

Digital platforms and the potential changes to competition law at the European level

The view of the Nordic competition authorities

September 2020



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Foreword

The rise of digital technologies has brought great benefits for companies and consumers but has also raised new challenges, leading to questions about the future of EU competition law. These questions now lie at the centre of an antitrust debate in Europe and the rest of the world.

The Nordic competition authorities in Denmark, Finland, Iceland, Norway and Sweden have responded to these challenges by committing to a robust enforcement of competition rules that keeps pace with technological developments. Our experiences are testament to the growing relevance of digital platforms, and we recognise that our authorities have a vital role to play in developing competition law in relation to these markets through the cases that we bring.

In making this commitment, we are aware of the importance of having the expertise, tools and methods necessary to apply the competition rules in an agile manner to complex and fast-moving markets. It is also our responsibility to time our interventions correctly in order to protect competition while not stifling innovation.

We recognise that the challenges arising from digital platforms are often inherently cross-border in nature. This is why we are convinced of the importance of international cooperation to ensure a coherent application of the EU/EEA rules. This is evidenced by our approach to this memorandum, but also by our engagement in the work being undertaken at the European level. As the policy debate around digital platforms continues, cooperation will help avoid fragmentation of the single market and enhance the impact and effectiveness of the harmonised EU/EEA competition rules.

The basis for the current policy discussion lies in a set of reports issued in 2019 exploring how competition policy should evolve in the digital age.¹ The debate has continued into 2020 and as the year has progressed, steps towards new legislative measures have been taken.² Anticipated by the strategy “Shaping Europe’s digital future” presented in February 2020,³ the European Commission has at the time of publishing this memorandum just carried out public consultations on two distinct legislative initiatives, which could impact antitrust enforcement in the digital economy significantly.

In our capacity as independent competition authorities, we wish to contribute to the discussion of the benefits and concerns related to digital platforms and especially to the development of European competition policy. We hope this may inspire the European Commission, competition authorities in other countries and others with an interest in the subject.⁴

¹ Furman et al. (2019), “*Unlocking digital competition*”, Report of the Digital Competition Expert Panel; Stigler Committee on Digital Platforms (2019), “*Final Report*”; Crémer J., Montjoye YA, Schweitzer H (2019), “*Competition policy for the digital era*” and Australian Competition and Consumer Commission (2019), “*Digital Platforms Inquiry – Final Report*”.

² See e.g. the German government, which in January 2020 published a legislative proposal for reforming competition law. The draft can be found at <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referententwurf.pdf>

³ European Commission (2020), “*Shaping Europe’s digital future*”, COM(2020) 67 final.

⁴ This memorandum comes in addition to the individual participation of the Nordic competition authorities in the ongoing EU-policy debate.

We begin by introducing the common features and values of the Nordic countries that allow us to form a unified opinion on competition policy related to digital platforms. We then address the benefits that digital platforms create for Nordic and European consumers and companies, as well as the main competition concerns they raise. Finally, we discuss our views on the future of competition enforcement and competition policy in the digital age, including the current proposals from the European Commission on ex ante regulation of gatekeepers and a new competition tool.



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Features and values unifying the Nordic countries

The Nordic countries share features and values that help its competition authorities to form a common view on the role and importance of competition and a proactive competition policy on how to address digital platforms.

First, the Nordic countries are all small, open economies and therefore highly dependent on trade with each other, the rest of Europe and the world. In order for the Nordic economies to be competitive and successful in the global economy, it is important to ensure a high degree of competition both locally and internationally.

Competition spurs efficient companies to grow and less efficient ones to exit, incentivises innovation, and results in lower prices, higher quality products and a wider selection of goods for consumers. In addition, competition contributes to reducing inequality in income and wealth by reducing prices and mark-ups.⁵ Studies have also shown that increased competition provides significant benefits for the lowest income groups.⁶ The Danish Competition and Consumer Authority is currently investigating this issue based on Danish data.

Being small and open, the international competitiveness of the Nordic economies is also vital to protect and sustain the Nordic welfare model, which provides a comprehensive social safety net and welfare services.

Second, the high degree of digitalisation, technological development and innovation of digital services offer several opportunities for Nordic companies and consumers. The Nordic countries have embraced the advantages brought by such digital and technological developments, and are among the most digitised countries in Europe and globally — see Box 1.

⁵ See, *inter alia*, OECD (2014), “[Factsheet on how competition policy affects macro-economic outcomes](#)”.

⁶ See Ennis SF, Gonzaga P, Pike C (2019), “*Inequality: A hidden cost of market power*”, Oxford Review of Economic Policy 35, pp 518-549.

Box 1
Digitalisation in the Nordic countries

The Digital Economy and Society Index (Desi), which the European Commission has used since 2014 to monitor Member States' digital progress and digital competitiveness, shows that in 2019, Finland, Sweden, and Denmark were the top 3 countries out of the 28 Member States. The only additional Nordic country that Desi monitors is Norway. If Norway's results were to be included in the ranking, the country would have been in third place.⁷

In 2019, the vast majority of the population (more than 90%) in Denmark, Sweden and Finland used the internet at least once a week,⁸ and over 95% of the population in Denmark, Finland, Iceland, Norway and Sweden had used the internet in the past three months.⁹ In the same year, 95% of the Swedish population over 12 years of age had access to a smartphone.¹⁰ Nordic consumers are also keen to shop online. In 2019, 86% of internet users in Denmark, 84% in Sweden, 80% in Norway and 77% in Finland and Iceland shopped online.¹¹

Third, the Nordic competition authorities have a long history of unique cross-border cooperation and a tradition of collaboration to achieve common goals. We believe that collaborating and learning from each other's experiences is vital to advocate for the right tools and powers to ensure that our enforcement is as effective as possible. This is important in a long-term perspective where an ever-changing world continues to raise challenges to competition policy. Collaboration is also important to avoid a fragmented approach to digital platforms and to competition policy in general. Thus, collaboration can ensure greater impact and effectiveness of the harmonised EU/EEA competition rules.

The Nordic competition authorities are committed to working closely together in order to benefit from shared experiences and find optimal solutions to different challenges. With this in mind, issues related to digitisation will become a regular agenda item in our future cooperation.

⁷ European Commission (2020), "Digital Economy and Society Index (Desi) 2020". Desi is a composite index that takes into account five dimensions of digitization: connectivity, human capital, use of internet services, integration of digital technology, and digital public services. Finland, Sweden, and Denmark's country profiles are available at <https://ec.europa.eu/digital-single-market/en/desi>. For more information about Norway's country profile, see <https://ec.europa.eu/digital-single-market/en/scoreboard/norway>; and SSB (2019), "Åtte av ti har handlet på nett det siste året". Furthermore, with regard to Iceland, see Gallup (2019), "Aldrei fleiri íslendingar verslað á netinu" (More Icelanders than ever before shop online).

⁸ European Commission (2020), "Digital Economy and Society Index Report 2020 - Use of Internet Services", available at: <https://ec.europa.eu/digital-single-market/en/use-internet>.

⁹ Eurostat Data Browser at: <https://ec.europa.eu/eurostat/databrowser/view/tin00028/default/table?lang=en>.

¹⁰ Svenska internetstiftelsen (2019), "Svenskarna och internet", p 16.

¹¹ European Commission (2020), "Digital Economy and Society Index (Desi) 2020".

2 Opportunities and challenges created by digital platforms

Digitisation provides many opportunities for companies, consumers and entrepreneurship. It fosters innovation and economic growth.

One aspect of digitisation is that digital platforms play an increasingly important role in our economies. Digital platforms are characterised by a multi-sided nature and the fact that they facilitate interactions between two or more distinct but interdependent groups of users, thereby lowering transaction costs.¹²

Digital platforms can be critical to the future success of companies, as they can generate new revenue streams and provide access to new customers.¹³ Many companies, especially small ones, view digital platforms as an opportunity to enhance their visibility and access new markets and customer groups. This is also true for Nordic companies — see Box 2.

Box 2 Benefits for business users

In 2019, between 28% and 34% of the companies in Norway, Denmark, Sweden and Finland had e-commerce sales, compared to an EU/EEA average of 20%.¹⁴

A Danish survey of companies selling on digital platforms showed that 71% of those interviewed saw platforms as an opportunity, 87% thought that platforms may enhance their visibility online, and 82% thought that platforms can give access to new customer groups.¹⁵ A similar perception has emerged in Sweden, where small brick-and-mortar resellers can overcome their limited geographic reach and achieve large sales numbers through digital channels.¹⁶

However, if companies operating in the Nordic region and in Europe are to seize the opportunities that digitisation brings, the right policies are needed to ensure a safe, fair and transparent digital economy.

Digital platforms also provide consumers with a greater variety of products and services, and offer the benefits of reduced search and transaction costs. This was confirmed by a survey on Danish consumers' use of digital platforms in 2019. Among the respondents who made purchases on digital platforms, 65% responded that platforms make it easier and quicker to find

¹² See e.g. OECD (2019), "An introduction to Online Platforms and their role in the digital transformation", p 21, where an online platform is defined as "a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet".

¹³ See Accenture (2020), "Platforms for success: Why Nordic needs to embrace digital platforms. Now."

¹⁴ Eurostat (2020), "E-commerce sales", available at <https://ec.europa.eu/eurostat/web/products-datasets/product?code=isoc.ec.eseln2>.

¹⁵ Incentive (2019), "Danske virksomheders salg via digitale platforme".

¹⁶ Konkurrenserket (2018), "Konkurrencen i Sverige".

whatever they need and 42% responded that they choose to buy on platforms because they offer a larger selection of products.¹⁷

However, the increasing role of digital platforms also creates new challenges for companies, consumers and authorities. This paper focuses on four challenges digital platforms pose to achieving effective competition. These relate to the competition law framework, both in respect of antitrust and mergers, and to the presence of market failures. While the economic features that underlie these challenges are not new, their effects in digital markets are significant and may therefore warrant modified or new policy responses.

A first challenge relates to the current debate around “tipping” scenarios, where a market may “tip” in favour of one single platform and leave no room for competing platforms. That is, competitive dynamics in digital markets are in some cases characterised by the prevalence of competition *for* the market, where competitors try to reach a dominant or monopoly position, rather than competition *in* the market, where dominance is harder to achieve.

Some digital markets display economic characteristics that allow for a successful company to tip the market in its favour. This is especially common in markets where multi-sided business models are widespread, network externalities are present, and the platforms benefit from significant economies of scale and scope.¹⁸

In addition, strong network externalities can be an obstacle to the entry or expansion of competitors, because platforms entering the market need to achieve the necessary critical mass of users to compete effectively with an established platform. Once a platform has attained a position where it has an incumbent advantage, the strong network effects and significant economies of scale and scope may protect it from competition. The platform may thus have the incentive and ability to engage in exclusionary and exploitative behaviour, harming competition and ultimately consumers.

Companies may also attempt anti-competitive strategies to win the market. One example is the anti-competitive use of exclusivity clauses or anti-competitive bundling — see Box 3.

Box 3
Potential anti-competitive behaviour by digital platforms in Sweden

In 2015-2016, the Swedish Competition Authority investigated exclusivity clauses in the food delivery market. As a result, the exclusivity clauses were abandoned, thus allowing restaurants to multi-home.¹⁹

In 2017, the Swedish Competition Authority closed an investigation into a large advertising platform suspected of using anti-competitive bundling between two platform products in the used car advertising sector. The case was closed after the platform unbundled its offering.²⁰

¹⁷ Incentive (2019), “*Danskernes brug af digitale platforme*”.

¹⁸ Economic characteristics such as multi-sided markets and indirect network effects have been largely studied in the economic scholarship. See e.g. Rysman M (2009), “*The economics of two-sided markets*” *Journal of Economic Perspectives*, p 125, where a multi-sided market is defined as “*one in which 1) two sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affects the outcome of the other set of agents, typically through an externality*”. A key feature of multi-sided markets is the presence of indirect network effects, which occur when the value achieved by a group of users (e.g. third-party sellers on a marketplace) is proportional to participation in the other group of users (e.g. buyers), and vice versa. See e.g. Evans DS, Schmalensee R (2007) “*The industrial organization of markets with two-sided platforms*” *Competition Policy International*, p 167.

¹⁹ Konkurrencerettet (2016), “*Disputed competition restriction – online food delivery*”.

²⁰ Konkurrencerettet (2017), “*Alleged competition concern – car advertising platform market*”.

Yet, there is still some uncertainty as to whether digital platforms can exploit their position in the same way as monopolies in more traditional sectors. The possibility of introducing alternative digital services may constrain the market power of the incumbent and dissipate its dominant position. If switching costs are low, or users can multi-home, the introduction of novel or qualitatively superior alternatives is more likely. This could potentially counterbalance a tendency for a market to tip.

A second challenge relates to the fact that some digital markets are characterised by the presence of large platforms, often referred to as “gatekeepers”, which in many ways act like regulators and unilaterally set the rules for accessing the ecosystem that they create.

When a digital platform competes in the retail market with its own goods or services, conflicts of interest may emerge. In theory, the platform may have an incentive to adopt practices capable of distorting competition, including favouring its own goods or services or imposing unfair terms or conditions for companies participating in its ecosystem to the disadvantage of consumers. This is one of the topics currently being investigated in the Swedish Competition Authority’s ongoing sector inquiry of digital markets.²¹

Such large players may also amount to indispensable trading partners. In a survey carried out in Denmark in 2019, 70% of the companies interviewed thought it necessary to be present on a *specific* platform to compete. The same survey showed that 66% of the companies found difficulties in negotiating terms and conditions with digital platforms, while 57% underlined opacity in the platforms’ ranking practices.²² A similar issue has also emerged in the Icelandic tourism industry — see Box 4.

Box 4
Indispensable trading partners in the Icelandic tourism industry?

In Iceland, the Icelandic Tourist Board has complained about Booking.com’s alleged abuse of dominance. In addition, the Icelandic Competition Authority has received tip-offs concerning alleged anti-competitive behaviour by booking sites for hotels, tours and other tourism services. In a 2018 survey among foreign tourists travelling to Iceland, 44% of tourists used booking sites to plan their trip, making it increasingly important for tourism service providers to be present on these platforms.²³ The Icelandic Competition Authority is currently reviewing the complaints to determine whether there is a need for further investigation.

Prior to the 2018 Icelandic survey, price parity clauses in hotel booking sites were investigated in several EU Member States, including Sweden. The largest booking platforms committed to abolishing wide price parity clauses in 2015.²⁴ The commitments ensured that horizontal competition between booking platforms was upheld.

A third challenge relates to situations where large digital platforms try to leverage their market power into new or adjacent activities, or vertically integrate into upstream or downstream markets.

Over the past few years, part of the expansion of large digital companies has been pursued through takeovers and acquisitions of small, innovative start-ups.²⁵ There is a risk that such

²¹ See <http://www.konkurrensverket.se/en/Competition/-ovrigt-/market-study-of-digital-platforms/>.

²² *Incentive (2019), “Danske virksomheders salg via digitale platforme”.*

²³ The survey is available at <https://www.ferdamalastofa.is/static/files/konnun2018/konnun-18-2.pdf>. See particularly p.18.

²⁴ See e.g. Sweden at <http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/>.

²⁵ As put forth in e.g. *Crémer J, Montjoye YA, Schweitzer H (2019), “Competition policy for the digital era”.* For an empirical account of the effects of such acquisitions, see e.g. *Koski H, Kässi O, Braesemann F (2020), Killers on the road of emerging start-ups, ETLA Working Papers 81.*

acquisitions have enabled some platforms to obtain control over complementary innovative products or processes, thus eliminating competitive constraints from future competitors.

The tendency towards expansion appears partially motivated by the access to unique sets of data, which may allow digital companies to expand into new fields by offering products that will accommodate users' preferences better. While the role of data as a barrier to entry depends on a number of factors such as the specific type of data and the market at stake, it appears that where an established platform presents strong data-analytics capacities, the inability for competitors to access a similar set of data may limit competition in the market.²⁶

A fourth challenge is the need to keep up with the high speed at which digital markets evolve. Investigations concerning digital ecosystems may turn into complex and laborious procedures, which can affect the timeliness and effectiveness of an intervention, especially in preventing a market from tipping. Consequently, the risk of irreparable damage to the competitive process and, ultimately, to consumers may increase.

When it comes to mergers, the highly dynamic and fast-moving nature of digital markets makes it difficult to predict the counterfactual scenario, i.e. how the market is likely to evolve in the absence of a merger. Counterfactual scenarios in dynamic markets are therefore more likely to have a higher degree of uncertainty, which may pose a challenge to authorities when it comes to developing clear theories of harm supported by robust evidence.

In what follows, we will present our perspectives in relation to the abovementioned challenges, and where relevant, share policy ideas as well as solutions adopted in our decisional and enforcement practice that have proved effective in addressing some of these issues.

²⁶ See [Hagiu A. Wright J \(2020\). "When data creates comparative advantage", Harvard Business Review Jan-Feb 2020.](#)

3

Nordic recommendations and policy suggestions

The general aim of competition policy is to safeguard competition to protect the welfare of consumers. Yet, for competition to function well in the marketplace, competition policy must be able to adapt to the developments and challenges in a fast-paced environment.

In the ongoing debate, there are a variety of opinions on whether it is sufficient to adjust current analytical tools, methodologies and theories of harm to fit new market realities better, or whether there is a need for new tools and/or rules.

Though there are many features and values that unify the Nordic countries, the Nordic competition authorities' responsibilities, and the legal and institutional frameworks that govern competition law enforcement, vary to some extent across our jurisdictions.

In the following section, we therefore discuss a broad set of recommendations and policy ideas that reflect both our similarities and our different experiences. We first discuss potential updates to the current EU/EEA competition law framework. We then discuss the need for complementary tools that until now have not been part of the EU/EEA competition law framework.

3.1 Updates to the current EU/EEA competition law framework

The Nordic competition authorities consider the current competition law framework capable of handling most anti-competitive behaviour in the digital economy. The competition law framework has proven to be resilient and flexible in the face of technological growth and disruptive innovation, making it highly relevant for tackling competition issues in digital markets.

The Nordic competition authorities have been active in enforcing competition law in digital markets. For instance, in 2020 the Danish Competition Council issued four decisions relating to digital platforms. In one case, the council found that a digital platform had infringed competition law by facilitating collusion,²⁷ while in two other cases the platforms had set minimum prices.²⁸

Issues related to the pace of change of digital markets and the speed with which competition cases are enforced may be addressed by the use of interim measures. The Swedish Competition Authority provided a successful example of the use of interim measures in 2019. The authority found that a fitness aggregator's use of exclusivity agreements with fitness centres was likely to constitute a violation of the competition rules. In addition, the authority found that there were particular grounds to prohibit the company from applying exclusivity agreements even before it had been decided whether the agreements in question constituted a violation of the Competition Act. The case has since been closed, and the authority has accepted voluntary commitments from the fitness aggregator to limit the use of exclusivity agreements.

These cases illustrate the ability to apply the competition rules to new circumstances in order to safeguard the competitive process through traditional enforcement. They also reinforce the

²⁷ [Konkurrence- og Forbrugerstyrelsen \(2020\), "Danish Competition Council: Ageras has infringed competition law."](#)

²⁸ [Konkurrence- og Forbrugerstyrelsen \(2020\), "Commitment decision on the use of a minimum hourly fee" \(Happy Helper\) and \(Hilfr\).](#)

view of the Nordic competition authorities that continued vigilant enforcement of existing competition rules remains central to dealing with problems associated with digital platforms.

Furthermore, since digital markets are characterised by large international companies operating across Europe, the Nordic competition authorities believe in a coordinated European approach to ensure a targeted and efficient enforcement of competition rules. However, to meet the challenges described in the previous section in the future, some adjustments to the competition law framework can be considered.

Additional guidance to ensure efficient and coherent enforcement

Providing guidance on how competition concerns in digital markets will be evaluated by competition authorities ensures transparency for companies active in these markets.

One of the most important sources of guidance comes from the case law that is developed when competition authorities enforce the competition rules. For instance, the two Danish platform cases where the platforms had set minimum prices helped to clarify that platform workers are allowed to organise and enter into a collective agreement, but that independent companies are competitors and should set prices independently.²⁹ The Nordic competition authorities will therefore continue to pursue competition cases actively to shed light on how to interpret and apply existing and emerging competition law in the digital age.

In addition, the Nordic competition authorities are contributing to the European Commission's work to improve and develop existing guidelines, block exemption regulations and decisional practice on how competition authorities should assess the challenges associated with digital markets. Guidance from the European Commission enables more efficient case handling and helps ensure a uniform enforcement across the EU/EEA. This strengthens legal certainty and foreseeability for companies operating across Europe.

The ongoing work to review existing block exemptions and guidelines on vertical agreements and horizontal agreements, as well as the market definition notice, is an opportunity to offer transparent rules for market participants and more support to national competition authorities in how to deal with the challenges described in the previous section.

We provide the following examples of where additional guidance could support such transparency, efficiency and coherent enforcement across the EU/EEA.

A number of reports have provided strong theoretical support concerning the economic forces that may cause markets to tip. To meet the challenges described in section 2, the Nordic competition authorities advocate complementary guidance on how to assess the concepts specific to digital markets, such as competition concerns relating to tipping markets.

Digital ecosystems allow us to understand the importance that certain digital companies have for a well-functioning market. The market boundaries of such digital ecosystems are not always easily defined and can change quickly. Although these ecosystems can have a significant impact on competition in certain markets, case law and guidance on how to apply the competition rules to the complexities of these markets have yet to mature.

In the debate concerning digital ecosystems, much attention has been directed at the gathering and use of data. Access to data can be a barrier to entry for new platforms trying to enter the market and can be used as a mechanism to foreclose competitors.

²⁹ [Konkurrence- og Forbrugerstyrelsen \(2020\), "Commitment decision on the use of a minimum hourly fee" \(Happy Helper\) and \(Hilfr\).](#)

However, cooperation on data — i.e. agreements between companies to exchange, share and collate data — can also raise complex competition issues. The Nordic competition authorities therefore encourage the development of more guidance on data-sharing agreements and how to design data-sharing remedies in antitrust cases and mergers.

As previously described, big tech mergers may have adverse competitive effects and require scrutiny by competition authorities.³⁰ Aggressive acquisition strategies by digital platforms have caused much debate about the theories of harm in digital markets, including the resurgence of the theory of conglomerate effects of mergers, according to which a merged entity is able to leverage its market position on one market to a complementary market.³¹

Acquisitions in digital sectors, particularly in the case of "killer acquisitions" or "conglomerate mergers", are a source of concern that require competition authorities to make predictions about counterfactual scenarios in fast-moving markets and the future evolution of market conditions. More guidance on how to apply theories of harm to these types of acquisitions would be instructive when investigating these mergers and enhance legal certainty and foreseeability.

Tools allowing for the assessment of mergers

Under the current rules, many acquisitions involving small innovative start-ups will not be notified to competition authorities, since they fall below merger notification thresholds commonly based on turnover.

A particular source of competition concern stems from killer acquisitions. While mergers between big tech companies and young start-ups may generate important synergies and efficiencies,³² tech giants may also buy an innovative start-up to pre-empt future competition.³³ In this latter situation, the underlining theory of harm would involve the incumbent "killing" the development or production of the target, or eliminating its own internal efforts to innovate and develop competing products and services, as described in section 2.³⁴

While under EU/EEA competition law many of these acquisitions may fall below the traditional merger notification thresholds, and thus escape the scrutiny of competition authorities, the national competition laws of Norway, Sweden and Iceland provide the powers to ensure that many of these acquisitions can be captured by merger control. In particular, we refer to (i) the powers to order notification of transactions below the turnover thresholds, available in Norway, Sweden and Iceland; and (ii) the power to impose disclosure requirements on individual firms, available in Norway and Iceland — for an overview of these powers, see table 1 below.

³⁰ See [Motta M, Peitz M \(2020\), "Big Tech Mergers", CEPR Discussion Paper No.DP14353.](#)

³¹ E.g. [OECD \(2020\), "Conglomerate effects of mergers", DAF/COMP\(2020\)2](#); and [Cr mer J, Montjoye YA, Schweitzer H \(2019\), "Competition policy for the digital era".](#)

³² See [World Economic Forum \(2019\), "Competition Policy in a globalized, digitalized economy", White paper.](#)

³³ See e.g. [Cunningham C, Ederer F, Ma S \(2018\), "Killer Acquisitions".](#)

³⁴ See [OECD \(2020\), "Start-ups, Killer Acquisitions, and Merger Control – Background Note" DAF/COMP/2020\)5](#), p 6.

Table 1 Overview of Nordic merger tools

Norway ³⁵	Power to order notification ³⁶	<ul style="list-style-type: none"> - No later than three months after a final agreement has been concluded or control has been obtained. - Can be imposed on transactions that have been partially or fully implemented. - Can also be applied to acquisitions of minority shareholdings. - A standstill obligation will apply from the moment the order is effective. - Parties may also voluntarily notify a merger that does not meet the individual turnover threshold.
	Power to impose disclosures ³⁷	<ul style="list-style-type: none"> - Duty to inform the authority of mergers within a specific market that do not exceed the relevant turnover thresholds for mandatory notification. - No later than a certain amount of days (typically three days) after the final agreement has been concluded or control has been obtained. - Applies for a specified period of time, typically for two years. - Fines can be imposed if disclosure requirements are not complied with.
Sweden	Power to order notification ³⁸	<ul style="list-style-type: none"> - No later than two years after a merger has arisen.³⁹ - Can be imposed when a merger does not meet the thresholds of individual turnover.⁴⁰ - Parties may also voluntarily notify a merger that does not meet the individual turnover threshold.
Iceland	Power to order notification ⁴¹	<ul style="list-style-type: none"> - Can be imposed when a merger does not meet the thresholds of individual turnover.⁴² - Can be imposed when a merger does not meet the thresholds of aggregate turnover below the notification threshold, but the parties still have aggregate turnover above a certain threshold, and the merger is additionally considered likely to harm effective competition. - Parties may voluntarily inform the authority that such a merger has taken place. In such a case, the authority shall decide within 15 working days whether to call for a merger notification.
	Power to impose disclosures ⁴³	<ul style="list-style-type: none"> - Can be imposed in markets where there are structural or behavioural competition problems.

³⁵ For a summary on the Norwegian merger regime, see [OECD, \(2020\) "Start-ups, killer acquisitions and merger control. Contribution from Norway"](#).

³⁶ Norwegian Competition Act, Section 18. Concentrations must be notified to the Norwegian Competition Authority if: i) the combined annual turnover of the undertakings concerned exceeds NOK 1 billion, and ii) at least two of the undertakings concerned have an annual turnover exceeding NOK 100 million.

³⁷ Norwegian Competition Act, Section 24.

³⁸ Swedish Competition Act, Chapter 4, Section 7.

³⁹ Swedish Competition Act, Chapter 4, Section 13, para. 2.

⁴⁰ A concentration shall be notified to the Swedish Competition Authority if: i) the combined aggregated turnover in Sweden of the undertakings concerned exceeds SEK 1 billion, and ii) the individual turnover in Sweden of at least two of the undertakings concerned exceed SEK 200 million. If the aggregate turnover requirement of SEK 1 billion is fulfilled, but the individual turnover requirement of SEK 200 million is not fulfilled, the Swedish Competition Authority may request a notification.

⁴¹ Icelandic Competition Act, Article 17 b, para. 3.

⁴² A concentration shall be notified to the Icelandic Competition Authority if: i) the combined aggregate turnover in Iceland of the undertakings concerned exceeds 3 billion ISK and ii) the individual turnover in Iceland of at least two of the undertakings concerned exceeds 300 million ISK. If either, or both, of these two conditions are not fulfilled, but the aggregate turnover requirement of 1.5 billion ISK is fulfilled and the merger is considered likely to harm effective competition, the Icelandic Competition Authority may request a merger notification. Parties to a merger that falls within these criteria can inform the authority in writing that the merger has taken place. In that case, the authority shall decide within 15 working days whether to exercise the power to call for a merger notification.

⁴³ This could be a conclusion of a market investigation according to the Icelandic Competition Act, Article 16 (1) (c) e.

In Norway, Sweden and Iceland, the *power to order the notification of mergers that fall below the notification thresholds* can be employed when there are reasonable grounds to assume that competition will be affected by the transaction. Such particular grounds for intervention include the situation where a strong undertaking acquires a newly established firm that could challenge the position of the acquirer in the future. The Nordic competition authorities consider that this can be suitable for addressing the issue of killer acquisitions, while also being aware that such a tool must be implemented in a manner to mitigate potentially negative effects on investment or innovation incentives.

The power to order notification of mergers below thresholds has been used by all the Nordic authorities that have this power, with some cases resulting in mergers being blocked.⁴⁴ Recently, the Norwegian Competition Authority ordered notification in the *Schibsted/Nettbil* case. In this case Schibsted ASA (Schibsted) acquired the majority stake in a newly established company called Nettbil AS (Nettbil). Schibsted is the owner of Finn No AS, which is the largest online marketplace in Norway for the advertisement of a number of products, including used cars. Nettbil offers online sales and advertising services aimed at private individuals who are selling, and car dealers who are buying, used cars. The merger would not be captured by relying on traditional turnover thresholds. The forthcoming investigation will clarify whether the transaction raises any competition concerns.

In addition to the power to order the notification of mergers below the turnover thresholds, the Norwegian Competition Authority has the power to impose disclosure requirements on individual firms. That is, the authority can require companies to inform them of all mergers and acquisitions that are not subject to mandatory notification. Under certain circumstances, the Icelandic Competition Authority can impose a similar requirement. This can happen for example as a conclusion of a market investigation.

The power to impose disclosure is usually utilised in industries that are characterised by structural issues that justify an enhanced focus. This is particularly the case where, for example, a company holds a particularly strong market position or operates in an oligopolistic market structure.

The Norwegian Competition Authority enjoys a certain margin of discretion in deciding when to impose such a duty — so far, it has been imposed on 24 companies in 11 markets, including motor fuel retailing, electricity generation, waste management and recycling, and grocery store chains.

The imposition of disclosure requirements could prove a valuable resource in addressing big tech mergers, since it would ensure that the competition authority is sufficiently informed of new developments in a market and enable it to take action against potentially harmful transactions, without imposing an undue burden on the merging entities.

Overall, given our past positive enforcement experiences with the powers to require notifications and impose requirements, we suggest that the European Commission considers the introduction of supplementary tools in conjunction with the ongoing evaluation of the EU Merger

⁴⁴ *Iceland 2009-2020*: Seven ordered notifications, of which four were prohibited, one closed with remedies, and one is still under review at the time of publishing this memorandum. *Norway 2014-2020*: Seven ordered notifications, of which one was prohibited, one was closed with remedies and one is still under review at the time of publishing this memorandum. *Sweden 2010-2019*: Five ordered notifications, one of which was abandoned by the parties after the Swedish Competition Authority requested the court to block the merger. In the same period, 18 mergers falling below the merger thresholds were voluntarily notified.

Regulation.⁴⁵ In this context, the set of tools in the Nordic countries may serve as an inspiration, both at the EU level and at the Member State level.

3.2 Possible complements to the current EU/EEA competition law framework

The Nordic competition authorities believe that it is important to evaluate whether new policy tools beyond traditional competition rules should be introduced at the European level. An important element of this evaluation is to consider areas in which the present system may be unable to tackle the emergence of new competition problems, or address them in an effective manner, for example in relation to tipping markets or platforms acting as de facto regulators, as described in section 2.

Digital platforms have sparked a fierce debate about the necessity of complementing traditional competition law with broader regulatory intervention. The Furman and Stigler reports have described the need to equip existing legal systems with ex ante rules in order to ensure the contestability of online markets.⁴⁶ Similarly, multiple Member States and national competition authorities have supported the introduction of some form of new tool to address the challenges raised by digital platforms.⁴⁷

At the time of publication of this memorandum, the European Commission is seeking to modernise the current regulatory framework through the introduction of: (i) an *ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers* and (ii) a *new competition tool*.⁴⁸ These legislative proposals are intended to complement a vigorous enforcement of the existing competition rules by addressing the market power and possible misconduct of leading digital platforms, as well as the presence of structural market failures.

The Nordic competition authorities encourage a harmonised approach to any regulatory efforts to avoid fragmentation and safeguard the effective functioning of digital markets. An EU-wide process will guarantee a higher level of harmonisation and transparency, which are crucial for preserving a level playing field on the single market and for legal certainty and predictability.

Furthermore, the Nordic competition authorities stress the importance of ensuring compatibility between traditional competition enforcement tools and the proposed legislative initiatives. Particularly, we emphasise the need to address how Articles 101 and 102 TFEU (Articles 53 and 54 EEA), the proposed ex ante regulatory instrument on large digital platforms, and the new competition tool would relate to each other by clarifying the kind of problems intended to be tackled by these different policy tools. This is essential for ensuring the effective enforcement of the competition rules to the benefit of consumers and companies, as well as appropriate legal certainty and transparency for all, paving the way for open markets and innovation incentives. In addition, the utmost care must be taken to find clear and adequate methods of interaction with national competition authorities, and between the two pillars of enforcement of the EU/EEA competition rules.

⁴⁵ In 2016, the European Commission launched a public consultation regarding proposals to enhance the effectiveness of the EU merger regime. One component of this evaluation was a consideration of the effectiveness of the purely turnover-based jurisdictional thresholds of the EU Merger Regulation, specifically with regard to issues relating to the digital economy. Furthermore, it has recently been indicated that the European Commission will start accepting referrals from national competition authorities of mergers below the thresholds. The European Commission has stated that the evaluation is still ongoing and will be concluded by 2021.

⁴⁶ [Furman et al. \(2019\), "Unlocking digital competition", Report of the Digital Competition Expert Panel](#) and [Stigler Committee on Digital Platforms \(2019\), "Final Report"](#).

⁴⁷ See for instance the ["Joint memorandum from the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world"](#).

Besides these broad remarks, the following sections outline the Nordic competition authorities' views on the two legislative initiatives proposed by the European Commission.

Ex ante regulation of large digital platforms

The Nordic competition authorities welcome the ongoing focus on the trading practices of digital platforms and support the need to address the powers of those large platforms that act as gatekeepers. At the same time, we wish to stress that such platforms have also played an important and positive role in our economies, not only fostering innovation and underpinning economic growth, but also creating opportunities for companies and consumers.

However, when companies are dependent on a platform that acts as a gatekeeper, there may be far-reaching negative effects on innovation and contestability if the platform imposes unfair terms or conditions for participating in its ecosystem. Furthermore, in those cases where a platform also participates in the market with its own services, conflicts of interest may emerge, and the platform may have the incentive to adopt practices capable of distorting competition and favouring its own services.

The ex ante regulatory Platform-to-Business framework that entered into force in July 2020 seeks to create more fairness and transparency for companies on digital platforms. For instance, terms and conditions must be drafted in such a way as to give business users a reasonable degree of predictability about the most important aspects of their relationship with the online platform.⁴⁹

Establishing an additional regulatory framework that digital platforms acting as gatekeepers must comply with would have the benefit of having an immediate effect, since the framework could replace some of the need for long and resource-intensive competition cases, thus facilitating timely intervention and avoiding the risk of irreparable harm to competition. Furthermore, an ex ante regulatory framework focused on large platforms that act as gatekeepers would allow a targeted and proportionate intervention against those platforms that consumers and companies rely on, even if they are not considered dominant under competition law. An ex ante regulatory framework could also cover practices capable of hampering competitiveness and innovation, but not covered (or not covered effectively) by current rules.

However, regulatory intervention may not ensure the same level of flexibility and adaptability seen in the enforcement of competition law. In particular, it is doubtful that it would be beneficial to introduce a detailed list of obligations and prohibitions within an ex ante regulatory framework. 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. Furthermore, such 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 characterises 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 support the evaluation of such new regulatory initiatives being conducted by the European Commission. At the same time, we 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.

⁴⁹ [European Commission \(2020\), "Platform-to-business trading practices"](#).

A new competition tool

The European Commission is currently considering the introduction of a new competition tool capable of addressing the emergence of structural competition problems on a case-by-case basis where gaps in the current legal framework exist.

The proposed new competition tool would add a new dimension to the enforcement of EU competition law. The European Commission would be enabled to intervene and impose remedies in the case of certain market structures that distort competition or in the case of market failures, without the need to prove an infringement of the competition rules. The new competition tool could in some respects be characterised as an *ex ante* intervention, complementing the traditional *ex post* paradigm typical of EU competition law enforcement.⁵⁰

In forming our opinion on this matter, we have looked at the investigative tool introduced in Iceland in 2011,⁵¹ which was modelled after the UK market investigation tool.⁵² The Icelandic powers allow the competition authority to investigate market features or conduct that prevent, limit or affect competition to the detriment of the public interest, and to impose necessary and proportionate remedies.⁵³ In doing so, the Icelandic tool closely resembles the design of a market structure-based competition tool with a horizontal scope of application.

The Icelandic investigative tool is characterised by a highly transparent and participative procedure where all interested parties have the possibility to comment on the preliminary findings of the investigation, which are made publicly available on the competition authority's website. This, in turn, enables the development of an open dialogue with the companies that may have an interest in the investigation. Furthermore, the imposition of remedies is triggered by a clearly identified legal standard, i.e. the presence of a *serious impediment to competition*, which needs to be substantiated with sufficient evidence. The decisions of the authority are then subject to review by the Competition Appeals Committee as well as the general courts in Iceland.

According to the Icelandic Competition Authority, the tool has proven to be of substantial benefit to consumers and the competitiveness of markets in Iceland, as has been the case with regard to the UK market investigation regime.⁵⁴

⁵⁰ In the context of the new competition tool, the type of *ex ante* interventions would, for example, be remedies preventing a market from tipping or governing the future behaviour of firms.

⁵¹ The Norwegian Competition Authority is also provided with a tool that enables it to intervene indirectly against anticompetitive behaviour in a market. In particular, the Norwegian Competition Authority has the ability to recommend to the Ministry of Trade, Industry and Fisheries that regulations should be imposed in a market. This stems from Section 14 of the Norwegian Competition Act ('Measures to promote competition'), according to which regulations can be introduced to intervene against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act, if this is necessary to promote competition in the market. For example, this section was applied to ban airlines' frequent flyer programs on domestic flights in Norway.

⁵² The market investigation by the CMA is an in-depth investigation led by a group drawn from the CMA's panel of members. The CMA's panel comprises individuals from a variety of backgrounds. The market investigation is undertaken independently of the CMA Board and the group are the sole decision-makers. The group of members is supported by a team of staff, including specialists. Formally, market investigations consider whether there are features of a market that have an adverse effect on competition (AEC). If there is an AEC, the CMA has the power to impose remedies but it can also make recommendations to other bodies such as sectoral regulators or the government – for example when legislation might be required. The CMA has wide powers to change the behaviour of firms, such as governing the way a product is sold in a particular market and the information that is available to customers buying that product. The CMA also has the power to impose structural remedies, which can require companies to sell parts of their business to improve competition. For more information, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336077/Energy_market_investigation_note.pdf.

⁵³ See Article 16 (1) (c) of the Icelandic Competition Act. "Market features" can comprise, *inter alia*, those factors connected to the attributes of the market concerned, including the organization or development of companies that operate in it. "Conduct" refers to all forms of behaviour, including a failure to act, that may be detrimental to market competition without being in violation of the Icelandic Competition Act. Further rules can be found in regulation No. 490/2013 on market investigations carried out by the Icelandic Competition Authority.

⁵⁴ The estimated average annual CMA consumer savings for 2017-2020 by area of CMA work were the following: competition enforcement (£45,2 million), consumer protection enforcement (£70,0 million), merger control (£386,8 million) and market studies and market investigations (£839,5 million). See [CMA \(2020\), "CMA impact assessment 2019/20"](#).

We recognise that the introduction of a new competition tool for the European Commission has the potential to bring certain advantages at the European level as well, including the possibility to develop a more holistic approach that tackles different aspects of the market(s) concerned. Furthermore, the new tool would allow for structural issues to be addressed, such as oligopolistic markets that may facilitate anti-competitive behaviour.

At the same time, we recognise that the new competition tool would mark a significant enlargement of the European Commission's powers of intervention, thus requiring adequate safeguards and proportionality checks. In this sense, we believe that there are a series of procedural and substantive issues that have to be carefully considered, including the legal standard adopted, the level of engagement of the undertakings involved, and the importance of engagement of relevant national competition authorities.

In relation to the threshold test for initiating an investigation, we believe that there is a need to establish a clear legal framework capable of mitigating potential uncertainty on the part of companies. This holds particularly true in relation to a market structure-based competition tool, which would be applicable in the case of structural problems that cannot be addressed at all, or cannot be addressed effectively, under the EU competition rules. In order to avoid negative effects, we call for transparent and predictable rules or guidelines with regard to the new competition tool.

The Nordic competition authorities also believe that the companies involved in an investigation should enjoy similar rights and levels of engagement to those accorded to parties in traditional competition enforcement proceedings. In our view, the new competition tool should afford parties appropriate procedural safeguards including the right to judicial review.

Finally, we stress the importance of creating clarity about the power to impose remedies. In particular, it would be required to establish a clear legal standard reflecting the potential effects of the remedies imposed. In addition, a set of criteria or circumstances that justify the imposition of structural (e.g. forced divestitures) rather than behavioural remedies (e.g. transparency obligations or codes of conduct) would be necessary. Furthermore, given the absence of any infringements of competition rules, we believe that it is crucial to ensure the proportionality of the intervention and adequate checks and balances, as are provided for in the UK⁵⁵ and Icelandic rules stated above.⁵⁶ The Icelandic experience has demonstrated that it is possible to develop additional tools that provide for more competitive markets to the benefit of companies, consumers and the economy.

Overall, the Nordic competition authorities acknowledge that a new competition tool for the European Commission may be able to address some of the issues discussed in this report. However, we stress that transparency on the abovementioned aspects is paramount to ensure legal certainty and predictability, preserve incentives to invest and innovate, and ensure the effective use of the tool. We support the ongoing evaluation by the European Commission and look forward to continuing the debate and contributing to the design of the proposed new tool.

⁵⁵ For instance, Fletcher highlights that the market studies and market investigations in the UK effectively constitute a two-stage process and that rules require that there is no overlap of people between the Board members who take the reference decision and the Group members taking the final Market Investigation decision. See [Fletcher, A \(2020\), "Market Investigations for Digital Platforms: Panacea or Complement?" Centre for Competition Policy and Norwich Business School.](#)

⁵⁶ The principle of proportionality in the imposition of remedies in relation to infringements of Articles 101 or 102 TFEU is enshrined in Article 7(1) Reg.1/2003. According to this provision, the Commission may impose on an undertaking behavioural or structural remedies "which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end".