



Brussels, 6 March 2024
(OR. en)

7445/24

RC 9

COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 6 March 2024

To: Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

No. Cion doc.: COM(2024) 106 final

Subject: REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Annual report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)

Delegations will find attached document COM(2024) 106 final.

Encl.: COM(2024) 106 final



EUROPEAN
COMMISSION

Brussels, 6.3.2024
COM(2024) 106 final

**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**Annual report on Regulation (EU) 2022/1925 of the European Parliament and of the
Council on contestable and fair markets in the digital sector and amending Directives
(EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)**

EN

EN

I. INTRODUCTION

- (1) This report is addressed to the European Parliament and the Council of the European Union. It sets out the activities undertaken by the Commission in the context of Regulation (EU) 2022/1925¹ (the Digital Markets Act, hereinafter “DMA”) in 2023, as foreseen in Article 35 DMA.²
- (2) Article 35 DMA requires the Commission to submit an annual report on the implementation of the DMA and the progress made towards achieving its objectives. This is the first report of this kind, covering the first year in which the DMA became applicable and was implemented by the Commission.
- (3) Section II of this report gives an overview of the Commission’s activities in 2023 under the DMA. Section III describes the monitoring activities carried out and Section IV describes cooperation and coordination with national authorities. Finally, Section V sets out the tasks performed by the High-Level Group for the Digital Markets Act.

II. THE COMMISSION’S ACTIVITIES IN 2023

a. Procedural decisions and documents

Implementing Regulation

- (4) The DMA empowers the Commission to adopt implementing acts laying down detailed arrangements on issues identified in Article 46 DMA. A number of these empowerments were bundled in a single implementing act, namely Commission Implementing Regulation (EU) 2023/814 (‘the Implementing Regulation’).³
- (5) The Commission published a draft version of the Implementing Regulation for public consultation between 9 December 2022 and 9 January 2023. Following the procedural rules introduced by the DMA, the Implementing Regulation also draws on procedures used in competition law enforcement. It furthermore includes novel elements to ensure a leaner and more effective procedure given the dynamic nature of digital markets. This notably includes a leaner procedure for access to the Commission’s file, while ensuring legal certainty and rights of defence for the companies concerned.
- (6) The Commission presented the draft Implementing Regulation, including the results of its public consultation, to the Digital Markets Advisory Committee (DMAC)⁴ during its inaugural meeting on 13 January 2023. Based on the responses to the public consultation, the Commission simplified the procedure for access to the file laid down in the Implementing Regulation.

¹ OJ L 265, 12.10.2022, p. 1–66

² The Report covers the calendar year 2023, hence more recent developments such as the closing of market investigations launched in 2023 for iMessage, Bing, Edge and Microsoft Advertising are not covered, see https://digital-markets-act.ec.europa.eu/commission-closes-market-investigations-microsofts-and-apples-services-under-digital-markets-act-2024-02-13_en

³ OJ L 102, 17.4.2023, p. 6–19

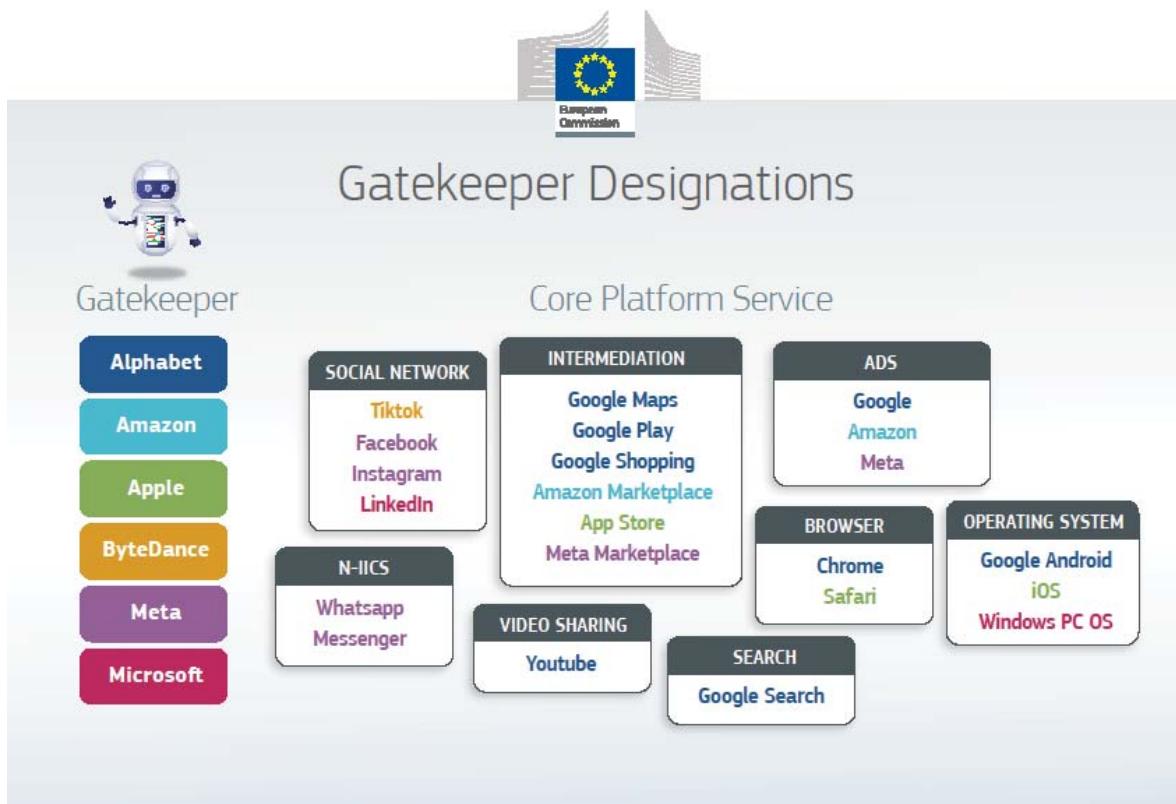
⁴ The DMAC supports the Commission in the adoption of implementing acts under the DMA. It is classified as a committee under Regulation (EU) No 182/2011 and functions in accordance with its Rules of Procedure.

(7) On 14 April 2023, the Commission adopted the Implementing Regulation together with its two Annexes, which include the form that undertakings who meet the thresholds laid down in Article 3(2) DMA must use to notify the Commission for the purposes of designation as gatekeeper (the 'Form GD'), and specifications on the form and length of documents submitted under the DMA.

(8) In addition to the Form GD, the Commission published a number of other templates in the context of DMA implementation to ensure legal certainty and a uniform application of submissions and requests made to the Commission.⁵

b. Designation decisions

(9) Article 3(3) DMA sets out that undertakings providing core platform services that meet the thresholds laid down in Article 3(2) DMA shall notify the Commission of having reached these thresholds. On 3 July 2023, the Commission received notifications⁶ from Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung pursuant to Article 3(3), first subparagraph, DMA. On 5 September 2023, the Commission designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as gatekeepers of altogether 22 Core Platform Services (CPS) as indicated in the table below, and adopted a decision not to designate Samsung as a gatekeeper for its web browser.⁷



⁵ https://digital-markets-act.ec.europa.eu/legislation_en#templates

⁶ The Commission has been in constructive discussions with undertakings other than those that have notified, in view of possible notifications. The DMA is built on a system of self-assessment, where it is for the companies concerned to notify their core platforms services if they meet the relevant thresholds. The Commission notes that none of these other undertakings which have been in discussion with the Commission considered that they would meet the thresholds for notification in 2023.

⁷ <https://digital-markets-act-cases.ec.europa.eu/search>

- (10) Companies that exceed the thresholds laid down in Article 3(2) DMA had the opportunity to present substantiated arguments that they should not be designated as a gatekeeper (“rebuttal”) under Article 3(5) DMA. Of the ten rebuttals⁸ the Commission received together with the first wave of notifications, the Commission accepted three outright,⁹ rejected three¹⁰ and considered that four rebuttals¹¹ were sufficiently substantiated for the Commission to open market investigations to further assess the arguments provided therein.
- (11) In parallel, the Commission opened a qualitative market investigation to determine whether Apple’s operating system iPadOS, despite not meeting the quantitative thresholds, should be listed as an important gateway for business users to reach end users.
- (12) At a meeting on 10 October 2023 the Commission informed the DMAC about the gatekeeper designation decisions and the opened market investigations. On this occasion, the Commission outlined the timeline and procedures for both existing and potential new designations, along with the sequence of events for market investigations.

Overview of designations by notifying undertaking

- (13) **Alphabet** notified the Commission that it meets the thresholds in relation to the following core platform services (“CPSs”): (i) its online intermediation service Google Shopping; (ii) its online intermediation service Google Play; (iii) its online intermediation service Google Maps; (iv) its online search engine Google Search; (v) its video-sharing platform service YouTube; (vi) its number-independent interpersonal communications service (“NIICS”) Gmail; (vii) its operating system Google Android; (viii) its web browser Google Chrome; and (ix) its online advertising services. With its notification, Alphabet presented arguments seeking to demonstrate that although its NIICS Gmail meets all the thresholds, it does not satisfy the requirements listed in Article 3(1) DMA in relation to that CPS and that CPS should therefore not be listed in its designation decision as an important gateway for business users to reach end users.
- (14) The Commission designated Alphabet as a gatekeeper¹² in relation to:
 - (i) Alphabet’s online intermediation services Google Shopping;
 - (ii) Alphabet’s online intermediation services Google Play;
 - (iii) Alphabet’s online intermediation services Google Maps;
 - (iv) Alphabet’s online search engine Google Search;
 - (v) Alphabet’s video-sharing platform service YouTube;

⁸ The Commission received rebuttals from Alphabet regarding their number-independent interpersonal communications service (NIICS) Gmail, from Apple regarding their NIICS iMessage, from ByteDance regarding their online social networking service (notified by ByteDance as a video sharing platform service) TikTok, from Meta regarding their NIICS Messenger and their online intermediation service Marketplace, from Microsoft regarding their NIICS Outlook, their online advertising service Microsoft Advertising, their online search engine Bing, and their web browser Edge, and from Samsung regarding their web Browser Samsung Internet Browser (SIB).

⁹ The Commission accepted outright the rebuttals submitted by Alphabet regarding Gmail, by Microsoft regarding Outlook and by Samsung regarding the web browser SIB.

¹⁰ The Commission rejected outright the rebuttals submitted by ByteDance regarding TikTok, and by Meta regarding Messenger and Marketplace.

¹¹ The Commission opened market investigation for Apple’s iMessage, Microsoft’s Bing, Microsoft Advertising and Edge.

¹² https://digital-markets-act.ec.europa.eu/gatekeepers_en#alphabet-inc

- (vi) Alphabet's operating system Google Android, including Alphabet's related middleware insofar as it controls the basic functions of Google Android tablets and smartphones and enables software applications to run on them;
- (vii) Alphabet's web browser Google Chrome; and
- (viii) Alphabet's online advertising services, including Google Analytics and AdSense for Search. Further, while Alphabet submitted that the display of an ad is part of the end user-facing service where the ad is displayed, the Decision finds the display of ads to be part of both Alphabet's end user-facing services and Alphabet's online advertising CPS.

(15) The Commission accepted the rebuttal arguments raised by Alphabet in relation to its NIICS Gmail, because it is provided based on open standards and in a standardised format, allowing Gmail users to exchange messages with users of any email service, and because Alphabet currently does not exert any control over the operations of Gmail that would allow it to impose any significant degree of dependency between business users and end users. On this basis the Commission considered that Gmail is not an important gateway for business users to reach end users within the meaning of Article 3(1)(b) DMA and therefore did not list that CPS in Alphabet's designation decision.

(16) **Amazon** notified the Commission that it meets the thresholds in relation to the following CPSs: (i) its online intermediation services Amazon Marketplace; and (ii) its online advertising services Amazon Advertising.

(17) The Commission designated Amazon as a gatekeeper in relation to:

- (i) Amazon's online intermediation services Amazon Marketplace;
- (ii) Amazon's online advertising services Amazon Advertising.¹³

(18) **Apple** notified the Commission that it meets the thresholds in relation to the following CPSs: (i) its online intermediation services iOS AppStore; (ii) its operating system iOS; (iii) its web browser Safari on iOS; and (iv) its NIICS iMessage. Together with its notification, Apple submitted a rebuttal request in relation to its NIICS iMessage.

(19) The Commission designated Apple as a gatekeeper¹⁴ in relation to:

- (i) Apple's online intermediation services AppStore, irrespective of the device on which it is used because the App Store is used for the same common purpose across all devices on which it is available (i.e. iOS, iPadOS, macOS, watchOS and tvOS), namely to intermediate the distribution of apps;
- (ii) Apple's operating system iOS, where the Decision considers that, while the core features and technical characteristics of iOS and iPadOS are similar and result in similar environments, Apple has provided sufficient facts and arguments to hold that in the end, each of them constitutes a distinct operating system under the DMA, with only iOS meeting the quantitative thresholds for designation; and

¹³ https://digital-markets-act.ec.europa.eu/gatekeepers_en#amazoncom-inc

¹⁴ https://digital-markets-act.ec.europa.eu/gatekeepers_en#apple-inc

- (iii) Apple's web browser Safari, irrespective of the device on which it is offered because Safari serves the common purpose across devices (i.e. iPhone, iPad and Mac) of providing users with a tool to offer, access and interact with web content.

(20) The Commission concluded that Apple provided sufficiently substantiated arguments to manifestly call into question the presumptions laid down in Article 3(2) DMA in relation to Apple's NIICS iMessage and therefore decided to open a market investigation.

(21) In relation to Apple's arguments regarding iOS and iPad OS, the Commission opened a market investigation with a view to establishing whether Apple is a gatekeeper also in relation to iPadOS, even though it does not meet the quantitative thresholds.¹⁵

(22) Apple appealed the Commission's designation decision, as well as the decision to open a market investigation in relation to iMessage (Cases T-1079/23 & T-1080/23, both appeals are ongoing).

(23) **ByteDance** notified the Commission that it meets the thresholds laid down in Article 3(2)(a) and Article 3(2)(b) DMA, but not those laid down in Article 3(2)(c) in relation to its TikTok service which it considers to constitute as a video-sharing platform service CPS (as opposed to an online social networking service CPS). With its notification, ByteDance submitted arguments for rebuttal in relation to TikTok.

(24) The Commission designated ByteDance as a gatekeeper¹⁶ in relation to its online social networking service TikTok. While the Decision does not contest that TikTok meets the definition of a video-sharing platform service, the Commission considers that TikTok goes beyond video-sharing functionalities and offers all the features and functionalities of an online social networking service, and that this qualification best reflects the breadth of TikTok's functionalities under the DMA. The Decision also finds that ByteDance's methodology for counting TikTok's users is flawed and concludes that ByteDance meets all the thresholds laid down in Article 3(2) DMA in relation to TikTok. The Decision rejects the rebuttal arguments raised by ByteDance, because those were not sufficiently substantiated to manifestly call into question the presumption that it is a gatekeeper with respect to the online social networking service TikTok.

(25) ByteDance appealed the decision to reject its rebuttal arguments and designate it as a gatekeeper in relation to TikTok (Case T-1077/23, still ongoing).

(26) **Meta** notified the Commission that it meets the thresholds in relation to the following CPSs: (i) its single online social networking service supported by online advertising comprising, in Meta's view, Facebook, Instagram, Meta Ads, Messenger, Marketplace, Facebook Dating and Facebook Gaming Play; and (ii) its NIICS WhatsApp.

(27) The Commission designated Meta as a gatekeeper in relation to

- (i) Meta's online social networking service Facebook;
- (ii) Meta's online social networking service Instagram;
- (iii) Meta's online advertising service Meta Ads;
- (iv) Meta's NIICS WhatsApp;

¹⁵ By end of 2023, the Commission had no indication that opening of other market investigations for qualitative designation was warranted. The Commission's does a continuous monitoring in this respect.

¹⁶ https://digital-markets-act.ec.europa.eu/gatekeepers_en#bytedance-ltd

(v) Meta's NIICS Messenger and
 (vi) Meta's online intermediation services Marketplace.¹⁷

(28) The Decision rejected the rebuttal arguments raised by Meta in relation to its NIICS Messenger and its online intermediation service Marketplace. Contrary to those rebuttal arguments, the Commission considers Messenger to be a standalone NIICS CPS which cannot be considered to merely be the chat functionality of the online social networking CPS Facebook. Contrary to those rebuttal arguments, the Commission considers Marketplace to have business users and therefore to also constitute a business-to-consumer online intermediation service.

(29) Meta appealed the designation of its NIICS Messenger and of its online intermediation services Marketplace as important gateways for business users to reach end users in its designation decision (Case T-1078/23).

(30) **Microsoft** notified the Commission that it meets the thresholds in relation to the following CPSs: (i) its operating system Windows PC OS; (ii) its online search engine Bing, (iii) its web browser Edge; (iv) its online advertising services Microsoft Advertising; (v) its NIICS Outlook.com; and (vi) its online social networking service LinkedIn. With its notification, Microsoft presented arguments seeking to demonstrate that although its online search engine Bing, its web browser Edge, its online advertising services Microsoft Advertising, and its NIICS Outlook.com meet the thresholds laid down in Article 3(2) DMA, these CPSs do not satisfy the requirements listed in Article 3(1) DMA and that they should therefore not be listed in Microsoft's designation decision.

(31) The Commission designated Microsoft as a gatekeeper in relation to
 (i) Microsoft's operating systems for PCs, which includes Windows PC OS; and
 (ii) Microsoft's online social networking service LinkedIn.¹⁸

(32) In the Decision, the Commission accepted the rebuttal arguments raised by Microsoft in relation to its NIICS Outlook.com, since the current configuration of that service, it is not an important gateway for business users to reach end users. In a separate Decision, the Commission opened market investigations regarding the search engine Bing, the web browser Edge; and the online advertising services Microsoft Advertising¹⁹, because the Commission considered the arguments presented by Microsoft to be sufficiently substantiated to manifestly call the presumptions laid down in Article 3(2) DMA into question.

(33) **Samsung** notified the Commission that it meets the thresholds in relation to its web browser Samsung Internet Browser ("SIB"). Together with its notification, Samsung presented a rebuttal request seeking to demonstrate that although SIB meets all the thresholds in Article 3(2) DMA, it does not satisfy the requirements laid down in Article 3(1) DMA and that it should therefore not be designated as a gatekeeper. The Commission accepted the rebuttal arguments raised by Samsung in relation to its web browser SIB and decided not to designate Samsung as a gatekeeper.²⁰ In particular, the

¹⁷ https://digital-markets-act.ec.europa.eu/gatekeepers_en#meta-platforms-inc

¹⁸ https://digital-markets-act.ec.europa.eu/gatekeepers_en#microsoft-corporation

¹⁹ https://ec.europa.eu/competition/digital_markets_act/cases/202343/DMA_100015_584.pdf

²⁰ https://ec.europa.eu/competition/digital_markets_act/cases/202346/DMA_100038_100.pdf

Commission considered SIB's low share of webpage views and low scale of usage in the Union as an indicator that SIB is not a significant web browser in the Union and thus, it is not an important gateway for business users to reach end users.

III. MONITORING

- (34) Gatekeepers need to comply with the obligations laid down in Articles 5, 6, 7 and 15 DMA six months after designation, implying that those companies designated on 5 September 2023 need to comply by 7 March 2024. Therefore, the monitoring of compliance with those obligations falls outside of the scope of this first annual report.
- (35) The obligations on gatekeepers to provide information about concentrations pursuant to Article 14 DMA and to set up a compliance function pursuant to Article 28 DMA apply from the moment of designation and the Commission's activities related to them in 2023 are therefore included in this report. The Commission is assessing compliance with these obligations and may take action where deemed appropriate.

a. Article 14 DMA: Information about concentrations

- (36) Pursuant to Article 14 DMA, gatekeepers are required to inform the Commission of any concentration they intend to undertake, where the merging entities or the target of the concentration provide CPSs, other services in the digital sector, or enable the collection of data.
- (37) In 2023, the Commission received three submissions of intended concentrations by gatekeepers, in September, October, and December 2023. A non-confidential summary of the information submitted by gatekeepers pursuant to Article 14 DMA, together with the date of notification and the identity of the undertakings concerned is published on the Commission's website²¹ on a rolling basis and not earlier than four months after receipt of the information.

b. Article 28 DMA: Compliance function

- (38) Pursuant to Article 28 DMA, gatekeepers are required to introduce a compliance function which must be independent of the gatekeeper's operational functions and consist of one or more compliance officers with sufficient authority, stature, and resources to be able to monitor the gatekeeper's compliance with the DMA and advise them on it.
- (39) The Commission has been monitoring the establishment of such a compliance function by each designated gatekeeper to ensure that it meets the requirements laid down in Article 28 DMA. After discussions with and guidance from the Commission regarding these requirements, all designated gatekeepers have appointed compliance officers following principles laid down in Article 28 DMA and communicated the details to the Commission.

IV. COOPERATION BETWEEN THE COMMISSION AND NATIONAL AUTHORITIES

²¹ <https://digital-markets-act-cases.ec.europa.eu/acquisitions>

- (40) The DMA lays down the general principles governing the interplay between the DMA and other relevant Union law, such as competition, data protection and consumer protection law. These principles are outlined in Articles 1(5) and 1(6) DMA.
- (41) In addition, Articles 37 and 38 DMA envisage that the Commission and Member States work in close cooperation and coordinate their enforcement actions to ensure coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers.
- (42) To date, cooperation between the Commission and national authorities, and in particular national competition authorities (NCAs), has taken place mainly through the European Competition Network (ECN). This cooperation goes in both directions: the Commission provided information and updates to the NCAs about its designation decisions and market investigations under the DMA, and NCAs provided information to and exchanged views with the Commission, as envisaged by the DMA, on relevant enforcement actions under their national competition laws.
- (43) During the reporting period, no NCA informed the Commission of first formal investigative measures and their intention to launch an investigation under national competition law concerning a designated gatekeeper. Before the end of the reporting period, one NCA communicated to the Commission under Article 38(3) DMA draft measures it intends to impose on a designated gatekeeper based on national competition law. Since the obligations in Articles 5, 6 and 7 DMA only apply as of 7 March 2024, no investigation has been conducted by an NCA as foreseen under Article 38(7) DMA into a case of possible non-compliance with these obligations in their territory.

V. THE HIGH-LEVEL GROUP FOR THE DIGITAL MARKETS ACT

- (44) The High-Level Group for the Digital Markets Act was established by a Commission Decision of 23 March 2023 based on Article 40 DMA.²² The group is composed of the European bodies and networks identified in the DMA²³ and has been set up as a group of experts, in compliance with the Commission Decision²⁴ establishing horizontal rules on the creation and operation of Commission expert groups. The High-Level Group is chaired by the Commission which additionally offers the group secretariat support. The group aims to support a coherent and effective implementation of the DMA and other sector-specific regulations applicable to gatekeepers.
- (45) The group is also relevant in the identification and evaluation of any interactions between the provisions of the DMA and sector-specific rules. Moreover, the Commission can also leverage the expertise and experience of relevant sectoral bodies and networks during market investigations into new services and practices.²⁵

²² European Commission, "Commission Decision of 23.3.2023 on setting up the High-Level Group for the Digital Markets Act," Brussels, 23.3.2023, C(2023) 1833 final. More information available at:

https://competition-policy.ec.europa.eu/system/files/2023-03/High_Level_Group_on_the_DMA_0.pdf.

²³ Body of the European Regulators for Electronic Communications, European Data Protection Supervisor and European Data Protection Board, European Competition Network, Consumer Protection Cooperation Network, and European Regulatory Group of Audiovisual Media Regulators.

²⁴ Commission Decision C(2016) 3301 final establishing horizontal rules on the creation and operation of Commission expert groups.

²⁵ Ibid. art. 40(7).

(46) The High-Level Group convened for its inaugural meeting on 12 May 2023, following the nomination of six representatives by each of its five members.²⁶ During the inaugural meeting, the members presented developments in their areas of expertise relevant for the enforcement of the DMA. The Commission presented the state of implementation of the DMA, which was followed by an exchange of views.

(47) The High-Level Group agreed on Rules of Procedure at its second meeting on 27 November 2023. The discussion in that meeting focussed on the preparation of the establishment of High-Level Group sub-groups. It is expected that two sub-groups will be established during 2024. The High-Level Group and its sub-groups shall not be involved in ongoing Commission proceedings or investigations under the DMA.²⁷

²⁶ Each body or network can also provide for alternate members.

²⁷ Which is the sole prerogative of the Commission as enforcer of that Regulation, subject to the Advisory Committee procedure as laid down in Article 50(2) DMA.