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The EU Court of Justice's Advocate General sets a high bar for rebutting the Digital Markets Act's gatekeeper presumptions and advises dismissing the appeal (*Bytedance*)

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References: [EU Court of Justice, *ByteDance*, Case No. C-627/24 P, AG Opinion, 15 October 2026](#) | [EU Court of Justice, *ByteDance*, Case No. C-627/24 P, Press release, 15 October 2026](#)

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The DMA's first opinion, and the case law it walked past (*Bytedance*, C-627/24 P)*

Descartes opened his method with a refusal. The first of his four precepts was “never to accept anything for true which I did not clearly know to be such”, and to admit into judgement nothing that was not presented “so clearly and distinctly as to exclude all ground of doubt”. The Digital Markets Act was written on the opposite precept. Where three numbers are met, the Commission accepts as true that a company is a gatekeeper, and the company must dislodge the belief.

On 15 October 2026, Advocate General Biondi delivered the first *opinion* in a DMA case to reach the Court of Justice, *Bytedance v Commission*, and spent the first fifty-seven points on what it takes to dislodge that belief. His answer is a “high degree of plausibility”. That asks more of the company than Bytedance wanted, which was that doubts should suffice, and less than the DMA's own words “exceptionally” and “manifestly” seemed to promise, which was something close to certainty.

The opinion proposes to dismiss the appeal. Two limits should be stated before anything else. The Court asked the Advocate General to address only the first and third parts of the first ground of appeal and the Commission's request for a substitution of

grounds (point 11), so three parts of *Bytedance*'s case have no opinion at all. And an opinion is not a judgment. What follows reads the opinion as a text, against the record, and says what the Court would be adopting if it followed it.

The Competition System is about competition law, and the DMA is, by its own account, not competition law. With Godefroy de Boiscuillé, I have argued elsewhere, from the enforcement record of 2024 to 2026, that the DMA's operative content is unilateral conduct control of the Article 102 kind under a harmonization label, and that the regulation delivers the same outcomes as Article 102 at a lower evidentiary cost (*Questioning the Digital Markets Act's Legality*). That paper looked at the obligations and the fines and set the designation machinery aside, as the one part of the DMA with no counterpart in Article 102. This opinion is about that machinery, and, if anything, it reinforces the argument. The designation stage borrows the one concept it shares with Article 102, the ecosystem, from an Article 102 judgment, and discards the evidentiary discipline that comes with it, the burden on the authority, the ordinary standard of proof, the open evidentiary window and the hearing on the objections. An instrument that keeps the vocabulary of competition law and drops its method is what the paper described from the enforcement end. The opinion shows the same design at the entrance.

The method, in four sentences

The opinion's 186 points were matched to the

paragraphs of the General Court judgment they review and to the sixteen judgments they cite, each checked at the paragraph in the corpus or on EUR-Lex. Three words the opinion turns on, “ecosystem”, “multi-homing” and the standard of proof, were then searched across the 1,061 judgments of the corpus and the 8,859 Commission merger decisions in a companion corpus. The judgments the opinion does not cite were located by their distance in the graph from the ones it does, so that the omissions could be listed rather than guessed at. Above the paywall, paragraph numbers refer to the opinion unless another text is named. Below it, every passage is reproduced verbatim.

The opinion in four points

The first point concerns the standard of proof, and where the Advocate General found it. Article 3(5) of the *DMA* lets a company that meets the thresholds present “sufficiently substantiated arguments” that “manifestly call into question” the presumptions. Bytedance said that doubts or prima facie evidence should suffice to force a market investigation. The General Court had said the arguments must show “with a high degree of plausibility” that the presumptions are called into question, and had twice used the word “exceptionally” on the way (General Court, paragraphs 70 and 71). The Advocate General calls that word “unfortunate” (point 43) and keeps the standard, restated in words of his own (point 36). The arguments “have to be genuinely compelling, with no easily identifiable weaknesses in their capacity to rebut the presumption”. He adds one thing the General Court had not said. The third subparagraph of Article 3(5) provides that, where a company does present such arguments, the Commission “may” open a market investigation. On the Advocate General’s reading the word gives the Commission no choice. It “cannot reject those arguments without opening a market investigation” (point 23).

Where does that standard come from? Not from competition law. The opinion cites twelve judgments under sixteen case numbers. Six are competition cases, every one of them cited for a point of appellate procedure, the scope of review, distortion of evidence, the duty to state reasons. Three are intellectual property cases, two on trade marks and

one on designs, cited for what distortion of evidence means and for what the right to be heard does not require. One is an anti-dumping case, one concerns the return of an illegally staying migrant, one is a dispute over an EU research grant. **Not one is cited for what Article 102 says about proving or rebutting dominance, and not one is a merger case.** The corpus confirms the gap from the other side. The phrase “high degree of plausibility” appears in exactly one of the 1,061 judgments, the Bytedance judgment under appeal. So does “manifestly call”. The DMA’s standard of proof has a pedigree of one.

What would the standard have looked like if it had been built on Article 102? Under *Regulation 1/2003* the burden of proving an infringement rests on the authority. The Court has accepted since *Hoffmann-La Roche* that very large market shares are in themselves evidence of dominance “save in exceptional circumstances”, a presumption the Commission must still build a decision around and the company rebuts under the ordinary rules of evidence. Since *Intel* in 2017, where a company submits evidence during the administrative procedure that its conduct could not foreclose, the Commission must analyse it. Since *Galp*, *PROAS* and *Servier*, a company may put evidence before the General Court for the first time. Bytedance cited the last three. The Advocate General answers that under the DMA all rebuttal material must come with the notification and nothing later (points 130 and 131). On each of the four variables, who bears the burden, how strong the showing must be, when the evidence can be produced, and what the authority must do with it, **the DMA as read by the opinion is the inverse of Article 102.** That is not an error in the opinion. It is the design of the regulation, which the opinion calls at point 2 “a familiar legislative technique”. **The technique is familiar from anti-dumping, trade marks and immigration, not from the law of dominance, and the opinion’s citations say so.**

The graph adds what the citations leave out. Start from the four competition judgments the opinion does cite, *Generics*, *Galp*, *PROAS* and *Servier*, and walk outward. One edge from *PROAS* sits *Eni*, which restates the Court’s rule on rebuttable presumptions, and behind it *Elf Aquitaine*, where the Court held that a presumption remains within acceptable limits only so long as evidence to the contrary can be adduced and the rights of the defence are safeguarded. Two steps away sits *Aalborg Portland*, which lets the facts require a company to

explain itself but keeps the legal burden on the Commission. At the standard-of-proof node sit [Im-pala](#) and [CK Telecoms](#), which fix what the Commission must show to prohibit a merger, that harm is more likely than not. None of these is in the opinion. The audit lists eight such judgments and what citing each would change. None makes the opinion wrong. Four would have given it a competition-law source for what it holds. Three would have forced it to say out loud what it leaves implicit, that a company must show more to escape designation than the Commission must show to block a merger, and must do so without the hearing Elf Aquitaine makes a condition of the presumption's validity.

The same borrowing decides the second ground of appeal. The General Court had found that the Commission infringed Bytedance's right to be heard on two findings and had refused to annul because the outcome would not have changed (General Court, paragraphs 353 and 370). The Advocate General finds no infringement at all. Article 34(1) and (3) of the DMA, which govern the hearing before a decision, do not apply to a designation made on the presumptions alone (points 146 to 150). The Charter applies, but it does not oblige the Commission to disclose its provisional assessment of the company's own evidence before deciding (point 159). The authorities for that are a trade-mark appeal and the migrant case. The General Court had cited [Slovak Telekom](#) for the same right. The opinion keeps the right and drops the source. The reader may compare Article 27 of Regulation 1/2003, under which the Commission "shall base its decisions only on objections on which the parties concerned have been able to comment". The opinion concedes that the boundary it draws "may be difficult to draw" (point 160).

The **second point concerns the word "ecosystem"**, and it reaches beyond the DMA. Since 2024, the word has been given content in three places. The General Court in Bytedance defined it from the DMA's recitals as a space where "several categories of suppliers, customers and consumers are brought together and interact within a platform" whose products "may overlap with, or be connected to, each other in terms of their horizontal or vertical complementarity" (General Court, paragraphs 128 and 129). The Advocate General endorses that definition (point 60). The General Court in [Booking/eTraveli](#), last month, in a judgment [analyzed here](#),

used "travel ecosystem" seventeen times and defined it nowhere, treating it as a thing Booking's internal documents said would be "difficult for competitors to replicate". And the Commission's [draft merger guidelines](#) ([analysis here](#)) make an ecosystem the setting for a new head of harm, entrenchment, and define it in a footnote as "a primary core product and several secondary (digital) products whose consumption is connected to the core product", citing the General Court's Android judgment as the example.

Set the texts side by side and one thing stands out. The General Court's DMA definition at paragraph 129 of Bytedance is, almost word for word, its Article 102 definition at paragraph 116 of [Google Android](#) in 2022, "a digital 'ecosystem', which brings together several categories of supplier, customer and consumer and causes them to interact within a platform". Bytedance does not cite Android. It attributes the sentence to the DMA's recitals. The DMA's first judicial definition of an ecosystem is therefore an Article 102 definition travelling under a new name. The record behind the word is thin. "Ecosystem" appears in 7 of 1,061 judgments and in 69 of the merger cases in the decisions corpus, 52 of them since 2016 and none before 2008. A concept the Court of Justice has itself used as a legal category once, at paragraph 273 of Android this July, now anchors a designation regime, a merger prohibition and a draft head of harm.

The **third point concerns multi-homing**, i.e., the fact that users use several competing services in parallel. Bytedance's central factual argument was that 77 to 82 per cent of TikTok's users also use Facebook or Instagram, so TikTok locks nobody in.

The General Court answered that high multi-homing says nothing about intensity of use and that the asymmetry is explained by Facebook and Instagram having been there first. Lock-in "may arise even in the presence of multi-homing" (General Court, paragraphs 179, 198 and 200). The Advocate General holds that Bytedance is "incorrect to assert that there is necessarily a link between multi-homing and a lack of lock-in effects" (point 111). Booking made the same argument to the same court two years later about hotels listing on several agencies, and did better without it changing anything. The General Court held that the Commission had failed to examine Booking's evidence that hotels use channel managers to list on many agencies at once, so that

its finding that hotels would drop rival agencies was unsubstantiated (Booking, paragraphs 415 to 417). It then upheld the prohibition on an overall assessment of the rest of the evidence (paragraph 473). Before the EU Courts the argument has been rejected on the merits once, endorsed as rejected by the Advocate General, and in Booking it won a point about the Commission's method that left the outcome untouched.

Before the Commission it is a different story. The term appears in 41 merger decisions between 1998 and 2025. In 19 of them the Commission relied on multi-homing to dismiss or reduce a concern, [Facebook/WhatsApp](#), [Microsoft/GitHub](#) and [Amazon/MGM](#) among them. In 7 it rejected the argument, and the seven include all three prohibitions in the set, [MCI WorldCom/Sprint](#), [Deutsche Börse/LSE](#) and [Booking/eTraveli](#), with [Microsoft/LinkedIn](#), [Meta/Kustomer](#) and [Broadcom/VMware](#), which ended in commitments. The Courts only see the second group, because nobody appeals a clearance, so the Luxembourg record is a selected sample. But the selection cuts one way. The argument that wins at the Commission has not yet changed an outcome at the Court, and the opinion, if followed, will make it the law of the DMA that it cannot win on its own.

The **fourth point** is about what the opinion leaves to the Court. It says nothing on three parts of the first ground, because the Court asked it not to. It says nothing on the paragraph of the General Court judgment that Booking/eTraveli relied on last month, paragraph 40, which holds that quantitative and qualitative evidence cannot be neatly separated, so if the Court follows the opinion that paragraph survives untouched and the Booking judgment's use of it stands. And it says something the General Court had not said, in the company's favour, that a sufficiently substantiated challenge obliges the Commission to open a market investigation. The next gatekeeper to notify will cite point 23. The Commission will cite point 36. Both will be right, and the Court will have to say which sentence governs.

What the opinion settles

Descartes refused to accept as true what he could not see clearly. The DMA accepts as true what three

numbers say, and the opinion makes the company's road back a steep one, with a standard of proof that has no source in competition law and a right to be heard borrowed from trade-mark and immigration cases. The evidentiary window closes with the notification. None of that is a criticism of the Advocate General, who read the regulation as it was written. It is a description of what the regulation is. **If the Court follows him, the first thing the DMA will have established at the highest level is that its procedure owes nothing to Articles 101 and 102, and the second is that the one concept it shares with them, the ecosystem, was copied from an Article 102 judgment without saying so.** The regulation that disclaims competition law has borrowed its vocabulary and declined its method, and the judgments that would have supplied the method sit one or two edges away in the graph. The audit names them. 4. Descartes would have called that a judgment reached with the doubt still in it. The regulation calls it designation within 45 working days.

What follows below the paywall is the audit that sustains the four points above. It is written to be dropped into a brief. If you advise a company that will notify under the DMA, sit in an authority that will read the next designation, or write about the DMA for a living, this, I hope, should help:

- *Five figures. Where the opinion's law comes from, judgment by judgment. The omissions map, drawn from the graph. The ecosystem matrix. The multi-homing ledger across 27 years of merger decisions. The two words that exist in one judgment only.*
- *The opinion in one table, proposition by proposition, each mapped to the General Court paragraph it reviews and the authority it cites, marked restates, narrows or innovates, so you can see in one screen where the Advocate General added law and where he copied it.*
- *The standard-of-proof passages verbatim, opinion against judgment, beside the Article 102 passages that would have governed the same question, Regulation 1/2003, Hoffmann-La Roche, Intel, Galp and Servier. Four variables, two columns.*
- *The omissions map. Eight judgments that sit one or two edges from the opinion's own authorities and never appear in it, each quoted at the paragraph, with whether it helps or hurts the opinion and what citing it would change. It ends with the three paragraphs the next notification*

- Every judgment the opinion cites, checked at the paragraph, with the area of law and the fit, and the finding that not one is cited for a rule of competition law.
- Five definitions of “ecosystem” side by side, Android, Bytedance, the opinion, Booking and the draft merger guidelines, with the sentence the General Court copied from its own Article 102 judgment without saying so, and the counts over time in 1,061 judgments and 8,859 decisions.
- The multi-homing ledger. Forty-one Commission decisions since 1998 coded as accepted, rejected or descriptive, with the names, the three Court passages, and the pattern that explains why it wins in Brussels and has not yet changed an outcome in Luxembourg.
- The right to be heard, with the trade-mark and immigration paragraphs the opinion built it from, set against Article 27 of Regulation 1/2003. Then five predictions on what the Court will do, dated, to be scored at judgment.

Opinion delivered 15 October 2026 (original language English) on the appeal against the General Court's judgment of 17 July 2024 in T-1077/23, which upheld the Commission's decision of 5 September 2023 designating Bytedance a gatekeeper for TikTok under Article 3 of the DMA. Hearing 12 May 2026. The opinion addresses, at the Court's request, the first and third parts of the first ground of appeal and the Commission's request for substitution of grounds (point 11), and proposes dismissal (points 185 and 186). Corpus, 1,061 judgments of the Court of Justice and the General Court, and 8,859 Commission merger decisions. Point numbers refer to the opinion, paragraph numbers to the General Court unless another text is named. Quotations are verbatim from the official English texts.

Area of Law	Judgments Cited
competition procedure	6 (Cases C-815/17, C-816/17, C-817/17, C-818/17, C-819/17, C-820/17)
EU research contracts	1 (Case C-715/14)
trade marks and designs	3 (Cases C-815/17, C-816/17, C-817/17)
anti-dumping	1 (Case C-438/86)
investigation	1 (Case C-393/13)
the judgment under appeal	1 (Case C-117/10)
substantive competition law (Articles 101, 102, emergence)	0

Exhibit 1: The map				See Commission Report
Provisions	Options	General Court decision	Authority cited	Measurement
The Ombuds on state prosecution's maintenance in "a sufficient obligation" brought to the attention of the Ombudsman	2	none	none	None existing
State's obligation to maintain the prosecution of the Commission's control on the application of the law	23, 30	35, 71	Article 68 and 1135 Ombudsman	Check the law in the Commission's control
State's obligation to maintain the prosecution of the Commission's control on the application of the law	23, 30	35, 71	Article 68 and 1135 Ombudsman	Check the law in the Commission's control
Standard of control on the state's maintenance, not only in a large degree of probability, but also in a large degree of probability	23, 30	35, 71	Article 68, 71	None existing
"Consideration" or "obligation" (71) is not a sufficient basis for a suit	42, 45, 46, 49, 50, 51, 52	85, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000		
Not having a state does not of its probability, but not a suit	55, 111	106, 109 to 120	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
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Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the Ombudsman	80, 85	100 to 101 to 102	none	None existing
Provisions adopted from within 3, 20 and 207, absence of an obligation does not add the				

- **Opinion, point 23.** “On that interpretation, where an undertaking submits sufficiently substantiated arguments manifestly calling into question the presumptions laid down in Article 3(2) of the DMA, the Commission cannot reject those arguments without opening a market investigation, unless it is already apparent that the requirements under Article 3(1) are not satisfied in view of the circumstances in which the CPS operates. By contrast, where the arguments submitted do not manifestly call into question those presumptions, the Commission may reject them without opening a market investigation.”
- **Opinion, point 30.** “To summarise, if the quantitative thresholds under Article 3(2) of the DMA are met and the undertaking seeks to challenge the resulting presumptions, the specific trigger for opening a market investigation is the presentation of sufficiently substantiated arguments that manifestly call into question those presumptions. Presented with such arguments, the Commission either (i) opens a market investigation to verify whether the undertaking has demonstrated that the qualitative requirements

are, exceptionally, not met due to the circumstances in which the relevant CPS operates, or (ii) considers that, already at this stage, it is clear that that is the case; ‘exceptionality’ is thus clearly demonstrated *ab initio*. Conversely, if the arguments do not manifestly call into question the presumptions, the Commission may reject them without further examination within a market investigation.”

- **Opinion, point 34.** “Next, the standard of proof required by Article 3(5) of the DMA is not satisfied by mere *prima facie* evidence. Rather, the requirement that the presumptions be ‘manifestly’ called into question indicates that the undertaking must adduce evidence that the presumptions should not apply. If the mere casting of doubt or contesting of the presumptions were to be considered sufficient, the Commission would be obliged to open a market investigation in each case where an allegation to that effect is raised. Such an interpretation would compromise the objective of the presumption mechanism, which is intended to ensure a fast designation procedure and the effective application of the DMA. (9) Moreover, it could also obfuscate the difference between a presumption-based designation pursuant to Article 3(2) thereof and a designation pursuant to Article 3(8) thereof: in practice, in both scenarios, the Commission would ultimately always be required to undertake a market investigation.”
- **Opinion, point 36.** “Thus, in order to ensure the effective application of the DMA and the swiftness of the designation process, (10) as well as to make it possible for its provisions to apply to the market actors whose CPS may impact the digital sector in a manner that the DMA aims to limit, the standard of proof required by Article 3(5) amounts to a high degree of plausibility. (11) The arguments have to be genuinely compelling, with no easily identifiable weaknesses in their capacity to rebut the presumption, in order to be considered as ‘manifestly’ calling it into question.”
- **Opinion, point 43.** “While the use of the term ‘exceptionally’ in paragraphs 70 and 71 of the judgment under appeal may be unfortunate, a comprehensive reading of the judgment does not disclose the error of law alleged by Bytedance.”

- **Opinion, point 49.** “In that setting, in spite of the wording of paragraphs 70 and 71 of the judgment under appeal and the use of the term ‘exceptionally’ contained therein, the standard of proof formulated by the General Court in paragraphs 39 to 72 perfectly matches the standard of proof required by the DMA and described in point 36 of the present Opinion.”

The General Court passages under review.

- **General Court, paragraph 66.** “Thus, the Commission referred to the requirement to adduce ‘convincing’ evidence to rebut the presumption laid down in Article 3(2) (b) of the DMA only once, in recital 126 of the contested decision, with the result that this is an isolated occurrence. Furthermore, if that reference were to be understood, as the applicant claims, as meaning that the applicant must adduce evidence which rebuts that presumption once and for all, such a requirement would indeed not correspond to the standard of proof required under Article 3(5) of the DMA. However, in the present case, nothing in the contested decision, read in its entirety, suggests that, by the term ‘convincing’, the Commission intended to require that evidence rebutting that presumption once and for all be produced.”
- **General Court, paragraph 70.** “Such a standard of proof does not correspond to that established in the third subparagraph of Article 3(5) of the DMA, under which a market investigation may be opened where the arguments of the undertaking concerned are sufficiently substantiated so as, exceptionally, manifestly to call into question the presumptions laid down in Article 3(2) of that regulation.”
- **General Court, paragraph 71.** “It is indisputably apparent from the terms ‘exceptionally’ and ‘manifestly’, in Article 3(5) of the DMA, that the standard of proof required of the undertaking concerned is high, in the sense that the arguments presented by that undertaking must be capable of showing, with a high degree of plausibility, that the presumptions laid down in Article 3(2) of the DMA are called into question. The standard of proof put forward by the applicant, namely proof of the existence of mere ‘doubts’ or ‘*prima facie*’ evidence, is hence lower than that required by the DMA.”

Two observations. The opinion's formulation at point 36, "genuinely compelling, with no easily identifiable weaknesses", is not in the General Court judgment, not in the DMA and not in any of the 1,061 judgments. It is the Advocate General's. And point 23 adds an obligation the General Court did not state. If the Court adopts both, the DMA will have a standard that is high on content and binding on consequence, which is more than either party asked for.

Exhibit 3: What Article 102 would have given

The opinion never puts the DMA's mechanism beside the law of dominance. This exhibit does, on the four variables that matter.

Who bears the burden.

- **Regulation 1/2003, Article 2.** "In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."

Under the DMA, recital 23 and Article 3(5) place on the company the burden of adducing evidence that the presumption should not apply (opinion, points 33 and 53).

What a presumption of market power looks like in Article 102.

- **Hoffmann-La Roche (85/76), paragraph 41 (capitalisation as in the official text).** "FURTHERMORE ALTHOUGH THE IMPORTANCE OF THE MARKET SHARES MAY VARY FROM ONE MARKET TO ANOTHER THE VIEW MAY LEGITIMATELY BE TAKEN THAT VERY LARGE SHARES ARE IN THEMSELVES, AND SAVE IN EXCEPTIONAL CIRCUMSTANCES, EVIDENCE OF THE EXISTENCE OF A

DOMINANT POSITION."

- **AKZO (C-62/86), paragraph 60.** "With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case."

The Article 102 presumption is evidential and operates inside a decision the Commission must still reason. The DMA presumption is statutory and triggers designation unless rebutted to a high degree of plausibility.

What the authority must do with the company's evidence.

- **Intel (C-413/14 P), paragraph 138.** "However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects."
- **Intel (C-413/14 P), paragraph 139.** "[As rectified by order of 19 September 2017] In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (see, by analogy, judgment of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, paragraph 29)."
- **Google Shopping (C-48/22 P), paragraph 166.** "That demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that

or those market(s). That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130 and the case-law cited).”

Under the DMA as read by the opinion, the Commission “does not conduct an independent investigation into whether the requirements for designation are met unless it decides to open a market investigation” (point 148), and its task is “limited to assessing the arguments and evidence submitted by the undertaking” (point 148).

When the evidence can be produced.

- **PROAS (C-616/13 P), paragraph 43.** “In that regard, as the Court has stated on many occasions, the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicants and taking into account all the elements submitted by them, whether those elements pre-date or post-date the decision at issue, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the Commission decision (judgment of 21 January 2016 in *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 72).”
- **Servier (C-201/19 P), paragraph 124.** “In accordance with that case-law, if the Commission succeeds in establishing the existence of potential competition between two undertakings, on the basis of a body of consistent evidence, and without disregarding any evidence to the contrary of which it actually became aware in the course of the investigation conducted by it on an adversarial basis, including evidence relating to potential barriers to market entry, it is for those undertakings to refute the existence of such competition by adducing evidence to the contrary,

which they may do either in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court (see, in the latter regard, judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 72). Such a burden does not constitute either an undue reversal of the burden of proof or a *probatio diabolica*, since it is sufficient for the undertakings in question to adduce evidence of a positive fact, namely the existence of technical, regulatory, commercial or financial difficulties which, according to them, constitute insurmountable barriers to one of them entering the market. Once such evidence has been adduced, it is for the Commission to ascertain whether it invalidates its analysis as to the existence of potential competition.”

- **Opinion, point 130.** “Moreover, the interpretation according to which an undertaking could, in order to challenge the legality of a presumption-based designation decision, put forward new arguments and evidence before the General Court is contrary to the scheme and objectives of the DMA.”
- **Opinion, point 131.** “As I have already observed, under the DMA, the burden of adducing evidence to rebut the presumptions is borne by the undertaking concerned. As explained by the General Court in paragraph 233 of the judgment under appeal, Article 3 of the DMA establishes a procedure where all the elements seeking to call into question the presumptions laid down in paragraph 2 thereof are to be presented together with the undertaking’s notification. The General Court also correctly drew attention to Commission Implementing Regulation (EU) 2023/814, (32) Article 2(3) of which requires the undertaking concerned to provide its arguments in an annex to its notification by clearly identifying to which of the three cumulative requirements set out in Article 3(1) of the DMA its arguments relate and, for each argument, to explain why, exceptionally, the CPS concerned does not satisfy that requirement, despite the fact that it meets the corresponding threshold laid down in Article 3(2) of the DMA.”

Bytedance cited Galp, PROAS and Servier for the rule that evidence may be produced for the first time before the General Court (fn 31). The opinion does not dispute the rule for Articles 101 and 102. It holds

and, to the extent possible, provide the undertaking concerned with information on its preliminary assessments. (46)”

Exhibit 4: Citation integrity

- **Regulation 1/2003, Article 27(1).** “Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.”

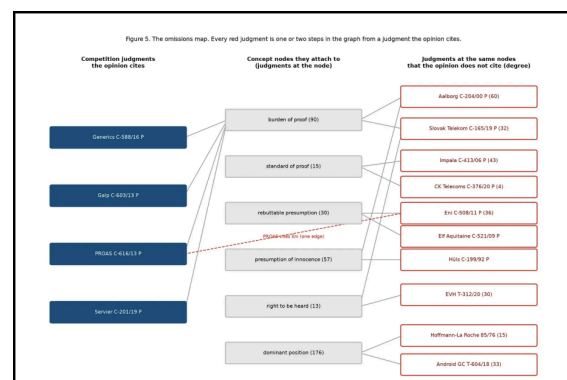
- **Opinion, point 146.** “Article 34(1) of the DMA does not impose the same obligations on the Commission before the adoption of a designation decision made pursuant to Article 3(4) and (5) of the DMA, where no market investigation is opened since the quantitative thresholds of Article 3(2) are met and the arguments challenging the presumptions do not manifestly call them into question. That presumption-based mechanism for a designation decision is simply not referred to in Article 34(1) of the DMA.”

- **Opinion, point 159.** “Consequently, unless the Commission has used its investigative powers before opening a market investigation, (44) the right to be heard does not require it to give the undertaking an opportunity to comment on its provisional assessment of the arguments and evidence before it adopts its final decision.”

- **Opinion, point 160.** “Applying that distinction may not always be straightforward in practice. The boundary between assessing whether the arguments and evidence submitted by the undertaking are capable of calling a presumption into question, on the one hand, and making its own findings, on the other hand, may be difficult to draw. In the absence of specific guarantees for the protection of the undertaking under the DMA’s presumption-based designation mechanism, (45) the Commission should therefore exercise caution

Twelve judgments cited under sixteen case numbers, plus the judgment under appeal. Six concern competition law and all six are cited for procedure. Three of the six are Bytedance's authorities, which the opinion cites in order to hold that they do not apply to the DMA. None is cited for the substance of Article 102 or merger control. The corpus holds the six competition judgments and Bytedance. The other six are outside it and were checked live.

Exhibit 5: What the graph places next to the opinion, and the opinion leaves out



The omissions map

The graph links each judgment to the concepts it decides and to the judgments it cites. Start from the four competition judgments the opinion cites on the evidentiary window, Generics, Galp, PROAS and Servier, and walk outward. Two steps away, through the burden-of-proof node that 90 judgments share, the standard-of-proof node, the rebuttable-presumption node and the right-to-be-heard node, sit the judgments below. One of them, *Eni*, is a single edge from PROAS, which cites it. one appears in the opinion. For each, the table gives the paragraph, the position in the graph relative to the opinion's own authorities, whether the judgment supports the opinion or cuts against it, and what citing it would change. The claim is not that the omissions mislead. It is that a reader of the corpus would expect each of them to be there, and that the opinion reads differently with them in.

Judgment	Paragraph	Position in the graph	Fit to support the opinion	What citing it would change
<i>Eni</i> (C-521/09 P)	41	Eni is a single edge from PROAS, which cites it. It is the only judgment cited by the opinion that is not a competition judgment.	Paragraph 41 supports the opinion.	The fact that Eni is a single edge from PROAS, which cites it, is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Generics</i> (C-307/10)	42	Paragraph 42 is the first of the four competition judgments cited by the opinion.	Paragraph 42 supports the opinion.	The fact that Generics is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Galp</i> (C-307/10)	43	Paragraph 43 is the second of the four competition judgments cited by the opinion.	Paragraph 43 supports the opinion.	The fact that Galp is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>PROAS</i> (C-307/10)	44	Paragraph 44 is the third of the four competition judgments cited by the opinion.	Paragraph 44 supports the opinion.	The fact that PROAS is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Servier</i> (C-307/10)	45	Paragraph 45 is the fourth of the four competition judgments cited by the opinion.	Paragraph 45 supports the opinion.	The fact that Servier is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Eni</i> (C-521/09 P)	46	Paragraph 46 is the first of the four competition judgments cited by the opinion.	Paragraph 46 supports the opinion.	The fact that Eni is a single edge from PROAS, which cites it, is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Generics</i> (C-307/10)	47	Paragraph 47 is the second of the four competition judgments cited by the opinion.	Paragraph 47 supports the opinion.	The fact that Generics is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Galp</i> (C-307/10)	48	Paragraph 48 is the third of the four competition judgments cited by the opinion.	Paragraph 48 supports the opinion.	The fact that Galp is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>PROAS</i> (C-307/10)	49	Paragraph 49 is the fourth of the four competition judgments cited by the opinion.	Paragraph 49 supports the opinion.	The fact that PROAS is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Servier</i> (C-307/10)	50	Paragraph 50 is the first of the four competition judgments cited by the opinion.	Paragraph 50 supports the opinion.	The fact that Servier is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Eni</i> (C-521/09 P)	51	Paragraph 51 is the second of the four competition judgments cited by the opinion.	Paragraph 51 supports the opinion.	The fact that Eni is a single edge from PROAS, which cites it, is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Generics</i> (C-307/10)	52	Paragraph 52 is the third of the four competition judgments cited by the opinion.	Paragraph 52 supports the opinion.	The fact that Generics is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Galp</i> (C-307/10)	53	Paragraph 53 is the fourth of the four competition judgments cited by the opinion.	Paragraph 53 supports the opinion.	The fact that Galp is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>PROAS</i> (C-307/10)	54	Paragraph 54 is the first of the four competition judgments cited by the opinion.	Paragraph 54 supports the opinion.	The fact that PROAS is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."
<i>Servier</i> (C-307/10)	55	Paragraph 55 is the second of the four competition judgments cited by the opinion.	Paragraph 55 supports the opinion.	The fact that Servier is a competition judgment is not sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity."

The passages, verbatim.

- **Elf Aquitaine (C-521/09 P), paragraph 61.** “In those circumstances, if, in order to rebut that presumption, it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness.”
- **Elf Aquitaine (C-521/09 P), paragraph 62.** “It follows from the case-law, moreover, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (see, to that effect, Case C-45/08 Spector Photo Group and Van Raemdonck [2009] ECR I-12073, paragraphs 43 and 44, and EUR. Court H.R., the Janosevic v. Sweden judgment of 23 July 2002, Reports of Judgments and Decisions 2002-VII, § 101 et seq.).”
- **Elf Aquitaine (C-521/09 P), paragraph 70.** “As regards, moreover, the criticism set out in the first indent of paragraph 44 above, that the size of the shareholding in the subsidiary is in itself sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity.”
- **Aalborg Portland (C-204/00 P), paragraph 79.** “Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.”
- **Impala (C-413/06 P), paragraph 48.** “Contrary to what the appellants submit, it cannot therefore be inferred from the Regulation that there is a general presumption that a notified concentration is compatible with, or incompatible with, the common market.”
- **Impala (C-413/06 P), paragraph 51, final sentence.** “In that regard, the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required.”
- **CK Telecoms (C-376/20 P), paragraph 87.** “In those circumstances, having regard, in particular, to the symmetrical structure of Article 2(2) and (3) of Regulation No 139/2004 and to the prospective nature of the Commission’s economic analyses when conducting the review of concentrations, it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the

concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it.”

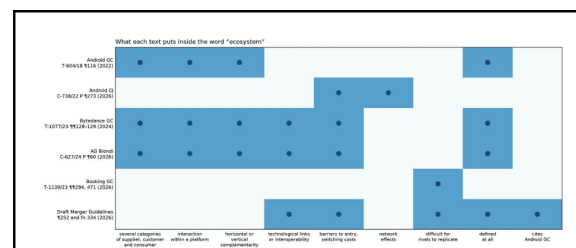
- **Hüls (C-199/92 P), paragraph 150.** “It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments”
- **Slovak Telekom (C-165/19 P), paragraph 80.** “As regards the complaint that the General Court erred in law by failing to acknowledge an infringement of the appellant’s rights of defence, it should be recalled that the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures (judgment of 25 October 2011, Solvay v Commission, C-109/10 P, EU:C:2011:686, paragraph 52 and the case-law cited). That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union and applies where the authorities are minded to adopt a measure which will adversely affect an individual (see, to that effect, judgment of 16 January 2019, Commission v United Parcel Service, C-265/17 P, EU:C:2019:23, paragraph 28 and the case-law cited).”
- **EVH (C-464/23 P), paragraph 211, final sentence.** “That being so, where an institution enjoys broad discretion, observance of procedural guarantees is of fundamental importance, including the obligation for that institution to examine carefully and impartially all the relevant aspects of the situation in question (judgment of 4 May 2023, ECB v Crédit lyonnais, C-389/21 P, EU:C:2023:368, paragraph 57 and the case-law cited).”

Two things follow. The opinion is not short of authority. It is short of authority from the field whose vocabulary the DMA uses, and the field was one or two edges away. Of the eight judgments above, four would have supported the opinion with a competition-law source it does not have, Aalborg for the burden, Hüls for the presumption of innocence, Hoffmann-La Roche for the word “exceptionally”

and Android for the ecosystem. Three would have obliged it to say in terms what it leaves implicit. Impala and CK Telecoms would have put on the page that the gatekeeper’s rebuttal standard exceeds the Commission’s prohibition standard. Elf Aquitaine would have joined the standard of proof to the right to be heard, since the Court there made the second a condition of the first. EVH would have made the opinion choose between a Commission with no discretion and a Commission that weighs whether arguments are genuinely compelling.

For the next notification, three paragraphs to cite. Elf Aquitaine, paragraph 62, for the proposition that a presumption is acceptable only if the rights of the defence are safeguarded in the rebuttal. Aalborg, paragraph 79, for the proposition that an evidential burden on the company does not displace the legal burden on the authority, so that the DMA’s reversal of the legal burden must be justified from the regulation itself and not from competition law. CK Telecoms, paragraph 87, for the comparison the Commission will not want to make.

Exhibit 6: Five definitions of "ecosystem"



What each text puts inside the word ecosystem

- **Google Android, General Court (T-604/18), paragraph 116.** “Thus, in a digital ‘ecosystem’, which brings together several categories of supplier, customer and consumer and causes them to interact within a platform, the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that

brings its components together and of any competitive constraints within that system or from other systems”

- **Bytedance, General Court (T-1077/23), paragraph 128.** “The DMA does not comprise a definition of the term ‘ecosystem’. Nevertheless, the meaning of that concept can be inferred from recitals 3, 32 and 64 of the DMA, from which it is apparent, in essence, that a digital platform ecosystem may consist of one or more CPSs and other services connected to them, for example by means of technological links or interoperability; this is liable to exacerbate entry barriers for competitors of those undertakings and increase the cost of switching providers for end users, making it more difficult for existing or new market operators to compete with those undertakings or contest their position.”
- **Bytedance, General Court (T-1077/23), paragraph 129.** “Consequently, a digital ‘ecosystem’ exists where several categories of suppliers, customers and consumers are brought together and interact within a platform, and where the products or services comprising that ecosystem may overlap with, or be connected to, each other in terms of their horizontal or vertical complementarity.”
- **Opinion, point 60 (opening).** “As a preliminary remark, in paragraphs 128 to 131 of the judgment under appeal, the General Court observed that while the DMA does not provide a definition of an ‘ecosystem’, the meaning of that concept can be inferred from its recitals.”
- **Google Android, Court of Justice (C-738/22 P), paragraph 273.** “It is true that the Court has held that that analysis may prove to be relevant for pricing practices as well as for non-pricing practices, depending on the circumstances. However, as the Advocate General noted in points 131 and 132 of her Opinion, and in accordance with the case-law recalled in paragraph 271 of the present judgment, there are situations in which it is not possible, nor does it make sense, to base the analysis of exclusionary effects of particular conduct on the question whether an as-efficient competitor could replicate that conduct. That is particularly so where the structure of the market, involving, for example, an ecosystem characterised by significant barriers and network

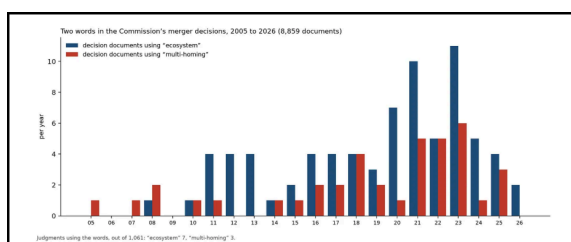
effects, and the conduct at issue make the entry, maintenance or even emergence of an as-efficient competitor practically impossible.”

- **Booking/eTraveli, General Court (T-1139/23), paragraph 471.** “Second, it should be recalled that, in the present case, the increment in the applicant’s market share would be achieved through high growth in one of the few channels for acquiring hotel customers which the applicant does not yet dominate, namely flights, thereby creating a travel ecosystem which would be difficult for other OTAs to replicate, since the applicant would be the leader on both the hotel OTA market and the flight OTA market (see paragraph 440 above). That growth is, in addition, likely to affect in particular certain OTAs which the Commission expressly identified in the contested decision and which, despite their currently modest position on the hotel OTA market, must be regarded as playing a sufficiently important role in the competitive process on that market that the impact on their competitiveness can be regarded as capable of having a negative impact on the dynamics of competition (see paragraph 439 above).”
- **Draft Merger Guidelines, paragraph 252 (footnote markers omitted).** “Entrenchment occurs when the merged firm gains control over certain assets in a way that structurally creates or reinforces existing barriers to entry and expansion resulting in reduced market contestability. Entrenchment gives rise to dynamic anticompetitive effects by deterring the prospect of future entry, expansion or innovation by current or potential competitors. A merger may result in a SIEC when it leads to the entrenchment of a dominant position within a ‘core market’ or across closely related markets, which may consist of one or several distinct but interconnected markets (‘ecosystem’). A merger may lead to entrenchment in the presence of the following factors.”
- **Draft Merger Guidelines, footnote 334.** “See Market Definition Notice, paragraph 104. For instance, (digital) ecosystems can, in certain circumstances, consist of a primary core product and several secondary (digital) products whose consumption is connected to the core product, e.g., by technological links or interoperability. See also Judgment of 14 September 2022, Google and

Alphabet v Commission, T-04/18, EU:T:2022:541 for an example of a digital ecosystem encompassing products built around a mobile operating system, including hardware, an application store and software applications.”

Four observations. Paragraph 129 of Bytedance reproduces the structure and most of the words of paragraph 116 of Android, “several categories of supplier, customer and consumer”, “interact within a platform”, “horizontal or vertical complementarity”, and cites the DMA’s recitals instead. The opinion endorses the definition and adds nothing. Booking defines nothing and uses the word as a finding of fact from internal documents. The draft guidelines are the only text that cites Android, in a footnote, as an example rather than a source. And the Court of Justice, in Android this July, used the word as a legal category once, at paragraph 273, not as a definition but as a market structure in which the as-efficient-competitor test stops making sense. Its other appearances in that judgment are the proper name of Google’s system or the parties’ arguments.

The record. “Ecosystem” appears in 7 of 1,061 judgments, Intel before the General Court in 2014 (one mention, in a Dell document), Android GC (59), Android CJ (15), Superleague (one), T-452/20 (one, in a search term), Booking (20) and Bytedance (59). It appears in 69 merger cases (76 decision documents), none before 2008 and 52 from 2016 onward, with a peak in 2021. The decisions that use it most are Booking/eTraveli (30), Google/Fitbit (27), Oracle/Sun (21), Broadcom/VMware (21), Meta/Kustomer (19) and ARM/Giesecke/Gemalto (17).



Two words in the merger decisions

Exhibit 7: The multi-homing ledger

The three Court passages. Two reject the argument. The third, Booking, accepts it as to the Commission’s

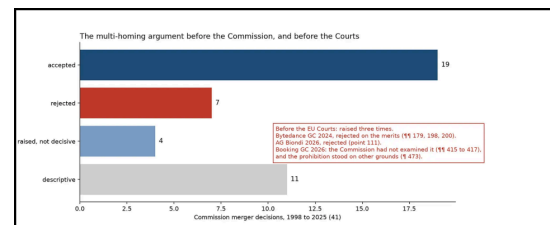
method and leaves the prohibition standing.

- **Bytedance, General Court (T-1077/23), paragraph 171.** “It should be noted that, in the context of digital services in general and online platforms in particular, the concept of ‘multi-homing’ describes the situation in which users use several competing digital services in parallel; in the present case, those services are online social networking services.”
- **Bytedance, General Court (T-1077/23), paragraph 179.** “It is also important to note that the lock-in effects that an online social networking platform may have on its users is a factor different from that relating to the existence or absence of ultrahoming, as is apparent from recitals 2 and 13 of the DMA. Such effects may rise even in the presence of multi-homing, depending, for example, on the significant network effects generated by the platform in question, the intensity of use of a given online social networking platform, the stronger engagement of certain categories of users with that platform, or behavioural bias which certain groups of users might display towards such a platform, to which they may be particularly attached. In addition, even in the presence of multi-homing, some users may be faced with switching costs when they switch the focus of their activities from one platform to another, such as those linked to adjusting their content to the format and algorithm of the various platforms, as the Commission rightly observed in recitals 136 to 139 of the contested decision.”
- **Bytedance, General Court (T-1077/23), paragraph 198.** “Second, and as explained in recital 141 of the contested decision, the asymmetric nature of multi-homing, as far as TikTok users are concerned, can be explained by the economic and historical context in which online social networks operate in the Union. It is common ground that Facebook and Instagram had been active in the Union long before TikTok and that the former already had a large user base in the Union before TikTok was launched in the internal market. In those circumstances, it was to be expected that a large proportion of TikTok users were already using Facebook and Instagram prior to the launch of TikTok and would continue to do so, in parallel, thereafter.”

- **Bytedance, General Court (T-1077/23), paragraph 200.** “In any event, the applicant has not demonstrated that the asymmetric nature of multi-homing as practised by TikTok users, on the one hand, and Facebook and Instagram users, on the other, was due not to the economic and historical context in which online social networks operate in the Union (see paragraph 198 above), but to the absence of network effects and lock-in effects on TikTok.”
- **Opinion, point 55.** “However, that line of argument disregards the manner in which the legal presumptions operate against the undertaking meeting one of the quantitative thresholds of Article 3(2) of the DMA. A case in point is provided by Bytedance’s own illustration, wherein the presumed circumstance was inferred from the number of users and not from the fact that they do not engage in multi-homing. The demonstration of prevalent multi-homing alone is therefore not sufficient manifestly to call into question the presumption because the lack of multi-homing is only one of the proxies for the presumed important gateway position of the CPS in question.”
- **Opinion, point 111.** “However, not only is Bytedance incorrect to assert that there is necessarily a link between multi-homing and a lack of lock-in effects, (23) but it also misrepresents the possible alternative explanation of the asymmetrical nature of multi-homing among OSNs’ users. In paragraph 198 of the judgment under appeal, the General Court repeated the point made by the Commission that this asymmetry is likely to be due to the fact that Facebook and Instagram have been in operation for a longer period in the European Union and that they had a large user base in the European Union before TikTok was launched in the internal market. The other non-designated platforms mentioned by Bytedance do not appear to meet the second criterion (having a large user base in the European Union) and it does not appear to argue otherwise.”
- **Booking/eTraveli, General Court (T-1139/23), paragraph 409.** “Therefore, hotels’ incentives to multi-home depend on the bookings which they expect to make via each hotel OTA. According to the Commission, if post-transaction, the number of bookings on alternative hotel OTAs is likely to

diminish or, at least, risks not increasing as much as would have been possible absent the transaction, hotels will, post-transaction, be more likely to terminate their commercial relationships with the applicant’s competitors, while joining or remaining on the applicant’s platform in order to access its increasing end-customer base (recitals 230, 952 and 953 of the contested decision).”

- **Booking/eTraveli, General Court (T-1139/23), paragraph 415.** “It follows, first, that the applicant’s argument based on the widespread use of channel managers is admissible and, second, that the Commission failed to examine that argument, which, if it were established, could call into question its statement that hotels can generally manage only a limited number of hotel OTAs.”
- **Booking/eTraveli, General Court (T-1139/23), paragraph 417 (opening).** “It must be held that the Commission did not comply with that obligation when it failed to examine the applicant’s argument concerning the widespread use of channel managers. Therefore, the evidence provided by the Commission is not capable of substantiating its conclusion that the applicant’s acquisition of additional customers post-transaction would be likely to result in hotels terminating their commercial relationships with other hotel OTAs. Indeed, if the use of a channel manager were to allow hotels to maintain relationships with a number of OTAs without substantial additional costs or workload, the relatively limited loss of customers suffered by OTAs other than the applicant post-transaction ought not to encourage hotels to reconsider their relations with those OTAs.”



The multi-homing argument before the Commission and before the Courts

The 41 decisions, coded. “Accepted” means the Commission relied on multi-homing in its own assessment to dismiss or reduce a concern. “Rejected” means it found the argument insufficient.

“Descriptive” means the term appears in a market description or a boilerplate passage without bearing on the outcome. The last category, raised and not decisive, means the notifying party argued it and the decision does not rule on it.

Exhibit 7: The multi-homing ledger

Decision	Year	Outcome of the argument
M.1069 WorldCom/MCI II	1998	rejected
M.1741 MCI WorldCom/Sprint	2000	rejected
M.3752 Verizon/MCI	2005	accepted
M.4523 Travelport/Whitlape	2007	accepted
M.4721 Google/DoubleClick	2008	accepted
M.5051 APN/GIGAMAP	2008	accepted
M.5727 Microsoft/Valve	2010	descriptive
M.6091 Microsoft/Sage	2011	accepted
M.7217 Facebook/WhatsApp	2014	accepted
M.7292 DEB/Mondres	2015	raised, not decisive
M.7976 Vodafone/Liberty Global NL	2016	descriptive
M.8124 Microsoft/LinkedIn	2016	rejected
M.7995 Deutsche Börse/LSE	2017	descriptive
M.8228 Facebook/WhatsApp (Article 14)	2017	descriptive
M.8744 Dailymotion/YouTube	2018	accepted
M.8798 Apple/Google	2018	descriptive
M.8880 T-Mobile/UPC Austria	2018	descriptive
M.8884 Microsoft/Google	2018	accepted
M.8884 Vodafone/Liberty Global	2018	descriptive
M.8887 ASB/Final Data	2018	accepted
M.8886 Google/FBI	2018	descriptive
M.10001 Microsoft/Qualcomm	2021	accepted
M.10758 Orange/Telecom Romania	2021	descriptive
M.10058 Sky/Vision/CBS	2021	raised, not decisive
M.8964 LSC/Datality	2021	accepted
M.8828 Avio/NTV	2021	descriptive
M.10025 Meta/Kustomer	2022	rejected
M.10021 CVC/Eurocell	2022	accepted
M.10048 Amazon/Altal	2022	accepted
M.10034 T-Mobile/Telekom	2022	accepted
M.10055 Virgin/MediaTel	2022	accepted
M.10815 Booking/Travel	2023	rejected
M.10845 Microsoft/Activision	2023	raised, not decisive
M.10863 Orange/VOO	2023	descriptive
M.10796 Google/Photomath	2023	raised, not decisive
M.10808 Booking/Vivamus	2023	rejected
M.10809 Facebook/VNAP	2023	accepted
M.10806 Orange/Makhuil	2024	descriptive
M.11481 Synovus/Arvus	2025	accepted
M.11793 Mastercard/VNAP	2025	accepted
M.11854 Zalando/About You	2025	accepted

Accepted 19, rejected 7, descriptive 11, raised and not decisive 4. The seven rejections are the two internet backbone cases of 1998 and 2000, and five since 2016, LinkedIn, Deutsche Börse/LSE, Kustomer, VMware and Booking. Those five ended in commitments or prohibition. The pattern is not that multi-homing is a bad argument.

It is that it is a clearance argument, and the cases in which it fails are the cases that reach a court. Booking shows the ceiling. Even where the General Court faulted the Commission for not examining it, the prohibition stood (paragraphs 415 to 417 and 473).

Exhibit 8: The right to be heard, substituted

- **General Court, paragraph 353.** “In the third place, it must be held, by contrast, that, as the applicant claims – without serious challenge on

the part of the Commission – the applicant did not have the opportunity to submit its observations during the administrative procedure on the Commission’s finding in recital 132 of the contested decision that ByteDance had its own ecosystem, with the result that its right to be heard had been infringed. While the absence of an ecosystem and its consequences for the designation of ByteDance as a gatekeeper had admittedly been the subject of discussions between the parties, the Commission had not informed the applicant of its view that, as a matter of fact, ByteDance did have an ecosystem.”

- **General Court, paragraph 370.** “In those circumstances, the applicant has failed to show, in accordance with the case-law referred to in paragraph 355 above, that it cannot be entirely ruled out that the Commission’s decision would have been different if it had had the opportunity to comment on the findings made in recital 141 in fine of the contested decision concerning the intensity of use of TikTok.”
- **Opinion, point 156.** “Against that backdrop, first, as already observed by the General Court, (40) the right to be heard does not require that, before taking a final position on the assessment of the evidence submitted by a party, a competent authority must offer that party a further opportunity to comment on that evidence. Secondly, an undertaking which has itself submitted the relevant facts and evidence is ordinarily in a position to address their relevance to the assessment at the time of submission. (41)”
- **Opinion, point 157.** “Thirdly, the Court’s case-law makes clear that, where a competent authority has no discretion and is required to draw a legal consequence from a specific circumstance that is the premiss of its decision, the right to be heard requires that the affected party be given an effective opportunity to express its view on both that circumstance and the applicability of any exception to drawing that legal consequence from it. (42) The right to be heard does not, however, require the authority to disclose its intended decision or its provisional assessment to the affected party. It requires the authority to take into account the observations submitted and to examine carefully and impartially all the relevant aspects of the case, and to give a detailed statement of reasons for its decision. (43)”

- **Opinion, point 184.** “Overall, it follows that the General Court erred in law in finding that the Commission was required to give Bytedance the opportunity to submit observations on its findings in recitals 132 and 141 of the decision at issue. That said, it is also apparent that, in paragraphs 353 and 370 of the judgment under appeal, the General Court was entitled to conclude that the arguments alleging a breach by the Commission of Bytedance’s right to be heard in respect of those recitals had to be rejected.”

The sources of point 156 are a trade-mark appeal and a return decision under the Return Directive.

- **Tulliallan Burlington (C-155/18 P), paragraph 94.** “The right to be heard extends to all the factual and legal material which forms the basis for the decision, but not to the final position which the authority intends to adopt (order of 8 September 2015, DTL Corporación v OHIM, C-62/15 P, not published, EU:C:2015:568, paragraph 45). That right does not require that, before taking a final position on the assessment of the evidence submitted by a party, the Board of Appeal of EUIPO must offer that party a further opportunity to comment on that evidence (judgment of 19 January 2012, OHIM v Nike International, C-53/11 P, EU:C:2012:27, paragraph 53). In addition, a party which itself submitted the facts and evidence in question was by definition in a position to state their possible relevance to the resolution of the dispute at the time when it submitted them (order of 4 March 2010, Kaul v OHIM, C-193/09 P, not published, EU:C:2010:121, paragraph 66).”
- **Boudjlida (C-249/13), paragraph 55.** “It follows that the right to be heard prior to the adoption of a return decision must be interpreted not as meaning that the authority concerned is required to warn an illegally staying third-country national, prior to the interview organised with a view to that adoption, that it is contemplating adopting a return decision against him, to disclose to him the evidence on which that authority intends to rely to justify that decision, or again to allow him a period for reflection before admitting his observations, but as meaning that that third-country national must have the opportunity effectively to submit his point of view on the subject of the illegality of his stay and reasons which might, under national law, justify that

authority refraining from adopting a return decision.”

Both say what the opinion says. Neither concerns an undertaking facing a regulatory status with, in the opinion’s own words at point 152, “significant legal and operational consequences”. Al-Jubail, cited at footnote 46, says that institutions must be “all the more scrupulous” where the rules provide fewer guarantees, which reads as a caution against the opinion’s conclusion rather than for it.

- **Al-Jubail (C-49/88), paragraph 16.** “It should be added that, with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems.”

Exhibit 9: What the Court did not ask, and a ledger

The Court confined the opinion to the first and third parts of the first ground and to the substitution of grounds (point 11). The second, fourth and fifth parts of the first ground, which concern the presumptions under Article 3(2)(a) and (c), significant impact and entrenched and durable position, have no opinion. The Court may decide them without one.

Five predictions, to be revisited at judgment.

Exhibit 9: What the Court did not ask, and a ledger	
Proposition in the opinion	Prediction
The high degree of plausibility confirmed as the Article 9(3) standard	Adopted
Obligation to open a market investigation where arguments manifestly call the presumptions into question (point 23)	Adopted in substance, with “may” read as a bounded discretion
Evidence not submitted with the notification inadmissible before the General Court (points 130, 131)	Adopted, and the point most likely to generate the next reference
No breach of the right to be heard (Article 347) and (3) inapplicable to presumption-based designations	Adopted as to the result: the Court may keep the General Court’s reasoning and refuse the substitution
Multi naming not linked to absence of lock-in (point 111)	Adopted without discussion

What to watch

Whether the Court follows point 23 and makes the market investigation an obligation, which no designation decision so far has had to reckon with. Whether it follows points 130 and 131 and closes

the evidentiary window at notification, which would change how every notification is drafted. Whether it mentions Article 102 at all. Whether paragraph 40 of the General Court judgment, on which Booking/eTraveli rests part of its evidence analysis, survives untouched. And whether the next court to define an ecosystem, in the DMA, in Article 102 or in merger control, cites the other two.

Method note

The opinion was taken from InfoCuria in its original English and split into its 186 points. The General Court judgment was taken from EUR-Lex, split into its 381 paragraphs and added to the corpus. Every judgment the opinion cites was checked at the cited paragraph, in the corpus for the six competition judgments and on EUR-Lex for the six others. The omissions in Exhibit 5 were found by taking the four competition judgments the opinion cites, listing the concept nodes they share in the graph, and ranking the other judgments at those nodes by degree. Each candidate was read at the paragraph, in the corpus or live on EUR-Lex, and kept only where the paragraph

decides a question the opinion decides. The standard-of-proof phrases, “ecosystem” and “multi-homing” were searched across the 1,061 judgments of the corpus and the 8,859 Commission merger decisions in the companion corpus, with counts by year. The 41 decisions mentioning multi-homing were coded by reading each passage. The coding is mine and the categories are stated in Exhibit 7. The ecosystem matrix records which elements each text names, not how it weighs them.

On the use of AI. The SAGE publishing guidelines distinguish assistive uses of AI from generative ones and ask for disclosure of the second. This piece used the first. AI corrected grammar and punctuation, reordered paragraphs I had drafted, formatted references, and ran a retrieval routine I designed. The routine matched each point of the opinion to the paragraphs it reviews and cites and pulled the texts from the official sources. The word counts across the two corpora came from the same routine. The questions, the reading, the coding of the decisions and the prose are mine, and so is the responsibility for them.

See also: The EU Court of Justice’s Advocate General proposes dismissing a Big Tech company’s appeal against its gatekeeper designation under the Digital Markets Act (*ByteDance*) – 15 October 2026, Art. 140029

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