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A More Flexible, Effects Based Approach is Required if the DMA is to Foster Innovation and Protect the Value Platforms Offer

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In a recent "myth-busters" post on LinkedIn, Thierry Breton claims (in reference to the Digital Markets Act, "DMA") that:

> *"We [the European Commission] address a list of clearly egregious practices by gatekeepers. Years of experience in investigations and research have shown that these types of behaviour are problematic. There is no need to spend years analysing their effects each time they take place: we have done it ex ante, once and for all."*

But is this really the case? Are all the practices targeted by the DMA so "clearly egregious" they require no further analysis? Or are there cases in which those same practices can offer benefits to society, warranting a closer examination of their specific effects rather than simply condemning them "once and for all"?

In a recent study,[2] commissioned by the Computer and Communication Industry Association, we dug in to these questions to better understand how platforms create value for society and to ask whether certain of the practices being restricted by the DMA — namely bundling and tying, self-preferencing, and leveraging — can deliver benefits for consumers and business users in certain circumstances.

The study examines the academic literature on platform markets and management to shed light on how these practices are used by platforms to help create value for their users, and illustrates this with a large number of examples and case studies from both online and offline markets.

How Platforms Create Value

At their most basic level platforms act as intermediaries, connecting users to facilitate an interaction. In doing so, platforms are often characterized by what economists would call "positive network effects." This simply means that as more people use the platform, the value to *all* users increases.

For example, if more people join a social network, each user enjoys more opportunities to make new connections; while if more buyers join an online marketplace, more sellers are incentivized to offer their goods and services for sale on that platform (and vice versa).

However, most modern-day digital platforms generate considerable value over and above their simple role as intermediaries. In particular, many platforms play active roles as:

- **aggregators**: helping to unlock scale economies for businesses while reducing transaction costs, increasing quality and building trust with consumers; and/or
- **innovators**: realizing economies of scope as they add new features and services that foster innovation and dynamic competition, both *within* and *between* digital ecosystems.

In both cases, we find that tying and bundling, self-preferencing and leveraging can be important tools for platforms as they seek to create value for their users.

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[2] Oxera (2021), "How platforms create value for their users: implications for the Digital Markets Act," May 12, 2021. The study was commissioned and funded by the Computer and Communications Industry Association ("CCIA"); and is available at: https://www.oxera.com/insights/reports/how-platforms-create-value/.

Platforms as Aggregators

The bundling and tying of different features and services by platforms can boost economic efficiency in the market by: (i) making it easier and cheaper for consumers and business to trade; (ii) increasing choice for consumers; and (iii) helping businesses reduce costs through scale economies while avoiding infrastructure duplication. This can be observed both offline (for example, in the range of services offered by supermarkets) and online (such as with social media platforms or app stores).

Similarly, helping consumers find the products and content that are most relevant to them is a fundamental way in which platforms add value as aggregators. Both online and offline businesses can use self-preferencing to increase product discovery and choice for consumers, as well as to promote quality and build trust; while the leveraging of data helps them provide greater convenience through product personalisation and better matching users to the most relevant options for them.

Google Maps is an excellent example of how these different practices can come together to deliver significant aggregation benefits to consumers.

First, a range of additional Google services are bundled with Google Maps, such as user reviews, photos and navigation. This is highly convenient for consumers, can benefit business users (who may gain from increased trade), and gives Google greater confidence and control over the quality of the information it is providing.

Second, Google often uses its own mapping service to provide users with richer general search results. A detailed assessment by the UK High Court[3] confirmed that the deep, cross-product integration enabled by this self-preferencing unlocked benefits for users that could not have been equaled by using third-party mapping services.

Finally, Google creates additional value by leveraging data and know how throughout its ecosystem. Drawing on the same data — such as local business information — across multiple products ensures consistency for consumers and unlocks efficiencies for Google; while the use of personal data plays an important role in matching consumers to the most relevant search results and content for them.

Platforms as Innovators

For platform operators looking to compete with other digital ecosystems, self-preferencing can be an important tool to differentiate their service and offer meaningful choice to consumers. For example, while some consumers prefer a more "closed" ecosystem (because of the benefits that tighter end-to-end control over the services offered affords) others prefer a more "open" ecosystem with more choice of services but less guarantee of seamless interoperability.

The bundling and tying of additional features, tools or services can also serve to incentivize innovation and competition; both *by* platforms and by third parties *on* platforms. In either case, the platform's users stand to benefit as the number of features and functionalities available to them grows. Similarly, both online and offline businesses can also leverage the data and know-how at their disposal to create new innovations that spur dynamic competition and challenge the *status quo*.

Apple Silicon (i.e. Apple's new, in-house chipset that has been developed to power the next generations of Mac computers) is a neat example of how platforms can use each of these practices to facilitate innovation and competition between ecosystems.

First, Apple's decision to self-supply processors for its Mac line has allowed performance gains from the closer integration of hardware and software. One of Apple's key motivations for self-supplying their own chips over third-party alternatives was to give themselves more flexibility and agility when it

[3] *Streetmap v. Google*, UK High Court case number: [2016] EWHC 253 (Ch).

comes to future CPU needs. This will allow Apple to be more innovative with its product development, increasing the differentiation and competition between Macs and Windows computers.

Second, the switch to Apple Silicon has also offered a level of standardization that helps support innovation on the platform by third-party developers. Prior to Apple Silicon, developers wishing to offer apps across the Apple ecosystem had to build and maintain separate macOS and iOS apps. In contrast, as Apple Silicon leveraged the know-how developed from building chips for iOS devices, developers can now create universal apps and/or port their iOS apps to Mac by making some relatively simple tweaks to the existing code. Apple's hope is that the large and active iOS developer community can quickly and easily build and maintain more apps for macOS — increasing the competitiveness of the Mac platform while benefiting all Mac users.

Implications for the DMA

Our study has shown that platforms are not just neutral intermediaries helping users reach and/or interact with each other. Rather, platforms also take an active role in the creation, design and governance of the markets in which they operate In doing so, they are often able to stimulate competition and create value for their users by engaging in many of the practices that are under the scope of the DMA.

As such, we find limited support for the contention that there is "no need to [analyze the] effects" of these practices, as claimed by Mr. Breton. Instead, we recommend that the DMA should develop a more flexible, effects-based approach which provides greater room for the tailoring of proportionate and effective remedies in their specific market context.

This could include strengthening the role of the regulatory dialogue process envisaged in the DMA and providing a clear route to appeal decisions "on the merits" to specialist courts. Similar provisions already exist in the European telecoms regulatory framework, and are also being considered in the recent proposals from the UK's Digital Markets Taskforce,[4] and as affirmative defenses in some U.S. proposals.

Fast-moving digital markets require equally nimble regulatory authorities to oversee them. However, speed of action must not come at the cost of evidence-led market analyses, unless we are to risk jeopardizing the benefits digital markets have to offer.

[4] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code; Competition and Markets Authority (2020) "A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce," CMA 135, December; and the "American Choice and Innovation Online Act," June 11, 2021.