HENGELER MUELLER

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Digital Markets Act and Merger Control

or the Story of the Wizard's Apprentice

Markus Röhrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

The much-anticipated Digital Markets Act ("DMA") is currently being discussed by EU lawmakers, while Member States are asking for a bigger role in the draft legislation and urging the EU to clarify the interaction with the bloc's competition law and national legislation. However, voices from Germany propose even more far reaching changes that would have the DMA broaden the types of transaction that are reportable to the Commission under the current EU merger control regime. This issue of Brussels à Jour looks into whether the DMA might evolve into yet another tool to close what regulators perceive as an enforcement gap with respect to "killer acquisitions".

Rewind … Regulators' Attempts to Get a Hold on "Killer Acquisitions"

Changes to the current EU merger regime when it comes to digital markets have been the talk of the town for some time now. The discussion was sparked by Facebook's acquisitions of WhatsApp and Instagram, following which Margrethe Vestager coined the term "killer acquisitions", whereby – so the regulators' story goes – tech (and not only) giants are able to neutralize future competition by buying potential rivals while they're still small startups, often paying enormous purchase prices to persuade the founders to sell.

In August 2016, the European Commission launched in an evaluation of procedural and jurisdictional aspects of EU merger control. One of the targets of the evaluation was whether the current framework for EU merger control sufficiently allows the Commission to capture and review concentrations that may have a significant impact on effective competition in the internal market or, conversely, whether potentially problematic mergers may fall outside the Commission's jurisdiction. At the core of this topic lies the

emerging issue of the effectiveness of the purely turnover based jurisdictional thresholds of the EUMR where large "incumbents" pay high purchase prices for targets that have low turnover in digital, pharma and other sectors. In 2019, the Commission also organized a high-level conference and published a report on competition policy in the digital era, prepared by three special advisers appointed by Margrethe Vestager. Then, the discussion fizzled out at the EU-level.

At a national level, though, Austria and Germany introduced transaction value test to their merger control regimes in 2017. The new rules state that, in addition to the countries' previous turnover thresholds, mergers also have to be notified if the transaction value exceeds 200 million euros in Austria or 400 million euros in Germany and the target has significant domestic operations. In July 2018, the Austrian and German competition authorities published a set of joint guidelines on the application of their new transaction value thresholds that should create "legal certainty" for companies by providing a definition of "consideration", input on how to interpret the "domestic operations" requirements, together with practical examples. While the application of the transaction value thresholds continue to carry significant uncertainties for companies, the regulators appear to pave the way for another extension of the current rules.

Also at national level, Germany stole the show in January 2021, with its 10th amendment to its Act against Restraints of Competition. In a nutshell, procedurally speaking, the amendments allow the Federal Cartel Office ("FCO") to establish whether companies have a "paramount significance for competition across markets" – new terminology to describe "gatekeepers", generally based on their "digital ecosystems". It broadly includes market players that combine a variety of tools and systems and offer platforms for several market players. Second, the FCO will be able to assess whether companies qualifying to have such "paramount significance" abuse this position on the basis of a non-exhaustive list of prohibited behavior.

In March 2021, the Commission published its guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases. The guidance encourages NCAs to refer cases to Brussels when they have competition concerns even when their own national notification thresholds are not met. The Commission heralded the guidance as a legal instrument leading to "more legal certainty" because businesses would now "know what to expect". For the moment, the poster case for the Article 22 referral procedure is the Illumina / Grail deal, a saga which is now pending before the courts in Luxembourg.

What the Current Draft DMA has in Store for Mergers

The current DMA draft does propose to introduce specific merger control rules. Article 12 of the draft merely establishes an obligation for gatekeepers to inform the Commission of any intended acquisition of another provider of core platform services or any other services provided in the digital sector, irrespective of whether it is notifiable under the EUMR or a Member State's national merger rules. The deal needs to be notified to the Commission prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The provisions were quickly dismissed by some stakeholders as not properly reflecting current digital market realities and leaving plenty of room for discussions for improvements.

Here Come the Three Professors

A team of three international academics – Jens-Uwe Franck, Giorgio Monti and Alexandre de Streel – was tasked by the Federal Ministry for Economic Affairs and Energy to draft a legal opinion concerning Article 114 TFEU as a legal basis for strengthened control of acquisitions by digital gatekeepers. In true German style, the hefty 74-page resulting report details how merger control provisions could be included in the DMA.

The paper essentially says that many EU Member States are currently reforming their merger control rules, but these divergent systems could "severely undermine" the digital single market. Also, some Member States are planning to use the specificities of their national legislation to close the perceived enforcement gap. For that reason, it is "necessary" for the EU to include merger control provisions in the DMA to prevent the fragmentation of the internal market.

Interestingly, the team explores four possible options for preventing this phenomenon.

First, they look at the Commission's current weapon of choice – encouraging referrals from the Member States to the Commission under Article 22 of the EUMR. Although this option does not require a change of the current legislation, it was criticized for not being robust enough, in light of the most recent cases (in particular Illumina / Grail). Although not a point raised by the professors, the Commission's guidance paper is widely perceived as threatening the EUMR's one-stop-shop system and adding to a heterogeneous enforcement environment with NCAs taking diverging views as to whether or not mergers that they have no power to review under their own rules should be referred to the Commission.

Second, establishing through the DMA new notification thresholds for digital gatekeepers that would complement the existing thresholds of the EUMR. This option relies on Article 1(5) EUMR which provides that the Council "acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3". While this provision has now expired, it remains an indicator that the notification thresholds are not based on substantial normative choices by the EUMR's original legislature. In the team's view, once the new thresholds are met, the acquisition would be reviewed by the Commission under an unchanged EUMR, i.e. according to the existing theories of harm and the current burden of proof. This option was deemed legally feasible under Article 114 TFEU

because it would prevent the fragmentation of the internal market. Also, it would be possible to establish a new notification threshold without amending the EUMR, which would (at least in theory) require unanimity.

Thirdly, there would be the option of amending the EUMR itself to establish new notification thresholds in a way that would require the notification of mergers involving nascent competitors but also adapt the Significant Impediment to Effective Competition test used to assess concentrations as well as the rules on proof. The team considered that basing the reform of the EUMR on Article 114 TFEU would be legally feasible, since the legislature is not bound to retain the original basis when amending EU secondary law.

The last option is to establish through the DMA a new and separate regime to review acquisitions by digital gatekeepers, which would either replace or complement the existing merger control under the EUMR. This option could also be based on Article 114 TFEU, similarly to the previous option.

In conclusion, the team considered that the first option, being the weakest, should not be taken in account. The other three options would offer a one-stop-shop solution, would be preferable, and could be implemented sequentially. For instance, the second option could be implemented immediately in the context of the DMA negotiations. Then, the third and the fourth options could be implemented later in the context of a more comprehensive review of the EU merger control regime, once the lessons learned from applying merger control to the acquisition of nascent competitors by digital gatekeepers have provided helpful experience that could be broadened to a wider range of concentrations.

In neither option 2 or 3 does the team name names, in terms of concrete threshold figures or criteria, which leaves room for interpretation and speculation, maybe on purpose. Going forward, we could see, for example, thresholds similar to the joint German-Austrian transaction value test. Or maybe we will be looking at a two-step assessment inspired by the German newly introduced gatekeepers' amendment.

And now, over to Brussels

In the European Parliament, the discussion over the draft DMA is giving legislators revolutionary vibes. Take socialist MEP Evelyne Gebhardt, who is center-left representative in the negotiation with Andreas Schwab on the text. She takes a more radical view of the direction in which the reform needs to go, and that is recasting the EU's merger test for the digital sector.

Under Gebhardt's proposal, companies that have been gatekeepers for two years or more would need to prove that their deal does not harm competition. They would be obliged to notify all deals to the Commission. In contrast, Schwab suggest that the threshold should apply to gatekeepers present for three years in three countries.

For reference, under the current merger system, only deals involving companies with significant turnovers need to be notified and if officials want to block them, they have to prove they are harmful to competition.

Negotiations in the European Parliament are due to continue this year with a view to formalizing a position in December. In the meantime, officials of EU Member States are also discussing changes to the draft proposal. Both institutions need to reconvene with the Commission to issue a compromise version of the legislation before it is adopted.

What's Next?

The newly published report not only provides a basis for further discussions between the EU institutions, but also makes for an educated read about the fundamentals of EU competition and constitutional law for the Brussels legal community's rainy autumn evenings. And while you enjoy it, don't forget to follow us on LinkedIn for more updates on your favorite antitrust topics.

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