Three stress tests for the future of European antitrust policy

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Stress tests are important. They assist doctors in detecting heart abnormalities, financiers in anticipating financial shocks, and engineers in learning about the hidden vulnerabilities of operating systems. They test regulators' creative theories of enforcement and regulation and the long-term sustainability of their policy choices. The European Union's antitrust policy faces three major stress tests at a critical time, as a new European Commission for 2024–2029 is about to be established.

The first stress test evaluates the effectiveness of the EU's Article 22 referral policy and the Commission's capacity to potentially examine any merger globally. The extraterritoriality of the EU's merger policy and the effectiveness of the 'Brussels effect' are currently being challenged, going beyond the technical aspects of the discussion. I predict, as I previously stated[1] that the Commission will not pass this test.

The second stress test pertains to the EU's Digital Markets Act (DMA), aimed at fostering regulatory dialogue and timely interventions to prevent litigation in the realm of digital competition. Based on the latest developments, I once again

1 Aurelien Portuese, 'Making Sense of EU Merger Control: The Need for Limiting Principles' (*CPI Antitrust Chronicle*, November 2023), www.pymnts.com/wp-content/uploads/2023/11/ANTITRUST-CHRONICLE-Horizontal-Competition-Mergers-Innovation-and-New-Guideline-November-2023.pdf.

predict that the European Commission is likely to fail this test due to its litigation-driven enforcement of the DMA.

The third and final stress test evaluates the EU's regulation of artificial intelligence (AI) with the aim of promoting both competition and innovation. The EU has the potential to achieve success if it makes the correct choices based on rational decision-making and avoids dogmatism.

There are three stress tests that the future European Commission must face, each with its own level of difficulty: one failure that is expected, one failure that is probable, and one success that is possible. These tests present significant challenges, they nonetheless cannot be avoided. I analyse the reality of each of these three stress tests and provide guidance on how to respond to each of them, before concluding.

The Brussels effect of European antitrust under stress: the failure of the new Article 22 referral policy

Article 22 of the European Union Merger Regulation (EUMR) lays down for a referral mechanism so that the European Commission can review mergers at the suggestion of Member States.[2] Traditionally, Article 22 has been widely perceived as a post-notification referral mechanism for Member States to refer a merger case to

2 Regulation 13/2004/EC [2004] of 20 January 2004, OJ L 24/1, amending Regulation 4064/89/EEC pf 21 December 1989 on the control of concentrations between undertakings ('the EC Merger Regulation') [1989], OJ L 395/1. Article 22(1) states that 'One or more Member States may request the Commission to examine any concentration [...] that does not have a Community dimension [...] but affects trade between Member States that threatens to significantly affect competition within the territory of the Member State or States making the request.' See, more generally, Eleanor Morgan, 'EU merger control reforms: An appraisal' (1998) 16(1) *European Management Journal*, 110–120 (noting the benefit of the 'one-stop shop' mechanism); Gotz Drauz, Stephen Mavroghenis, Sara Ashall, 'Recent Developments in EU Merger Control', (2012) 3(1) *Journal of European Competition Law & Practice*, 52–75 (noting the limited use of Article 22); Johannes Luebking, 'The EU Merger Regulation Ten Years after the 2004 Review', (2014) 5(4) *Journal of European Competition Law & Practice*, 185–186 (advocating for 'Article 22 [to] be better aligned to the principle of 'one-stop-shop', allowing the Commission to examine the merger for the whole of the European Economic Area'.); Gianni De Stefano, Rita Motta, Susanne Zuehlke, 'Merger Referrals in Practice –Analysis of the Cases under Article 22 of the Merger Regulation, (2011) 2(6) *Journal of European Competition Law & Practice*, 537–550 ('Article 22 referrals are mostly suitable where the transaction affects markets that are wider than national.'); Axel Reidlinger, Heinrich Kuhnert, 'The role of NCA competence under Art. 22 ECMR', (2007) 5(2) ZWeR 129–140 (concluding that 'Commission has gone too far in refusing to take into account the competence of the referring NCA when deciding whether or not to accept the referral'.)

the Commission whenever they deemed it necessary[3] or they lacked the adequate merger control mechanism.[4] This mechanism is part of a broader set of referral mechanisms established by the EUMR whereby authorities delegate competence.[5] But it was widely understood that the referring authority had to be competent to refer the merger case to the other authority. In other words, commentators and regulators held the belief that Article 22 did not permit a Member State to refer concentrations for review if that Member State did not initially have jurisdictional competence over the merger.[6] Article 22 was about referring concentrations with Community dimension, thus having supra-national effects – not about referring concentrations that lack a national dimension, thus having infra-national effects.

This was true until recently: fearing that so-called 'killer acquisitions'[7] go unchecked, the European Commission issued a Guidance Paper about the Article 22

3 The first country to invoke Article 22 was Belgium following a request by Air France and Sabena in *British Airways/Dan Air*. See Commission Decision of 17 February 1993: Case IV/M.278 – *British Airways/Dan Air* (on appeal, Case T-3/93 *Air France v Commission* [1994] ECR II-121. See also Commission Decision of 20 September 1995, Case IV/M.553—*RTL/Veronica/Endemol*; Commission Decision of 17 April 2002, Case COMP/M.2738 –*GEES/Unison*; Commission Decision of 5 December 2003, Case COMP/M.3136 – *General Electric/Agfa NDT*, paras 1–2; Commission Decision of 31 March 2010, Case COMP/M.5828 – *Procter & Gamble/Sara Lee Air care*. See also Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 – 11 December 2001, para 86 (lack of effectiveness of the joint request referrals).

4 Article 22 is often referred as the 'Dutch clause' because, at the time of the adoption of the EUMR, the Netherlands did not have its own national system of merger control. Article 22 enabled such countries to refer concentrations with no Community dimension to the Commission. See Edurne Navarro, Andres Font, Jaime Folguera, Juan Briones, *Merger Control in the EU* (Oxford University Press, 2002), 404.

5 Article 4(4) of the EUMR creates an downward referral mechanism where the Commission refer a concentration partially or entirely to Member State(s); Article 4(5) of the EUMR creates an upward referral mechanism when merger filings are required in at least three Member States; and Article 22 of the EUMR creates an upward referral mechanism when concentrations affect trade between Member States.

6 See Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2; Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2008] OJ C 95. The referral mechanism can be seen in light of the general referral mechanism of the preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union where national courts can refer to the Court of Justice of the European Union, provided that they are initially competent on the matter referred.

7 On the theory, see Colleen Cunningham, Florian Ederer, Song Ma, 'Killer Acquisitions', (2022) 129(3) *Journal of Political Economy*, 649–702; Sai Krishna Kamepalli, Raghuram Rajan, Luigi Zingales, 'Kill Zone' (NBER Working Paper Series, 2022); 'Start-ups, Killer Acquisitions and Merger Control', OECD Background Note (OECD, 2020), https://web-archive.oecd.org/2020-10-16/566931-start-ups-killer-acquisitions-and-merger-control-2020.pdf . On the challenges of the theory, see Aurelien Portuese, 'Reforming Merger Reviews to Preserve Creative Destruction', (*ITIF Report*, December 2021), www2.itif.org/2021-merger-reviews.pdf ; Jeffrey T. Macher and John W. Mayo, 'The Evolution of Merger Enforcement Intensity: What Do the Data Show?' (2021) 17(3), *Journal of Competition Law & Economics* 708–727.

referral mechanism where the European Commission changed its policy from historically discouraging referrals under Article 22 to encouraging such referrals.[8] But, in doing so, the European Commission went one step further and encouraged not only concentrations with Community dimension that Member States could review, but also, more controversially, asked Member States to refer small concentrations for which they lack jurisdictional competence because the concentration falls below national thresholds for merger control.

European Commission Executive Vice-President Margrethe Vestager, in a speech at the International Bar Association's 26th Annual Competition Conference in Florence, 'Merger control: the goals and limits of competition policy in a changing world', referred to 'the enhanced use of Article 22, ie, the referrals to the Commission from EU Member States for cases for which national jurisdictional criteria have not been met'.[9] She continued:

> 'These powers were always provided for in the legislation[...] The evolution in the application of Article 22, which we announced two years ago, is just one example of how flexibility and adaptability can work in practice to help us address emerging challenges. By adapting the referral mechanism, we can capture below-threshold acquisitions that could raise competition concerns. And to maximise this potential, we need to work together with the national competition authorities across the Union to develop a unified and coherent approach.'[10]

This change of policy is fundamentally wrong as it blatantly violates the fundamental principles of EU law – ie, the principles of subsidiarity and of legal certainty.[11] Indeed, in an article that I wrote, titled 'Making Sense of EU Merger Control: The Need for Limiting Principles', published in November 2023 in *Competition Policy International*[12], I argued that the new Article 22 guidance from the European Commission infringes the EU principles of subsidiarity and legal certainty, and that it will not pass muster in courts despite a hasty win before the General Court

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8 Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C/2021/1959 (2021).

9 Margrethe Vestager, speech at the International Bar Association's 26th Annual Competition Conference in Florence 'Merger control: the goals and limits of competition policy in a changing world' (European Commission, 9 September 2022), https://ec.europa.eu/commission/presscorner/detail/da/SPEECH_22_5423

10 *Ibid.*

11 For a discussion on the legal and economic importance of both principles, see Aurelien Portuese, 'The Principle of Subsidiarity as a Principle of Economic Efficiency,' (2010) 17 *Columbia Journal of European Law*, 231; Aurelien Portuese, Orla Gough, Joseph Tanega, 'The principle of legal certainty as a principle of economic efficiency' (2017) 44(1), *European Law Journal*, 131–156.

12 See n1 above. ('EU merger control needs limiting principles, or else the Commission's unprincipled approach may undermine the legitimacy of EU merger decisions due to regulatory overreach.')

in the *Illumina/GRAIL* case.[13] In what I referred to as 'misguided guidance', I previously wrote that the Guidance Paper 'disregards the principle of subsidiarity' because it ignores the constitutional principle of conferral – according to which, one cannot confer a power that one does not have – that underpins the principle of subsidiarity.[14] I also argued that the new Article 22 Guidance Paper violates the principles of legal certainty by dismantling the reference to fixed turnover-related criteria, thus undermining the legal certainty and legitimate expectation that businesses can rightfully expect from EU institutions, and by discriminately applying to 'certain categories of cases' without clarifying such selection.[15] My criticism of the Article 22 Guidance Paper was justified.

Indeed, in the case *Illumina/GRAIL* – which constitutes the first stress test of the new Guidance Paper[16] – the Advocate General Nicholas Emiliou has recently articulated a brilliant and reasonable critique of the new Article 22 Guidance Paper and recommended the European Court of Justice to set aside the judgement of the General Court that endorsed the Commission's new Guidance Paper to block the merger between Illumina and GRAIL.[17]

AG Emiliou's opinion emphasises how the new Article 22 Guidance Paper violates the principles of subsidiarity and of legal certainty. The AG Emiliou assessed the General Court's conclusion that a 'literal, historical, contextual and teleological' interpretation of that provision supported the view that Member States may request the Commission to examine a concentration which does not have a Community dimension, even where they have no competence to review such a concentration under national law.[18]

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13 T-227/21, *Illumina Inc v European Commission*, ECLI:EU:T:2022:447.

14 See n1 above.

15 *Ibid.*

16 This approach to Article 22 referrals was first used by the French Competition Authority to refer Illumina's acquisition of GRAIL. Since then, the EC has accepted referral requests in three more merger cases where the transaction was not notifiable at the EU or Member State level. EC accepted Article 22 EUMR referral on 19 April 2022. The proposed concentration did not meet EUMR turnover thresholds and was not subject to Member State jurisdiction. The EC found that GRAIL's (lack of) turnover did not reflect its competitive significance and that it could affect trade in the single market and threaten competition in France, so a referral was appropriate. Illumina sought to overturn the EC's acceptance of the referral on the grounds that it could not accept an Article 22 EUMR referral from a Member State without merger control jurisdiction over the proposed concentration. The General Court ruling on 13 July 2022 supported the EC. The Advocate General disagreed with the General Court's interpretation of Article 22 EUMR, thereby undermining the Commission's new Guidance Paper on Article 22.

17 Opinion of Advocate General Nicholas Emiliou delivered on 21 March 2024 in Joined Cases C-611/22 P and C-625/22 P, *Illumina, Inc v European Commission* (C-611/22 P) and *Grail LLC v Illumina, Inc, European Commission* (C-625/22 P), ECLI:EU:C:2024:264.

18 *Ibid*, para 50.

First, from a literal perspective, AG Emiliou notes that 'referral' means 'in the vast majority of the language versions' of the EUMR the application of 'the legal maxim *nemo dat quod non habet* (no one can give what they do not have)'.[19] Also, the mergers to be referred must significantly affect competition 'within the territory of the Member State or States making the request', thus allowing for review of mergers that could distort competition in a Member State that does not have a national merger control system.

Second, from a historical perspective, AG Emiliou notes that the 2001 Green Paper[20] 'indicates that its objectives ("to strengthen the application of Community competition law in cases with cross-border effects, to strengthen the 'one-stop shop' principle and to alleviate the problem of multiple filings") were to be achieved by ensuring that cases leading to multiple notifications at national level could be handled by the Commission. It goes without saying that cases leading to multiple notifications are not those falling below the national thresholds.'[21]

Third, from a contextual perspective, AG Emiliou noted that 'the EUMR intended to develop the 'one-stop-shop' objective of the referral mechanism. Therefore, since that objective concerns only notified or notifiable mergers, it is quite obvious that the wording of those provisions and recitals was drafted with those transactions in mind.'[22]

Fourth and most importantly, from a teleological perspective, AG Emiliou notes that the EUMR 'refers to a mechanism having a corrective function in terms of *allocation of competences'* between the Commission and national competition authorities.[23] The EUMR's references to the principles of subsidiarity and legal certainty are informative from a teleological perspective. Indeed, AG Emiliou rightly considers that:

> 'The reference to the principle of subsidiarity and to the adequate protection of the Member States' competition confirms a narrow scope for the referral mechanism: it is only intended to remedy situations in which competition is affected locally. Second, the reference to legal certainty and the "one-stop-shop" principle also suggests that the referral mechanisms are aimed at replacing several national procedures with one centralised procedure, which presupposes that the mergers in question meet the national thresholds.'[24]

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19 *Ibid.*
20 Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 – 11 December 2001.
21 See n17 above, para 91.
22 *Ibid*, para 161.
23 *Ibid*, para 179.
24 *Ibid*, para 182.

AG Emiliou notes that the Commission's new Guidance Paper would create an unlimited competence for the Commission to review any merger of any size at anytime from anywhere in the world. These unreasonable extraterritorial effects of European merger control, albeit in line with the most aggressive view of the 'Brussels effect', would violate the principle of international comity. AG Emiliou indeed writes: 'I wonder whether the Commission's view of its far-reaching jurisdiction to review mergers under Article 22 EUMR is fully in line with the principle of international comity.'[25]

Last November, I wrote that the new Article 22 Guidance Paper was fundamentally wrong as it violated constitutional principles of the EU.[26] Considering AG Emiliou's opinion delivered on March 2024 that shares these legitimate concerns, I anticipate that the European Court of Justice will wisely follow AG Emiliou's opinion and reject the controversial interpretation given to Article 22 EUMR in the Commission's Guidance Paper.

The 2020 policy on the new Article 22 Guidance Paper will be short-lived. It means that the Brussels' effect will be curtailed. Indeed, the *Illumina/GRAIL* blocked merger based on the new Article 22 policy had no business activity in the EU, so the European Commission used its new Article 22 Guidance paper to review and block mergers where merging companies have no business activity in the EU. This policy is paramount to the sought-after Brussels effect[27] whereby European regulations and policies have extraterritorial effects not only coincidentally but as part of the Commission's deliberate effort to exert soft power globally[28] by exporting its regulatory approaches. The new Article 22 Guidance Paper clearly demonstrates that European institutions are not simply exercising extraterritorial jurisdiction, but actively formulating (controversial) policies that extend their jurisdictional authority beyond the EU. The forthcoming rejection by the European Court of Justice of the merger prohibition in *Illumina/GRAIL* and the Commission's Article 22 Guidance Paper also signals a strong and laudable adherence to the general principles of EU law. Anticipating such rejection, the European Commission unfortunately envisages to challenge below-thresholds mergers, thus re-asserting the Brussels effect of European merger policy despite the shortcomings of such approach.[29]

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25 *Ibid*, para 223.

26 See n1 above.

27 On the Brussels effect, see Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, (Oxford University Press, 2020); Anu Bradford, 'Exporting standards: The externalization of EU's regulatory power' (2015) 42 *International Review of Law and Economics*, 158–173.

28 Zaki Laidi, *Norms over Force. The Enigma of European Power*, (Springer Books, 2008).

29 Victoria Ibitoye, 'Guersent: EU will deploy Article 102 if ECJ thwarts Article 22 approach' (*Global Competition Review*, 10 April 2024) https://globalcompetitionreview.com/article/guersent-eu-will-deploy-article-102-if-ecj-thwarts-article-22-approach

More reasonably, the new European Commission will have to come up with a new Guidance Paper that reverts to the historical and adequate referral policy under Article 22. This will have substantive effects not only for ongoing cases such as *Illumina/GRAIL* and *Nasdaq Power/EEX*[30], but most importantly for the misguided narrative of 'killer acquisitions' that the unprincipled new Article 22 Guidance Paper failed to effectively address due to the imminent rejection of the Article 22 Guidance Paper by the forthcoming decision by the European Court of Justice. European antitrust policy, and especially European merger control, cannot and should not assert jurisdictional competence over any deal from anywhere at any time, as the Article 22 Guidance Paper envisaged. We need a European merger control policy with limiting principles that can be persuasive and constitutionally valid – this is the ambitious goal that the new European Commission will have to focus on.

Litigating the Digital Markets Act: the likely failure of the regulatory dialogue

The sought-after Brussels effect on European merger control is bound to fail the stress test given the upcoming ruling by the European Court of Justice. The other stress test on antitrust policy for the next European Commission relates to the most important piece of regulation that the European Commission has put forward to regulate the digital economy – the Digital Markets Act (DMA).[31] The purpose of

30 Germany's EEX acquisition of Nasdaq Power was announced on 20 June 2023. The Commission accepted Article 22 referral on 18 August 2023. See Case M.11241, *EEX/Nasdaq Power*, C(2023) 5733 final 18 August 2023; 'Mergers: Commission to assess the proposed acquisition of Nasdaq Power by EEX (European Commission, 21 August 2023) https://ec.europa.eu/commission/presscorner/detail/en/MEX_23_4221. The companies raised concerns about the unpredictability of the new Article 22 Guidance Paper's policy. See Andrew Boyce, 'EEX, Nasdaq Power, deal referral to EU raises "unpredictability", companies say' (*MLex*, 21 December 2023) https://mlexmarketinsight.com/news/insight/eex-nasdaq-power-deal-referral-to-eu-raises-unpredictability-companies-say. There was also *Qualcomm/Autotalks* that the European Commission asserted jurisdiction over. See 'Mergers: Commission to assess the proposed acquisition of Autotalks by Qualcomm' (European Commission, 18 August 2023), https://ec.europa.eu/commission/presscorner/detail/en/MEX_23_4201. However, antitrust concerns both in the EU and the UK deterred Qualcomm from acquiring Autotalks. See, 'Qualcomm end bid to buy Israel's Autotalks after antitrust probe' (Reuters, 22 March 2024), www.reuters.com/business/media-telecom/qualcomm-ends-bid-buy-israels-autotalks-after-antitrust-probe-2024-03-22/.

31 On the DMA, generally, see Aurelien Portuese, 'Precautionary Antitrust: The Changing Nature of Competition', (2022) 17(3) *Journal of Law, Economics and Policy*, 548–634; Aurelien Portuese, 'The Digital Markets Act: European Precautionary Antitrust' (*ITIF Report*, May 2021), www2.itif.org/2021-digital-markets-a4.pdf ; 'The Digital Markets Act: The Path to Overregulation' (*Competition Policy International*, 13 June 2022); Aurelien Portuese, 'The Digital Markets Act: A Triumph of Regulation Over Innovation, (*ITIF Report*, August 2022), www2.itif.org/2022-digital-markets-act.pdf ; Aurelien Portuese, 'The Digital Markets Act: Precaution Over Innovation' (*Epicenter*, 9 June 2021), www.epicenternetwork.eu/wp-content/uploads/2024/01/Digital-Markets-Act-precaution-over-innovation-final.pdf.

the DMA was to serve as a form of proactive, *ex ante* regulation that would enable timely regulatory interventions and prevent the need for lengthy and uncertain litigation processes.[32] More bombastically, the DMA was intended to shift its focus from litigating antitrust rules in courts to facilitating a 'regulatory dialogue'[33] that encourages competition. The DMA's proposal explicitly stated that the regulation 'provides for the possibility of a tailored application of some of the obligations through a dialogue between the Commission and the gatekeepers concerned'.[34] The final version of the DMA adopted in 2022 acclaim this 'regulatory dialogue'.[35] This regulatory dialogue was a component of the concept of 'participative antitrust' advocated by Nobel Prize laureate Jean Tirole.[36]

32 Impact Assessment Report accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' SEC(2020) 363 final. See, generally, Aurelien Portuese, 'Precautionary Antitrust: The Changing Nature of Competition', (2022) 17(3) *Journal of Law, Economics and Policy*, 548–634; Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, Marshall Van Alstyne, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts', (2021) Joint Research Centre European Commission, JRC122910; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition law', (2023) 19 *European Competition Journal*, 57–85; Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective', (2023) 19 *European Competition Journal*, 1–29; Pierre Larouche, Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded in Traditions', (2021) 12(7) *Journal of European Competition Law & Practice*, 542–560; Friso Bostoen, 'Understanding the Digital Markets Act', (2023) 68(2) The Antitrust Bulletin, 263–306.

33 Impact Assessment Report accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' SEC(2020) 363 final. See also Ann C Witt, 'The Digital Markets Act: Regulating the Wild West', (2023) 60(3) *Common Markets Law Review*, 625–666; Pinar Akman, 'Regulating competition in the digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act', (2022) 47(1) *European Law Review*, 85–114.

34 European Commission, Proposal for a Regulation of the European Parliament And of The Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December 2020, 6. The preferred option involved 'directly applicable obligations, including certain obligations where a regulatory dialogue may facilitate their effective implementation', see *Ibid*, 10.

35 Regulation (EU) 2022/1925 Of The European Parliament And Of The Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) L 265/1, 12 October 2022 (recital 65, 'It may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned and after enabling third parties to make comments, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with obligations that are susceptible of being further specified or, in the event of circumvention, with all obligations').

36 Allison Schrager, 'A Nobel-winning economist's guide to taming tech monopolies', (*Quartz*, 27 June 2018), https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies ; Cited also by Alexandre de Streel, 'Should digital antitrust be ordoliberal?', (2020) *Concurrences*, No 1-2020, 2–4.

The scepticism toward such vision has been articulated at length. I previously wrote that the DMA's regulatory dialogues 'are not genuine. They are investigations without names – an undercover prosecutorial exercise disguised as data compilation. Regulatory dialogues in the DMA will fail from the start.'[37] This was a prophetic statement since it is exactly what is happening now that the DMA's compliance date of 7 March 2024 is behind us. Indeed, the skepticism was justified: the non-litigation pro-dialogue aspect of the DMA is now seriously under a considerable stress test.

For, on 25 March 2024, the European Commission opened non-compliance investigations against Alphabet, Apple and Meta.[38] Additionally, the Commission has taken 'other investigatory steps' on Amazon's self-preferencing practices and Apple's new fee structure.[39] The are five non-compliance investigations:

1. Alphabet's steering rules may breach Article 5(4) of the DMA;
2. Apple's steering rules may breach Article 5(4) of the DMA;
3. Alphabet's self-preferencing practices may breach Article 6(5) of the DMA;
4. Apple's choice screen measures may breach Article 6(3) of the DMA;
5. Meta's 'pay or consent' model may breach Article 5(2) of the DMA.[40]

These five investigations do not mean that the Commission 'endorse all other measures implemented by gatekeepers which are not (or not yet) subject to investigation',[41] thereby paving the way for additional investigations and future non-compliance decisions.

As a preliminary remark, these investigations raise multiple questions in terms of timing. First, only 18 days after the DMA has fully entered into force (since gatekeepers had to comply with the DMA by 7 March 2024), the European Commission is already eager to break away from the 'participative antitrust' it lauded with the DMA's 'regulatory dialogue' and launch investigations which are very much pre-litigation phases, since the expected non-compliance decisions will inevitably be challenged by the gatekeepers in courts. The regulatory dialogue, if any, was short-lived.

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37 Aurelien Portuese, 'The Digital Markets Act: European Precautionary Antitrust' (*ITIF Report*, May 2021), www2.itif.org/2021-digital-markets-a4.pdf, 62.

38 'Commission opens non-compliance investigations against Alphabet, Apple, and Meta under the Digital Markets Act' (European Commission, 25 March 2024), IP/24/1689.

39 *Ibid.*

40 *Ibid.*

41 Margrethe Vestager, 'Remarks by Executive-Vice President Vestager and Commissioner Breton on the opening of non-compliance investigations under the Digital Markets Act', (European Commission, 25 March 2024), https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1702

Second, the European Commission held several 'workshops' in its premises.[42] A few days before the announcement of the non-compliance investigations, the gatekeepers were gathering and discussing with Commission's officials while they were preparing the decisions. This uneven playing field generates distrust and can only encourage the gatekeepers not to engage. I previously wrote that 'from a strategic viewpoint, gatekeepers may be well advised to remain silent, as they will be placed in a situation of being under investigation or even facing prosecution. These dialogues are not genuine'.[43] It is unfortunately confirmed: whatever the gatekeepers may say or discuss these workshops may either be used against them or be irrelevant, since the decisions are being prepared in parallel of these workshops.

Third and finally regarding the timing, it cannot go unnoticed that the considerable urge for the European Commission to break the regulatory dialogue by announcing non-compliance investigations against the gatekeepers take place during political campaigns for the European elections that will take place on 6 to 9 June 2024. The 'political pressures'[44] to hit 'Big Tech' companies runs in the way of the DMA's regulatory dialogue. In other words, the importance of regulating dialogue is overshadowed by the political necessity to demonstrate assertiveness towards foreign technology platforms. Regrettably, this is the prevailing political situation in contemporary Europe.

More generally, the non-compliance investigations and the inevitable non-compliance decisions that the European Commission is about to issue at the closing of these investigations represent a serious stress test for the DMA: is the DMA doomed to fail considering its adversarial, rather than 'participative', turn? In other words, does the adversarial turn of the DMA signal its failure since it was designed to be a regulatory tool for *ex ante*, participative antitrust and not *ex post*, litigation-driven antitrust? The answer seems dangerously positive – dangerously because all players would be worse off by such an outcome: the European Commission because it fails to make the DMA a success, and the gatekeepers because they are about to be dragged into protracted litigation processes.

Beyond serious risks of regulatory fragmentation against its stated objective,[45] the DMA faces a considerable challenge: the risk of becoming irrelevant as the regulatory dialogue between the European Commission and the digital gatekeepers becomes broken and litigation becomes the default way of enforcing the DMA.

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42 'DMA stakeholders' workshops' (European Commission) https://digital-markets-act.ec.europa.eu/events/workshops_en, accessed 12 June 2024.

43 See n67 above.

44 Julia Tar, 'Cracking down on Big Tech: The drive behind the barrage of measures of EU's digital acts' (*Euractiv*, 10 April 2024).

45 Aurelien Portuese, 'The Digital Markets Act: A Triumph of Regulation Over Innovation' (*ITIF Report*, August 2022), www2.itif.org/2022-digital-markets-act.pdf.

Litigation-driven enforcement of the DMA is the very opposite of the essence of the DMA, which is meant to provide an alternative route to promoting competition beyond litigation. And yet, litigation-driven enforcement of the DMA seems to have become the likely outcome, thereby putting the existential nature of the DMA under test. The new European Commission must either give up on the regulatory dialogue of the DMA and this regulation will be a failure, or sincerely engage in a regulatory dialogue by organising workshops and discussions without preparing investigations in parallel.

Of course, enforcement of the DMA does not mean the absence of non-compliance decisions, but the timing for such decisions is critical – it should not be 18 days after the compliance date, it should not be simultaneously with a workshop on compliance, and it should not be politically weaponised during election campaigns. Unfortunately, with the announced non-compliance investigations fail to avoid these three timing pitfalls – hence, the new European Commission must rebuild trust to meaningfully engage in a regulatory dialogue with the gatekeepers.

Competition in artificial intelligence: the possible success if the diagnosis is right

The third and final stress test for the new European Commission with respect to competition policy pertains to the talk of the town: artificial intelligence (AI). Here, I would like to articulate a hopeful expectation: the new European Commission can deliver interesting and promising work should the diagnosis be right, and if the regulatory steps are carefully measured.

To get the diagnosis right, one must understand the complexity not only of AI, but of the multiple layers upon which AI exists. On 13 March 2024, the European Parliament adopted the AI Act.[46] In January 2024, the Commission launched the AI innovation package to support AI startups,[47] including a Communication on boosting startups and innovation in trustworthy AI.

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46 European Parliament, Artificial Intelligence Act, P9_TA(2024)0138, www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf. See also 'Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts', COM(2021) 206 final, (European Commission, 21 April 2021), 2021/0106 (COD).

47 'Commission launches AI innovation package to support Artificial Intelligence startups and SMEs' (European Commission, 24 January 2024,) IP/24/383, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_24_383/IP_24_383_EN.pdf; 'Communication on boosting startups and innovation in trustworthy artificial intelligence', COM(2024) 28 final, (European Commission, 24 January 2024), https://ec.europa.eu/newsroom/dae/redirection/document/101621.

Albeit proposed in 2020, the DMA is already old: it did not anticipate the advent and ubiquity of AI technologies, let alone the deployment of AI by the very gatekeepers it targets.[48] Be that as it may, there is room for the DMA, and more broadly the AI Act, to apply to potentially anticompetitive practices. The EU can, if measured in its approach and with the right diagnosis, foster competition and innovation in the AI sector. Two observations can help the new European Commission pass the stress test of promoting competition in the AI sector.

First, the acknowledgement, as it is increasingly doing so in the telecom sector[49], that AI industry and technologies require supra-scale so that not only 'big is not bad', but small is the barrier to do good – namely, to enhance competitiveness of the sector. Indeed, a massive amount of data is required for large language models to operate efficiently and become self-learners. Of course, smaller datasets with superior technological abilities can, on a limited basis, compete with large language models trained on massive datasets.[50] Nonetheless, both large datasets and very large computational power are required as prerequisites for developing large language models which underpin AI technologies. Absent such large datasets and computational power, reliance on large firms providing such critical inputs becomes necessary. In that regard, OpenAI's use of Microsoft's computational power as well as Bing's dataset, or Anthropic's use of Amazon's cloud service, illustrate how start-ups and disruptors lacking these critical inputs eventually turn partners to build the dynamic capabilities they need to scale up their models.

The European regulators, including the new European Commission, are faced with a critical question regarding how the regulation of digital competition,

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48 Natasha Lomas, 'Unpicking the rules shaping generative AI', (*TechCrunch*, 13 April 2023), https://techcrunch.com/2023/04/13/generative-ai-gdpr-enforcement/?guccounter=1 (noting that the DMA and the DSA will not 'apply directly to makers of generative AI tools, according to the European Commission — at least not yet. Or that's what the EU's executive told us when we asked. But a spokesperson suggested they may apply indirectly, ie, if regulated platforms and core platform services are making use of generative AI technology.').

49 EU officials seek to foster telco consolidation and envisage a Digital Network Act (DNA) in the next few years. See Floris Hulshoff Pol, 'EU wants Digital Network Act as answer to telecom concerns big tech' (*Techzine*, 25 October 2023), www.techzine.eu/news/privacy-compliance/112550/eu-wants-digital-network-act-as-answer-to-telecom-concerns-big-tech/#:~:text=The%20European%20Union%20is%20considering,pay%20for%20European%20operators'%20networks ; Clara Hernanz Lizarraga, Jillian Deutsch, 'EU Proposes Broader Telco Reform As 'Fair Share' Falls Flat' (*Bloomberg*, 24 October 2023), www.bloomberg.com/news/articles/2023-10-24/eu-proposes-broader-telecom-reform-as-fair-share-falls-flat ; Bethan John, 'Letta report floats telecoms consolidation, pan-European state aid mechanism', (*Global Competition Review*, 17 April 2024), https://globalcompetitionreview.com/article/letta-report-floats-telecoms-consolidation-pan-european-state-aid-mechanism.

50 See, for instance, Jiaxin Ge, Hongyin Luo, Yoon Kim, James Glass, 'Entailment as Robust Self-Learner', (2023) 1, Proceedings of the 61st Annual Meeting of the Association for Computational Linguistics, 13803–13817.

which is biased against large companies, aligns with the implementation of AI technologies. The rise of European AI startups, which show great potential and require partnerships, could potentially lead to a regulatory approach that prioritises practicality rather than rigid adherence to rules. The enforcement of regulations like the DMA and the AI Act in the AI sector may consider the necessity for widespread adoption, both within Europe and beyond, to ensure that consumers can fully benefit from the capabilities of AI. Put simply, the lack of AI technology in the DMA is not a flaw but a solution for promoting a more practical approach to regulating AI for gatekeepers and their partners.

Second, if competition in the AI sector is critical to deliver not only the benefits of AI technologies but also the necessary openness to critical AI infrastructure, competition cannot be summarised to one or few layers of the many layers of the value chain in AI. We already focus excessively (if not exclusively) on the development and deployment of the large language models (or 'foundational models') by few large companies – such as Amazon's Titan, Apple's MM1, Google's Gemini, Meta's Llama and Microsoft's Turing. Notwithstanding the importance of preserving competition in this layer of the AI infrastructure as well as at the layer of computational/cloud layer of the AI infrastructure, regulators should not overlook one critical aspect of competition in the production of AI's large language models – namely, the production and supply of AI chips. However, within that highly concentrated sector of AI chips, there may be certain bottlenecks that are worth considering. As an example, Nvidia currently holds a market share of more than 80 per cent in the data center chip market, particularly in the segment of generative AI chips. If a single market actor has control over the cost of AI chips, competition in all aspects of the AI infrastructure value chain is not possible. This actor can raise prices and engage in self-preferencing practices that are prohibited by the DMA but which does not apply in this critical digital market. European regulators, including the new European Commission, should prioritise promoting competition in the AI sector across all levels of the AI infrastructure, without obscuring any part of the value chain.[51]

The new Commission may face a rigorous evaluation of its capacity to regulate AI, not only encompassing copyright, data privacy and other evident issues, but more critically addressing competition across all levels of the AI infrastructure's value chain. Due to the DMA's lack of response regarding this matter, there is

51 For an example of this obfuscation and naïve approach, see, 'AI Foundation Models: Update Paper' (Competition and Markets Authority, 16 April 2024), https://assets.publishing.service.gov.uk/media/661941a6c1d297c6ad1dfeed/Update_Paper__1_.pdf (noting 'The availability of AI accelerator chips remains constrained, but there are some signs that the market may be diversifying [...] Nvidia continues to be the lead supplier but, since our initial report, a range of competitors [...] have released or announced the future release of AI chips.')

optimism that past errors can be acknowledged, and a more practical approach can be adopted.

The upcoming European Commission will undergo three stress tests as outlined: it will fail the first test concerning Article 22, it may fail the second test regarding the significance of the DMA's regulatory dialogue, but it has a chance to succeed in the final stress test by adopting a practical and constructive approach to maintaining competition in the field of AI.

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