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DMA FROM A NORDIC COMPETITION POLICY PERSPECTIVE
Innovation at risk

I have been commissioned by Google to analyse and comment on the European Commission's legislative proposal, Digital Markets Act (DMA), from a Nordic competition policy perspective.

I extend my warmest thanks to Sten Nyberg, Professor of Economics at Stockholm University, and Dagne Sabockis, PhD researcher at Stockholm School of Economics, Center for Business Law, for their invaluable input and comments on my work.

Summary

In short, my main conclusions are as follows:

- Over-regulation or regulating markets in too much detail can seriously harm the innovation climate and is a key rationale for the European Commission's Better Regulation Agenda. Sound regulation should be grounded in economic analysis and adapted to the relevant economic context.

- The DMA is not a typical market regulation – it proscribes one set of rules across markets with very different economic conditions and business models without recourse to exemptions.

- The competition law enforcement possibilities are not exhausted.

- The definition of gatekeepers in the DMA is not tied to any competition concerns and is based on thresholds in absolute numbers without connection to any relevant market.

- The gatekeeper criteria give rise to threshold effects and, as a result of the criteria's definition and design, counteract a level playing field.

- The DMA is at risk of hitting the innovation climate particularly hard in the Nordic countries and may have a negative impact on incentives for Nordic start-ups. The region is a leading hub of innovation in Europe; therefore, the effects of the DMA will be particularly problematic for the region. The Nordic competition authorities have also jointly expressed concerns about the impact of the DMA on incentives to invest and innovate.

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- Integrated and innovative new services provide massive consumer benefits, and these benefits are at risk of ceasing as a result of the DMA. Complementary innovations to digital platforms are at high risk of being discouraged.

- The DMA offers no direct consumer benefits in contrast to other regulations such as electronic communication concerning roaming and number portability.

- It must be recognized that acquisitions are also important drivers of innovation.

- There is a strong rationale for justification of rules, in same way as there are justification rules under Article 101(3) and case law under Article 102 TFEU.

Introduction

Digitalization has come to permeate economic life to an unprecedented extent and this trend shows no signs of slowing down anytime soon. First and foremost, digitalization has fundamentally transformed our economies and provided enormous benefits. However, in its wake digitalization has given rise to a few heavily concentrated digital platform markets which have spurred general antitrust concerns, as well as a few antitrust cases. The proposed DMA is the first attempt to provide a comprehensive regulation targeting digital platforms in order to address competition concerns where the instruments provided by competition law are perceived to be inadequate or insufficient. One may note that DMA is moving in the opposite direction of the decentralizing development of EU competition policy over the last two decades. Both EU competition law and the electronic communication regulation (telecom operators and SMP etc.) have, to a relatively large extent, been dealt with by national authorities and courts. On the contrary, the DMA is moving in a centralizing direction. In addition, the DMA departs from the more economic approach that has characterized European competition law and policy for decades and has moved onto a more regulatory-oriented path with a rather dubious economic foundation.

Basis for a DMA regulation[1]

Economic regulation can address market failures and make markets work better but too much, or badly designed, regulation will achieve the opposite and stifle growth and economic progress. The European Commission is keenly aware of this and has recently launched the Better Regulation Agenda where the first listed objective is: “Removing obstacles and red tape that slow down investments and building of 21st century infrastructure, working with Member States, regions and key stakeholders.” Digital platforms undeniably constitute vital elements in the infrastructure of the 21st century. In this regard, it is critically important to ensure that an economic regulation, which will govern key digital platforms, is fit for the job.

In view of the potential drawbacks of economic regulation it is natural to ask under what circumstances *ex ante* regulation constitutes the best policy tool. In another area that has been characterized by rapid technological change – the telecoms sector – the European Commission has formulated a conceptual test for when imposing *ex ante* regulation may be

[1] There are several interesting papers on this subject, see e.g. OECD Competition Committee Chairman Frederic Jenny, Competition Law and Digital Ecosystems: Learning to Walk Before We Run. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776274

justified. The well-known three criteria test postulates three cumulative conditions that should be present in a market to justify regulation:

1. Entry barriers
2. No change within a reasonable time
3. Competition law insufficient

If these conditions are satisfied, the proportionality principle implies that authorities should seek the least intrusive way of addressing potential harm to effective competition. The commission goes on to note that "an excessive regulatory burden on operators could stifle investment and innovation."[2]

There are no similar provisions in the DMA despite digital platforms being subject to continuous technical change, innovation and the emergence of new platforms exhibiting rapid growth. Spotify and Klarna are two recent Swedish examples of such developments. On the global scale, the recent growth of Snapchat, as well as the recent revenue surge of firms like Shopify, Pinterest and not least Zoom – whose increase in revenue was nearly five-fold last year and which has now introduced "Zoom Apps" – are other examples suggesting that the digital arena is far from a static place.[3] In a fast-paced technological landscape, it is especially important that regulatory interventions target only the potential market failures they are intended to address. It is important to ensure that red tape does not stifle innovation or hamper development of critical infrastructure in Europe, which would ultimately harm consumer welfare.

With the low transaction and transportation costs enjoyed by digital markets, the premium on quality is exceptionally high and the best offers on the market will command very high market shares and profits to match. The dominant tech-firms of today are built on innovation and have proved to be the most successful competitors in highly innovative markets. This could be compared to current or former state-owned monopolies, who have developed their businesses under totally different circumstances. Of course, this does not give the dominant tech-firms a license to consolidate leading positions by means of anticompetitive measures, but neither does it provide a reason to put them at a competitive disadvantage. To borrow a classic quote from antitrust: "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry…The successful competitor, having been urged to compete, must not be turned upon when he wins."[4]

Moreover, the markets dominated by the tech-giants are not automatically non-contestable. Telegram and Tiktok show that it is clearly possible to build up new installed bases on the social media scene despite the incumbency advantage of e.g. Facebook. This illustrates that multi-homing is a key dimension of competition. Some other prime examples are Snapchat and, most recently, the novel social media audio app Clubhouse. The latter was launched in March 2020 and had reached more than 10 million weekly active users by the end of January

[2] European Commission, 2020, Explanatory note, Staff Working Document 337. C(2020) 8750 final. (http://www.astrid-online.it/static/upload/enan/enannexpdf.pdf)
[3] "How to thrive in the shadow of giants", The Economist, 20 May 2021. www.economist.com/business/2021/05/20/how-to-thrive-in-the-shadow-of-giants
[4] Judge Hand in United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

2021.[5] Besides social media, the recent developments with regard to other digital services such as Zoom for videoconferencing, or the e-commerce platform Shopify, indicate that incumbency advantage cannot be regarded as a prerequisite for market entry or rapid growth.[6] Many of these industries are still young and claiming the persistence of monopoly may be premature. Also, preventing monopolization through acquisitions of budding competitors, or maverick firms, falls clearly within the domain of prudent enforcement of the merger regulation. Failures in this policy area do not provide a justification for regulation.

Typical market regulations

Market regulation has long been used to address various forms of market failures, particularly in markets with so called natural monopolies. Typically, a regulation is tailored to a specific industry and the specific competition problems, or systemic risks, arising there. This could include right to access, termination and fees in telecom and similar issues in electricity transmission. Other issues take center stage in financial regulation.

While *ex ante* regulation may sometimes be the best policy tool, it remains a blunt tool and there are numerous difficulties involved in forging a regulation providing appropriate economic incentives. The dismal performance of many regulatory regimes back in the 70s and 80s fueled a wave of deregulation (Swedish deregulations and liberalizations include postal infrastructure, telecommunications, the school system and primary care). It also spurred a vast economic literature on regulation which analyzed the challenges of regulation. The Swedish Regulatory Reform Commission (SOU 2005:4) noted that it is particularly difficult to regulate markets characterized by network effects.[7]

In addition, in technology-intensive industries, there are usually large changes, with some products and even dominant companies being replaced by completely different ones. Therefore, there is much to suggest that intervention should only take place if the effects of a restriction of competition are counteracted with a high degree of certainty or if it is easy to foresee its effects.

It is of importance to further examine how optimal incentives to invest in new infrastructure and service development (dynamic efficiency) can be ensured. Short-term interventions aimed at creating competition can affect long-term efficiency and the pace of innovation can be adversely affected by such short-term policies.[8] The combination of network effects and rapid technological development means that particular care should be taken with respect to the interventions made in the market. It is usually very difficult to predict the technology of the future, therefore, it is also difficult to know how the market would have developed without intervention.

DMA is not a typical market regulation

The DMA is not a market regulation in the classical sense. The DMA departs from this pattern in that it does not target an industry but instead targets firms relying on a certain mode of producing or delivering services. In fact, none of the firms targeted by the regulation

[5] Salvador Rodriguez, "Clubhouse hires Android software developer, signaling work on Android app has begun", CNBC, 23 February 2021. www.cnbc.com/2021/02/23/clubhouse-hires-android-developer-work-on-android-app-has-begun.html
[6] "How to thrive in the shadow of giants", The Economist, 20 May 2021. www.economist.com/business/2021/05/20/how-to-thrive-in-the-shadow-of-giants
[7] Mats Bergman, The Swedish Regulatory Reform Commission SOU 2005:4 p. 667.
[8] The Swedish Regulatory Reform Commission SOU 2005:4 p. 666.

belong to the same relevant market and they operate under different competitive conditions with different business models. To address competition concerns, a regulation such as the DMA must rely on the common denominator – the economic logic underlying multi-sided platforms. To design a regulation applicable to platforms across markets with different business models and yet maintain focus on what really matters for competition is clearly a formidable challenge. There is a clear risk that rules which are applicable in some contexts will be counterproductive in others. The attempt to regulate different markets with the same regulation is difficult, especially when digitalization changes and develops the markets very quickly.[9]

The competition law enforcement possibilities are not exhausted

The regulation is proposed without having exhausted the possibilities of existing competition law tools related to enforcement.

The DMA regulates different types of procedures, without first establishing that the classic prohibitions on restrictions of competition are insufficient regarding digital platforms. The European Commission has, *inter alia*, imposed heavy fines on Google in three cases and in two of them it has ordered Google to change its behavior. Google is questioning the decisions and a reasonable possibility would be to await judicial review in these cases, not least in the case of Google Shopping. The case is about self-preferencing and the proposed Article 6(1)(d) of the DMA follows by providing that self-preferencing is banned, without exceptions. However, certain types of vertical integration within companies can promote competition rather than restrict it. This makes it difficult to ban self-preferencing per se. In the first place, the General Court, and possibly later the Court of Justice, must decide whether certain types of contested proceedings should be regarded as abuse of dominance.[10]

The DMA deviates from the European Commission's established competition policy principles and economics-based theories

As a result of the DMA's deviation from th European Commission's established competition policy principles and economics-based theories, a paradigm shift will occur. The objectives pursued by the DMA (contestability and fairness) remain closely related to those of competition law, despite the EU Commission's references to "complementarity" between the two sets of rules. Therefore, the DMA deviates not only because it moves away from economic-based theories but also because it moves away from standard antitrust procedural rules and principles, i.e. the Commission frees itself from definition of relevant markets; identifying any wrongdoing in a particular defined relevant market. There are, to the best of my knowledge, no precedents in any market regulation of such far-reaching deviation from procedural safeguards.

The introduction of a new concept of a gatekeeper without the need for establishing dominance or significant market power would represent a major competition policy shift. Other market regulations have clearly had the objective of being supplementary to the

[9] Even the European Commission in the announcement of the Google Shopping case acknowledged that the decision "doesn't replace the need for a case-specific analysis to account for the specific characteristics of each market". https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784

[10] The Swedish Competition Authority states in the report "The competition on digital platform markets in Sweden 2021" that there is no case law on, and under what conditions, self-preferencing may constitute abuse (see p. 215).

competition tools whereas the DMA is something else entirely. There are ongoing investigations and court cases, and the European Commission urgently seems to want a paradigm shift as it has lost its faith in well-established competition policy principles and economics-based theories. It is a rather unfortunate backwards development in a more ordoliberal direction towards form-based rules whereas the recent decades of competition law enforcement have been characterized by a more economics-based approach. This approach has been focused on how certain types of market behavior affect the competition in the market. It is a well-known fact that the same behavior can have both pro-competitive and anti-competitive effects depending on the market circumstances.

It should be noted that the UK has chosen a different approach to the DMA model where firms identified as having strategic market status (SMS) will have to abide by a regulation that is tailored to the competitive context they are in.[11]

Gatekeeper definition is not tied to any competition concerns or market power

The proposed DMA falls short in several respects. The first challenge appears in the definition of gatekeepers. It is not clear how the quantitative thresholds are tied to competition concerns. Instead, a certain size appears to be equated to competitive harm and the vague concept of "unfairness." The thresholds are set in absolute numbers rather than in relation to some relevant market. Specifically, the turnover is not related to the platform business but to the owner's turnover meaning that similar platforms may be treated very differently depending on ownership. Moreover, it is far from clear why the absolute number of business users is a relevant metric.

The thresholds appear to have been set to identify a particular group of firms, and to exclude others without basis in any theory of competitive harm. The introduction of quantitative criteria for defining who is a gatekeeper is a blunt instrument which, although good for predictability, can create unfortunate threshold effect. On the one hand, that companies may be treated differently, and, on the other hand, the criteria may hamper companies from wanting to grow.

Furthermore, while network effects can be very strong in digital markets, they are not necessarily exclusive – even if all consumers use one platform this does not preclude them from also using another platform, so called multi-homing. Multi-homing therefore counters the underlying arguments that motivate the DMA. The extent to which this is practical or attractive to consumers differs between markets but, for instance, many individuals use more than one social network. From a competition point of view, it makes a big difference whether there is multi-homing or not, yet there is a glaring absence of such considerations in the DMA.

The thresholds counteract a level playing field and give raise to threshold effects

Quantitative criteria can also lead to threshold effects, as companies above and below the thresholds are treated differently from a regulatory perspective. In addition, the DMA does not consider the fact that digital markets consist of active companies that have very different business models.

[11] Se e.g. Caffarra and Scott Morton (2021) for a discussion. https://voxeu.org/article/european-commission-digital-markets-act-translation

Another aspect worth considering is how the DMA might affect the pool of firms that hover around the thresholds set out in the DMA. Will they act strategically to steer clear of at least one of the criteria set out in the DMA, say by curbing growth of business users or acquiring providers of complementary services? With the emerging IoT applications one can imagine that firms in a range of businesses, such as household appliances and motor vehicle manufacturers, will join the ranks of firms close to the thresholds.

In summary, this counteracts a level playing field.

DMA risks damaging Nordic innovation and may have a negative impact on incentives for Nordic start-ups

Around 90-95 % of Swedes use the Internet. Three quarters of the country have access to fast fiber optic broadband. Historically, Sweden has promoted the use of the Internet for several decades – from subsidizing households' purchases of personal computers in the 90s, to subsidized or fully state-financed installations of internet cables in rural areas. The presence of a *digital custom* is therefore clear in Sweden. A society that is increasingly cashless, public authorities' use of digital solutions to communicate with citizens and continuous digital innovation in the private sector are some of its characteristics.

Another important fact is that Sweden is a small market, meaning that start-ups commonly begin their activities already with an ambition to expand globally. Indeed, Sweden has been a good market for successful companies in the digital field - with Spotify, Izettle, Skype and Mojang being some prominent examples.

The Swedish levels of innovation are, however, highly similar to those of its Nordic EU neighbors. Sweden, Finland and Denmark occupy the three top positions in the EU with respect to their levels of innovation.[12]

The European Commission claims that the DMA is *inter alia* innovation driven by stating that the innovators and technology start-ups will have new opportunities to compete and innovate in the online platform environment without having to comply with unfair terms and conditions limiting their development.

But it's a well-known fact that public regulation (both deregulation and re-regulation, including *ex ante* regulation) of markets that tend to over-regulate or regulate too much in detail can:

- Be counterproductive to the very goals it aims to pursue
- In itself lead to distortions of the competitive conditions in the markets
- Negatively impact the innovation climate
- Lead to reduced consumer welfare

Economists and regulators often have differing views on how intensively a market should be regulated, with regulators tending to want quick regulation, while economists tend to warn that it can be particularly difficult in technology-intensive industries to predict how such

[12] Nordic competition authorities memorandum "Digital platforms and the potential changes to competition law at the European level", September 2020; European Commission, "European Innovation Scoreboard 2020", 23 July 2020, see also https://ec.europa.eu/growth/industry/policy/innovation/scoreboards_en and European Innovation Scoreboard: Innovation performance keeps improving in EU Member States and regions, 21 June 2021; https://ec.europa.eu/growth/industry/policy/innovation/scoreboards_en.

industries will develop and how rapid market interventions can risk hindering effective resource allocation in the long run.[13]

The DMA is at risk of hitting the innovation climate particularly hard in the Nordic countries and risks having a negative impact on incentives for Nordic start-ups, which will be troublesome since the region (and Stockholm as a city) is among the most innovative places in the world.[14] In a European context, the Nordic region is the one of the most innovative hubs in Europe[15] meaning that any negative effects on innovation will be particularly problematic for the Nordic countries.[16]

The Nordic competition authorities have jointly expressed concerns about the incentives to invest and innovate

The Nordic competition authorities signed a common memorandum in September 2020 which pointed out their doubts that it would be beneficial to introduce a detailed list of obligations and prohibitions within an *ex ante* regulatory framework.[17] This is because the same type of conduct can have both pro and anticompetitive effects depending on the market and/or the specific gatekeepers, and because digital markets are fast-moving. A regulatory intervention should rely on a clear and objective set of criteria. It needs to be clear which companies are considered digital gatekeepers, and companies must be able to foresee which type of regulation they will be subject to.

The complexity and variety of business models adopted by digital platforms, together with the high pace of innovation that characterizes this dynamic sector, make the establishment of clear-cut *ex ante* criteria a challenging task. Nonetheless, a lack of clarity on these points may not only impact the rights of the companies involved but also diminish trust from companies and hamper incentives to invest and innovate.

Overall, the Nordic competition authorities stress the importance of duly considering the advantages and risks associated with a regulatory intervention for companies and consumers, and the need to protect legal certainty and ensure predictability.

Different types of innovation

A far-reaching regulation such as the proposed DMA is bound to affect incentives for innovation.

However, the effects may differ depending on what type of innovations we are contemplating and what actors' incentives we are concerned with. If small inventors fear that the value of their inventions can be extorted by fees or self-preferencing measures, alleviating such concerns serves to stimulate these actors' incentives. For actors who invent with the hope of being acquired by a dominant actor in order to fruitfully commercialize the invention, a more

[13] The Swedish Regulatory Reform Commission SOU 2005:4 p. 665.
[14] Cornell University, INSEAD, and WIPO "The Global Innovation Index 2020: Who Will Finance Innovation?", 2020, pp. xxi, 44-54.
[15] From Spotify to Minecraft, Sweden Proves Fertile Ground for Unicorns, https://www.bloomberg.com/news/articles/2021-04-26/spotify-s-nest-proves-a-fertile-breeding-ground-for-unicorns
[16] European Commission, "European Innovation Scoreboard 2020", 23 July 2020, the results of which are summarised at https://ec.europa.eu/growth/industry/policy/innovation/scoreboards_en;
[17] Nordic competition authorities memorandum "Digital platforms and the potential changes to competition law at the European level", September 2020.

restrictive enforcement of merger policies may dampen the incentives to innovate. In addition, the platforms themselves are important innovators in their own right – indeed their dominant position in many cases rests on superior innovation ability – and the effect of the regulation on their incentives to innovate should therefore be an important consideration.

Another question here is related to the importance of trade secrets and IP rights for innovations. However, these aspects are not covered here.

The economic literature on innovation and competition is vast and I will make no attempt to cover that here. Instead, I will just suggest that it may be useful to make a distinction between different types of innovations:

- Innovations that have a distinct stand-alone value to users (**stand-alone innovations**), and
- Innovations that enhance the value of using the platform, which we may call **complementary innovations**.

In the former case, the innovator can sell the innovation directly to users for what the market can bear.

In the latter case, the value of the innovation is more indirect and could make other services more useful. Such innovations may be just as valuable but may be more difficult to monetize directly. However, they often have the effect of creating extra value to the eco-system in the short or long term.

Furthermore, platform operators have strong incentives to develop features or services that improve the user experience on the platform. Even if they cannot be directly monetized, platform operators benefit from more extensive use of the platform and from a reduced risk of the platform being challenged by alternative offerings. Such innovations are less likely to be provided by third parties.

Integrated new innovative services provide massive consumer benefits that the DMA may stop

In the case of Google, the ability to provide map services related to searches enhances the user experience. Now, the proposed DMA regulation risks preventing Google from integrating these services, which primarily diminishes the value of the service to users without having any redeeming pro-competitive effect.

Suppose Google's map services did not exist, the DMA regulation would dampen Google's incentives to develop such a service since it could not be used to its full potential. It would also reduce Google's willingness to pay a third-party inventor to acquire this technology, thereby reducing third party innovators' incentives as well. A third party could develop the service and sell it as a stand-alone add-on service to search engines. However, the third party would not benefit from the positive externalities the service has on the search platform and would have to monetize the service by charging users for the service which would lead to inefficient utilization and reduce consumer welfare.

This logic is by no means limited to map services but goes to show that regulatory restrictions curtailing the scope of integrating complementary services are likely to have adverse effects on innovations that enhance the value of using a platform in general, i.e., innovations that have, what economists call, positive external effect on the platform.

From a regulatory perspective, it makes more sense to focus on protecting competition rather than to diminish the value of the services a platform owner can provide. In particular, to protect the rights of third parties, making innovations that complements the platform, whether that may entail equal access to certain data, compatibility with the platform's services or to protect against fees designed to extract the innovators surplus, would strengthen incentives for third party innovation for two reasons. First, it would provide an opportunity to prosper from the innovation on a level playing field. Second, it would strengthen the innovator's bargaining position should it wish to sell the innovation to the platform operator. A regulation which prevents certain types of integration by the platform operator could diminish the value of the innovation and harm the incentives for innovation by both third parties and platform operators. In addition, the negative effects of stifled innovation are also transferred to consumers, which are left without more qualitative or cheaper services.

Finally, to achieve an overall pro-competitive result, the key for such regulation is to ensure that innovation by the platform itself is not disincentivized at the same time. From an economic point of view, it would therefore be useful to further clarify the meaning of self-preferencing as expressed in Article 6(1)(d) of the DMA.

It is unclear what is to be considered as a more favorable treatment of services and products offered by the platform. For example, the DMA appears to disregard the fact that search results which are shown to consumers are often based on algorithms and aim to present the consumers with the most relevant results. Regardless of whether they do or do not include other products or services of the platform, such algorithm-driven rankings reveal consumer preferences.

Furthermore, Recital 49 states that gatekeepers should not engage not only in preferential treatment but in any *differentiated treatment*. This would run counter to the very idea of a search engine (i.e. the need to use different algorithms and formats for different types of queries) and would hamper the usefulness of services (i.e. in relation to service recommendations).

A regulation that disregards consumer preferences and requires alterations of the way the results are presented simply because the products are produced within the same undertaking stifles both innovation and competition. A platform that can offer competitive products will be forced to refrain from doing so simply because it is a platform of a certain size – and consumers will be faced with less choice.

A straight-forward example might be a situation where a platform sells a stand-alone service or product in competition with third party suppliers of similar services and products and treats their own offering more favorably. A more problematic situation is when third parties provide services that are highly complementary to the platform and the platform would like to integrate these features into the platform.

Vertical integration could be anticompetitive if the bundling is a way to leverage dominance in one market into an adjacent market, as was argued in the Netscape and Internet Explorer case. However, if self-preferencing is taken to be a blanket argument against vertical integration of complementary features of a service, once some version of the feature has been offered by a third party, this could clearly hamper product development in a ham-fisted way that does not seem in tune with the Better Regulation Agenda. Since there may be perfectly valid arguments both for and against self-preferencing regarding complementary services, this seems like an area which should be addressed by competition law. Competition

law can take the context and the economic effects into account, as opposed to blunt regulation, which cannot.

In summary, the DMA could reduce rather than contribute to consumer benefits. As mentioned, the Nordic countries have the most frequent and advanced internet users in the EU.[18] Therefore, the DMA is at risk of reducing the benefits to the Nordic consumers. In comparison, the EU electronic communication regulations had some clear consumer-focused objectives for the EU, in the form of:

- Roaming in the EU
- Number portability, which facilitates operator switching.

Acquisitions are important drivers of innovation

As the Swedish Government has previously stated, business acquisitions are important for the continuous development of business and for a good structural change in business. It develops the economy and leads to an adjustment regarding the changing conditions of the market.[19]

There is a consensus worldwide that acquisition control should be restrictive and used for intervention only in exceptional cases.

Acquisition of innovative startups can be a driving force in itself for innovators and entrepreneurs to develop an idea. The next step in investment and development may be naturally done in collaboration with a major financial or industrial player.[20]

Even if an innovative company were to be incorporated into the acquirer's activities, it could be good for the national economy. It promotes rather than restricts competition, as it leads to a struggle for progress and new technological developments between actors. It also leads to development and benefits for welfare and consumers.

As long as the drivers of new innovations are strong enough, and the buying companies implement them, the fruits will at least partially benefit consumers.[21] In the case of Whatsapp, for example, the business has developed under the new owners.

Android is another good example of a successful acquisition that has stimulated innovation. When acquired in 2005, there was not a single Android device in the market. After Google's investments and added resources, Google currently has over 1,300 Original Equipment Manufacturers offering over 25,000 Android devices. Android became a competitor to Apple's iOs, which would not have been the case otherwise.

Strong rationale for justification rules also in the DMA

Tying and self-preferencing can be justified if there are technical efficiency reasons, superior technical product performance, material benefits to customers and vertical integration. There is nothing inherently anti-competitive in offering a portfolio of complementary products. However, vertical integration based on ownership without sufficient demonstrable benefits to

[18] Nordic competition authorities memorandum "Digital platforms and the potential changes to competition law at the European level", September 2020.
[19] See e.g. prop. 1992/93:56 p. 38 f and prop. 1998/1999:144 p 32 f).
[20] See e.g. Cabral, L. (2021), Merger policy in digital industries, *Information Economics and Policy*, Vol. 54, for a cautionary discussion of merger policy.
[21] The Economic Policy Council report 2021:1.

customers falls outside of competition on the merits. Taking the same example of self-preferencing it has been noted that self-preferencing can be pro or anti-competitive, depending on the circumstances and the nature of the behavior at issue.

Self-preferencing can unfairly advantage companies' own services at the expense of efficient rivals without offering adequate countervailing benefits to customers.

At the same time, certain practices that could be described as 'self-preferencing' have led to clear product improvements. There are examples of courts finding Google's practice of showing a map thumbnail at the top of search results pages to be "*procompetitive*" and an "*indisputable*" product improvement.[22] Likewise, Google's display of weather information at the top of search results for weather queries have been found to serve "*to increase the overall attractiveness of [Google's] search engine*". This type of product integration creates a richer search experience and offers more relevant information thereby saving people time, improving discovery, and reducing search costs.[23]

Under EU competition law, the prohibition of anticompetitive agreements (Article 101(1) TFEU) contains an explicit direct exemption with four cumulative criteria for an anticompetitive agreement which contributes to consumer benefit to be exempted from the prohibition (Article 101(3) TFEU).

The prohibition of abuse of dominance also does not apply where there are objectively acceptable grounds for an otherwise contested procedure of a dominant company.

Such exceptions are completely missing in the DMA, the only very narrow exceptions being Article 8 on suspension and Article 9 on derogations due to overriding reasons of public interest.

Stockholm, 29 June 2021

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[22] High court of England & Wales, [2016] EWHC 253 (Ch)Case No: HC-2013-000090.

[23] Hamburg District court, Verband Deutscher Wetterdienstleister eV v Google, Reference No. 408 HKO 36/13 (Apr. 4, 2013).