The Future of Digital Mergers in a Post-DMA World

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Introduction

The Digital Markets Act (DMA)[1] wants to ensure that digital markets are – or once again become – contestable and fair. To that purpose, Articles 5, 6 and 7 DMA foresee some ground rules for those providers of core platform services that have been designated as digital gatekeepers.[2] These are important do's and don'ts. The DMA also foresees a less well-known obligation in Article 14 DMA,[3] however: digital gatekeepers are required to inform the European Commission of any merger they want to engage in before carrying it out, if this merger[4] involves a core platform service or a service in the digital sector, or if it enables data collection. At first sight, this additional obligation on gatekeepers might seem somewhat odd, for the DMA does not foresee any direct consequences of providing said information. Also, the European Union already possesses an entirely independent system of EU merger control for all those mergers that reach the jurisdictional thresholds, and the DMA does not visibly link to that system. The only direct consequence flowing from an information that a gatekeeper provides under Article 14 para 1 DMA consists in the European Commission advising competent national authorities of said information and publishing an annual report on such information received.[5] While this consequence was not contained in the original proposal for the DMA in 2020,[6] it was later added in the legislative process.

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[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, DMA) [2022] OJ L265/1.

[2] For gatekeeper designation, see Article 3 DMA.

[3] Article 14 para 1 DMA states that a 'gatekeeper shall inform the Commission of any intended concentration [involving] core platform services or any other services in the digital sector or enable the collection of data, […].' To this, Article 14 para 4 DMA adds that '[t]he Commission shall inform the competent authorities of the Member States of any information received pursuant to paragraph 1 and publish annually the list of acquisitions […].'

[4] A merger is understood to be a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) [2004] OJ L24/1.

[5] Article 14 para 4 DMA.

[6] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

Article 14 DMA in context

To make sense of Article 14 DMA, this provision needs to be seen against the background of the rising concentration in digital markets, with market power and power over user data increasingly concentrated in the hands of only a small number of digital platforms. The specific characteristics of digital markets lend themselves to this market outcome, with 'winner takes all' (or most) of the market competition, network effects, tipping and user lock-in.[7] On the other hand, digital platforms have for many years engaged in an active policy of buying promising, innovative start-ups. While many observers have dubbed these 'killer acquisitions',[8] these are often more like zombie acquisitions: the innovation of the start-up is not killed off, but incorporated into the powerful digital platform.[9]

Over the past decade or so, Big Tech companies have acquired over 800 small companies.[10] Of these, only one was successfully challenged and stopped last year, namely Meta's acquisition of Giphy in the UK.[11] The European Commission had no jurisdiction to review this merger. In Austria, Meta's acquisition of GIF library Giphy was cleared subject to conditions by the Supreme Cartel Court.[12] So, to put it somewhat exaggeratedly, one Big Tech merger was successfully challenged – but what about the remaining 799? In a study I carried out for the European Commission, I investigated nearly 100 national merger cases in digital and technology sectors, and found that national competition authorities only rarely challenge these acquisitions. In fact, 76% of these mergers were unconditionally cleared in either phase 1 or 2, while only 6% of mergers were ultimately prohibited.[13]

What is the reason for this very high rate of digital mergers that go unchallenged? There are three possible answers to this question: (1) Either there is no competition problem, or (2) no jurisdiction can be established to analyse these mergers at the level of the European Union, or

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[7] Jason Furman et al., *Unlocking Digital Competition – Report of the Digital Competition Expert Panel* (2019); Jacques Crémer, Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Report to the European Commission, 2019).

[8] This term was used in relation to acquisitions in pharmaceuticals by Colleen Cunningham, Florian Ederer & Song Ma, 'Killer Acquisitions' (2021) 129 *Journal of Political Economy* 649.

[9] Empirical evidence has found that 60% of products acquired by Big Tech between 2015 and 2017 were discontinued, as well as 50% of mobile apps acquired by Big Tech between 2015 and 2019; see Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy' (2021) 54 *Information Economics and Policy*, Article 100890; Pauline Affeldt and Reinhold Kesler, 'Big Tech Acquisitions – Towards Empirical Evidence' (2021) 12 *Journal of European Competition Law & Practice* 471. However, the technology behind those products and apps may still be relied upon by the acquirer; see Laureen de Barsy, 'Big Tech Acquisitions and Innovation' (24 March 2023, MaCCI conference 2023).

[10] Federal Trade Commission, 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study' (September 2021) <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>; American Economic Liberties Project, 'Big Tech Mergers' <https://www.economicliberties.us/big-tech-merger-tracker/>; Chris Alcantara, Kevin Schaul, Gerrit De Vynck and Reed Albergotti, 'How Big Tech got so big: Hundreds of acquisitions' *Washington Post* (21 April 2021) <https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/>.

[11] Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021); *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

[12] Kartellgericht, 7 February 2022, 28 Kt 8/21t and 28 Kt 9/21i – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.

[13] Viktoria H.S.E. Robertson, *Merger Review in Digital and Technology Markets: Insights from National Case Law* (Report to the European Commission, 2022).

(3) competition law does not provide appropriate theories of harm to analyse these digital mergers in substance.[14]

No competition concerns regarding digital mergers?

Concerning the first hypothesis, namely that digital mergers do not raise any competition concerns, research has shown that this conclusion would be misguided.[15] The very active M&A activity on the part of Big Tech platforms – or gatekeepers – has allowed the emergence of entire digital ecosystems that envelop users and make multi-homing unnecessary and often cumbersome.[16] Several big digital platforms have morphed into digital ecosystems that offer a multitude of digital goods and services, many of which are interoperable within the provider's digital ecosystem, but not between one provider and another. It is this artificial barrier that many merger decisions in digital markets – be it *Google/Fitbit*[17] in the EU or *Meta/Giphy*[18] in Austria – have targeted in the past. And it is this particular feature of digital markets that the DMA is targeting with its bespoke do's and don'ts that aim at contestability. So there certainly are competition concerns regarding digital markets – to which the mere existence of the Digital Markets Act is testament. And these also extend to gatekeeper mergers.

The difficulty of establishing jurisdiction over digital mergers

Turning to the second hypothesis, we need to ask whether the European Commission can establish jurisdiction over these Big Tech acquisitions. And in fact, this is not always possible – an issue to which Article 14 DMA provides a somewhat unconventional solution. Before turning to this solution, however, it is worth mentioning that the third hypothesis – the lack of appropriate theories of harm to tackle digital mergers – also needs to be borne in mind;[19] a complex issue which we will need to leave for another day.

What is the contribution of Article 14 DMA to solve the issue of jurisdiction over digital mergers? The European legislator has come to realize that the M&A activity by powerful digital platforms has led to the incontestability of some digital markets, and a first thing that the DMA intends to do is to make them visible. But it is more than just visibility that Article 14 DMA is about when gatekeepers need to inform the Commission of their intended acquisitions – as can be seen when we consider the interplay of Article 14 DMA with EU merger control.

EU merger control and Article 14 DMA

Under the EU Merger Regulation, the European Commission has sole competence to review a merger whenever a transaction has a European dimension, meaning that it reaches the turnover

[14] Robertson, *Merger Review in Digital and Technology Markets* (n 13) 75.
[15] Eg, see Marc Bourreau and Alexandre de Streel, *Digital Conglomerates and EU Competition Policy* (CERRE Report, March 2019); Anne C. Witt, 'Who's Afraid of Conglomerate Mergers' (2022) 67 *Antitrust Bulletin* 208; Robertson, *Merger Review in Digital and Technology Markets* (n 13).
[16] On platform envelopment, see Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 *Strategic Management Journal* 1270.
[17] European Commission Decision of 17 December 2020, M.9660 – *Google/Fitbit*.
[18] Kartellgericht, 7 February 2022, 28 Kt 8/21t and 28 Kt 9/21i – *Meta/Giphy*; Kartellobergericht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – *Meta/Giphy*.
[19] On this, see already Robertson, *Merger Review in Digital and Technology Markets* (n 13) 75.

thresholds.[20] These turnover thresholds relate to both the acquiring and the acquired company. In the digital sphere, however, the target regularly is a small start-up that may be very innovative and seen as credible competition by Big Tech – but may not yet generate noteworthy turnover. This means that a transaction whereby a gatekeeper buys such a promising start-up does not come within the EU Merger Regulation.

Some Member States have reacted to this by introducing so-called transaction value thresholds in addition to their national turnover thresholds. When a buyer agrees to pay a considerable price for another company, then this is seen as an indication that it should be screened for possible anti-competitive effects, and the parties are required to notify their transaction to the national competition authority. In Austria, where the transaction value threshold was introduced in 2017, the transaction value threshold is set at €200m,[21] while in Germany – where the transaction value threshold was introduced in the same year – it is set at €400m.[22] Other Member States, such as Spain, have a market share threshold in addition to a turnover threshold, meaning that a small but successful target in a niche market may also establish the jurisdiction of the national authority.[23]

Where a national competition authority believes a merger to be of Union-wide significance, it can refer said merger to the European Commission. Usually, the national competition authority's attention will be drawn to a merger when it is notified of it by the companies involved. When EU merger control was established, however, not all Member States had systems of merger control, and it was important to the drafters to include those Member States in the system of EU merger control. For this reason, the so-called *Dutch clause* was introduced. It states, in Article 22 para 1 EUMR, that a national competition authority may refer a merger to the European Commission where it believes said merger to have a European dimension, and where this merger 'threatens to significantly affect competition within the territory of the Member State or States making the request.' The referring authority must make this request within 15 working days of being notified of – or of becoming aware of – the merger.[24] The European Commission informs the Member States' competition authorities of such a referral, allowing them to join it.[25] If the Commission accepts the referral, it becomes competent to review it for those countries whose authorities joined the referral.[26] Where the Commission becomes aware of a merger that has a European dimension and threatens to significantly affect competition, it can also invite Member States' competition authorities to make a referral under Article 22 EUMR.[27]

[20] Article 1 paras 2 and 3 EUMR, in connection with Article 21 EUMR.
[21] § 9 para 4 Cartel Act, Austrian Federal Law Gazette I 61/2005 as amended.
[22] § 35 para 1a Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended. See also the joint Austro-German guidance on these transaction value thresholds: Bundeswettbewerbsbehörde and Bundeskartellamt, Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG) (January 2022).
[23] Article 8 para 1 lit a Law 15/2007 of 3 July on the Defence of Competition, Spanish Official State Gazette No. 159/2007, as amended. The market share threshold is set at 30%, unless the target has a turnover not exceeding €10 million, in which case the market share threshold is set at 50%.
[24] See, eg, Jan Kupčik, 'The "Dutch clause" of EUMR – An Overview' (2022) *Competition Forum*, n°0036 available at <https://competition-forum.com>.
[25] Article 22 para 2 EUMR.
[26] Article 22 para 3 EUMR.
[27] Article 22 para 5 EUMR.

While the European Commission was long reluctant to accept referrals under Article 22 EUMR if the referring national competition authority did not itself have jurisdiction to review said merger, it issued guidance in 2021 that changed its approach.[28] Especially in the case of Big Tech mergers, it may now increasingly rely on its power to accept such referrals coming from national competition authorities. This policy change will particularly affect Big Tech and the pharmaceutical sector, as the 2021 guidance emphasises.[29]

Understandably, companies affected by this policy change were not amused because mergers that may not come under any national thresholds, and that do not reach the Union thresholds, may now still become reviewable by the European Commission by reliance on this almost forgotten provision in the EUMR. Recently, this approach was therefore challenged in a pharmaceutical merger case before the General Court – *Illumina/Grail*.[30] In its judgment, the General Court squarely sided with the Commission, saying that the wording of Article 22 EUMR in fact mandates that it must be possible for a national competition authority to refer a case to the Commission even where it is not competent under national law to review that merger. It is now for the Court of Justice to decide this issue on appeal.[31]

Some national competition authorities have a policy not to make referrals where they are not themselves competent to review a merger, and it currently looks like they will hold on to this policy. But others have shown themselves more open to use this tool. Where both approaches collide, however, this can have unintended negative effects on merger control in Europe: In 2022, the Dutch clause led to a duplication of merger reviews in a Big Tech case. In *Meta/Kustomer*, the Austrian competition authority referred Meta's acquisition of this customer relationship management software company to the Commission, while Germany did not. This resulted in the Commission and the German Bundeskartellamt reviewing this merger in parallel, as Austria's referral did not grant the Commission exclusive competence.[32] This can weaken the one-stop-shop principle enshrined in the EU Merger Regulation,[33] but also challenges consistency among merger reviews in the EU more generally.

Importantly, the referral mechanism of Article 22 EUMR also raises some serious issues in terms of legal certainty, for it means that the jurisdictional thresholds at EU level and at Member State level are no longer conclusive. It is for the Court of Justice to now weigh in on this. From a policy perspective, however, the European Commission's new approach to Article 22 EUMR is part of a puzzle to which Article 14 DMA also belongs: From now on, gatekeepers need to inform the Commission about any merger they envisage, as foreseen in Article 14 DMA. The Commission then informs the national competition authorities of this, as is also foreseen in Article 14 DMA. The national competition authorities can then refer said merger to the Commission based on Article 22 EUMR, enabling the Commission to establish its jurisdiction over the merger for those countries that referred it. The Commission may also choose to

[28] European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (Article 22 Guidance) [2021] OJ C113/1.
[29] Article 22 Guidance, para 9.
[30] Case T-227/21, *Illumina-Grail/Commission*, ECLI:EU:T:2022:447.
[31] Case C-611/22 P, *Illumina-Grail/Commission*, appeal pending.
[32] European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*; Bundeskartellamt, *Meta/Kustomer* (B6-37/21, 9 December 2021).
[33] See Article 21 EUMR.

explicitly invite competition authorities to make such a referral, as foreseen in Article 22 para 5 EUMR.

A prohibition on future digital mergers as a DMA remedy

When discussing the future of digital mergers after the DMA, on must also mention a further provision, namely Article 18 DMA. The European legislator has quite clearly realized that Big Tech is consolidating based on acquisitions of start-ups. For this reason, if there is systematic non-compliance with the DMA, the European Commission can adopt a decision that foresees behavioural as well as structural remedies, and in particular it can foresee that the gatekeeper shall be prohibited from further acquisitions in the digital sector for a number of years.[34] However, before the Commission can impose such remedies, the gatekeeper needs to have been the subject of three prior non-compliance decisions over the preceding eight years,[35] meaning that this remedy is not something that will capture the immediate interest of gatekeepers. Nevertheless, this provision is testament to the European legislator's critical view of unchecked digital mergers.

Outlook: The DMA's impact on digital mergers

Following the Commission's guidance on referrals under Article 22 EUMR and its interaction with Article 14 DMA, national competition authorities will increasingly become aware of Big Tech mergers that they can refer to the Commission – and, indeed, the Commission may even specifically invite them to do so. Following the General Court's judgment in *Illumina-Grail*, it is irrelevant whether the referring competition authority was itself competent to review said merger. In a post-DMA world, a digital gatekeeper can therefore never be certain of whether or not its merger will be reviewed by the Commission, no matter how little turnover the acquired target generates. It is thus clear that gatekeepers need to treat any acquisition with caution as regards its possible anti-competitive effects. The hope is that this will contribute to the aim of the DMA, namely to make digital markets contestable. To do so, however, theories of harm that are applied to such mergers will also need to be updated, with a greater focus on digital ecosystems and data advantages.[36]

[34] Article 18 para 2 DMA.
[35] Article 29 DMA.
[36] On this, see already Robertson, *Merger Review in Digital and Technology Markets* (n 13).