeach based on a different set of relevant facts[1].

2.2 Same or Different Standards to Rebut the Presumption Based on Quantitative Thresholds?

Art 3(5) enables firms to submit 'arguments' as to why, despite meeting the quantitative thresholds under Art 3(2), they should not be designated as gatekeepers and the CPS or service in question should not be regulated. Art 3(8) provides for the opposite situation, in which the European Commission may designate a gatekeeper despite the firm or CPS in question not meeting the quantitative thresholds under Art 3(2). In this case, the text provides a list of 'elements' which the Commission is required to take into account 'insofar as they are relevant' when undertaking its assessment.

However, it is not clear whether the intention is for the same evidential thresholds and relevant factors to apply in both situations. Art 3(5) states that exemptions will be 'exceptional'. This appears to be intended to discourage firms providing CPSs which the DMA is intended to regulate from submitting arguments that they should be exempted and/or to allow the Commission to reject most of those that are submitted. However, it may also serve to limit the number of exemptions which the Commission can make without the risk of legal challenge by interested third parties[2]. In contrast, Art 3(8) does not say that designations of firms that do not meet the quantitative thresholds will be exceptional, and Art 4(2) expressly requires the Commission to review markets every year in order to identify new firms that it should designate under Art 3(8).

Whether designations of firms not meeting the quantitative thresholds will outnumber exclusions of firms that do may depend on whether the Commission applies the same evidential standard to its own assessments under Art 3(8) as it requires from firms submitting arguments under Art 3(5). It may also depend on whether the criteria employed by the Commission in their assessment, which are listed in Art 3(8), are the same criteria that firms are expected to address when advancing 'substantiated arguments' under Art 3(5). There are good reasons to think that the same considerations should be relevant to both situations.

[1] There are two ways in which 'conglomorate effects' might still be taken into account in the designation. First, in quantitative terms the market capitalisation and revenues of the firm (Art 3(2)(a)) will reflect the totality of its activities and not just the individual CPS service for which the firm is designated a gatekeeper. Second, in qualitative terms, Art 3(8) allows the Commission to have regard to conglomerate effects derived from other activities in the assessment, including those that might be obtained from prospective acquisitions. This aside, each service is assessed separately.

[2] The inclusion of the term 'exceptionally' in Art 3(5) is unsatisfactory in the sense that it seems to prejudge how often firms that meet the quantitative criteria might nonetheless prove not to be gatekeepers. This could only be determined after considerations of the facts, rather than being something that could be predicted in advance. Even if the standard of proof is very high, it is still possible that a significant number of services might reach it.

As regards evidential standards, Article 17 would seem to envisage the European Commission undertaking a similar form of market investigation when arguments for exemption have been accepted under Art 3(5) and when the Commission proposes to designate under Art 3(8). The reference in Art 3(5) to whether a firm has presented 'sufficiently substantiated arguments' in favour of exemption relates only to the decision of the Commission as to whether or not to proceed to the next step of initiating a market investigation and *not* to the outcome of that investigation. In other words, the presumption in favour of designation if a firm meets the relevant quantitative thresholds affects the likelihood of the Commission being persuaded to undertake a market investigation. This is so presumably in order to reduce the risk of the Commission finding itself otherwise obliged to devoting valuable resources to market investigations when it is already clear that the firm in question is a gatekeeper for the purposes of the Act, and the investigation will simply delay compliance and add uncertainty into the regime. That said, the question of what constitutes a 'sufficiently substantiated' argument for the purposes of moving to a market investigation under Art 3(5) seems likely to be litigated.

Once the Commission has decided to proceed to a market investigation then it would seem appropriate that the assessment would be undertaken by the Commission adopting the same evidential standard as it would apply to any other market investigation, including an investigation undertaken pursuant to Art 3(8). At this stage of the process, therefore, the standards for exclusion of a firm meeting the quantitative thresholds or inclusion of firm that did not meet the thresholds ought to be the same. Having said this, the Commission will have only 5 months in which to assess whether a firm meeting the quantitative thresholds should be excluded from designation but 12 months in which to assess whether a firm not meeting the thresholds should be included. Although there is no a priori reason to think that a decision to exclude a firm from designation would require less evidence, or evidence to a lesser standard, than a decision to include a firm, the difference in timescales must have some practical implications for nature of the assessment which the Commission is able to undertake.

2.3 The Application of Anti-Circunvention Rules

The intention of the anti-circumvention provisions of Art 13 in addressing strategic behaviour by firms and preventing the 'slicing and dicing' of services to evade regulation is clear. At the same time, however, Annex A appears to encourage or at least accept such 'slicing and dicing' by accepting that that firms may offer different commercial services which may each form part of the same CPS and be provided to the same set of users, and allowing each to be reported, assessed and designated separately provided they are used for 'different purposes'.

In order to address strategic behaviour, therefore, the Commission will either need to show that commercial services within the same CPS class are not, in fact, being used for 'different purposes' and users of these services should be aggregated together for the purposes of Art 3(2)(b), or that the motive for disaggregating services was to evade regulation rather than for some other legitimate commercial purposes, such as responding to changes in user preferences or competition. This may prove challenging: internal documents may assist in answering the latter question, but regulated firms may anticipate this, and motivations for changing commercial practices may be complex. Whether

two services are being used for a different or the same 'purpose' by users is likely to become a contested question and something which may also be capable of being influenced by the firms themselves.

3. CONCLUSIONS

We recommend that the European Commission clarify that **every decision to regulate a CPS will require a designation that the undertaking in question is a gatekeeper in relation to the provision of that specific service** and that, accordingly, references to 'active users' for the purposes of gatekeeper designations are references only to users of the CPS in question.

We recommend that the Commission confirm that it will **apply the same evidential standards in market investigations considering whether to exclude a firm that otherwise meets the quantitative thresholds for gatekeeper designation as in market investigations considering whether to include a firm that otherwise does not meet the same quantitative thresholds**, subject to the practical constraints that arise from differences in the timescales available to the Commission to complete its investigations.

The **application of Annex A, with the possibility that services provided by the same firm within the same CPS category may be assessed separately for gatekeeper designation if they are used for 'different purposes', will need to be clarified through specific cases**. The Commission will want to ensure that firms do not abuse this provision in order to evade designation.

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