Digital Antitrust Enforcement

New perspectives and challenges

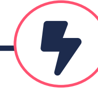
LEAR Competition Festival – 25 September 2024

Freshfields Bruckhaus Deringer

The DMA and its frenemies

Prof. Giuseppe Colangelo

DMA and its frenemies:



- antitrust rules (see, eg, CNMC v. Booking.com)
- abuse of economic dependence
- unfair commercial practices (see, eg, AGCM v. Google)
- market investigation tools (DE, IT, DK)

Abuse of economic dependence to the rescue?

Cecilia Carli– Freshfields - Senior Associate

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Abuse of economic dependence to the rescue?

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*"economic dependence is a situation in which an undertaking is able to bring about an **excessive imbalance of rights and obligations** in its business relations with another undertaking… shall also be assessed by taking into account the **real possibility … to find satisfactory alternatives** on the market .. In the absence of proof to the contrary, economic **dependence shall be presumed** where an undertaking uses the **intermediation services** provided by a **digital platform** that plays a **decisive role in reaching end users** or suppliers, including in terms of network effects or data availability"*

Any room to stay away from the presumption of economic dependence?

- using intermediation services by a digital platform
- "determinant role" vs. "dominance" vs. "essential facility"?

«*real possibility for the dependent party to find satisfactory alternatives*»

- "*determinant role*" vs "*satisfactory alternatives*" : one for all, all for one?
- What relevant factors in the "digital" space?
- What market .. for what alternatives?

New "digital" abuses

- The (non-exhaustive) list of conducts
- Stretching the boundaries of a.d.e. vs. limit of "significant imbalance of rights and obligations"?
- Circling back on the existence of economic dependence?

What is the future of the digital M&A transactions?

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Are M&A digital transactions still possible?

The overall environment for M&A digital transactions is very burdensome and players face increasingly strong obligations arising **from the EUMR and national merger control regimes** – **as well as from other regulatory instruments** – **whose scope has been progressively broadened**

The reasons for such broadening are mainly:

- Facing the issue that turnover thresholds are not sufficient to capture all the acquisitions that are likely to significantly reduce competition within the internal market
- Experiencing that classic theories of harm do not fit for emerging multi-sided markets, the spread of digital ecosystems that benefit from strong network effects and the provision of multiple interconnected goods and services

❑ Beyond the application of the EUMR, other regulatory frameworks like the **Foreign Subsidies Regulation** and **Digital Markets Act**, contribute to slowdown/make harder the closing of deals

The broadening of jurisdictional powers to scrutinize transactions (1/2)

Turnover thresholds are not sufficient to capture all the acquisitions that are likely to significantly reduce competition within the internal market

Article 22 EUMR

- According to EC's Article 22 Guidance, Member States may refer a concentration to the EC **regardless of whether they are competent to review it**, provided that: (i) it affects trade between Member States; and (ii) it threatens to significantly affect competition within the territory of the Member State making the request.
- Such **'corrective' use of Article 22** is nowadays filled with uncertainty, due to the most recent ECJ judgement in the ***Illumina/Grail* case**, in which the ECJ specified that the Commission **can no longer accept referrals from EU Member States if they are not competent** to examine a proposed transaction.

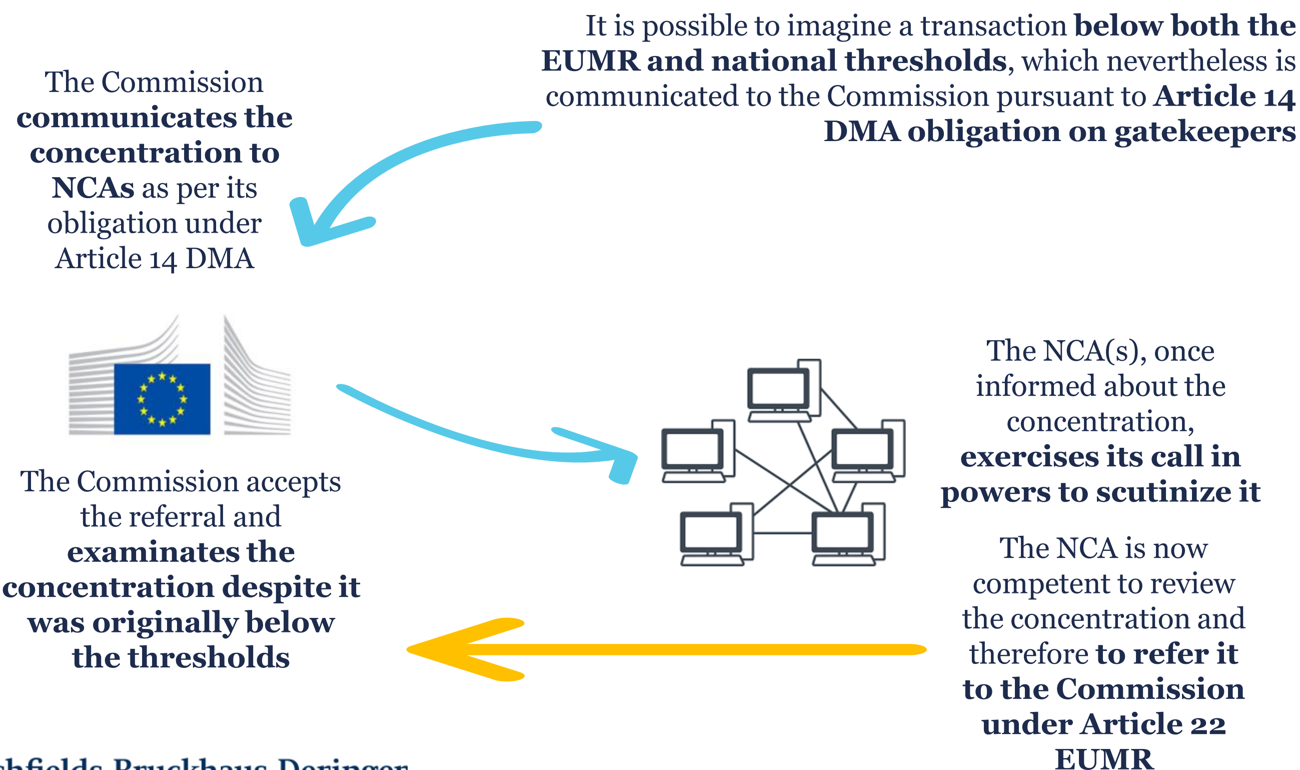
National 'call in' regimes

- A number of EU Member States have already implemented legislative national provisions aiming at capturing all relevant transactions which happen to be below the thresholds.
- States with *ex officio* call in powers include **Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia**, and **Sweden**.
- States with alternative thresholds to cover the so-called 'killer acquisitions' include **Germany** and **Austria**.

National authorities which previously referred the *Microsoft/Inflection* acquisition to the Commission withdrew such referral, following ECJ ruling

The broadening of jurisdictional powers to scrutinize transactions (2/2)

What happens if we combine Article 22 referral, with NCAs’ call in powers (and the new provision under Article 14 of the DMA)?



Is it still possible to completely rule out with certainty that any intended acquisitions must be notified and could be considered out of the scope of merger control review?

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The multiple jurisdicition extension may have a significant impact on transaction documents, including:

- deals timeline
- condition precedents
- effort clauses
- long stop date

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Merger control theories of harm – are we nearly at a substantive analysis update?

The changes in the recent past are not only from a procedural/jurisdictional perspective, but impact the substantive merger analysis

Booking/ eTraveli case

- On 25 September 2023, the European Commission **prohibited** Booking's proposed acquisition of eTraveli
- In assessing the negative effects steaming from this transaction the Commission relied on the so-called, **theory of ecosystem harm**
- According to the Commission the acquisition could also reinforce the ecosystem's dominance by adding **complementary services that increase value for consumers and help retain users by offering partial substitutes**

THEORY OF ECOSYSTEM HARM

When the acquiring company operates an ecosystem with strong network effects, which create high barriers to entry, the competitive **risk goes beyond restricting rivals' access to inputs**

PRACTICAL TAKEAWAYS TO BE CONSIDERED IN A PRE- NOTIFICATION PHASE

1. When predicting the counterfactual scenario, make sure to consider also the so-called **'dynamic' counterfactual scenario**, for markets that evolve particularly fast
2. Do not underestimate certain factors that were not material running a more traditional assessment (e.g. the **value of key people in a company**)
3. When defining the relevant market, remember that many of the markets characterized by innovation are markets in which **competition is 'non-price competition'**

The IAA's new "super-powers" (and other NCTs): what about the digital / tech sector ?

Alessandro Di Giò – Freshfields - Counsel

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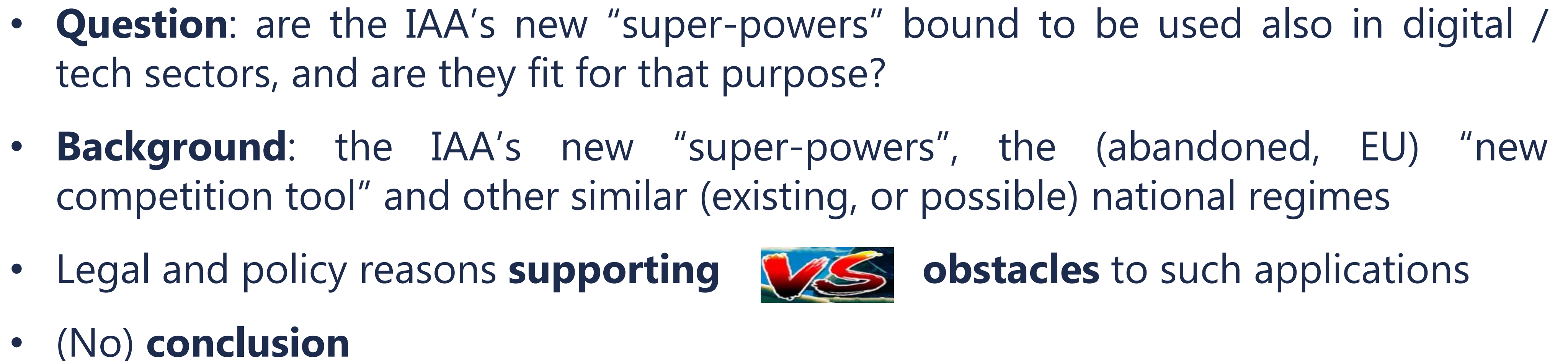
The IAA's new "super-powers" and the digital / tech sectors

Outline

- **Question**: are the IAA's new "super-powers" bound to be used also in digital / tech sectors, and are they fit for that purpose?
- **Background**: the IAA's new "super-powers", the (abandoned, EU) "new competition tool" and other similar (existing, or possible) national regimes
- Legal and policy reasons **supporting**  **obstacles** to such applications
- (No) **conclusion**

The IAA’s new “super-powers”: background and benchmarks

Current, past and possible futures regimes

- The **IAA’s new super-powers**:
  - Behavioural and/or structural measures (or commitments) in case of “competition problems”, resulting from non-fining investigation
  - No sector limitation
- The **“NCT”** (abandoned) precedent at **EU** level (and “defrosted” in the future?)
- The **UK market investigations** experience
- Possible other national regimes: e.g. in **Germany** about NCT under 11th GWB Amendment; recent initiatives in e.g. Denmark, Norway, Sweden, Finland, as well as (under consideration) the Netherlands and Spain

Applying the super-powers to the digital / tech sector

Legal and policy reasons which may support this use of NCTs

- No general **scope** limitation in the Italian law
- The very **origin** of the IAA's super-powers: algorithm parallelism / collusion
- The recent activism of the IAA and other NCAs in pursuing **antitrust** cases in the digital / tech space, even for global conducts, and even for matters bound to be covered by EU sector regulation (e.g. Spain, for parity clauses)
- The experience of **sector investigations** by the IAA (e.g. big data (2020))
- The UK experience of **CMA's market investigations**, often in the digital sectors (e.g. cloud computing, cloud gaming; mobile ecosystems, online platforms and digital advertising)
- NCT as means for "**filling regulatory gaps**"

Super-powers and digital / tech sector: legal challenges and basis for self-restraint

Legal and policy obstacles against this use of NCTs

- **Global issues** v. national enforcement / centralised v. decentralised enforcement (plus, limits in administration resources)
- Multiple concurrent and relevant (non-sector specific) **regimes**, i.e. antitrust, UCPs, economic dependences, unfair competition
- Sector regimes, incl. in particular the **DMA**
  - art. 1(5): “fairness” and “contestability” v. other purposes / art. 1(6)(b): DMA v. antitrust rules (see also BGH’s decision confirming a designation under 19a(1) GWB)
- EU NCT “**replaced**” by the DMA (and UK market investigations superseded (?) by the DMCC)
- Differences between **diverse market failures / ToHs**
  - e.g. barriers to entries; pricing; unilateral market power conduct v. information asymmetry / tacit collusion / tipping markets (?)

Thank you!

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Back up materials

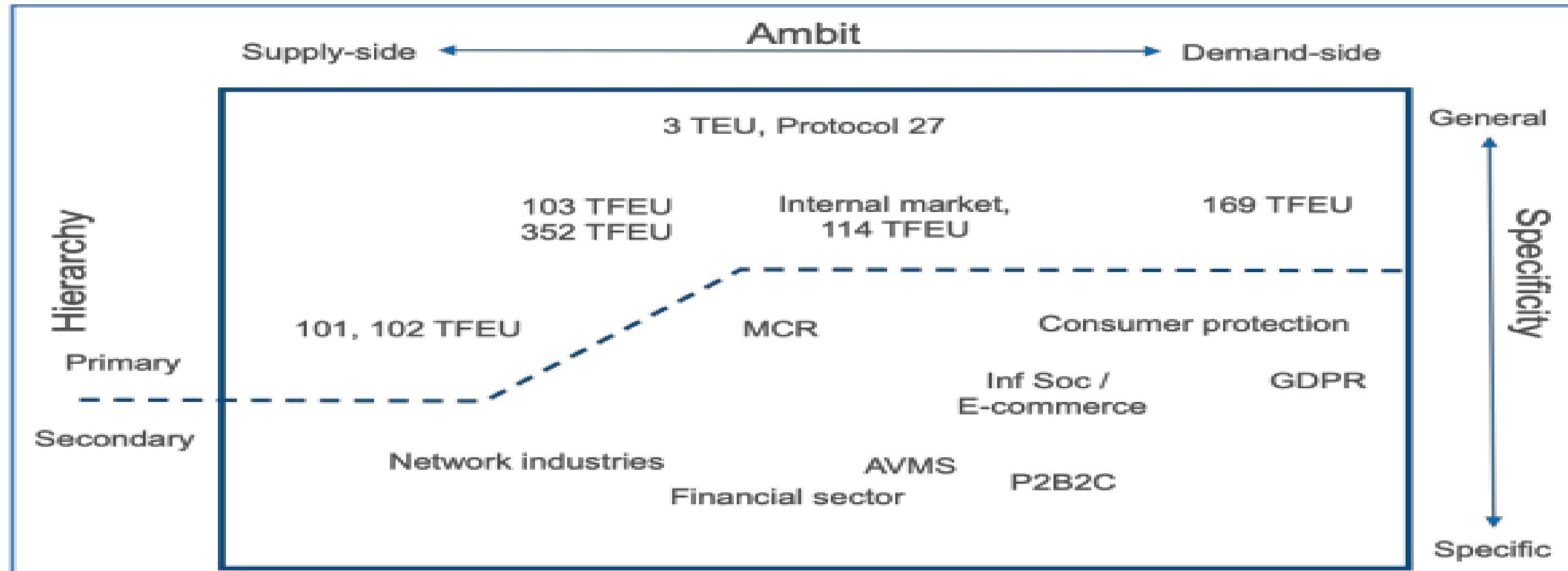
The IAA’s new “super-powers”: the law

Article 1(5) of Decree-Law No 104 of 10-8-2023, as converted by Law No 136 of 9-10-2023 (‘Asset Decree’)

"...if, by way of outcome of a fact-finding investigation conducted pursuant to Article 12, para 2, of Law No. 287 of 10 October 1990, the [IAA] finds ***problems of competition*** *that hinder or distort the proper functioning of the market with consequent harm to consumers, it may impose on the undertakings concerned, in compliance with European Union law principle and after consulting the market, any* ***structural or behavioural measures*** *which are necessary and proportionate to eliminate distortions of competition [...]'*

(convenience translation; emphasis added)

Digital sector in the EU: concurring regulations



Source: *Larouche/de Streel*, 2020

UK: market investigations v. sector *ex ante* regulation in the digital sector

Digital markets

We are currently conducting 2 investigations in digital markets with some of the biggest global companies as parties [Footnote 7].

But the challenges presented by digital markets cannot be solely addressed by an investigatory system designed around one-off interventions even where, as with open banking, one can build in longer term oversight of remedies. Market investigations are also not always optimal in fast moving markets where more rapid interventions may be required.

New UK legislation will allow for ex ante regulation of firms with market power in a digital activity. There will also be an investigatory tool, similar to a market investigation – pro-competition interventions (PCI). PCI investigations will have a shorter timeline than market investigations, but the same remedial powers. They will enable us to address the root cause of market power and promote dynamic competition and innovation. Remedy options could include personal data mobility and interoperability – critical in addressing features, such as barriers to entry, which prevent innovative new competitors driving greater competition.

Source: GOV.UK website

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