Showcases and showstoppers: the DMA's impact on merger control in digital markets**

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Abstract: The Digital Markets Act (DMA) focuses on several *ex ante* behavioural obligations on entities that have been designated as so-called gatekeepers. However, the DMA also introduces certain elements that have the potential to significantly impact the established merger control system within the EU. It includes two new relevant instruments for the European Commission aiming at the regulation of gatekeepers' ability to grow externally by way of mergers and acquisitions. One of the obligations imposed by the DMA is the obligation on gatekeepers to inform the Commission of any intended concentrations irrespective of whether they are notifiable under EU merger laws. Secondly, the DMA seeks to implement a link between the behavioural control of gatekeepers and their transactional activities by authorizing the Commission to prohibit the gatekeeper, for a limited time, from conducting any more acquisitions in the specific sector that is affected by so-called systemic non-compliance with the obligations under the DMA. This article explores the impact of these two types of provisions and calls for a cautious approach, striking the balance between the interests of undistorted competition, innovation and the dynamic impact that M&A activity may bring to these and other relevant factors.

Keywords: DMA, M&A, merger control, transaction, gatekeeper, referral, Article 22 EUMR

1. Introduction

More than 18 months after the European Commission (Commission) presented the first draft of the new Digital Markets Act (DMA), the legislative process has now come to a successful end.[1] The DMA is expected to govern the activities of certain yet to be determined large online platforms known as 'gatekeepers' that may set in part the rules of the game for their users and competitors.

While the new rules and the public debate focus on the series of *ex ante* behavioural obligations on entities that have been designated as so-called gatekeepers, the DMA also introduces certain elements that have the potential to significantly impact the established merger control system within the EU. This article discusses the background of the new rules and explores how they might change the review of M&A transactions in digital markets going forward.

1.1. Background: the DMA's behavioural control of gatekeepers

The DMA comes amid a general political trend emphasizing the importance of regulating Big Tech companies. Margrethe Vestager, the Commissioner for Competition in the European Commission, has repeatedly mentioned how large tech companies need to follow certain standards in order to allow for fair competition – 'With size also came the economic power for some companies to dominate markets in ways that threaten fair competition'.[2]

The DMA therefore aims at regulating companies in the tech sector that provide 'core platform services', including online intermediation services, online search engines, online social networking services, video-sharing platform services, advertising services and a host of other services.

According to Article 3(2) DMA, undertakings qualify as gatekeepers based on a set of narrowly defined quan-

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1 The DMA was recently published in the Official Journal (OJ L 265 of 12 October 2022, p. 1) and it entered into force on 1 November 2022. Most of its provisions, including the ones discussed in this article will, however, only be applicable from 2 May 2023.
2 Speech by Executive Vice-President Margrethe Vestager on the Digital Package, 18 September 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1704 (accessed 26 October 2022).

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titative criteria, which include achieving a turnover of above €7.5 billion in each of the last three financial years or an average market capitalization or equivalent fair market value amounting to at least €75 billion in the last financial year, and providing a core platform service in at least three Member States. Additionally, an undertaking would also need to have in the last financial year at least 45 million monthly active end users in the EU and at least 10,000 yearly active business users in the EU, in order to qualify as a gatekeeper. If these requirements are met, a company is presumed to be a gatekeeper and the Commission shall designate it as such within 45 working days after receiving the complete relevant information (Article 3(4) DMA).[3]

While the legislation is particularly targeted towards those companies which form a part of the so-called Big Tech industry, the regulation will apply to any company which might grow into the role of a gatekeeper in the years to come.

The main focus of the obligations in the DMA is to police certain types of conduct by these gatekeepers, which evidently draw inspiration from previous competition law decisions and investigations of the European Commission, e.g. on self-preferencing, interoperability or the use of data.

1.2. The DMA's links to merger control

> *'If a gatekeeper wants to make an acquisition, it can do it – but we are also watching.' Commissioner Breton*

In the context of the general political debate around regulating digital markets with competition law instruments, mergers and acquisitions conducted by large tech companies have been raised as a concern by some. Commissioner Vestager has specifically highlighted the issue of 'killer acquisitions', a fighting word which has emerged in merger control reform discussions in several jurisdictions: 'Promising ideas from small innovators can disappear … because bigger business buys them in order to kill them.'[4] Thierry Breton, the Commissioner for Internal Market of the European Union, has also pointed out that 'If a gatekeeper wants to make an acquisition, it can do it – but we are also watching'.[5]

Whether or not inspired by the EU, the US also sees a policy change towards a more aggressive approach concerning merger control involving Big Tech companies. The FTC and the DOJ are currently in the process of revising and likely tightening the merger guidelines, with Lina Khan, the Chairperson of the FTC, stating that 'several digital platforms today now increasingly control key arteries of commerce and communications in our country'.[6]

Indeed, the DMA is not limited to behavioural 'antitrust-like' obligations only. It also includes two new relevant instruments for the European Commission aiming at the regulation of gatekeepers' ability to grow externally by way of mergers and acquisitions. One of the obligations imposed by the DMA is the obligation on gatekeepers to inform the Commission of any intended concentrations irrespective of whether it is notifiable under EU merger control guidelines ('obligation to inform' – see section 2). This obligation by itself seems like a harmless requirement since it does not establish a formal clearance process. However, when read in conjunction with a recent policy change at EU level concerning the review of mergers as well as some Member States' national merger control laws, the obligation to inform has the potential to change the landscape of merger control in digital markets.

Secondly, the DMA seeks to implement a link between the behavioural control of gatekeepers and their transactional activities. It authorizes the Commission to prohibit the gatekeeper, for a limited period of time, from conducting any more acquisitions in the specific sector that is affected by so-called systemic non-compliance with the obligations under the DMA ('M&A ban for systematic non-compliance' – see section 3).

This article explores the impact of these two provisions and calls for a cautious approach, striking the balance between the interests of undistorted competition, innovation and the dynamic impact that M&A activity may bring to these and other relevant factors.

3 For completeness, it should be mentioned that the Commission can, according to Article 3(8) DMA, also designate companies as gatekeepers which do *not* meet the abovementioned quantitative criteria but which nevertheless have: (i) a significant impact on the internal market, (ii) provide a core platform service which is an important gateway for business users to reach end users, and (iii) enjoy 'an entrenched and durable position' in their operations (or if it is foreseeable that they will enjoy such a position in the near future). This designation process is, however, much more complex than the thresholds-based one and it seems questionable to what extent it will play a role in practice.

4 European Commission, 'Shaping Competition Policy in the Era of Digitisation' (Brussels, 17 January 2019), available at: https://content.mlex.com/#/content/1058304?referrer=search_linkclick (accessed 26 October 2022).

5 'Online gatekeepers' acquisitions will be 'watched' by EU regulators, Breton says' (15 December 2020), available at: https://content.mlex.com/#/content/1250489?referrer=search_linkclick (accessed 26 October 2022).

6 'US FTC's Khan, DOJ's Kanter told of online platform dominance across industries' (12 May 2022), available at: https://content.mlex.com/#/content/1377615?referrer=search_linkclick (accessed 26 October 2022).

2. Obligation to inform about concentrations

2.1. Scope

Article 14(1) DMA imposes an obligation on gatekeepers to inform the Commission of any intended 'concentration', as defined in Article 3 of the EU Merger Regulation (EC) No 139/2004 (EUMR), where the merging entities or the target provide core platform services or any other services in the digital sector or enable the collection of data.

The information provided under the DMA should include relevant information such as the target's EU and worldwide annual turnover, its fields of activity (including those directly related to the concentration), the transaction value or an estimate, a summary of the concentration (including its nature and rationale), as well as a list of the EU countries concerned by the operation. In relation to core platform services, the information also needs to be split up to cover relevant EU annual turnover, the number of yearly active business users and the number of monthly active end users.

While M&A activities can result in a company becoming a gatekeeper, its transaction activities will not be relevant in that regard until such designation decision has been made, i.e. the Commission formally declares such company a gatekeeper pursuant to Article 3(4) or Article 3(8) DMA. Before such moment, the information obligation does not apply.[7] That said, Article 14(3) DMA provides that if, following any concentration about which a gatekeeper has to inform the Commission, additional core platform services individually meet the thresholds in Article 3(2) point (b) DMA,[8] the gatekeeper concerned shall inform the Commission thereof within two months from the implementation of the concentration and provide the Commission with the respective information. So in the end, a gatekeeper will not only have to inform the Commission about its transactions as such but also assess their potential to increase the number of the gatekeeper's core platform services that fall under the DMA.

The obligation to inform about transactions is broad and can have an indirect impact on transactions by gatekeepers. It applies to 'everything digital' and 'everything data': The provision does not stop at transactions concerning core platform services but instead also extends to deals where the merging entities or the target of the concentration provide: (i) 'any other services in the digital sector' or (ii) 'enable the collection of data'. In particular, this last alternative significantly expands the ambit of the provision.

This notification may be the first step for the Commission to use other instruments in order to initiate a merger review.

It should be noted that the DMA does not require gatekeepers to seek approval from the Commission; it is merely an obligation to inform. However, as will be explained below, providing information may be the first step for the Commission to use other instruments in order to actually initiate a merger review.

2.2. Purpose

According to the recitals of the DMA, the information 'should not only serve the review process regarding the status of individual gatekeepers, but will also provide information that is crucial to monitoring broader contestability trends in the digital sector'.[9] In practice, the obligation to inform will not only serve statistical or policy review purposes though.

Instead, it serves the specific purpose of sharing information about ongoing transactions with Member States. The Commission shall inform the competent national authorities of any information received pursuant to Article 14(1) DMA and publish annually the list of acquisitions of which it has been informed by gatekeepers.[10] It is not clear from the provision when the Commission will pass on this information, but it can be assumed that it will inform competition authorities in Member States regularly and in a timely manner in order to provide them with the possibility of considering their options under merger control laws.

While this will not have much impact on Member States with binary 'passed-or-not-passed' revenue or asset value thresholds, it might affect those jurisdictions with thresholds that allow for some discretion and/or rely on parameters that are less clear-cut *ex ante*. Examples include Portugal and Spain which rely on a market share test (that can be interpreted in a way that defines markets narrowly and hence requires a filing) or jurisdictions that have

7 *Westermann*, ZHR (2022), p. 334 et seq.

8 In short, this requires that the core platform service had in the last financial year at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union.

9 Recital 71 of the DMA.

10 In that regard, Article 14(4) second sentence stipulates that the Commission also 'shall take account of the legitimate interest of undertakings in the protection of their business secrets'. Presumably, this implies in particular that the Commission will redact, when publishing its lists, reference to any transaction for which at the time of publication no public deal announcement has yet been made.

introduced transaction value tests (such as in Germany and Austria, which no longer rely solely on target sales).

Even more importantly, Member States authorities will, based on the information received from the Commission, also maintain their ability to intervene in M&A activity at EU level, i.e. merger control reviews conducted by the Commission under the EUMR. Similar to the cooperation rules the DMA establishes in Articles 37 to 41 for the behavioural control of gatekeepers, the obligation to inform about concentrations also makes room for the involvement of both the Commission and national enforcers. Unlike the initial draft tabled by the Commission in December 2020, the final text of Article 14(5) explicitly connects the DMA-specific obligation to inform with the pivotal general merger control policy shift the Commission made last year: its endorsement of 'sub-threshold' merger referrals under Article 22 EUMR. This new practice, which was first announced in September 2020 by Commissioner Vestager,[11] aims at ensuring that not only national authorities, but also the European Commission can review transactions that do *not* meet the traditional revenue or asset-based thresholds. Hence, the obligation to inform under Article 14 DMA is a first acknowledgement of that new policy in a formal act of law. This will be discussed further in the next section.

2.3. Article 22 EUMR and the Commission's new referral policy

Article 22 EUMR allows Member States to submit a request to the Commission for a concentration to be examined not at national level but in Brussels. The only substantive criteria for such request are that it: (i) is a transaction within the meaning of the EUMR, i.e. a merger or an acquisition of control, (ii) affects trade between Member States, and (iii) threatens 'to significantly affect competition within the territory of the Member State or States making the request' based on prima facie evidence. If the Commission decides to examine the case, it assumes jurisdiction for each market area located in the territory of any Member State making the request or joining it.

For years the administrative practice of the Commission had provided for a clear limitation on the provision's application. Specifically, the Commission did not accept requests submitted by Member States whose national notification thresholds were not exceeded and which, therefore, did not have merger control jurisdiction themselves.

As of early 2021, however, that position has officially changed. On 26 March 2021, the Commission, without any public consultation, published its new guidance on accepting merger referrals from Member States under Article 22 EUMR[12] even in 'sub-threshold' cases. In its Guidance, the Commission states that in recent years, 'market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration'. While the Guidance does not employ the term, this is an ill-concealed allusion to so-called 'killer acquisitions', in particular in the digital economy.[13]

> *The information obligation under the DMA dovetails neatly with the Commission's merger policy shift.*

This notion has been picked-up again in the DMA. According to Article 14(5) DMA, national competition authorities 'may use the information received […] to request the Commission to examine the concentration pursuant to Article 22 [EUMR]'. In other words: the information obligation under the DMA dovetails neatly with the Commission's merger policy shift. This shows that the delineation between the DMA as a regulatory instrument designed to maintain 'contestable and fair markets' on the one hand and competition law on the other hand is quite blurry. In fact, both will go hand in hand and complement each other.

It has been argued that the nexus to Article 22 EUMR referrals is, while being a 'foreign body' to the subject matter of the DMA, even the main *raison d'etre* for Article 14 DMA, i.e., the entire obligation to inform.[14] And it seems conceivable that in practice, Article 14(5) DMA will be more than just a one-way street. While

11 See speech at the Annual Competition Conference of the International Bar Association, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en (accessed 26 October 2022).

12 European Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (26 March 2021) (Guidance), available at: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf (accessed 26 October 2022).

13 Guidance (fn 12) para 9.

14 *Zimmer/Göhsl*, ZWeR, 2021, p. 29, p. 46 et seq; *Seip/Berberich*, GRUR-Prax, 2021, pp. 44 and 46; *Westermann*, ZHR, 2022, p. 335. This view appears rooted in the notion that Article 14 DMA serves as a form of 'merger control light', a mere residue of the broader merger-related intervention powers that the DMA ultimately could not award to the Commission for legal reasons. This is due to the fact that the DMA has its legal basis in Article 114 TFEU, whereas merger control-related powers arguably would have had to be anchored in Article 352 TFEU, *Schweitzer*, ZeuP, 2021, p. 543.

the provision only makes reference to Member States using the information received to request a referral from the *Commission*, it can be assumed that, conversely, the Commission will also use the information it received from gatekeepers to ask or encourage *Member States* to submit a referral request and thus indirectly trigger a merger control review.[15]

2.4. Assessment and implications for merger control in digital markets

This can cause a lot of headaches for gatekeepers as they are being forced by law to expose themselves to an administrative practice which has already drawn a lot of criticism. While the Guidance published by the Commission contains some helpful explanations around the application of Article 22 EUMR in terms of the relevant substantive criteria and types of acquisitions targeted, none of these explanations are conclusive and important procedural aspects – which are crucial for deal timetables – appear to be (deliberately) left hanging in the balance.[16]

Nevertheless, the (intended) consequence of this new system for gatekeepers is that their transactions will face more and likely also tougher scrutiny going forward. Previously, parties had to self-assess whether their transactions were likely to trigger interest or concerns of any competition authorities and whether to approach them proactively or not. This is now being gradually replaced by a system of full transparency of each transaction in the digital sector that a gatekeeper pursues. This increases the overall likelihood of Article 22 EUMR referral requests – and subsequent merger reviews in Brussels that more often than not will end up in phase II.

While such referrals are already embedded in the existing EUMR framework, in particular smaller transactions by gatekeepers may well be put on the Commission's radar solely because of Article 14 DMA. Looking at the Guidance, this means that in every case in which a gatekeeper has to report a potential candidate deal for an Article 22 EUMR referral, the parties need to consider whether they risk closing the transaction before any potential merger control implications are resolved.

Another relevant timing question is when the 15 working days deadline of Article 22(1) EUMR for Member States to make their referral request lapses. As in the 'sub-threshold' cases relevant here, no merger control filing will be made anywhere initially, this deadline starts on the date on which the concentration is 'otherwise made known' to the Member State concerned. According to the Guidance, '[t]he notion of "made known" should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral'. Unfortunately, the Guidance is completely silent on the concept of *sufficient information*. Going forward, it could be argued that the information gatekeepers statutorily need to provide according to Article 14(2) DMA is sufficient to initiate this deadline since the European legislator has expressly set out this catalogue in view of Article 22 EUMR. However, to avoid any discussions about a potential discrepancy between information to be provided based on Article 14(2) DMA and Article 22 EUMR, gatekeepers are well advised to err on the side of caution and provide more factual details than set out in Article 14(2) DMA (and thus trigger the Article 22 EUMR deadline).[17]

This may have a broader impact on all M&A activity in the digital sphere.

All of this not only has an impact on individual gatekeepers themselves but all transactions involving gatekeepers – including their respective counterparties. Article 14 DMA and the Commission's new stance on Article 22 EUMR referrals will also increase the burden for sellers such as early-stage investors or founders of start-up companies. In many cases, they will have to brace themselves for longer deal timetables, more complex transaction agreements and an increased risk of deal failure – be it because of an outright prohibition of the transaction or because of the requirement of remedies that break the deal rationale or are otherwise not viable. This may lead to potential sellers re-thinking their exit routes and, therefore, have a broader impact on all M&A activity in the digital sphere – at least to the extent it has a nexus to Europe.

15 The Commission has already created such 'encouragement precedent' in case COMP/ M.10188 *Illumina/GRAIL*, see also Commission, press release, *Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3844 (accessed 26 October 2022).

16 For more details, see *von Schreitter/Urban*, NZKart, 2020, pp. 637 et seq; *Schmidt/Steinvorth*, BB, 2021, p. 1666; *Neideck*, NZKart, 2021, pp. 263 et seq; *von Schreitter/Urban*, WuW, 2021, pp. 674 et seq; *Cukurov*, NZKart 2021, p. 606.

17 Notably, the Guidance points out that the information relevant for the assessment of Article 22 EUMR could also come from third parties if a transaction, 'in their opinion, could be a candidate for a referral under Article 22'. Such third parties are called upon to 'include sufficient information to make a preliminary assessment as to whether the criteria for referral are met, to the extent such information is available to the third party'. This further adds to the complexity of the review process, as it gives disgruntled customers, suppliers and competitors a new tool to put a spanner in the works of unwelcome transactions.

The exact magnitude of that impact, however, will depend on whether or not the European Court of Justice is going to endorse the Commission's policy shift on Article 22 EUMR – which the General Court has already done in first instance.[18] The parties in that case have appealed the decision.[19] But for the time being, it seems likely that both the Commission and national competition authorities will take a bolder approach and increase the number of '22 referrals' – in particular when gatekeepers are involved. Unless the European Court of Justice should ultimately rule against the Commission, the legislative blessing of the referral policy in the DMA therefore has implications that are directly relevant for all parties – whether acquirers, targets or sellers – to transactions involving gatekeepers and their transaction documents:

Conditions precedent can be formulated analogously to the usual clauses for merger control notification obligations. It will be particularly important, however, to define an outcome upon the occurrence of which the condition precedent is met, i.e. at which point in time the closing impediment of potential Article 22 EUMR referrals is deemed to be eliminated.[20] This will depend on the parties' risk sensitivity in the individual case.

Efforts clauses should be implemented as well, i.e., the parties must define (with the specific referral risk in mind) how they intend to interact on the path to achieving the desired outcome to which the condition precedent is tethered and whether and how they intend to commit to cooperate in removing any related obstacles to closing.

When agreeing the **long-stop date**, the realistic assessment of the total duration of any referral process and any ensuing merger control review is crucial. When in doubt, it can be prudent to include a clause allowing for subsequent renegotiation of the date. The referral process alone can take a long time and combined with formal merger control proceedings, the total duration between deal announcement and an official (clearance) decision can quickly amount to (well) over a year.[21] This period must also be taken into account in agreements on **deal financing** and with regards to provisions concerning the target company's **ordinary course of business**.

It should be reiterated, however, that the information obligation under Article 14 DMA only concerns 'concentrations' as per Article 3 EUMR which require the acquisition of at least joint control. This means that (strategic) acquisitions of minority shareholdings will not be required to be reported to the Commission under Article 14 DMA, even if the acquiring company is a gatekeeper seeking to build ties to (potential) competitors – and even in markets in which the gatekeeper already offers core platform services within the meaning of Article 2(2) DMA.

3. M&A ban for systemic non-compliance

The second merger-control related provision of the DMA is even more far-reaching than the obligation to inform the Commission about intended concentrations. In an unprecedented step, the DMA seeks to create a link between the behavioural control of gatekeepers and their transactional activities by providing for the instrument of an M&A ban for systematic non-compliance with the DMA's behavioural obligations.

3.1. Scope

Article 18 DMA provides the Commission with the power to impose remedies for 'systematic non-compliance' with the requirements of the DMA. Non-compliance relates to the obligations in Articles 5, 6 and 7 DMA, that concern behavioural obligations in relation to the core platform services. Notably, the clause does not cover any non-compliance relating to the reporting obligation under Article 14 DMA discussed above.

Pursuant to Article 18(3) DMA, a gatekeeper will be considered to have engaged in 'systematic non-compliance' where the Commission has issued at least three non-compliance decisions in the last eight years before beginning such an investigation. Gatekeepers might argue that this is a low standard to meet in order to qualify as *systematically* non-compliant, especially considering the other remedies that are available for such behaviour.

Article 18(2) DMA authorizes the Commission to prohibit the gatekeeper, for a limited period of time, from conducting any more acquisitions in the specific sector that is affected by the systemic non-compliance. The Commission can only do so if it can demonstrate that an M&A ban is proportionate and necessary in

18 Judgment of 13 July 2022, Case T-227/21 *Illumina v. Commission*, ECLI: EU:T:2022:447.

19 Cases C-611/22 P *Illumina v Commission* and C-625/22 P *Grail v Commission and Illumina*.

20 For instance, and analogous to the usual clearance letters under merger control law, a written or electronic communication from the authorities could be considered for this purpose, to the extent it conveys the message that a potential referral request will not be accepted and/or filed (the former taking the Commission's perspective into account, the latter from the national competition authorities' perspective).

21 In the aforementioned COMP/ M.10188 *Illumina/GRAIL* case, the parties announced the transaction in September 2020 and the Commission issued its prohibition decision on 6 September 2022 – two years later. See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364 (accessed 26 October 2022).

order to maintain or restore fairness and contestability as affected by the systematic non-compliance.

3.2. Purpose

If a gatekeeper violates its obligations, Articles 30 and 31 DMA provide for an extensive repertoire of fines of up to 20% of the gatekeeper's total worldwide turnover and periodic penalty payments of up to 5% of the average daily worldwide turnover that the Commission can impose. However, it seems that the legislators had some doubt if even these draconic fines would have sufficient deterrent effect. They therefore introduced an additional, not directly behaviour-related sanction to avoid a gatekeeper choosing to ignore fines and penalties and not changing its conduct.

More specifically, the Commission in such cases has the power to impose other remedies. The M&A ban enables the Commission to take measures that aim at ensuring that a gatekeeper cannot frustrate the objectives of the DMA by systematic non-compliance with one or several of the obligations.[22]

3.3. Assessment and implications for merger control in digital markets

The introduction of an M&A ban in the DMA is an unprecedent step.

The introduction of an M&A ban in the DMA is an unprecedented step. At first sight, such prohibition is an unexpected instrument in a regulation dealing with behavioural issues.[23] Generally, merger control implements an *ex ante* system according to which transactions meeting the thresholds for national or EU merger control are reviewed concerning their potential impact on competition and vetted prior to their implementation. Even if a concentration does not meet the merger control thresholds and is assessed only following a referral under the Commission's new Article 22 EUMR policy, the transaction would always be scrutinized (and, if necessary, prohibited) on the individual merits of the case.

In contrast, Article 18 DMA provides for an abstract decision that any further acquisition involving a gatekeeper who is found to have systematically not complied with the DMA should be prohibited, regardless of whether such a transaction would significantly impede effective competition in Europe (which is the substantive standard under the EUMR). In other words, there is no presumption for anti-competitive effects which could be rebutted, but rather the Commission does not need to prove an impediment to competition at all. This underlines the character of the M&A ban as a sanction for infringements under the DMA, rather than as a new instrument under the EUMR.

Gatekeepers are likely to find such a measure disproportionate as the remedy being imposed seems to be too far-reaching in comparison to the behaviour that is being regulated. Also, since this remedy can be imposed as a result of a violation of which at least parts have been conducted up to eight years earlier, gatekeepers are likely to argue that this measure should be imposed only in very rare circumstances.

However, the temporary disqualification of companies from certain market activities is not an entirely unknown concept in EU law. Directive 2014/24/EU on public procurement provides for the right for contracting authorities to exclude companies from participation in a procurement procedure if they are found liable for certain criminal infringements, in breach of its obligations relating to the payment of taxes or social security contributions or other infringements, notably anti-competitive agreements or practices.[24]

That said, the M&A ban introduced by the DMA bears only superficial resemblance to the mechanism in procurement law. First, in procurement law there is a direct connection between the misconduct and the exclusion of participants from procurement procedures as those bidders are not considered reliable (and therefore do not meet a substantive eligibility criterion under procurement law).[25] In contrast, the M&A ban applies regardless of whether a proposed M&A

22 Recital 75.

23 There have been some questions about whether an M&A ban, or indeed any merger specific provisions in the DMA, can be based on the legal basis of Article 114 TFEU which confers on the legislature the power to adopt measures for the establishment and the functioning of the internal market. In contrast, the original Merger Regulation was adopted on the basis of Articles 103 and 352 TFEU (see also fn 13 above). The German Ministry of Economics commissioned a study that concludes that the DMA can include merger-specific provisions; however, the study did not address the M&A ban which was only introduced at a later stage. See *Franck/Monti/de Streel*, Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers (20 September 2021), available at: bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5 (accessed 26 October 2022).

24 Article 57 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

25 See recital 101 of Directive 2014/24/EU (fn 24).

transaction has any connection with the conduct in breach of the DMA. Secondly, while a disqualification from a public tender is a serious consequence for a company, it only affects public tenders, whereas the private sector remains open for business activity. The M&A ban in contrast is much more comprehensive as it is designed as an absolute prohibition regarding all transactions in the affected sector. Finally, public procurement law provides for a self-cleaning mechanism according to which bidders found to have infringed the relevant laws can provide evidence that they have taken sufficient measures to demonstrate their future reliability, e.g. concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.[26] There is no comparable option of exculpation for gatekeepers to demonstrate that they have taken measures to ensure compliance with the DMA going forward.

These far-reaching, rigid and invasive characteristics of Article 18(2) DMA cast some doubt as to the proportionality of this instrument.

These far-reaching, rigid and invasive characteristics of Article 18(2) DMA cast some doubt as to the proportionality of this instrument. It will therefore be important for the Commission in every individual case to demonstrate clearly that the general prohibition for the gatekeeper to enter into concentrations in the affected area is actually *necessary*, as a tool of *ultima ratio*, in order to maintain or restore fairness and contestability as affected by the systematic non-compliance. In addition, the Commission will need to carefully consider for how long it imposes an M&A ban. There is no clear understanding of what is meant by 'limited period' in Article 18(2) DMA. Using the parallel instrument in public procurement law as a comparison, the maximum exclusion period of bidders from procedures is three years for competition law-related infringements,[27] if not shorter in the case of the self-cleaning mechanism described above. The duration of the M&A ban should not exceed that time-frame (or even be shorter), considering the ban's comparably much more restrictive nature and the fact that gatekeepers cannot rely on any exculpatory mechanisms.

Overall, in view of the alternative options for the Commission to impose fines on gatekeepers for systematic non-compliance and the challenges gatekeepers might bring against an M&A ban, it can be presumed that this instrument will remain a means of last resort and will not be used very often. However, its mere existence sends a strong signal to gatekeepers that non-compliance with the DMA does not solely come with a 'price tag' of fines, but potentially even more severe consequences.

4. Conclusion

The DMA does not only introduce far-reaching instruments concerning the behavioural control of gatekeepers, but also elements that have the potential to shape the merger control landscape of M&A transactions involving such companies.

The regulatory sword of imposing an M&A ban will likely – and hopefully – not find regular use in practice but be more of a policy gesture. There are sufficient and better suited alternatives to discipline companies that do not comply with the DMA. M&A transactions should be assessed on their individual merits instead of being prohibited outright.

The obligation to inform the Commission about concentrations, however, will be important for all parties involved in gatekeepers' M&A projects, including sellers, target companies and financing parties. It seems likely that this new obligation will increase the importance of the new Article 22 EUMR referral policy, and potentially also lead to more national filings based on transaction value thresholds or market share tests as companies will rather err on the side of caution in notifying transactions even though thresholds are not clearly met. Companies should therefore consider the timing implications of this new obligation.

Generally, the DMA further increases the regulatory scrutiny of M&A transactions. The rather straightforward revenue tests of the past have already been supplemented by new instruments to review transactions even if the target does not meet the traditional sales or asset tests. In addition, many transactions in the tech sector are likely to also trigger Foreign Direct Investment (FDI) screening mechanisms in one or several EU Member States. Another instrument to review M&A deals of state-sponsored players is the proposed EU Regulation on foreign subsidies distorting the internal market which the Commission initially presented in May 2021[28] and on which

26 Article 57(6) of Directive 2014/24/EU (fn 24).

27 Article 57(7) of Directive 2014/24/EU (fn 24).

28 Proposal for a Regulation on foreign subsidies distorting the internal market, 5 May 2021, COM(2021) 223 final.

a provisional agreement was reached in Trilogue negotiations on 11 July 2022.[29]

All of these regulatory instruments are likely to increase the hurdles for M&A transactions between Big Tech companies and their counterparties. The addition of new instruments potentially triggering a merger review such as the obligation to inform the Commission does not automatically lead to more prohibitions. However, it has the potential to delay transactions. The Article 22 EUMR referral process is time-consuming. Moreover, these referrals require that a transaction theatens to significantly affect competition. The likelihood for a phase II investigation, remedies or even a prohibition is therefore higher compared to 'standard' reviews.[30]

To date, none of the regulatory requirements that parties need to go through have effectively stopped the surge in M&A transactions over the last few years. In fact, it seems that rather than regulatory reviews other factors such as unfavourable market conditions, the currently high inflation rate, uncertainty about interest rates or the continued impact of COVID-19 on global supply chains have had a more direct impact on M&A activity. This suggests that companies regard more intense merger control or other regulatory reviews as nothing but the price to pay for external growth.

However, as with every price negotiation, there will be a level where the regulatory price will simply be too high to engage in certain transactions. This can have a negative impact on smaller start-up companies who are not considered to be a must-have acquisition by a potential buyer and hence struggle to find a buyer willing to invest the time it takes to get a deal cleared. In effect, this can, particularly in times of rising interest rates, endanger the financing and, thus, the growth perspectives of such smaller companies. It will therefore be important for authorities to implement the new powers with care and to strike the right balance between ensuring un-distorted competition on the one hand and not jeopardizing European companies' chances to combine (and innovate) with larger players on the other hand.

29 Available here: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf (accessed 26 October 2022). A full plenary vote is currently scheduled for November 2022 and the legislation is expected to enter into force early in 2023.

30 As recently evidenced by the Commission's prohibition decision in COMP/ M.10188 *Illumina/GRAIL* (see fn 21).