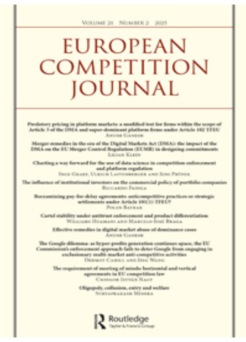

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Merger remedies in the era of the Digital Markets Act (DMA): the impact of the DMA on the EU Merger Control Regulation (EUMR) in designing commitments

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ABSTRACT

The Digital Markets Act (DMA) and the EU Merger Control Regulation (EUMR) are complementary tools that could apply concurrently to mergers involving gatekeepers. Yet, potential tensions between the DMA and the EUMR have been unexplored. It is this paper's objective to shed light on the interplay between the EUMR and the DMA, in the context of commitments design for gatekeeper acquisitions. This paper argues that the DMA could influence the EUMR in designing remedies, since these tools may be taking a similar approach to addressing the harmful effects of gatekeepers' practices. Accordingly, the new DMA obligations could impact future commitments design under the EUMR in two ways. First, at the theory of harm stage, because of the DMA's deterrent effect. Second, at the remedy design stage, because of the principle of proportionality. Therefore, the DMA could restrict the EUMR's power to design merger commitments, in the context of gatekeeper acquisitions.

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KEYWORDS EU Merger Control Regulation; Digital Markets Act; merger commitments; deterrent effect; proportionality; digital markets

1. Introduction

The DMA[1] is substantially an *ex ante* sector-specific competition law, which the European Commission (Commission) will implement and

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[1]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) [2022] OJ L 265/1 (DMA).

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

enforce. The objective of the DMA is to promote effective competition in digital markets.[2] Particularly, to address the current market failure in digital markets and to render these markets contestable, competitive and fair.[3] The DMA seeks to fill the current perceived gap in competition enforcement and sector regulation in digital markets, by creating obligations for gatekeepers. To achieve its aims, the DMA lists in Articles 5, 6 and 7 a set of *ex ante* obligations for qualifying gatekeepers[4] in respect of each of their core platform services.

To date, the following companies have been designated as gatekeepers under the DMA: Alphabet (Google), Amazon, Meta (formerly Facebook), Apple and Microsoft (also collectively known as GAMAM companies), ByteDance and Booking.[5]

Mergers involving gatekeepers (as designated under the DMA) could be covered by the EU Merger Control Regulation (EUMR).[6] The EUMR aims to ensure that "the process of reorganisation" does not result in lasting harm to competition.[7] In order to alleviate expected concerns resulting from a merger, the Commission may block a merger, or alternatively, and more commonly,[8] clear a merger with commitments offered by the merging parties. As the onus is on the merging parties to decide on remedies,[9] they can also be termed "commitments" which is synonymous to "remedies" in this context. Therefore, the terms "remedies" and "commitments" are used interchangeably in this paper. Commitments " … should be proportionate to the competition problem and entirely eliminate it".[10] Merger remedies are central to EU merger control: if commitments do not fully remove the competition concerns, then assessing anticompetitive effects would be futile.[11] The Commission

[2]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, page 58.
[3]ibid.
[4]DMA, article 3(1) lists the criteria for designating gatekeepers under the DMA.
[5]Commission, DMA website: <https://digital-markets-act.ec.europa.eu/gatekeepers_en>; Commission Press Release IP/24/2561, 'Commission Designates Booking as a Gatekeeper and Opens a Market Investigation into X' (2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561>; Henceforth, the term "gatekeepers" in this paper refers to the companies designated as gatekeepers under the DMA.
[6]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 (EUMR).
[7]EUMR, para 5.
[8]Simon Vande Walle, 'Remedies in EU Merger Control – An Essential Guide' (12 May 2021) page 4 Figure 1 <https://ssrn.com/abstract=3782333>.
[9]Ioannis Lianos, 'Competition Law Remedies in Europe' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar 2013) 369.
[10]EUMR, recital 30.
[11]Carles Esteva Mosso and Simon Vande Walle, 'EU Merger Control: How to Remove Anticompetitive Effects?' Chapter 3 in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law-Substance, Process and Policy* (Wolters Kluwer Law International 2020) 1; Vande Walle (n 8) 5.

may accept commitments in either phase of the procedure.[12] Merger remedies, like the DMA obligations, are imposed *ex ante*, before (or during) the harmful conduct takes place.[13]

Where one of the merging parties is a gatekeeper, the merger could be subject to both the EUMR and the DMA. The EUMR could apply to all companies who fall within its jurisdictional scope[14] when there is a merger. The DMA applies to core platform services provided/offered by gatekeepers,[15] independently of a merger. The DMA is complementary to competition rules and merger control and should apply without prejudice to their application.[16] Thus, where a merger involves a gatekeeper, the DMA and the EUMR could apply concurrently. This raises the question whether, and how, the DMA will influence commitments design under the EUMR. Given the centrality of merger remedies to the effectiveness of EU merger enforcement, this issue is of crucial importance.

Against this backdrop, this paper's objective is to shed light on the evolution of merger remedies design going forward, in light of the new set of DMA obligations. The interaction between the DMA and competition rules has been much discussed in the literature.[17] With regards to merger control, the DMA has been discussed, e.g. in the context of mergers' detection.[18] Accordingly, the new obligation upon gatekeepers to inform the Commission about concentrations under Article 14

[12]Commission, Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C 267/1, para 18.

[13]See Brian Galle, 'In Praise of Ex Ante Regulation' [2015] Vand.L.Rev 1715, 1715&1718.

[14]EUMR, article 1; Further in this context, in 2021 the Commission broadened the application of EUMR Article 22 referral mechanism: Communication from the Commission, '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 final.

[15]DMA, article 1(2).

[16]DMA, article 1(6) & recital 11.

[17]See, e.g. Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' [2021] Journal of European Competition Law & Practice 542; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] Journal of European Competition Law & Practice 561; Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] Journal of European Competition Law and Practice 529; Konstantina Bania, 'Fitting the Digital Markets Act in the Existing Legal Framework: The Myth of the "Without Prejudice" Clause' [2023] European Competition Journal 116; Victoria HSE Robertson, 'The Complementary Nature of the Digital Markets Act and the EU Antitrust Rules' [2024] Journal of Antitrust Enforcement 1.

[18]See Victoria HSE Robertson, 'The Future of Digital Mergers in a Post-DMA World' (17 March 2023) <https://commission.europa.eu/system/files/2023-05/Morning-4-5-Robertson.pdf>; Magali Eben and David Reader, 'Taking Aim at Innovation-crushing Mergers: A Killer Instinct Unleashed?' [2023] Yearbook of European Law 1, 27–31; D'Amico Alessia Sophia, 'Closing the Tech Acquisitions Enforcement Gap: From Article 22 to Article 102' (2024) 20(1) European Competition Journal 193, 202–05; Salome Cisnal de Ugarte, Melanie Perez and Ivan Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' [2022] European Competition and Regulatory Review 17, 20–21.

DMA[19] along with the recent broadening of Article 22 EUMR referral mechanism,[20] can help ensure that potentially problematic acquisitions by powerful digital companies do not escape scrutiny even if they acquire a small start-up with a very small turnover.[21] However, potential tensions between DMA obligations and merger commitments have not been explored so far. The contribution of this paper is to discuss the interplay between the EUMR and the DMA, in the context of commitments design for mergers involving gatekeepers.

This paper's central argument is that the DMA could reduce the EUMR's power in designing remedies, since the EUMR and the DMA may be taking a similar approach to addressing the harmful effects of digital gatekeepers' practices. This influence is limited only to mergers involving gatekeepers, i.e. GAMAM, ByteDance and Booking, as the DMA and the EUMR could apply concurrently to such transactions (regarding their core platform services).

The starting point of this paper is to argue that the complementary DMA and EUMR are taking a similar approach to addressing the harmful effects of gatekeepers' practices. While it is well known that nearly all Article 5 and Article 6 DMA obligations are based on conduct that has been found, or it is currently investigated, as infringing abuse of dominance position rules,[22] the link between the DMA and the EUMR has not been considered. In this paper, it is argued that the Commission has also been drawing from its past experience of merger assessment. This is supported by the finding that all commitments in past mergers where the acquirer is now a gatekeeper, also exist as DMA obligations. Therefore, some DMA obligations are very similar to past merger commitments. This may indicate that the Commission's merger concerns could continue to reflect conduct prohibited in the DMA[23] and that merger remedies may echo DMA obligations.

[19]DMA, article 14(1)&14(4)&14(5).
[20]Communication from the Commission (n 14).
[21]See Robertson, 'The Future of Digital Mergers' (n 18) 6; Eben and Reader (n 18) 31; D'Amico (n 18) 203; Cisnal de Ugarte, Perez and Pico (n 18) 20.
[22]Commission Staff Working Document: Impact Assessment Report Accompanying the document Proposal for the DMA SWD(2020) 363 final Part 1/2 57 <https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF>; CERRE, 'The European Proposal for a Digital Markets Act A First Assessment' (2021) 16–18 <https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf>.
[23]See *Amazon/iRobot*, where some of the Commission's concerns, e.g. self-preferencing, reflected conduct prohibited under the DMA: Foo Yun Chee, 'Amazon's iRobot Deal Faces EU Antitrust Veto, Sources Say' (*Reuters*, 21 January 2024) accessed 1 June 2024; Commission Press Release IP/23/5990, 'Commission Sends Amazon Statement of Objections Over Proposed Acquisition of iRobot' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990>.

As a result of this similarity in approaches, the new DMA may impact the future design of merger commitments. This paper advances the argument that the set of *ex ante* DMA obligations could restrict future commitments design under the EUMR in two ways. The first way is at the theory of harm stage. This is because it is argued that the Commission will have to take into account the deterrent effect of the DMA, in relation to the merged entity's incentive to foreclose.[24] The second way is at the remedy design stage, because the merging parties could invoke the proportionality argument. Either way, this could result in possible unintended consequences: the new DMA obligations could reduce the EUMR's power in designing commitments, in the context of gatekeeper mergers simultaneously covered by both the DMA and the EUMR.

The remainder of this paper is organized as follows. Section 2 focuses upon the similarity between the DMA and the EUMR, in the context of their approaches to addressing the harmful effects of gatekeepers' conduct. Then, this paper turns to argue that as a result of this similarity, the DMA could modify the EUMR's power in designing commitments in two ways, with each way at a different stage of the merger assessment. Section 3 discusses the first way in which the DMA could defeat EUMR in designing remedies, which is at the theory of harm stage. Notably, this discussion is limited to non-horizontal effects and foreclosure concerns. Section 4 explores the second way, which is at the remedy design stage.

2. DMA and EUMR: similar approach to addressing harmful practices by digital gatekeepers

Nearly all Article 5 and Article 6 DMA obligations are based on conduct that has been found, or it is currently investigated, as infringing abuse of dominance position rules.[25] In this section, it is argued that the Commission has also been drawing from its past experience of merger assessment, indicating that the complementary DMA and EUMR are taking a similar approach to addressing the harmful effects of gatekeepers' practices. To support this, it is shown that all commitments in past mergers where the acquirer is now a gatekeeper (within the meaning of the DMA), also exist as DMA obligations. Then, the implications of the similar approach taken by the EUMR and the DMA are discussed.

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[24]In non-horizontal mergers.
[25]Impact Assessment 1/2 (n 22) 57; CERRE (n 22) 16–18.

2.1. Commitments in past gatekeeper mergers and corresponding DMA obligations

So far, the Commission conditionally cleared four acquisitions by three gatekeeper companies.[26] These are *Microsoft/LinkedIn,*[27] *Google/Fitbit,*[28] *Meta (Facebook)/Kustomer*[29] and *Microsoft/Activision Blizzard.*[30] The Commission's concerns in these mergers are now summarized.

In *Microsoft/LinkedIn*, the concern was that the merger would lead the merged entity to leverage its strong market power from the markets for personal computers-based operating systems (PC-based Oss) and for productivity software, to the market for professional social networking (PSN) services where LinkedIn's position was already strong.[31] As a result, competitors in the PSN services market would be foreclosed and competition would be harmed.[32] Foreclosure would be done by (1) pre-installing a LinkedIn application on a Windows PC and by (2) integrating LinkedIn features into Office and denying access to Microsoft Application Programming Interfaces (APIs).[33]

In *Google/Fitbit*, the Commission had the following concerns. First, Google would use Fitbit users' data and strengthen its position in online advertising.[34] Second, the merged entity would have the ability and incentive to foreclose access to Fitbit's data, namely, the users' data that Fitbit made available via its Web API.[35] Third, Google would leverage its position in the supply of licensable OSs for smart mobile devices into the wrist-worn wearables market.[36] Particularly, the concern was that Google could put rival manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.[37]

In *Meta(Facebook)/Kustomer*, the Commission was concerned that the merger would harm competition in the market for the supply of customer relationship management (CRM) software and in the market for the

[26]DG Comp Competition Case Search option enabled to objectively identify the relevant past merger Decisions cleared subject to commitments, in which the acquirer was a gatekeeper <https://competition-cases.ec.europa.eu/search>.
[27]*Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision C(2016) 8404 final.
[28]*Google/Fitbit* (Case COMP/M.9660) Commission Decision C(2020) 9105 final.
[29]*Meta(Formerly Facebook)/Kustomer* (Case M.10262) Commission Decision C(2022) 409 final.
[30]*Microsoft/Activision Blizzard* (Case M.10646) Commission Decision C(2023) 3199 final.
[31]*Microsoft/LinkedIn* (n 27) para 301.
[32]ibid.
[33]ibid paras 301–338, 351.
[34]*Google/Fitbit* (n 28) para 419.
[35]ibid para 503.
[36]ibid para 716.
[37]ibid para 717.

supply of customer service and support CRM software.[38] The Commission found that Meta would have the ability and incentive to engage in foreclosure strategies vis-à-vis Kustomer's close rivals and new entrants.[39] Accordingly, Meta had the ability and incentive to deny or degrade access to the APIs for Meta's messaging channels.[40] The popular messaging channels were WhatsApp, Instagram and Messenger of Meta.[41] In *Microsoft/Activision Blizzard,* the Commission had foreclosure (vertical) concerns in the market for the distribution of console and PC games via cloud game streaming services.[42] If Microsoft made Activision's games exclusive to its own cloud game streaming service, Game Pass Ultimate, and withheld them from rival cloud game streaming providers, it would reduce competition in the distribution of games via cloud game streaming.[43] The Commission also had foreclosure concerns (conglomerate) on the market for the supply of PC OSs, as a result of the tying of Activision Blizzard's games and of Microsoft's distribution of games via cloud game streaming services to the Windows OS.[44]

To alleviate its concerns in these mergers, the Commission cleared the transactions subject to commitments. Arguably, all merger remedies proposed by the parties and utilized as commitments in these gatekeeper mergers now have corresponding obligations under the DMA. The merger commitments in these Decisions can be divided into four categories: interoperability; "data silo"; choice to un-install; and data access for third parties. Some DMA obligations fall under these four categories to correspond with the commitments in past gatekeeper mergers. In order to show this, the following discussion cuts through the four categories. In each category, the relevant commitments are discussed, along with the similar DMA obligation.

2.1.1. Interoperability

The DMA introduces two forms of interoperability: horizontal interoperability and vertical interoperability which can be distinguished.

[38] *Meta(Facebook)/Kustomer* (n 29) paras 185–513.
[39] ibid paras 190–429.
[40] ibid paras 241–429; Commission Press Release IP/22/652, 'Mergers: Commission Clears Acquisition of Kustomer by Meta (formerly Facebook) Subject to Conditions' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_652>.
[41] *Meta/(Facebook)/Kustomer* (n 29) paras 271-272; ibid Press Release IP/22/652.
[42] *Microsoft/Activision Blizzard* (n 30) paras 456–571.
[43] Commission Press Release IP/23/2705, 'Mergers: Commission Clears Acquisition of Activision Blizzard by Microsoft, Subject to Conditions' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2705>.
[44] *Microsoft/Activision Blizzard* (n 30) paras 615–747.

Horizontal interoperability is between competitors, allowing network effects to be shared among rivals with the objective of levelling the playing field.[45] In contrast, vertical interoperability allows services at different levels of the digital value chain to work together.[46] This enables complements to enter the market and allows them to compete with gatekeepers.[47] The DMA mandates vertical interoperability in Article 6(7), which is concerned with obliging gatekeepers to allow effective interoperability, free of charge.[48] The duty to grant protocol interoperability was imposed as a remedy in *Microsoft*, where it was required to make available and allow the use of the specified "interoperability information" on reasonable and non-discriminatory terms to developers and distributors of work group servers.[49] This was later largely upheld by the CFI in *Microsoft v Commission*.[50]

Vertical interoperability remedies were utilized in all four gatekeeper mergers conditionally cleared by the Commission. Accordingly, in *Microsoft/LinkedIn, Google/Fitbit, Meta (Facebook)/Kustomer* and *Microsoft/Activision Blizzard* interoperability commitments were offered by the merging parties and accepted by the Commission as alleviating the relevant identified concerns.

In *Microsoft/LinkedIn*, the "Integration Commitments" aimed to address the Commission's concerns regarding the integration of LinkedIn features into Office and denying access to Microsoft APIs.[51] Two aspects focused on interoperability. Firstly, the commitments sought to ensure that rival PSNs would continue to have access to the Office APIs (and the related Office Add-in Program) on standard terms and policies.[52] They will be afforded the same type of access also in relation to other Office products for which add-in programs exist, namely Word, PowerPoint and Excel.[53] As a result, rival PSNs will be able to build add-ins for the different Office products that offer similar functionalities as those that Microsoft was envisaging to introduce regarding LinkedIn.[54] Secondly, the commitments also required Microsoft to continue to make

[45]Marc Bourreau, 'DMA Horizontal and Vertical Interoperability Obligations' (2022) CERRE Issue Paper, page 5 <https://cerre.eu/wp-content/uploads/2022/11/DMA_HorizontalandVerticalInteroperability.pdf>.
[46]ibid.
[47]ibid 15.
[48]DMA, article 6(7).
[49]*Microsoft* (Case COMP/C-3/37.792) Commission Decision C(2004)900 final, Article 5(a).
[50]Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.
[51]*Microsoft/LinkedIn* (n 27) para 446.
[52]ibid.
[53]ibid para 447.
[54]ibid para 448.

available the Microsoft Graph i.e. the unified API for modern work[55] to rival PSNs.[56] Finally, Microsoft committed to allow any user to disable the LinkedIn Features for Outlook and for all other major Office products.[57]

Four years later, interoperability commitments were accepted in *Google/Fitbit*. According to the "Android API Commitment", Google committed to continuing to license, free of charge, to Android original equipment manufacturers (OEMs) the Public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone.[58]

Interoperability remedies were arguably accepted in both *Meta (Facebook)/Kustomer* and *Microsoft/Activision Blizzard*. In *Meta (Facebook)/Kustomer*, the commitments arguably focused on interoperability (even though they are not referred to explicitly as such) to address the Commission's competition concerns. Accordingly, Meta offered comprehensive access commitments, as follows. First, the "public API access commitment", whereby rival customer service CRM software providers and new entrants are guaranteed free non-discriminatory access to Meta's publicly available APIs for its messaging channels.[59] Second, the "core API access-parity commitment", under which Meta will maintain the same level of feature-capabilities for Kustomer's rivals and new entrants in the event that it improves/updates the functionality of Messenger, Instagram messaging or WhatsApp.[60]

In *Microsoft/Activision Blizzard*, Microsoft offered comprehensive licensing commitments, which were arguably interoperability commitments. First, Microsoft offered a free license to consumers that would allow them to stream, via any cloud game streaming services of their choice, all current and future Activision Blizzard PC and console games for which they have a license.[61] Second, Microsoft offered a corresponding free license to cloud game streaming service providers, in order to allow gamers to stream any Activision Blizzard's PC and console games.[62]

[55]See Microsoft, 'Microsoft Graph' <https://developer.microsoft.com/en-us/graph>.
[56]*Microsoft/LinkedIn* (n 27) para 449.
[57]ibid para 450.
[58]*Google/Fitbit* (n 28) para 953; Commission Press Release IP/20/2484, 'Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2484>.
[59]*Meta(Facebook)/Kustomer* (n 29) para 676; Press Release IP/22/652 (n 40).
[60]ibid para 677; ibid Press Release IP/22/652.
[61]*Microsoft/Activision Blizzard* (n 30) para 881; Press Release IP/23/2705 (n 43).
[62]ibid.

2.1.2. "Data Silo" (data separation)

Under the DMA, Article 5(2) mandates a "data silo" specifically for personal data. According to Article 5(2)(a)-(d) the gatekeeper shall not process, combine or cross-use personal data, as well as not sign-in users to other services of the gatekeeper in order to combine personal data.[63] The Impact Assessment to the DMA Proposal stated that this obligation is based upon, e.g. the practice condemned by the German Competition Authority in the 2019 *Facebook* case.[64] This National Competition Authority (NCA) applied the German rules of abuse of dominance, which are stricter than Article 102 TFEU. It found that Facebook abused its dominant position by applying terms and conditions which made its use conditional upon Facebook's possibility to collect and combine user data from multiple sources, including from beyond the Facebook platform.[65] The NCA prohibited Facebook from using these terms and conditions and from processing data accordingly.[66] It is interesting that the Commission chose to create an obligation based on this conduct condemned by the German NCA. This could mean that the Commission is acknowledging the extent of the harm brought about by gatekeepers' data collection and combination conducts.

Such a "data silo" remedy was offered in *Google/Fitbit*. Accordingly, the "Ads Commitment" envisages the creation of a "silo" for storage of data subject to strict access rules.[67] Fitbit health and fitness data would be stored in a "silo" subject to strict access rules and not allowed to be used for Google's online ads.[68] The fact that a "data silo" commitment was proposed by the parties and accepted by the Commission in this recent acquisition by Google is a welcome development. A "data silo" remedy was suggested by US Commissioner Harbour in 2007, regarding Google's acquisition of DoubleClick, in her dissenting statement.[69] Nevertheless, that merger was cleared unconditionally both in the US

[63]DMA, article 5(2)(a)-(d).

[64]Impact Assessment 1/2 (n 22) 53; B6-22/16 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8> Summary in English: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4>.

[65]ibid.

[66]Commission Staff Working Document Impact Assessment Report SWD(2020) 363 Final Part 2/2 121 <https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_2&format=PDF>.

[67]*Google/Fitbit* (n 28) para 965.

[68]ibid paras 896, 897, 944, 964–973.

[69]Google/DoubleClick, FTC File No.071-0170, Dissenting Statement of Commissioner Pamela Jones Harbour (2007) 5 <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf>.

and the EU. The existence of a "data silo" commitment in the more recent *Google/Fitbit* shows that EUMR commitments for digital markets are becoming more sophisticated. Indeed, this could establish a precedent for future data separation merger commitments to address concerns arising from digital mergers.

2.1.3. Choice to uninstall

Article 6(3) of the DMA obliges gatekeepers to allow " … end users to easily un-install any software applications on the operating system of the gatekeeper … " and to enable users to " … easily change default settings on the operating system".[70] This provision is inspired by *Google Android*[71] and *Microsoft (Tying)*.[72] There is a strong consumer bias towards pre-installed software, and such conduct has been prohibited by the Commission in these cases.[73]

Such remedies were accepted by the Commission in *Microsoft/LinkedIn*. Accordingly, the "Pre-Installation Commitments" addressed the concern regarding the pre-installation of LinkedIn on a Windows PC. These aimed to ensure that the effective choice of whether or not to have a LinkedIn application (or tile) installed on Windows PCs is preserved both at the OEM level and at the Windows-user level.[74] At the OEM level, this was ensured by allowing OEMs not to pre-install the LinkedIn application.[75] At the Windows-user level this was done by allowing users to remove such application if installed by OEMs, entirely from their Windows PC.[76] As such, these commitments sought to prevent Microsoft from deciding to make the LinkedIn application automatically present on all the Windows PCs to be distributed in the course of the following five years.[77] Ancillary Obligations against Exclusivity and Retaliation aimed to preserve the effective freedom of OEMs (or distribution partners) to enter into arrangements with third-party PSNs to pre-install or otherwise support those providers' Windows applications without undue pressure

[70]DMA, article 6(3).
[71]Case AT.40099 *Google Android* Commission Decision C(2018) 4761 final; Impact Assessment 1/2 (n 22) 56.
[72]Case AT. 39530 *Microsoft (Tying)* Commission Decision of 16 December 2009; Impact Assessment 1/2 (n 22) 56.
[73]Impact Assessment 1/2 (n 22) 56.
[74]*Microsoft/LinkedIn* (n 27) paras 438, 453–454.
[75]ibid para 453.
[76]ibid para 454.
[77]ibid para 456; Eleonora Ocello & Cristina Sjödin, '*Microsoft/LinkedIn*: Big data and conglomerate effects in tech markets' [2017] Competition Merger Brief Issue 1/2017 Article 1, 5 <https://ec.europa.eu/competition/publications/cmb/2017/kdal17001enn.pdf>.

from Microsoft.[78] These commitments also sought to prevent Microsoft from circumventing the commitments by "pushing" the LinkedIn application or Tile to users after they have purchased their Windows PC.[79] At the same time, they preserved Microsoft's freedom to promote the LinkedIn application through the Windows store.[80]

2.1.4. Data access for third parties

Article 6(10) DMA obliges gatekeepers to provide third parties " … at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data … ".[81] The data includes provided data and generated data in the context of use.[82] While this obligation is not based on an Article 102 case, it was recommended, e.g. by the UK Competition and Markets Authority (CMA) which discussed this intervention in the context of Google's data-advantages.[83]

In *Google/Fitbit*, the commitment to maintain data access for third parties was accepted by the Commission. Under the "Web API Access Commitment", Google has committed to maintain access for API Users, subject to user consent consistent with applicable laws and without charge for access, to Supported Measured Body Data which is made available to third parties through the Fitbit Web API.[84] Applicable laws probably meant the GDPR. This data access would be subject to compliance with the various applicable privacy policies.[85] The commitment applies not only to data made available by Fitbit at the time but also to future new Data Types identified by specific criteria.[86]

2.2. Implications

So far, it has shown that all commitments in past gatekeeper mergers are very similar to some DMA obligations. The remedies in past gatekeeper mergers were divided into four categories: interoperability, "data silo", choice to un-install and data access for third parties. The DMA obligations

[78] *Microsoft/LinkedIn* (n 27) para 453.
[79] ibid para 455.
[80] ibid.
[81] DMA, article 6(10).
[82] ibid.
[83] CMA, 'Online Platforms and Digital Advertising' *Market study final report* July 2020 page 365 <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf>.
[84] *Google/Fitbit* (n 28) paras 946, 947(b).
[85] ibid para 946 (a)&(b).
[86] ibid para 949.

in Articles 6(7), 5(2), 6(3) and 6(10) fall under these four categories, to correspond with the commitments in past gatekeeper mergers. The finding that all commitments in past gatekeeper mergers also exist as DMA obligations could mean that the Commission has been drawing from its past experience of merger assessment. Overall, it is argued that this suggests that the complementary DMA and EUMR are taking a similar approach to addressing the harmful effects of gatekeepers' practices.

The DMA and the EUMR, which are taking a similar approach, could apply concurrently to gatekeeper mergers. Two points can be discussed in this context.

The first point is that proposed merger commitments and DMA obligations may be similar. For instance, interoperability commitments were accepted in all past gatekeeper acquisitions. Indeed, the interoperability remedy is viewed as particularly suited to digital business models and fast-changing digital technology.[87] Now, with the introduction of the DMA, gatekeepers are obliged to allow vertical interoperability, regardless of a merger. The second point is that there may already exist a DMA obligation that prohibits the gatekeeper from acting in a way that is concerning to the Commission in its merger assessment. For example, in *Amazon/iRobot* some of the Commission's concerns, e.g. self-preferencing, reflected conduct already prohibited under the DMA (this transaction was ultimately abandoned).[88]

As a result of this similarity in approaches, the DMA could modify the EUMR's power in designing commitments. In the following sections, this paper advances the argument that the set of *ex ante* DMA obligations could defeat future merger commitments design under the EUMR in two ways. The difference between these two ways is whether or not there is a finding of "serious doubts" or a Significant Impediment to Effective Competition (SIEC). In other words, whether or not commitments are required in order to clear the merger. Chronologically, commitments come after the theory of harm and finding of "serious doubts"/SIEC. Accordingly, the stage in which the EUMR could be defeated by the DMA differs in each of the two ways.

[87]Fiona M Scott Morton et al, 'Equitable Interoperability: The "Super Tool" of Digital Platform Governance' (2021) Digital Regulation Project Policy Discussion Paper No.4 1 <https://tobin.yale.edu/sites/default/files/2022-11/Digital%20Regulation%20Project%20-%20Equitable%20Interoperability%20-%20Discussion%20Paper%20No%204.pdf> accessed 25 May 2024.

[88]Commission Press Release IP/23/5990 (n 23); Foo Yun Chee, 'Amazon's iRobot deal' (n 23); STATEMENT/24/521, 'Statement by Executive Vice-President Vestager on Announcement by Amazon and iRobot to Abandon their Transaction' (2024) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_521>.

The first way in which the DMA can defeat the EUMR is at the theory of harm stage (discussed in Section 3). The second way is at the remedy design stage (explained in Section 4). Either way, it could be that ultimately, there are no commitments under the EUMR.

3. Way 1: taking into account the deterrent effect of the DMA (theory of harm stage)

This section discusses the first way in which the DMA could defeat the EUMR in designing remedies. In non-horizontal mergers, the Commission must take into account the deterrent effect of laws in relation to the merged entity's incentive to foreclose.[89] The presence of laws could determine whether or not a merger is ultimately found to raise "serious doubts" (phase 1) or an SIEC (phase 2). From the perspective of merger remedies, if the merger is not found to raise "serious doubts" or an SIEC, then the merger would be cleared unconditionally meaning that no commitments would be required. This section begins by discussing the Commission's approach to taking into account the presence of laws in the jurisprudence and as synthesized in the *Non-Horizontal Mergers Guidelines* (*Guidelines*).[90] Then it is argued that, by analogy, the Commission must take into account the deterrent effect of the DMA, in relation to the merged entity's incentive to foreclose. The way in which the Commission will do so is explained. Following this, it is considered how the DMA could defeat the EUMR at the theory of harm stage, in the context of merger commitments.

3.1. Commission's approach: EUMR and future illegal conduct

Merger control is *ex ante*. Assessment of mergers is a prospective analysis, involving a prediction of whether a merger will lead to harmful effects on competition.[91] Regarding non-horizontal mergers, in assessing the likelihood that the merged entity will engage in foreclosure, the Commission examines three things: the merged entity's ability to foreclose; the merged entity's incentive to do so and; the overall likely impact on effective competition.[92]

[89] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2008] OJ C 265/6 paras 46 & 110.
[90] ibid.
[91] Case C-12/03 P *Commission v Tetra Laval* ECLI:EU:C:2005:87 paras 42–43.
[92] *Non-Horizontal Mergers Guidelines* (n 89) para 32.

In considering incentives to foreclose, the Commission is required in vertical and conglomerate mergers to take into account the possibility that a conduct, which is an essential step in foreclosure, might be illegal as a factor to reduce such incentives.[93] Such conduct can be unlawful because of the presence of competition laws or sector-specific rules.[94] Given the approach to non-horizontal mergers, the way the Commission should take into account the possible illegality of future conduct seems controversial and unclear. In any case, the Commission could be restricted in its application of the EUMR: it has to take into account the deterrent effect of EU laws in merger assessment. The approaches in the jurisprudence and in the *Guidelines* are now each discussed.

3.1.1. Case law

Taking into account Article 102 was the focus of the relevant jurisprudence. Accordingly, the approach in the case law regarding taking into account the presence of Article 102 in considering incentives of the merged entity to foreclose is explained. So, what is the extent to which the presence of Article 102 can be expected to affect the merged entity's incentive to act illegally and to foreclose? Thus, should the fact that foreclosure might/would constitute an abuse of dominant position under Article 102 affect merger assessment? Appeals in *Tetra Laval/Sidel*[95] and *GE/Honeywell*[96] gave rise to this issue. In these cases, the Commission blocked the transactions because of their conglomerate effects. The Commission found that in both mergers the merged entity would have an incentive to leverage market power between related markets. These were appealed and the EU Courts were critical of the Commission's approach.

The General Court (GC) in *Tetra Laval v Commission* stated that the Commission is required to assess whether the merged entity will act illegally or whether the illegal nature of the conduct in question/risk of detection will make it unlikely.[97] For this, the GC contended that the Commission must take into account the incentives of the merged entity to act illegally as well as the extent to which the incentives

[93]ibid paras 46 & 110.
[94]ibid para 46.
[95]M.2416, 30 October 2001, annulled on appeal Case T-5/02 EU:T:2002:264, aff'd Case C-12/03 P EU:C:2005:87.
[96]M.2220 3 July 2001, aff'd Cases T-209 and 210/01 *Honeywell v Commission* EU:T:2005:455 and EU:T:2005:456.
[97]Case T-5/02 *Tetra Laval v Commission* [2002] E.C.R. 11-4381 CFI para 159.

would be reduced or eliminated.[98] The GC annulled the Commission's Decision as it had not carried out such an assessment. The Commission appealed.

On appeal, the European Court of Justice (ECJ) in *Commission v Tetra Laval* dismissed the GC's way of analysis. Accordingly, the ECJ accepted that " … the likelihood … " of the merged entity acting illegally " … must be examined comprehensively … taking account … both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful".[99] However, the Commission should not assess the extent to which the incentives would be reduced/eliminated " … as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities … and the financial penalties which could ensue".[100] This is because such an assessment would go against the EUMR preventative function.[101] What is meant by this is that if Article 102 would have been enough to prevent abuse of the dominant position then there would be no need for *ex ante* merger control. Assessing the extent would require " … an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised in them".[102] Such an exercise would be too speculative as it is about the hypothetical future application of Article 102.[103]

In *GE v Commission*, the GC further clarified that where the Commission " … without undertaking a specific and detailed investigation … can identify the unlawful nature of the conduct in question … ", in light of Article 102 or of other provisions which it is competent to enforce, " … it is its responsibility to make a finding to that effect and take account of it in its assessment of the likelihood that the merged entity will engage in such conduct".[104]

Importantly, *GE v Commission* seemed to relax the approach in *Commission v Tetra Laval*. Accordingly, in *GE v Commission*, the GC stated that: " … the Commission is entitled to take as its basis a summary analysis, based on the evidence available to it at the time … of the lawfulness of the conduct in question and of the likelihood that it will be punished".[105]

[98]ibid.
[99]*Commission v Tetra Laval* (n 91) para 74.
[100]ibid para 75.
[101]ibid.
[102]ibid para 76.
[103]ibid para 77.
[104]Case T-210/01 *GE v Commission* ECLI:EU:T:2005:456 para 74.
[105]ibid para 75.

Thus, only a summary analysis of this issue is required. Nevertheless, the Commission must " … identify the conduct foreseen and, where appropriate, evaluate and take into account the possible deterrent effect represented by the fact that the conduct would be clearly, or highly probably, unlawful … " under EU law.[106] Nevertheless, it is not entirely clear why the summary analysis proposed here would not run counter to the EUMR purpose of prevention, and at the same time, be convincing and comprehensive enough.

Therefore, the jurisprudence shows that the deterrent effect of Article 102 should be taken into account in merger assessment. However, the way in which the Commission should do this is yet unclear.

3.1.2. Non-horizontal mergers guidelines

The Commission synthesizes these cases in its *Guidelines*.[107] This is discussed at length in the vertical mergers section of the *Guidelines* and repeated more briefly in the conglomerate mergers section. The wording from the vertical mergers section of the *Guidelines*, where the explanation is the most comprehensive,[108] is summarized as follows. Where conduct by the merged entity is an essential step in foreclosure, the Commission must examine two things. First, the merged entity's incentives to act. Second, the factors liable to reduce/eliminate such incentives, including the possibility that the conduct is illegal under EU law, competition rules or sector-specific rules at EU or national levels. The Commission should conduct a summary analysis only, considering three points: the likelihood that the conduct is illegal; the likelihood of detection of the conduct and the penalties that could be imposed on the merged entity.[109] The approach in the *Guidelines* seems to be broader and more general than the approach in the case law. The GC in *Tetra Laval v Commission* and the ECJ in *Commission v Tetra Laval* seemed to focus on illegal conduct under Article 102. The GC in *GE v Commission* focused on Article 102 and on other provisions that the Commission is competent to enforce. The *Guidelines* explain the Commission's assessment referring to possible future illegal conduct under EU law, competition rules and sector-specific rules more generally, not just Article 102. Additionally, it is not entirely clear whether the Commission must take into account that the conduct may be unlawful under laws

[106]ibid.
[107]*Non-Horizontal Mergers Guidelines* (n 89) paras 46 & 110.
[108]ibid para 46.
[109]ibid summarized in the author's own words.

that the Commission is not necessarily competent to enforce. Furthermore, the certain circumstances in which the illegality of the conduct would disincentivize the merged entity are not explained in the *Guidelines*. *Microsoft/LinkedIn* is an example of a recent treatment of this issue in a gatekeeper merger. There, the Commission briefly engaged with this when discussing the merged entity's incentive to pre-install a LinkedIn application on Windows PCs and to integrate LinkedIn features into Office while denying access to Microsoft APIs.[110] This conduct would result in foreclosing rivals.[111] In this context, the Commission stated that it seems that Microsoft " … would not abstain from engaging in those practices out of fear of violating antitrust rules or other legal provisions … ", noting Microsoft's positive intentions to engage in such conduct expressed in its internal documents.[112] Here, the Commission referred to (in a footnote) the ECJ approach in *Commission v Tetra Laval*.[113] Thus, in *Microsoft/LinkedIn* the Commission took into account competition rules or other legal provisions in possibly deterring the merged entity from acting unlawfully. The Commission found that these would not reduce/eliminate the incentives of the merged entity from engaging in such conduct. Indeed, the Commission found that the merger would raise "serious doubts" as rival PSN providers would be foreclosed and cleared the transaction subject to commitments (see Section 2). It appears that the Commission deemed this analysis, i.e. examining Microsoft's internal documents, as sufficient and suitable to conclude that the merged entity will not be deterred by existing laws.

3.1.3. Link to EUMR's commitments

The jurisprudence and the *Guidelines* show that in non-horizontal mergers, the Commission must take into account the deterrent effect of EU laws in relation to the merged entity's incentive to foreclose. However, the way in which the Commission should do this is yet unclear. What this approach indicates is that the Commission could be restricted in its application of the EUMR: it has to take into account the deterrent effect of EU laws in its merger assessment. In (unspecified) certain circumstances, the illegality of a conduct could be likely to significantly disincentivize the merged entity to engage in the conduct. This means that the EUMR could be restricted in its power, in light of the

[110] *Microsoft/LinkedIn* (n 27) para 336.
[111] ibid.
[112] ibid.
[113] See ibid and footnote 322 to para 336 in case.

deterrent effect of EU laws. The presence of EU laws could determine whether or not the merger is ultimately found to raise "serious doubts" or an SIEC. This can be linked to commitments. Chronologically, commitments come after the theory of harm and finding of "serious doubts" or an SIEC. For phase 1, the Commission has to, according to its theory of harm, have "serious doubts" regarding the merger before requiring commitments. For phase 2, the Commission has to, according to its theory of harm, find an SIEC before requiring commitments. The presence of EU laws could determine whether commitments are required in order to clear the merger, or whether the merger is cleared without commitments. This discussion is used in the context of the DMA, to which the focus is now turned.

3.2. Taking the DMA into account in merger assessment

So far, it has shown that in non-horizontal mergers, the Commission must take into account the deterrent effect of EU laws in relation to the merged entity's incentive to foreclose. It is now deduced that by analogy, the Commission will have to take into account the deterrent effect of the DMA, in relation to the merged entity's incentive to foreclose.

The DMA is EU law, namely, a sector-specific regulation. Under Article 288 TFEU, the EU institutions shall adopt, among others, regulations " … To exercise the Union's competences … ".[114] Accordingly, the DMA, as a regulation, " … shall have general application. It shall be binding in its entirety and directly applicable in all Member States".[115] Article 114 TFEU forms the legal basis of the DMA, as stated in the Impact Assessment.[116] Therefore, an analogy is possible: The Commission has to take into account, in merger assessment, the possibility that a conduct might be illegal under the DMA as a factor to reduce incentives for such conduct. It should be noted that it is unclear whether the Commission must take into account the deterrent effect of laws that it is not necessarily competent to enforce. While this point is interesting to examine, it is not relevant in this context as the DMA is enforced by the Commission.

Therefore, by analogy, the Commission has to take into account the deterrent effect of the DMA, in relation to the merged entity's incentive

[114]Article 288 TFEU.
[115]ibid.
[116]Impact Assessment 1/2 (n 22) 28.

to foreclose. As discussed above, the DMA lists in Articles 5, 6 and 7 a set of *ex ante* obligations for qualifying gatekeepers in respect of each of their core platform services. The approach in the jurisprudence and the *Guidelines* means that the Commission must take into account the deterrent effect of these obligations in its merger assessment. In (unspecified) certain circumstances, the illegality of a conduct under the DMA could be likely to significantly disincentivize the merged entity to engage in the conduct. The Commission has to consider that the existence of these obligations will disincentivize the merged entity from acting in a way that would result in their breach.

The wording of the *Guidelines*[117] (summarized above in Section 3.1.2) is now applied to the context of the DMA. In considering incentives to foreclose, the Commission is required, in both vertical and conglomerate mergers, to take into account the possibility that the foreclosing conduct might be illegal under the DMA obligations. An exhaustive examination is not required. Thus, where conduct by the merged entity is an essential step in foreclosure, the Commission must examine two things. First, the merged entity's incentives to act. Second, the factors liable to reduce/ eliminate such incentives, including the possibility that the conduct is illegal under the DMA obligations. The Commission should conduct a summary analysis only, considering three points: the likelihood that the conduct is illegal under the DMA; the likelihood of detection of the conduct; and the penalties that could be imposed on the merged entity under the DMA.

In short, the Commission must take into account the deterrent effect of the DMA, in relation to the merged entity's incentive to foreclose. But how could the DMA defeat the EUMR in the context of designing merger remedies?

3.3. DMA may defeat the EUMR?

The Commission could, on summary analysis, find that the DMA is sufficient to deter the merged entity from acting illegally and foreclosing. Thus, the Commission may find that the existence of DMA obligations will disincentivize the merged entity from acting in a way that is an essential step in foreclosing rivals. This could mean that the Commission will not find "serious doubts" or a SIEC, and subsequently clear the merger without commitments.

[117]See *Non-Horizontal Mergers Guidelines* (n 89) para 46.

The presence of the DMA could mean that the Commission finds, more often than not, that the merged entity would be disincentivized from acting illegally and foreclosing. Since the EUMR and the DMA may be taking a similar approach to addressing the harmful effects of digital gatekeepers' practices (argued in Section 2), it could be likely that there already exists a DMA obligation that is found to deter the merged entity from acting in a way that is concerning to the Commission. This means that the DMA could restrict the Commission's powers to require merger commitments under the EUMR. In non-horizontal mergers, if there is no foreclosure there are no "serious doubts", or the merger does not give rise to a "SIEC". As a result, no commitments would be required. From the perspective of merger commitments, this could reduce their power.

This is now illustrated through an example: the data access for third parties remedy. A gatekeeper, subject to Article 6(10) DMA obligation, acquires a company. In its merger assessment, the Commission may be concerned that the merged entity will act in a certain way, resulting in rivals being unable to access data post-transaction. This would be an essential step in foreclosing the merged entity's competitors. The merged entity acting in this way, with the result of rivals being unable to access data, may be illegal under Article 6(10) DMA. The Commission could determine that Article 6(10) DMA deters the merged entity from acting illegally and foreclosing. Thus, the Commission finds that the existence of this DMA obligation will disincentivize the merged entity from adopting a certain conduct which is an essential step in foreclosure. This could mean that the Commission will not find "serious doubts" or a SIEC, and subsequently clear the merger without commitments. From this perspective, the EUMR's powers to require data-sharing commitments would be reduced. This may hold true for all other DMA obligations.

In short, the first way in which the DMA could defeat the EUMR's power in the context of commitments is at the theory of harm stage. The Commission, taking into account the deterrent effect of the DMA obligations, may conclude that the merger does not raise "serious doubts"/SIEC. As a result, the merger could ultimately be cleared without commitments. From the point of view of EUMR commitments, this could restrict their power: the DMA can defeat the EUMR because the Commission could rely on the deterrent effect of the DMA and clear the merger unconditionally.

Alternatively, it is possible that the Commission could find that EU laws, including the DMA, are insufficient to deter the merged entity from acting illegally and foreclosing. *Microsoft/LinkedIn* (see 3.1.2) is an example of a past merger in which the Commission found that the relevant existing laws would not deter the merged entity from acting unlawfully, ultimately clearing the transaction subject to commitments. Thus, in a situation in which the Commission finds at the theory of harm stage that the merged entity will not be deterred by the relevant laws, the transaction could be found to raise "serious doubts" or an "SIEC". As a result, commitments may be needed in order to clear the merger. This brings us to the remedy design stage. However, the DMA could defeat the EUMR at the remedy design stage, as the following section now argues.

4. Way 2: proportionality argument (remedy design stage)

The Commission may accept commitments in either phase of the procedure.[118] *De jure*, the usual practice is for the merging parties to make the final remedy offer to the Commission, who can either accept it or reject it.[119] Rejection in phase 1 results in referral to phase 2, and rejection in phase 2 results in the Commission blocking the merger. Phase 1 remedies and phase 2 remedies can be distinguished. The legal basis for commitments is provided in Article 6(2) for phase 1 investigations, and in Article 8(2) for phase 2 investigations.[120] The commitments submitted in phase 1 " … must be sufficient to clearly rule out … " "serious doubts" and can only be accepted where the " … competition problem is readily identifiable and can easily be remedied".[121] Only limited modifications can be accepted to the proposed commitments.[122] Phase 2 commitments must be sufficient to eliminate an SIEC.[123] Remedies can be proposed by the merging parties at phase 2 by the legal deadline.[124]

The type of remedy suitable to address the competition concern has to be examined case-by-case.[125] Merger commitments can be structural or behavioural. A distinction can be made between divestitures, other structural remedies, such as granting access to key infrastructure, and

[118]Commission notice on remedies (n 12) para 18.

[119]See Bruce Lyons and Andrei Medvedev, 'Bargaining Over Remedies in Merger Regulation' CCP Working Paper No.07-3, 1 <https://cdn.sanity.io/files/hr4v9eo1/production/96753532f9fd4b2b1e4856d6e5ea0cb4d2290b8f.pdf>.

[120]EUMR, articles 6(2) & 8(2).

[121]Commission notice on remedies (n 12) paras 18&81.

[122]ibid para 83.

[123]EUMR, article 8(2).

[124]Commission notice on remedies (n 12) para 88.

[125]ibid para 16.

behavioural commitments.[126] While structural commitments are seen as preferable by the Commission,[127] there has been a growing use of complex behavioural remedies in, e.g. mergers in digital markets.[128] Behavioural remedies can be preferable for digital mergers because they are relatively flexible and do not have the long-term effect of structural remedies.[129] This is important as the future of tech industries is very uncertain.[130]

This section discusses the second way in which the DMA could defeat the EUMR, i.e. at the remedy design stage. This is linked to the principle of proportionality. The principle of proportionality is laid down in Article 5(4) TEU: " … Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties … The institutions of the Union shall apply the principle of proportionality".[131] Accordingly, " … The principle of proportionality … requires the means employed … to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it".[132] Relevantly, Commission Decisions under the EUMR, including merger commitments, should respect this principle.[133]

Indeed, according to the EUMR, merger remedies " … should be proportionate to the competition problem and entirely eliminate it".[134] If so, " … the Commission should be able to declare the concentration, as modified, compatible with the common market".[135] This means that merger commitments should be proportionate: they should not go beyond what is necessary. Against this background, the question arises: is an EUMR commitment still proportionate if there already exists a similar and concurrent DMA obligation?

The Commission could find that a gatekeeper acquisition raises "serious doubts" or a "SIEC". As a result, it may require commitments in order to clear the merger. This brings us to the remedy design stage. At this stage, the merging parties could invoke the proportionality

[126]ibid para 15.
[127]ibid.
[128]Spencer Weber Waller, 'Access and Information Remedies in High-Tech Antitrust' [2012] Journal of Competition Law and Economics 575, 576.
[129]Stephen Davies and Bruce Lyons *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition* (Edward Elgar Publishing Limited 2007) 23.
[130]ibid.
[131]Article 5(4) Treaty on European Union (TEU).
[132]Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573 para 144.
[133]Case C-202/06 P *Cementbouw Handel & Industrie v Commission* EU:C:2007:814 para 52.
[134]EUMR, recital 30.
[135]ibid.

argument. Accordingly, it is likely that the merging parties will argue that commitments are not needed, that is, necessity is not established because of the existing set of similar and concurrent *ex ante* DMA obligations. In other words, the parties could argue that the DMA already covers the behaviour/s in question with close to *per se* obligations, therefore, a merger commitment addressing the same behaviour would be disproportionate. This stems from the argument made above (2.2) that the complementary DMA and EUMR are taking a similar approach to addressing the harmful effects of gatekeepers' practices. Ultimately, the merger could be cleared without commitments.

To illustrate this, it may be that the commitments in the past gatekeeper mergers (discussed above in Section 2.1) would have been seen as disproportionate if these mergers would have taken place with the DMA in existence. Accordingly, it was shown (Section 2) that all the remedies in *Microsoft/LinkedIn, Google/Fitbit, Meta (Facebook)/Kustomer* and *Microsoft/Activision Blizzard* have corresponding obligations under the DMA. For instance, why would a vertical interoperability commitment be necessary, when Meta (Facebook), Google and Microsoft would already be covered by the corresponding DMA obligation in Article 6(7)? If all these mergers would have taken place now, this proportionality argument may have been invoked for all the commitments utilized in these transactions. This could mean that, in light of the similar and concurrent DMA obligations, all these mergers could have now been cleared without commitments or with weaker ones.

For gatekeeper mergers taking place from now on, the merging parties may successfully argue that merger commitments would be disproportionate, in light of similar DMA obligations covering the same concerning behaviour. From the perspective of EUMR commitments, the DMA could restrict their power: the powers of the Commission to design merger remedies could be reduced, as it relies on the presence of the DMA instead. As a result, because of the existence of the DMA, mergers could be cleared without commitments, or with weaker ones, even though competition concerns, e.g. foreclosure concerns, exist.

5. Conclusion

The DMA, which the Commission will implement and enforce, is one of the first regulatory tools to tame the gatekeeper power of the largest tech companies.[136] The DMA's objective is to address the current market failure in digital markets and to render these markets contestable, competitive and fair.[137] To achieve this, the DMA lists a set of *ex ante* obligations for qualifying gatekeepers in respect of each of their core platform services. The EUMR could cover mergers involving gatekeepers. The goal of the EUMR is to ensure that "the process of reorganisation" does not result in lasting harm to competition.[138] Merger commitments, which are proposed by the merging parties and imposed *ex ante*, are the most common way to alleviate expected concerns resulting from a merger.[139] The DMA and the EUMR are complementary tools[140] that could apply concurrently to mergers involving gatekeepers. This raises the question whether, and how, the DMA will influence commitments design under the EUMR in the future going-forward.

This paper starts by arguing that the complementary DMA and EUMR are taking a similar approach to addressing the harmful effects of gatekeepers' practices. To support this, it is shown that all commitments in past mergers where the acquirer is now a gatekeeper (within the meaning of the DMA), are very similar to some DMA obligations. The DMA and the EUMR, which are taking a similar approach, could apply concurrently to gatekeeper mergers. For the future, this could imply two points. First, proposed merger commitments and DMA obligations may be similar. Second, there may already exist a DMA obligation which prohibits the gatekeeper from acting in a way that is concerning to the Commission in its merger assessment. Therefore, the Commission's merger concerns could continue to reflect conduct prohibited in the DMA and merger remedies may echo DMA obligations. As a result of this similarity in approaches, the set of *ex ante* DMA obligations could restrict future commitments design under the EUMR in two ways, in two stages of the merger assessment.

The first way in which the DMA can defeat the EUMR is at the theory of harm stage. This is because it is argued that the Commission will have to take into account the deterrent effect of the DMA, in relation to the merged entity's incentive to foreclose.[141] Since the EUMR and the DMA may be taking a similar approach, there may

136Commission, DMA website 'About the Digital Markets Act' <https://digital-markets-act.ec.europa.eu/about-dma_en>.
137DMA Proposal (n 2) 58.
138EUMR, para 5.
139Vande Walle (n 8) 4 Figure 1.
140DMA, article 1(6) & recital 11.
141In non-horizontal mergers.

already exist a DMA obligation which is found to deter the merged entity from acting in a way that is concerning to the Commission. The Commission, taking into account the deterrent effect of the DMA obligations, may conclude that the merger does not raise "serious doubts" or an SIEC. As a result, the merger could ultimately be cleared without commitments. From the perspective of merger remedies, this could restrict their power: the DMA can defeat the EUMR because the Commission could rely on the deterrent effect of the DMA and clear the merger unconditionally.

Alternatively, it is possible that the Commission could find that the DMA is insufficient to deter the merged entity from acting illegally and foreclosing. In such a situation, the transaction could be found to raise "serious doubts" or an SIEC. As a result, commitments may be needed in order to clear the merger. This brings us to the second way in which the DMA may impact the EUMR, namely, at the remedy design stage.

The DMA may defeat the EUMR at the remedy design stage because the merging parties could invoke the proportionality argument. Accordingly, it is likely that the merging parties will argue that commitments are not needed, that is, necessity is not established because of the existing set of similar and concurrent *ex ante* DMA obligations. In other words, the parties could argue that the DMA already covers the behaviour/s in question, therefore, a merger commitment addressing the same behaviour would be disproportionate. From the perspective of EUMR commitments, the DMA could restrict their power: the powers of the Commission to design merger remedies could be reduced, as it relies on the presence of the DMA instead. As a result, because of the existence of the DMA, mergers could be cleared without commitments, or with weaker ones, even though competition concerns exist.

The DMA may restrict the EUMR's power to design commitments in the theory of harm stage or in the remedy design stage. Either way, it could be that ultimately, there are no commitments under the EUMR. Overall, the new DMA obligations could reduce the EUMR's power in designing commitments, in the context of gatekeeper mergers simultaneously covered by both the DMA and the EUMR. In this sense, the new DMA may have unintended consequences on the EUMR, precisely regarding acquisitions by the most powerful digital companies. While the Commission's recent intervention in *Amazon/iRobot* shows that the DMA obligations are not intended to be used as an " … excuse … " for

" … a more lenient" merger enforcement,[142] in practice, this paper argues that the DMA can raise the risk of reducing the EUMR's power to design remedies. Given the vast merger activity of GAMAM companies,[143] such a weakening of the EUMR is unwelcome and a cautious approach on the side of the Commission is called for.

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[142]Foo Yun Chee, 'EU Commission Lawyers Initially Opposed Warning Amazon on iRobot Deal-sources' (*Reuters*, 29 November 2023) <https://www.reuters.com/markets/deals/eu-commission-lawyers-initially-opposed-warning-amazon-irobot-deal-sources-2023-11-29/> accessed 1 June 2024.

[143]See Federal Trade Commission, 'Non-HSR Reported Acquisitions by Select Technology Platforms 2012-2019: An FTC Study' [2021] 1&3 <https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study>.