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The European Commission's Template Relating to the Obligation to Inform about (Gatekeeper) Concentrations in the DMA: A Blessing in Disguise?

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On 14 July 2023, the European Commission launched its second template relating to the gatekeeper's compliance with Article 14 of the DMA (the Template), i.e., their obligation to inform about any intended concentration involving core platform services or any other services in the digital sector or enabling the collection of data (Article 14(1) of the DMA).

As opposed to the first template the Commission issued regarding the items that the compliance reports under Article 11 of the DMA should include (see previous comment here), this second Template was not launched to the general public to gain insight and knowledge of third parties on its substance. Instead, the Commission has chosen to exercise its capacity to issue its third implementing act under Article 46(1)(h) of the DMA directly. Even though the 4-page long second Template does not differ as much from the content of Article 14 of the DMA as the first Template did with Article 11, the Commission's engagement with this provision places it at the forefront of its priorities as long as the DMA is concerned.

The Commission's legal framework when enforcing the DMA is now made up of its Procedural Implementing Regulation (see comments on its first draft here and its final version here) and this second Template regarding the obligation to inform about concentrations under Article 14 of the DMA. The EC's review of the public feedback it received following the publication of the draft Template for compliance reports is yet pending and has not yet been published on its official website.

Article 14 of the DMA vis-à-vis Article 22 EUMR

The substantive provision to the Template (Article 14 of the DMA) attracted both academic and institutional attention since its introduction into the regulatory framework. By itself, the provision brings a bold statement to the table: once designated a gatekeeper, then every single concentration shall undergo the screening of the European Commission. By this token, Article 14 of the DMA may play a gap-filling role in terms of capturing the mergers performed by the future-to-be-designated gatekeepers (closer by the day! – seven operators have already notified the European Commission of their potential status for designation, including Alphabet, Amazon, Apple,

ByteDance, Meta, Microsoft and Samsung).

Even though Article 14(1) of the DMA sets forth the gatekeeper's obligation to "*inform the Commission of any intended concentration (within the meaning of Article 3 of EUMR) where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data*" in line with EU merger control regulations, the provision's scope is wider than that, compromising all of the concentrations that would not be notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules. Hence, Article 14(1) of the DMA provides for a coherent provision with EU merger control (according to Richter, the substantive standard for merger review in the EU is not altered) but prompts at expanding their scope from the regulatory perspective, due to the (not-so-well-documented) capacity of digital platforms to absorb -and ultimately 'kill' innovation- startups or nascent competitors into their own organisational structures (for a comment on those strategies, see here).

Starting on this same point, Article 14 may unfold into two related scenarios. First, the situation where the concentration is non-notifiable before the Commission or an NCA because it does not meet the quantitative thresholds (and qualitative in some of the Member States such as Spain) established by merger control. In that case, the gatekeeper is forced to inform the Commission, which then will have the capacity to redirect that same information to the competent authorities of the Member States (Article 14(4) of the DMA). Following this motion, the NCAs might use that same information to request the Commission to examine the concentration pursuant to the revamped mechanism set out in Article 22 EUMR (Article 14(5) of the DMA). And second, in those cases where additional core platform services individually meet the thresholds in Article 3(2)(b) EUMR, the gatekeeper is forced to inform the Commission within 2 months from the implementation of the concentration (Article 14(3) of the DMA).

If the gatekeeper was to intentionally or negligently fail in its obligation to notify this same information or supply incorrect, incomplete, or misleading information required pursuant to Article 14 of the DMA, the Commission could adopt a decision imposing fines not exceeding 1% of their total worldwide turnover in the preceding financial year (Article 30(3)(c) of the DMA).

The underlying causes: the DMA's flexibility and high concentration levels

Regarding the first scenario contemplated by the application of Article 14 of the DMA in practice, one would automatically think that it mimetically pursues the same objective as the Commission's issuing of its new Guidance on the application of Article 22 EUMR: to capture those transactions, especially in the digital (and pharma) sector, that had gone under the radar due to the lack of initial jurisdiction of the Member States and the Commission on those cases when the thresholds were appraised (paras 10 and 11 of the Guidance).

The ultimate objective of Article 14 of the DMA is somewhat different to that pursued by the EC's re-working around jurisdictional thresholds. According to Recital 71 of the DMA, the provision is not primarily aimed at capturing those transactions which might have gone under the radar and transformed into killer acquisitions over time (for the paper fleshing out the paradigm of assassinations, see here). Instead, Article 14 of the DMA pursues four related aims: i) to ensure the effectiveness of the review of gatekeeper status; ii) to confer the Commission with the possibility

to adjust the list of core platform services provided by a gatekeeper; iii) to monitor broader contestability trends in the digital sector; and iv) to facilitate the potential referrals to the Commission via Article 22 EUMR from the Member States.

Thus, the first two goals are not directly related to securing the capturing of killer situations, but rather to keep the DMA up to date as far as the designation process under Article 3 of the DMA is not static but dynamic in nature, in the sense that the Commission may add on different categories of core platform services to an already designated gatekeeper, and it is forced to review its designation decisions at least every 3 years (Article 4(2) of the DMA).

The third of the Commission's ambitions is to monitor broader contestability trends taking place in the digital sector. Considering the definition of contestability in Recital 32 of the DMA, it relates to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services. Therefore, there seems to be a particular reluctance on the side of the Union legislator to associate lack of contestability with high levels of concentration, especially if one looks around at the definition of contestability in Article 12(5) of the DMA. As opposed to the definition contained in Recital 32 of the DMA, Article 12(5) addresses the lack of contestability through the gatekeeper's capacity to impede innovation and limit choice for business and end users.

The disconnect between both definitions responds to a clear idea: there is not enough empirical evidence to acknowledge that the industry level increases in concentration -which have been largely documented, see here and here– may not necessarily imply an increase in concentration in the corresponding antitrust markets (see Durand's & Jaoui's views on this same point here). Taking the argument further, the wisdom in antitrust points to signalling a positive correlation between market power and concentration (the seminal work of Bain highlighted this association), but it may also point at other elements that we might be missing out on, such as an increase in competition or productivity (these findings have also been documented recently by Bighelli et al. based on Demsetz's contesting of Bain's ideas).

Relating to the fourth and final objective hinted at by Recital 71 for Article 14 of the DMA, the connection of the provision with the narrative of capturing killer acquisitions under Article 22 EUMR is self-evident. Although Article 14 of the DMA is not solely and directly addressed at responding to this cause, it does aim to complete the NCAs capacity to refer merger cases via this mechanism, although the phenomenon of killer acquisition might be anything but documented (see here De Coninck & von Muellern for further comment on this same topic and empirical evidence on this same point, here). By this token, the DMA engages with the Commission's normative preference to capture these types of mergers and provides an additional tool to make their capturing easier, i.e., the provision of information by the gatekeepers of all of their concentrations and the annual publication of the list of acquisitions of which it has been informed by gatekeepers (Article 14(4) of the DMA).

The already relevant notified mergers thereof

Aside from the publication of its new Guidance on Article 22 EUMR (reviewed in the blog here, here and here and for a longer discussion on the topic, listen to the episode you may find here for the International Law Talk Podcast), Article 14 of the DMA has been portrayed both as a blessing

and as a curse.

On one side, the provision might trigger not only the NCAs application of merger control provisions but also of Article 102 TFEU following the recent *Towercast* ruling (paras 52 and 53 – see comments of the ruling and AG Kokott's thought-provoking Opinion, here, here and here). The ironic situation here would point at the NCAs reserving the cases of digital platforms for themselves under Article 102 TFEU (even if that means meeting the ECJ's high demands regarding the proving of a substantial impediment of competition, ex para 52) and not referring the cases back to the European Commission (the initial idea of this 'blessing' for NCAs via Article 14 of the DMA was first put forward by Mândrescu, see here). Ironically, these scenarios would fall within the complementary clause contained under Article 1(6) of the DMA establishing that competition law proceedings run separate from the DMA obligations, despite the fact that the original information born into those files will come from the direct application of the regulatory framework.

On the other hand, however, the triggering of Article 22 EUMR via the indirect means of Article 14 of the DMA might also cause the appearance of a *DMA bis* (in the terms presented by Komninos in his post, see here) mechanism, acting as a supporting scheme of the current EU merger control regulation to counteract the actions of those Member States that still refuse to refer cases that they do not have any jurisdiction over. Time will tell whether this curse for undertakings may also crystallise as a blessing for the Commission.

The Template for the Gatekeeper's Compliance with Article 14 of the DMA: Mimetic Shadowing

In contrast with the Commission's prior implementing acts, the Template is quite straightforward in mirroring the content of Article 14 into reality.

Five Sections are presented in the Template to flesh out the DMA's imposed obligation on gatekeepers to provide information describing the "*undertakings concerned by the concentration, their Union and worldwide annual turnovers, their fields of activity, including activities directly related to the concentration, and the transaction value of the agreement or an estimation thereof, along with a summary of the concentration, including its nature and rationale and a list of the Member States concerned by the concentration. The information provided by the gatekeeper shall also describe, for any relevant core platform services, their Union annual turnovers, their numbers of yearly active business users and their numbers of monthly active end users, respectively*" (Article 14(2) DMA).

The five Sections are broken down into the following items: i) summaries of the concentration (Section 1); ii) information about the undertakings concerned (Section 2); iii) information about the concentration (Section 3); iv) information about any relevant core platform services related to the concentration (Section 4); and v) the undertaking's declaration on providing true, correct, and complete information (Section 5).

Following the letter of the law, Sections 1, 2, 3 and 4 of the Template list directly what items should be notified to the Commission concerning the concentration. Section 1 provides for the format of the confidential and non-confidential summary that the gatekeeper must provide to the Commission, whereas Sections 2 to 4 detail the minimum requirements that the notification must

include.

In a similar vein to the first Template, the only criticism that can be directed at the Commission is that of establishing additional criteria and items, with the nature of the minimum information that must be provided to the gatekeeper, compared with the items directly required by Article 14 of the DMA. For example, the Template unravels that the gatekeeper must provide a list of items relating to the target of the concentration including a description of the products and services offered by it in the digital sector, how they overlap with those of the gatekeeper, the data whose collection will be enabled by the concentration and any other commercially relevant assets of the target's, such as its IP rights. Another related example with this same disconnect between both pieces of regulation prompts at the fact that Article 14 of the DMA only required the gatekeeper to include in its notification a list of the Member States concerned by the concentration, whereas the Template establishes that the gatekeeper must also list all of the jurisdictions within and outside the EEA where the concentration has been or ought to be notified or is under investigation, with a complete indication of the date of notification in those jurisdictions and their current stage within those proceedings. As I pointed out in the previous post relating to the first (draft) Template issued by the Commission, Recital 31 compels the EC to bring its enforcement in coherence with the principles of necessity and proportionality with regard to the gatekeeper. By extending its own reach on the items that the gatekeeper must notify under Article 14 of the DMA, proportional and necessary enforcement seems to go adrift.

Key takeaways

The Template does not put forward any substantive change to that initially enshrined in Article 14 of the DMA: gatekeepers must notify all of their concentrations to the Commission so that then it can pass on that same information to the NCAs. Thus, the provisions leave ample leeway for the NCAs to refer back to those concentrations for their analysis under Article 22 EUMR (although the EC may exercise its discretion at this point, too in accepting or refusing to take forward its merger proceedings) and, in a wide reading of *Towercast*, NCAs may even take it upon themselves to consider those mergers in light of Article 102 TFEU.

In any case, however, Article 14 of the DMA is not completely inspired and guided by the Commission's wish to capture killer acquisitions. Additional objectives are pursued via its application, i.e., attaining the closure of the DMA as well as its flexibility in expanding its provisions on top of the already existing Articles 5 to 7 as well as in broadening the scope of its application by adding on different core platform services which might be integrated into the gatekeeper's realm via acquisition.

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