Oles Andriychuk*
oles.andriychuk@ncl.ac.uk
Professor, Newcastle University Law School

Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA

ABSTRACT

XXX Merci d'ajouter un abstract en français. XXX

The Digital Markets, Competition and Consumers Bill (DMCCb) is currently being scrutinised by both Houses of UK Parliament. The regulatory philosophy underpinning the proposal is very similar to EU Digital Markets Act. The legal mechanic of the DMCCb yet is very different. In the future, both acts and both regimes will be assessed and compared from different perspectives. This article offers a first look at the Bill identifying its 7 advantages and 4½ shortcomings in comparison with the DMA.

* @oandriychuk1 | Digital Markets Research Hub antitrust interview series https://www.youtube.com/@digital.markets. No conflicts of interest to declare.

I. Introduction

1. After a long theatrical pause, the UK is finally introducing its version of *ex ante* regulation aimed at recalibrating competition in digital markets. The new Digital Markets, Competition and Consumers Bill (DMCCb) is currently at the third reading in Parliament. The Bill represents a very long and very detailed piece of jurisprudential craft—full of nuanced and complex procedural formulas. Most of the provisions relevant to the discussion on *ex ante* rules for digital markets are contained in Part 1 of the Bill.

2. The main components of the new UK mechanism for regulating competition in digital markets are comparable to those present in the EU Digital Markets Act (DMA), yet as two chefs make very different courses from identical ingredients, both regimes, while being driven by conceptually very similar incentives and while being very well informed of each other's juristic mechanic, come up with two very different laws. Some of the tools appear to be more workable in the DMA, others in the DMCCb.

3. This situation urges for a comparative analysis of the two very interlinked systems. Such an instant analysis is possible with two caveats: (i) the effectiveness of each model can only be evaluated when the basic key performance indicators are identified: what is a success for one normative or procedural parameter may well be seen as an absolute failure if seen through a different normative prism; and (ii) the assessment is subject to the third reading in Parliament, which can edit significantly the law as proposed by the UK Department for Business and Trade.

4. The normative parameters used for the analysis in this paper are summarised in the following section. As for the second caveat, at least three reasons justify the analysis of the Bill before it becomes an Act: (i) while the final version of the DMCCb is likely to be changed, scrutinising the Bill allows us to identify the ideal model as envisaged by the UK Government. It helps to better understand the intentions and the vision of the UK as to the new pro-competition approach to digital markets (*nota bene* unlike the Commission, designing the DMA proposal "for itself," the Department for Business and Trade designed it for an independent competition agency); (ii) identifying the best and the worst elements of the Bill may help to improve it (and protect the achieved) in the third reading; and finally (iii) contrary to the DMA, which has been published as a Commission's proposal well ahead of its scrutiny by the co-legislators, the DMCCb has been released only in late April 2023. Before that, the broader antitrust community had only access to consultations about intentions and components—they have never been provided with an opportunity to examine the legislative proposal itself.

5. The Bill constitutes a very detailed and complex piece of legislation with numerous unannotated references to specific sections of other laws. It introduces a host of new terms, concepts, and procedural mechanisms. This feature of the DMCCb is an immediate, a priori contrast with the DMA. The latter is a much more succinct, composed, and autonomous law. The difference goes far beyond the legal stylistic. This complexity is likely to have an impact on the functionality of the new regime in the UK. The nuanced—and polarising—discussion on the semantics of every article, every rule, every concept and indeed every adjective of the DMA reveals that even such coherent and concise regulation still contains a wide scope for mis-, under- and over-interpretation, enabling many opportunities for tactical pacification for some—and fuelling for others—of its ambitious provisions in practice.

6. The remainder of the paper summarises the main normative and procedural benchmarks, through which the DMCCb will be examined. It then articulates seven systemic advantages of the DMCCb, followed by the analysis of its four (and a half) systemic shortcomings in comparison to the DMA.

II. Normative compass and procedural navigators for the new regime

7. The evolution of digital competition policy can be compared to the evolution of the concept of European integration. The entire EU integration project started with the negative imperative, aiming merely at eliminating the impediments to four economic freedoms. Only much later it became obvious that a mere elimination of differences is not enough—one must complement it with building similarities, and the idea of free movement of goods, services, people and capital can function as a negative concept only at its initial, embryonic stage. It requires further proactive steps even to sustain, let alone if the intention is to develop it further. This paved the way for the introduction of much more expansive (and much more problematic) toolkits of positive integration. Similarly, the idea of competition policy also started with a negative mandate of protecting markets from anticompetitive conduct. Over the course of time, it is expanding into a more proactive, market-shaping modality.

8. Endorsing or criticising this metamorphosis, such an expansion of competition policy—at least as far as digital markets are concerned—is becoming a new hybrid, *sui generis* reality. Being simultaneously competition and "something else," the new regime is clearly inspired by antitrust and is being pursued by the same "epistemic community"—yet it explicitly distances itself from the conceptual legacy of *ex post* competition law, economics and policy. In this regard, it is being driven by a semantically self-evident formula: if a policy

impacts competition, it is a competition policy (even if taken *sensu lato*). Antitrust in this constellation is seen as an established and indeed the central—but no longer the exclusive—incarnation of competition policy. The DMA, with its "fairness & contestability" proxies, epitomises explicitly this new start of a proactive digital competition regulatory experiment. Arguably, the reasons for the DMA starting from level zero go far beyond the logistics of Article 114 of the Treaty on the Functioning of the European Union (TFEU) permitting the qualified majority vote. The reasons are broader and more impactful. One may see them as bidding farewells to established doctrine—with its powerful juristic- and econometrics-focused pro-defence toolkit. Of course, different areas of law are separable chiefly in theory, and the general due process and proportionality principles of EU and ECHR law will still be applicable to the DMA. Yet, many of the formulas will have to be redesigned, thereby providing the enforcer with so much-needed temporary flexibility, discretion, and relief. The new start is not a panacea from the enforcers' errors, but it is a levelling of the playing field, a symbolic reset of the legal and economic self-referential casuistic, hijacking the regulatory capacity of *ex post* competition policy over the last decades. Enough is to document the eagerness with which the Commission officials emphasise that while inspired by competition law instruments, the DMA should not be looked at through the prism of existing competition policy concepts. The new policy requires the new apparatus—and the promotion of competition-qua-contestability has not much to do with the protection of competition-qua-welfare. It is a new policy, not a mere incremental extension of the old one. This is missing in the DMCCb. For better or worse, the DMCCb does not provide the new UK regime with this privilege of a new start, designing the new rules as a continuation of the existing ones—even if significantly expanded and refined.

9. Digital markets are systemically entrenched by a handful of the largest online platforms, which due to a perfect combination of their competence and luck, have monopolised most of the markets, transforming themselves into unavoidable intermediaries, gatekeepers, participating in (and thus commissioning, shaping, charging, steering, and learning from) each of the endless avalanches of digital transactions.

10. These unavoidable online intermediaries have passed the marathon distance from their virtual garages to the largest global corporations with indeed a sprinter speed, and they continue their remarkable growth, generating and interpreting (and now scaling up exponentially with AI large language models) more and more consumer and industrial data. The trajectory of their economic growth is mouth-opening. It is as impressive as the trajectory of the growth of their broader societal importance as we are only at the footing of the digital Everest. The further we move, the greater their importance becomes.

11. The main technical implication of this comprehensive entrenchment and tipping of digital markets is that the strengthening of gatekeepers' dominance takes place without a violation of *ex post* competition rules. Once achieving their status as incumbents, these undertakings can comprehensively control and shape the parameters of competition without necessarily engaging in any conduct prohibited by *ex post* competition law.

12. For this reason, it is acknowledged that the traditional *ex post* competition rules (the importance of which remains to be paramount) must be complemented by the new regime—complemented, not replaced.

13. With a degree of stylisation, one may submit that normatively, the recalibration of the rules regulating competition in digital markets is predetermined by a basic formula: the more ambitious the plans, the more plausible the changes. The gap between the entrenched systemically monopolised digital markets, on the one hand, and the available antitrust toolkits, on the other, indicates the obvious: the rules either must be fundamentally redesigned, or there is little sense in all the excitement about the "new era" of digital competition policy at all. The decision is hard, and the immediate, spontaneous reaction to this is to pause, to get more evidence, to wait for the next election, to start with a little: to procrastinate and thus to lose the momentum. Evidently, the cardinal reform raises a plethora of challenges. Some of them are of a purely normative and methodological nature—namely, if competition authorities even have the mandate to intervene in the markets to such extent and if competition policy would even tolerate such a radical redesign of its basic rules, principles and mission, as well as an alarming proximity of the contours of the new digital competition policy to the micromanaging dirigisme, protectionism and all other vice-isms. Other challenges associated with the reform are of a purely practical, technical nature. They concern the very ability of competition authorities to act as a regulatory agency intervening and steering on a continuous basis.

14. Three overarching systemic elements were seen almost consensually as inevitable for enabling the ambitious project of the recalibration of competition in digital markets: (i) pro-competition agenda, (ii) shortening of time and procedures, and (iii) new powers for the Competition and Markets Authority (CMA). The Bill, as introduced to the Parliament, meets all three systemic benchmarks in general—but it is still far from perfect as far as the finetuning of the most effective model is concerned.

III. Seven systemic advantages of the DMCCb

15. Speaking of the advantages and disadvantages of both new pro-competition regimes for regulating digital markets is only

possible after establishing what is advantageous and disadvantageous. This paper's guiding criterion is whether the new rules allow the relevant authorities sufficient discretion and toolkit to deliver a meaningful recalibration of competition in digital markets. Against this background, the DMCCb contains at least seven mechanisms, which are more flexible and proactive in comparison to the DMA.

16. The first systemic advantage is that while identifying the goals more or less similar to the DMA's fairness and contestability ones, the DMCCb separates them into autonomous procedures, granting the CMA more flexibility and discretion in enforcing the contestability-related policies of Chapter 4 in comparison to the fairness ones (Chapter 3). Such a modality correctly identifies the centre of gravity of the very rationale of the new rules. The gist of the reform is in enabling more competition in digital markets rather than restoring the entitlements of business users suffering from a lack of competition. The latter may well appear to be easier targets—yet focusing on nurturing fairness-related rights of business users is misleading as these are the symptoms not the causes of the systemic problems. Separately, the very idea that business users are entitled to a specific conduct by the undertakings with strategic market status (the DMCCb equivalent of the DMA gatekeepers) would be not far from a populistic turn. The apparatus of the smart asymmetric interventionism is being developed to allow the public to trigger and tailor competition where and when they consider it possible, prudent, and necessary to trigger and tailor. Contrary to, say, EU Platform-to-Business Regulation, private parties should be seen in this regard as the proxies for pursuing the new policy—not as direct beneficiaries of the new rules. They are beneficiaries—but only for as long as they adapt accordingly to the new reality. They are beneficiaries only in the sense of using the opportunities for improving their business, not in the sense of producing vexatiously damages claims (and with such a proactive set of obligations, the opportunities for damages would be disproportionately pervasive).[1] This is the reason for the new discretionary competences being centred in the hands of a single enforcer rather than being disseminated horizontally under the "the more, the better" rationale. Preferring contestability over fairness is the right calibration of the new rules.

17. The second important advantage of the DMCCb is that it does not constrain the enforcer's discretion in detailing and delineating core platform services (the DMCCb uses the term "digital activities") nor specific obligations of the designated undertakings (the DMCCb uses the terms "conduct requirements" and "pro-competition interventions"). This prudent solution allows the CMA much-needed flexibility in establishing the addressees of the rules (subject to meeting other qualifying requirements)—and more importantly, in tailoring each individual obligation for each designated undertaking. The DMA, with its elegant "*obligations* (…) *susceptible of being further specified*" formula, clearly identified the correct trajectory of the enforcement discretion. The DMCCb went much further, designing for its fairness-related obligations a mechanism of the "*permitted types of conduct requirement*," the essence of which is a delegation to the CMA of the power to impose a conduct requirement as long as it is "*for the purpose of obliging a designated undertaking to*"[2] do actions comparable to obligations of Articles 5–7 DMA. Similarly, for its contestability-related obligations, the DMCCb empowers the CMA to issue an order "*imposing on the designated undertaking requirements as to how the undertaking must conduct itself, in relation to the relevant digital activity*."[3] Clearly, both modalities are incomparably more flexible than even the flexible in itself scope of Articles 6 and 7 DMA. Sections 20 and 44(3), offering a wide scope for imposing each obligation, could be seen as the etalon of the enforcer's discretionary mandate. Additionally, for achieving the contestability-related objectives, the CMA may further issue recommendations "*to any person exercising functions of a public nature about steps which the CMA considers the person ought to take in respect of the designated undertaking or the digital activity*."[4] This procedure represents a remarkable example of the meaningful regulatory dialogue between the CMA and other public authorities.

18. Thirdly, contrary to the model opted for in the final version of Article 25 DMA, the DMCCb allows for a more pervasive use of the mechanism of commitments, enabling it at any instance of the alleged "breach" of required conduct (terminology opted for by the DMCCb as opposed to a softer "non-compliance" DMA vocabulary)—rather than predetermining it to the proceedings of "*market investigation into systematic non-compliance*" as envisaged in Articles 18 and 25 DMA. In combination with greater discretionary powers of launching investigations on a possible breach of the DMCCb obligations, the mechanism of commitments allows for a more meaningful regulatory dialogue with the undertakings with strategic market status. Commitments help make the rules softer, more targeted, flexible and bespoke—and thus more effective. Their power to achieve the expected outcomes without using to the maximum the regulatory "stick" is particularly appropriate for the regulatory model introduced by *ex ante* digital competition rules—the purpose of which is to nudge the addressees to act in a specific way rather than simply in ceasing and desisting, and the essence of which is by far more interventionist in comparison to *ex post* prohibitions. The logic of the new policy is not in penalising and deterring, but in tailoring and shaping. Fines in this regard can be seen only as the *ultima ratio* trigger. Commitments, on the contrary—particularly if underpinned with the discretion of going further—become a much-needed bargaining chip allowing for

[1] This rationale is developed in detail in O. Andriychuk, Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?, *Journal of Antitrust Enforcement*, Vol. 11, No. 1, 2023, pp. 123–132.

[2] Digital Markets, Competition and Consumers Bill, 25 April 2023 (hereinafter, DMCCb), Sec. 20.

[3] Ibid., Sec. 44(3)(a).

[4] Ibid., Sec. 44(3)(b).

the meaningful enforcer-led regulatory dialogue with the addressees of the new rules. The DMCCb does not use the opportunity to reflect upon (and to expand) the term "commitments" itself. In its current Article 9, Regulation 1/2003 shape, the offer of the specific commitment provision must come from the alleged infringer. This makes sense for the *ex post* enforcement but appears to be insufficient for the purposes of *ex ante* regulatory dialogue, the gist of which is in calibrating the nuances of each obligation for each relevant undertaking. The Bill could be improved by offering a new, more dialogical definition of the term, not merely permitting the CMA to accept an appropriate commitment from a relevant undertaking, but also allowing it to propose a format of the expected conduct—either at the very beginning or following the relevant public consultation.

19. Fourthly, the DMCCb contains a reception of the rationale elaborated inter alia in the Australian Competition and Consumer Commission media bargaining code known in the Bill as the final offer mechanism. Each access-related obligation envisaging some form of pecuniary compensation is inherently susceptible to being misused by the designated undertakings. On the one hand, the enforcers never want to cross the line of becoming price regulators. This impels adopting the requirements akin to those envisaged in Article 6(11) and (12) DMA mandating access "*on fair, reasonable and non-discriminatory terms*." On the other hand, establishing what is fair, reasonable and non-discriminatory may turn into a laborious labyrinth of continuous and circular argumentation. To streamline a workable compromise and to prevent designated undertakings from misusing their superior bargaining position by demanding unreasonable remuneration for products and services, which they may be required to share with their business users (or indeed competitors), the DMCCb puts forward the final offer mechanism. The idea is very game-theoretically intuitive: two parties would be required to suggest their vision of a FRAND-price, allowing the CMA to choose one which does appear to be more fair, reasonable and non-discriminatory. The mechanism may only be used when "*the CMA could not satisfactorily address the breach within a reasonable time frame by exercising any of its other digital markets functions*."[5] The semantics of this condition is fully understandable. The syntax though may still be improved in terms of leaving it for the CMA (rather than phrasing it as an objective—and thus justifiable—criterion "*the CMA could not satisfactorily address*"). The benchmark of what constitutes the "satisfactorily" could be coined in a way implying the exclusivity of the CMA itself to evaluate if the breach could be addressed "satisfactorily" or not. Also, it would be prudent to expand the scope of the final offer mechanism from the current fairness-only set of requirements to the contestability-related ones as well. In the EU for example, the mechanism is equally relevant for fairness- (see, e.g. Art. 6(12) DMA) as well as for contestability- (see, e.g. Art. 6(11) DMA) related obligations.

20. The fifth systemic advantage of the DMCCb over the DMA is the presence of the optional efficiency defence in evaluating compliance with contestability-related obligations. The provision of Section 44(2) permits—but never mandates—the CMA to examine the possibility of applying efficiency defence, stipulating that in considering "*whether to make a PCI* [pro-competition intervention], *and the form and content of any PCI, the CMA may have regard to any benefits to UK users or UK customers that the CMA considers have resulted, or may be expected to result, from a factor or combination of factors that is having an adverse effect on competition*."[6] This formula appears to be the golden standard of discretionary enforcement. On the one hand, it does not mandate the CMA to exempt (or indeed even to consider an exemption of) a conduct, which it aims either to limit, prohibit or prescribe based on "*any benefits*" to UK users or customers, leaving the CMA a room to decide on a case-by-case basis. On the other hand, yet it allows exempting on an essentially open-ended "*any benefit*" basis any conduct, which is potentially subject to a pro-competition intervention—both at the stage of deciding on whether or not to make a pro-competition intervention as well as when deciding on the form or content of any pro-competition intervention, allowing thereby a very fertile soil for a regulatory dialogue between the CMA and the designated undertaking. It is precisely the modality of a regulatory dialogue, which appears to constitute the quintessence of a new pro-competition regime for digital markets, and the greater the bargaining power of the CMA, the more plausible the positive implications on competition in digital markets become. Additionally, Section 83 provides for a broader "reasonableness" justification for failing to comply with competition requirements—these concern both fairness- and contestability-related obligations. The final arbiter in defining the scope of the reasonableness test is the CMA itself. In other words, the provisions of Section 83 allow the CMA to exempt from the penalties for failure to comply even if the first fairness- or contestability-related efficiency defence tests are not passed by the designated undertaking.

21. The sixth element deserving full endorsement is softer and more flexible designation requirements in terms of the link to the UK (Sec. 4 DMCCb)—this provision is by far more flexible than its broad equivalent in Article 2(b) DMA. The UK regime allows establishing the link to the UK if one of the three conditions is satisfied: (i) "*the digital activity has a significant number of UK users*"; (ii) "*the undertaking that carries out the digital activity carries on business in the United Kingdom in relation to the digital activity*"; or (iii) "*the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom*."[7] The EU regime derives from a quantitative presumption that the relevant undertaking must have "*at least 45 million monthly active end users established or located in the Union and at least 10,000*

[5] Ibid., Sec. 38(4).

[6] Ibid., Sec. 44(3)(b).

[7] Ibid., Sec. 4.

yearly active business users established in the Union."[8] Additionally, Section 6 DMCCb requiring, for the designation, the presence of a position of strategic significance appears to be more flexible than its DMA equivalent. Under Section 6, it is sufficient for the undertaking to meet one of the four broad conditions: (i) having a position "*of significant size or scale in respect of the digital activity*"; (ii) having "*a significant number of other undertakings*" using that digital activity; (iii) the possibility to extend market power "*to a range of other activities*" or (iv) to "*determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise*."[9] In contrast, the abovementioned Article 3(2)(b) requires much higher quantitative criteria for meeting a similar criterion. Finally, the turnover requirement also appears to be relatively easy to meet for the "usual suspects" as while the sum of the turnover is larger in the UK, it measures the global—as opposed to the DMA requiring the EU—annual turnover. The required global annual turnover in the DMCCb is £25 billion (or £1 billion for the UK). Importantly, this formula allows the UK to regulate undertakings coming from foreign jurisdictions that are not yet actively present in the UK market in terms of their business model, but are already generating their digital impact and popularity in the UK—those that have not started converting their digital muscles into the monetary one. Such an approach permits the CMA an earlier start in comparison to the Commission's mandate.

22. The seventh advantage of the DMCCb is the greater flexibility of the CMA to select, tailor, differentiate, update and repeal obligations of the designated undertakings. Several commentators observed that a possible shortcoming of the DMA is a difficulty to repeal a specific (e.g., outdated) obligation of Arts 5–7 DMA. The mechanism has been finally adopted. The DMCCb went much further than the formula of Article 12 DMA permitting the Commission to update Articles 5–7 obligations. While the instrument of delegated acts allows sufficient flexibility, the Commission cannot do it individually at the level of obligation for each specific gatekeeper. Under the proposed UK regime, each fairness- and contestability-related obligation is tailored individually for each undertaking with strategic market status. It is with the mandate of the CMA to amend, reshape and indeed revoke the conduct requirement. This approach, in its very nature, is more suitable for the principles of tailored asymmetric regulation, permitting the CMA to calibrate its toolkit in accordance with its enforcement priorities, broader strategic vision, and tactical relation with each undertaking in respect to specific—or any other—DMCCb obligation as well as the rapidly changing objective circumstances.

[8] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1), Art. 3(2)(b).

[9] DMCCb, Sec. 6(1).

IV. Four (and a half) systemic disadvantages of the DMCCb

23. The Bill contains several significant disadvantages, which, if applied literarily—and the defendants will be using all its competences and skills for applying the requirements literarily—or interpreted in a defence-friendly way, would paralyse the mechanism outright. Most of them are easily avoidable at the third reading. Some, though, are of a more systemic nature. The main procedural pitfall is being identified in the devil-in-the-details-type of juristic complexity and casuistic, allowing the relevant undertakings to vexatiously filibuster the effective implementation of the new pro-competition policy by the CMA. The main normative pitfall is that the bill develops a narrower and more conservative (rather than more expansive, forward-looking, proactive, market-design) conception of the notion of "pro-competition" (pro-competition regime, pro-competition interventions, pro-competition outcomes). This reading of the notion of "pro-competition" limits the ambition and potential of the new regime.

24. More specifically, the first systemic shortcoming of the DMCCb is that it requires too many sequential procedural steps from the authority before, during and after each of its actions: starting from designation and ending with the imposition of penalties.

25. If the very idea of the new modality of digital competition law convinces the legislators of its merits and importance, then it should be implemented swiftly. One of its specificities is pro-enforcement discretion and pro-enforcement simplification. Each procedural requirement—however reasonable it may appear to be in the eyes of the legislator—will be thematised, problematised, reinterpreted by the defence—those having the ability to use the brightest legal, economic, data and behavioural science and technology minds and skills.

26. The overarching imperative of the legislators must be "make things easier," not "make the enforcer more accountable." The CMA can be more accountable—but not to the virtues of due process—the mechanics of which are so skilfully instrumentalised by the digital undertakings in various *ex post* procedures—but accountable to the broader UK digital agenda and strategy.

27. The history of *ex post* competition law indicates clearly at least three catchphrases which, while being consensually self-evident and uncontroversial at first glance, become a real impediment to effective enforcement. Those are "the interests of consumers," "evidence-based policy" and "democratic accountability." Clearly, these values are and should remain at

the core of any public policy. The problem is not in these uncontroversial values themselves, but in their instrumentalised misuse. While the first one is successfully overcome in Part 1 of the DMCCb, the remaining two persist. Instances of a counterproductive overreliance on "evidence-based" policy are omnipresent in the Bill. The new policy is much less about "evidencing"; it is much more about "experimenting." In combination with the "democratic accountability" imperative, the Bill may turn into a burdensome procedural labyrinth of risk-averse checks-and-balances protocols, constraining the discretion and incentives of the CMA to act in an experimental, "sandbox" way, triggering it being better safe than sorry. An example of this combination is the overreliance on the mechanism of public consultation.

28. The DMCCb is full of compulsory public consultations. They are introduced in remarkable contrast to the DMA procedures. The latter envisages neither mandatory public consultations nor even the right of third parties to provide evidence. The enforcer knows the *what*, *how* and *why* they want to do. If further information is needed, they may consult relevant parties. The fears in the DMA discussions were that even allowing third parties room for submitting evidence would risk slowing down the functionality of the mechanism.

29. The phrase "spamming the regulators" is more and more often being explicitly used in regulatory circles.[10] Each undertaking with strategic market status, by definition, serves many thousands of business users. Each of those users has some form of legitimate interest. By being overly welcoming, the system risks becoming stuck.

30. The DMCCb, in this regard, not only goes a step further by allowing for such parties to submit their evidence at various stages of the procedure; it explicitly mandates numerous public consultations. Alongside various obligatory consultations with the Secretary of State, Bank of England, other digital regulators, relevant third parties, consumer protection consultations within the remit of the CMA, as well as a number of optional public consultations, the Bill requires conducting mandatory public consultations (i) "*on any decision that it is considering making as a result of an SMS investigation*";[11] (ii) before "*imposing a conduct requirement on a designated undertaking*,"[12] though with a caveat that these two consultations may be combined;[13] (iii) if it considers eventual "*revoking a conduct requirement*";[14] (iv) when making a final decision "*on whether to make a* [pro-competition intervention] *as a result of a* [pro-competition intervention] *investigation*";[15] (v) "*on the terms of any pro-competition order before making it*";[16] (vi) before "*revoking a pro-competition order*."[17]

31. The nature of the obligations, as well as the reasons for designing them, is very specific. The most plausible result of each public consultation will be that a significant part of respondents would support the decision, and a significant part would criticise it. The rationale for these positions depends on the outcomes of the measure on each specific respondent. The DMCCb envisages no—and indeed can never envisage any—formula as to how exactly the CMA should process this 'big data' of responses. The CMA will not be bound to the outcomes of these consultations—even if the outcomes could be distilled and taxonomised from the myriad of opinions. Introducing any—and even more so if introducing so many—mandatory consultations is counterproductive. It significantly extends the time between the intention to act and the action serving chiefly declaratory function.

32. The DMCCb is expected to launch an experimental modality of regulating digital markets. Consultations are important for the enforcer only when they feel the need to get missing information. Public consultation requirements must be made optional, using for example the formula envisaged for CMA consultation on introducing enforcement orders: the CMA "*may consult such persons as the CMA considers appropriate before making an enforcement order*,"[18] should be extrapolated to all consultations.

33. Contrary to the *ex post* model, the new one is not about *protecting* competition, but about designing it. This is a much more ambitious, creative, non-mechanistic, experimental process, requiring new skills and new strategic thinking. Competition cannot be tailored by some predetermined objective standards. These standards and these recipes do not exist. They are moving targets crystallising in the process of enforcement. One can spend all regulatory time and efforts scrutinising the pros and cons of the meticulous arguments about whether and to what extent a specific conduct of an undertaking with strategic market status or a specific situation in the market is pro- or anticompetitive or both and whether and to what extent it should be justified—if this is the essence of the reform, we are guided by a wrong star.

34. The second systemic shortcoming is the quasi-criminal nature of the rules (and to a large degree, this also concerns the DMA). Alongside its presupposed benefits (high fines, access to information and premises, criminal liability triggering deterrence), it increases significantly—often insurmountably—the standard of proof for the enforcer. The formula is not

10 M. Jugl, W. A. M. Pagel, M. C. Garcia Jimenez, J. P. Salendres, W. Lowe, H. Malikova and J. Bryson, Spamming the Regulator: Exploring a New Lobbying Strategy in EU Competition Procedures, *Journal of Antitrust Enforcement*, 2023, jnad009.

11 DMCCb, Sec. 13(1).

12 Ibid., Sec. 24(1).

13 Ibid., Sec. 13(2).

14 Ibid., Sec. 24(4).

15 Ibid., Sec. 47(1).

16 Ibid., Sec. 52(1).

17 Ibid., Sec. 52(3).

18 Ibid., Sec. 31(5).

undisputable even for *ex post* competition law purposes—yet at least *ex post* competition procedure is established and will always remain evidence-based. The increased standard of proof is mitigated by secret, highly sensitive and easily disposable information collected during down raids and high fines imposed on the infringers. The rationale of pro-competition rules is different. It is much less about discovering and penalising, and much more about constraining and steering the designated undertakings. The liability is needed for disciplinary—not for restorative—purposes. Its function is not to compensate, but to force to comply.

35. The decisions of the CMA should not be so much based on evidence. The new pro-competition approach for digital markets is characterised by its experimental nature and is much more discretionary than its *ex post* counterpart. The enforcer is allowed to use the regulatory sandbox to test which policy leads to which implications for the markets. The new proactive digital competition policy is more about making discretionary choices than discovering the factual truth.[19] The interventionist competence of the CMA to design obligations *ad hoc* presupposes the elements of easy compliance monitoring. There is no need for the CMA to use its *ex post* procedural quasi-criminal competences. The information discovered in this way would serve no value in increasing the competences to tailor obligations and monitor compliance: if the CMA suspects incompliance, it can redesign obligations accordingly. These additional competences do not come at no cost. In return to being subject to quasi-criminal competences, the defendants receive much higher due process defences. This would lead the new modality of proactive digital rules to the old *ex post* pitfalls.

36. Decreasing fines and police-style investigatory powers with the symmetrical decrease of the standard of proof (one cannot be confident in experimenting) would also make the enforcers less risk-averse and the entire procedure less antagonistic. Otherwise, imposing a fine of 10% of the total value of the turnover of the designated undertakings for non-complying with a requirement, which until the entry of the DMCC into force was blatantly *ultra vires*, would be correctly identified as disproportionate. The new policy must be designed as a game full of trials and errors—these cannot be acceptable under the quasi-criminal modality. It is a very different enforcement protocol, and a very different regulatory philosophy.

37. It would be much more strategic to design a system which, on the one hand, would give the CMA greater discretion and less demanding expectation to justify each of its procedural steps while counterbalancing it with much less investigatory competences and much smaller (though imposed more often) fines. This format would be more appropriate for the parameters of the behavioural game the CMA is called to engage. It is also worth noting that the version of the DMA adopted by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) contained an even more aggressive attitude to penalising gatekeepers for non-complying. Not only the size of possible fines has been increased from 10% of total (supposedly) global turnover to 20% of total global turnover. The DMA-IMCO imposes a minimum cap of 4%, below which the Commission is not allowed to impose such fines: there is no limit in good intentions. Yet the logic of the new rules is not in high fines, but in frequent imposition of small fines, being seen as a designing scissoring rather than a compensatory hammering.

38. The third and fourth shortcomings appear, on the one hand, to be much easier to avoid, while simultaneously being even more problematic than the previous two.

39. The third shortcoming is inconceivable outright. It concerns a designation requirement of "*substantial and entrenched market power*" envisaged in Section 5 of the Bill.

40. While all other designation requirements are commendable, very welcome and are, on average, much better than those developed in the DMA, the wording of Section 5 is simply illogical, unachievable, and can be seen as opening Pandora's box in terms of likely challenges in court by the relevant undertakings. It mandates the CMA when defining if an undertaking has substantial and entrenched market power to "*carry out a forward-looking assessment of a period of at least 5 years, taking into account developments that — (a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity, and (b) may affect the undertaking's conduct in carrying out the digital activity*."[20] There are so many self-evident reasons why this provision should be fundamentally redrafted. No designation procedure can ever meet the literal—and the defendants will be correctly insisting in courts on the strict literal reading of the—requirements of this section. Five years in digital markets is next to eternity. Nobody can model how the relevant digital activity will look in five-year time, and how it would look without the designation. The requirement is impossible to meet outright, and equally, it is illogical since there is no reason, in doing a "forward-looking" assessment, to demonstrate that the relevant undertaking is already "entrenched." This requirement is also disproportionate if compared with all other designation requirements. For example, the provision of Section 6 requiring a demonstration of a "*position of strategic significance*" is incomparably more flexible, allowing the CMA a very beneficial and easily demonstrable threshold. It remains unclear what is the reason for such a drastic difference in proving a "*position of strategic significance*" as opposed to demonstrating a "*substantial and entrenched market power.*" Inasmuch as the designation criteria are cumulative, challenging the validity of a designation decision based on failing to satisfy the unsatisfiable provisions of Section 5—undertaking strategically at the latest permissible

[19] O. Andriychuk, Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law, *Modern Law Review*, Vol. 85, Issue 3, 2022, pp. 598–634.

[20] DMCCb, Sec. 5.

date—would relieve—and possibly with the res judicata effect—the relevant undertaking from the application of the DMCC retroactively. This loophole must be closed.

41. Additionally, the term "market power," as envisaged in Section 2(2)(a) and elaborated on in Section 5, is stylistically unfortunate. It refers to a well-established concept relevant to *ex post* area of competition law. Homonymy, with two conceptually very similar but procedurally very different terms, is harmful, counterproductive and may delay and challenge the process of designation. It is recommended to change the term "entrenched market power" to the term "entrenched market position." Further, the requirement of substantial and entrenched market position can be presumed if all other designation requirements are met. This is an approach opted for by the DMA, stating in Article 3(2)(c) that an entrenched and durable position is met "*where the thresholds* [quantitative thresholds comparable to those specified in Secs. 2–8] (…) *were met in each of the last three financial years.*"

42. The fourth shortcoming of the DMCCb concerns a compulsory obligation imposed on the CMA to admit efficiency defence representations made by the designated undertakings when evaluating a possible breach of fairness-related obligations of the designated undertaking.

43. The provision in its current form looks inconceivable for ten concurrent reasons:

(i) The very rationale of the new pro-competition rules is based on the idea that the traditional toolkit is not sufficient, and thus more proactive—and indeed interventionist—measures should be designed. These measures are adopted in addition to the existing *ex post* ones. They penalise conduct which otherwise constitutes part and parcel of competition on the merits (is ultra vires for *ex post* rules). These practices are being problematised in the first place not because they are harmful and anticompetitive, but because they constitute the tools for the entrenchment. They are essentially the only remaining way to soften the entrenched status of these undertakings by introducing smart asymmetric interventionist policies, allowing thereby the newcomers a (potential) opportunity for a meaningful scaling up. As status quo ante the prohibited practices embody absolutely permissible market conduct, finding efficiency defence for justifying them would be much easier than one expects—particularly for the undertakings understanding the intricacies of the digital mechanism and consumer preferences much better than the regulator with its limited resources would ever be able to.

(ii) Based on the above, another self-evident implication of this provision will be the exhaustion of significant regulatory resources for scrutinising, evaluating, and balancing the evidence.

(iii) The second reason opens the door for the third one: each instance of evaluation of complex economic and data-related evidence offers a host of opportunities for appeals—complicating, refocusing, and procrastinating the process.

(iv) Even without the appeals the very procedure is time-consuming, delaying the action, making the enforcer unnecessarily risk-averse and cautious.

(v) The rationale of the new rules is in providing the enforcer with greater flexibility and discretion. It is based on the legislative response to the new digital reality, where the antitrust standards of the past—the scientifically deterministic measurability of economics and the casuistic self-referentiality of law—are being converted into an expensive, sophisticated technical tool constraining any meaningful policymaking. A procedural shortcut relieving the proactive enforcers from this perpetual intellectual endeavour is needed. Clearly, such a discretion implies the mandate to refrain from enforcing specific competences—or exempting the undertakings from penalties. However, such a procedural tool should be discretionary, not mandatory.

(vi) The interests of different competitors, their business and end users are very heterogenous, and each reasonable economic conduct is beneficial for some and harmful for others. Who, how and mainly for what purpose should engage in these highly technical 51 vs. 49 guestimations? This formula has been categorically refused in the DMA—and for very right reasons.

(vii) The formula of Article 101 TFEU taken as a benchmark for the "countervailing benefits exemption" is a bad analogy. Article 101 deals with strict and almost self-evident instances of infringements, many of which are object restrictions. Finding justification for such conduct is a challenging task. The DMCCb mechanism of "conduct requirements," on the contrary, deals with incomparably softer actions—and the softer and the more ordinary the action, the easier the route to its justification.

(viii) Equally unconvincing is the reference that the mechanism of Article 101(3) TFEU is hardly ever applicable in practice. Nominally, this is correct. Partially because of the nature of the infringement, which is much more obvious—and thus harder to justify—than the expected DMCCb conduct requirements, but also because the lion's share of agreements which formally meet the requirements of Article 101(1) are block-exempted precisely on the logic of Article 101(3). If a significant portion of even such blatant violations of competition as anticompetitive agreements are justifiable, the proportion of DMCCb conduct requirements justifiable under Section 29 countervailing benefits exemption would be incomparably higher.

(ix) The fourth cumulative condition of Section 29 is not transposed from Article 101(3) TFEU correctly, making even less sense to the very rationale of the countervailing benefits exemption. The wording of Article 101(3)(b)

refers to not affording "*such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*," implying that if competition is restricted (and it remains to be restricted as the agreement is yet within the ambit of Art.101(1)), at least the efforts should be made not to restrict competition more than absolutely necessary for achieving the "countervailing benefits." In the same vein, Section 9 of the UK Competition Act 1998 transposes the EU law provision stating that the agreement in question should not "*afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question*."[21] The wording of Section 29(2)(d) of the DMCCb is interrupted. The provision simply requires that "*the conduct does not eliminate or prevent effective competition*."[22] This cannot be the rationale of the exemption. If the action "does not eliminate or prevent effective competition," the CMA cannot have the mandate to impose the conduct requirement in the first place—however discretional and interventionist the rationale of the new rules is.

(x) Leaving aside all of the above, the wording of Section 29(1) is too imperative—not only mandating the CMA to grant the countervailing benefits exemption when the four cumulative conditions are met, but indeed requiring it to close a conduct investigation "*where representations made by the undertaking to which the investigation relates lead the CMA to consider that the countervailing benefits exemption applies*."[23] In other words, it is enough for the defence merely to provide representations "leading the CMA to consider" that the countervailing benefits exemption applies. This, on the one hand, may decrease the standard of proof even further if the verb "consider" is read as "thinking of a possibility," while, on the other, may be substantively correct, allowing for the CMA sufficient discretion if the verb is read as "thinking of something as." In the latter case, however, there would be a logical discrepancy between the "must"-duty and "consider"-discretion. Inasmuch as both readings if underpinned with sufficient resources are plausible, necessitating thereby a hard 50/50 case, regardless of the outcomes, lots of the recourses would be burned before any of 50% is declared to be the right answer, based on what the CMA will ultimately consider.

44. A simple solution to all these ten shortcomings of the efficiency defence for fairness-related obligations would be to make these requirements optional for the CMA to apply—as is indeed the case with contestability-related obligations. Changing efficiency defence from mandatory to discretionary would transform it from a regulatory burden to a powerful precondition of an effective regulatory dialogue.

45. In addition to the above four systemic shortcomings of the DMCCb, further improvements would be desirable:

– Expanding the final offer mechanism from fairness- to contestability-related obligations in Chapter 4 of the Bill dealing with pro-competition interventions.

– Making the objectives of fairness-related obligations as envisaged in Section 19(5) broader. The main problem with the conduct requirements provisions is that under Section 19(5), "*[t]he CMA may only impose a conduct requirement on a designated undertaking if it considers that it would be appropriate to do so for the purposes of one or more of the following objectives — (a) the fair dealing objective, (b) the open choices objective, and (c) the trust and transparency objective.*" The list appears to be too restrictive. It may be suitable to complement the existing list with the fourth criterion of, e.g. the following wording: "(d) the improvement of the structure of the market objective," with the following amendment of Section 19(8)(2) concretising the provisions of Section 19(5): "The improvement of the structure of the market objective is that undertakings offering or aiming to offer products and services on the market/s relevant to the conduct requirement receive more opportunities to compete with the undertaking designated with the strategic market status."

– The objectives of contestability-related obligations may also be expanded. Alongside the paradigmatic advantages of the mechanism of pro-competition interventions as discussed earlier, a possible disadvantage of Chapter 4 is that the term "pro-competition" is being taken narrower than it could. Under the current version, the CMA "*may make a pro-competition intervention* (…) *in relation to a designated undertaking where, following a PCI investigation* (…) *the CMA considers that — (a) a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition, and (b) making the PCI would be likely to contribute to, or otherwise be of use for the purpose of, remedying, mitigating or preventing the adverse effect on competition.*"[24]

The idea of pro-competition intervention is not limited to the restorative modality, envisaging in addition also an option—even if experimental, even if rarely used in the first periods—of creating, tailoring, designing competition in the market. This feature goes beyond mere (though still very significant) contributing "*or otherwise be of use for the purpose of, remedying, mitigating or preventing the adverse effect on competition*."

Section 44(1)(b) would benefit if amended by the phrase "remedying, mitigating or preventing the adverse effect

[21] UK Competition Act 1998, Sec. 9.

[22] DMCCb, Sec. 29(2)(d).

[23] Ibid., Sec. 29(1).

[24] Ibid., Sec. 44(1).

on competition or improving competition in the market/s related to a relevant digital activity."

It must be noted, though, that a proactive, pro-enforcement interpretation of the current version of Section 44(1)(b) does still allow for—even if only indirect—tailoring and shaping of competition in digital markets, implying that remedying, restoring, and preventing the enforcer *ipso facto* also contributes to shaping and improving. A more explicit provision, as recommended above, would streamline the idea of the new pro-competition regime for digital markets in general and the mechanism of pro-competition interventions more specifically.

– The proposal puts forward two autonomous types of obligations: conduct requirements (Chapter 3) and pro-competition interventions (Chapter 4). It is conceptually correct that greater flexibility is being provided for the latter type of enforcement, which appears to be drafted as an extension of the current UK market investigation regime as envisaged in the Enterprise Act 2002,[25] and as such, is more related to remedying structural market failures.

The obligations indeed can be separated under such rubrics, and it may indeed be reasonable to consider these obligations as deriving their legitimacy from these two different conceptual sources. At the same time, offering two routes for investigating and designing the conduct for relevant undertakings may circumscribe the discretion of the CMA to predefined categories.

While being conceptually separable, these types of requirements are interdependent, converting seamlessly into each other depending on the theory of harm—or rather the theory of aim—used by the enforcer during the investigation.

To streamline the process and to allow the CMA to complement and reinforce its actions, some procedural bridges could be envisaged in the DMCCb, allowing the enforcer to convert the most resource-/time-intense procedural elements from the conduct requirements to pro-competition interventions route.

46. Finally, the Bill does not contain a few other landmark DMA elements, which at first glance may look like shortcomings, while in reality being rather very pragmatic choices. For example, it does not appear to enclose so much praised anti-circumvention provision. This may well be the right decision. The overall formula of anti-circumvention provisions as envisaged in Article 13 DMA is essentially a version of the *pacta sunt servanda* message, which depending on its narrow or wide reading, may be either tautological (as all obligations of all binding rules with or without such specifications are expected to be complied with by the addressees) or *ultra vires* (as one cannot be held liable for a behaviour that formally meets the prescribed conduct). Law is inherently elastic, open-textured, and flexible. But it is not amorphous. The dialectical link between the form and the essence must always bind the interpretive limits. It is impossible to simultaneously comply and not comply with the obligation. If a designated undertaking satisfies the textual/formal provision of all relevant obligations, it cannot be legally liable for any factual consequences of the compliance if such consequences are not compatible with the expectations of the enforcer. This is the reason why the provisions of the DMA have been designed in an asymmetric, open-textured way, allowing the enforcers much greater discretion in designing and interpreting the provisions of each obligation. These are the new parameters of the new game. But they cannot be further. Otherwise, there is no need to have a list of obligations in the first place: just asking arbitrarily for the effects meeting the expectations of the enforcer would suffice. In any event, the anti-circumvention provision is as binding as the provision of, e.g. Article 8(1) DMA, stipulating inter alia that the designated undertaking "*shall ensure that the implementation of those measures complies with applicable law*"—and if the compliance with applicable law may be seen as an instance of circumvention, it would trigger the general proportionality principle rather than giving priority to Article 13 over Article 8(1) DMA outright.

V. Conclusion

47. The function of *ex ante* regulatory rules for competition (such as contained in Part 1 of the DMCCb) is to promote competition. This is the reason for calling it a new pro-competition regime for digital markets, and this is the reason for the reform to introduce paradigmatic—not merely incremental—changes. The choice is hard—but *alea iacta est*—and *tertium non datur.*

48. The idea of the new regulatory philosophy in general—and the new rules embodied in the Bill specifically—is to complement the responsive competence of competition enforcers with new proactive, pro-competition powers of the enforcer. The main rationale of the reform is that the *ex post* responsive approach alone can work only in stable offline markets. This modality is by far insufficient for markets characterised by their systemic imperfections and by their unprecedented dynamism.

49. The new law shaping the regulatory model for a pro-competition regime in digital markets should encapsulate the new competences for the enforcer allowing it to act discretionally when pursuing—or at least contributing to—the strategic digital agenda. The new policy must be part of the broader regulatory vision and action. It should not be insulated from it, as the new *ex ante*, pro-competition policy is not a mere incremental extension of the former *ex post* responsive antitrust one. These features are being well observed by the DMA—and we see an appetite of many EU Member States to

[25] UK Enterprise Act 2002, Part 4.

adopt even more flexible pro-enforcer rules for regulating the competitive dynamic of digital markets.[26]

50. Overall, the DMCCb appears to offer a sufficient degree of so much needed flexibility and discretion to the CMA in pursuing the new policy. Once the identified pitfalls are addressed, the potential of the Bill may indeed be greater than the one "encoded" in the DMA. At the same time, the "decoding" process as offered in the current version of the Bill appears to be more demanding, thorny, and challenging. ■

[26] *See*, e.g. a discussion, M. Komninos, R. Podszun and S. Gappa, The 11th Amendment to the German Competition Act GWB, https://www.youtube.com/watch?v=i_Xt0tR7G68.