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Enter the DMA bis! The new Article 22 Guidance and how it accompanies the DMA

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At a recent post, I discussed how the European Commission's change of approach with the publication of its new Guidance on Article 22 of the Merger Regulation, in reality, should be seen as an accompanying measure to the Digital Markets Act (DMA). I called this a "DMA bis". Let me share my thoughts in a slightly more developed manner.

Those following the DMA saga would have noticed the absence of any major proposed changes in merger control rules. The DMA Proposal only includes the introduction of an "*obligation to inform about concentrations*" in Article 12. The proposed provision uses the word "notification" but should not be seen as similar to a merger control notification. It's simply a way to keep the Commission well-informed, and the Commission cannot perform a merger control assessment leading to an individual decision of clearance or prohibition. The fact that Article 12 has nothing to do with merger control is clear by reading Recital 31 of the DMA Proposal, which clarifies that this mechanism aims at facilitating the Commission in reviewing the application of the DMA. In particular, the Commission can use the information received via Article 12 to review gatekeeper designation and adjust the list of core platform services provided by the gatekeeper, based on its recent acquisitions. Such information would also serve the Commission's monitoring of "*broader contestability trends in the digital sector*".

So some commentators have been wondering why the DMA did not include any provisions "with teeth" on mergers. One possible explanation for this is the legal basis. The DMA's proposed legal basis, Article 114 TFEU, is already controversial. In short, on the one hand, the fragmentation risk that the DMA Proposal supposedly addresses, i.e. the proliferation of different national "regulatory" rules, is not there, since no Member State has proposed such "regulatory" rules. On the other hand, the fragmentation risk of the proliferation of different national rules under the guise of "competition" laws is already a reality. Suffice it to look at the new Section 19a of the German Competition Act (see here), the recent proposals to amend the Italian Competition Act or the idea to amend the Greek Competition Act (see here) and introduce the concept of an undertaking holding a "*dominant position in an ecosystem of paramount importance for competition*" (see here). All these rules are unaffected by the DMA Proposal. This choice defeats the DMA's self-proclaimed goal of harmonising national laws and raises serious doubts as to whether Article 114 TFEU can be the right legal basis. Now, imagine if the DMA Proposal included merger control rules! In that scenario, there would be no doubt whatsoever as to the legal basis: it would have to be Article 352 TFEU, which must be used for any amendments to the Merger Regulation. And we all know that Article 352 TFEU requires unanimity in the Council and the Parliament has no say.

But another explanation as to the absence of merger control rules in the DMA Proposal is the publication of the new Guidance on Article 22. It purports simply to change the Commission's "practice" or "approach". From now on, the Commission will welcome referrals from Member States of concentrations even where there is no national jurisdiction in the first place. In other words, this is about mergers that fall below national thresholds and would not have been notifiable either nationally or at the EU.

I do not wish to enter into the debate whether Article 22 of the Merger Regulation allows this. A literal interpretation of Article 22 would support the legality of this practice. The decisional practice also indicates that there have been cases where Member States joined a referral request, even though the merger fell below their national thresholds (but, to the best of my knowledge, there was always one or more Member States that had jurisdiction). A historic and teleological interpretation of Article 22 may, however, cast doubt on the question of legality. In the end, this is something that will be decided by the EU Courts.

In any event, the interesting element is that the new Guidance is intended to catch "*in particular, transactions in the digital and pharma sectors*" (para. 10). According to para. 19, the transactions targeted are those where "*the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential*". The Guidance includes an indicative list of factors to put flesh on these bones. It refers to cases "*where the undertaking: (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/ components for other industries*". In its assessment, the Commission "*may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target*". In short, the Commission is, in reality, describing those cases which could fall within the pejorative term "killer acquisitions".

So it is clear that the Commission is now closing all loopholes in the DMA Proposal. What was absent in it, is now attained through a mere "*change in approach*". For the avoidance of doubt, para. 11 of the new Guidance states: "*This change in the current practice does not require a modification of the relevant provisions of the Merger Regulation.*" So the "DMA bis" will not require going through the legislature or using Article 352 TFEU. Although the Commission (and the NCAs) have not mentioned only the digital sector as the target, I have no doubt that the new "tool" will primarily be employed against big tech.

So I would expect the system to work as follows: The Commission will hear about a concentration from public information and in any event, it will be "informed" about it through Article 12 of the DMA. Then, the Commission will "invite" specific Member States to refer upwards. I have no doubt that there will be many volunteers to do so. Hence, no more a DMA "gap" when it comes to mergers.

And, by the way, according to para. 21, "*the fact that a transaction has already been closed does not preclude a Member State from requesting a referral*"! On this last point, the Commission points to Article 22(4) of the Regulation which seems to allow this. Respectfully, I have my doubts on this. If anything, this probably supports the historic/teleological interpretation of Article 22,

mentioned above. But this is not the focus of my present blog post. My only focus was to alert us all on the “DMA bis”…

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