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Conglomerate mergers in the digital era:

Examining the Big Tech conglomerate mergers through the DMA

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Abstract

The bachelor's thesis aims studies the current conglomerate merger regulation control in the European Union that the largest technology companies face.

In order to do so, the thesis will firstly explore competition law in the European Union and its approach to conglomerate mergers. Secondly, the newly introduced Digital Markets Act (DMA) will be introduced alongside its effects to the largest digital service providers within the European Union. Thirdly, the thesis will study how currently the acquisitions by Big Tech fall outside of merger control and their possible effects. Lastly a conclusion will be drawn on the current state of conglomerate mergers and merger regulation in the European Union.

Methodology-wise the thesis will use the method of legal doctrine for examining competition law and the DMA, but due to the topic's strong connection with economics, current Big Tech mergers will be reflected upon from the viewpoint of law and economics.

Keywords Conglomerate mergers, competition law, big tech, digital markets act, merger control, DMA, law and economics, mergers and acquisitions

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Tiivistelmä

Tutkielman tarkoituksena on käsitellä eurooppaoikeudellista monialayrityskauppasääntelyä, jota teknologiajätit kohtaavat.

Tähän vastatakseen tutkielma ensimmäiseksi käsittelee kilpailuoikeutta monialayrityskauppojen näkökulmasta Euroopan unionissa. Toiseksi tutkielma esittelee vasta voimaantulleen digimarkkinasäädöksen (DMA), sen yhtymiä kilpailuoikeuteen ja vaikutuksia suurimpiin digitaalisten palveluiden tarjoajiin Euroopan unionin alueella. Seuraavaksi tarkastellaan suurimpien teknologiayritysten viimeaikaisia monialayrityskauppoja, jotka ovat alittaneet ilmoituskynnyksen ja niiden vaikutusta kilpailuun.

Kilpailuoikeudellista sääntelyä ja digimarkkinasäädöstä tarkastellaan lainopillisen metodin kautta, mutta kilpailuoikeuden vahvasta yhteydestä liiketaloustieteeseen johtuen, käsitellään teknologiajättien yrityskauppoja oikeustaloustieteellisestä näkökulmasta.

Avainsanat Monialayrityskaupat, kilpailuoikeus, teknologiajätit, digimarkkinasäädös, DMA, oikeustaloustiede, yritysten sulautuminen

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1 Introduction

The digital sector has frequently been characterized as the Wild West due to the lack of efficient regulation in the field leaving digital giants to act as they wish. However, due to importance of the digital sector constantly on the growth the legislators have woken up to the potential risks arising from the lack of regulation specific to the digital sector. The European Union has adopted the Europe's Digital Decade policy programme comprising of several aims for Europe's digital transformation for 2030. The instruments for meeting the set targets include *inter alia* the Digital Markets Act that sets out obligations for the designated gatekeepers – that essentially at the time of writing the thesis are the sixth largest core platform service providers functioning within the Union.[1]

Data-based information has become increasingly valuable as its potential has been realised by undertakings in the digital sector. Facebook (now Meta) has made a fortune not from its users but by using the data it gathers from its users to enable its business users to effectively target the users most likely to buy their services or products with advertisements. The business model brings to mind the saying: "If you are not paying for the product, you are the product." The value that data holds has been demonstrated in many mergers and acquisitions that have recently taken place in the digital sector; for example, the Finnish food delivery service Wolt was acquired by its larger US counterpart DoorDash in 2021 for over $8,1 billion in an all-stock transaction.[2] Nowadays the mergers in the digital sector come with an extra advantage that of the data the acquired company holds. This new data opens new possibilities for the acquiring company on tailoring their product or service, but on the other hand it might impede competition by enabling the creation of oligopolistic markets for Big Tech.

[1] See chapter 3.1. for the criteria and the naming of the gatekeepers.
[2] For DoorDash's press release see: https://ir.doordash.com/news/news-details/2021/DoorDash-Joins-Forces-with-Wolt/default.aspx

The thesis will analyze conglomerate mergers of Big Tech and the EU regulation surrounding it. It will also study the potential pitfalls the current regulation has from the point of view of fair competition. Furthermore, the paper examines the topic by aiming to answer the following questions:

1. *How are the conglomerate mergers of Big Tech regulated in the European Union law?*
2. *What kind of Big Tech's anti-competitive behaviour is left outside the current regulation regime?*

In the second part of the thesis, merger control in the European Union will be studied by taking a look at its origins and moving onto the current regime with the focus on conglomerate mergers. The third part will introduce the new Digital Markets Act (DMA). In addition, it will lay out its content in the level of detail appropriate, its place in *acquis communautaire* and lay out the designated gatekeepers. The fourth part will assess *status quo*. The assessment will discuss briefly some current conglomerate mergers that could give rise to issues in the competition and introduce theoretical problems arising from such mergers. In the final fifth part, a conclusion is drawn from the current merger control regime in the digital sector and a brief *de lege ferenda* evaluation is given.

Despite the thesis' concentration on the conglomerate merger regulation of the designated gatekeepers, the distortions of competition presented are ones that can exist in other larger tech corporations as well. The focus of the thesis will be on the competition law of the EU and the Digital Markets Act. Methodology-wise the thesis will explore European competition law and the DMA through the method of legal doctrine.[3] Due to the connection between competition law and economics, the thesis will deviate from purely doctrinal research to the field of law and economics in order to assess the economic factors at play such as the aims of the competition policy and how they are achieved with the current merger control regime.[4]

[3] For more on the research method see Smits 2015.
[4] For more on research in the field of competition law see Kuoppamäki 2003, p. 10-11.

2 Merger control under EU competition law

2.1 Considering the history and purpose of merger control

The underlying purpose of merger control under EU law can be found from the general principles of competition law which then can be traced down to the fundamental principles of the common market. Art. 119(1) TFEU states that:

"...the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

Thus, an open market is required by TFEU. The principle predates to the time of the European Coal and Steel Community in which's founding treaty a common market is established as a mission to be accomplished by the community.[5] In addition, direct provisions can be found from the Treaty concerning the regulation of competition. In the ECSC Treaty article 65 covers the rules relating to anticompetitive agreements similar to Art. 101 TFEU now. Art 66 ECSC Treaty lays out the rules regarding mergers and abuse of the dominant market position the rules on the latter being the predecessor of the current Art. 102 TFEU. Despite the High Authority being entrusted to take action regarding breaches of the Treaty obligations, Buch-Hansen notes the very limited enforcement of the aforementioned competition rules.[6]

[5] Treaty Establishing the European Coal and Steel Community, Art. 2.
[6] Buch-Hansen & Wigger 2011, p. 48.

A change came in 1962 in the era of the EC Treaty when the Council adopted Regulation no. 17 First Regulation implementing Articles 85 and 86 of the Treaty, which Dumitru describes as the moment competition became centralized.[7] However, the predecessors of Arts. 101 and 102 (Arts. 85 and 86 of the EC Treaty) were not enough in the view of the Commission, which mentioned the need for merger control in the European Communities in a 1966 memorandum[8] and adopted its first legislative proposal in 1973.[9] The Commission tried to lobby the Council to pass another regulation specific to merger control and to use Arts. 85 and 86 for preventing the creation of a dominant position through take-overs and acquisitions.[10] Prevention of mergers fell short with the two articles as Art. 86 required a dominant position already at the time of the merger and Art. 85 mainly considered agreements between independent undertakings and thus could only be applied to mergers on a broader perspective.[11]

The 1980s saw a reinforced effort in the establishment of European integration under the Delors Commission as the EU Competition Policy was to be modernized and the adoption of the Single European Act in 1986.[12] 1989 saw the adoption of Merger Control Regulation. The overarching need for merger regulation stems from the notion that concentrations of undertakings may impede competition in the market as mergers eliminate competition between the merging parties.[13]

[7] Dumitru 2020, p. 24.
[8] Concentration of firms in the Common Market 1966, p. 3-4.
[9] Dumitru 2020, p. 25.
[10] Dumitru 2020, p. 25.
[11] Dumitru 2020, p. 25.
[12] Buch-Hansen & Wigger 2011, p. 78 & Dumitru 2020, p. 25.
[13] Dumitru 2020, p. 27.

2.2 Merger control in the Union today

The current rules on competition between undertakings are heavily based on Articles 101 and 102 TFEU. Article 101 deals with prohibited concerted practises between undertakings while Art. 102 prohibits the abuse of dominant market position. Art. 103 TFEU lays out the competence for the Commission to propose secondary legislation to provide detailed rules on the application of Arts. 101 and 102.

The merger control regulation in force has been implemented on the basis of Art. 103 TFEU. Currently, the central instrument is the Council Regulation No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) known today as the EU Merger Regulation. According to Dumitru the current regulation is more flexible in its approach and thus more capable to capture problematic mergers that its predecessor could not.[14]

Alongside the regulation, guidelines for assessing mergers were introduced for both horizontal and non-horizontal mergers.[15] The non-horizontal merger guidelines deal with both vertical and conglomerate mergers. However, the guidelines are not binding but an instrument of soft law. Still, they serve an important role as they have been used by the Directorate-General for Competition as a means of internal control.[16]

The aforementioned serve as the basis for merger control in the European Union, however, due to the limitations of the thesis further attention won't be paid to them but the thesis will move onto conglomerate merger control.

[14] Dumitru 2020, p. 55.
[15] See: Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07) & Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/c 31/03).
[16] De Coninck 2010, p. 931.

2.3 Regulating conglomerate mergers

The EU law definition for conglomerate mergers can be found from the Non-Horizontal Mergers Guidelines. It lays out the following definition:

"Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers). In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).[17]

Thus, in a conglomerate merger the undertakings involved provide independent or complementary products.[18] Conglomerate mergers are not viewed to be as problematic for the competition as horizontal and vertical mergers, a notion that too can be found from the guidelines:

"... it is acknowledged that conglomerate mergers in the majority of circumstances will not lead to any competition problems..."[19]

Still, it is noted that in certain specific circumstances there may be harm to competition. The guidelines line out foreclosure as the main concern of conglomerate mergers, where the existence of combination of products in markets related to one another could offer an undertaking the possibility to foreclose its competitors from linking products from separate markets

[17] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/c 265/07), para 5.
[18] Dethmers et al. 2005, p. 266.
[19] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/c 265/07), para 92.

together.[20] This process of linking products together is called tying or bundling. In bundling the merged entity offers separate products together. If the products are only sold together in fixed proportions, the process is called pure bundling. And if the products are also available separately but are sold at a lower priced together it is called mixed bundling.[21] On the other hand, if a customer is required to purchase another good (the tied good) in order to purchase one good (the tying good), it is called tying.[22]

This would suggest that the focus of conglomerate merger control is on very limited number of situations where the acquiring company has some pre-existing market power that they are able to leverage to a new market by the acquisition of a new company.[23] Thus, holding a large portfolio of companies is not seen as itself a risk, but a risk arises only if the market power stemming from an undertaking in another sector can be leveraged to a new market.

2.4 Risks of conglomerate mergers

Conglomerate mergers don't directly contribute to the structure of the market as the number of competing undertakings stays the same as.[24] The incentive for larger companies to grow their company across different industries can be explained by the benefits of diversification and the fact that merger control on conglomerate mergers is typically laxer compared to vertical and

[20] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/c 265/07), paras 93 & 95.
[21] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/c 265/07), paras 96.
[22] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/c 265/07), paras 97.
[23] Witt 2023, p. 633.
[24] Kuoppamäki 2012, p. 290.

horizontal mergers.[25] Kuoppamäki shares this notion as he asserts that it is very seldom that authorities are interested in these mergers as their effects are rather indirect.[26] On the upside, conglomerate mergers can also be beneficial for the acquired company as it has been presented that conglomerates might be able to find unprofitable companies and turn them profitable.[27] Moreover, conglomerate mergers might present synergies for existing lines of business flowing from the acquired company.[28]

Despite not being as regulated as vertical and horizontal mergers conglomerate mergers pose serious risks to competition. One such risk is that due to the size of conglomerates they are able to subsidize their smaller companies' potential risks and failures due to their access to seemingly unlimited resources when compared to their counterparts acting in the same industry.[29] For example, in its 2001 decision to disallow the merger decision between General Electric and Honeywell it was noted by the Commission that due to their financial strength they were able to assume higher risks than their industry peers.[30] This has been referred to as the deep pocket theory; a smaller company can reap benefits from the bigger corporation's resources that has acquired it to the detriment of competition.[31]

Another risk that conglomerates can pose to competition is reciprocal dealing where undertakings receiving orders from one company are in turn required to buy from the undertaking ordering from them.[32] Similar risk to this is the removal of competition by bundling products together. This could be detrimental to special producers who would be unable to offer a package such as

[25] Hill & Pickering 1986, p. 59.
[26] Kuoppamäki 2012, p. 291.
[27] Kuoppamäki 2012, p. 291.
[28] Bourreau & de Streel 2019, p. 5.
[29] Hill & Pickering 1986, p. 61.
[30] Commission Decision of 03/07/2001, paras 108-111.
[31] Balanoff 1966, p. 395.
[32] Kuoppamäki 2012, p. 291.

a conglomerate.[33] Bundling was another issue in the proposed GE-Honeywell merger that the Commission pointed out in its decision.[34] However, in the subsequent proceedings before the Court of First Instance[35] rejected the bundling arguments, but nevertheless held up the Commission's decision on other grounds of competition law.[36]

Also, the mere existence of a conglomerate corporation in given segment can be a barrier to entry for its competitors as they might be reluctant to enter the market because their notion that they won't be able to compete with the conglomerate due to its enormous resources.[37]

To summarize, the risks possessed by conglomerate mergers are less direct than those by other types of mergers. And, as they can hardly be assessed using a threshold-based system, it will be harder to deem whether they constitute anti-competitive behaviour. Moreover, as the GE-Honeywell case demonstrated, a conglomerate merger issue can exist amidst other merger control considerations.

[33] Vives & Staffiero 2012, p. 442.
[34] Commission Decision of 03/07/2001, para 354.
[35] The Court of First Instance corresponds to the General Court. The name Court of First Instance was used prior to the Lisbon Treaty.
[36] Case T-210/01, paras 470 & 734
[37] Kuoppamäki 2012, p. 291.

3 DMA and the Gatekeepers' mergers

3.1 Adopting the act and naming the Gatekeepers

The Digital Markets Act (DMA) is a regulation that was adopted by the European Union as a part of the European Digital Strategy and entered into force on the first of November 2022 and its rules became applicable on 2nd of May 2023. The European Digital Strategy package comprised of the DMA and a second act, the Digital Services Act (DSA). It was argued that they introduced the most revolutionary and impactful changes in the Union's legal framework for digital service since the adoption of the E-Commerce Directive in 2000.[38] Moreover, the Union is the first major jurisdiction to adopt such a comprehensive regulatory regime.[39]

The preamble of the regulation states that digital services in general and online platforms in particular are of great importance in the economy facilitating cross-border trade and enabling new opportunities to a large number of companies to the benefit of the customers.[40] On the other hand, the preamble notes that core platform services are part of those services, and they can be exploited by the undertakings providing them. Core platform services providing undertakings can benefit from such things as extreme scale economies, data-driven advantages, significant degree of dependence of both business users and end users. In turn, these characteristics in combination with core platform service providers' unfair practices can substantially undermine the contestability of the core platform services and the fairness of

[38] Moskal 2022, p. 1115. For the E-Commerce Directive see Directive 2000/31/EC.
[39] Witt 2023, p. 626.
[40] Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022, preamble, recital 1.

the commercial relationship between the undertaking providing core platform services and their business users together with end users.[41]

Thus, the main function of the DMA is to set requirements for the designated gatekeepers in the digital market in order to ensure the contestability and the fairness of the market. It also lays out rules governing the relationship between gatekeepers and its business users. The regulation is applicable to core platform services provided or offered by gatekeepers to business users established in the Union or end users established in the Union, regardless of the domicile of the gatekeepers (Art. 1, DMA). Core platform services include *inter alia* online search engines, social networks, operating systems, web browsers and video-sharing platform services (Art. 2(2)). For an undertaking providing or offering core platform services in the manner described above it has to meet certain conditions set in the regulation. According to Art. 3(1):

> *An undertaking shall be designated as a gatekeeper if:*
> *(a) it has a significant impact on the internal market;*
> *(b) it provides a core platform service which is an important gateway for business users to reach end users; and*
> *(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.*

The DMA then goes in more depth as to put quantitative thresholds when each of the three criterion is met. Significant impact on the internal market shall be assumed when it achieves an annual Union turnover of €7,5 billion or higher in each of the last three financial years, or where its average market capitalisation or fair market capitalization equivalent amounts to at least €75 billion the last financial year, and it provides the same core platform service in at least three Member States (Art. 3(2)(a)). As an example of the current gatekeepers, the market cap of Meta is around $840,91 billion at the time of

[41] Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022, preamble, recital 2.

the writing this essay and its quarterly turnover of $7,7 billion for the third quarter in 2023 exceeded the annual Union turnover requirement set.[42] The requirement in section (b) is presumed to have been met when its core platform service in the last financial year has had at least 45 million monthly active end users established or located in the union or at least 10 000 yearly active business users established in the Union (Art. 3(2)(b)). Entrenched and durable position foreseeable to continue in the near future is assumed where the threshold set in section (b) has been met in each of the last three financial years (Art. 3(2)(c)). In the case that an undertaking providing core platform services fulfils the above criteria, it must notify the Commission without delay (Art. 3(3)). The Commission then after receiving the information from the undertaking designates it as a gatekeeper (Art. 3(4)). Failure to inform the Commission of meeting the thresholds, entitles the Commission to designate an undertaking as a gatekeeper where it can make such conclusion from information available to it (Art. 3(3)).

The thresholds for gatekeepers has been set high. There are currently only a few undertakings that meet the criteria. The designated gatekeepers currently are Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft.[43] All but one of the designated gatekeepers are US companies, the one being the Chinese conglomerate ByteDance mostly known in the West for owning the online video sharing network TikTok. Originally there was a seventh potential gatekeeper outlined by the Commission, Samsung, which had notified the Commission of meeting the thresholds, but it was since dropped from the designation.[44] Samsung Internet, a pre-installed web browser in mobile phones along with Gmail and Outlook.com met the thresholds laid out by the DMA. However, Alphabet, Microsoft and Samsung provided arguments

[42] For market capitalization see: https://finance.yahoo.com/quote/META/key-statistics?p=META & for turnover see: https://www.statista.com/statistics/745351/facebooks-quarterly-revenue-in-europe/ , last visited on 1 December 2023
[43]Commission Press release 6 September 2023: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328
[44] Commission Statement 4 July 2023: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3674

showing that the services did not qualify as gateways for the respective core platform services which were accepted the Commission.[45] Thus, Samsung was able to escape the gatekeeper designation.

3.2 DMA as a deviation from competition law

The DMA despite affecting competition in the Union is not an instrument of competition law *per se*. Competition law regulations and directives in the European Union are adopted through a legislative process laid out in Article 103 TFEU. However, the DMA has been adopted on the basis of Article 114 TFEU instead. Article 114 enables the adoption of consumer protection measures and has been used in the adoption of for example, the E-Commerce Directive. The DMA has raised some concerns due to its rather unclear nature in connection with the general competition policy of the EU.[46] Nevertheless, it must be noted from the DMA, that despite its partly overlapping nature with Articles 101 and 102 TFEU, its core goals are not based on the competition policy but the contestability of the market and fairness for users. The deviation from competition law approach can be in part explained by the notion expressed in the DMA's recitals that competition law fails to capture conduct of the gatekeepers that challenge the effective functioning of the internal market where they are not necessarily dominant in competition-law terms.[47] Yet, it can be argued that some of the obligations are inspired by past cases of abuse of dominance.[48]

Another aspect of the regulation that sets it apart from the general regime of the European competition law is that it is an *ex-ante* instrument compared

[45] Commission Press release 6 September 2023: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328
[46] For example, see Georgieva 2023 p. 27
[47] Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022, preamble, recital 5.
[48] Witt 2023, p. 649.

to the *ex post* nature of Articles 101 and 102 TFEU. The DMA being an *ex-ante* regulation it applies in advance to all of the gatekeepers conduct rather than being used to determine whether there has been illicit behaviour retroactively such as the case with Art. 102 TFEU. This might allow the DMA to be speedier in its enforcement but as the Commission is yet to apply it in practice this remains speculative for the time being. However, considering the length proceedings based on Art. 102 TFEU have historically taken hope remains that the DMA would better achieve this.

Article 102 TFEU has been criticized to be slow and limited in its impact.[49] This can be demonstrated by the three Big Tech cases concluded that it has been used in. All three cases were lodged against Google.[50] In the first case the investigation took nearly six and a half years to conclude, however, in the latter two they were significantly faster as investigation in *Google Search (AdSense)* took 32 months to conclude and 25 months in the latest *Google (Android)*. Yet this does not tell the whole story as the above-mentioned were merely the lengths of the proceedings and the conduct on which the decision was based had taken place years prior. For example, in the mentioned *Google (Shopping)* the first complaint against Google was lodged in late 2009 with the infringement decision being taken in 2017.[51] In addition, after the decision Google launched a subsequent action for annulment for the Commission Decision that was decided in 2021 by the General Court.[52]

If the proceedings take a considerable amount of time, it poses two risks. Firstly, in markets prone to tipping the risks are enormous as illegal behaviour can drive out competitors leaving only the undertaking having abused its position with a monopoly over the market. Ex post decisions and fines

[49] Witt 2023, p. 629.
[50] Commission Decision of 27 June 2017 AT.39740 *Google Search (Shopping)*, Commission Decision of 20 March 2019 AT.40411 *Google Search (AdSense)* and Commission Decision of 18 July 2018 AT.40099 *Google Android*.
[51] Commission Decision of 27 June 2017 AT.39740 *Google Search (Shopping)*, para 39.
[52] Case T-612/17, *Google,* [2017] ECLI:EU:T:2021:763.

cannot retroactively undo this damage.[53] As the decision has taken substantial time from the illicit behaviour the competitors – to whose detriment the conduct was – have long been driven out of the market and cannot be expected to "continue where they left off". The second risk it poses is that with time passing between the breach and the fines imposed, the profits made from the abuse of its dominance offset the fines payable. Thus, the fines could be merely viewed as costs of doing business. The notion of viewing fines stemming from anti-competitive behaviour as costs of doing business when there is significant time between the initial behaviour and the final decision on fines is collaborated by Kuoppamäki.[54] He points out that even with high fines if the fined undertaking is well-performing and able to invest the profits wisely it would be beneficial to abuse its dominant position from the viewpoint of value maximation.[55]

Another key aspect in the examination of the DMA contrasted against the general competition law regime is that of sanctions. Without sufficient sanctions for illicit behaviour an undertaking can keep on breaking the rules and benefitting from which is something that no system can sustain.[56] Thus, it must be studied how gatekeepers' breaches of their obligations can be sanctioned. Similar to the enforcement of Articles 101 and 102 TFEU, the responsibility lies with the Commission. Under Art. 29 DMA where the Commission finds an offence pursuant to the act it may adopt a non-compliance decision. In the non-compliance decision it may impose to a first-time offender a fine up to 10% of its total worldwide turnover (Art. 30(1)). The potential upper limit of fines raises to the maximum of 20% where a similar offence has been found to been committed in last eight preceding years by a non-compliance decision (Art. 30(2)). For less serious failures of information duties a gatekeeper may be fined up to 1% of its turnover (Art. 30(3)). Also, periodic

[53] Witt 2023, p. 629.
[54] Kuoppamäki 2023, p. 116.
[55] Kuoppamäki 2023, p. 116.
[56] Kuoppamäki 2023, p. 116.

payments up to 5% of daily worldwide turnover may be imposed to compel a gatekeeper to comply with a Commission decision or to supply the Commission with correct and complete information (Art. 31(1)).

3.3 Collusions of the DMA and Competition law

Despite the DMA's nature being different from that of the general EU competition law, the two can be seen to intertwine at times. This has brought up discussion on whether the DMA has created a regime of two-fold regulation where the same conduct is scrutinized twice – *ex-ante* by the DMA and *ex post* by Articles 101 and 102 TFEU – and to what extent is the DMA congruent with them.[57]

The potential double enforcement of the DMA and competition law has raised concerns regarding *ne bis in idem*. Could an undertaking be subjected to competition law proceedings after already having been either sanctioned or acquitted in a DMA-related proceedings? Generally, the *ne bis in idem* principle has been understood as prohibition of prosecuting or convicting for conduct that has already been decided on.[58] The principle can be found codified in the EU Charter of Fundamental Rights in Article 50. In *Slovak telecom* case the Court noted that there is a two-fold condition for application of the *ne bis in idem* principle: firstly, there must a be a prior definitive decision; and secondly, the subsequent proceedings or decisions concern the same anti-competitive behaviour.[59] The second, "*idem*" condition is subject to three sub-conditions: (1) the facts must be the same, (2) the offender is the same and (3) the legal interest protected must be the same.[60] The competition law reading of the *ne bis in idem* principle would suggest that a

[57] Georgieva 2021, p. 26 & Kuoppamäki 2023, p. 94.
[58] Neagu 2012, p. 955.
[59] Case C-857/19, *Slovak Telecom,* [2021] ECLI:EU:C:2021:139, para 42.
[60] Case C-857/19, *Slovak Telecom,* [2021] ECLI:EU:C:2021:139, para 42.

gatekeeper could be subjected to proceedings based on both the DMA and Articles 101 or 102 TFEU as the interests protected – despite their closeness to one another – are different.[61]

3.4 DMA's limited approach to mergers

In the background of the DMA lies the concern of how the tech giants designated as gatekeepers are able to abuse their position in the digital markets, it can be argued that its aims along the ones presented earlier are those of addressing concentrations of the digital economy.[62] Article 14 DMA sets out a requirement for the gatekeeper to inform the Commission for any intended concentration within the meaning of Art. 3 of the EC Merger Regulation, where the merging entities or the target of concentration provide core platform services or any other services in the digital service or enable the collection of date regardless of whether the merger is notifiable under the Merger Regulation or national competition rules.[63] This notification, however, is different from one made pursuant to the Merger Regulation.[64] Nevertheless, the information received in the notification may serve as a basis for starting a Commission examination under Art. 22 of the Merger Regulation where a competent authority of a Member State requests such (Art. 14(5)).

The remedies pursuant to the DMA are not limited to fines which were discussed in section 3.2 but can also include a prohibition on mergers. According to Article 18(2), the Commission may adopt an implementing act in a case of systematic non-compliance which prohibits the gatekeeper in question from acquisitions in the digital sector. According to Robertson Art. 18

[61] Kuoppamäki 2023, p. 117.
[62] Witt 2023, p. 631.
[63] See Council Regulation (EC) 139/2004 of 20 January 2004.
[64] Witt 2023, p. 640.

demonstrates the European legislator's critical approach to the state of digital mergers.[65]

A topic for another discussion is that whether the DMA articles not *prima facie* relating to mergers could discourage gatekeepers from taking part in mergers. This could for example, be the case under Art. 6(5) the DMA as it prohibits the self-preferencing of services and products of the gatekeeper. This could possibly deter a gatekeeper from acquiring a promising tech company if it could not artificially push it to a better position on the core platform service than its competitors. However, the topic of self-preferencing has already been subject to the scrutiny of the General Court prior to the adoption of the DMA in the Google Shopping case mentioned above in section 3.2.[66] In *Google Shopping* the General Court found that Google's conduct of promoting its own products in the search engine results while demoting its competitors was an infringement of Article 102 TFEU.[67] Thus, the ban on self-preferencing is by no means a new concept in the internal market. Moreover, due to the uncertainty of the effects and lack of further study in the topic, the existence of the effect presented cannot be ascertained. Nevertheless, a further study on the matter could provide valuable information on if the DMA could discourage big tech from conglomerate mergers.

It can be concluded that the DMA introduces limited new tools for merger control, however it will be for time to show, how big of an impact they will have on digital mergers. Still, it can be argued that it will force the gatekeepers to be more cautious in their mergers and acquisitions as they can't be certain when their mergers will be reviewed by the Commission.[68]

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[65] Robertson 2023, p. 6.
[66] Case T-612/17, *Google,* [2017] ECLI:EU:T:2021:763.
[67] Case T-612/17, *Google,* [2017] ECLI:EU:T:2021:763, para 703.
[68] Robertson 2023, p. 6.

4 Big Tech mergers now

One thing common with many of the current gatekeepers is that they started with one core product: be it Facebook, Amazon or Google, but with time all of them have diversified their portfolio by either creating new digital services or through acquiring other smaller tech companies. One of the most notable examples of such acquisitions was in 2014 when Facebook acquired WhatsApp Messenger. The merger was not without its problems as Facebook was fined €110 million in the EU for providing misleading or incorrect information during the Commission's investigation into the merger.[69] It is not an example of a conglomerate merger as Facebook already operated in the instant digital messaging sector, but it demonstrates the phenomenon of digital services concentrating under same corporation.

Moving on to pure conglomerate mergers, a 2021 study by the Federal Trade Commission in the US noted that Apple, Facebook, Alphabet, Amazon and Microsoft[70] had acquired over 800 corporations in acquisitions that did not meet the US merger control notification thresholds between 2010 and 2019.[71] Moreover, the year 2017 alone saw the aforementioned companies invest $31.6 billion in start-up acquisitions.[72]

Often these start-up acquisitions are titled "killer acquisitions". They are considered killer acquisitions as they pre-emptively kill future competition. Killer acquisitions can be divided into two sub-categories: pure killer

[69] See the Commission Press release of 18 May 2017 "*Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*": https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369
[70] The five companies are collectively known as GAFAM and represent five of the six designated gatekeepers.
[71] Federal Trade Commission; "*Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study*".
[72] The Economist, June 2nd 2018; "*American tech giants are making life tough for startups*".

acquisitions and "zombie acquisitions".[73] In pure killer acquisitions the acquired product is discontinued. A study on digital mergers by the GAFAM found that 60% of the products acquired were discontinued and most of the time it was within a year after the acquisition.[74] On the other hand, this does not mean that the knowledge and innovation acquired is lost as well, as in the so-called zombie acquisition the bought start-up innovation is absorbed by the principal's digital platform.[75]

As established above, typically Big Tech buy smaller technology companies in acquisitions that don't meet the thresholds. This is quite natural as the companies targeted are promising start-ups and are not working in the same field.[76] However, the digital sector differs from many traditional sectors as a complementary product might end up becoming a substitute and a competitor for the dominant platform.[77] This can be argued to have been the case for Instagram. In the beginning it was a service where one could share their photos, but it has become a social media site with similar features to Facebook which acquired it in 2012. The merger was subject to the approval of the European Commission, nonetheless, most acquisitions by Big Tech are not subject to competition authority approval.[78]

[73] Robertson 2023, p. 2.
[74] Gautier & Lamesch 2021, p. 8.
[75] Robertson 2023, p. 2.
[76] Robertson 2023, p. 2.
[77] Gautier & Lamesch 2021, p.11.
[78] Gautier & Lamesch 2021, p. 11.

5 Conclusion

5.1 Still room for more digital regulation

Time has yet to tell, whether the DMA will be effective in bringing about contestability for the digital markets. In section 3.2. it was established that competition law proceedings under Art. 102 TFEU took considerable time to conduct and eventually finish. Especially in the technology sector where changes in the markets are rather fast, slow enforcement of competition policy poses a risk to the fairness of competition as by the time a final decision is given it is a risk that the ex post prohibited behaviour has already deterred other undertakings from the relevant market sector. The Commission's proceedings against Google have demonstrated the slowness of the current competition law instruments to tackle market contestability. However, the DMA being of *ex-ante* nature brings hope for an approach that would be able to tackle at least some of the challenges at the time the breaches are conducted. Nevertheless, it must be noted once again that the DMA is not an instrument of competition law and thus, it will only be used in a limited number of cases involving the gatekeepers.

The DMA did not bring much in the sector of merger control in the European Union. However, as established in 3.4 the possibility of the Commission to prohibit a gatekeeper's acquisitions for a limited period can be considered a step in the direction of more rigorous digital merger control. Still, it does not directly touch on conglomerate mergers which can be considered a large trend in the digital sector which would benefit from more focus from the legislator.

5.2 Need for a merger control reform in the digital sector

The current merger control regime focuses strongly on horizontal and vertical mergers. Conglomerate mergers are not typically seen as anti-competitive. However, the trend of digitalization has seen calls for more merger control focus on digital mergers including those of conglomerate nature.

It has been argued that the current merger control regime is fit for brick-and-mortar industry and that it fails to fit contemporary needs within digital economy where traditional threshold-based merger control mechanisms cannot be applied in same extent in circumstances where the acquired company is a promising new start up which's potential is yet to be shown.[79]

In regulating the digital economy, the DMA is a needed instrument but still more regulation is still required. Thus, the European Union should adapt its merger control especially that of conglomerate mergers to reflect the contemporary needs better to combat the rise of oligopolies in the digital sector. The focus for the legislator should be on merger control that is able to account for the competitive advantages arising from acquired data and the nature of digital ecosystems as whole.

Goal of merger control is to prevent transactions capable of lessening competition in a market or on the other hand enabling anti-competitive behaviour.[80] Thus, merger control by its definition has failed if Big Tech is able to kill its competition by conglomerate mergers.

[79] Witt 2023, p. 666.
[80] OECD 2021

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