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New EU & UK Rules for Regulating Competition in Digital Markets: A Comparative Perspective

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"New EU & UK Rules for Regulating Competition in Digital Markets: A Comparative Perspective"

Newcastle University

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Foreword by Lord Clement-Jones

As digital platforms and Big Tech companies have rapidly grown to hold tremendous economic power and influence, lawmakers around the world are grappling with how to best regulate these sectors to promote competition, innovation, and consumer welfare. With traditional ex-post antitrust enforcement often seen as inadequate, jurisdictions like the European Union and United Kingdom have pioneered new ex-ante regulatory regimes aimed specifically at large digital platforms. These novel approaches promise more proactive policing of potential anti-competitive practices, but also raise concerns about regulatory overreach, impacts on innovation, and compliance burdens.

This collection of remarkably well-argued essays provides an in-depth comparative analysis of the EU's Digital Markets Act (DMA) and the UK's Digital Markets, Competition and Consumers Act (DMCCA) - two leading examples of this new wave of digital regulation. While sharing the overarching goal of enhancing competition and contestability in digital spaces, the essays highlight how the DMA and the recently enacted DMCCA employ different mechanisms and regulatory philosophies.

Key areas of comparison include discretionary powers granted to regulators, designation criteria for regulated platforms, obligations and prohibitions imposed, and relationships to traditional antitrust concepts. Several essays argue that the DMCCA’s flexible, discretionary approach is better suited to addressing the complex challenges of digital markets.

Tailored obligations can target root causes of market power specific to each designated firm. They claim that the DMA's more rigid, blanket prohibitions risk regulatory overreach and stifling innovation. However, concerns are also expressed about uncertainty created by the DMCCA’s expansive regulatory discretion, and whether adequate safeguards exist to prevent arbitrary enforcement. The DMA offers greater legal certainty to platforms, but at the cost of less adaptability.

The essays also analyse how the acts' designation criteria balance regulatory certainty and flexibility. They assert that the DMA relies heavily on quantitative user thresholds, while the DMCCA emphasizes qualitative criteria like a platform's "strategic significance." This allows

the DMCCA to capture major players while the DMA potentially misses, but also creates uncertainty for industry. They outline how the acts take different approaches to assessing market power as well - the DMA looks backwards at historic data, while the DMCCA potentially focuses on more speculative forward-looking judgements. Additionally, the essays explore unresolved tensions between these new digital regulatory tools and traditional antitrust concepts like dominance. Obligations on non-dominant platforms under the DMA's expanded "gatekeeper" designation raise consistency issues. The acts' reversal of the established error cost framework in competition law is also concerning to some.

However, proponents argue digital markets require a rethinking of traditional principles. Looking globally, the essays also find that while the EU offers an influential model for digital regulation, its norms do not translate directly into complete international harmonization. Local institutional contexts and regulatory cultures shape how external regulatory standards are adopted and adapted.

The complex interplay between global influences and domestic environments underscores the difficulties of simply replicating regulatory regimes across borders. Together, these essays illuminate key developments, debates, and design choices shaping modern technology regulation worldwide. Lawmakers seeking to effectively govern digital spaces without overreach must carefully balance competing interests of flexibility and certainty, discretion and safeguards, and innovation and oversight.

It is clear however that if drafted with care, new targeted and tailored rules have a real prospect of promoting competition and consumer welfare amidst the ever-continuing rise of powerful tech titans. But they also carry risks if deployed arbitrarily or without nuance. As jurisdictions continue experimenting with evolving regulatory philosophies, approaches, and tools, these essays offer insightful guidance grounded in rigorous comparative analysis.

All credit to the questioning academic analysis involved which is too rarely celebrated!

Lord Clement-Jones

North East Law Review Editorial Board 2023-2024

Academic lead:

Prof. Oles Andriychuk,

"Shaping Competition in the Digital Age" (SCiDA) research project:

https://scidaproject.com/

Digital Markets Research Hub, weekly discussions:

https://www.youtube.com/@digital.markets

Student editor:

Eleanor Clayton

Student editorial board:

Busola Bada,

Jake Edwards,

Mollie Sullivan-Jones.

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Editorial

Experimenting with regulatory mechanisms for shaping competition in digital markets

Oles Andriychuk, Eleanor Clayton

Digital markets demonstrate unprecedented dynamism. They are becoming omnipresent. Most of them in one way or the other are characterised by the features making most forms of competition on the merits either very problematic or impossible outright. The traditional toolbox of ex-post competition rules can only mitigate the pervasive misbalanced and asymmetries sporadically and in response to an (alleged) infringement. The systemic problems urge for systemic solutions, going (far) beyond the established apparatus of competition law.

Two jurisdictions showing the most articulated regulatory intention to recalibrate the structure of competition in digital markets are the EU and UK. Both are privileged of having very advanced system of competition law, economics and policy – building upon its successes and failures a completely new regulatory system. The system is inherently original and inherently experimental – and thus inherently risky. While early 2020s were seen as the years of reports and proposals, 2024 is the year where both jurisdictions-trendsetters have their new regimes in operation.

The performance the UK Digital Markets, Competition and Consumers Act as well as its broad EU equivalent Digital Markets Act will be assessed through various normative and methodological prisms. What appears to be a success for some may well be seen as an absolute failure for others. The diversity of views and perspectives through which the DMA and DMCCA are being examined is very rich. Their categorisation and systematisation is still waiting for a curious PhD mind. The only thing on which all stakeholders appear to be agreeing is that the functioning of both regimes will be understood better if examined in a comparative perspective. Luckly, both regimes offer a host of opportunities for a comparative analysis.

This Special Issue of the North East Law Review is the first thematic volume focused on examining the DMA and DMCCA through the prism of each other. The exceptional nature of

the project is further enhanced by the fact that all papers offering a comparative analysis of the emerging legal regimes for regulating competition in digital markets are written by students (and indeed the majority of publications are written by undergraduate students). Who else knows, understands, senses the nature of digital markets than those who are born and raised digitally, then those who think and live digitally, then those who are indeed been nurtured and steered by the omnipotent digital giants. Only they are capable of developing the effective antidote, only they sense the depth and breadth of the digital universe.

We are hopeful that many of the students will not abandon their interest in examining the functioning of competition in digital markets but continue shaping the discussion on various intricacies of the emerging and rapidly evolving systems.

We are also honoured that the Special Issue is being provided with an "intellectual blessing" by one of the most knowledgeable co-legislators creating the DMCCA – Lord Clement-Jones. We are grateful for his Foreword opening this volume.

Many papers which we offer for our knowledgeable readers in this volume have been written by UG and PGT students of Prof. Oles Andriychuk who benefits from a generous support of the AHRC/DFG funding of a research project "Shaping Competition in the Digital Age" allowing together with Prof. Rupprecht Podszun to establish a research team examining the emerging regimes in more detail and on a more continuous basis. We invite our readers to consult the project webpage https://scidaproject.com/. Prof. Podszun also hosts a very popular blog https://www.d-kart.de/en/. For those interested in an audiovisual form of discussions on the new regimes we recommend joining our Digital Markets Research Hub YouTube channel https://www.youtube.com/@digital.markets where Prof. Andriychuk hosts on weekly basis the discussions with the leading participants and commentators on the emerging regimes.

On the substantive side of the Special Issue, we have selected out of many submitted papers nine very insightful pieces. The issue opens with a paper "Contours of Contestability: A Comparative Analysis of EU and UK Digital Markets Regulation" by *Ondrej Kubaric* examining one of the most important but the hardest to achieve objectives of the new regimes. It examines the key characteristics of digital markets offering an analysis of the main mechanisms of both the EU and UK regulatory regimes. An attention is paid to a mechanism of Section 29 DMCCA allowing the designated undertakings an opportunity to justify their

eventual non-compliance with imposed conduct requirement in case such non-compliance meets cumulatively the requirements of Section 29. The author submits inter alia that the mandatory (for the CMA) elements of the efficiency defence may be a problem not least in terms of opening room for strategic litigation.

The second paper "With or Without Efficiency Defence?" by *Emely von Platen* continues on the trajectory set up by the previous paper by focusing on a comparative analysis of the mechanism of efficiency defence as present in traditional ex-post competition law and policy, the DMCCA and (as absent) in the DMA. The paper explains the reasons impelling the Commission to be plea consistently against incorporating the elements of mandatory efficiency defence into the new legislation, explaining how and why this proved to be a very prudent move if seen from the perspective of a proactive regulatory modality.

The paper "Discretionary Dynamics: A Comparative Analysis of the DMA and the DMCCA" by *Kai Fessey* focuses on another important element of the new regimes – a significantly increased role of enforcers' discretion. It goes without saying that a new experimental approach epitomised by the DMA & DMCCA confronts many unknowns. Furthermore, it is developing against the background of fierce opposition by many impactful stakeholders. Mistakes are inevitable and the regime must tolerate some room for such mistakes. Further, as we are abandoning the era of axiomatic, formulaic enforcement philosophy of ex-post competition – the philosophy circumscribed and predetermined by the existence of the right answers discoverable in their entirety by the advanced economic metric and moving towards of uncharted waters of enforcement qua policy-*making*, the latter modality presupposes generous discretion of those aiming to shape competition in digital markets. The paper examines the requirements of the new regimes by explicating the basic instances where exercising enforcement discretion is indispensable for the effective functioning of the new regimes.

The fourth paper "The DMA and DMCCA Designation Criteria: A *Sui Generis* Remedy to a *Sui Generis* Problem?" by *Mollie Sullivan-Jones* addresses comparatively another pivotal element of the new regimes – the ways how the addressees of the proactive rules are being allocated by the Commission and the CMA. The matter which appeared to be almost self-evident in the period of preparatory reports conceptualising the need for a new asymmetric regulatory regime, is turning out into yet another challenge for the enforcers. Despite the

overarching ethos of pro-enforcement underpinning the rationale of both legislative regimes, the legal mechanisms of the DMA and the DMCCA allow for a meaningful challenging of the designation decisions. The author looks inter alia at the eventual algorithm of disputing the designation (by for example questioning if the core platform service has been defined correctly within the DMA or if the 5-year forward-looking analysis of the entrenched market status (which some correctly call "crystal ball gazing") has been successful within the DMCCA).

The paper "A comparative analysis of enforcer discretion across the DMCC and DMA" by *Rebecca Price* addresses the issue of enforcement discretion from a broader, more conceptually holistic angle, explaining why both regimes contain various opaque and underdefined elements (starting from the generic goals and ending to the flexibility and bespoke nature of the substance of obligations), and explaining that such relative indeterminacy is not a bug but a feature of the new regimes. Without such flexibility and discretion, the enforcers would lose an important bargaining chip in their negotiation mechanics in the course of the regulatory dialogue.

The discussion on the designation criteria continues in the next paper "Is Big Necessarily Bad? An Examination of the Revolutionary DMA and DMCC Designation Criteria" by *Jason Highfield*. The paper questions the first order rationale of the new regimes examining the phenomenon of bigness. It then addresses the competing interests of flexibility and certainty explaining the reasons for the preference of the former over the latter. Finally, the issue of under- and over-designation is being explained. This is an often-neglected element of the new regime. The importance of the correct calibration lays in the fact that due to the binary nature of the process, an undertaking stopping a half-step before being designated becomes ipso facto the main beneficiary of the new regime – and vice versa those "barely" designated care the largest regulatory burden. The prudent and strategic exercise of discretion therefore is quintessential for shaping competition in digital markets, and it also presupposes significant room for enforcement discretion.

The examination of the first-order issues continues with the paper "Principles in Transition: What Remains of Competition Law in the Era of Hybrid Competition Enforcement?" by *Spencer Cohen*. It explores a series of tectonic shifts undergone by competition law over the last decade, explaining the reasons for shifting towards the emergence of a more hybrid regimes and asking if the new regimes allow for an establishment of "competition law without

constraints" for enforcers. The comparative discussion so far focused mainly on the DMA and DMCCA is being further expanded to a fertile sole of Germany and South Africa.

The paper "The 'Gatekeeper' Scope of the DMA: An Analysis of Its Soundness and Compatibility of 'Dominant position' in Competition Law" by *Lyuxing Tao* offers a general and detailed outline of the new regime. The paper allows for a holistic understanding of the main mechanisms of the DMA, offering a comparative analysis of the new instrument with the traditional ex-post case law.

The eleventh paper of the Special Issue "Is there a Brussels Effect in Brazil? The Case of Digital Platforms Regulation" co-authored by *Arthur Sadami, Lucas Víspico and Matheus Bernardes* expands further the jurisdictional scope of the discussion by examining the implications of the DMA & DMCCA to the discussions on establishing a comparable legal framework in Brazil – and indeed in jurisdictions of Global South reverting to the phenomena of the Brussels Effect and regulatory convergence.

As becomes evident from this cursory outline, the Special Issue contains an abundance of new ideas presented by the youngest voices in the discussion. This fact alone merits a gratitude and appreciation of the work committed and outputs delivered by the authors of the journal. We wish to our readership a fruitful and informative engagement with the offered texts, and we hope sincerely that the questions raised by the authors of these contributions will resonate and we will continue the discussion in other venues.

Contours of contestability: A comparative analysis of EU and UK digital markets regulation

Ondrej Kubaric

Introduction

The unrestrained power of leading tech giants has prompted a critical reassessment of traditional competition regimes in the digital markets. The introduction of regulatory measures like the European Union's Digital Markets Act (DMA) and the United Kingdom's Digital Markets Competition and Consumers Act denotes a pivotal moment in creating a framework that promotes more equitable and competitive digital markets. This article lays the groundwork for discussing the implications of these pieces of legislation and analyses the intricacies and obstacles induced by the digital economy's ingrained dynamics. It will redefine market dynamics in the new digital terrain before comparing the EU's method of deciphering it to the UK's. The DMCC, with its adaptable structure, is posited as potentially allowing for a more refined approach to targeting contestability issues in digital markets than the DMA's broad, one-size-fits-all mandates. By analysing each regulatory measure, this paper aims to unpack the contention that while neither solution is without its shortcomings, a more nuanced and flexible system, such as the one contained in the UK's proposal, could better navigate the unique challenges of digital markets contestability and promote an environment conducive to innovation and fair competition.

1. Redefining market dynamics; the digital terrain

Digital markets do not have one fixed attribute that discerns them from other, more traditional markets. What makes them different is the simultaneous presence of a multitude of features that are usually only encountered separately in non-digital markets. The simultaneous presence of characteristics such as strong economies of scale and scope[1] durable network

[1] Jason Furman and others, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* Report No 2243 (Stationery Office 2019) para 1.68; Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) 20; Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms* (University of Chicago Booth School of Business 2019) 35-36.

effects,[2] and the markets' global presence[3] make digital markets intensely concentrated. This causes companies to compete 'for' the market, in contrast to 'in' the market.[4] Consequently, once an online service attains an adequate customer base, the market usually 'tips' towards that platform, which then becomes a monopoly.[5] This is the condition in which the digital markets are in the present moment, where regular market forces[6] cannot correct the situation.[7] The influence of today's large platform services, such as Google or Amazon, is more entrenched than that of their predecessors,[8] causing them not even to encounter competition 'for' the market.[9] Such a combination of economic features presents novel difficulties that might be impossible to settle using conventional competition law tools. In such fast-paced market areas, timely action is imperative in averting irreversible detriment to contestability. Nevertheless, competition authorities have traditionally intervened *ex-post*[10] and usually after a tedious investigation spanning several years, *inter alia*, in their pursuit of demonstrating consumer impairment on a case-by-case basis.[11] Meanwhile, the large platform was able to employ all manners of actions to eliminate its rivals[12] and cement its market power. After the market had 'tipped',[13] it was generally not necessary to pursue the anticompetitive conduct scrutinised by the authorities anymore, as the ingrained economic elements of the digital markets would assist the company in preserving its overwhelming market power. Seeing that the dominant digital platforms have been shown to be virtually immune to antitrust enforcement in this manner and

[2] Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* ACCC 06/19-1545 (ACCC Publications Office 2019) 41; Stigler Center for the Study of the Economy and the State (n 3) 34-35.
[3] Furman (n 3) 37; Stigler Center for the Study of the Economy and the State (n 3) 34-35; Bundeskartellamt, 'Working Paper: Market Power of Platforms and Networks' https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2 accessed 30 November 2023, 9-10; Japan Fair Trade Commission, 'Report of Study Group on Data and Competition Policy' (June 2017) https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_ files/170606-4.pdf accessed 30 November 2023, 39-41.
[4] Furman (n 3) 18; Stigler Center for the Study of the Economy and the State (n 3) 35; Autoriteit Consumer en Markt, 'Market Study into Mobile App Stores' (April 2019) https://www.acm.nl/sites/default/files/documents/market-study-into-mobileapp-stores.pdf accessed 1 December 2023, 103-104.
[5] Stigler Center for the Study of the Economy and the State (n 3) 39.
[6] Including 'creative disruption': Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (5th edn, Routledge 1994) 71.
[7] E.g., William J Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure' (1982) 72(1) Am Econ Rev 1; Jonathan B Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (HUP 2019) 84-85.
[8] Furman (n 3) para 1.95.
[9] For instance, the CMA's finding that there has not been a significant challenge to the position of Google and Facebook in years: Competition and Markets Authority, (July 2020) 'Online Platforms and Digital Advertising: Market Study Final Report' https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_ report_Digital_ALT_TEXT.pdf accessed 30 November 2023, 9.
[10] I.e., after the competition-harming conduct has occurred.
[11] Cremer (n 3) 3-4.
[12] For instance, 'killer acquisitions': Claire Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' (2021) 5(2) Eur Comp Reg Law Rev 112.
[13] Stigler Center for the Study of the Economy and the State (n 3) 39.

have thus become 'too big to care',[14] the new regimes proposed by the EU and the UK endeavour to resuscitate contestability in this field.

2. The EU's Method: A Unified Regulatory Vision?

The straightforward focus on large platforms in an *ex-ante* regime[15] proposed by both the European Union and the United Kingdom is imperative to improve contestability in the digital markets. Both the EU's Digital Markets Act and the UK's Digital Markets, Competition and Consumers Act aspire to diminish the barriers to entry and the bargaining power held by a small number of platforms by reducing switching costs and an overall market lock-in.

Their central divergence lies in their approach to rules-setting and enforcement. While the UK's proposal is relatively flexible, making it comparatively more suitable to address the markets' contestability considerations, the EU's legislation leaves little to no room for rules adjustability on an individual level.

The DMA's major hindrance in this regard is that the obligations in Articles 5 and 6 appear to pertain, in principle, to *all* 'gatekeepers', disregarding the kind of a 'core platform service' they provide and their business model. This is straightforward with regard to Article 5, which includes general 'obligations for the gatekeepers'.[16] Nevertheless, the inference seems to be the same even concerning Article 6, which, under the heading of 'obligations (...) susceptible of being further specified', empowers the Commission to carry out a 'regulatory dialogue' with 'gatekeepers' to somewhat qualify these requirements;[17]but the provision does not indicate that the 'dialogue' enables the designated undertaking to avoid the obligation in whole.

Some of the obligations in Articles 5 and 6 can be connected to issues that the competition authorities coped with in the context of past investigations against specific online platforms. These are, for instance, *Google Shopping* and its direct correlation with the prohibition of self-preferencing in Article 6(5) of the DMA,[18] or the German *Facebook* case and its connection to

[14] As expressed by Thierry Breton, EU Internal Market Commissioner: Javier Espinoza, 'EU vs Big Tech: Brussels' Bid to Weaken the Digital Gatekeepers' *Financial Times* (Brussels, 8 December 2020) https://www.ft.com/content/4e08efbb-dd96-4bea-8260-01502aaf1bd7 accessed 30 November 2023.

[15] As opposed to traditional '*ex-post*' competition law. E.g., Nicholas Nicoli and others, 'EU Digital Economy Competition Policy: From *Ex-Post* to *Ex-Ante*. The Case of Alphabet, Amazon, Apple, and Meta' (2023) 8(1) Glob Media China 24.

[16] Digital Markets Act (n 1) Art 5.

[17] ibid Art 6.

[18] Case T-612/17 *Google and Alphabet v Commission* [2021] ECLI:EU:T:2021:763, para 58; Digital Markets Act (n 1), Art 6(5).

the prohibition of data combination in Article 5(2)(b).[19] Nonetheless, while some obligations may be suited to address controversies surrounding one specific 'core platform service', such as a search engine, it may not make much sense to apply the same obligation to a different service provider, e.g., an online marketplace.

Admittedly, Article 9 gives the Commission the authority, on a reasoned submission by the designated undertaking, to revoke a particular obligation arranged under Article 5 or 6.[20] Nonetheless, this can only occur in extraordinary circumstances. Article 9 necessitates the designated undertaking to show that compliance with a specific obligation would threaten the economic viability of its operation due to circumstances outside the company's control.[21] Hence, unless the 'gatekeeper' proves that a requirement jeopardises its presence on the EU's market, which is a very onerous threshold to satisfy, it will have to conform to an obligation that is not necessarily relevant to its services. In this manner, the superfluous substance of the rules may result in excessive regulation that could deteriorate contestability in this area.

The DMA endeavours to address this concern to some degree. For example, Articles 5(9) and 5(10) explicitly apply to designated undertakings that provide advertising services,[22] Article 6(3) pertains to undertakings managing search engines,[23] and Article 6(4) is only applicable to companies operating on application stores.[24] Although such a step towards a more nuanced approach is welcomed, the underlying issue persists. Some requirements included in these provisions may be pertinent to address the challenges that have cropped up in the context of a particular core platform service (as in the *Google Shopping* case).[25] However, the broad obligation would still, in principle, apply to all other designated undertakings operating in vastly different markets. In addition, Article 12, granting the Commission the power to redesign the obligations in Articles 5 and 6,[26] also seems to attempt to weaken the blanket effect of the rules. However, those obligations cannot be revised separately, i.e., at the level of specific requirements for each designated undertaking.[27] Thus, Article 12 serves as another illustration of the universal nature of these rules.

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[19] *Facebook* (2020) KVR 69/19 (GER) para 4; Digital Markets Act (n 2), Art 5(2)(b).
[20] Digital Market Act (n 1) Art 9.
[21] ibid Art 9(1).
[22] ibid Arts 5(9) and 5(10).
[23] ibid Art 6(3).
[24] ibid Art 6(4).
[25] *Google and Alphabet v Commission* (n 20).
[26] Digital Markets Act (n 1) Art 12.
[27] ibid Art 12(2); Oles Andriychuk, 'Comparing the Incomparable: Analysing UK Digital Markets, Competition and Consumers Bill Through the Prism of the DMA' (2023) Concurrences 03/2023.

3. Deciphering the Digital Economy: Between Flexibility and Rigidity

The EU's approach could prove problematic. As demonstrated above, the Digital Markets Act is somewhat adamant in imposing universal, non-tailored obligations on all enterprises designated as 'gatekeepers'.[28] However, digital markets are inherently complex and multi-faceted, requiring a thoroughly nuanced approach toward specific company commitments to ensure healthy competition. Regulatory flexibility in this domain is crucial since a universal determination of the rules is likely to cause contestability to deteriorate.

One of the digital market areas necessitating a very nuanced understanding is *interoperability*. The DMA contains two specific types of interoperability obligations. The first obligation deals with the duty to provide access to software features of the undertaking's products to other companies.[29] For instance, Apple could be instructed to give Spotify access to Siri so that consumers can use Siri to play music via Spotify. The other obligation covers messaging services, allowing the users of one messaging application (such as WhatsApp) to communicate with users on another (e.g., Facebook Messenger).[30]

These interoperability requirements are meant to create more market competition by empowering rival firms to resist barriers to entry brought about by incumbent companies' network effects.[31] Indeed, on a general level, interoperability is likely to promote such an objective. For example, if users of one social network can easily engage with other users on a different platform, there will be less need for consumers to be active on the most popular platform, and smaller service providers may be able to enter the market. However, blanket interoperability obligations entail significant obstacles. For instance, they may inhibit 'multi-homing',[32] as there would be less demand to try products of a rival undertaking. As an illustration, users who make use of both WhatsApp and Skype might end up only using one of them because they can access all their contacts through that service provider. As a result, the designated undertaking may retain the benefit of having customers who are unwilling to switch, with the reinforced incentive for the users not to try other platforms. Indeed, as noted in the

[28] Digital Markets Act (n 1) Art 3.
[29] Digital Markets Act (n 1) Art 6(7).
[30] ibid Art 7.
[31] E.g., Digital Markets Act (n 1) recital 64.
[32] I.e., users using several platforms simultaneously.

Commission's report itself, 'full (...) interoperability can come at a high price' since it presents the risk that 'competition between platforms' becomes 'weakened or even eliminated'.[33]

Another complex regulatory area is *self-preferencing*, i.e., precluding designated undertakings from treating their products more favourably than competing products or services offered on the designated undertaking's platform with regard to ranking and indexing.[34] Though such prohibition will presumably protect market competition adequately in most instances,[35] there are circumstances in which self-preferencing benefits the market. In the realm of video game platforms, for example, it has been recognised that where a new console is bundled with the manufacturer's own game, the manufacturer's video games tend to expand the user base of that console.[36] This advances the prospects of the new console in the market, improving the overall contestability situation. Such a way of self-preferencing also helps third-party game developers who create video games for that console to increase their market success even when facing competition from first-party game producers.[39] Moreover, it has been demonstrated that where a large platform enters a particular third-party digital market, it often increases consumer attention, leading to greater innovation and competition.[37] Therefore, the long-term impacts of self-preferencing also rest on the precise context and will vary in line with different market participants. Even the General Court admits that the overall market impact of self-preferencing should be evaluated on a case-by-case basis.[38]

In addition, regarding *data sharing*, the DMA's implicit presumption is that data-sharing obligations will foster competition between the designated undertakings and smaller market players.[39] However, this need not be so. For instance, most users of providers that have been identified as 'core platform services' make use of multi-homing.[40] This indicates that the

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[33] Cremer (n 3) 59.
[34] Digital Markets Act (n 1) Art 6(5).
[35] Usually, third-party sellers seem to reduce the number of products they sell on a platform in fear of self-preferencing when that platform decides to enter third-party market. E.g., Feng Zhu and Qihong Liu, 'Competing with Complementors: An Empirical Look at Amazon.com'
(2018) 39 Strat Mgmt J 2618, 2631.
[36] Carmelo Cennamo, Yuan Gu and Feng Zhu, 'Value Co-creation and Capture in the Creative Industry: The US Home Video Game Market' (2016) Boston University Questrom School of Business Working Paper
https://questromworld.bu.edu/platformstrategy/wp-content/ uploads/sites/49/2017/06/PlatStrat_2017_paper_21.pdf accessed 1 December 2023, 4. [39]ibid 7.
[37] Jens Foerderer and others, 'Does Platform Owner's Entry Crowd Out Innovation? Evidence From Google Photos' (2018) 29(2) Inf Syst Res 444, 470.
[38] *Google and Alphabet v Commission* (n 20) paras 177-180.
[39] Digital Markets Act (n 1) Art 6(9)-(11) and recitals 3, 13, 36.
[40] Directorate-General for Communications Networks, Content and Technology, *MultiHoming: Obstacles, Opportunities, Facilitating Factors* Analytical Paper 7 (European Commission Publications Office 2021) 22; N´estor Duch-Brown, 'Quality Discrimination in Online
Multi-Sided Markets' (European Commission Publications Office 2017) 9.

absence of data sharing is not automatically a barrier to entry or expansion for new platforms. In some instances, data-sharing obligations might even impair contestability in digital markets. This can be illustrated by competition between gatekeepers, often the most potent source of competitive tension among incumbents. For instance, in Amazon's entry into video streaming services, the company could only challenge Netflix and other platforms by leveraging its stable place as a digital sales platform and bundling Amazon Video with its Prime subscription.

In the same way, Apple is firmly situated to enter the online search engine market, where Google is the dominant actor, thanks to its position in another domain.[41] Blanket data-sharing obligations in the DMA[42] may dissuade this disruptive form of competition, as potential entrants might be discouraged by the fact that they can no longer rely on their data banks to keep users around for long enough to build up sufficient interest in their platform. For these reasons, the UK developed a different legislative tool that would allow more of a nuanced and targeted regulation.

4. The UK's Strategic Regulatory Manoeuvre

The Competition and Markets Authority (CMA) has emphasised from the onset that, to enhance contestability in the digital markets, appropriate obligations need to be imposed upon particular types of activities.[43] Under the Digital Markets, Competition and Consumers Bill (DMCC), companies with 'strategic market status' ('SMS') will be subject to an enforceable code of conduct outlining how they are expected to operate.[44] Nevertheless, binding precepts will only be developed from three higher-level objectives following the precise needs regarding each undertaking. This is, firstly, the 'fair trading' objective, requiring that (business) users be treated fairly and can conduct business on equitable commercial conditions with large undertakings.[45] Furthermore, the 'open choices' precept demands that users be able to freely and easily select, without experiencing any impediments, between the services provided by 'SMS' undertakings and those offered by other service providers.[46] Finally, the 'trust and

[41] Tim Bradshaw and Patrick McGee, 'Apple Develops Alternative to Google Search' *Financial Times* (San Francisco, 28 October 2020) https://www.ft.com/content/ fd311801-e863-41fe-82cf-3d98c4c47e26 accessed 30 November 2023.
[42] Digital Markets Act (n 1) Art 6(9)-(11).
[43] Competition and Markets Authority, 'Correspondence: CMA Submission to the Digital Markets, Competition and Consumers Bill Committee' (*GOV.uk*, 27 June 2023) https://www.gov.uk/government/publications/ cma-submission-to-the-digital-markets-competition-and-consumers-bill-committee/ cma-submission-to-the-digital-markets-competition-and-consumers-bill-committee accessed 2 December 2023.
[44] Digital Markets, Competition and Consumers Bill (n 1) cl 19.
[45] ibid cl 19(6); Explanatory Notes to the Digital Markets, Competition and Consumers HL Bill (2023-24) 12 para 157.
[46] Digital Markets, Competition and Consumers Bill (n 2) cl 19(7); Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) para 158.

transparency' principle, which encourages efficient user choices concerning how they interact with 'SMS' undertakings by equipping them with transparent and pertinent information, enables them to comprehend the services offered by large platforms.[47]

Concerning the contrast between the obligation-setting powers,[48] it is evident that in the EU's regime, the decision upon the fundamental rules for designated undertakings has been made in the Parliament and Council legislation itself. Under the DMCC, this responsibility is left to the CMA. In respect of enriching competition in the digital markets, it is a wise advancement. As shown earlier, improving contestability in the digital markets calls for a nuanced methodology, which appears to be antithetical to the blanket approach taken in the DMA. Under the DMCC, each conduct requirement can be adapted independently of one another for each undertaking designated to have 'strategic market status'.[49] This allows the CMA to shape its regulatory tool kit in conformity with its overall competition-enhancement vision concerning each company's conduct requirements. Such an approach is also more prudent in the context of quickly changing regulatory objectives, which is critical in the area of digital markets.

At the same time, the discretion under the DMCC poses concerns relating to the Competition and Market Authority's political accountability because, since the CMA's Board is appointed by the Secretary of State,[50] the body has somewhat narrow public scrutiny for its decisions. For this reason, the Bill is persistent in demanding the agency to carry out public consultations practically every time before taking any procedural step.[51] This can be contrasted to the strategy taken by the DMA, which does not provide for any consultation-related duties for the regulators, nor does it allude to any right of parties to supply evidence where needed.[52] In this way, consultation requirements under the DMCC induce public legitimacy in terms of

[47] Digital Markets, Competition and Consumers Bill (n 2) cl 19(8); Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) para 159.
[48] Digital Markets, Competition and Consumers Bill (n 2) cl 19; Digital Markets Act (n 1) Arts 5-7.
[49] Digital Markets, Competition and Consumers Bill (n 2) cl 19(1); Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) para 153.
[50] Enterprise and Regulatory Reform Act 2013, s 1(1).
[51] Digital Markets, Competition and Consumers Bill (n 2) cls 24(1)-(2), 24(4), 47 and 52.
[52] A possible explanation for this could be the desire to avoid unnecessary prolongation of the obligations-setting process under the Act along the lines of Marlene Jugl and others, 'Spamming the Regulator: Exploring a New Lobbying Strategy in EU Competition Procedures' [2023] J Antitrust Enforc 1.

the CMA's highly respected[5354] obligation-tailoring abilities to improve contestability in the digital markets.

Alongside requirements tailoring, the CMA will also be able to use procompetitive interventions (PCIs), which are measures directed towards opening up markets to more competition, if it establishes that an 'SMS' undertaking's conduct has a detrimental impact on contestability.[55] They are complementary to the standard conduct requirements, authorising the CMA to put into effect measures that focus on the 'root causes' of a firm's sizable entrenched market power.[56] As delineated by the Parliament, PCIs will chiefly seek to reduce network effects and barriers to entry or expansion.[59] Because these measures can be invoked with regard to any 'SMS' undertaking's digital activity,[5758590] they can bring about a more incremental and consistent approach to putting specialised remedies into effect, thus presumably resulting in a better-adjusted competition enhancement.

In terms of enforcement, the CMA's Digital Markets Unit (DMU) is envisaged to have ample discretion to determine whether to rely on a more participative approach.[60] Should the DMU choose to do so, the Unit would enter into exchanges of views with all the parties (including the 'SMS' undertakings) to untangle the issue and consider whether formal enforcement is needed to secure greater compliance.[61] This is more responsive than the EU's approach, allowing comparatively more room for participative enforcement and adjustability. Moreover, while in the EU's DMA, enforcement capabilities are vested solely in the Commission,[62] the DMU's powers would be much more streamlined with the work of other authorities, such as the data protection (ICO) or telecom (Ofcom) authorities, and the CMA

[53] Indeed, the courts have expressed concerns about the prospect of 'second guessing' the conclusions made by the CMA as an 'expert and experienced decision-maker': *BAA Ltd v Competition Commission* [2012] CAT 3, [2012] CLY 547 [20]. Similar views were also expressed in, e.g., *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [2009] CLY 594 [56] or *Barclays Bank plc v Competition Commission* [2009] CAT
[54] , [2010] CLY 491 [27].
[55] Digital Markets, Competition and Consumers Bill (n 2) ch 4.
[56] Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) para
[57] ; Secretary of State for Digital, Culture, Media and Sport and the Secretary of State for Business, Energy and Industrial Strategy, *Government Response to the Consultation on a New Pro-Competition Regime for Digital Markets* CP 657 (Stationery Office 2022) 34. [59]Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) para
[58] and 243.
[59] Digital Markets, Competition and Consumers Bill (n 2) cl 44(3).
[60] ibid cls 26 and 36.
[61] ibid cl 36.
[62] Digital Markets Act (n 1) Art 1(7).

itself.[63] Collaboration with these authorities will enable the DMU to focus on more systemic dangers regarding contestability and better understand the industry.

5. The UK's Regulatory Compromise: The Countervailing Benefits Exemption

The regulatory flexibility afforded by the Bill could, nevertheless, be threatened by the requirement of the CMA to receive countervailing benefits representations by the large platforms in assessing a potential infringement of conduct requirements. Essentially, wherever the company can establish that a breach of a conduct requirement affords sufficient benefits to consumers without rendering effective competition non-existent and is 'indispensable and proportionate', the undertaking becomes exempt from adhering to the requirement.[64] Because of the exemption's mandatory nature[65] and the steep penalties for requirement breaches,[66] this provision lends an incentive for the undertakings to be inventive in their arguments.

The benefits created by platform services are remarkable and range from enlarged connectivity and diminished transaction costs to increased general workforce productivity.[67] However, this provision subverts the very design of *ex-ante* market regulation. One of the root ideas behind both the DMCC and the DMA is that rivalry between digital undertakings has the potential to generate greater innovation and related consumer prosperity.[6869] Ergo, any capacity of companies to evade liability for what would otherwise be anti-competitive conduct serves as an intermediary for entrenching their dominant market position. As a result of this provision, any meaningful contestability-enhancing reform in the future is virtually unattainable.

A full-fledged analysis of this subject matter is outside the scope of the present discussion. Nevertheless, perhaps the standard for a defence of this type should be *innovation* rather than overall *benefits* to address the aim of market disruption more effectively and, hence, increase contestability.[70] Otherwise stated, instead of relying on 'benefits' in assessing whether particular

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[63] Digital Markets, Competition and Consumers Bill (n 2) cls 106 and 108; Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) paras 464 and 457.
[64] Digital Markets, Competition and Consumers Bill (n 2) cl 29(2)(c).
[65] ibid cl 29(1).
[66] ibid cls 83-90.
[67] Cremer (n 3) 12; Bundeskartellamt (n 5) 1; Comisi´on Federal de Competencia Econ´omica (M´exico), 'Rethinking Competition in the Digital Economy' (February 2018) https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_
ENG_letter.pdf accessed 30 November 2023, 15 and 35.
[68] Explanatory Notes to the Digital Markets, Competition and Consumers Bill (n 48) paras
[69] and 7; Digital Markets Act (n 1) recitals 3 and 4.
[70] There is a directly proportional relationship between innovation and contestability. E.g., David Deller and others, 'Competition and Innovation in Digital Markets' (2021) BEIS Research Paper Number: 2021/040 https://ueaeprints.uea.ac.uk/id/eprint/80051/1/

conduct should be exempt,[71] the CMA could instruct large digital platforms to present evidence of product innovation beyond what is expected from new entrants in the market. This might seem like somewhat of a fierce standard, considering the regulator's ability to determine the expected degree of innovation, among other things. Nonetheless, an incremental development in this area would empower the regulators to design the markets in a more contestable way. Without a meaningful change in this domain, the countervailing benefits exemption could create a severe detriment to competition pursuits under the Bill.

Conclusion

This article has assessed the merits of the Digital Markets, Competition and Consumers Bill against the Digital Markets Act's one-size-fits-all approach, demonstrating the former's potential to address the contestability challenges within digital markets more adeptly. The analysis affirms that the UK's proposal, with its flexible and nuanced framework, provides a more suitable strategy for advancing competition and innovation in the digital economy. It is submitted that although both regimes include substantial inadequacies, the adaptability of the DMCC positions it as a more viable tool for navigating the complexities of digital market dynamics. This article emphasises the pressing relevance of a regulatory system that evolves with the markets it seeks to govern, forming a competitive landscape that benefits consumers, new market entrants, and the broader economy. In conclusion, we reaffirm the necessity of a continuing dialogue to devise a responsive and robust regulatory framework in line with digital market advancements to ensure that the markets remain fair and competitive.

Published_Version.pdf accessed 1 December 2023, 15.

[71] Digital Markets, Competition and Consumers Bill (n 2) cl 29(2)(c).

With or without efficiency defence? Analysing the role of efficiency defence in traditional ex-post enforcement, the EU Digital Markets Act & the UK Digital Markets, Competition and Consumers Act

Emely von Platen

Introduction

In an era where digital platforms have seamlessly intertwined with the fabric of our daily lives – shaping social interactions, professional engagements, and commerce – the ascent of 'big tech' corporations like Meta, Apple, and Alphabet (Google) has become a defining narrative.[1] During the fast rise of big tech, the competition authorities underestimated the power these corporations would obtain and allowed significant mergers such as Facebook's acquisition of Instagram, without having grasped the ensuing market repercussions.[2] The power and growth of these tech giants have raised questions about the application of competition law in navigating the intricate landscape of digital markets. As these digital powerhouses wield unparalleled influence, the need to scrutinize their activities through the lens of effective competition law becomes paramount.

The landscape of competition regulation in digital markets is currently undergoing a transformative shift, as new pro-competition rules change the regulatory approach from ex-post to ex-ante. This shift is encapsulated in the European Union's adoption of the Digital Markets Act (DMA) in 2022, and the ongoing amendments for implementation of the United Kingdom's Digital Markets, Competition, and Consumers Act (DMCCA). Among the key differences between these pieces of legislation is the inclusion or absence of an efficiency defence – a mechanism allowing legal justification for anticompetitive practices by demonstrating efficiency gains resulting from the conduct.

This article embarks on a comparative analysis delving into the very essence, role, and necessity of the efficiency defence, juxtaposing its relevance in traditional ex-post enforcement

[1] Liew Li Ren, 'Digital Market Regulation: Lagging behind?' (2023) Sing Comp L Rev 2023 118-127, 118.
[2] Mike Walker, 'The UK Facebook/Giphy Case: Taking Dynamic Competition Seriously' (*Network Law Review*, 5 July 2023) https://www.networklawreview.org/facebook-giphy/ accessed 12 December 2023.

against its potential significance in the emerging ex-ante regulatory landscape. The central question guiding this exploration is whether the efficiency defence remains a requisite element in this new era of ex-ante regulation for digital markets. Opinions differ on this matter, with the DMA refraining from incorporating the mechanism while the DMCC has opted to incorporate it. Adopting a pro-enforcement perspective, this article aligns with the DMA's strategy, recognizing its pivotal role in shaping the future of competition law within the dynamic realms of the digital economy.

The scope of this analysis is intentionally limited, primarily concentrating on the efficiency defence within the DMA and DMCC. While acknowledging the broader aspects of competition law including merger policies and state aid rules as integral, they lie beyond the immediate purview of this discussion. Additionally, acknowledging the evolving nature of the DMCC during its implementation phase, this discussion will predominantly be drawing insights from the April 2023 draft, with subsequent updates from November 2023 presented separately for a comprehensive understanding.

2 Efficiency Defence

2.1 Understanding Efficiency Defence in Digital Markets

In the realm of digital markets, the major market power possessed by big tech risk leading to abuse of dominant position. Instances where these big corporations acquire smaller competitors and preference their own products over others, such as Apple and the App Store, underscore the imperative need for intervention through competition law.[3] Article 102 of the Treaty on the Functioning of the European Union (TFEU) stands as a regulatory provision expressly designed to curb undertakings' abuse of their dominant positions. To determine the relevant market and assess the market power, the European Commission must perform a close examination of the markets in question, from a case-by-case approach.[4] When an undertaking is suspected of engaging in abusive conduct, the efficiency defence emerges as a legal recourse. This legal mechanism allows companies to argue that seemingly anti-competitive conduct is justified due to its positive effects. Undertakings involved in potentially anti-competitive conduct may raise arguments for justification under Article 101 TFEU and Section 9 of the UK

[3] Adrian Kuenzler, 'Third-generation competition law' (2023) Journal of Antitrust Enforcement 2023 vol 11 133–141, 134.
[4] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) Journal of European Competition Law & Practice vol 12 529-541, 530.

Competition Act 1998. Similarly, concerns related to abuse of dominance could invoke Article 102 TFEU and Section 18 of the UK Competition Act. The efficiency defence allows for the undertaking to argue that the efficiencies resulting from their conduct outweigh any potentially anti-competitive effects, thereby justifying their actions.[5]

While Article 102 is relevant to this discussion as it specifically targets abuse of dominance, Article 101(3) serves as a more illustrative example of an efficiency defence. Article 101(3) exempts conduct if it encourages advancements in production and distribution, promotes technical or economic progress, allow consumers a fair share of the benefits, and do not impose unnecessary restrictions or eliminate competition for a substantial part of the products in question.[6] Evaluating this requires the Commission to conduct a thorough analysis of the specific conduct in question, ensuring a comprehensive understanding of its implications for market dynamics.

2.2 Efficiency Defence in Ex-Post Regulation

In ex-post regulation, enforcement operates retrospectively to address conduct on the market that has already occurred, focusing on the effects. Article 101(3) is a prime example of this. The guidelines provided by the EU Commission on the application of the Article shed light on the intricacies of the ex-post efficiency defence, underscoring its subjective nature and the balancing of anti-competitive and pro-competitive effects.[7]

The efficiency defence adds a nuanced dimension to the regulation, allowing enforcers to consider overall efficiency gains. Its flexibility allows for a thorough analysis of market dynamics, promoting a deeper and more contextualised assessment.[8] One might argue that this encourages innovation and pro-competitive behaviour, as conduct that otherwise could be seen as anti-competitive now may be exempted because of its overweighing positive effects.[9] This could make the compliance burden lighter and allow for a greater degree of flexibility in navigating the regulatory landscape.

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[5] LexisNexis, 'Glossary: Efficiency defence definition' (*LexisNexis,* 2023) accessed 20 November 2023.
[6] Commission, Notice – 'Guidelines on the application of Article 81(3) of the Treaty' OJ C 101 (2004) 1.
[7] Ibid 2ff.
[8] Ibid 15ff.
[9] Richard Blewett and Maarten Kennis, 'EU vertical agreements' (2023) TR Practical Law, 14ff. < https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/06/eu_vertical_agreements_June_2023.pdf> accessed 22 November 2023.

While flexibility stands out as a key strength, it can also act as a double-edged sword by posing challenges and potential drawbacks. The power imbalance within the market, where large corporations wield substantial resources, raises concerns about their ability to influence regulatory decisions. Such influence not only holds the potential to distort the level playing field intended by competition law, but also burdens enforcers with extensive material to process.[10] The assessment of efficiency arguments, especially in digital markets, demands significant resources and time which can result in substantial delays in the enforcement process, potentially diverting resources from effective enforcement.[11]

Moreover, the efficiency defence could open the door to potential abuse; with corporations exploiting its subjective nature to pursue objectives beyond genuine competition interests to circumvent the regulation. Arguments presented as pro-competition under the guise of efficiency may, in reality, serve alternative objectives, undermining the purpose of competition regulation. This emphasizes the need for a comprehensive evaluation of the defence arguments.[12] Looking at older cases, such as the Microsoft v. the Commission case from 2007, it is evident that the courts have rejected justification arguments for not matching the evidence.[13] In fact, when it comes to the application of efficiency defence in Article 101(3), the defence is deemed to not be applicable in most cases. Those where it has been applied are extremely rare.

In contemplating the suitability of traditional ex-post enforcement principles for digital markets, a mismatch becomes apparent. Established principles aimed at restoring a competitive balance may struggle in markets dominated by a few powerful corporations. Questions arise about the normative concept of 'competitive balance' in such scenarios and whom competition should primarily benefit; consumers, competitors, or both.[14] Traditional views centred on pricing struggle to address product quality concerns efficiently in a zero-price market like this. Similarly, the focus on decentralization of these major corporations to enable consumers to switch to other alternatives is also challenging, due to the dominance of a few powerful players limiting equal alternatives for consumers. The existing ex-post competition law regulation lacks the nuanced approach necessary for this dynamic, and rather new, landscape.[15]

[10] Friso Bostoen, 'Understanding the Digital Markets Act' (2023) The Antitrust Bulletin 68(2), 263-306, 287.
[11] Ibid 265.
[12] Or Brook, 'Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five Competition Authorities' (2019) 56 Common Market Law Review 121, 155.
[13] Case T-201/04 Microsoft v Commission, judgment of 17 September 2007, at paragraphs 1091 ff.
[14] Kuenzler (n 3) 135.
[15] Kuenzler (n 3) 134.

3. The Ex-Ante Revolution: DMA & DMCC in Focus

3.1 DMA & DMCC Unveiled

The power in the digital markets is becoming more and more centralised. Big tech corporations act as a bottleneck between businesses and consumers for key digital services.[16] Regulatory authorities have struggled to address the growing dominance of these corporations adequately.[17] To properly regulate big tech and promote competition, both the EU and UK have introduced new legislation on this area; the DMA and the DMCC. These regulations operate ex-ante, identifying and addressing market issues beforehand, rather than reacting to their effects. The requirements in these regulations can hence be seen as self-executing, often not requiring an intermediary regulatory decision.[18]

The DMA is the EU's new regulation on digital markets and competition, enacted in 2022 and applicable since May 2023. As stated in its recitals, the DMA is complementary to article 101 and 102 of the TFEU and is meant to work alongside them. Unlike traditional approaches focused on undistorted competition, the DMA aims to enhance market contestability and fairness within the digital economy.[19] The regulation applies to undertakings that have been designated as Gatekeepers – companies offering 'core platform services' such as search engines or social networks that meet specific size thresholds. To be designated they also need to have a significant impact on the internal market and have an entrenched and durable position.[20] Designated Gatekeepers must then follow the self-executing obligations in Articles 5, and the provision susceptible of being further specified in Article 6.[21] Designated Gatekeepers must ensure compliance within six months of designation, with no provision for an efficiency defence.[22] The Commission briefly discuss the decision to exclude an efficiency defence in the

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[16] Daniel Zimmer, 'An ex ante evaluation' (2022) Concurrences N° 3-2022, Art N° 107720 3, 4-9, 6 <https://www.concurrences.com/en/review/issues/no-3-2022/on-topic/the-digital-market-act#nb12> accessed 30 November 2023.
[17] Lord Clement-Jones, 'Digital Markets, Competition and Consumers Bill', 2nd reading excerpts, House of Lords debate (*Parallel Parliament*, 5 December 2023) <https://www.parallelparliament.co.uk/lord/lord-clement-jones/debate/2023-12-05/lords/lords-chamber/digital-markets-competition-and-consumers-bill> accessed 10 December 2023.
[18] Zimmer (n 17) 7.
[19] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14September2022 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), (hereinafter DMA), Recital 11.
[20] DMA, Art 3.
[21] Alexandre de Streel, Centre on Regulation in Europe, 'The European proposal for a Digital Markets Act: A first assessment' (2021), 12.
[22] Bostoen (n 10) 286.

Impact Assessment, stating that efficiency arguments like these often are one-sided and do not match the evidence presented.[23]

The UK equivalent to the DMA is the DMCC, aiming to promote competition in digital markets for the benefit of consumers. While similarities between the DMCC and DMA are evident, there are some important differences. The Act gives the Competition and Markets Authority (CMA) the power to designate undertakings engaged in digital activities with a 'strategic market status' (SMS) (undertakings with SMS are hereinafter also referred to as Gatekeepers). This designation is applicable if these entities possess 'substantial and entrenched market power' or occupy a 'position of strategic significance'.[24] In assessing whether an undertaking has substantial and entrenched market power, the DMCC employs a forward looking judgement of 5 years, instead of backwards looking like the DMA.[25] Unlike the DMA's standardized list of prohibited actions for all Gatekeepers, the DMCC tailors conduct requirements to each Gatekeeper individually.[26] Another major distinction of the DMCC is the presence of efficiency defence in two sections. It is separated into evaluating compliance with contestability- and fairness-related obligations. The efficiency defence for contestability is found in Section 44(2) and is optional for the CMA to apply.[27] It allows the CMA to exempt conduct on the grounds of 'any benefit' when determining whether to make a pro-competition intervention or not, as well as when determining the nature or extent of any pro-competition intervention. This opens up for a regulatory discussion between the CMA and the corporations.[28]

The more criticized efficiency defence is the countervailing benefits exemption in Section 29, a compulsory obligation for the CMA to admit the representations made by the designated undertakings when evaluating potential breaches of fairness- related obligations.[29] This is similar to section 9 of the Competition Act 1998, which provides an efficiency defence for entities investigated by the CMA for breaches of conduct requirements.[30] Should the company make sufficient explanations that the conduct falls within the countervailing benefits exemption

[23] Commission, 'Impact assessment report Digital Markets Act', COM(2020) 842 final, 61.
[24] Digital Markets, Competition and Consumers Bill, Bill 294, 58/4, 25 April 2023. (hereinafter, DMCC), Sec 2.
[25] DMCC, Sec 5; DMA, Art 3(1)(c).
[26] George Christodoulides et al., 'The DMA and the DMCC: A Side by Side Analysis' (2023) Bryan Cave Leighton Paisner LLP, 4.
[27] DMCC, Sec 44(2).
[28] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA' (2023) Concurrences N° 3-2023, Art N° 113202, Sec 20.
[29] Ibid Sec 42.
[30] Christodoulides (n 28) 6.

in Section 29 DMCC, the CMA must close a conduct investigation.[31] The exemption applies when 4 conditions are met: (a) the conduct gives rise to benefits to (potential) users of the digital activity for which the conduct requirement applies; (b) those benefits outweigh any actual or likely detrimental impact on competition resulting from a breach; (c) the conduct is indispensable and proportionate to the realisation of those benefits; and (d) the conduct does not eliminate or prevent effective competition.[32] The latest version of the bill from November 2023 removes 'indispensable' from criteria C and introduces a new criteria, requiring that 'those benefits could not be realised without the conduct'.[33] The removal of 'indispensable' decreases the standard of proof to just proportionality, lowering the threshold of criteria C. However, this is partly compensated for by the new criteria.[34] Consequently, even with these amendments, meeting the conditions in Section 29 remains challenging in practice.[35]

3.2 Absence of Efficiency Defence in the DMA

The exclusion of an efficiency defence in the DMA sparks a discussion on the strengths and weaknesses with this regulatory approach. One thing that is apparent with the DMA is the rules being detailed for faster intervention and enforcement.[36] The choice to exclude an efficiency defence aligns with the urgency that the fast-evolving digital markets demand, making the regulation applicable soon after an undertaking is designated Gatekeeper. Adding an efficiency defence could jeopardise this swiftness of the DMA's uniformity and enforceability, burdening authorities with delays that counteract its intended protective effects for new and smaller competitors.[37]

Conversely, concerns arise about potential overregulation and reduced flexibility due to the absence of an efficiency defence.[38] Prohibiting conduct without allowing consideration for possible advantages may pose a risk of stifling innovation. This rigid approach might compel companies to refrain from behaviours that could foster more innovation and efficiencies than

[31] DMCC, Sec 29(1).
[32] Ibid Sec 29(2).
[33] Digital Markets, Competition and Consumers Bill, HL Bill 12, 58/4, 22 November 2023 (hereinafter, DMCC November), Sec 29(2).
[34] Tom Smith, 'UK digital markets regime under attack, but still on course' (*The platform law blog*, 17 November 2023) <https://theplatformlaw.blog/2023/11/17/digital-markets-competition-and-consumers-bill/> accessed 10 December 2023.
[35] See Tom Morrison-Bell, Google, 'Supplementary Written Evidence' (20 June 2023) Written evidence DCC0028, 4.
[36] Bostoen (n 10) 265.
[37] The Monopolies Commission, 'Recommendations for an effective and efficient Digital Markets Act' (2021) < https://www.monopolkommission.de/images/PDF/SG/sr_dma_fulltext.pdf> accessed 5 December 2023, 44.
[38] Ibid 10.

drawbacks, possibly leading to a loss of overall welfare.[39] The DMA's stricter and less individually adaptable regulation could unintentionally ignore legal advantages, missing chances to improve competition overall. [40]

Despite these concerns, the preventative stance in the absence of an efficiency defence contributes to a clearer and more proactive regulatory environment. In the power dynamics between Gatekeepers and regulators, the absence of an efficiency defence gives regulatory bodies a position of strength. Instead of Gatekeepers taking the initiative and requiring an effects analysis that could jeopardize the DMA's prompt enforcement, it allows regulators to take the initiative and tip the scales in their favour.[41]

Advocates of an efficiency defence in the DMA argue that having this option would improve the DMA's capacity to evaluate efficiency gains more fairly, at least in theory.[42] However, while a traditional efficiency defence is excluded, some argue that there still are avenues to introduce efficiency arguments during the regulatory dialogue.[43] Gatekeepers can present efficiency considerations during the proportionality discussion preceding the Commissions specification of obligations. This defence is limited, nevertheless, in that it only shapes obligations rather than removing them completely.[44]

3.3 Efficiency Defence in the DMCC

As previously mentioned, the DMCC introduces the efficiency defence mechanism in two sections, one mandatory for fairness-related obligations, and one optional for contestability. The optional efficiency defence gives the CMA a great advantage in the regulatory dialogue with the Gatekeeper, allowing for a more effective dialogue.[45] However, this discussion will focus on the more criticised efficiency defence, the mandatory countervailing benefits exemption.

Several strengths and weaknesses associated with this mechanism parallel those discussed concerning the ex-post defence. The presence of an efficiency defence allows for greater

[39] Ibid 44.
[40] Bostoen (n 10) 287.
[41] Ibid.
[42] Oles Andriychuk, 'EU Digital Competition Law: The Socio-legal Foundations' (2023) Cambridge Yearbook of European Legal Studies doi:10.1017 1–24, 15.
[43] Pierre Larouche, Alexandre de Streel, 'A compass on the journey to successful DMA implementation' (2022) Concurrences Competition law review 3, 27-30, 28 ff.
[44] de Streel (n 22) 22.
[45] Oles Andriychuk, 'Pros & Cons of the Digital Markets, Competition and Consumers Bill: An Academic Perspective' (July 2023) Written evidence DCC0001, 2.

regulatory flexibility by allowing Gatekeepers to demonstrate that otherwise prohibited conduct has benefits that outweigh competitive harm. This approach may permit conduct fostering pro-consumer benefits or other pro-competitive effects, even if initially perceived as anticompetitive; potentially fostering innovation and new perspectives.[46]

Nevertheless, the efficiency defence can also be criticised on several points. First and foremost, this mechanism risk creating a major workload for the enforcer, potentially exhausting regulatory resources and delaying the process.[47] The gatekeepers have large resources and might use these to overload the CMA with justifications for their conduct, diverting focus, and complicating proceedings. Even if these arguments are ultimately rejected, the mandatory efficiency defence requires the regulator to invest time and resources in evaluating them.[48] The mandatory nature of this mechanism is highly questionable, as it contradicts the purpose of the regulatory dialogue between the CMA and the Gatekeeper.[49] Section 29 of the Act is designed to address anti-competitive conduct, but with the efficiency defence it risks becoming a loophole for companies to avoid regulatory action.[50] Using it to challenge conduct requirements through long and tactical legal discussions, 'spamming the regulators' and possibly delaying interventions for years.[51]

Despite the focus of this discussion being the role of efficiency defence in the regulation, it is not possible to move past the poor formulation of section 29. It seems as if Article 101(3) TFEU served as a template for this section without further consideration. In the DMCC, an undertaking with a SMS is initially subjected to conduct requirements outlining its behaviour, whilst the ex-post exemption first comes into play after a violation has occurred.[52] The placing of an ex-post provision into an ex-ante regulation result in a bad analogy.[53] Looking at criteria D, it mandates that 'the conduct does not eliminate or prevent effective competition'. However, this requirement seems contradictory. If the action 'does not eliminate or prevent effective competition', there would be no justification for the CMA to impose the conduct requirement in the first place.[54] Furthermore, interpreting criteria D as not allowing any distortion of

[46] Epic Games Inc, 'Review of the Digital Markets, Competition and Consumers Bill' (2023) Written evidence DCC0012, 5.
[47] Which?, 'Review of the Digital Markets, Competition and Consumers Bill' (June 2023) Written evidence DCC0030, 3.
[48] Open Markets Institute, 'Review of the Digital Markets, Competition and Consumers Bill' (June 2023) Written evidence DCC0013, 4.
[49] Andriychuk (n 30) Sec 44 e contrario.
[50] Lord Clement-Jones (n 18).
[51] Which? (n 49) 3.
[52] See Tom Morrison-Bell, Google, 'Supplementary Written Evidence' (20 June 2023) Written evidence DCC0028, 3.
[53] Andriychuk (n 30) Sec 43(vii).
[54] Ibid Sec 43(ix).

competition logically excludes criteria B, that allows impact on competition as long as it is not detrimental.[55]

Additionally, it is important to highlight that for the CMA to designate an undertaking as having SMS, the criteria in Section 5 on determining if the undertaking has substantial and entrenched market power must be met.[56] This involves a forward-looking assessment on developments five years ahead, a virtually unachievable task given the dynamic nature of digital markets. In this market, five years is a substantial timeframe. Consider today's major players in generative AI as an example; determining their dominance five years ago would have been a formidable challenge.[57]

4. Navigating the Regulatory landscape: A Comparison

4.1 Comparative Discussion

In the rapidly evolving digital markets, where speed and adaptability are critical, the need for a regulatory framework that keeps pace becomes evident. The case-by-case approach of traditional competition law in determining relevant markets and market power proves being lengthy and insufficiently adaptable. Ex-post regulation falls short in addressing the dynamics of digital markets, leaving regulators with inadequate power to handle the dominance of these corporations.[58] Consequently, the new ex-ante regulations aim to step in as a modern pro-competition solution.[59] Instead of merely safeguarding competition, the ex-ante regulations actively seek to promote it.[60]

While the DMA shares objectives similar to traditional competition law, it diverges significantly with its per se rules on conduct. Tailored to the dynamic digital landscape, it leaves the power with the regulator and applies a swift and preventative approach, defining precisely what Gatekeepers can and cannot do. The DMA is more than competition law, coexisting with it instead of replacing it. With its internalized possible trade-offs between efficiencies and the

[55] DMCC, Sec 29(2).
[56] Ibid Sec 5.
[57] Open Markets Institute (n 50) 4 ff.
[58] Kuenzler (n 3) 135.
[59] Luís Cabral et al., European Commission, 'The EU Digital Markets Act - A Report from a Panel of Economic Experts' (2021) doi:10.2760/139337, 10.
[60] Bostoen (n 10), 304.

DMA objectives, it does not seem to need an efficiency defence.[61] However, its strict focus on the size of the Gatekeepers raises concerns about a 'big is bad' approach, potentially letting the distrust of the immense scale of these corporations overtake the positive effects these platforms create. Not all big corporations are anti-competitive, one could argue that they should have a chance to show this.[62]

As for the DMCC, while holding promise for fostering pro-competition environments, flexibility, and innovation, there are concerns regarding its mandatory efficiency defence. It risks generating a substantial workload for public authorities and courts, creating delays, and tying up resources, which challenges the very essence of efficient regulation.[63] The purpose of this regulation should be to simplify matters, rather than holding enforcers more accountable.[64]

Considering the unclear and challenging nature of the efficiency defence, it is worth questioning whether the exemption is needed at all. Instances of anti-competitive behaviour in digital markets that result in more benefits than harm are rare.[65] Looking at the ex-post efficiency defence for comparison, it is rarely applied. If retained in the Bill, the countervailing benefits exemption should be narrowed down or made optional. If optional, the CMA is free to accept or reject arguments for justification, allowing for a more effective and cooperative dialogue with the Gatekeeper.[66] This adjustment could be achieved by a simple change of the wording in Section 29(1), from 'must close investigation' to 'may'.[67]

Conclusion

The efficiency defence mechanism facilitates a regulatory dialogue between the undertaking and the enforcer, offering a flexible and pro-innovation approach to competition in the digital markets. However, this flexibility poses a risk of becoming a loophole for companies, potentially burdening enforcers, and leading to prolonged processes. While the ex-post efficiency defence brings flexibility and a nuanced dimension to competition law, it is seldomly applied and risks being inefficient regarding digital markets.

[61] Kuenzler (n 3) 136.
[62] Bostoen (n 10) 281.
[63] Which? (n 49) 3.
[64] Andriychuk (n 30) Sec 26.
[65] Open Markets Institute (n 50) 4.
[66] Andriychuk (n 30) Sec. 44.
[67] DMCC, Sec. 29(1).

The EU made a strategic decision to omit an efficiency defence from the DMA. Instead, the regulation relies on its clear ‘dos and don'ts’ for designated Gatekeepers, emphasizing swift processes that promote competition. An efficiency defence could risk standing in the way of this. Conversely, the UK opted for an inclusion of the efficiency defence, most notably through the countervailing benefits exemption. As criticized throughout this article , this mechanism is mandatory and based on a forward-looking assessment, while the formula presents an ill-suited analogy of an ex-post efficiency defence. The inclusion of such a provision raises questions about the reasoning behind its incorporation into the regulation, as it appears to have been done hastily without meticulous consideration.

Amidst these considerations, the paramount question lingers: What is in the best interests of consumers and fosters healthy competition on the market? The apparent conflict between pro-enforcement and a pro-big tech stance surface. One would assume that pro-enforcement is in the consumers interest, protecting them from anti-competitive behaviour. However, others might argue that big tech is more beneficial for the consumers, by fostering innovation and providing these constantly evolving platforms free of charge. This balance between consumer protection and tech innovation remains a critical aspect of regulating digital markets.

In conclusion, the exclusion of an efficiency defence mechanism in the new ex-ante regulation for digital markets signals a proactive stance aimed at consumer protection and fair competition. Given the swift ascent of these market-dominant platforms, effective regulation becomes imperative, and the DMA's strategy emerges as a well-suited choice. The inefficiency of the ex-post efficiency defence, which also proved to be rarely applied, further justifies the DMA's approach. By forgoing the efficiency defence and concentrating on the designation of certain Gatekeepers to subject them under the same rules, the DMA offers a more streamlined and effective regulatory path. This ex-ante regulation does not need an efficiency defence, as the regulation is adapted to be proactive and direct. In contrast, the UK's decision to include the countervailing benefits exemption in the DMCC is more lenient towards big-tech and might foster innovation better.

This inclusion could even be perceived as a post-Brexit strategy to attract companies from the EU. Unlike the DMA's more rigid ways, the CMA crafts specific conduct requirements for each company, potentially simplifying compliance for big tech, or even leaving room for loopholes. It remains to see how the DMCC Act will unfold, and if the designated Gatekeepers

in the EU will manage to ensure full compliance with the obligations in the DMA. We stand on the cusp of an exciting period that will scrutinize these new regulations and, over time, reveal the most effective approaches in navigating competition in digital markets.

Balancing power in digital markets: enforcer's discretion

Kai Fessey

Introduction

The UK's Digital Markets, Competition and Consumers Act ("DMCCA") grants new discretionary powers to the Competition and Markets Authority ("CMA"). These new powers will ensure that designated undertakings and the obligations imposed upon them will be dealt with appropriately and in the manner that is most fitting. The aim of the bill is not to punish undertakings designated as having strategic market status ("uSMS"). Rather, it is hoped that the regime will see a regulatory dialogue take place between the CMA and uSMS when interpreting provisions of the Act which will ensure compliance with, and effectiveness of any obligations imposed.[1] This is a goal shared with the EU's Digital Markets Act ("DMA"),[2] however the method of achieving this differs greatly. The level of discretion given to the CMA by the DMCCA is unprecedented, [3] but likely the correct approach. This will be established by analysing the theory behind enforcer discretion, the need for it, differences in designation, differences in imposing obligations and finally the safeguards justifying discretion.

Further, the DMCCA only intends to deal with the largest of undertakings operating on the UK's digital markets. This is made apparent by the designation criteria which have been designed so that only such undertakings will meet the required quantitative criteria for designation before the CMA can exercise discretion in the later steps of designation.[4] Therefore, the discretion given to the CMA has the function of balancing the power between the "Big Tech" companies that will become uSMS and the CMA themselves.[5]

[1] Stephen Whitfield, Ingrid Hodgskiss and Aimee Westley, 'The UK's new competition regime for digital markets: to remedy a gap in the CMA's toolkit', (2023) Comp Law 22(2) 63, 72.
[2] Regulation (EU) 2022/1925.
[3] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Sarah Cardell, First Sitting, p. 5; Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Mark Buse, Third Sitting, p. 86.
[4] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, Chapter 2, cls. 2-18.
[5] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 600.

1. Theoretical Underpinning

Competition policy in the area of digital markets must be flexible. Without flexibility, development and innovation would be stifled by the absolutism of enforcement.[6] It is in Hart's formulation of the hard cases in law where this need for flexibility is most necessary.[7] In such cases there is room for both the enforcer and uSMS to make equally meritorious arguments about why their interpretation of the provisions is the correct one, this makes up the 'penumbra' around the 'hard core' of the law.[8] Where there is room for many different interpretations, there must be an efficient method of selecting the correct interpretation to avoid long and drawn out processes that cannot keep pace with the markets. Therefore, it is necessary that the enforcer has the competence to establish what the correct interpretation will be from within the penumbra.[9]

A further justification for discretionary powers being given to enforcers comes from Ezrachi's idea of competition policy as a 'sponge'.[10] Within this idea is the suggestion that legal certainty ought to not be the overriding legal value concerning competition policy,[11] and instead a focus on a 'conceptual core' which remains the same but adapts to the needs of the market is necessary.[12] A rigid approach to application, as also identified by Andriychuk above,[13] can lead to competition policy becoming obsolete.[14] This is particularly nascent in digital markets which develop at a much faster pace than the traditional markets that competition policy is designed to handle.[15] Ezrachi's 'conceptual core' is a similar concept to Hart's penumbra in that there is a hard core around which there is a need for interpretation and discretion in choosing the correct course of action. This is essentially what can be observed within the provision of the DMCCA in that there is a core concept focused on ensuring that the CMA can deal with issues expediently – to match the pace of the markets and ensure future-proofing[16] – as well as encouraging a

[6] Ibid, 632.
[7] H.L.A. Hart, 'Positivism and the Separation of Law and Morals', (1958) HARV L REV 71 593; Hansard, Digital Markets, Competition and Consumers Bill – Volume 741: debated on Monday 20 November 2023 (Saqib Bhatti MP, col. 52).
[8] Ibid, 607.
[9] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 624.
[10] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49.
[11] Oren Perez, 'Law in the Air: A Prologue to the World of Legal Paradoxes' in Oren Perez and Gunther Teubner (eds), Paradoxes and Inconsistencies in the Law (Bloomsbury Publishing 2005) 16–17.
[12] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49, 67.
[13] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 632.
[14] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49, 67.
[15] Sarah Cardell, 'Ensuring digital market outcomes that benefit people, businesses and the wider UK economy' (28 November 2022), available at: https://www.gov.uk/government/speeches/sarah-cardell-ensuring-digital-market-outcomes-that-benefit-people-businesses-and-the-wider-uk-economy, ("third, our current toolkit tends…").
[16] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professor Myers, pp. 45-46, Second Sitting.

regulatory dialogue between the uSMS and the CMA to determine the correct interpretation within the penumbra.[17] Giving this competence to the enforcers allows them to strive for the best outcome in the immediate cases rather than being overly concerned with doctrines such as stare decisis which would likely lead to enforcement of digital markets grinding to a halt.[18] The DMCCA realises the 'sponge' analogy of Ezrachi by keeping a conceptual core and allowing the CMA to ensure that this adapts as the market requires.

2. The Need for Discretion

Current competition regulatory frameworks are not sufficient to effectively regulate digital markets. The current framework which the CMA works under places them at a severe disadvantage against the undertakings that they are attempting to enforce competition policy against.[19] As Andriychuk suggests one of the biggest threats facing markets is the rapid growth of digital markets.[20] These "Big Tech" companies have almost limitless funds and resources and so can afford to hire the best legal and economic minds to argue their cases for them while the CMA must carefully balance their time and resources across multiple cases. These issues were also faced by The Commission ("EC") in the EU, cases would take years to resolve as the undertakings being dealt with would bring endless arguments that the EC were required to consider and deal with thereby delaying the process massively. A notable example of this is the EC's *Intel* case, these proceedings began in 2009 and the most recent judgements were delivered in 2022 and 2014 before that.[21] These thirteen years in digital markets is a lifetime, the BlackBerry brand of mobile phones rose to dominance in the 2000s and then fell into obscurity in a shorter span of time than thirteen years. The challenges that are brought by undertakings are usually procedural and so making the procedure one based upon discretion means that there is less room for questioning the merit of decisions made by the authorised body. This issue is so prevalent that it has been termed 'spamming the regulator'.[22] This highlights a need to

[17] Ibid, Professor Marsden, p. 31, Second Sitting.
[18] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 633.
[19] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, George Lusty, p. 7, First Sitting.
[20] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 618.
[21] Case T-286/09 *Intel Corporation Inc. v European Commission* ECLI:EU:T:2022:19; Case T-286/09 *Intel Corporation Inc. v European Commission* ECLI:EU:T:2014:547.
[22] 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', (2023) JAE 1-22.

expediate the process by which the enforcers regulate digital markets as well as ensure that these processes are future-proof or else they will quickly no longer be fit for purpose.[23]

Furthermore, these lengthy processes that take place under the current regime mean that undertakings have been able to repeatedly breach consumer protection regulations without facing the full force of the repercussions.[24] Discretion is the strongest regulatory tool that the CMA can be given to combat these issues. Drafting provisions that rely on the discretion of the enforcer, while still having a 'conceptual core'[25] around which the provisions are drafted, means that there is less room for undertakings to argue that the interpretation that has been taken by the enforcers is wrong. Relying on discretion means that there are fewer challenges that can be brought by undertakings that, under the current regime, would lead to a protracted regulatory process. Therefore, enforcer discretion is the new and innovative tool that is needed to combat the threat that is posed to markets by the 'rapid development of the digital economy'.[26]

3. Differences in Designation

Both the DMA and the DMCC are targeted at only the largest undertakings that operate on their respective markets.[27] The designation criteria of each make this clear through the turnover thresholds that undertakings must meet before they can be designated either as gatekeepers or uSMS.[28] However, there are key differences in the designation procedure of each piece of legislation; firstly, the DMCC grants the CMA discretion in whether they designate an undertaking or not which the DMA does not. Secondly, the DMA has a prescribed list of 'core platform services'[29] whereas the DMCCA allows designation of undertakings that carry out 'digital activity'.[30]

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[23] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professor Furman, pp. 26-27, Second Sitting.
[24] Ciara Cullen and Hettie Homewood, 'Digital Markets, Competition and Consumers Bill – bolstering consumer protection and sharper teeth for the CMA', (2023) Ent LR 34(6) 178, 178.
[25] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49, 67.
[26] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 618.
[27] Stephen Whitfield, Ingrid Hodgskiss and Aimee Westley, 'The UK's new competition regime for digital markets: to remedy a gap in the CMA's toolkit', (2023) Comp Law 22(2) 63, 64; Department for Business & Trade and Department for Science, Innovation & Technology, 'Digital Markets, Competition and Consumers Bill Impact Assessment', November 2023, p. 15 [39].
[28] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 7; Regulation (EU) 2022/1925 art. 3(2).
[29] Regulation (EU) 2022/1925, art. 2(2).
[30] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cls. 2(1) & 3.

Clause 2(1) DMCCA states that the 'CMA may designate an undertaking' where the CMA 'considers' that the requirements for designation have been met.[31] The DMA, on the contrary, requires that 'The Commission shall designate' a gatekeeper once the required thresholds have been met.[32] This immediately sets the two designation procedures apart; the CMA can choose whether it thinks that it is necessary to designate an undertaking even where all of the thresholds for designation are met. Whereas, once it has been demonstrated that an undertaking operating in the EU meets the DMA's requirements then the EC must designate them as a gatekeeper. The approach of the DMCCA encourages the regulatory dialogue that is at the heart of both the DMCCA and the DMA even at the stage of designation. If it is at the CMA's discretion to designate an undertaking then the undertaking may be more inclined to work closely with the CMA to avoid designation but in doing so act in a way that the CMA thinks is right, essentially a 'gentleman's agreement' between the two. In the case of the DMA there is more scope for the undertakings to argue that they do not fall within the rigidly defined 'core platform services',[33] this is not an option under the DMCCA as the digital activity need only be provided by the internet, provision of digital content or any other activity.[34] Therefore, an undertaking being designated under the DMA would be far more likely to dedicate its resources to dispute its designation rather than to work with the DMA under the participatory model. This can be seen to have already happened with Apple, Meta and TikTok already challenging the EC's decision to designate each of them as gatekeepers under the new regime.[35] Although the details of the disputes are not disclosed, it is unlikely that similar challenges would be brought so quickly under the mechanisms of the DMCCA.

In addition, the use of 'core platform services' and 'digital activity' respectively set the scene for the rest of the provisions that follow in both the DMA and DMCCA. As the DMCCA provides broadly defined designation criteria rather than the DMA's rigid list,[36] this justifies the more tailored approach taken to the obligations that are imposed. In its rigid approach to designation, the DMA must ensure that the obligations that are then automatically imposed are appropriate for all gatekeepers. This has the potential to lead to the obligations not being

[31] Ibid, cl. 2(1).
[32] Regulation (EU) 2022/1925, art. 3(4).
[33] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer Bill', (2023) ECLR 44(8) 322, 325.
[34] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 3(1).
[35] Martin Coulter, 'Apple files legal challenges to EU's Digital Markets Act', Reuters, 17 November 2023. Accessed on 12/12/2023 at: https://www.reuters.com/legal/transactional/apple-files-legal-challenge-eus-digital-markets-act-2023-11-17/.
[36] David Cran, Chriss Ross, Melanie Musgrave and Leonia Chesterfield – Legislation empowering the CMA's Digital Markets Unit introduced into Parliament (2023) Ent L.R. 34(7) 203, 203.

sufficiently bespoke because of the completely non-discretionary approach to designation.[37] This 'one size fits all approach' contrasts with the approach taken by the DMCCA but accurately reflects the DMA's approach to designation. Therefore, the approach to designation taken by the DMCCA is preferred as it better encourages active participation from undertakings,[38] one of the aims of the Act.

4. Designing Obligations

At the stage of imposing obligations on uSMS, the CMA 'may impose […] conduct requirements',[39] here the CMA is again given discretion in deciding whether to impose obligations or not.[40] However, these may only be imposed where the CMA considers that they are appropriate for the purposes of fair dealing, open choices or the trust and transparency objectives.[41] The DMCCA also does not list specific obligations but lists further objectives that the CMA must tailor the obligations to achieve; the first permitted type of conduct requirement obliges uSMS to take action and the second are preventative.[42] The DMA on the other hand provides that once an undertaking is designated as a gatekeeper, they 'shall comply with all obligations' set out in Articles 5, 6 and 7.[43] The obligations under Article 6 DMA are an example of the EC being given a level of discretion, these obligations are susceptible to further specification by the EC under Article 8.[44]

The powers given to the CMA under clause 20 DMCCA allow them to design obligations,[45] this gives the CMA great flexibility in how they approach problems facing markets from uSMS.[46] These obligations can be specifically tailored to both the uSMS and the problem that exists within the market as long as they are in line with the objectives outlined.[47] The most discretionary of which is likely to be obliging a uSMS to 'trade on fair and reasonable terms',[48] what is fair and reasonable will be determined by the CMA. This does not however mean that

[37] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) EL Rev 47(5) 597, 620; Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professor Fletcher, p. 25, Second Sitting.
[38] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA', 2023 Concurrences No. 3, para. 17.
[39] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 19(1).
[40] David Cran, Chriss Ross, Melanie Musgrave and Leonia Chesterfield – Legislation empowering the CMA's Digital Markets Unit introduced into Parliament (2023) Ent L.R. 34(7) 203, 204.
[41] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 19(5).
[42] Ibid, cl. 20(2-3).
[43] Regulation (EU) 2022/1925, arts. 5, 6 & 7.
[44] Ibid, arts. 6&8.
[45] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 20.
[46] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer Bill', (2023) ECLR 44(8) 322, 327.
[47] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 20(2&3).
[48] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 20(2)(a).

the CMA has absolute discretion to do with the market and uSMS as they wish, there is still a need for the decision of the CMA to be evidence based and specific to the activity at hand.[49] Although the DMA also allows for tailoring of obligations to an extent, the DMCCA far outstrips the discretionary competence of the DMA in this regard.[50] This is likely to result in obligations that are always relevant to the issues,[51] fast-paced[52] and means that the Bill is future-proofed as the CMA has the discretion to deal with any issues as they arise.[53]

In trying to achieve the goal of encouraging regulatory dialogue between the EC and gatekeepers, the obligations under Article 6 DMA are intentionally opaque.[54] This means that where gatekeepers are unsure about how the obligations should apply to them, they are encouraged to approach the EC for clarification and further specification. This opacity by design is also a feature of the DMCCA but in a more explicit way, rather than having opaque obligations there are instead no listed obligations.[55] Therefore, to understand and perhaps influence the obligations that will be imposed upon them, it is in the interest of the uSMS to approach the CMA and take part in a dialogue to establish what their obligations ought to be.[56] While the DMA approach is likely to be effective in encouraging a regulatory dialogue, the approach of the DMCCA goes further to that effect by essentially being opaquer and therefore requiring a higher level of participation from uSMS. Cran contends that the approach of the DMCCA is likely to lead to less legal certainty for uSMS than the DMA would for gatekeepers.[57] This is only true if the uSMS refuse to take part in the dialogue and, as has been suggested by Whitfield, when an uSMS does take part in the dialogue then the new powers given to the CMA will likely lead to a more 'predictable regulatory experience'.[58] Furthermore, taking into account Ezrachi and Perez's suggestions that legal certainty ought not to be an

[49] A. Coscelli, 'Beesley Lecture: A new route forward for regulating digital markets' (28 October 2021), available at https://www.gov.uk/government/speeches/beesley-lecture-a-new-route-forward-for-regulating-digital-markets ("moving onto the UK's …").
[50] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professor Fletcher, p. 25, Second Sitting.
[51] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer Bill', (2023) ECLR 44(8) 322, 327.
[52] UK Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy consultation document, 'A New Pro-Competition Regime for Digital Markets', 20 July 2021, p. 35 [111].
[53] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professor Myers, pp. 45-46, Second Sitting.
[54] Regulation (EU) 2022/1925, art. 6.
[55] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cls. 19-20.
[56] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA', 2023 Concurrences No. 3, para. 17.
[57] David Cran, Chriss Ross, Melanie Musgrave and Leonia Chesterfield – Legislation empowering the CMA's Digital Markets Unit introduced into Parliament (2023) Ent L.R. 34(7) 203, 204.
[58] Stephen Whitfield, Ingrid Hodgskiss and Aimee Westley, 'The UK's new competition regime for digital markets: to remedy a gap in the CMA's toolkit', (2023) Comp Law 22(2) 63, 72.

overriding concern of competition law,[59] it is likely that Cran's concerns regarding the reduction of legal certainty are misplaced. Overall, the approach to imposing obligations taken by the DMCCA provides a much-needed level of flexibility for the CMA and ensures future-proofing as well as bettering the effectiveness of obligations and the regulatory dialogue.[60]

There is one provision of the DMA that perhaps grants the EC too much discretion. The DMA's anti-circumvention measures allow for the EC to open proceedings against a gatekeeper where they merely 'suspect' that an undertaking is circumventing the aims of an obligation.[61] The fines that can be imposed because of such proceedings are substantial, up to 10% global turnover for first-time offence,[62] therefore there ought to be a higher requirement to evidence such suspicions from the EC. Simply having an appeal available is not sufficient. Furthermore, this provision means that a gatekeeper could have proceedings brought against them where they have complied with the letter of the obligations but not with the intention. This highlights an issue of the anti-circumvention measures punishing gatekeepers for the potentially poor drafting of obligations by the EC, this is disproportionate and "anti-Big Tech". This issue is avoided in the DMCCA due to the bespoke nature of the obligations that the CMA can impose,[63] as the obligations of the DMCCA are not rigid they can be tailored to the specific uSMS thereby ensuring that the objectives of the Bill will be met.[64]

However, following both designation and imposition of obligations there is a mandatory requirement that the CMA must 'carry out a public consultation'.[65] This is a big shortcoming of the DMCCA, this will only result in slowing down the CMA in carrying out their functions.[66] This provision ought to be changed to make the consultation discretionary, the CMA are best placed to understand whether they would benefit from the input from such a consultation.[67] If this provision persists in the Bill as being mandatory, then it will only compound the problem

[59] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49, 67; Oren Perez, 'Law in the Air: A Prologue to the World of Legal Paradoxes' in Oren Perez and Gunther Teubner (eds), Paradoxes and Inconsistencies in the Law (Bloomsbury Publishing 2005) 16–17.
[60] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA', 2023 Concurrences No. 3, para. 50.
[61] Regulation (EU) 2022/1925, art. 13.
[62] Ibid, art. 30.
[63] UK Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy consultation document, "A New Pro-Competition Regime for Digital Markets" (20 July 2021), p. 35 [111].
[64] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) EL Rev 47(5) 597, 620.
[65] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cls. 13(1)(a) & 24(1)(a).
[66] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA', 2023 Concurrences No. 3, para. 24.
[67] Ibid, para. 32.

of 'spamming the regulators'[68] and will be contrary to the goal of expediating the enforcement process of the DMCCA. Although both consultations can be done at the same time in order to save time, this is an inefficient solution in cases where there is no need for a consultation at all.[69] Finally, Ezrachi identifies that in 'sponge' systems there is a risk of undue influence from third party representations.[70] Therefore, having this procedure as a mandatory step that the CMA must take, risks the CMA being unduly influenced by representations made by third parties that may obscure the focus of their decision making. This mandatory consultation procedure is something that is absent from the DMA and is therefore an advantage of the EU legislation.[71]

5. Making the DMCCA's Efficiency Defence Discretionary

The current formulation of the 'countervailing benefits exemption' ("efficiency defence") in the DMCCA is flawed and must be reconsidered.[72] Currently, the CMA would be required to 'close a conduct investigation' where they consider that the conduct of the uSMS provides 'benefits to users', which 'outweigh […] detrimental impact', while being 'indispensable and proportionate', without eliminating or preventing 'effective competition'.[73] This would allow uSMS to breach their obligations where doing so is beneficial to users and the CMA must allow this, it is a mandatory procedure. This is contrary to the goal of the Bill of creating a regulatory dialogue,[74] uSMS will always be able to formulate meritorious arguments as to why they needed to act in the manner that they did to gain the perceived benefit for users. Therefore, they will not feel the need to engage in the regulatory dialogue when they know that they can fallback onto this efficiency defence and likely fulfil its requirements.[75] The solution to this is the same as with the consultation procedure, making the efficiency defence available only at the discretion of the CMA would not only correct the harm done to the regulatory dialogue but likely make it more effective.[76] Where uSMS had worked closely with the CMA through the participatory model they would better understand the reasoning behind the uSMS taking the action that they did and with the defence only being available at their discretion, the uSMS

[68] 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', (2023) JAE 1-22.
[69] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cls. 13(2) & 24(3).
[70] Ariel Ezrachi, 'Sponge', (2017) JAE 5(1) 49, 69.
[71] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer Bill', (2023) ECLR 44(8) 322, 323-324.
[72] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 29.
[73] Ibid, cl. 29(2)(a-d).
[74] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer Bill', (2023) ECLR 44(8) 322, 327-329.
[75] Ibid.
[76] Oles Andriychuk, 'Comparing the incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through the prism of the DMA', 2023 Concurrences No. 3, para. 44.

would be motivated to work more closely with the CMA to ensure that the defence is available to them. The DMA does not face these issues as there is no efficiency defence within the new legislation as there is under the previous EU law for non-digital markets.[77] This approach is not preferred as there ought to be space within legislation for conduct that is genuinely beneficial to the market without undue harm to competition, but such a provision ought not to be automatically available to undertakings.

Furthermore, having a mandatory efficiency defence will see competition enforcement driven back to the Chicago school's idea of price theory. Too much of a focus would be given to consumer welfare and driving prices as low as possible as the ultimate 'benefits to users' could be said to be low prices which would surely outweigh any 'detrimental impact on competition' where the focus is consumer welfare.[78] With these two requirements met, the uSMS will have no issues arguing the final two due to the immense funding that they can direct towards hiring the best legal and economic minds to argue these points for them. Therefore, keeping this defence as something that the CMA are mandated to apply ignores the idea that competition requires flexible enforcement, and that regulation cannot simply be binary but must be polyvalent.[79]

In the newest version of the DMCCA there has been a slight change to the wording of the efficiency defence. However, all that this has done is separate what was previously Clause 29(2)(c)[80] into Clause 29(2)(c-d)[81] and made proportionality and indispensability two separate requirements. This is not a substantial change to the Bill and is not sufficient to remedy the issues outlined above.

6. Discretion Safeguards

The most powerful justification for the discretion given by the DMCCA to the CMA is the undertakings that are being targeted.[82] As mentioned previously, the DMCCA only allows designation of the biggest undertakings, these undertakings have significant resources and so discretion is needed to balance the power and enable effective enforcement.

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[77] Treaty on the Functioning of The European Union, Article 101(3).
[78] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 29(2)(a-b).
[79] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2021) MLR 85(3) 598, 600-601.
[80] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, cl. 29(2)(c).
[81] Digital Markets, Competition and Consumers HL Bill (2022-23), 22nd November Version, cl. 29(2)(c-d).
[82] Digital Markets, Competition and Consumers Bill Public Bill Committee Compilation PBC (Bill 294) 2022-2023, Professors Marsden and Fletcher, p. 25, Second Sitting.

While the CMA may have discretion under the DMCCA, they remain answerable to Parliament and the courts directly via judicial review ("JR") of their decisions.[83] Baroness Stowell outlines perfectly why JR is the correct standard of appeal for the DMCCA as it provides 'speed, fairness, a non-adversarial approach and regulatory certainty'.[84] This was in response to lobbying from the undertakings that would be impacted by the introduction of the DMCC into UK law,[85] this should be resisted as it would seek to undermine the current expediency of the Bill. The DMA takes a full-merit review approach, and it is likely that this will be seen to have been a mistake, as gatekeepers will benefit from delaying proceedings under such review processes.[86]

Conclusion

Overall, the DMCCA strikes a good balance which, overall, looks to be a better approach than that of the DMA. However, there remain some glaring shortcomings which question the entire motivation and purpose of the Act.

[83] Digital Markets, Competition and Consumers HC Bill (2022-23), 25th April Version, Chapter 7; Hansard, Digital Markets, Competition and Consumers Bill – Volume 741: debated on Monday 20 November 2023 (Saqib Bhatti cols. 76-77).
[84] Rt Hon the Baroness Stowell of Beeston MBE, Letter to Prime Minister regarding DMCC, 17 October 2023; Communications and Digital Committee, Letter from the Chair to Rt Hon Kemi Badenoch MP, Secretary of State for Business and Trade, Department for Business and Trade (21 July 2023).
[85] Sofia Villegas, 'House of Lords warns watering down Digital Markets, Competition and Consumers Bill would 'create a power imbalance', retrieved from https://www.proquest.com/magazines/house-lords-warns-watering-down-digital-markets/docview/2879248724/se-2.
[86] Rt Hon the Baroness Stowell of Beeston MBE, Letter to Prime Minister regarding DMCC, 17 October 2023

Comparing the DMA and DMCC designation criteria: A *sui generis* remedy to a *sui generis* problem?

Mollie Sullivan-Jones

Introduction

The unique volatility of digital markets has produced a new vacuum in current competition policy, thus requiring pro-competition intervention to tackle its *sui generis* characteristics which *ex post* enforcement has failed to regulate effectively and efficiently. Two new *ex ante* regimes; The Digital Markets Act (DMA) which has been enforced in the EU since 2022,[1] and The Digital Markets, Competition and Consumers A (DMCCA) are set to "fill the gap" in our existing regulatory framework.[2] These **"**cutting-edge solutions" intend to strengthen *contestability* and *fairness* on the digital market by *designating* the largest digital undertakings, as either "*gatekeepers"* or having "*strategic market status"* ("*SMS*"), placing them under loftier obligations to recalibrate the currently weak structure of this highly concentrated market.[3] Although both measures have been welcomed in 'design[ing] the contours of a new digital competition policy',[4] it has not been in its entirety.[5]

As they both possess some substantive discrepancies that could punch holes in their armour, to which unfortunately, the cracks have already started to appear within the DMA, having let some BigTech subsidiaries slip through the gaps. However, if the DMCCA chooses to remain flexible in its scope and application and make some seemingly small yet significant changes to capture influential companies, which would otherwise "fly below the radar"*,* it could be the much longed for and revolutionary weapon to combat the unique battle of competition on digital markets.[6] In summary, both the DMA and DMCCA designations have the potential to correct current market and enforcement failures however the DMCCA is a better model to follow.

[1] European Parliament, Briefing EU Legislation in Progress: Digital Markets Act (European Parliamentary Research Service November 2022).
[2] Digital Markets Research Hub, 'UK Digital Markets, Competition & Consumers Bill: Robert Palmer, Ian Forrester, Sarah Long', (October 18 2023) (1:17) available a t<https://www.youtube.com/watch?v=8MNsQ0rKRk4> accessed 9 Nov 2023.
[3] Oles Andriychuk, 'Unboxing the UK Digital Markets, Competition and Consumer's Bill' (2023) ECLR 44(8), 322.
[4] ibid.
[5] DMRH (n 2) (Robert Palmer).
[6] Oles Andriychuk, EU Competition Law: The Socio-Legal Foundations (CUP 2023), 17.

1. Rectifying *Ex Post* enforcement: A move towards pro-competition

Many believe 'competition is self-discovering and should only be protected—never proactively shaped or promoted',[7] however the failure to squash the growing influence of a few major digital platforms that capture the largest share of the market has been a source of growing concern.[8] For example, BigTech companies; Google, Amazon, Facebook, Apple, and Microsoft (GAFAM) are practically monopolistic; operating completely independently of their competitors, foreclosing the market to newcomers while solidifying their already strong positions, highlights the *laissez faire* approach is ineffective in correcting this markets poor structure.[9] This market failure has resulted from a combination of *sui generis* digital market characteristics alongside the underenforcement of inflexible *ex post* regulation which has failed to adequately adapt to them. This has enabled these digital giants to, *inter alia*, easily exploit economies of scale to circumvent additional regulatory burdens, which has embedded their dominance as a result.[10] Therefore, new pro-competition regimes like the DMA and DMCCA are designed to tackle these unique challenges by complementing the current regulatory framework through imposing additional and pre-emptive obligations.[11]

1.1 Market failure

Digital markets are often attached to an accumulation of "strong externalities" which create the perfect recipe for "tipping."[12] One of the main sources of this phenomenon is *network effects*, whereby as the number of people on a platform increases so does its value.[13] This is particularly true for social media, as more users migrate to more popular platforms to increase connections. This increased user "engagement", allows the companies to collect more data to improve their algorithms and refine searches to provide users with a tailored experience.[14] Although, this seems positive, it does not come without its dangers, as utilising these data-driven advantages have highlighted privacy issues and creates a "winner-takes-all" attitude,[15] whereby "super-dominant" undertakings could completely dictate the market.[16] Thus, the

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[7] ibid.
[8] Pauline Affeldt and Reinhold Kelser, 'Big Tech Acquisitions – Towards Empirical Evidence' ECLR 12(6), 471, 473.
[9] ibid.
[10] DMRH (n 3) [4:07] (Sarah Long).
[11] Oles Andriychuk, 'Comparing the Incomparable: Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act', Concurrences 3-2023, (2023) 3, [8] available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4507277> accessed 14 Nov 2023
[12] Digital Competition Expert Panel, Unlocking Digital Comepetition, Report of the Digital Competition Expert Panel (13 March 2019) 4, [2].
[13] CMA, Online Platforms and Digital Advertising, Market Study Final Report (1 July 2020) 2, [5].
[14] ibid, [4].
[15] European Commission, 'DMA Impact Assessment Report: On Contestable and Fair Markets in the Digital Sector' (Brussels 15 December 2020), [92]
[16] *Coll v Alphabet Inc* [2022] CAT 39, [9]

ability to spill into others makes it impossible for newcomers to compete "on equal terms."[17] further exacerbated by economies of scale, where marginal costs fall after a company reaches a certain size.[18] These "incumbency advantages" and initial investments make it more difficult to entice users to *switch* from well-known brands to a new one which keeps users "locked-in" to the ecosystem.[19]

However, Tommaso Valletti states that the question of whether these BigTech companies *create value* or whether we are *better off without them* is irrelevant – the likely answer is somewhat both; a market failure has occurred, and regulators should aim to remedy the current market structure to the *benefit of society*.[20] Therefore, the need to introduce *ex ante* regulation such as the DMA and DMCCA to "level the playing field" is paramount.[21]

1.2 Enforcement Failure

Underenforcement has added to the high concentration of digital markets. This is due to a myriad of reasons including, asymmetric information between regulators and regulatees, procedural delays, innovation challenges, limited remedies and ultimately a lack of pre-emptive deterrence.

Digital markets are still a relatively new concept of competition law; therefore, enforcers are always one step behind their digital counterparts. As tech companies know their databases and how their algorithms operate best, means enforcers often must take the information provided at face value, leading to incorrect rulings.[22] Empowering enforcers to intervene earlier could rebalance the asymmetry and prevent errors.[23]

Another concern is procedural delays due to the tiresome appeal process. It took the Court 5 years to determine whether *Google Shopping*'s self-preferencing was anticompetitive, during this procedure they maintained their dominant position.[24] Therefore, assessing at the

[17] CMA (n 14) 5
[18] ibid, 252 [5.159].
[19] ibid, 135 [3.210].
[20] OECD Competition Law and Policy 2022, 'OECD Open Day – Regulation and Competition Enforcement in Digital Markets (23 February 2022) [10:46] (Tommaso Valletti).
[21] Andrichuk, (n 12).
[22] *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission (Google Shopping)* (Case T-612/17) [2021] ECR II-763, [8].
[23] DMRH (n 3) [45:00] (Sarah)
[24] *Google Shopping* (n 23).

designation stage could reduce delays and administrative costs, whilst allowing enforcers to apply their resources more efficiently.

Ex post's rigidity is limited to retrospective remedy such as fines, usually 10% of worldwide turnover.[25] This punishment is only an effective deterrent to smaller companies, as large conglomerates, like Facebook and Google have the revenue to mitigate its economic impact.[26] This will refrain smaller companies from exhibiting similar behaviours compared to their larger counterparts, as they do not have the revenue to pay the harsh fines, foreclosing the market as they can no longer compete, thus stunting innovation.[27]

The DMA and DMCCA's *pro-interventionism* attempt to rectify these issues through its designation criteria, by imposing behavioural requirements on digital giants, like BigTech, before legal infringement occurs.[28] This will prevent BigTech from further embedding their dominance in the digital market, allowing new entrants to emerge, recalibrating the market thus promoting contestability and fairness.[29] Ultimately, DMA and DMCCA designation could give enforcers the chance to determine the 'rules of the game'.[30]

2. Comparing the DMA and DMCCA's designation criteria

There are numerous similarities between the DMA and DMCCA definitions and scope criteria, however the different use of language and thresholds, could have a significant impact on designation outcomes.

Both approaches possess material and territorial scope where the DMCCA Chapter 2 Section 2 will designate undertakings with "*strategic market status" ("SMS")* who carry out a digital activity, which (a) is linked to the UK and (b) meets the relevant SMS conditions.[31]

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[25] European Commission, 'Fines For Breaking EU Competition Law' Fact Sheet on Fines (20 January 2021) available at < https://competition-policy.ec.europa.eu/index/fines_en#:~:text=The%20fine%20is%20limited%20to%2010%25%20of%20the,turnover%20of%20that%20group%20of%20companies%20is%20relevant> accessed 2 Dec 2023

[26] Ingrid Hodgskiss, Aimee Westley and Stephen Whitfield, 'The UK's New Competition Regime for Digital Markets: To Remedy a Gap in the CMA's Toolkit (2023) Competition Law Journal 22(2), 63, 65.

[27] ibid.

[28] DMHR (n 3) [40:43] (Robert Palmer).

[29] Andriychuk (n 12).

[30] Multimedia Centre European Parliament, Conference by Andreas Schwab (EPP, DE), rapporteur on the Digital Markets Act - results of the trilogue (25 March 2022) [12:20] (Margrethe Vestager (DK, CE)) <https://multimedia.europarl.europa.eu/en/video/press-conference-by-andreas-schwab-epp-de-rapporteur-on-the-digital-markets-act-dma-results-of-the-trilogue_I222440> accessed 30 Jan 2024

[31] Digital Markets, Competition and Consumers HL Bill (2023-2024) [12], ch2 s2(1)(a), (b) and s2(2).

Under Chapter 3, Article 3(1) the DMA will designate undertakings as a "gatekeeper" if they have (a) a significant impact on the internal market, (b) provides a "core platform service" ("CPS") which is an important gateway for business users to reach end users and (c) enjoys an 'entrenched and durable position',[32] whilst also meeting the quantitative thresholds.[33]

The DMA has a *"dual ambit",* where gatekeepers must provide one or more core platform services whilst being a gateway between business and end users, this adds an additional pressure for designation capture.[34] Article 2(2) does not define the CPS however provides an exhaustive list of 10 services:[35]

"Online intermediation, online search, online social networking, video-sharing platforms, number-independent interpersonal communications, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising."

The list presents certainty for those who are captured by the regulation, but it does not account for developments in the market including cloud gaming which is now an area of contention.[36] The absence of cloud-gaming in the exhaustive list of core platform services has been highly disputed for various reasons. Despite this, the DMA being able to overcome some instances of gaming through other CPS areas could mean that its prescriptive list could cause some large digital firms will carry on business undetected.

Cloud-gaming is a method of playing video games online through a streaming service using remote servers. Playing through the "cloud" does not require users to download or install game software on their PC or console but just need internet connection to send gaming information to an app or browser on the recipient's device.[37] This means that heterogeneous devices such as mobiles can be used and as there is universal access to them this is often a popular form of gaming. Big Tech intermediaries such as Apple's Appstore and Google's Play have used their

[32] Council Regulation (EU) 2022/1925/EC of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1, ch3 art3(1)(a), (b) and (c).
[33] ibid, art3(2).
[34] Natalia Moreno Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (2023) ELR 48(4), 391, 395.
[35] DMA (n 32) art2(2).
[36] CMA, *Mobile Browsers and Cloud Gaming Market Investigation*, Statement of Issues (13 December 2022), [5]; Anne C. Witt, The Digital Markets Act – Regulating the Wild West, Common Market Law Review (2023) 60: 625, 636 [4.2.1].
[37] Jiyan Wu, et al, Streaming Mobile Cloud Gaming Video Over TCP With Adaptive Source–FEC Coding (2017) IEEE Transactions on Circuits and Systems for Video Technology 27(1), 32.

platforms' broad access to game developers and users to their advantage, in which they are able to heavily influence which games are interacted with. However, their duopolistic powers have allowed them to block certain games from other platforms and increase commissions on their own platform by up to 30% to cut online game developer's revenues and make larger profits themselves.[38] It is estimated that 80% of Apple's revenue is from its Appstore, the majority of it returned on games, which is much more than the figure the developers would be awarded anyway.[39] Therefore, their abuse of power would certainly need to be monitored to allow developers to distribute and users to stream games more freely. Although cloud-gaming itself is not listed as a core platform service, Apple Appstore and Google Play are covered by the online intermediaries category and designated as two of the current 22 gatekeepers.[40] In this case mobile use of cloud gaming regarding appstores are therefore indirectly covered by the obligations under Art 5 and 6 of the DMA. This is particularly important since the *Epic Games* cases, where Apple and Google were able to circumvent the obligations under traditional *anti-trust* law.[41]

However, the focus is on the connection between business and end users rather than the cloud gaming being a core platform service. The absence in the list has meant that big players in the sector, who are perhaps not intermediaries or who could later extend to Apple and Google status have escaped capture by the regulation. For example, in 2022 Microsoft Xbox Cloud Gaming dominated the area with 60-70% market share with Sony PlayStation Cloud possessing a considerably lower but influential share of 10-20%.[42] As Xbox Cloud Gaming and PlayStation Cloud are considerable platforms which connect game developers (business users) to consumers (end-users) and have the potential to reach a similar scale to Apple and Google in terms of userbase and revenue, it is perplexing why the Commission are yet to investigate their gatekeeper status. Perhaps if cloud-gaming was a category of its own, the Commission would have legs to stand on and have Microsoft Xbox Cloud Gaming under the influence of the DMA.

[38] Epic Games Inc v Apple Inc; Epic Games Inc v Alphabet Inc [2021] CAT 4, [43].

[39] CMA, CMA's Market Study into Mobile Ecosystems: Final Report Summary (10 June 2022), 6.

[40] European Commission Press Release 'Digital Markets Act: Commission Designates Six Gatekeepers under the Digital Markets Act' (Brussels, 6 September 2023) available at <https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06_en accessed 20 Nov 2023.

[41] *Epic Games* (n 39).

[42] CMA, New Microsoft/Activision Prevented to Protect Innovation and Choice in Cloud Gaming (26 April 2023).

Furthermore, Sony continues to completely share the videogame (console) market with Microsoft Xbox.[43] Often when popularity of one wains the balance tips into the other's favour. However, neither Microsoft Xbox nor Sony PlayStation have been considered by the DMA as threats to competition, thus have not been designated as gatekeepers. This could have fierce consequences, as Sony has already shown anti-competitive tendencies to try and "lock-in" users through requiring a subscription to PlayStation Plus to access the PS5,[44] and Microsoft has displayed its intent to acquire Activision Blizzard, one of the largest gaming companies in terms of market capitalisation across America and Europe.[45] This is a particular threat to fairness and contestability as similar to social media, the success of video-game platforms is based on "value capture" where value is interdependent to the number of users on a particular platform.[46] Not only are there few newcomers on the market, Microsoft and Sony are broadening their scope and trapping users into their ecosystems. The continuation of anti-competitive activity supports the idea that the closed list provided by the DMA's Article 2 'CPS' is limited and fails to handle the extent of dominance in the videogame market, both console and cloud.

This issue of Article 2's definition should have been rectified at the time of the Commission's original draft where previously only 8 services were listed, excluding web browsers.[47] This would have meant conglomerate subsidiaries like Google Chrome would not have been captured. Google is a dominant search engine with nearly 95% market share globally, its subsidiary,[48] Google Chrome is a dominant web browser.[49] If the list continued to exclude web browsers, Google Chrome would not be a "gatekeeper*"* and would carry out its activities without further scrutiny.[50] Other than indirect obligations placed on Alphabet, such as bundling, Google Chrome would still benefit from user data advantages through its own research algorithm and enabling it to foreclose the market to others.[51]

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[43] Statistica, 'Market Share of Console Operating Systems in the United Kingdom (UK) from 2012 to 2022' (2024) available at <https://www.statista.com/statistics/487460/market-share-of-console-operating-systems-uk/> accessed 26 Jan 2024.
[44] Francesco Lantano, Antonio Messessni Petruzzelli and Umberto Panniello, Business Model Innovation in Video-Game Consoles to Face the Threats of Mobile Gaming: Evidence from the Case of Sony PlayStation (2022) Technological Forecasting and Social Change 174 (1211210), 6.
[45] Xingyu Mi , 'Analaysing the Anticipate of Microsoft's Acquisition on Activision Blizzard' (2024) SHS Web of Conferences 181, 1 available at < https://doi.org/10.1051/shsconf/202418101019> accessed 28 Jan 2024
[46] Lantano et al (n 47) 2.
[47] ibid.
[48] OECD (n 21) [16:00] (Tommasso Valletti).
[49] Statistica 'Google's Chrome Has Taken Over the World' (1 September 2023) available at <https://www.statistica.com/chart/amp/30734/browser-market-share-by-region/> accessed 1 Dec 2023.
[50] DMA (n 32) art3(2)(b).
[51] ibid, art3(8).

Additionally, the gatekeeper status needs to be met in tandem with the quantitative requirement of 'at least 45 million monthly active ends users and at least 10,000 yearly business users in the Union.'[52] The emphasis on a specific number of *"business users*" rather than *users in general* has led to the DMA failing to capture significant digital subsidiaries such as iMessage.[53] Since Apple rebutted the gatekeeper presumption as iMessage was a personal service and therefore did not provide a "*gateway*" between business and end users nor meet the Art 3(1)(b) thresholds, it escaped designation.[54]

Arguably the DMA's scope places too much emphasis on targeting undertakings with specific characteristics rather than applying the legislation more broadly to target inherent market power properties of the digital services themselves.[55] These properties encourage weak contestability and unfairness, particularly on the downstream market.[56] Rather than being preoccupied with just the largest platforms such as GAFAM, the DMA should look to apply its scope more broadly to capture conglomerate subsidiaries who would otherwise not come under it, like the DMCCA model.[57]

The European Commission's Joint Research Centre (JRC) established a Panel of Economic Experts on Platform Issues to produce an economic opinion on the DMA proposal, suggesting that a broader definition should be provided, that does not rely on the current business model.[58] Digital markets do not operate in the same way normal businesses do as users' dependency on a service rely on key characteristics such as broad connections with other users rather than a low price therefore the definition of a gatekeeper should reflect that. Rather than a list-based approach which limits the DMA's scope, there should instead be a "functional definition" outlining what a core platform service is, providing (but not limited to) characteristics such as the ability to multi-home.[59] This would be a much broader definition as to which digital services are encapsulated and reflect more effectively the influence other large firms have over digital markets not just GAFAM.

[52] ibid, art3(2)(b).
[53] European Commission (n 41).
[54] ibid.
[55] Bellosso and Petit (n 34), 6.
[56] CMA (n 14), 18 [58].
[57] Bellesso and Petit (n 46).
[58] Luis Cabral et al, 'The Digital Markets Act: A Report from a Panel of Economic Experts' (Publications Office of the European Union, Luxemburg, 2021) JRC122910, 15.
[59] ibid, 16.

On the other hand, the DMCCA does not define the terms "strategic market status" nor "digital activity", which could lead to legal uncertainty, however its broad parameters account for vertically integrated undertakings who benefit from their parent companies scale advantages, which the DMA does not.[60] Section 3 "digital activities" are described as 'the provision of a service by means of the internet', or 'any other activity carried out for the [similar] purposes.'[61] Not providing a closed list creates application flexibility to capture new digital markets, which the DMA fails to achieve. The open-ended language gives the CMA a broad discretion and the ability to keep up with digital markets.[62] Furthermore, the DMA states there must be a specific number of business and end users, whereas the DMCCA only requires 'a significant number of UK users'.[63] The lack of specificity reduces the threshold for designation, capturing less dominant but significantly influential personal use platforms, such as iMessage.[64] This is beneficial as iMessage would no longer be able to profit from Apple's anti-competitive yet legal conduct, which it has previously done under traditional competition policy.[65]

2.2 Market Power Assessment

Both the DMA and DMCCA apply combined qualitative and quantitative designation criteria which is a better model in tackling digital market issues than the traditional *ex post* assessment. The DMCCA's revolutionary section 6 describing "strategic significance*"* could help designation, setting it apart from traditional enforcement policies. However, section 5's irrational and contradictory "entrenchment" condition could reverse its progress.[66]

Section 5 of the DMCCA applies the designation requirement that the undertaking must have "substantial and entrenched market power", but also requires the CMA to 'carry out a forward-looking assessment of a period *of at least 5 years'.*[67] The wording is both irrational and contradictory, as it burdens regulators to "crystal ball gazing", where they would have to predict the unpredictable changes in digital markets.[68] Furthermore, for an undertaking to have an *entrenched* market power, its ecosystem must already be embedded.[69] A forward-looking

[60] CMA (n 14), 19 [62].
[61] DMCC (n32), ch3 s3(1)(a) and (b).
[62] Andriychuk (n 7).
[63] DMCC (n 32), ch3 s2(1)(a) and s4(1)(a).
[64] Europeam Commission, (n 43).
[65] ibid.
[66] DMCC (n 32), ch3 s5(a)
[67] ibid.
[68] DMHR (n 3) [16;00] (Robert Palmer).
[69] Andriychuk, (n 12), [40].

assessment would be contradictory and unbeneficial in its SMS assessment because it does not consider the undertaking's current size and scale.[70] Therefore, section 6 parameters would be more appropriate.

The specific requirement of a period of "*at least five years"* is particularly dangerous since digital markets are fast moving.[71] Five years is a long time to assess potential SMS, which would allow companies to continue developing their databases and algorithms through data collection, increasing their engagement thus maintaining their position.[72] Therefore, Section 5 completely defeats the objective of correcting *ex post* enforcement's downfalls as its loopholes create procedural delays, allowing anti-competitive behaviour to continue while preventing *injection* of competition in the market.[73]

Opposingly, the DMA provides a slightly more flexible approach where designation is based on "an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future",[74] which grants the Commission more discretion to designate both current and *emerging* gatekeepers, whilst not requiring a specific deadline for a forward-looking assessment, minimising digital ecosystems to circumvent regulation.[75] However, both s5 DMCCA and Art 3 DMA take the *entrenchment* approach which assumes firms are already well-established in the market whereas s6 *strategic significance* assesses SMS, through characteristics of companies and their potential to become entrenched. This is a better assessment as it allows designation for up-and-coming gatekeepers.

Section 6 provides a revolutionary feature in designating SMS undertakings as its holistic scope more accurately reflects the realities of the digital market which *ex post* enforcement failed to consider. Assessing markets through a traditional lens meant Big Tech achieved circumventing their grasp whilst continuing to carry out anti-competitive conduct.[76] Therefore, Section 6's pre-emptive guidance could capture undertakings and redesign the market.

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[70] DMCC (n 32), ch3 s6(1)(a).
[71] Ibid, s5(a).
[72] Andriychuk (n 57).
[73] OECD (n 21) [18:46] (Tomasso Valletti).
[74] DMA (n 32) art 3(1)(c).
[75] Ibid, art 3(8).
[76] Giuseeppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse', (2022) ELR 47(5), 597, [2.2].

Section 6 DMCC sets out that undertakings will be designated if they meet one or more of four '*strategic significance'* conditions;[77]

(i) having a position of significant size or scale in respect of the digital activity; or (ii) 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.

Firstly, requiring only one of the conditions creates a low threshold, possibly leading to overinclusion where smaller companies are also captured and subject to the regulation, causing a *flooding* of claims.[78] However, the interpretive language of Section 6 counteracts this by empowering the CMA with a broad discretion when determining the thresholds of the conditions.

Section 6 accounts for the realistic characteristics of the digital market such as its multi-sidedness.[79] Particularly *(iii)* could prevent ecosystem building which led to a lack of competition downstream.[80] This phenomenon is often achieved through conglomerate acquisitions which has gone unregulated as *ex post* enforcement remains unconcerned with vertical integration such as the *Facebook/WhatsApp,*[81] and *Meta/Giphy* mergers.[82] Section 6 promotes contestability as it could prevent dominant companies acquiring younger companies on "neighbouring*" or "*unrelated markets" and expanding their dominance.[83] Although the Chicago School may argue this inhibits *competition on the merits* and could reduce innovation,[84] *ex post*'s underestimation of false negatives, including 800 "killer acquisitions" taking place,[85] has caused long-term harm to the digital market structure.[86] Therefore, proving a pre-emptive assessment which compliments the current framework will allow regulators to intervene and proactively redesign the market.

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[77] DMCC (n 32) ch3 s6(1)(a)-(d),
[78] Andriychuk (n 12), [29].
[79] Affeldt and Kelser (n 9), 472.
[80] CMA (n 36), 18, [58].
[81] Facebook/Whatsapp (Case IV/M.7217) Commission 139/20041/EC [2014] OJ L 2985/7239.
[82] CMA, Completed Acquisition by Facebook, Inc (Now Meta Platforms, Inc) of Giphy, Inc, Summary of Final Report (18 October 2022)
[83] Witt (n 36) 633, [8].
[84] ibid.
[85] Viktoria H.S.E. Robertson, (2023), 'The Future of Digital Mergers in a Post-DMA World', ECLR 44 (10), 447.
[86] Witt (n 36) 633.

Despite the DMCC's unique features and flexible application, a few conceptual issues could prevent its full progress, one of which is its turnover threshold. Section 7(1) states 'the CMA may not designate an undertaking as having SMS…unless the turnover condition is met'.[87] This requirement ultimately undermines its purposefully broad scope, as companies who meet the qualitative criteria but not the quantitative will escape capture, defeating the DMCC's main objective.

Article 3(2) DMA turnover threshold requires '(a) an annual Union turnover equal or above EUR 7.5 billion' or a market value of 'at least EUR 75 billion' whereas section 7(2) DMCC requires either '(a) total global turnover which exceeds £25 billion or (b) UK turnover exceeding £1 billion [in a relevant period]'. Although, the DMCCA turnover requirement seems a lower threshold, the DMA's larger geographical scope allows it to pool revenues and users from multiple countries making the threshold easier to meet.

Furthermore, the sole economic metrics of the DMCC may prevent capture of medium-sized firms and BigTech subsidiaries, as it fails to consider the dynamism of digital markets as digital services are often "*non-commodities*", - which main indirect income is through display advertising.[88] This means companies with large user bases may not meet economic thresholds. For example, Spotify, despite having a 30.5% share on the music streaming market,[89] generating a worldwide revenue of €11.7bn and £190m in UK turnover, would not meet either DMCC turnover thresholds, thus not be designated.[90] Therefore, the DMCC should either lower its threshold or broaden its scope to include non-economic considerations to account for low-income or free platform services.

However, challenges of over and under-inclusion makes it difficult to determine an appropriate threshold. Over-inclusion could lead to smaller company capture and incentivise GAFAM to decrease their operations to not meet thresholds.[91] Under-inclusion would likely

[87] DMCC (n 32) ch3 s7(1).
[88] OECD (n 21) [29:20] (Eliana Garces, Meta Economic Policy Advisor).
[89] Statistica 'Spotify's revenue worldwide from 2013 to 2022' (26 Septermber 2023) available at <https://www.statistica.com/statistics/813713/spotify-revenue/> accessed 28 Nov 2023.
[90] —,'Share of music streaming subscribers worldwide in the second quarter of 2022, by company' (26 September 2023) available at <https://www.statistica.com/statistics/653926/music-streaming-service-suscriber-share/> accessed 28 Nov 2023.
[91] Witt (n 36), 633.

not consider large tech companies' complex *corporate structure;* thus its subsidiaries could remain untouched.[92]

At the Digital Markets Act press conference in 2021, Andrew Schwab has already been criticised for setting 80 billion EUR (which has now been lowered to 75 billion EUR) as the value for market capitalisation.[93] There has been a growing fear that the quantitative threshold would also encompass innovative smaller to medium-sized European firms who are not the intended targets to the legislation.[94] However, as it has been established the targets are mostly 'American firms at the top',[95] and it remains in the European Commission's "hands" to designate gatekeepers, but it seems unlikely that they would subject their own companies to such harsh legislation.[96] However, the purpose of designation should not be to *cherry-pick* who is punished and who is ignored but whether the company meets the thresholds and the relationship with regulators going forward.

Furthermore, false positives and negatives could also negatively impact the market it would be wise for regulators to account for this, which both the DMA and DMCCA somewhat do, however the DMA accounts for this more.

2.3 False Positive and Negatives

Both the DMA and DMCCA have contradictory legislative issues which would likely lead to regulatory escape through provisional contradictions and arbitrary procedural requirements.

Contrasting to the DMCCA's s 7(1) designation escape, art 3(3) DMA provides that an undertaking will be presumed as a gatekeeper if it meets all the quantitative criteria even if it does not meet the qualitative.[97] Furthermore, art 3(8), also gives the Commission authority to evaluate emerging gatekeepers who wouldn't otherwise satisfy the quantitative requirement,

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[92] DMA (n 32) art 3(8)(f).
[93] Multimedia Centre European Parliament, Press Conference by Andreas Schwab, Rapporteur on the Digital Markets Act (DMA) – Outcome of the Vote in Committee (23 November 2021) [09:29:23] (Andrew Schwab) available at <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-outcome-of-vote-in-committe_20211123-0920-SPECIAL-PRESSER> accessed 28 Jan 2024.

[94] Ibid, [09:34:37].

[95] ibid, [09:29:33].

[96] ibid, [09:37:52].
[97] ibid.

through aspects such as 'size…conglomerate and corporate structure'.[98] This creates a lower burden as both articles only require companies to meet either their qualitative or quantitative criteria. However, this is contradictory to art 3(1)'s strict designation scope; requiring companies having to both provide a CPS and be a gateway between business and users.[99] Creating multiple designation avenues leads to confusion whether companies will be subject to the provisions. A broader scope in first place would limit this.

Art 3(5) DMA allows for rebuttal of gatekeeper status, which pursuant of art 17 requires authorities to carry out market investigations; while leading to a more democratic process it creates another route for BigTech subsidiaries to escape.[100] For example, following market investigations; Gmail, Outlook, and the Samsung Internet Browser, while satisfying the requirements outlined in the DMA would not be considered gatekeepers, since Alphabet, Microsoft, and Samsung presented "sufficient arguments" successfully refuting their status.[101] This poses the issue of whether market investigation powers will in fact encourage designation or rather allow clever digital giants to exploit the system and circumvent capture much like traditional enforcement.[102]

Similarly, Sections 9 to 11 DMCCA also provide that the CMA *may* open an SMS investigation where it has "reasonable grounds".[103] However, the CMA is also required to carry out *mandatory* public consultations on any decision-making because of an SMS investigation.[104] This again creates a more democratic procedure, placing limits on the CMA's discretionary powers but there are 'more opportunities for defence' which will likely lead to an overwhelming *spam* of submissions, exhausting resources and slowing the process.[105] Furthermore, the CMA is not "bound*"* by their outcomes, so the requirement to carry them out is futile.[106] Therefore, public consultations should be discretionary as the need for quick implementation is more important.

[98] ibid, art 3(8)(a)-(f).
[99] Ibid, art 3(1)(b).
[100] Ibid, art 17(1).
[101] ibid, art3(5);
[102] European Commission (n 41).
[103] DMCC (n 32) s9(1), s10(1) and s11(2)(a)(i).
[104] ibid, s13(1)(a).
[105] Andriychuk (n 12), [29].
[106] ibid.

Furthermore, possible under-inclusion from the DMA's designation rebuttal and untimely DMCCA public consultations is likely to be heightened by new technological advancements, such as Artificial Intelligence (AI). For example, OpenAI being one of the fastest growing companies in the sector, developing projects such as ChatGPT and Dall-E could pose significant risks to digital market structures.[107] Although, its market power may not be of current concern to the European Commission, it must be noted that its influence is likely to grow. Especially since a large portion of its funding is through Microsoft and Amazon Web Searches investments.[108] OpenAI is not a subsidiary of Big Tech *per se*, but it would be unwise to ignore their stakes and interests in the company, and how they may later choose to acquire it as they have done with many smaller yet influential firms. These tech giants may wish to integrate its data into their own established systems such as Microsoft's Azure AI to further boost their search results and tailor their targeted advertisements. If regulators are not careful these *ex-ante* prolonged market investigations could resemble the outcomes of Google/Fitbit and Facebook/WhatsApp cases, leading to excess administrative costs in the attempt to rectify possible mistakes.[109] Therefore, to prevent these possible circumventions of legislation and further leveraging of power amongst multiple digital markets shows there must be a more holistic yet expeditious investigation and consultation process to designation application and rebuttal.

2.4 Designation Application

Under the DMA's binary model, if an undertaking is designated as a gatekeeper, the obligations apply automatically and wholly, otherwise none of them apply.[110] Contrastingly, the DMCCA section 19 states undertakings *may* be subject to certain conduct requirements,[111] on an *ad hoc* basis which is decided by the CMA.[112] Although less certain the DMCCA allows for regulatory dialogue which would rebalance information asymmetry whilst encouraging better relations between regulators and regulatees.

[107] Statistica 'OpenAI – Statistics and Facts' (5 December 2023) available at < https://www.statista.com/topics/10406/openai/#topicOverview> accessed 29 Jan 2024

[108] ibid.

[109] Google/Fitbit (Case IV/M.9660) Commission 139/2004/EC [2020] OJ C194/7; Facebook/Whatsapp (n 84).
[110] Andriychuk (n 7).
[111] DMCC (n 32) s19(1) and (2).
[112] Andrichuk (n 7) 3.

The DMA's *all-or-nothing* approach offers a more legally definitive line regarding the applicability of obligations to designated firms, compared to the DMCCA's. However, the DMA's strict application could be counterintuitive and overly punitive to those who are captured by the regulation, possibly worsening the current relationship between regulators and regulatees with Big Tech not limiting their "systemic behaviour" but finding new ways to bypass the enforcer's grasp.[113] Furthermore, since the obligations are *cartes blanche*, it does not account for company dynamics, which the DMCCA does.

The DMCCA empowers enforcers with the "normative choice" as to which obligations may apply to designated undertakings and can change this dynamically,[114] allowing for a more productive regulatory dialogue. [115] This would encourage companies to be more forthcoming with information while allowing the CMA to gain insight into their operations and pre-empting anticompetitive behaviour, which would improve contestability.

In short, the DMCCA's more open approach allows for development and conversation between fast growing businesses as the top dogs today, Google and Apple, may not be tomorrows.[116] Therefore, rather than blanket obligations and regulatory oppression, there should be a constant oversight of key players whether they currently dominate the market or may do so in the future.

Conclusion

Overall, the DMCCA designation criteria creates a more flexible approach in its scope especially with its "*strategic significance*" condition compared to the prescriptiveness of the DMA, which has already raised potential loopholes which tech giants may seek to abuse. However, the DMCCA also poses certain linguistic and substantive issues, which could be corrected; firstly, changing section 5's '*entrenched market power with a forward-looking assessment of 5 years*' closer to the DMA's '*entrenched position, in its operations or in the near future*' standard, provides more leeway to capture emerging SMS, who could soon cause

[113] Multimedia Centre European Parliament, (n 94) [12:00] (Margrethe Vestager (DK, CE)).

[114] DMRH (n 3) [11:39] (Ian Forrester).
[115] Ibid, (n 3) [46:00] (Oles Andriychuk).
[116] Multimedia Centre European Parliament, Press Conference by Andreas Schwab, Rapporteur on the Digital Markets Act (DMA) – Outcome of the Vote in Committee (23 November 2021) [09:37:43] (Andrew Schwab) available at <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-outcome-of-vote-in-committe_20211123-0920-SPECIAL-PRESSER> accessed 28 Jan 2024

these markets to tip in their favour. Secondly, lowering the turnover condition or applying a more holistic test allowing non-economic considerations to capture influential *non-commodities*. Finally, replacing the *mandatory* public consultations to *discretionary*, would allow the CMA to allocate its resources efficiently and limit procedural delays which traditional competition policy suffers from. Making these stylistic changes will prevent circumvention of the designation criteria which in turn will induce contestability.

A comparative analysis of enforcer discretion across the DMCC and DMA

Rebecca Price

Introduction

The focus of this article is the discretion of enforcers in the DMCC[1] and DMA.[2] The discretion of regulators in the DMCC is advantageously far greater than that of the DMA. This will be highlighted by the vague language used in provisions that give the CMA significant power such as the ability to choose whether to act, giving them substantial discretion over firms when deciding on conduct requirements and extensive intervention over dominant firms.[3] As the discretion of enforcers in the DMCC covers many provisions within the bill, multiple areas will be discussed.[4] To highlight the extensive discretionary power chapter 2 (delegation criteria),[5] chapter 3 (conduct requirements),[6] and chapter 4 (pro-competition intervention)[7] will be discussed and compared to a similar provision in the DMA which highlights the minimal discretion of regulators in the EU model.[8]

It will be argued that the wide discretionary powers of the enforcers in the DMCC are more effective in dealing with such a volatile and changing area of competition law.[9] The importance of discretion and how it is being tailored in the DMCC[10] compared to the DMA[11] will be discussed throughout. It will be argued that despite criticism suggesting the discretionary power of the CMA is too broad there are suitable checks and balances on the power strengthened by the new proposals.[12] Before discussing this, the performance criteria of flexibility will be explained.

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[1] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350].
[2] 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).
[3] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350].
[4] Ibid.
[5] Ibid, chapter 2.
[6] Ibid, chapter 3.
[7] Ibid, chapter 4.
[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).
[9] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350].
[10] Ibid.
[11] 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).
[12] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350].

1. Performance criteria

The yardstick that will be used to compare the discretion in the DMCC and DMA will be flexibility. The DMCC bill providing the CMA with a vast amount of discretion allows regulators to keep up with the fast-paced developments in the digital market. However, it will be highlighted how the more flexible approach because of the vast discretion of the CMA is more suitable than the rigid adherence to regulation in the DMA due to the experimental approach inherent in DMCC.

2. Vague language

As indicated above, the vague language used to define concepts highlights the significant discretion of the CMA compared to regulators in the DMA. This can be articulated by how a regulator determines a firm as being dominant. In the DMCC the requirements that most prudently show regulators discretion in determining Strategic Market Status (SMS) are the CMA must prove the company is in a position of 'strategic significance' relating to 'digital activity'.[13] For 'strategic significance' the CMA must be satisfied that the firm fits at least one of the four requirements listed in section 6 such as a firm is in a 'position of significant size and scale'.[14] The definitions for key terms are accompanied by elastic language such as 'significant size and scale'. [15]This shows the vast amount of discretion afforded to the CMA because it is up to their competence to decide what is 'significant' as there is no quantitative threshold to be met. [16]This is very different to the limited discretion in the DMA. In the DMA the Commission must follow quantitative criteria.

One requirement in determining whether a business provides a Core Platform Service (CPS) is an 'important gateway for businesses to reach end users'.[17] In relation to this, a company must have 'in the last financial year... at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users.[18] This gives regulators in the DMA significantly less discretion as having quantifiable data leaves little room for interpretation as businesses can plainly see if they meet the criteria. The discretion in the DMCC has been criticised due to the significant amount of power it gives the CMA. This can

[13] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 2(b).
[14] Ibid Sec 6 (1)(a).
[15] Ibid.
[16] Ibid.
[17] 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), art 3 para 1(b).
[18] Art 3 para 2(b).

be articulated regarding the term 'digital activity'[19] in the DMCC compared to 'core platform service' in the DMA.[20] Sinclair highlights as the term 'digital activity' meaning any 'services by means of internet [21]'gives considerable power to the CMA to affect 'any sector in the economy'.[22] This is considerably more discretion than the DMA as they provide a ridged list of 'CPS' covered by the act. [23]Alexiadis and Streel highlight that the DMCC moving away from 'bluntly framed provisions' is incoherent 'with the principle of legal certainty'.[24] Auer, Lesh and Radic suggest that as a result there could be substantial negative consequences for consumers as firms may 'not introduce' features for British users to 'minimize the risk of falling afoul of the new regime'.[25]

Therefore, a limited list of services should be defined, as well as quantifying terms such as 'strategic significance' to limit the discretion of the CMA. [26] This would allow for 'fast compliance of the gatekeepers' like in the DMA.[27] However, while the terms in the DMCC delegation criteria give the CMA significant discretion this is not without limitations. There is sufficient checks on their discretion. There are quantified criteria that must be met for a company to be seen as dominant which narrows 'the scope of the SMS regime' (Sher and Vallat). [28]For instance, a business must have a turnover of one billion pounds[29] or that exceeds

[19] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 2(b).
[20] 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), art 3 para 1(b).
[21] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 3 (1)(a).
[22] Matthew Sinclair , 'The unregulated regulator How the Digital Markets, Competition and Consumers Bill could undermine dynamism in digital markets By Matthew Sinclair ' [2023] Institute of Economic Affairs <https://cps.org.uk/wp-content/uploads/2023/06/CPS-The-Unregulated-Regulator-final.pdf> accessed 3rd December 2023.
[23] 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), art 2 para 2.
[24] Streel Alexandre de and P Alexiadis , 'The EU's Digital Markets Act – Opportunities and Challenges Ahead'(SSRN, 5th January 2023)<https://www.docscrids.eu/files/original/f189aeed08d5184bd5cd90976b42837d00e32d67.pdf> accessed 5 December 2023.
[25] Dirk Auer, Matthew Lesh, Lazar Radic , 'DIGITAL OVERLOAD How the Digital Markets, Competition and Consumers Bill's sweeping new powers threaten Britain's economy IEA Perspectives' (IEA, 18th September) <https://iea.org.uk/publications/digital-overload-how-the-digital-markets-competition-and-consumers-bills-sweeping-new-powers-threaten-britains-economy/> accessed 7 December 202312. 12.
[26] Ibid.
[27] W Kerber, 'Taming tech giants with a per se rules approach? The Digital Markets Act from the "rules vs. standard" perspective' (SSRN, 8TH June 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861706/<accessed 8th December 2023 28,31.
[28] Brian sher and Jacqueline Vallat , 'The UK's new digital regime regulating firms with "strategic market status": who is within scope?' [2023] Privacy & Data Protection <https://uk.westlaw.com/Document/I6769E62041BA11EEB465DEBCC9BD9312/View/FullText.html?originationContext=document&transitionType=SearchItem&ppcid=a0be7d6ceec449e48af943f4bcb4c5b5&contextData=(sc.Search)&navigationPath=Search%2fv1%2fresults%2fnavigation%2fi0ad73aa70000018c0125a91f430be10c&listSource=Search&listPageSource=ec4fe9fa432018303404073e7527dfb1&list=UK-JOURNALS&rank=18&comp=wluk&firstPage=true> accessed 7 December 2023, 8,9.
[29] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 2(b).

25 billion pounds globally.[30] This does provide clarity in terms of if firms would be considered as having SMS as there are quantitative requirements that must be met. Furthermore, the lack of legal certainty is necessary to allow for a flexible approach. The fact that the DMA's 'definition of gatekeeper is not nuanced'[31] does not allow for a responsive approach 'to the new digital reality. [32] In the DMA there are constant questions as to whether new developments such as Alexa fit the CPS criteria. This is because 'in the digital economy services are mostly designed to provide into multiple areas' and therefore 'dividing lines between these services are becoming vague' and therefore do not neatly fit into CPS.[33]

In the DMCC there is no need to do this because of the broad definition of digital activity. Therefore the power this gives the CMA over the economy is justifiable as it allows for a responsive approach to changing digital developments. Furthermore, the argument that such broad discretion will be negative for consumers is not justifiable. In fact, it is noted that current actions of businesses such as 'companies can make it unreasonably difficult for consumers to cancel a subscription, or inhibit choice by artificially ranking their own products higher in search results.' [34] Therefore the lack of certainty because of the discretion of the regulators is necessary to ensure the bill is sustainable in such a fast-changing market.

3. Choice to act

As indicated previously there is significant regulatory discretion in the DMCC compared to the DMA to allow the CMA to keep up with a rapidly changing market. This is highlighted by the theoretical choice given to the CMA as to whether or not to act which is not found in the DMA. This again can be seen in the delegation criteria in the DMCC. It is indicated that 'the CMA may designate an undertaking as having' SMS.[35] A striking use of language is the word 'may'.[36] It does not say the CMA must declare a company as having SMS, they have a choice. They may determine a company as meeting this duty but are not designated.

[30] Ibid Sec 2(a).
[31] Fiona Scott Morton, Cristina Caffara , 'The European Commission Digital Markets Act: A translation' (VOXeu, 5th January) <https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation> accessed 5 December 2023.
[32] Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act', (SSRN, 21st July 2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4507277 8.
[33] Capobianco, Antonio ; Nyeso, Anita, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2018) Vol.9 (1) Journal of European competition law & practice 19, 20.
[34] HC Deb 25 April 2023, vol 731, col 38WS.
[35] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 2 (1).
[36] Ibid.

This is a significant amount of competence given to the CMA demonstrating their 'extensive enforcement powers proposed under the Bill'. [37]This discretion afforded to the CMA is present throughout Part 1 of the bill.[38] In Chapter 3 'the CMA may impose one or more conduct requirements'.[39] While there are criteria that must be met discussed in the following paragraph the word 'may' is used again indicating a choice.[40] The CMA could theoretically determine a company is a gatekeeper but choose to not impose any conduct requirements again highlighting the significant discretion of regulators in the DMCC. This is again seen in chapter 4 indicating the CMA 'may make a pro-competition intervention (a "PCI") in relation to a designated undertaking' as well as having discretion as to what 'may' be considered.[41] This discretion afforded to the regulator in the DMCC is not as vast as in the DMA. For instance, when a company fits the quantified criteria as discussed in the previous paragraph the company 'shall notify the Commission'[42] and 'the Commission shall designate as a gatekeeper'. [43]

The Commission is then 'empowered to adopt delegated acts in accordance with Article 49'[44]. There is no choice afforded to the Commission. Once a company is determined as fitting the criteria they are seen as a gatekeeper. There is no choice like in the DMCC for a regulator to fit the criteria of dominance but to not be considered a gatekeeper. [45]This shows there is much less regulatory discretion in the DMA. This is also evident in Article 5.[46] This indicates a 'gatekeeper shall comply with all obligations set out in this Article.' [47] There is no ability for the Commission to choose which obligations a gatekeeper must comply with, a gatekeeper must comply with them all which will be discussed in the following paragraph.[48] This powerful wide discretion of the CMA has been criticised. For instance, in the DMA it is clearly stated when a

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[37] David Cran, Chris Ross,Melanie Musgrave,Leonia Chesterfield,'Legislation empowering the CMA's Digital Markets Unit introduced into Parliament' [2023] 34(7) Ent LR <https://uk.westlaw.com/Document/I7E9AEBE0515B11EE929CD51BAEAA98FC/View/FullText.html?originationContext=document&transitionType=SearchItem&ppcid=58f5b63f79b9480fb1a320e4d41ef001&contextData=(sc.Search)&navigationPath=Search%2fv1%2fresults%2fnavigation%2fi0ad73aa70000018c0125a91f430be10c&listSource=Search&listPageSource=ec4fe9fa432018303404073e7527dfb1&list=UK-JOURNALS&rank=15&comp=wluk&firstPage=true> accessed 7 December 2023, 203,206.
[38] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Part 1.
[39] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 19 (1).
[40] Ibid.
[41] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 45 (1).
[42] 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), art 3(3).
[43] 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), art 3(4).
[44] Article 3)6_
[45] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], Sec 2 (1).
[46] 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), art 5(1).
[47] Ibid.
[48] Ibid.

business will be considered a gatekeeper and then which obligations will be placed on them. It is not so certain in the DMCC due to the word 'may' if a firm will be deemed as having SMS and if obligation will be played on them. However, this criticism does not justify condemning the discretion of the CMA.

Firstly, this ability to choose whether or not to act is beneficial to businesses. For instance, the DMA's ridged criteria and lack of choice 'risks creating unnecessary regulatory burdens for firms.'[49] This is because once they are deemed to be gatekeepers the business has no choice but to comply with the obligations.[50] By allowing for discretion it allows for flexibility which is important to ensure that conduct requirements are only imposed when necessary as well as being deemed as having SMS status. Allowing the CMA to have discretion in choosing whether to act is actually beneficial for firms ensuring that the imposition of conduct requirements for instance are only given when necessary. Furthermore, while the CMA has much more discretion than in the DMA this is not without sufficient checks. For instance, public consultations are required at every step.[51] This highlights the 'important point for transparency'[52] as it gives a chance for businesses to give input on their use of discretion as well as telling them exactly what they plan to do. This means that while there is some uncertainty for businesses as they will not know if they will be deemed as having SMS status and then if conduct requirements will be imposed on them, there is a sufficient check on CMAs 'needed competence'[53] as any decision will be transparently discussed.

4. Obligations on the company

As indicated above, the 'bespoke nature'[54] of the conduct requirements in the DMCC shows the significant discretion possessed by the CMA exerting power over firms in comparison to the Commission. Not only is the vast discretion articulated by the choice to impose or not impose conduct requirements but the choice in the nature of the conduct requirements themselves.[55] The CMA can choose which conduct requirements are imposed on

[49] HC Deb 25 April 2023, vol 731, col 38WS.
[50] 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), art 5(1).
[51] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350] sec 24 (1)(a).
[52] HC Deb 20 June 2023, col 129.
[53]Oles Andriychuck 'Unboxing the UK Digital Markets, Competition and Consumer Bill' E.C.L.R. 2023, 44(8), 322, 330.
[54] Oles Andriychuk , 'EU Digital Competition Law: The Socio-legal Foundations' [2023] Cambridge university press <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B894FD61D553AD48B32B8901663D53E3/S1528887023000125a.pdf/eu-digital-competition-law-the-socio-legal-foundations.pdf> accessed 6 December 2023, 1,3.
[55] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], sec 19(1).

the company as long as they are 'appropriate…for the purpose of…(a) the fair dealing objective, (b) the open choices objective, and (c) the trust and transparency objective.'[56] This is a significant amount of authority over a firm. The discretion to choose which obligation a company is subjected to highlights the power placed on the regulators over firms as the conduct requirement chosen is grounded in the evidence the CMA believes to be relevant. This contrasts greatly with the DMA as obligations are largely based on 'traditional policy choices.' [57] In the DMA choice is not afforded to the Commission.

It is indicated that a gatekeeper 'shall comply with all obligations set out… with respect to each of its' CPS. [58] There is no discretion for the Commission to decide which obligation is most suitable for the company they simply must comply with all listed obligations. In the DMA the conduct requirements are more rigid leaving little room for discretion with 'blunter tools' at the Commission's' disposal.[59] Furthermore, regarding the DMCC, while the CMA must only impose conduct requirements that relate to '(a) the fair dealing objective, (b) the open choices objective, and (c) the trust and transparency objective,' [60]which is a notable check on their discretion, these terms are loosely defined. For instance, in regard to fair dealing the CMA must merely ensure potential users are treated fairly[61] and are '(b) able to interact, whether directly or indirectly, with the undertaking on reasonable terms.' [62]There is 'no statutory limit to the types of requirements that may be imposed'. [63]This highlights the significant discretion of the CMA in comparison with the Commission as terms are not rigidly defined but leave room for CMA judgment, 'permitting the CMA to calibrate its toolkit in accordance with its enforcement priorities,'[64]

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[56] Ibid, sec 19(5).
[57] P Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law & Practice< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911361> accessed 12 December 2023, 548, 563.
[58] 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), art 5(1).
[59] New UK Digital Markets Regime: Key Differences With the EU Digital Markets Act *(*Sidley Austin LLP, April 27 2023) <https://www.sidley.com/en/insights/newsupdates/2023/04/new-uk-digital-markets-regime-key-differences-with-the-eu-digital-markets-act> accessed 11 December 2023.
[60] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350] sec 19(5).
[61] Ibid sec 19(6)(a).
[62] Ibid sec 19(6)(b).
[63] George Peretz KC, 'Clause 19 of the Digital Markets, Competition and Consumers Bill: Power without accountability' (UK Constitutional Law Association, 5 November 2023)< https://ukconstitutionallaw.org/2023/11/15/george-peretz-kc-clause-19-of-the-digital-markets-competition-and-consumers-bill-power-without-accountability/>accessed 10 December 2023.
[64] Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act', (SSRN, 21st July 2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4507277 1,6.

This significant discretion regarding conduct requirements has been criticised by firms due to the impact and control it gives the regulators over them. For example, Apple indicates the list of conduct requirements is 'far too vague giving the CMA almost limitless discretion regarding how to achieve these goals'.[65] This 'sweeping' authority given to CMA is argued to create 'an unpredictable regulatory regime limiting businesses' ability to plan for further operations. [66] Therefore, to ensure 'a predictable regulatory environment' this discretion needs to be limited[67] and a 'clear framework' established. [68]However, this discretion is necessary. The purpose of the DMA is a restorative process and therefore the mission of the Commission is merely to police the market not to create and tailor it. A category of obligations specifically defined is therefore suitable. In contrast, the purpose of the DMCC bill is to create a more proactive and changing impact on the market. This is very experimental in nature and therefore discretion allowing for flexibility is needed to allow for mistakes. As indicated by Andriychuk the CMA must be 'granted with significant new competence… or there is little sense in engaging in this ambitious project'.[69] It is therefore important to have discretion in order to specify provisions in a regulatory dilogy to tailor them 'to the firm'.[70]

It is true that the CMA has a vast amount of discretion in determining which obligations a company would be subject to but there is the ability to compromise through this regulatory dialogue.[71] The whole point of terms being loosely defined is to tailor the most affective approach to the individual circumstances and market of the firm through their input. This discretion gives the CMA 'flexibility in a fast-moving diverse digital economy' rather than falling behind.[72] Furthermore, as highlighted by WHICH? 'participative' regulatory approach' makes the UK 'an attractive jurisdiction in which firms can invest and innovate'.[73] This is because while the CMA has a large amount of powerful discretion, through the mechanism of regulatory dialogue firms' position can be articulated. Therefore, the firms are not

[65] Apple Inc, 'apple Inc. submits these comments in response to the House of Commons Public Bill Committee's call for evidence related to its scrutiny of the Digital Markets, Consumer and Competition Bill ("DMCC")' (session 2022-2023).
[66] Ibid.
[67] Gov.uk ' A new pro-competition regime for digital markets- government response to consulation' (*Gov.uk,* 6 May 2022)< https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>accessed 11 December 2023.
[68] Ibid.
[69] Oles Andriychuck 'Unboxing the UK Digital Markets, Competition and Consumer Bill' E.C.L.R. 2023, 44(8), 322, 323.
[70] Flora Robertson, 'Regulating Big Tech in the UK', (*Competition Bulletin,* 17 May 2023)< https://competitionbulletin.com/2023/05/17/regulating-big-tech-in-the-uk/> accessed 9 December 2023.
[71] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350] sec 19.
[72] Said Al Hinai, 'Tackling the digital economy from a fresh perspective: a comparison between the EU and the UK proposed sector regulation' Competition Forum, 2022, 1,11.
[73] Which?—supplementary written evidence (DCC0030) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill, 2.

disadvantaged by imposing a vast number of obligations onto them but advantaged as they have an ability to work with the regulators unlike in the DMA.[74] The 'benefits outweigh the risks' regarding CMA discretion. [75] This approach is also more sufficient as it means firms are not subject to generic obligations and allowing the CMA necessary powerful discretion in an experimental design.

5. Investigatory power

The 'wide-ranging investigatory'[76] power the CMA has compared to the Commission again highlights the difference in discretion possessed by regulators in the two models. While the CMA has multiple powers of investigation the focus will be on the Pro Competition Intervention (PCIs) as this best demonstrates how the discretionary power of the regulator deviates from the Commission.[77] PCI are actions taken by the regulator that go 'over and above the conduct requirements' allowing the CMA to make further recommendations to address 'the root causes of entrenched market power.'[78]

While the DMA provides similar powers of intervention such as the ability to open a market investigation[79] this mechanism does not provide the Commission with such extensive investigatory discretion as the DMCC does. For instance, in the DMCC, not only does the CMA have such extensive power over the firm when conducting an investigation this mechanism also allows the CMA to impose remedies such as 'mandated interoperability, data sharing, and consumer choice screens'[80] that would affect every aspect of a particular firm. This discretion is necessary for a 'flexible and proportionate'[81] response to ensure companies do not exploit their position and exploit innovation for consumers by designing 'appropriate remedy to address the competition problem.'[82] This contrasts greatly with the power of the Commission as the

[74] 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).
[75]Open Markets Institute—written evidence (DCC0013) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill', 3.
[76] Digital Markets, Competition and Consumers Bill: UK tech sector competition rules (*pinsentmason,* 30 May 2023)< https://www.pinsentmasons.com/out-law/analysis/uk-tech-sector-competition-rules> accessed 5 December 2023.
[77] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350], sec 45(1).
[78] TechUK, 'The UK's pro-competition regime for digital markets: how do we make it a success for UK tech?'(*TechUK,* 14 April 2023)< https://www.techuk.org/resource/the-uk-s-pro-competition-regime-for-digital-markets-how-do-we-make-it-a-success-for-uk-tech.html> accessed 2 December 2023.
[79]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), art 17(1).
[80] Department for Science, Innovation and Technology (DSIT) and Department for Business and Trade (DBT) joint written evidence— DCC0025 House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill'.
[81] Ibid.
[82] Ibid.

DMA 'narrowly specifies a relatively limited number of interventions for a limited set of companies.'[83]

For instance, while the Commission does have the power of investigation and the ability to impose 'additional remedies' this is very limited.[84] The Commission can only impose remedies if they find the gatekeeper has engaged in 'systematic non-compliance'.[85] This narrow circumstance in which further investigations and remedies can be imposed highlights the limited power the Commission has over firms in comparison to the CMA's ability to impose remedies and investigations that affect the whole firm at their discretion. However, this again has been criticised by firms. Microsoft suggests that 'greater predictability' is needed in the regime to allow 'firms to plan their UK investigations' in order to not 'stifle innovation and investment in the UK' [86] creating 'significant damage to the British economy'.[87] Microsoft while not disputing the need for the CMA to 'exercise discretion' in relation to PCIs, they believe there should be sufficient 'checks to ensure' decisions by the CMA are proportionate.

These checks include merit standard of review as a safeguard [88] to 'ensure accountability and the consistent application of any new law based on precedent.'[89] This view is also held by Google as the 'judicial review (JR) standard provides insufficient safeguards for businesses' against the significant discretion highlighted by the intrusive investigatory competence of the CMA. [90] It is therefore suggested that this would manage the discretion of regulators more beneficially. However, a full merit-based review system would not be appropriate. For instance, having a merit-based review system means that cases will get stuck in the court system. This is because as highlighted by Batchelor firms will seek to use this platform as a means of contesting every issue in the review rather than working with regulators through a transparent dialogue in

[83] IEA, 'Digital markets bill threatens Rishi Sunak's 'science and tech superpower' (*IEA,* 19 September 2023)< https://iea.org.uk/media/new-cma-powers-threaten-rishi-sunaks-science-and-tech-superpower/>accessed 12 December 2023.
[84] 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), (73).
[85] 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), art 18(1).
[86] Microsoft—written evidence (DCC0017) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill' 1.
[87] CAPX, 'Why the Digital Markets Unit poses a fundamental threat to British innovation'< https://capx.co/why-the-digital-markets-unit-poses-a-fundamental-threat-to-british-innovation/>accessed 3 December 2023.
[88] Microsoft—written evidence (DCC0017) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill'.
[89] Victoria Hewson & Cento Veljanovski, ' How will the Digital Markets Unit affect competition and innovation?'(IEA, July 2022)< https://iea.org.uk/wp-content/uploads/2022/07/IEA-_Regulatory-Affairs_Powering-up_web.pdf>accessed 11 December 2023, 1,48.
[90]Tom Morrison-Bell, Public Policy Manager, Competition, Google— supplementary written evidence (DCC0028), 2.

a prompt fashion.[91] This would undermine the purpose of giving such wide discretion to the CMA to allow for a flexible approach to respond quickly to changing developments in such a volatile digital market as well as discouraging the regulatory dialogue. This being said, the new proposed amendment to the DMCC would allow for merit review regarding fines. [92]This would strike a correct balance between allowing for a safeguard to challenge the large fines while not limiting the discretion of the CMA significantly.[93] This avoids the mistakes of the DMA by allowing full merit review without significantly limiting the discretion of the DMA.

Conclusion

Overall, the CMA has much more discretionary power compared to the Commission. This is highlighted by the key terms such as in the delegation criteria not being clearly defined giving the CMA scope when determining a firm as having SMS. This discretion is also widened by the language used giving them the power to decide whether not to act as well as discretion when they do act in determining what conduct requirements are needed and if further pro-competition intervention is beneficial. This contrasts greatly with the Commission's much more limited discretion. DMA is based on ridged criteria, with little competence given to the Commission in deciding if it is best to act. Furthermore, unlike the CMA there is no discretion in choosing which conduct requirement will be imposed on a firm as well as limited investigation power and control over a firm.

The largest opposing voice to the CMA discretion comes from firms warning that the uncertainty generated by such a broad discretionary power will lead to less innovation for consumers as businesses will want to avoid being subject to such uncertainty.[94] It is therefore suggested that the Commission's discretionary limits should be adopted by the DMCC to make it more palatable for firms. This is because the Commission's ridged discretion is much less intrusive. However, this criticism is not justifiable. Firstly, the approach to regulation in the DMCC is experimental and considerably different to the approach taken by the DMA and their

[91] Digital Market Research hub, 'Judicial Review v Full Merits Scrutiny in the DMCC: Peter Freeman, Catherine Batchelor & Tom Fish'< https://www.youtube.com/watch?v=pgF_u3BcEJ0>accessed 12 December 2023. 14:00.
[92]Department for Science, Innovation and Technology, 'Changes to Digital Markets Bill introduced to ensure fairer competition in tech industry' (*Gov.uk,* 15 November 2023)< https://www.gov.uk/government/news/changes-to-digital-markets-bill-introduced-to-ensure-fairer-competition-in-tech-industry>accessed 10 December 2023.

[93]Department for Science, Innovation and Technology, 'Changes to Digital Markets Bill introduced to ensure fairer competition in tech industry' (*Gov.uk,* 15 November 2023)< https://www.gov.uk/government/news/changes-to-digital-markets-bill-introduced-to-ensure-fairer-competition-in-tech-industry>accessed 10 December 2023.
[94] Microsoft—written evidence (DCC0017) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill' 1.

discretion is needed to navigate uncharted territory.[95] The DMCC approach to discretion of regulators is more beneficial as it allows for flexibility ensuring businesses are not subject to unnecessary constraints on their power by tailoring obligations to individual businesses.[96]

Furthermore, there are sufficient checks on DMCC authority such as the requirement of public consultations to ensure transparency of decisions.[97] Therefore, the discretion of the regulators in the DMCC is much more appropriate in dealing with a fast paced market in comparison to the DMA.

[95] Oles Andriychuk 'Unboxing the UK Digital Markets, Competition and Consumer Bill' E.C.L.R. 2023, 44(8), 322, 323.
[96] Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act', (SSRN, 21st July 2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4507277 1,6.
[97] Digital Markets, Competition and Consumers Bill HC Bill (2023) [350] sec 24 (1)(a).

Is Big Necessarily Bad? An Examination of the Revolutionary DMA and DMCC Designation Criteria

Jason Highfield

Introduction

In recent times, the digital economy has been developing at a rapid pace. This process of global transformation has been described as the 'fourth industrial revolution'.[1] Such prominent developments have forced regulators to act expeditiously to maintain control over the digital sector, with an 'unprecedented recalibration'[2] of competition rules producing the Digital Markets Act (DMA) in Europe and the Digital Markets, Competition and Consumers Act (DMCC) in the UK.

With the digital economy being 'the focal point of the most vigorous and prominent competition policy debates',[3] it has been of the upmost importance that regulators strike the correct balance between fairness and contestability. At the forefront of this discussion lies the issue of designation, and the question of where to draw the line of applicability. This is accentuated by the 'binary mode'[4] of both pieces of legislation. A '"one size fits all" code of conduct'[5] requires 'surgical precision'[6] in determining when activity must be regulated, especially in an area as politically charged as competition policy. Whether an undertaking is subject to these regulations or not will have drastic consequences that could shape the digital ecosystem.

Therefore, it will be necessary to provide an overview of the rationale for the DMA and DMCC, and the themes present in designation criteria. Moreover, this text will scrutinise the

[1] Oles Andriychuk, Shifting the digital paradigm: Towards a *sui generis* competition policy (Computer Law and Security Review 2022, 46). Shifting the digital paradigm: Towards a sui generis competition policy - ScienceDirect
[2] Oles Andriychuk, Shaping the New Modality of the Digital Markets: The impact of the DSA/DMA Proposals on Inter-Platform Competition, 2. Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition (strath.ac.uk)
[3] Niamh Dunne, Pro competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit (The Antitrust Bulletin 67(2)) 341. Pro-competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit - Niamh Dunne, 2022 (sagepub.com)
[4] Andriychuk (n 2) 14.
[5] Heike Schweitzer, The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal (ZEuP 2021, 3) 5. The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal by Heike Schweitzer :: SSRN
[6] Andriychuk (n 2) 18.

methods employed in both provisions to successfully grapple with the competing notions of flexibility and certainty. Sub-section four will highlight the success of the DMCC with its 'more flexible and time-resilient'[7] approach to types of activities subject to control, in contrast to 'the closed list caught within the DMA'.[8] On the other hand, sub-section five focuses on the 'inconceivable shortcoming'[9] of the DMCC relating to 'substantive and entrenched market power' and questions the resilience of the DMA and DMCC when faced with future challenges. Sub-section six will assess how both bills balance qualitative and quantitative criteria, exploring how this equilibrium interplays with over and under qualification. Lastly, the final sub-section will attempt to address a recurring critique of both the DMA and DMCC, namely that 'regulation makes imitation more attractive than innovation'.[10]

2. The need for designation

As previously alluded to, digital markets exhibit distinctive traits that render enforcement particularly challenging. Rapid technological evolution can create a market with an 'inner nature characterised by network effects and substantive economies of scale and scope'.[11] In turn, these powerful economic forces promptly force digital markets to 'tend inherently and inexorably toward concentration'.[12] Eventually, this can lead to 'market structures populated by a handful of "Big Tech" giants'.[13] Essentially, the strong become stronger.

Although the development of the digital economy initially sparked optimism, recent perception is one of 'digital pragmatism'.[14] Big tech giants accumulate vast amounts of data, which 'constitutes a particularly high barrier to entry into digital markets'.[15] High barriers to entry can be problematic from a competition policy standpoint in any market. This situation has been exacerbated by the unprecedented speed of development in the digital market which could

[7] Thomas Tombal, Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches (European Competition Journal 18(3)) 482. Full article: Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches (tandfonline.com)
[8] Natalia Moreno Belloso and Nicolas Petit, The EU Digital Markets Act (DMA): a competition hand in a regulatory glove (European Law Review 2023 48(4)) 396.
[9] Oles Andriychuk, Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act, 8. Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act by Oles Andriychuk :: SSRN
[10] Henrique Schneider, The European Union's Digital Markets Act Seeks to Regulate Competition with Little Regard to Impact on Consumers (CEI May 2022, 277) 11. Henrique_Schneider_-_Digital_Markets_Act.pdf (cei.org)
[11] Andriychuk (n 1).
[12] Dunne (n 3) 342.
[13] ibid.
[14] Andriychuk (n 2) 12.
[15] Dunne (n 3) 342.

prove catastrophic. Consequently, improving contestability in digital markets has been at the forefront of both bills.

As previously stated, legislation prior to the DMA and DMCC has been 'unable to address the contestability challenges presented by digital platforms'.[16] This has often been attributed to investigative ex-poste enforcement procedures being 'too time-consuming',[17] 'complex and slow'.[18] Article 102 TFEU[19] is a prime example, with the requirement of defining the relevant market being largely arbitrary and demanding. In contrast, both new provisions deploy ex-ante regulation to address this issue with the promptness of enforcement. With regard to the DMA specifically, paragraph 23 provides 'any justification on economic grounds seeking to enter into market definition should be discarded'.[20] This has been described as a 'bold statement',[21] but in reality, is sensible to avoid prolonged legal discourse in an attempt to define indeterminate digital markets. Subsequently, there is no mention of market definition in the DMCC.

Furthermore, it can be argued that being designated by either the DMA or DMCC is a 'sanction of the first order' in itself, with several obligations immediately applicable for compliance. This demonstrates a positive legislative move, showcasing an 'ambition to promote fairness beyond competition policy'[22] in both the DMA and DMCC. The following section will scrutinise whether the streamlining and enhancement of the investigative process has been successful with respect to balancing flexibility, fairness, and certainty.

3. Competing interests of flexibility and certainty

Both the DMCC and the DMA face the challenge of balancing two polarising objectives, namely flexibility and certainty. Inherently, 'ex-ante rules present a trade-off between flexibility

[16] Manuel Woersdoerfer, The Digital Markets Act and E.U. Competition Policy: A Critical Ordoliberal Evaluation (Philosophy of Management 2023, 22) 151. The Digital Markets Act and E.U. Competition Policy: A Critical Ordoliberal Evaluation | Philosophy of Management (springer.com)
[17] ibid.
[18] Regina Hučková and Martina Semanová, Various Consequences of Digital Markets Act on Gatekeepers (ECLIC 7) 296. View of VARIOUS CONSEQUENCES OF DIGITAL MARKETS ACT ON GATEKEEPERS (srce.hr)
[19] Article 102 Treaty on the Functioning of the European Union.
[20] 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) Paragraph 23.
[21] Ief Daems, The complexity and practical challenges of implementing the new DMA (Competition Law & Policy Debate, 2022, 7(2)) 108. CLPD_01_Daems_Proof 106..112 (concurrences.com)
[22] Anna Moskal, Digital Markets Act (DMA): A Consumer Protection Perspective (European Forum 2022, 7(3)) 1116. Digital Markets Act (DMA): A Consumer Protection Perspective by Anna Moskal :: SSRN

and certainty',[23] as they allow for rapid enforcement while grappling with the challenge of being comprehensive enough to prevent under-qualification. However, the DMA strikes an effective balance with provisions that are 'as prescriptive, binding, and punitive as ex-ante regulation'[24] but also as 'broad and general as traditional ex-post'.[25]

DMA designation criteria provides for several examples of the balance edging towards flexibility rather than certainty. Primarily, the term 'gatekeeper' is novel in itself and a fresh introduction to competition regulation. There has been some discourse that the 'gatekeeper concept is problematic and requires a length explanation'.[26] It is unclear why 'gatekeeper' itself is troublesome, given the vast set of criteria that follows in Article 3.[27] Alternatively, introducing this novel term is useful, as it prevents digital markets dialogue being muddled with other forms of competition policy.

Another provision demonstrating some flexibility is Article 3(8). This provides the commission with the ability to designate an undertaking as a gatekeeper if it satisfies 3(1) but does not meet the quantitative thresholds in paragraph 2.[28] Consequently, the Commission appears to possess a 'get out of jail free card' whereby they can ignore the strict quantitative thresholds and offer a purely qualitative explanation for designation. This affords the Commission 'significant leeway and discretion'[29] as this principle removes a layer of certainty for undertakings. On the one hand, it could be argued that 3(8) demonstrates that the Commission are overreaching, as it reduces the quantitative criteria to merely being a warning for undertakings, who must instead navigate 3(1) which 'lacks precise definition'.[30] On the other hand, it is more realistic to scrutinise 3(8) as a device to protect against false negatives. This provision provides a 'built in mechanism'[31] to rectify this very issue and can be seen to future-proof the designation criteria. It would far more dangerous to purely rely on the quantitative criteria to ensure all necessary undertakings are caught in the definition. This is especially relevant given the difficulties with having only one set of quantitative criteria to cover all core platform services.

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[23] Pinar Akman, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets (European Law Review 2022) 18. The Digital Markets Act and E.U. Competition Policy: A Critical Ordoliberal Evaluation | Philosophy of Management (springer.com)
[24] Andriychuk (n 2) 14.
[25] ibid.
[26] Schneider (n 10) 3.
[27] European Digital Markets Act Chapter II, Article 3.
[28] European Digital Markets Act Chapter II, Article 3(8).
[29] Woersdoerfer (n 16) 163.
[30] ibid.
[31] Anne C. Witt, The Digital Markets Act – Regulating the Wild West (Common Market Law Review 2023 60(3)) 27. The Digital Markets Act – Regulating the Wild West by Anne Witt :: SSRN

The theme of flexibility can also be seen to be pervasive throughout Article 4, in reviewing whether gatekeeper status should be altered. Notably, the two scenarios when the Commission may consider a review are when 'there has been a substantial change in any of the facts on which the decision was made' or 'designation was based on incomplete, incorrect or misleading information'.[32] Although these statements may appear inherently broad, the Commission 'enjoys a lot of leeway in assessing these arguments'.[33] Crucially, it is unclear what 'substantial change' or 'misleading information' constitute, leaving the Commission with extensive freedom in reviewing designative status.

The DMCC can be seen to go even further with regard to promoting flexibility. Primarily, the DMCC opts for an 'expansive definition of digital activities'.[34] In contrast, the DMA exhibits a greater amount of rigidity through its 'closed list'[35] of core platform services. This will be analysed in greater detail in the next section.

Subsequently, the DMCC can be construed to offer a more flexible approach in determining the significance of the position of an undertaking. DMCC s.6 states that an undertaking 'holds a position of strategic significance where one or more of the following conditions are met…'.[36] In contrast, the homogenous provision in the DMA requires 'at least 45 million monthly active end users located in the Union…'.[37] This approach is 'excessively focused on quantitative thresholds'[38] which could lead to 'insufficiently nuanced designation assessments'[39] as it leaves little room for flexibility or discretion. Moreover, the provisions that follow in DMCC s.6 'envisage a more context-specific assessment'[40] to ensure no undertaking can slip through the net. Terms such as 'position of significant size' and 'substantially influence'[41] present a 'desire not to be bogged down in formalism'[42] that results in a forward-looking approach. The

[32] European Digital Markets Act Chapter II, Article 4(1).
[33] Daems (n 21) 108.
[34] Open Markets Institute – written evidence (DCC0013), House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill'. 2
[35] Belloso and Petit (n 8) 396.
[36] Digital Markets, Competition and Consumers Bill, s.6(1).
[37] European Digital Markets Act Chapter II, Article 3(2)(b).
[38] Magali Eben, the interpretation of a 'strategic market status' a response to the public consultation by the UK government on 'a new pro-competition regime for digital markets' CREATe Working Paper 2021/10, 7.
[39] ibid.
[40] Dunne (n 3) 349.
[41] Digital Markets, Competition and Consumers Bill, s.6(1)(a).
[42] Eben (n 38) 3.

persistent need to calculate total end users throughout DMA designation criteria will be examined further in the text.

4. Article 2(2) DMA, 'Core platform service'

Some disparity can be seen between both sets designation criteria in the form of the DMA's 'core platform services' list versus 'digital activities' in the DMCC. On the one hand, 'lawmakers have preferred to draw up a closed list of CPS caught within the DMA',[43] which covers ten possible services that undertakings may be covered by These range from online search engines[44] to advertising services.[45] There are several potential drawbacks to this approach. Primarily, there is the potential for the 'selected list of services to become outdated very quickly'.[46] As previously stated, digital markets are rapidly evolving,[47] with regulation and enforcement struggling to keep pace. The dynamic nature of these markets introduces an element of unpredictability, the pressure of 'digital market forces lead to huge efficiency gains'[48] and massive economies of scale. This can render any efforts in forecasting the future of the digital economy futile. Therefore, it could be argued that opting for a format that reduces enforcers to fitting the activity of an undertaking into one of ten categories makes the process more difficult. Moreover, the list has been described as a concoction of 'instruments thrown in a basket that are not always entirely consistent with one another'.[49] Unfortunately, this issue runs against the problems with opting for a closed list, with the 'language used in the definitions delineating broad rather than narrow categories'.[50] There are few obvious links between each separate core platform service, and undertakings may struggle in assessing which are relevant. The list of core platform services could be described as being stuck between attempting to offer rigidity through ten fixed options, but also ensuring those options are sufficiently broad to cover all possible instances. Therefore, this provision is ultimately unsuccessful in achieving either certainty or flexibility.

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[43] Belloso and Petit (n 8) 396.
[44] European Digital Markets Act Chapter I, Article 2(2)(b).
[45] European Digital Markets Act Chapter I, Article 2(2)(j).
[46] Mario Mariniello and Catarina Martins, Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma (Bruegel Blog December 2021). Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma (bruegel.org)
[47] Alexandre de Steel and Pierre Larouche, The European Digital Markets Act proposal: How to improve a regulatory revolution (Concurrences 2 – 2021) 57. The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution by Alexandre de Streel, Pierre Larouche :: SSRN
[48] Regina Hučková and Martina Semanová, The Position and Regulation of Gatekeepers in the Context of the New European Legislation (ECLIC 6) 513. View of THE POSITION AND REGULATION OF GATEKEEPERS IN THE CONTEXT OF THE NEW EUROPEAN LEGISLATION (srce.hr)
[49] Larouche and Steel (n 47) 56.
[50] Belloso and Petit (n 8) 399.

On the other hand, the 'digital activities' provision in the DMCC is one of the strongest elements of the bill. Instead of a closed list, the DMCC 'opts for an open definition of the types of activities subject to regulatory control'.[51] Digital activities are merely defined as 'provisions of a service by means of the internet, or a provision of digital content'.[52] This provides enforcement with significant discretion and the opportunity to employ a sliding scale in determining how expansive the digital activities definition must be. Therefore, this 'presents the advantage of being more flexible and time-resilient'[53] than its European counterpart which must rely on the ten core platform services as adequate cover for future developments. Some may argue that the vague nature of digital activities provides enforcers with too much discretion. However, these concerns are unnecessary as partaking in digital activities alone is insufficient for designation. The DMCC model is 'proportionate and flexible'[54] in this regard as far more detail on designation is given in other sections of the bill, such as 'position of strategic significance'.[55] Conversely, the rigid approach[56] in the DMA means an excessive amount of time and resources will be spent on the arbitrary task of confirming an undertaking provides a core platform service. If these 'big tech giants'[57] continue to 'turn everything they touch into gold'[58] the DMA's closed list will quickly become futile.

5. The DMCC's forward looking assessment

The flexibility of the DMCC's design has 'created an enviable model for pro-competition regulation of big tech'.[59] The bill is expansive in nature, meaning it appears to almost be tailor made to combat any new developments. This is what makes section five of the bill difficult to accept. Section five states that 'in assessing whether an undertaking has substantial and entrenched market power…the CMA must carry out a forward-looking assessment for a period of at least five years'.[60] In such a fast moving and unpredictable sector as the digital markets,

[51] Tombal (n 7) 482.
[52] Digital Markets, Competition and Consumers Bill, s.3.
[53] Tombal (n 7) 482.
[54] Which?-supplementary written evidence (DCC0030) House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill' Digital Markets, Competition & Consumers Bill Introduction, 2.
[55] Digital Markets, Competition and Consumers Bill, s.6(1).
[56] Which? (n 54) 2.
[57] Dunne (n 3) 342.
[58] Oles Andriychuk, Chillin' Competition DMA Symposium: Will the DMA deliver? On carrots and sticks (and some magic tricks). Chillin'Competition DMA Symposium: Will the DMA deliver? On carrots and sticks (and some magic tricks), by Oles Andriychuk | Chillin'Competition (chillingcompetition.com)
[59] Which? (n 54) 2.
[60] Digital Markets, Competition and Consumers Bill, s.5.

'five years is next to eternity'.[61] Further than that, the process of carrying out a five-year assessment is 'unachievable and can be seen as opening pandoras box'.[62] It is difficult, if not impossible, to conduct a forward looking assessment in a sector where developments in just the next six months are unforeseeable. This provision is uncharacteristically restrictive in the DMCC and may open the door for firms to force a stalemate, by refuting and challenging large parts of the five-year assessment.

Moreover, the nature of the provision gives minimal indication of what the CMA will consider in undertaking this Sisyphean task.[63] All section five offers is that the CMA must 'take into account developments that are expected or foreseeable and may affect the undertakings conduct in carrying out the digital activity'.[64] One of the biggest strengths of the DMCC is found in its use of 'expansive definitions'[65] to leave the CMA with discretion. In this case, the expansive nature of section five is one of its biggest issues. Terms such as 'foreseeable', 'expected' and 'may affect' do not mean anything and do not give the CMA anything to rely on when challenged by an undertaking. If this section is interpreted strictly 'no designation criteria procedure can ever meet the literal requirements of the section'.[66] Therefore, this provision may operate as the greatest stumbling block for adequate enforcement throughout the DMCC.

Looking towards the future in assessing whether a firm is entrenched is a foggy approach at best, it may be 'more concrete and verifiable to look towards the past'.[67] Crucially, the DMA does not make the same mistake as the DMCC, instead classifying an undertaking as 'in an entrenched and durable position where quantitative thresholds are met in each of the last three financial years'.[68] Rather than attempting to predict the unpredictable, it will be much more difficult to challenge dominance with reference to the past which can be 'proven with objective data'.[69] It is unclear why the legislature in crafting the DMCC opted for a forward-looking assessment given that the process in the DMA appears to be sound. Although quantitative thresholds are not always suitable given their rigidity, assessing the capability of an undertaking

[61] Andriychuk (n 9) 8.
[62] ibid.
[63] Oles Andriychuk, Do DMA obligations for gatekeeper create entitlements for business users (Journal of Antitrust Enforcement 2023(11)) 126. Do DMA obligations for gatekeepers create entitlements for business users? | Journal of Antitrust Enforcement | Oxford Academic (oup.com)
[64] Digital Markets, Competition and Consumers Bill, s.5(a).
[65] Open Markets Institute (n 34) 2.
[66] Andriychuk (n 9) 8.
[67] Open Markets Institute (n 34) 5.
[68] European Digital Markets Act Chapter II, Article 3(2)(c).
[69] Open Markets Institute (n 34) 5.

requires a degree of certainty that is not present in looking five years ahead, especially in digital markets. One criticism of the DMA's approach to determining whether an undertaking is entrenched may be that if five years is too far forward, then three years is too far back. However, in assessing the last three years, enforcers can rely on established data that is easily comparable, versus the 'inevitably speculative nature of a forward-looking assessment'.[70] Therefore, DMCC section five can be considered a legislative failure that overstepped the line in an attempt to be forward looking and future proof.

6. The quantitative approach and over/under qualification

As previously stated, one notable characteristic of the DMA designation criteria is its heavy reliance on quantitative data. On the one hand, it can be argued that this promotes certainty, 'leaving no room for the imagination and curbing shenanigans by companies trying to argue against common sense'.[71] However, the very nature of the quantitative criteria offers the opportunity for undertakings to attempt to evade capture. Primarily, Article 3(2)(b) requires 45 million monthly active end users and 10,000 yearly active business users established or located in the Union.[72] This may be challenging to assess, as 'accurately capturing unique end users may be subject to a significant margin of error'.[73] In contrast, the comparable provision in the DMCC, section 4(a), requires 'a significant number of UK users'.[74] The term 'significant' is not reliant on any specific threshold, which ensures this provision will not need adjusting as the market continues to expand in size. Yet again, the DMCC showcases a willingness to adapt to all circumstances.

This leads into the DMA's potential issue of over and under qualification. Correctly calibrating the quantitative thresholds is of the utmost importance to lawmakers, given the 'binary mode of the DMA'.[75] If the thresholds prove to be adequately determined, the 'binary either/or mechanism of designation appears to be the most suitable',[76] as only undertakings that should be captured will be above the threshold and vice versa. However, finding the exact

[70] ibid 4.
[71] Fiona Scott Morton and Cristina Caffarra, The European Commission Digital Markets Act: A translation (VOXEU Column 5 Jan 2021). The European Commission Digital Markets Act: A translation | CEPR
[72] European Digital Markets Act Chapter II, Article 3(2)(b).
[73] Daems (n 21) 107.
[74] Digital Markets, Competition and Consumers Bill, s.4(a).
[75] Andriychuk (n 2) 14.
[76] ibid 16.

numbers to ensure this works correctly is a difficult task requiring 'surgical precision that should not be reduced to a mechanistic box-ticking exercise'.[77]

If the quantitative thresholds are too low, they may 'outlaw behaviour that does not cause any real harm'.[78] This is known as a false positive. Consequently, this would reduce the effectiveness of the DMA, as competitors would have inadequate opportunity to scale up and genuinely compete before being subject to restrictions. On the other hand, if thresholds are too high, 'they may not capture behaviour that causes harm',[79] known as a false negative. False negatives are even more dangerous, as targeted undertakings may avoid designation altogether. However, as previously covered, Article 3(8) offers a commendable mechanism to prevent false negatives.

The DMCC is unlikely to experience any issues with over or under qualification, as its involvement with quantitative data is extremely limited. There is a quantitative condition in section 7, but this requires a turnover of just £25 billion and £1 billion globally and nationally respectively.[80] Conversely, the DMA requires a more substantial Union turnover of €7.5 billion, with no global turnover requirement.

7. Does designation inhibit competition?

One necessary final consideration covers the broader effect of designation and regulation of digital markets on competition. There has been notable criticism against both the DMA and DMCC based on the argument that they reduce innovation and represent overregulation. Specifically, Henrique Schneider questions 'what the point is in regulating the digital realm separately, as if digital transformation is indeed happening, everything is digital'.[81] Although there is some merit in the argument that digital regulation goes further than in other sectors, 'digital transformation' is the very reason for extensive regulation. There is currently no adequate form of competition regulation that could stall 'big tech giants'[82] in building towards digital ecosystems. On the other side, such rigorous regulation as seen in the DMCC and DMA

[77] ibid 18.
[78] Hučková and Semanová (n 18) 310.
[79] ibid.
[80] Digital Markets, Competition and Consumers Bill, s.7(2)(a).
[81] Schneider (n 10) 9.
[82] Dunne (n 3) 342.

would not be suitable for non-digital undertakings, as no other market 'tends so inherently and inexorably toward concentration'.[83]

Regarding the harm the DMA and DMCC have on innovation, the main argument claims that 'regulation makes imitation more attractive than innovation',[84] alluding to the problem of free riding. This relates to the interventionist nature of both pieces of legislation which work off 'the assumption that digital gatekeepers will act in an anti-competitive fashion if left unchecked'.[85] Primarily, the DMA and DMCC are unlikely to lead to any substantial problem with free riding. Although obligations in both pieces of legislation require 'data-sharing and grant access',[86] having access to this information will not easily translate into smaller undertakings being able to replicate the actual process of those that have been designated. Designation criteria in the DMA and DMCC will only capture the biggest undertakings, and those that receive their data will not have the resources or user base to achieve the same outcomes. Claims that digital regulation is interventionist and 'shifts focus from one of market efficiency to a "big is bad" approach'[87] are more relevant to the DMA, given its reliance on quantitative measures. However, provisions such as Article 3(5) ensure that the DMA is not purely concerned with size. Moreover, without some form of interventionism, the largest undertakings would continue to abuse current permissive regulation to 'turn everything into gold.'[88] A greater level of protection is necessary to combat this issue.

Conclusion

In summary, whilst the DMA and DMCC are navigating unprecedented territory, the principles developed in their designation criteria can largely be considered a legislative success. Although both are forward looking, the DMCC goes even further than the DMA with regard to flexibility, through section six (position of strategic significance) and its reluctance to opt for closed criteria in section three. The DMA itself is not short of malleability, the introduction of the 'gatekeeper' term and Article 3(8) ensure an effective balance between certainty and expansiveness. On the other hand, the DMA may experience some shortcomings with its closed list of core platform services in Article 2. Subsequently, it could be argued that the DMA is too

[83] Dunne (n 3) 342.
[84] Schneider (n 10) 11.
[85] ibid 13.
[86] ibid 11.
[87] ibid 13.
[88] Andriychuk (n 58).

reliant on quantitative data, but 'correct calibration would make this a suitable mechanism'[89] in designating an undertaking. The greatest issue with the DMCC bill lies in section five which, if interpreted literally, may be problematic. When considered against the background of rapidly evolving digital markets, both the DMA and DMCC will speed up the legislative process and embody the 'new role of competition policy',[90] arming enforcement with a new regulatory weapon against Big Tech.

[89] Andriychuk (n 2) 16.
[90] Andriychuk (n 2) 4.

Principles in transition: What remains of competition law in the era of hybrid competition enforcement?

Spencer Cohen

Introduction

Competition law is undergoing a series of tectonic shifts[1]. Reports questioning competition law's aptitude to effectively police digital markets abound, prompting an increasingly loud chorus of voices calling for reform[2]. Beyond the well-rehearsed debates about the goals of the discipline, the very principles that underpin competition law are being called into question. The direction in which these foundations are evolving remains to be fully determined.

The development of "hybrid" regimes offers important hints. Pitched as complements to traditional antitrust enforcement, "hybridised" tools allow competition authorities to give competition law a "regulatory flavour" by incorporating, in both form and substance, elements of regulation into competition law[3]. This enables authorities to transcend their concurrent application, or the application of competition *as* regulation[4], and instead employ one brawnier integrated tool that, in theory, combines the best of both disciplines.

Authorities resort to hybrid tools to overcome traditional competition enforcement's perceived limitations, allowing for a more proactive, bold policing of markets. The structure of hybrid tools reveals much about the constraining principles of competition law. First, it reveals which of competition law's limiting features policymakers are seeking to alter and consider undesirable or unnecessary. Second, competition law as a discipline is inevitably transformed through its interactions with hybrid enforcement mechanisms. In this sense, hybrid tools and their principles act as an anemoscope, indicating the direction in which the competition law winds are blowing.

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[1] Ibáñez Colomo, P. (2021). New Times for Competition Policy in Europe: The Challenge of Digital Markets. *Journal of European Competition Law & Practice*, *12*(7), 491.
[2] See: Furman, J. (Ed.). (2019). *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (herein "Furman Report"). HM Treasury, and Crémer, J., De Montjoye, Y.-A., & Schweitzer, H. (2019). *Competition Policy for the digital era*. European Commission, Directorate-General for Competition (herein "Special Adviser's Report").
[3] Dunne, N. (2014). Between competition law and regulation: hybridized approaches to market control. *Journal of Antitrust Enforcement*, *2*(2), 231.
[4] Ibáñez Colomo, P. (2010). On the Application of Competition Law as Regulation: Elements for a Theory. *Yearbook of European Law*, *29*(1).

Hybridisation is ripe for further study. While Niamh Dunne's formative article set out the analytical framework for understanding hybrid tools, there has been little follow-on scholarship taking a broad, comparative view of these regimes. This article contributes to this literature with a systematisation of the principles undergirding three hybrid regimes, analysing which competition law principles they challenge and which they preserve. It proceeds in three parts.

First, this article canvasses the perceived shortcomings of competition law, using expert reports commissioned by governments and their criticisms as benchmarks. Second, this article turns to three different regimes in between competition law and regulation – New Platform Regulations in Germany, Market Inquiries in South Africa, and Competition Rulemaking in the United States – to understand the principles underpinning each of these tools, and to elucidate their comparative advantages to competition law. Third, this article uses this analysis to argue that these hybrid regimes reveal three essential principles of competition law under challenge: its error cost framework, its progression away from administrable rules, and its tortured administration of proactive remedies. This article concludes on a normative consideration of the desirability of stripping competition law of its reasoned constraints in the name of a more proactive enforcement paradigm.

2. Three hybrid competition-regulation regimes

2.1 Why hybridise?

Competition law is a discipline defined in part by its constraints. These are both procedural and substantive.

It is constrained procedurally in the sense that application of competition law is subject to thresholds[5]. To find an infringement under 101 TFEU, the authority must demonstrate the existence of an agreement; similarly, under 102 TFEU, the authority must show that the firm in question is dominant in the relevant market. Once these thresholds are met, competition law must, in most circumstances, match the agreement or conduct to a pre-existing antitrust theory of harm, and engage in a context and case-specific analysis of its anticompetitive effects.

[5] Ibáñez Colomo, P. (2021b). The Draft Digital Markets Act: A Legal and Institutional Analysis. *Journal of European Competition Law & Practice*, *12*(7), 566.

It is constrained substantively in the sense that competition law, once those procedural guardrails are cleared, is moored by the existing antitrust theories of harm. Enforcement is guided with a concern for protecting the efficiencies created by competitive markets; while noneconomic values like fairness can play a role in competition law enforcement[6], action is constrained by existing theories of harm, precedent, and practice.

Hybrid regimes were designed as complements to traditional competition law enforcement, to be deployed beyond its delineated boundaries, and beyond its constrained objectives. The principal argument for the necessity of new tools is that competition law is too constrained to properly policy digital markets. The market features of the digital economy – two-sidedness, economies of scale and scope, incumbent data advantages, network effects[7] – make them uniquely prone to consolidation. But scholars have pointed out that these features are not unique to digital markets[8].

As will be introduced below, these hybrid tools are not solely applied in digital markets. Rulemaking and market investigations have principally been used in either "brick and mortar" or other complex markets with unique characteristics, like labour or banking markets. Even §19a and New Platform Regulations may be applicable beyond the traditional digital platform context – scholars have explored the possibility of applying §19a to airports or payment service providers[9]. It would thus be a mistake to understand these tools as responses to the challenges of policing digital markets.

Instead, the shortcomings of competition law and the critiques made in the reports should be understood as a broader critique of competition law's effectiveness in a broad swath of markets, not just digital[10]. This tracks with a larger trend of regimes being increasingly evaluated on outcomes, rather than their rigorous procedures. In this sense, hybrid regimes are used to deliver not just more enforcement, but new enforcement goals – like contestability, or the re-emergence of fairness – in contexts where competition law is limited.

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[6] Dunne, N. (2021). Fairness and the Challenge of Making Markets Work Better. *Modern Law Review*, *84*(2).
[7] See both the Furman Report (2019) and the Special Advisers Report (2019).
[8] Ibáñez Colomo, P. (2019). The report on 'Competition policy for the digital era' is out: why change the law if there is no evidence? And how? *Chillin'Competition. https://chillingcompetition.com/2019/04/05/the-report-on-competition-policy-for-the-digital-era-is-out-why-change-the-law-if-there-is-no-evidence-and-how/*
[9] Franck, J., & Peitz, M. (2021). Digital Platforms and the New 19a Tool in the German Competition Act. *Journal of European Competition Law & Practice*, *12*(7), 514.
[10] Dunne (2014)

This article argues that the three regimes studied below makes the "effectiveness" rationale clear. In their own ways, they seek to overcome three of competition's law limiting principles - the error cost framework, the case-by-case effects requirements, and the restricted remedy toolkit.

The analysis of the regimes used as case studies sheds new light on the purpose of competition regimes – and what their purpose is not – to understand why recourse to hybrid is necessary. A critical appraisal of the principles of competition law being challenged through these regimes follows in III.

2.2 "New platform regulations": competition law without constraints

The most common incarnation of hybrid rules of regulation and competition law are the "New Platform Regulations"[11]. Over the last few years, these have been introduced most prominently in the European Union (Digital Markets Act) and the United Kingdom (Digital Markets Competition and Consumers Act) to create *ex ante* regimes of digital market regulation.

This section analyses Section 19a of Germany's competition rules ("GWB") as the most instructive example of the development of hybridised regimes incorporating competition and regulation concepts. 19a stakes the strongest claim of these to representing a "hybrid" competition law framework, rather than simply an *ex ante* regulatory regime[12].

2.2.1 New platform regulations in Germany

In 2021, Germany amended GWB to add a new tool to the Bundeskartellamt's arsenal: Section 19a. In short, 19a allows the Bundeskartellamt to designate a platform with "paramount significance for competition across markets" for five years. This designation does not require dominance as a threshold criteria, unlike competition law. Designation involves the qualitative analysis of five criteria: market power, resources, level of vertical integration, access to

[11] Deutscher, E. (2022a). Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust. *The Antitrust Bulletin*, *67*(2), 302–340.
[12] Witt, A. C. (2022). Platform Regulation in Europe—*Per Se* Rules to the Rescue? *Journal of Competition Law & Economics*, *18*(3), 701.

competition-relevant data, and "intermediation power" [13]. As of early 2023, Alphabet, Meta, Amazon, and Apple have received this designation[14].

Once this designation is made, the Bundeskartellamt can prohibit the platform from a set of seven listed conducts deemed anticompetitive, including self-preferencing[15]. Contrary to traditional competition law systems, the burden of proof is shifted onto the undertaking: once a designation is followed by a prohibition, the platform must demonstrate an "objective justification" for the behaviour to reverse it[16]. 19a enforcement can only be appealed to the German Federal Court of Justice, unlike other proceedings under the GWB[17].

2.2.2 A hybrid mechanism of market supervision

While 19a was written in the language of competition law, it is, "if not squarely within the realm of regulation, then at the very least at its doorstep"[18]. In this sense, it constitutes a paradigmatic example of hybrid regimes, incorporating regulatory concepts to build up a proactive system to govern digital competition. 19a was designed with the purpose of a competition law system – to set basic rules governing the competitive process – but with the means of a regulatory regime.

This system departs from the classical principles of competition law in three ways. First, 19a targets firms, not because of their dominance, but their positions as intermediaries or "gatekeepers" in multi-sided markets. Second, 19a does not set generally applicable rules of competitive engagement. Instead, it creates *ex ante* prohibitions governed by discretion: only applicable to platforms designated by the Bundeskartellamt, only applied if the Bundeskartellamt intervenes. Finally, instead of policing anticompetitive behaviours *ex post*, listed conduct is presumed anticompetitive and thus prohibited before they have taken place. To reverse this, the platform must prove an "objective justification" for the practice, rather than agencies proving their anticompetitive effects[19].

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[13] German Competition Act, section 19a (1).
[14] Alba Ribera Martínez. (2022). *And Thus the Divide Manifests: The Bundeskartellamt's First Proceedings Based on Section 19a(2) GWB (Meta/Oculus)*. Kluwer Competition Law Blog. https://competitionlawblog.kluwercompetitionlaw.com/2022/11/29/and-thus-the-divide-manifests-the-bundeskartellamts-first-proceedings-based-on-section-19a2-gwb-meta-oculus/
[15] German Competition Act, section 19a (2).
[16] *Ibid*. While no such proceeding has taken place yet, the bar needed to clear this standard is likely higher than the efficiency justifications under 101(3) TFEU.
[17] Competition Act, section 73 (5).
[18] Witt 2022, 700.
[19] Franck, J., & Peitz, M. (2021). Digital Platforms and the New 19a Tool in the German Competition Act. *Journal of European Competition Law & Practice*, *12*(7), 514.

2.2.3 Rationales for adopting 19a

This hybridisation of competition law is driven by the development of three new principles that competition law alone cannot accommodate. Because 19a is still nascent, this analysis relies not on the experience of 19a, but its principles.

First, a shift in how agencies think about the optimal standard for intervention. Competition law traditionally errs on the side of generating Type II errors in fear of chilling procompetitive behaviour and dynamic efficiencies. Hybridised systems are designed, through *ex ante* rules with reversed burdens of proof, with a preference for over-enforcement errors, to, in the words of Bundeskartellamt's President, "shut the stable door before the horse has bolted"[20]. To 19a's proponents, recalibrating the error-cost framework is necessary to cope with the structural features of digital markets that tend towards concentration (economies of scale and scope, direct and indirect network effects, incumbent data advantages) require "a reconsideration of the probability distribution of anti- and procompetitive effects"[21]. These new regimes are thus aimed at minimising under-enforcement errors that would allow anticompetitive behaviour to take hold in the market, contrary to competition law's traditional error-cost framework[22].

Another reason for hybridising competition law is to allow enforcers to tackle not just more, but multiple – including noneconomic – harms occurring on digital markets. New Platform Regulations allow for the incorporation of regulatory values not usually pursued by competition law – like "contestability" and "fairness" – to guide enforcement. In this sense, 19a has fundamentally different goals to the rest of GWB: to preserve a rivalrous market structure, in which the exercise of intermediation power, even when acquired through "competition on the merits", is curbed, notwithstanding whether the platform's competitors are as efficient (contra *Intel*). This amounts to authorities directly challenging the truism of protecting "competition, not competitors", replacing the process of market competition culling less efficient rivals with an authority-directed protection of rivals. Other values, including privacy and data protection, are also incorporated into this regime.

[20] *Bundeskartellamt - Homepage - Amendment of the German Act against Restraints of Competition*. (2021) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html
[21] Deutscher (2022a), 381.
[22] Ibáñez Colomo, P. (2020c). What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed. *SSRN*, 9.

The third rationale for recourse to 19a over a traditional competition law system is administrability. 19a grants enforcers considerably more discretionary enforcement power than competition law systems do. This allows 19a to be deployed precisely, as the Bundeskartellamt chooses to prohibit a platform from engaging in only certain conduct it deems anticompetitive chosen from the statutory list of seven, instead of automatically prohibiting a whole host of behaviour like the DMA does. Moreover, it permits agencies to largely bypass effects tests, resulting in more time- and cost-efficient enforcement. This comes at a cost: scholars have raised rule of law concerns with this level of discretion[23], which could lead to a slippery slope of uneven enforcement, potentially allowing authorities to pick and choose winners or losers.

New Platform Regulations, like 19a, thus represent one rationale for developing hybrid regimes at the intersection of antitrust and regulation: to strip competition law of its constraints. Without the disciplining checks of competition law, systems like 19a are freed to tackle more harms in both quantity and quality.

2.3 Market investigations: remedying outcomes

Market investigations allow competition authorities to study the general state of competition in a sector of the economy without the tether of an inquiry into an agreement, conduct, or proposed merger. Investigations thus enable authorities to scrutinise and remedy market features that prevent effective competition but are not reachable under competition law. These include large economies of scale or scope, direct or indirect network effects, high switching costs, information asymmetries, and consumer bias[24].

Market investigations play two roles: they act as preludes to litigation in complex industries where additional expertise is needed to bring an enforcement action, and they form the springboard for competition advocacy, so enforcers can recommend regulatory or policy changes to foster competition based on its findings.

South Africa has progressively developed an effective market inquiry tool. To date, it has been deployed six times[25]. This section uses South Africa's experience with market inquiries to

[23] Dunne (2014), 324.
[24] Motta, M., & Peitz, M. (2022). Intervention Triggers and Underlying Theories of Harm, in M. Motta, M. Peitz, & H. Schweitzer (Eds.), *Market Investigations: A New Competition Tool for Europe?* (pp. 16-89).
[25] *Using Market Studies to Tackle Emerging Competition Issues – Contribution from South Africa*. (2020). OECD. Retrieved May 5, 2023 from https://one.oecd.org/document/DAF/COMP/GF/WD(2020)34/en/pdf

consider the limits of competition law, and analyse the prospects of market investigations as a hybrid tool expanding competition law.

2.3.1 Market inquiries in South Africa

Market inquiries have developed in three stages in South Africa. While the first inquiry, into the Banking sector (2006), was undertaken under a general provision of South Africa's Competition Act, these powers have since been specified through amendment. The competition authority (CCSA) may activate this authority if "any feature (…) of a market (…) prevents, distorts or restricts competition" [26]. In 2018, CCSA was granted the authority to devise, rather than just recommend, tailored remedies in accordance with the findings.

The breadth of this authority allows CCSA to determine the scope of each inquiry, in addition to the nature of the issues being studied, which extend to "competition plus" issues (barriers to entry, regulatory impediments, obstacles to participation)[27] and broader questions of public policy[28]. As a result, inquiries have sometimes concluded with recommendations beyond the scope of CCSA's regulatory authority. Implementing these remedies involves the prosecution of a violation of the Competition Act, or regulatory change secured through buy-in from regulators (CCSA's record doing so is mixed[29]).

2.3.2 Rationales for adopting market inquiries

The Grocery Retail Market Inquiry (2015-2019) exemplifies the market investigation's comparative advantages over competition law: the ability to identify and remedy anticompetitive conduct that does not meet the thresholds required for competition law. It focused on the exclusive lease agreements large grocery stores entered with shopping mall developers. CCSA initially struggled to meet the burdens required to prosecute exclusive leasing under the Competition Act, culminating in a non-referral (2014). But it then launched an inquiry, which allowed it to focus on the effects of the conduct, rather than having to establish culpability through the abuse of dominance process[30]. The inquiry, because it is participatory, transparent, and less adversarial than trial, secured industry cooperation (potential negative

[26] Competition Act, Section 21(1).
[27] CCSA can re-examine any aspect of how the markets are structured since Section 3(1A) grants it concurrent jurisdiction with sector specific regulators.
[28] Bonakele, T., Nair, R., & Roberts, S. (2022). Market Inquiries in South Africa, in *Market Investigations,* 295.
[29] *Ibid*., 308.
[30] Fletcher, A. (2021). Market Investigations for Digital Platforms: Panacea or Complement? *Journal of European Competition Law & Practice*, *12*(1), 46.

reputational effects also play a role). After the inquiry was published, and the economic analysis of the exclusive leasing agreements revealed they were largely anticompetitive, two of the largest retailers entered in voluntary consent decrees with CCSA to cease their exclusive leasing agreements[31]. In this sense, the rationale for an inquiry is clear: it allows authorities to study, consider, and prevent practices or market features that hinder competition without resorting to costly antitrust litigation and its associated limitations.

South Africa's experience also points to the challenges facing authorities in translating the findings of an inquiry into prescriptive remedies. This problem is especially acute when the CCSA's recommended remedies must be implemented by other regulators. Regulatory coordination of complex remedies can be complicated by a range of factors: the inquiry might criticise the current regulatory regime, jeopardising coordination; recommendations might surface value conflicts between CCSA and the regulators, or regulators might choose their own tools to fashion the remedy[32]. These dynamics played out after the Banking Inquiry (2006). The Central Bank and Treasury significantly delayed implementation of the inquiry's recommendations despite CCSA's advocacy[33]. The main antidote to deadlock in realising advice includes developing more participatory inquiries, into which the expertise of sector-specific regulators is incorporated, thus creating the "habit" and institutionalisation of regulatory coordination.

Regulatory coordination plays another role in the market inquiry process: ensuring that CCSA does not overstretch its competence. If a more proactive regulatory remedy is required to foster competition, then a sector regulator with the necessary expertise becomes responsible for its implementation, not the CCSA. By focusing on studying competition, market inquiries provide one competition-focused lens to a "regulatory state" effort to make markets work. In this sense, market investigations fit next to competition law as an additional, complementary tool at enforcers' disposal, since they do not dramatically expand the authority's powers or competence. Unlike the "New Platform Regulations", enforcement and inquiries can seamlessly co-exist, if competition authorities only employ them sparingly and strategically

[31] Bonakele & Roberts (2022), 313.
[32] Indig, T., & Gal, M. (2015). New Powers - New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities. In J. Drexl & F. Di Porto (Eds.), *Competition Law as Regulation* (pp. 89-118).
[33] Hawthorne, R., Goga, S., Robb, G., & Raadhika Sihin, R. (2014). *Review of the Competition Commission Banking Enquiry*. Centre for Competition, Regulation and Economic Development.

(the OECD has developed a helpful framework to help authorities choose when they should and shouldn't resort to them[34]).

2.4 Rulemaking: resurrecting per se rules

Rulemaking amounts to competition authorities issuing industry-wide per se rules to regulate or forbid conduct deemed to be anticompetitive. After a survey of the economic evidence of a practice's effects, laying down a prohibition rule allows for authorities to unambiguously police anticompetitive behaviour at a lower cost than litigation.

Rulemaking is particularly adapted when enforcers have developed expertise in a particular market, allowing them to better understand and anticipate the consequences of their intervention. Rulemaking is especially useful when private litigation is unlikely to stem anticompetitive conduct. Before her appointment as Chair the Federal Trade Commission (FTC), Lina Khan pointed to the lack of private litigation challenging non-compete clauses in employment contracts (due to arbitration clauses, challenging precedent, and the evidentiary requirements of the rule of reason) as an example of a reason for potential rulemaking[35].

This section considers the United States' rulemaking process, and the Federal Trade Commission's (FTC) proposed rule to ban non-competes, to consider what gaps in competition enforcement rulemaking tries to fill, and their limitations.

2.4.1 "Unfair methods of competition" rulemaking in the United States

Since its creation in 1914, the FTC has been granted the power to "make rules and regulations"[36] to prohibit "unfair methods of competition"[37]. In short, after an evidence gathering process, the FTC publishes notice of a proposed rule, which starts a "notice and comment" period, which the agency uses to amend and adjust the rule before promulgation. While this power has been confirmed in court[38], its precise scope is unspecified.

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[34] OECD (2018) *Market Studies Guide for Competition Authorities*, 15. Retrieved May 5, 2023 from www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm
[35] Khan, L., & Chopra, R. (2020). The Case for "Unfair Methods of Competition" Rulemaking. *University of Chicago Law Review*, *87*(2), 373.
[36] Federal Trade Commission Act, Section 6(g).
[37] Federal Trade Commission Act, Section 5.
[38] *National Petroleum Refiners Association v. FTC, 340 F. Supp. 1343 (D.D.C. 1972)*

After decades of dormancy[39], the FTC's rulemaking powers are in the process of being reactivated[40]. In April 2023, issued a notice of proposed rulemaking banning non-compete clauses in employment contracts under its UMC authority[41] (whether the exercise of this authority was proper is a debate that falls outside the scope of this article[42]). Defining the optimal scope for when and how this power should be exercised is critical for those in favour of its reactivation[43].

2.4.2 Rationales for adopting competition rulemaking

The debate over the relative merits of rulemaking and adjudication is a long-standing one in American antitrust law. Rulemaking is motivated by major four principles.

First, rulemaking allows competition authorities to circumvent the slow, costly, and burdensome process of antitrust litigation. Employees bound by non-competes have found it challenging to litigate these contracts as private plaintiffs under the Sherman Act, and have little precedent to rely on[44]. Second, putting together the evidentiary requirements for the rule of reason is both extremely costly and technical, and requires generalist judges to balance interests they may be ill-equipped to evaluate. Another drawback is the time it takes for the adversarial process to conclude; should years pass before a judgement is rendered, market conditions may have exacerbated the harms to competition or render the ruling less enforceable[45]. These impediments, to reprise the leitmotiv of hybridised regimes, make *ex post* enforcement ill-suited to address widespread anticompetitive agreements like non-compete clauses through the rule of reason.

Second, enacting rules provides for more legal certainty than rule of reason analysis and balancing do. In this sense, it would allow for agencies to minimise Type II errors that occur in rule of reason analysis by preventing the targeted behaviour altogether. This argument mirrors

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[39] For a historical account of why this authority became dormant in the 1970s and the arguments in favour of its revival, see: Herrine, L. (2021). The Folklore of Unfairness. *New York University Law Review*, *96*(2), 431–538.
[40] *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*. (2022). Federal Trade Commission. Retrieved May 1, 2023, from https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission
[41] *Non-Compete Clause Rulemaking*. (2023, April 17). Federal Trade Commission. https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking
[42] These arguments revolve around the FTC's 2022 interpretation of its UMC and the Major Questions Doctrine. Generally, see: Merrill, T. W. (2023). Antitrust Rulemaking: The FTC's Delegation Deficit. *Social Science Research Network*.
[43] Dunne (2014), 262.
[44] Posner, E. (2018). The Antitrust Challenge to Covenants Not to Compete in Employment Contracts. *Antitrust Law Journal*, *83*(1), 184.
[45] Khan & Chopra (2020), 361.

the larger debate in competition law about the relative merits of rules over standards. Naturally, some scholars have argued that a categorical ban on non-competes is misguided; instead, they propose a more precise rule that targets non-competes in contexts in which they are likeliest to create anticompetitive effects[46]. The merits of this debate are ultimately resolved by one's favoured error-cost framework. Regardless, FTCA rulemaking raises legal certainty pitfalls: since §5 reaches past the Sherman Act, it could lead to disparate treatment of the same conduct by the FTC and the Antitrust Division under these different authorities[47].

Third, proponents of rulemaking argue that its participatory process strengthens its legitimacy and allows for the perspective of market participants to be expressed, strengthening and sharpening the rule. The opportunity to refine a legal test not only bolsters compliance with the rule but allows for its adjustment to the market conditions as expressed directly by market stakeholders to the agency. Participation presents potential pitfalls – notice and comment can be prone to capture – but attempting to record the view of a wide array of market participants, even imperfectly, can bolster the legitimacy and efficacy of the rule.

Finally, bright-line rules are more administrable. Non-compete clauses are ancillary vertical restraints, meaning they are treated like an exclusive dealing arrangement, thus falling under the rule of reason. In practice, this amounts to a "de facto legality" standard given the "current sad state of antitrust's rule of reason"[48]. But the empirical literature demonstrates that non-competes systematically lead to lower worker wages, which suggests that they should instead be subject to a presumption of illegality[49]. Rulemaking thus allows agencies to bypass hostile precedent and exercise more control over the legal test-making process: the agency can take a first pass, receive feedback from stakeholders through Notice and Comment, and adjust the rule it accordingly, with an eye towards how it will be enforced – rather than leaving these responsibilities to a common-law judge.

In sum, UMC rulemaking allows a competition authority to tackle market features of behaviours that are impeding effective competition, but that are not usually within the scope of competition law, either in practice (rule of reason, stringent standing rules) or in theory.

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[46] Hovenkamp, H. (2023). Noncompete Agreements and Antitrust's Rule of Reason. *The Regulatory Review*. https://www.theregreview.org/2023/01/16/hovenkamp-noncompetes-and-rule-of-reason/
[47] *The FTC's Competition Rulemaking Authority*. (2023). Congressional Research Service, 5. https://crsreports.congress.gov/product/pdf/LSB/LSB10635
[48] Hovenkamp (2023).
[49] Posner (2018), 184.

3. Hybrid tools and the competition law principles they challenge

3.1 Reversing the error cost framework

At heart, these three hybrid regimes seek to challenge and reverse competition law's established error cost framework and readjust how enforcers conceive of the optimal standard for intervening. The United States, and to a lesser extent the European Union, has structured its competition case law to avoid Type I errors[50].

This tilt has its intellectual roots in Chicago School scholarship, and specifically, Frank Easterbrook's work on the "Limits of Antitrust"[51]. In his article, Easterbrook argues that Type I and Type II errors are "incommensurable": antitrust should systematically err on the side of generating over-enforcement errors when adjudicators are faced with trade-offs or uncertainty.

To Easterbrook, this is because markets "self-correct" through entry when authorities under-enforce competition laws. While this generates welfare losses in the interim, the social costs of over-enforcement are higher: when an adjudicator condemns efficient conduct, these errors get institutionalised through precedent, and thus perpetuate welfare losses over longer periods of time[52]. In this sense, Chicago Schoolers argue that over-enforcement errors betray the purpose of competition law, to promote efficiency, because false positives "chill the very conduct that the antitrust laws are designed to protect"[53].

This framework was enshrined by the Supreme Court in many of its unilateral conduct cases. In *Brooke Group*, false positives are perceived as "an obstacle to the chain of events most conducive to (…) the onset of competition"[54], adopting the argument that enforcement can be counter-productive. In *Trinko*, Justice Scalia similarly cautions that "the cost of false positives counsels against an undue expansion of §2 liability"[55]. This rhetoric about the risks of over-enforcement has led to the development of legal tests that exhibit an "anti-enforcement bias",

[50] Kovacic, W. (2020). The Chicago Obsession in the Interpretation of US Antitrust History. *University of Chicago Law Review*, *87*(2), 459–494.
[51] Easterbrook, F. (1984). Limits of Antitrust. *Texas Law Review*, *63*(1).
[52] *Ibid*., 2.
[53] *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574 (1986), 594.
[54] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993), 224.
[55] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2003), 14.

because so difficult to satisfy for plaintiffs[56], like *Brooke*'s recoupment requirement, which caused predatory pricing claims to "fall into disuse"[57].

While the European Union never went as far in adopting the Chicagoan error cost framework, the "more economic approach" nevertheless did mark a movement away from the "formalist" era of enforcement towards a reluctance to allow false positives[58], marking the recalibration of the European framework away from over-enforcement[59].

But today, the assumptions laid out in Easterbrook's scholarship are challenged in the academy and rejected by enforcers, who are proclaiming a "new consensus that the error cost framework was a mistake"[60]. The presumption that markets self-correct has been largely challenged by decades of empirical economics[61]. Moreover, the perfect competition model Easterbrook reasons with rarely corresponds to the markets enforcers encounter: competition is impeded by the presence of barriers to entry, which can be "natural" or erected by firms with market power to prevent new entrants. Even if entry were viable, it would not guarantee the market mechanism recalibrating competition: some markets are not easily "contestable" – meaning competition does not always develop easily (Jonathan Baker cites airline concentration as an example of this phenomenon[62]). In sum, the economic rationale behind Easterbrook's error cost framework has largely been discredited.

The rise of the digital markets has also played a part in making Easterbrook's framework outdated. The economic features of digital markets, which include high barriers to entry (for example, in the form of incumbent data advantages) and the presence of strong network effects, make them unlikely to self-correct. Given how often digital markets are multi-sided, platforms are incentivised, through extreme economies of scale and scope present in digital markets, to leverage their dominance into neighbouring markets through vertical integration. The cycle of acquiring and extending dominance is further catalysed by data, which amplifies the network

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[56] Hovenkamp, H. (2022). Antitrust Error Costs. *University of Pennsylvania Journal of Business Law*, *24*(2), 300.
[57] Weiser, P., & Hemphill, S. (2018). Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing. *Yale Law Journal*, *127*(7), 2049.
[58] *An economic approach to Article 82*. (2005). Economic Advisory Group on Competition Policy, 2-4.
[59] See: Case C-67/13 P, Groupement des Cartes Bancaires v Commission, EU:C: 2014:2204, and Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others EU:C: 2020:265.
[60] *Antitrust Division Policy Director David Lawrence Keynote*. (2022, October 24). https://www.justice.gov/opa/speech/antitrust-division-policy-director-david-lawrence-delivers-keynote-brigham-young
[61] Baker, J. (2015). Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right. *Antitrust Law Journal*, *80*(1), 18.
[62] Baker (2015), 9.

effects that tend these markets towards monopolistic market structures[63]. These features prompt "not only a reconsideration of the probability distribution of anti- and procompetitive effects", but also require "a greater awareness for the magnitude of harm that anticompetitive conduct may bring about"[64].

Finally, the recalibration of the error cost framework corresponds to a larger ideological shift away from Chicago School politics. The conception of liberty in Easterbrook's model is negative: welfare-reducing government intervention creates "unfreedom" for the alleged perpetrator. His model excludes from consideration potential gains in positive economic liberty for other market participants that could result from government intervention. This skewed understanding of freedom has distributional consequences: welfare losses by the alleged perpetrator are systematically considered graver than the welfare losses suffered by other market participants while the market is supposedly "self-correcting". The burdens of non-intervention consistently fall on consumers and competitors, who suffer deadweight loss from allegedly anticompetitive exercises of market power for indeterminate periods of time, to the benefit of the monopoly benefitting from the framework's largesse[65]. As such, Easterbrook's model is permeated with negative assumptions about the cost of state intervention, and a dogmatic predilection to protect the free market from "unfreedom" (state intervention), often to the detriment of other market actors. These assumptions are deeply political and increasingly rejected by enforcers.

Both the Furman[66] and Special Adviser Reports plead in favour of the error cost framework's reversal. In their view, authorities should start "erring on the side of disallowing potentially anticompetitive conducts"[67] to prevent anticompetitive conduct from lastingly impeding the development of competition. But this process is unlikely to happen in the short to medium term through traditional competition law, in part due to the force of precedent. Hence the appeal of hybrid regimes. These regimes reverse this framework in two ways: refocusing enforcement around rules rather than standards, and reviving presumptions of anti-competitiveness.

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[63] Deutscher (2022a), 311.
[64] *Ibid*. 321.
[65] Deutscher, E. (2022b). The Competition-Democracy Nexus Unpacked—Competition Law, Republican Liberty, and Democracy. *Yearbook of European Law*, 55.
[66] *Competition Policy for the Digital Era* (2019), 4.
[67] *Furman Report* (2019), 102.

3.2 Moving away from the case-by-case approach

The "more economic approach" to competition law sought to move enforcement away from reliance on "per se" rules towards requiring standards evaluating conduct through context-specific effects analyses[68]. As a result, rebuttable presumptions of illegality, which rely on clear "by object" categories of restriction, have fallen out of favour in competition law. This is because the more economic approach has recast legal categories as probabilistic estimations of a conduct's likely anticompetitive effects[69]. Under that reasoning, presumptions are poor tools for separating the beneficial sheep from the antitrust goats[70]; hence why per se rules of illegality have been narrowed in Europe and the United States over the last 30 years. For agreements, *Cartes Bancaires* sought to introduce an "experience" criterion to regulate when adjudicators should resort to by object restrictions, subjecting the category to a "restrictive" interpretation[71]. Although Article 102 TFEU does not present the same "by object" category of restriction in its text as Article 101(1) TFEU, the European Court of Justice has long recognised that unilateral conduct can also be presumptively illegal[72]. In that arena, *Intel* narrowed the presumption of illegality for loyalty rebates when they are unable to foreclose upon as efficient competitors, and confirming the necessity of finding a practice creating anticompetitive effects for it to fall under 102 TFEU[73].

Hybrid regimes seek to arrest this trend, in line with the larger reformist ambition to revive the use of per se rules of illegality in competition law. By object restrictions play a central role in rebalancing the traditional error cost framework. They represent enforcers' new willingness to commit Type I errors by promulgating rules that are potentially over-inclusive, under the theory that welfare losses resulting from chilling potentially efficient behaviour are outweighed by the welfare gains brought about by stronger enforcement of anticompetitive conduct. Another reason hybrid regimes are embracing rebuttable presumptions of illegality is the concern with designing rules that facilitate the "administrative system" of competition law enforcement[74]. The requirement to undertake case by case effects analyses have undermined enforcement; the rule of reason standard in the United States is onerous, and difficult to satisfy: a large majority of rule of reason cases end at stage one of the analysis[75]. Rebuttable

[68] *An economic approach to Article 82*. (2005). Economic Advisory Group on Competition Policy.
[69] Deutscher (2022b), 50.
[70] *Leegin Creative Leather Products, Inc. v. PSKS*, (J. Breyer, Dissenting) 551 U.S. 877 (2007), 8.
[71] Case C-67/13 P, *Groupement des Cartes Bancaires v Commission*, EU:C: 2014:2204
[72] Case C-62/86 P, *AKZO Chemie BV v Commission of the European Communities*, EU:C: 2009:536
[73] Case C-413/14 P, *Intel v Commission*, ECLI:EU:C: 2017:632
[74] *Leegin Creative Leather Products, Inc. v. PSKS*, (J. Breyer, Dissenting) 551 U.S. 877 (2007), 7.
[75] Stucke, M. (2009). Does the Rule of Reason Violate the Rule of Law? *UC Davis Law Review*, *42*(5).

presumptions allow enforcement agencies to dispense with this analysis; rulemaking allows enforcers to take a broader view about the general effects of a practice, and after an error cost analysis, decide whether a conduct's anticompetitive effects outweigh its efficiency benefits.

Presumptions of illegality are thus progressively being re-established in competition law. To guard against the legitimate risks of Type I errors, enforcers should use presumptions carefully. First, they should ensure that the economic evidence overwhelmingly shows that a practice consistently creates anticompetitive effects, or when enforcement experience suggests this is the case. The quality of these rules is determined, in large part, by the strength of the economic evidence put forward by the agency before a notice of proposed rulemaking of a designation under 19a. To preserve the legitimacy of these presumptions, agencies should steer clear of practices whose effects are either little-know or mixed. On these criteria, one could argue that 19a's presumption of anticompetitiveness for self-preferencing[76] by designated platforms as a suboptimal use of this power[77], and the §5 rulemaking against non-competes as a more appropriate one[78]. Agency discretion in enforcement is inevitable, and establishing guardrails is critical to maintaining the integrity of these hybrid regimes and reviving the role of rebuttable presumptions in competition law.

In sum, hybrid regimes employ presumptions of anticompetitiveness and bright-line rules to tilt their error cost frameworks towards erring on the side of over-enforcement. This suggests that the "new competition law" is trending towards this direction, to give enforcers an increased ability to police anticompetitive behaviour and roll back the more economic approach's narrowing of the by object category.

3.3 Remedies, above and beyond

The main challenge of activating a new proactive enforcement paradigm in competition law has been implementing the proactive complex remedies to match. This is especially true in digital markets enforcement, where competition authorities have sought to implement increasingly ambitious remedies, including ones that compel firms to alter the design of their

[76] Wright, J., & Manne, G. (2012). If Search Neutrality Is the Answer, What's the Question? *Columbia Business Law Review*, *2012*(1), 151–239.
[77] Ibáñez Colomo, P. (2020). Self-Preferencing: Yet Another Epithet in Need of Limiting Principles. *World Competition*, *43*(4).
[78] "The notion that non-competes are socially harmful, and harmful to labour markets in particular, is not a new-fangled academic conceit but a bedrock commitment of the common law that reaches back centuries", from: Posner (2018), 199.

products[79]. The Special Advisers Report, for instance, calls for the imposition of "restorative remedies"[80], which would seek to re-instate the market conditions that existed or would have existed prior to the infringement. Restorative remedies help offset the competitive advantage the incumbent firm gained during the period of the infringement. The necessity for proactive remedies has been underlined by the recent debate over the effectiveness of fines, which scholars have argued fails as both deterrent and as restitution[81].

The Commission, under Article 7 of Regulation no. 1/2003, has the authority to impose structural or behavioural remedies so long as they are proportionate to, and effective at ending, the infringement. But enforcement experience demonstrates the challenges associated with proactive behavioural or structural remedies. Proactive remedies require active monitoring, may require intrusion into product design, and run the risk of creating unintended consequences; they require caution. Hence, even the Special Advisers Report concluded that imposing these types of remedies "might be difficult for a competition authority to handle"[82].

The paradigmatic example of this challenge is the aftermath of *Google Shopping*, in which the Commission found that Google favouring its Shopping affiliate in Search amounted to "self-preferencing", which it designated as a new, standalone theory of harm under Article 102 TFEU. The Commission ordered Google Search to treat its shopping rivals "no less fairly"[83] than it treats Google Shopping. The remedy is largely considered a failure[84], – the drawback of a principled-based remedy is that measuring whether compliance is occurring is a matter of interpretation, which has generated legal uncertainty, undermining the purpose of the Commission's enforcement[85].

Hybrid regimes offer authorities a way out of the proactive remedy impasse by creating *ex ante* enforcement regimes. This also allows authorities to avoid having to find a means by which to "restore" market competition to pre-infringement levels. Ex ante rules are easier to enforce, because they can be self-executing, unlike principles-based remedies, which require expensive

[79] Google Search (Shopping) (Case AT.39740) European Commission Decision of 27 June 2017.
[80] Special Adviser's Report (2019), 68.
[81] Veljanovski, C. (2022). The Effectiveness of European Antitrust Fines. In T. Tóth (Ed.), *The Cambridge Handbook of Competition Law Sanctions*, pp. 54–85.
[82] Special Adviser's Report (2019), 66.
[83] Google Shopping, 698.
[84] Waldersee, F. Y. C. V. (2019, November 7). EU's Vestager says Google's antitrust proposal not helping shopping rivals. *U.S.* https://www.reuters.com/article/us-eu-alphabet-antitrust-idUSKBN1XH2I8
[85] Ibáñez Colomo, P. (2020c), 28.

and lengthy monitoring structures. Through 19a, agencies can avoid the complicated questions raised by implementation that the Commission faced in *Google Shopping*.

New Platform Regulations' prohibitions still leave some complicated implementation questions unanswered[86] – if a behavioural remedy suffices, then the question of what terms are "non-discriminatory", who gets to set them, and whether this fundamentally changes the platform's business model, all present their own unique challenges. Otherwise, mandating a structural remedy is usually something competition authorities avoid from experience, and presents its own drawbacks. When 19a forbids a platform from engaging in self-preferencing, the platform may have to redesign its product, or the competition authority may have to intervene to decide what constitutes "non-discriminatory" terms.

When more complicated remedies are required after an ex post evaluation, hybrid tools enable competition authorities to avoid overstepping their expertise and coordinate with the regulator most competent at implementing the required remedies. This is the major advantage of the market inquiry, which offers flexibility to devise a tailored remedy using a larger toolbox, while also preserving the possibility of traditional enforcement. Nevertheless, this power faces two caveats: first, these remedies are static – they are enacted at the end of the inquiry, and there is no formal mechanism to updated them as the market realities change[87]. Second, when inquiries issue recommendations, they are dependent on regulatory coordination, which, as explored in the context of South Africa's Banking Inquiry, can imperil the effective implementation of these remedies. Regardless, the flexibility of the remedy options available to hybrid regimes is a major advantage of hybrid regimes, and is a direct response to the challenges of implementing complex remedies.

Moreover, they allow authorities to remedy systemic barriers to competition not linked to firm behaviour or conduct that is technically challenging to reach under competition law, that impede well-functioning markets. This is the advantage of rulemaking: the difficulties of litigating the effects of non-competes discussed above can be bypassed through rulemaking if the FTC find enough evidence to suggest that they are on balance anticompetitive. Market studies also allow authorities to remedy competition without the gateways of an agreement or conduct, which, as this article has argued, is an important component of hybrid regimes.

[86]Ibáñez Colomo, P. (2020c), 26-31.
[87] Furman Report (2019), 79.

In sum, these hybrid regimes have devised new methods of devising remedies that avoid competition law's impasse with the administration of proactive remedies. This part of the hybrid regime's structure is the most "regulatory" – not only are hybrid regimes going beyond remedying firm conduct, they remedy market features. It signals a growing recognition of the importance of matching the theory of harm to the remedy – if hybrid regimes are adopting theories of harm that go beyond competition law, it might be inevitable to devise remedies that also do so. It portends a future for remedies with more regulatory coordination, and that moves away from ex post remedy implementation to a set of binding ex ante rules forms must comply.

Conclusion

In conclusion, competition-regulation hybrids are at the epicentre of competition law's ongoing transformations. By providing a forum for infusing regulatory values into competition law, hybrids offer clear previews of the future of market supervision and the role of competition law therein. Already, competition law is being shaped through its continuous interactions with hybrids, creating new toolboxes and perspectives for competition authorities as they seek to embark on a new era of proactive enforcement in markets, both new (digital, labour) and well-known. This article argued that three of competition law's structuring principles are challenged by these regimes: the error cost framework, the progressive curtailment of per se rules, and the administration of proactive remedies. Authorities are resorting to hybrid tools because of the challenge of changing these principles in the traditional enforcement process.

Competition law enforcement is not just undergoing a change of principles; its transformation is also institutional. A consistent theme of these hybridised tools is the augmented power they bestow upon competition authorities. These new powers ostensibly license them to, rather than simply policing anticompetitive conduct or agreements, play a more proactive role in structuring markets, raising the spectre of more intrusive state intervention, especially because hybrid regimes' pursuit of plural values. Proponents of these tools argue this new capacity is necessary to "rebalance the power between the competition watchdog and powerful firms"[88]. But the amount of discretion[89] with which hybrid tools are administered has

[88] Franck, J.-U., & Peitz, M. (2021, February 22). *Taming Big Tech: What Can We Expect from Germany's New Antitrust Tool?* Oxford Law Blogs. https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/02/taming-big-tech-what-can-we-expect-germanys-new-antitrust-tool

[89] In this vein, 19a is the most far-reaching: the Bundeskartellamt can choose which firms to designate as platforms, and which platforms to enforce certain of its provisions against.

raised rule of law concerns. This creates the potential for inconsistent enforcement, generating legal uncertainty that could chill the incentives to create efficiencies.

The most pressing concern is perhaps normative. This article has argued that our three hybrid regimes represent, in their own ways, different means of stripping competition law of its constraints. They unbind competition law from its jurisdictional guardrails (addressing competition issues beyond agreements and conduct), its limiting mandate (the pursuit of economic efficiency), and its traditionally modest remedy toolkit. In this sense, this raises the spectre of "hybrid powers (being) used primarily to circumvent the limitations of competition law *per se*"[90], not just for more effective or proactive enforcement, but to defy the logic of these very constraints.

But competition law's constraints exist by design. They were constituted through decades of enforcement experience and grounded in economic reasoning. They ensure legal certainty, preventing enforcers from the types of arbitrary intervention that may dissuade the long-term dynamic competitive process. These guardrails secure the development of dynamic efficiency, to preserve the freedom to compete and the incentives it creates. Whether agencies administering these hybrid tools – and contemplating competition law reform in that direction – can deploy these powers in service of competition with the discipline, rigor, and restraint required to secure their legitimacy is undoubtedly their most daunting challenge.

[90] Dunne (2014), 234.

The ‘gatekeeper’ scope of the Digital Markets Act: An analysis of its soundness and compatibility of ‘dominant position’ in the competition law

Lyuxing Tao

Introduction

The growth of digital markets is changing the global economy and people's lifestyles at breakneck speed. The ensuing rise in digital products and services has enabled many big internet platform undertakings to reach users across the European Union (EU) and benefit them by facilitating cross-border trade and opening up new business opportunities.[1] However, a small number of online platforms have developed a near-monopolistic competitive advantage over businesses and end-users by virtue of their sheer volume and services, as well as their powerful user connectivity, achieving control over the entire platform ecosystem in the digital economy.[2] To address this issue, the European Commission (EC) officially enacted the Digital Market Act (DMA) on 12 October 2022, with the DMA's scope of control being 'core platform services' (CPS) and the trigger being 'gatekeeper' status.

The designation of a company as a ‘gatekeeper’ depends on both qualitative and quantitative criteria. A crucial indicator is that of ‘size’, established in sections 3(1)(a) and 3(2)(a) of the DMA.[3] And undertakings are recognised as 'gatekeepers' precisely as they are the ones that the DMA seeks to target as 'big' undertakings of significant size. But 'big' in terms of size is a vague concept. In traditional EU competition law, the size of an undertaking that needs to be regulated is explained as ‘being in a dominant position’[4]. The DMA, however, identifies both dominant and non-dominant undertakings as gatekeepers.[5]

To explore this difference, the first part of this article will discuss the relationship between the DMA and competition by comparing competition law theories with the concept of gatekeepers in past jurisprudence and EU provisions. This part of the discussion will aim to

[1] Council Regulation (EC) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1, Recital 1 (Digital Markets Act)
[2] ibid, Recital 3.
[3] ibid., Article 3(1), 3(2).
[4] Treaty on the Functioning of the European Union [2012] OJ C326/47,Article 102 (TFEU).
[5] European Commission, Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, 15.

explain the relationship between gatekeepers and dominance, as well as the rationale for the 'big' scope of gatekeepers. The second part will examine in detail the qualitative and quantitative provisions used to determine the size of gatekeepers, and critically analyse the weaknesses of such provisions to offer suggestions for the improvement of the DMA.

1. Big is bad: the stranglehold on the 'winners' of digital competition

The DMA defines the 'gatekeepers' as large online platforms, and their critics cite that these platforms are based on 'extreme scale economies',[6] and have 'considerable economic power'[7]. In effect, these large platforms have a 'significant impact'[8] on digital markets, and the DMA text echoes these criticisms, in considering these 'gatekeepers' to have a negative impact due to being too big.

Of course, size is relative, yet the DMA details 'big' within the context of today's thriving digital economy as being of a size that can benefit from factors such as 'network effects' and the 'data economy'.[9] The concern is that 'big' platforms are developing their influence on end users and businesses in the EU internal market, thus becoming increasingly important to the digital economy, and holding ever more gateways.[10] However, existing competition laws have limitations and hysteresis, and are therefore not sufficient to address challenges arising from the growing impact of large online platforms.[11] Existing competition laws are limited to governing firms that abuse dominant positions or anti-competitive practices in a given market. Nonetheless, in a digital market, similar practices may cause harm to consumers, yet do not constitute abuse of a firm's position. These are more in line with being a result of the internet's 'winner-takes-all' economy.[12] In this realm, aspects such as 'network effects' and 'user data' form effective barriers to keep competitors out of the race, impacting consumers by reducing the competition and therefore the range of better-quality services and goods available.[13]

A further limitation of conventional competition law is that it is enforced after the fact once an instance of abuse of dominance has already occurred. The relevant enforcement agencies

[6] DMA (n 1), Recital 2.
[7] ibid, Recital 3.
[8] ibid, Recital 6.
[9] ibid, recital 2.
[10] ibid recital 1-7.
[11] DMA(n 1), recital 5.
[12] Commission (EC) 'Staff Working Document Impact Assessment Report: Accompanying the document Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' SWD (2020) 363 final, ½, para 92.
[13] ibid,. 24.

must first conduct extensive investigations into complex factual issues on a case-by-case basis. Such investigations can have prohibitive costs and must contend with time barriers, making it difficult to hand out penalties in the form of fines.[14] Given this context, the legislator of the DMA proposes the concept of 'gatekeeper'; this is a different variant of the established concept of 'dominance', and provides a way to target the problematic large platforms. So far, this does not seem to be a convincing strategy.

Before the inception of the EU's DMA, the member states of the EU as well as the UK applied a regulatory system to tackle large undertakings that occupy an extremely influential position in the market. These competition law statutes are represented by Article 102 of The Treaty on the Functioning of the European Union (TFEU)[15] and Section 19a of the German Competition Act (GWB)[16]. These prohibit the abuse of having a dominant position and regulate dominant undertakings. In both legislations, the key focus is dominance as the basis for strong competition law regulation and the subsequent sanctions for such undertakings.

In contrast, the DMA has a more negative determination of what constitutes dominance.[17] Its definition of 'big' regarding 'gatekeepers' is questionable in relation to the strength of the regulation it receives. Looking closely at the DMA's individual articles, there are acute flaws in the qualitative and quantitative criteria for determining 'gatekeepers', and these do not achieve the legislator's intended objectivity.[18] The question arises of whether 'gatekeepers' are indeed 'bad' enough to warrant the high degree of supervision and sanctions that is set in DMA, particularly if these 'gatekeepers' do not fully fit the definition of 'big', as laid out in concept and in the articles.

1.1 The problem of determining dominance behind the 'gatekeeper'

1.1.1 The relationship between DMA and competition law

As noted in the introduction, the EU and Member States previously used competition law to restrict large internet platforms. The DMA was enacted after it was concluded that

[14] Nicolas Petit, '*The Proposed Digital Markets Act (DMA): A Legal and Policy Review*' (2021) 12, JECLAP, 531.
[15] TFEU, Article 102.
[16] Gesetz Gegen Wettbewerbsbeschränkungen (GWB), Article 19(a).
[17] DMA (n 1), recital 5.
[18] Aurelien Portuese, '*The Digital Markets Act: European Precautionary Antitrust'*, Information Technology & Innovation Foundation, May 24, 2021.

competition law alone was not an effective solution.[19] Margrethe Vestager, has stated that 'the DMA is not a competition law instrument'.[20] The DMA explicitly reflects this approach; in fact, the EC has indicated that, the DMA is intended to protect different legal interests from those protected by competition law. What makes the DMA stand out is that it anticipates platform practices through ex ante regulation.[21] An opposing approach to regulation in comparison to competition law, the DMA is in line with Vestager's view. However, evidence shows that this view of the DMA is not the consensus.

The first indicator of this is in the DMA itself, stating that it is intended to complement competition law enforcement[22]: 'The objectives of this Regulation are complementary to those pursued in competition law'.[23] Yet, it is not as distinct as the EC would like.[24]

A further point of similarity to the conventional European competition law is that the DMA contains more prohibitions on platforms.[25] Petit (2021) maintains that the DMA regulations serve only to regulate and stipulate the terms and conditions that large undertakings impose on users. [26] In fact, the DMA has similar objectives to competition law, in that it aims to preserve the contestability and consumer rights.[27] Since the DMA is designed to regulate the digital market, Petit argues that it actually constitutes a sector-specific competition law.[28]

Further, Colangelo (2022) agrees that the DMA mimics the character of competition law: its content is informed by past cases involving antitrust investigations.[29] In fact, the clause of DMA on obligation transforms those cited in existing competition law. The DMA has made these automatically apply *ex ante*. Colangelo points out that the DMA does not pursue unique objectives, and neither does it protect specific legitimate interests.[30] Thus, by its nature, it remains firmly within the realm of competition law.[31] Given these arguments, there is a sound

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[19] *See* Pinar Akman, '*Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act'* (2022) 47 ELR,. 86; DMA(n 1), Recital 5.
[20] *See* Speech by Margrethe Vestager, '*Competition in a digital age*', 17 March 2021.
[21] DMA (n 1), 88.
[22]ibid(n 1), Recital 10.
[23] ibid (n 1), Recital 11.
[24] ibid (n 1), 86.
[25] ibid (n 1), Article 5-6.
[26] ibid (n 14), 531.
[27] ibid, . 531-532.
[28] ibid.
[29] Giuseppe Colangelo, '*The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*' (2022) White Paper, . 52.
[30] ibid.
[31] ibid.

foundation to discuss the connotations of the DMA and the theory behind its provisions within the boundaries of the EU's competition law.

1.1.2 Confusion over the expansion of the 'gatekeeper' connotation

A key difference between the DMA and competition law is in the term 'gatekeeper'. For DMA regulation, this is a trigger for penalties, whereas in the case of competition law, investigations are only carried out once an undertaking has abused its dominant position. For the enforcement of competition law, this dominance is a key factor. DMA does not require the 'gatekeeper' to hold a dominant position in the digital market. 'It should be noted that a gatekeeper may not necessarily be dominant within the meaning of Article 102 TFEU.'[32] On the contrary, the DMA's text deliberately obfuscates this point by using the vague phrasing 'significant impact'[33]. Thus, the scope of the concept of 'gatekeeper' has expanded in comparison to its definition in traditional competition law.

Here, confusion arises from the resulting conflict in definitions between that of the DMA and the EC.[34] This is evident from Articles 5 and 6 of the DMA, where obligations are prescribed for 'gatekeepers'. The EC's Working Report agrees with the academic consensus that obligations of 'gatekeepers' are derived from competition law cases.[35]

Judgements made in these cases are all based on the competition law definition that the undertakings in question had abused their 'dominant position', in accordance with Article 102 TFEU.[36] Significantly, the DMA designation of 'gatekeeper' breaks with these past and ongoing litigations, centred on the conclusion that the targeted businesses are dominant in their respective relevant markets. A problem arises here: Applying the DMA, undertakings that do not hold a dominant position within the scope of the term 'gatekeeper' are still subject to the obligations of dominant undertakings, as decreed by traditional competition law.

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[32] Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, . 15.
[33] DMA(n 1), Article 3(1)(a).
[34] DMA (n 19).
[35] DMA (n 12), pp. 53-61; DMA Article 5(2) and Bundeskartellamt, Facebook, 6th Div. Dec., B6-22/16; DMA Article 5(4) and Case COMP/AT.40437; DMA Article 5(9) and Cases COMP/AT. 40670; DMA Article 5 (8) and Case COMP/AT.40099; DMA Article 6(12) and Case COMP/AT.40716; DMA Article 6(2) and Case COMP/At.40462.
[36] European Commission, Microsoft Corp Case COMP/C-3/27.792 Microsoft, November 10, 2005, para 9; European Commission, Google Android Case COMP/AT.40099, para 37.

Portuese (2021) points out that, at the EU level, the EC's objective has led to the practices of undertakings being sanctioned or regulated even though they are deemed non-dominant under Article 102 TFEU. This Article and the DMA both agree that these undertakings are still liable, regardless of whether they are dominant.[37] Hence, the DMA's expansion of the 'gatekeeper' connotation will create great legal uncertainty for many small and medium-sized enterprises (SMEs) that are, in fact, non-dominant undertakings, but which may fit the DMA's 'gatekeeper' definition.[38]

To fully investigate whether the expansion of this concept is based on sound rationale, this article argues that the theory behind competition law must first be analysed, alongside the jurisprudence affecting the DMA.

1.1.3 Special responsibility

Initially, the aim of EU competition law was to aid the formation and effective functioning of the internal market, as well as gradually developing jurisprudence that would restrict the freedom of action of dominant undertakings. The latter was considered to have the 'special responsibility' of not harming the competitive process.[39]

In the realm of competition law, the doctrine of 'special responsibility' can be traced back to the 1983 judgement made in the case of *Michelin v. Commission*. This case held that 'a finding that an undertaking is dominant is not in itself a recrimination, but simply means that the undertakings concerned have a special responsibility not to allow their conduct to impair genuine undistorted competition in the Common Market.'[40] Essentially, an undertaking with market power has the special responsibility of being aware of the anti-competitive effects its unilateral commercial practices wield.[41] In digital markets, this obligation has been further extended in the form of a 'duty of care' held by dominant undertakings.[42] For the benefit of jurisprudence, there is strong burden of proof rules that dominant undertakings must abide by;

[37] *Supra* (n 18).
[38] ibid.
[39] Ioannis Lianos, '*Competition Law as a Form of Social Regulation*' (2020) 65, The Antitrust Bulletin, . 17.
[40] C-322/81 *Nederlandsche Banden-Industrie Michelin v Commission* ECLI:EU:C:1983:313, para 57.
[41] Konstantinos Stylianou, '*The Tragedy of the Successful Firm*'(2018) 1 Antitrust Chronicle, . 4-5.
[42] Wolf Sauter, 'A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law' (2019) 8, *Journal of Antitrust Enforcement,* . 415-416.

these are stricter and heavier than for non-dominant undertakings that shift to dominant undertakings once anti-competitive effects are inferred.[43]

Again, as in competition law, the DMA, too, is concerned with the core services owned by 'gatekeepers' if they have a significant impact on business and end-users. As part of their special responsibilities, 'gatekeepers' must be proactive in their cooperation with the Commission's scrutiny.[44] Regarding the so-called 'duty of care', critics point out that such positive steps is more akin to regulatory intervention rather than intervention under competition regulations.[45] The DMA regulations are in line with this concept of 'duty of care', particularly in the prohibitions of self-favouritism, and of data misuse.[46] It is evident that the concept of 'special responsibility' is closely interlinked to the broader scope of 'gatekeepers' in the DMA, forming the basis for the obligations held by gatekeepers.

Under the DMA, 'special responsibility' does not mean being exempt from other investigations and regulations that usually apply to digital markets. The *Furman Report* offers an instance where expert modifications to existing competition regulations are based on the undertakings having affirmed 'special responsibilities'.[47] Furthermore, a report by the UK Competition and Markets Authority (CMA) also outlines a perspective in line with a 'duty of care' within its discussion of *Google* and *Facebook*'s anti-competitive practices against their competitors.[48] Of course, regarding 'special responsibilities', these reports target undertakings that are dominant in the market, as opposed to 'gatekeepers', which also have 'special responsibilities'. What causes confusion here is the fact that the term 'gatekeeper' is not limited to dominant undertakings.

As noted in Section 2.1.2, most of the DMA's obligations and penalties are derived from established case law and traditional competition law. As established cases in digital markets applied 'special responsibility' to find an inference of consumer harm from the fact that competitors have been excluded.[49] Then there may be a requirement for non-dominant undertakings to be subject to the same degree of regulatory and penalisation that dominant

[43] Case T-201/04, *Microsoft Corp. v Commission,* para 1096.
[44] DMA (n 1), Article 11.
[45] Peter Alexiadis and Alexandre de Streel, '*Designing an EU Intervention Standard for Digital Platforms*', EUI Working Paper, . 3.
[46] ibid., . 3-4.
[47] Furman Report, . 6.
[48] CMA, Online platforms and digital advertising, Market study final report, 1 July,2020.
[49] DMA (n 39), . 17-18.

undertakings are subject to. This conflicts with the premise that the DMA requires that Article 102 TFEU not be breached (Article 102 is directed only at undertakings abusing their dominant position).

Based solely on the above argument, it seems to lead to the conclusion that ‘gatekeepers’ should not include non-dominant undertakings. Nevertheless, as 'special responsibility' is a broadly defined doctrine, as in The EU Regulation on platform-to-business relations (P2B Regulation), although it also applies the 'special responsibility' positive steps to protect customers from discriminatory and non-transparent practices by undertakings,[50] there is no explicit test for undertakings to differentiate between dominance and non-dominance. Given this tangled web of definitions, it is crucial to fully understand the relationship between 'gatekeepers' and 'special responsibility' with reference to the concepts of 'essential facility' and 'super-dominance', which are outlined in the following sections.

1.1.4 Essential facility

Nigh on synonymous with the term ‘bottleneck’ in EU competition law, ‘essential facility’ refers to a point of congestion within a market.[51] It would harm consumers, affecting the contestability of a market by imposing a 'refusal to deal or supply' requirement on consumers.[52] In an effort to reduce the likelihood of a 'winner-take-all' situation, ‘essential facility’ is widely applied when regulating dominant undertakings. In the EU, this is most relevant to physical network industries (e.g., telecommunications) and is tied to market configuration. Thus, the market’s end-users are single-attributed, while the business users are multi-attributed; business users are then forced to go with undertakings responsible for the 'essential facility', creating a barrier.[53] Within the European electronic communications code[54], a focus on this type of barrier is vital for the 'significant market power undertaking' test. Market conflicts that arise from such platform undertakings are therefore the inspiration for the designation of 'gatekeeper'.[55]

Previous case law has interpreted 'essential facilities' in the broadest scope of application currently afforded to it. In *Microsoft v. Commission case*, applying the *Bronner* ruling regarding

[50] Regulation (EU) 2019/1150, Article 4.
[51] DMA(n 45), . 4.
[52] Inge Graef, ‘*Rethinking the Essential Facilities Doctrine for the EU Digital Economy*’ (2019) TILEC Discussion Paper, . 2.
[53] Pierre Larouche, ‘*Competition Law and Regulation in European Telecommunications’,* (Hart) 2000, . 111-113.
[54] Directive (EU) 2018/1972 establishing the European Electonics Communications Code OJ L321/36, Article 67.
[55] *Supra* (n 12), . 47.

'indispensability'[56], the court held that Microsoft's licence was not 'without substitution'. However, Microsoft's refusal to licence the interoperability information could potentially eliminate all effective marketplace competition, thereby restricting the development of 'new products'.[57] Article 102(b) TFEU led to the decision that Microsoft constituted a dominant firm, which could cause harm to consumers 'where it restricts not only production or markets, but also technological development'.[58] Ultimately, Microsoft was held to be an undertaking in a position of 'overwhelming dominance' (i.e., 'super-dominance'). It therefore had to uphold its 'special responsibility' to a greater extent than other undertakings. The Commission compelled Microsoft to allow 'essential facility', to open its interfaces and licence interoperability to other parties.[59]

'Essential facility' provides a crucial aspect of regulating operators of digital platforms in the digital marketplace.[60] This is especially relevant for the regulation of search engines and tools for ranking data sets as development services.[61] First-mover undertakings tend to have vast data holdings alongside their digital market share, and there may often be user inertia to change platforms. In such circumstances, platforms can abuse their dominance via anti-competitive strategies and profiteering. Such 'gatekeepers' can impose conditions on downstream undertakings, or even refuse to trade or licence.[62]

The case of *Google and Alphabet v. Commission* exemplifies this. Google demanded of Android device manufacturers to pre-install Google's search application and browser, *Chrome*. This had the effect of securing Google's dominant position in online searches.[63] The Commission recognised this behaviour as a form of tying.[64] Usually, tying is determined when consumers must purchase a tying product in order to get another product. In this case, however, Google benefitted from downstream undertakings that would not have been able to obtain a licence without this tying deal.[65] The Commission determined that Google's behaviour not only harms consumers, but also restricts the development of the Android phone market through the

[56] Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitung*, para 43-46.
[57] Case T-201/04 *Microsoft Corp. v Commission*, para 563.
[58] ibid, para 647.
[59] Case COMP/C-3/37.792 - *Microsoft*, 24 March 2004, para 8.
[60] Scott Morton, F (Chair) (2019), *Report of the Committee for the Study of Digital Platforms,* . 84.
[61] Marina Lao, '*Search, Essential Facilities, and the Antitrust Duty to Deal*' (2013) 11 Northwestern Journal of Technology and Intellectual Property, . 272-319.
[62] *Supra* (n 45), 8.
[63] *Google Android* (Case AT.40099) Commission Decision (2003/1/EC) [2018] OJ C402/19.
[64] *Supra* (n 52), 28.
[65] *Microsoft – Tying* (Case AT.39530) Commission Decision (2003/1/EC) [2013] OJ C36/7

conditions it imposes.[66], embodied in its conduct of not granting licences to downstream handset manufacturers, rather than just tying that affects consumers. While 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations'[67] may also apply in this type of tying behaviour involving consumers, it does not provide relief from the harms that may limit the development of the Android phone market. If refusal to deal is an 'essential facility', then the penalties that were only for tying will also become more severe. The Commission acknowledged that 'Google's licence conditions make it impossible for manufacturers to pre-install certain applications but not others.'[68] Given this statement, academics posit that this is closer to the result of compensation based on 'essential facility'.[69]

The *Google (Android)* is widely considered to form the basis for Article 5(8) of the DMA.[70] This article is considered a provision relating to the prohibition of tying. [71] As stated above, this case is not an ordinary tying case. However, the EC did not opt for the stricter 'essential facility' theory to impose a speedy and effective penalty on Google. The EC still considered its behaviour to be tying and argued that Google's practices reduce both the incentives for manufacturers to pre-install competing search and browser apps, and for users to download such apps.[72] Google announced after the case, at the request of the court, that it would provide Android users in Europe with a choice screen where end users could select alternative browsers and carriers.[73] However, this approach only addresses the latter effect of the Commission's view, as the latter effect in fact satisfies the consumer harm caused by the 'tying' behaviour. The former effect, on the other hand, is closer to 'essential facility' and cannot be addressed by such an act against ordinary 'tying'. It can be seen that although the Commission is penalising Google for 'tying behaviour', there is more to the views expressed than just the belief that Google only has tying. It still concerns Android being monopolised as an 'essential facility'.

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[66] TFEU, Article 102(b).
[67] TFEU, Article 102(d).
[68] Press release European Commission, '*Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*', 18 July 2018. <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581>
[69] Pinar Akman, '*A Preliminary Assessment of the European Commission's Google Android Decision*' (2018), Competition Policy International Antitrust Chronicle, . 7.
[70] *Supra* (n 19), . 95.
[71] *Supra* (n 1), Article 5(8).
[72] *Supra* (n 68).
[73] Statement by Commissioner Vestager on Commission decision to fine Google €1.49 billion for abusive practices in online advertising, 20 March 2019.

The case sheds a light on the difficulties caused by the DMA's overly broad concept of 'gatekeeper'. If the Google case were to inform the DMA, future judgements would inevitably bypass the stricter requirements for 'essential facilities' by extending the scope of other conduct. Not only would this impact the internal consistency in the application of the law, but undertakings not dominant amongst 'gatekeepers' would still be subject to the same degree of regulation as 'super-dominant' undertakings.[74] Given the controversy around what undertakings have 'special responsibilities', as outlined in Section 2.1.3, the equally vague category of 'gatekeepers' may cause a divergence of views between the EU and its member states, which could trigger an increase in the number of appeal cases. This is contrary to the DMA's objective of avoiding fragmentation.[75]

Of course, the Commission's scope for the concept of 'gatekeeper' covers more than just dominant undertakings, yet a review of surveys and studies conducted by the Commission while formulating the DMA has shown that the relationship between 'gatekeepers' and dominant undertakings is still unclear, both to the Commission itself, as well as the National Competition Authorities (NCAs).

1.1.5 'Big' is relative for a 'gatekeeper' according to the EU documents

An in-depth examination of all DMA-related documents leads to confusion, as the Commission's definition of the scope of 'gatekeeper' is not exclusive to the final version. The Commission's survey first determined that 'gatekeepers' include non-dominant undertakings. Moreover, the NCAs' impact assessments regarding new competition tools relay the general view amongst authorities that gatekeeper situations can also arise in non-digital markets.[76] This is most often in relation to 'essential facility', which are linked to dominant undertakings (see Section 2.1.4). A further Commission report acknowledges that several of these NCAs had a particular stance on gatekeepers: these should be considered as having market power, and are therefore in a dominant position.[77] Moreover, within that same document, the Commission considers the main structural competition problems posed by a 'gatekeeper' to be 'vertical integration and the acquisition of competitors by dominant undertakings'.[78] The evidence

[74] *Supra* (n 18).
[75] *Supra* (n 1), Recital 7.
[76] Summary of the contributions of the National Competition Authorities to the impact assessment of the new competition tool, . 7.
[77] *Supra* (n 5), . 15.
[78] ibid, . 16.

suggests that the Commission used dominant undertakings as the basis for its definition of 'gatekeeper'.

In addition, the draft report on the DMA, prepared by the Committee on Internal Market and Consumer Protection (IMCO) and the Legal Affairs Committee (JURI), concludes that 'dominant platforms have gained significant market power, leading to a 'winner-takes-all' situation.'[79] The IMCO maintains that SMEs need to be taken seriously to avoid anti-competitive behaviour by large platforms.[80] When the two drafts are read together, it is evident that large platforms are held to the standard of being dominant.

There is a grey area here, where the Commission's standard for 'gatekeeper' is torn between large platforms with market power and dominant platforms. The former is a legal concept that has not been clearly settled, while the latter has been tested and matured over the decades. In this light, the DMA is simply a tool for the Commission to bypass the competition law test. Wielding the DMA means that it can directly subject undertakings of its choosing to competition law level sanctions. The expansion of definitions for 'big' of 'gatekeeper' has serious implications for growing platforms that are not considered 'big' under established case law.

2. Qualitative and quantitative criteria on the scope of 'gatekeeper'

Article 3 of the DMA outlines the criteria for 'gatekeeper', which is divided into qualitative and quantitative parts. When defining the Article 3 criteria on the scope and definition of 'gatekeepers', the Commission decided against using a single static quantitative option and a fully dynamic qualitative option. Instead, the final Article features a semi-dynamic and low-threshold combination of quantitative and qualitative criteria.[81] The benefit of this approach is that the Article avoids the ambiguity and uncertainty that the use of only qualitative criteria would have had, as well as the limitations of solely using quantitative criteria.[82] Moreover, the criteria cover a larger scope than that established by traditional competition law, and are intended to more effectively regulate internet platform undertakings within the EU's internal market.[83]

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[79] *Supra* (n 1), para 1.1.10.
[80] Draft opinion - PE653.798, IMCO/9/03325.
[81] *Supra* (n 12), . 64-65.
[82] Heike Schweitzer, '*The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*' (2021) 3 ZEuP, . 19.
[83] *Supra* (n 14), 536.

However, some scholars believe that Article 3's criteria are too loose.[84] In fact, the DMA does not directly explain or clarify the concepts used in the qualitative criteria.[85] In addition, the quantitative thresholds are not of sufficient 'objectivity', regarding their scope and economic dependence indicators. Even when combined with the qualitative criteria, the Commission still retains too much discretion.[86] This article contends that the scope of 'gatekeeper' is too 'big' and imperfect; thus, the scope outlined by the criteria is discussed in further detail in the following section.

2.1 Qualitative criteria

The DMA is not alone in its use of subjective qualitative criteria to determine which platforms require regulation. Other nations and regulatory bodies apply similar definitions for platforms. For example, these are defined as a 'significant and durable market power' (US House of Representatives Majority Staff Report), or a 'substantial market power' (Australian Commodity Exchange Commission Report), 'strategic market status' (The Furman Report),[87] 'position of strategic significance' (United Kingdom Digital Markets, Competition and Consumers Bill)[88], and 'firms that are quite active in the market' (Germany's GWB).[89]

Usually, qualitative criteria are paired with quantitative criteria to mitigate their subjective pitfalls. The following section presents an investigation of the reasonability analysis, along with a discussion regarding the lacking definition for the concept of 'significant impact on the internal market'.

2.1.1 Ignorance of cross-platform activities and ecosystem

The majority of the qualitative criteria mentioned at the beginning of this section only exist in the form of reports, not resulting in draft legislation. Thus, to facilitate a true comparative discussion, this section focuses on the Digital Markets, Competition and Consumers Bill (currently in the final stages), and Germany's GWB (currently being applied). Both Acts contain qualitative criteria that determine the 'scope' of a regulated undertaking, yet these are not summarised neatly in a single, straightforward sentence. In fact, Section 6(1)(c) of the Digital

[84] Cani Fernández, '*A New Kid on the Block: How Will Competition Law Get along with the DMA?*' (2021) 12 Journal of European Competition Law & Practice, . 271.
[85] *Supra* (n 19), . 92.
[86] *Supra* (n 18).
[87] *Supra* (n 12), . 2.
[88] DMCC, Section 2(2)(b).
[89] GWB, Section 19(a).

Markets, Competition and Consumers Bill (Digital Markets Bill) states, 'the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities' and that this is an important condition for 'strategic significance'.[90]

Similarly, Section 19(a) of the GWB aims to prevent competition problems in digital markets. It states that dominance in one or more markets must be given special consideration when determining an undertaking's impact on market competition.[91] On this point, the two Acts differ: while the Digital Markets Bill prevents undertakings from applying their dominance from one area to another, the GWB widens the scope, also aiming to regulate the existing market power in more than one of an undertaking's markets.[92] Despite this difference, both Acts have the same purpose: to limit anti-competitive behaviour arising from excessive dominance by an enterprise on multiple platforms or in multiple activities. The most vital limitations aim to inhibit the shifting of an enterprise's platform dominance and prey on new users via strategies such as data user stickiness. In the GWB, this restriction on the form of competition arising from the dominant position of an undertaking is supplemented by section 20(3a). This article states an undertaking with a dominant market power that prevents the creation of network effects in favour of competitors is abusive conduct.[93] The legislators combined it with 19(a) to prevent digital platforms from using their market position and economic power in certain markets to strategically restrict competition in other markets. As with the DMA legislators, they are based on the same opinion that 'these undertakings do not necessarily already have dominant positions in all these markets'[94].

Scholars dub this type of competition 'platform envelopment', noting that 'through envelopment, a supplier in an originating market can enter a target market and combine its own functionality with that of the target market to form a multi-platform bundle that capitalises on shared user relationships.'[95] By doing so, enterprises capitalise on network effects in their previous market. This blocks their competitors in the target market from gaining a market share. Overall, this undermines the ecosystem of the platform-mediated network industry.

[90] DMCC, Section 6(1)(c).
[91] GWB, Section 19a(1)(1).
[92] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen,Drucksache 19/23492, .81-83.
[93] GWB, Section 20(3a).
[94] *Supra* (n 1), . 94.
[95] Daniele Condorelli and Jorge Padilla, '*Harnessing Platform Envelopment in the Digital World*' (December 14, 2019), . 10.

Correspondingly, the same effect occurs in digital markets when firms from different fields enter new fields.[96]

As demonstrated in the Digital Markets Bill and GWB, when States take into account what to consider appropriate market size for regulated undertakings, the main issue to prevent is a capability for 'platform envelopment' and significant market dominance across multiple platforms. Despite this, the qualitative criteria laid out in the DMA do not address these aspects, as noticed by the Franch-German-Netherlands government authorities. Its concerns are that 'While we welcome the combination of quantitative thresholds and qualitative criteria through market surveys, the proposed list of criteria does not cover the question of whether a platform provides an ecosystem of services. We recommend that this criterion be added, as it is a significant contributor to limited and unfair competition in digital markets.'[97]

This concern corroborates the view of this article, which purports that the DMA ignores the concept of platform envelopment, even though this factor has a major impact on multiple activities and platform ecosystems in the digital market. The DMA repeatedly emphasises gatekeepers' impact on the digital economy ecosystem.[98] However, this aspect is not given sufficient attention in the qualitative assessment. Moreover, this concern is not only supported by EU member states. In various expert discussions on the formulation of the DMA, numerous scholars have proposed the addition of the ability to coordinate ecosystems as a fourth criterion to define which undertakings can be classified as gatekeepers.[99] As evidenced by the cases discussed above, many undertakings achieve this goal through platform envelopment, which is widely regarded as an unfair competition strategy.[100] Therefore, regardless of whether one adopts a preventative perspective or sees the digital economy ecosystem as already compromised, cross-platform practices must be incorporated into the DMA's qualitative criteria due to their considerable impact on the ecosystem.

However, the issue of platform envelopment is not completely disregarded by the DMA. On the contrary, the obligations expressed in Articles 5 and 6 of the DMA expressly prohibit gatekeepers from engaging in platform envelopment. In this context, this practice is seen as the

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[96] Case T-612/17, *Google and Alphabet v. Commission* [2017] OJ C369/37

[97] Strengthening the Digital Markets Act and Its Enforcement, para 'The scope of the DMA'.
[98] *Supra* (n 1), Recital 3, 32.
[99] Alexandre de Streel and others, '*Making the Digital Markets Act More Resilient and Effective*' (May 26, 2021), 26.
[100] Case T-612/17; Case AT.40099.

distortion of competition through three key methods: tying, virtual tying, and self-preference.[101] Tying, which is provided for in Article 5(8), refers to an undertaking selling bundles of products or services from both their original and target platforms to overlapping customer groups rather than separately.[102] Virtual tying is discussed in Article 6(3) as instances wherein products or services of the original and target platforms are not sold together, but are equipped with indispensable complementary features that enable tying.[103] Lastly, self-preference, mentioned in Article 6(5), occurs when an undertaking changes the rules of the original platform while entering the target market with the aim of enhancing the sale of its products and services.[104] However, it is hereby argued that prohibiting this unfair market practice in the obligations is not enough to compensate for the absence of related concepts among the qualitative criteria. On the contrary, this inconsistency undermines the overall contestability of the DMA, as will be discussed in the following section.

2.1.2 Impact of 'platform envelopment' on the achievement of contestability and fairness

The purpose of the DMA is to protect the contestability and fairness of the digital market by regulating it.[105] In this Act, contestability is defined as the ability of non-dominant undertakings to overcome barriers to entry and expand to gain a userbase.[106] This, in turn, implies that non-dominant undertakings, which include both new entrants in the market and pre-existing SMEs, will be able to fairly compete with gatekeepers.[107] In the broader perspective of classical economics, contestability is regarded as the establishment of a cost of entry that is low enough to guarantee the non-discrimination of entrants.[108] This view is also reflected in the DMA, as well as in the belief of the EC that gatekeepers should reduce entry barriers in their markets to prevent the emergence of ineffective competition. This would also resolve other common structural problems; not only barriers to entry, but also prohibitive expansion and exit costs.[109]

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[101] *Supra* (n 1), 11-13.
[102] *Supra* (n 1), Article 5(8).
[103] *Supra* (n 1), Article 6(3).
[104] *Supra* (n 1), Article 6(5).
[105] *Supra* (n 1), Recital 7.
[106] Jacques Crémer and others, 'Fairness and Contestability in the Digital Markets Act' (2021) 3 Yale Tobin Center for Economic Policy Discussion, . 117.
[107] ibid, . 118.
[108] William J Baumol, '*Contestable Markets: An Uprising in the Theory of Industry Structure*' (1982) 72 American Economic Review, . 3-4.
[109] Thomas Tombal, 'Ensuring Contestability and Fairness in Digital Markets through Regulation: A Comparative Analysis of the EU, UK and US Approaches' (2022) 18 European Competition Journal, . 469.

As for fairness, the DMA describes it as granting commercial users the rewards they are due for their economic and social contribution, without limiting their ability to compete.[110] For the EC, achieving fairness in the digital market would mean to resolve the imbalance between commercial users' rights and obligations and the conditions and behaviours adopted by gatekeepers to keep other undertakings from accessing the benefits derived from their contributions.[111] In economics, efficiency can only be achieved if all undertakings receive a return equal in value to their contribution to welfare. By hindering these returns, gatekeepers can produce market inefficiencies, which may then undermine the proper functioning of the overall digital economy. Hence, gatekeepers must be disciplined to protect fairness and, in turn, promote efficiency.[112]

While both contestability and fairness contribute to the stability of digital markets, they address two different goals. On the one hand, contestability concerns structural aspects of the market and its inherent characteristics. Fairness, on the other hand, regards gatekeepers' behaviour and its consequences. Based on these two elements, the regulatory function exerted by the DMA possess a two-fold implementation logic. From the logic of contestability, this Act seeks to ensure that digital markets do not 'tip' the market scales and prevent the emergence of monopolies. From the logic of fairness, its goal is to regulate the behaviours of existing undertakings in the market to maintain efficiency.[113] In summary, the DMA is designed to protect the contestability of digital markets while combating unfair practices from their players.

A key consequence of platform envelopment in the market ecosystem is the reduction of its contestability. By using this strategy, dominant undertakings exploit their dominance in the original market to enter the target market more easily and quickly gain a dominant position within it. As such, they restrict the ability of existing participants in the target market to compete with them.[114] As stated in the previous section, Articles 5 and 6 of the DMA establish specific obligations relating to platform envelopment. Among them, Article 6(2) is the clearest example of the DMA's efforts in limiting platform envelopment and the consequences it has for contestability and markets' structural problems.[115] This provision addresses foreclosures

[110] *Supra (*n 106), 104.
[111] *Supra* (n 1), Recital 33.
[112] *Supra* (n 1), . 111-112.
[113] *Supra* (n 1), . 107.
[114] *Supra* (n 1), . 9.
[115] *Supra* (n 1), Article 6(2).

resulting from the 'dynamic incentives to envelopment'.[116] In the context of platform envelopment, foreclosure refers to an undertaking using its market power in the original market to hinder or outright prohibit other competitors to access end-users.[117] The goal of this strategy is to ultimately drive competitors out of the target market. This, however, has the effect of altering the structure of the market to the detriment of end-users.

Through this obligation, the DMA aims to prevent gatekeepers from creating vertically integrated platforms offering multiple core services.[118] The EC foresees that such behaviour would grant differential treatment to gatekeepers' products or services, or to those provided by business users they control.[119] Therefore, this provision aims to prevent the formation of structural problems caused by gatekeepers using data from their original platforms to develop new business avenues in the target platform.

The limitation of this provision lies in the fact that it can only be imposed on undertakings that have been designated as gatekeepers in accordance with Article 5(1).[120] In a sense, however, if a market presents gatekeepers, it can be argued that it has already been tipped or has a great tendency to tip.[121] The notion of contestability, in theory, only covers markets that have not yet tipped.[122] Moreover, vertically integrated platforms create structural problems for the market, but the provisions in Article 6(2) do not address platforms that have already been vertically integrated by gatekeepers. This is because the DMA only restricts gatekeepers' abuse of data to restore balance in market competition,[123] and enable more equal competition in markets where gatekeepers exist by making gatekeepers act as fair intermediaries.[124] These regulations thus fall under the scope of fairness to protect the residual market competition.[125]

Yet, fairness in the digital market has already been limited by the gatekeepers' establishment of all-encompassing barriers to entry for potential competitors. In the case of

[116] *Supra* (n 1), . 17.
[117] ibid., . 33.
[118] IMCO, Andreas Schwab, Compromise Amendments, Recitals 48-49;
[119] Supra (n 1), Recital 52.
[120] ibid., Article 5(1).
[121] Monopolkommission, Recommendations for an Effective and Efficient Digital Markets Act, Special Report 82, 2021, . 19.
[122] *Supra* (n 19), . 23.
[123] Pablo Ibáñez Colomo, '*The Draft Digital Markets Act: A Legal and Institutional Analysis'* (2021) 12 Journal of European Competition Law & Practice, 581.
[124] *Supra* (n 82), . 9.
[125] *Supra* (n 19), 108.

Google, for example, the gradual encompassing of the browser market[126], the maps market[127], and the electronic payments market through its operating system has not reduced its shares in several markets, despite the imposition of sanctions.[128] This is because the presence of more market players that offer similar products and services will increase customers' cost of search, leading them to opt for the multi-platform Google ecosystem if they find a specific ecosystem more convenient than others.[129] This was further underscored by the EC report, which revealed that consumers are unlikely to switch platforms because of the personal data and high costs involved.[130] As a result, this DMA provision cannot easily break down the ecosystem of a market that has created such impassable barriers to competition and improve the contestability of the market. IMCO suggested that conflicts of interest could be avoided by forcing gatekeepers to treat all of their products and services as separate commercial entities, depriving the gatekeeper's ecosystem of products or services from different markets and platforms.[131] However, this proposal was not adopted by the EC because of the potential increased cost of the investigation.[132]

Furthermore, the DMA is limited by its failure to adequately address the issue of contestability with its obligations. The proposed update of the DMA's obligations would effectively extend them to cover 'practices affecting contestability' and 'practices that are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6'.[133] If this division is applied, the notion of platform envelopment that is already covered by existing obligations will come to be included among gatekeepers' 'unfair' market practices. This would satisfy the scholars who argue that most of the obligations undertaken by gatekeepers concern fair competitive processes.[134] In conclusion, the discussion of platform envelopment in the obligations section of the DMA does not address structural issues, such as vertical integration, that have already affected the digital economy ecosystem. Thus, by relying exclusively on these

[126] CASE AT.40099; See also Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications – Factsheet. <https://ec.europa.eu/commission/presscorner/detail/it/MEMO_16_1484>
[127] Streetmap.EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch)。
[128]Statcounter GlobalStats, Search Engine Market Share Worldwide,Google has 92.42% of the global search engine market share in 2022 and 88.13% in 2023, and has not lost its super-dominant position of over 70%.<https://gs.statcounter.com/search-engine-market-share>
[129] *Supra* (n 12), para 323.
[130] ibid., para 69.
[131] *Supra* (n 1), Recital 49.
[132] *Supra* (n 12), para 259.
[133] *Supra* (n 1), Article 12(1).
[134] *Supra* (n 48), p. 9; See Alexandre de Streel, '*The European Proposal for a Digital Markets Act: A First Assessment*', CERRE-Report January 2021, .11.

obligations, the Act cannot address the ecosystem-level effect of contestability that platform envelopment entails as a cross-platform practice.

In contrast, rather than only regulating the obligation, adding the 'platform envelopment' and the 'ecosystem impacts' it entails to the gatekeeper's designation is an effective way to protect the 'contestability' in the markets. First, the DMA mentions that service providers of CPS are given the status of 'gatekeepers' because their practices seriously undermine the competitiveness of CPS and the fairness of the relationship between business users and end-users.[135] And the ecosystem created by the 'platform envelopment' is an important factor affecting 'contestability' and 'fairness'.[136] Therefore, there is a rationale for adding this criterion to the qualitative criteria. This also fits with the view of the government report in Section 3.1.1 of this article. Furthermore, according to the above, gatekeepers are an indication of whether a market is tipping or has a high probability of tipping.[137] This has a direct impact on whether the 'platform envelopment' undertaken by the service provider has an impact on the contestability or fairness of the market.[138] Based on the requirements established in Article 3(3) of the DMA, undertakings meeting the quantitative criteria must notify the EC.[139] Therefore, pressured by the requirement of self-certification, undertakings may take more care to avoid behaviours that risk being considered a form of platform envelopment, thus reducing the probability of market tipping.

Furthermore, the inclusion of platform envelopment and its effects on the ecosystem in the criteria for the determination of gatekeepers is a legislative measure that aligns with scholarly research. Specifically, it is coherent with the view that a contestable market can only be achieved by introducing measures to address bottlenecks before they occur.[140]

In this regard, the DMCC offers a noteworthy approach by accommodating ‘platform envelopment’ and ‘ecosystem impacts’ within its qualitative criteria. Incorporating similar considerations into the DMA could enhance its flexibility and leniency in gatekeeper designations. For instance, in the EC's assessments concerning *TikTok*, Microsoft's online search engine *Bing*, web browser *Edge*, online advertising service *Microsoft Advertising*, and Apple's

[135] *Supra* (n 1), Recital 2.
[136] ibid, Recital 28.
[137] *Supra* (n 19), .108.
[138] *Supra* (n 99), p.14-15.
[139] *Supra* (n 1), Article 3(3).
[140] Supra (n 108), . 510.

iMessage, iPadOS as gatekeepers, the EC rebutted TikTok's argument, emphasising that there was no evidence indicating that having an ecosystem was an absolute pre-requisite for enterprises to serve as important gateways for business users to reach end users.[141] However, in assessments regarding Microsoft and Apple, the impact of ecosystems on CPSs became pivotal in the EC's designation that products like *iMessage* and *Bing* were not gateways, while *iPadOS* was deemed an important gateway.[142] This further raises doubts regarding the status of ecosystems within the DMA. 'The very notion of an 'ecosystem' comprises various business models and therefore each ecosystem needs to be assessed on a case-by-case basis.'[143] Considering this EC's perspective in the *TikTok* designation, suggests that ecosystem is not entirely disregarded. The dissonance arising from the discrepancy between statutory absence and practical application, not only constrains the EC and member state authorities in DMA usage but also introduces uncertainties for enterprises in self-assessment. Integrating the impact of ecosystems into relevant definitional provisions would facilitate a more poised application of the DMA.

In summary, the inclusion of a provision concerning platform envelopment in the DMA's obligations is not sufficient to adequately fulfil the goal of protecting the contestability and fairness of the market. To achieve this objective, this practice should be assess to the qualitative criteria for the designation of gatekeepers. Without it, the DMA's designation of gatekeepers will remain imperfect, continuing to affect their 'scope'.

2.2 Quantitative criteria

As stated at the beginning of section 1.2, the EC noted the legal ambiguity and economic shortcomings of the subjective qualitative criteria it proposed, and sought to complement them with more objective quantitative criteria.[144] It was believed that adopting quantitative criteria would enable the EC to qualify a limited number of companies as gatekeepers in terms of scope.[145] This article, however, argues that the EC's quantitative criteria fail to provide sufficient legal clarity and economic rationality to supplement the shortcomings of its qualitative criteria. Furthermore, these criteria only extend the 'big' and 'imperfect' qualitative criteria in terms of the scope of the gatekeepers. This argument is based on the review of

[141] DMA.100040 ByteDance – Online social networking services, Designation decision, *para* 130.
[142] *See* C/2024/2710, Summary of Commission Decision (Case DMA.100022- Apple iMessage), *para* 10; C/2024/2709. Summary of Commission Decision (Case DMA. 100015/100028/100034 Microsoft), *para* 12.
[143] *Supra* (n 141).
[144] *Supra* (n 18).
[145] *Supra* (n 12), *para* 135.

multiple documents at the EU level, combined with the opinions of the Regulatory Scrutiny Board and relevant scholars. Two crucial flaws of these criteria are examined below.

2.2.1 Ignorance of the dynamic approach

As stated in Part 3, in designing the DMA, the EC adopted a semi-dynamic policy combining a set of immediately applicable obligations that are characterised by a notable degree of flexibility.[146] Such a hybrid approach was thought to be able to cover the ambiguity and uncertainty of qualitative criteria. However, the inclusion of quantitative criteria based on thresholds and quantities in this dynamic policy project ignored the need for accurate market research.

The various stakeholders interviewed for the realisation of the EC's *Impact Assessment Report* on the DMA argued that the Commission's criteria should be transparent, objective and easily measurable to ensure a high degree of consistency and legal certainty.[147] This is among the factors that motivated the establishment of quantitative criteria. At the same time, other interviewees from platform and telecommunication companies, as well as business associations, warned that a 'one-size-fits-all' approach would not be feasible.[148] Indeed, Article 3(1)(b) of the DMA offers a broad qualification of gatekeepers as providers of CPS. These services, however, come from different markets with varying characteristics, barriers to entry, expansion potential, and distinct business models. These differences are scarcely reflected by quantitative criteria that only consider fixed thresholds and volumes. For example, Article 3(2)(b) sets the number of users as a quantitative criterion.[149] However, a platform with a large number of users is not automatically a market gatekeeper, because end-users remain able and even incentivised to conduct multi-attribute analyses of different platforms and switch at any time.[150] If the process of multi-attribution can still be employed within a certain market, it is highly questionable whether an undertaking acts as a significant gateway for business users to reach end users. This is even more evident when considering that a key criterion for assessing a gatekeeping situation is that users are locked into a particular platform.[151] Among digital markets, multi-attribution remains common for video platforms and web browsers. In contrast, the operating systems market monopolised by Google and Apple, and the sector of social

[146] ibid.,para 5.3.
[147] SWD (2020)363 final, 2/2, p.35.
[148] ibid.
[149] *Supra* (n 1), Article 3(2)(b).
[150] S*upra* (n 82), p.27.
[151] *i*bid., p.20; Supra n 18, para 'Digital Gatekeepers—the Unavoidability Assumption'.

networking platforms, where Facebook and Twitter hold the largest shares of users, are mostly single-attribution.[152] Therefore, it is not reasonable to apply a static quantitative criterion such as the number of users to identify gatekeepers in a range of different markets with distinct characteristics.

In the Impact Assessment Report, respondents from the telecommunications industry argued that a dynamic approach based on regular market surveys should be adopted, combined with case-by-case assessments of undertakings that should be subject to ex-ante regulation.[153] Market surveys would provide an exhaustive review of the characteristics of the market in which the platform operates, providing the necessary information to complement the application of static quantitative criteria. However, the DMA intentionally chose not to include this option in its gatekeepers determination system. In the Impact Assessment Report, two scenarios were considered, a low threshold fixing the turnover at €6.5- €7.5 billion, and a high threshold fixed at €5- €6 billion and considering the development of more than two CPS.[154] The low threshold would have covered 10-15 gatekeepers, while the high one would have addressed five to seven gatekeepers. Eventually, the final version of the DMA included the low threshold. The EC justified this choice by stating that the high threshold would have delayed intervention by necessitating the use of market surveys to appoint gatekeepers. However, in adopting the low threshold, it ignored the risk of attributing the qualification of gatekeepers to platforms that do not act as such.[155]

In response to the Regulatory Commission's impact assessment of the DMA, it questioned the specific relevance of quantitative criteria:

'The report should better define and justify the measures covered under the options. It should demonstrate why the proposed set of cumulative quantitative thresholds (under the 'non-dynamic' and 'semi-flexible' options) can be considered as a robust and reliable trigger across all selected CPS for the (quasi-automatic) designation of gatekeepers and the imposition of obligations. It should better explain why a market investigation is not deemed necessary or proportionate in these situations'.[156]

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[152] ibid.
[153] *Supra* n 144, p.35.
[154] *See* Supra n 12, para 148.
[155] ibid., paras 270,339.
[156] SEC(2020) 437 REGULATORY SCRUTINY BOARD OPINION, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)', para C(3).

Hence, according to stakeholders, the designation of gatekeepers needs to be tempered by the inclusion of market surveys, which would allow for the consideration of the actual characteristics of the market in combination with pre-established thresholds and quantities. From the regulator's perspective, the DMCC offers an alternative approach to mitigating delays in intervention by establishing a global annual turnover threshold of £250 billion as the reference point for calculating revenue.[157] While this threshold exceeds the turnover requirement under the DMA, the focus on global annual turnover enables the UK to investigate and regulate companies from foreign jurisdictions,[158] providing the authority with greater flexibility in its actions and reducing the risk of misjudgements.

2.2.2 Presumptions, rather than clear criteria

While the inclusion of quantitative criteria in the DMA was intended to make the designation of gatekeepers more objective, Article 3(2) states that a gatekeeper, to be qualified as such, 'shall be presumed to satisfy the respective requirements in paragraph 1'[159]. This indicates that the relationship between qualitative and quantitative criteria is not semi-flexible, as initially purported by the Commission. Instead, quantitative criteria can bypass qualitative judgements and take direct effect, turning these two supposedly complementary criteria into two separate provisions.

When the DMA's provisions were set, the EC attributed a high probative value to the quantitative thresholds established. This was based on the assumption that only in a few cases would an undertaking that meets these criteria not be qualifiable as a gatekeeper.[160] Moreover, the assumption underlying quantitative criteria has led to greater controversy in practical operation, primarily manifested in the interplay between Article 3(5) (Enterprise Rebuttals) and Article 3(8) (Qualitative Designation). Article 3(5) grants enterprises that reach the quantitative threshold the right to rebut presumptions, if the EC deems the evidence insufficient, it may reject the argument without investigations.[161] On the other hand, Article 3(8) allows the EC, when an enterprise does not meet quantitative standards but satisfies qualitative requirements, to consider several factors in the digital markets competition through investigations for

[157] DMCC, Section 7(2)(a).
[158] Oles Andriychuk, '*Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act*', 12 July 2023,Concurrences 3-2023, para 21.
[159] DMA (n 1), Article 3(2).
[160] *Supra* (n 12), para 389.
[161] DMA (n 1), Article 3(5).

qualitative determination.[162] On the other hand, Article 3(8) allows the EC, when an enterprise does not meet quantitative standards but satisfies qualitative requirements, to designate gatekeepers by considering several factors in the digital markets competition through investigations. These provisions have been applied in cases concerning *iPadOS* and *TikTok.*

In the *iPadOS* designation, the EC employed Article 3(8) to define Apple as a gatekeeper. Notably, the number of iPadOS end-users did not meet the quantitative threshold. The EC completed its assessment solely based on the number of compliant business users, the number of non-compliant end users (with foreseeable developments), and the determination of the lock-in effect on users.[163] Conversely, in the *TikTok* decision, ByteDance invoked Article 3(5) to rebut the gatekeeper designation, citing Union revenue below 7,5 billion euros and TikTok's 'multi-homing' and 'abuse of user lock-in effects' nature.[164] However, the EC rejected this argument, asserting that merely factors directly relevant to the quantitative standard were considered.[165] The EC's narrow interpretation restricts the possibility of rebuttal exclusively to the quantity stipulated by the quantitative standards.[166]

When comparing the EC's attitudes in the two cases, it is evident that, in determining whether an undertaking is a gatekeeper, the EC adopts a relatively flexible approach, allowing qualitative factors such as 'lock-in effects' to play a role. However, when faced with rebuttals from companies already presumed to be gatekeepers, the EC adopts a strict, narrow interpretation, prohibiting the usage of qualitative arguments, even in the presence of similar nature. In fact, the designation process was crafted by the legislator for the operators that were to be captured, and diligently implemented it,[167] disregarding the proportionality principle that should have been observed. The objectivity that quantitative standards should possess clearly has not been effectively demonstrated.

[162] ibid., Article 3(8).
[163] European Commission, Commission designates Apple's iPadOS under the Digital Markets Act, Press Release, 29 April 2024. <https://ec.europa.eu/commission/presscorner/detail/en/IP_24_2363>
[164] *Supra* (n 141), section 5.1.3.
[165] ibid., para 161.
[166] Alba Ribera Martínez, 'The Requisite Legal Standard of the Digital Markets Act's Designation Process', 16 January 2024, p. 38.
[167] SeeMario Mariniello and Catarina Martins, "*Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma*", 14 December 2021. <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma>

Conclusion

In the discussion above, this article argues that the relationship between gatekeeper size designation and dominance remains an issue that needs to be explored and resolved. The concept of gatekeeper and the obligations imposed on it draws its rationale from past and ongoing competition law litigation, which has centred around the root cause of the dominant position of the target firm in its respective relevant market.[168] If this issue cannot be resolved, undertakings will be confused by the fact that the same market practice will need to comply with all the rules at the same time in the overlapping dynamics of the DMA and EU competition law, as well as the competition laws of the Member States. Moreover, when the DMA and competition law disagree on whether to penalise the same conduct due to different determinations of dominance, this increases the amount of litigation by businesses, which is contrary to the DMA's desire to ensure proportionality and increase efficiency.[169]

Secondly, when it comes to specific provisions, this article argues that the impact of undertakings on the ecosystem and their practices in multi-platform activities should be focused on and stipulated in the qualitative criteria. And, when it comes to the quantitative criteria, it is necessary to refer to the opinion of the Regulatory Scrutiny Board and include a more flexible market survey in it. Moreover, the relation between quantitative and qualitative criteria should be clarified. This approach would enhance the DMA's internal normative coherence, ensuring a more consistent and predictable application of the regulation.

[168] DMA (n 12), *para* 389.
[169] DMA(n 1), Recital 86.

Is there a Brussels effect in Brazil? The case of digital platforms regulation

Arthur Sadami
Lucas Víspico
Matheus Bernardes

Introduction

It is not an overstatement to assert that digital platforms have experienced a "regulatory attack" over the past two decades. Despite the functioning of the internet within a collection of ideals, institutions, and interests guided by libertarian foundations, some authors suggest that this rationale has gradually been challenged.[1] Regulators mobilise a diverse range of justifications to endorse and scrutinize the various regulatory initiatives that arise in this context, amid a heated debate over the narrative surrounding the governance of these actors.[2]

Furthermore, the trend toward regulating digital platforms is frequently propelled and comprised of non-market elements,[3] including privacy, freedom of expression, and political participation. Consequently, if a libertarian ideal influenced the early years of the digital space, its principal actors are increasingly viewed not solely as socio-economic entities but also as technocultural constructs—reflecting not only economic dynamics but also political ones.[4]

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[1] See Terry Flew, *Regulating Platforms* (Polity 2021).
[2] While these justifications may differ significantly based on the specific institutional contexts in which they take place, some observations underscore at least three fundamental factors that justify the global regulation of digital platforms: the necessity to exercise control over the processes and internal structures of these entities, particularly when driven by algorithms and disruptive technologies; the promotion of a competitive environment wherein these actors engage with other participants in both traditional and digital markets; and the harmonisation of macroeconomic policies across diverse jurisdictions, including the fiscal treatment of their activities. See Pradip Ninan Thomas, *Platform Regulation: Exemplars, Approaches, and Solutions* (Oxford University Press 2023) 1-15.
[3] According to Karl Polanyi, a "market economy" could be defined as "an economic system controlled, regulated, and guided by market prices; the organization in the production and distribution of goods is entrusted to this self-regulating mechanism", originating "from the expectation that human beings behave in such a way as to achieve maximum money gains", where "the supply of goods (including services) available at a definite price will equal the demand at that price". See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001) 71. Moreover, Polanyi argued that non-market dimensions of the market economy, encompassing politics, society, law, and culture, enable its function, integrate its operation, and reflect its dynamics, emphasising that these dimensions should not be neglected in understanding the economy. See ibid. 60-64. Even Milton Friedman himself, being one of the most notable liberal economic voices in the public debate, acknowledged that market mechanisms are integrated by non-market dimensions, representing "the rules of the game". See Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' (*The New York Times*, 13 September 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 02 February 2024.
[4] See José van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford University Press 2018) 26-41.

Regulatory efforts directed at these digital players also challenge, in some way, a rhetoric of "market fundamentalism" that permeated the original configuration of the virtual world.[5]

Global South countries have been experiencing similar trends. In recent years, digital platforms in Brazil, for instance, have faced numerous regulatory initiatives across different domains, dealing with aspects such as privacy and data protection, competition, and content moderation. The election of President Luiz Inácio "Lula" da Silva brought new momentum to this regulatory movement, with a governmental agenda emphasising the connection between the regulation of these actors and the preservation of the Brazilian democratic structures.[6]

Regulatory developments do not take place in a vacuum, particularly when dealing with market players with global operations and complex economic governance networks. Several studies have delved into understanding processes of legal transplantation, convergence, or adaptation in regulation.[7] A notable narrative that has attracted considerable recent interest, especially regarding digital platforms, is the idea of "Brussels Effect", focusing on the role the European Union driving regulatory convergence towards its standards.[8]

This paper contributes to this narrative by examining how the regulation of digital platforms in Brazil, despite being influenced by Europe—at least rhetorically—can assume characteristics of its own, sometimes even diverging from the European regime. First, this article provides an overview of the concept of the "Brussels Effect", employing it as an analytical tool to understand the transnational harmonisation of regulatory standards in line with those adopted in the European context. Second, this study explores how regulating digital platforms in Brazil reflects these dynamics, along with its primary implications, drawing on instances of privacy and data protection, competition policy, and online disinformation. Third, this paper discusses how the Brussels Effect may not necessarily imply complete harmonisation towards European standards for regulation worldwide. The paper concludes by emphasizing the intrinsic challenges of incorporating external standards into local environments.

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[5] Here, a direct engagement with the Polanyian tradition is evident, interpreting the push for the regulation of digital platforms as a response to the adverse effects of the power wielded by these entities in both market and non-market dimensions. See John W Cioffi, Martin F. Kenney and John Zysman, 'Platform Power and Regulatory Politics: Polanyi for the Twenty-First Century' (2022) 27 New Political Economy 820.

[6] See Beatriz Kira, 'In Brazil, Platform Regulation Takes Center Stage' (*Tech Policy Press*, 24 April 2023) <https://www.techpolicy.press/in-brazil-platform-regulation-takes-center-stage/> accessed 02 February 2024.

[7] See, e.g., Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, 'The Transplant Effect' (2003) 51 American Journal of Comparative Law 163. On the discussion of legal transplants and implants, see Mariana Pargendler, 'The Rise of International Corporate Law' (2021) 98 Washington University Law Review 1765.

[8] See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

1. Brussels effect and regulatory convergence

The idea of regulation can denote a fragmented and decentralised phenomenon which takes place in an essentially polycentric environment. Marked by the interdependence among various distinct regulatory centres, whether governmental or not,[9] regulatory frameworks are influenced by entities in asymmetrical positions of power and influence across various jurisdictions.[10] This multidimensional nature[11] enables the identification of internal dynamics between different regulatory poles. Europe, for instance, is often described as a "regulatory powerhouse", and frequently regarded as one of the main forces in these processes.[12]

In this context, the term "Brussels Effect" is commonly used to illustrate the substantial influence of the region in driving regulatory convergence in other countries. The expression, coined by Anu Bradford, is a direct reference to the "California Effect", employed in the 1990s by David Vogel to describe how more stringent regulatory standards, such as in environmental and consumer protection, originally adopted in California, were disseminated to other states in the U.S. through the operations of large companies across the country.[13] Differently from the "Delaware Effect"[14], this process was marked by a race to the top for the improvement of regulation. However, rather than a simple reproduction of this same phenomenon on a global level, the Brussels Effect is one translation of the emergence of the European Union as a regulatory power.

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[9] See Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54 Current Legal Problems 103; Julia Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1; and Julia Black, 'Proceduralisation and Polycentric Regulation' (2005) Revista Direito GV 99.

[10] See Anu Bradford, Adam Chilton and Katerina Linos, 'The Gravity of Legal Diffusion' (2023) <https://ssrn.com/abstract=4508011> accessed 02 February 2024 (indicating that the size of a regulatory centre's economy is strongly correlated with its influence on legal convergence processes, within a "gravitational" scheme of influence).

[11] Christel Koop and Martin Lodge observed that, despite a relative absence of explicit definitions amid the broad polysemy of the term "regulation", it could be defined as "*the intentional intervention in the activities of a target population*". See Christel Koop and Martin Lodge, 'What is Regulation? An Interdisciplinary Concept Analysis' (2017) 11 Regulation & Governance 95, 104.

[12] See Catherine E. de Vries, 'How Foundational Narratives Shape European Union Politics' (2022) 61 JCMS: Journal of Common Market Studies 867 (emphasising that this narrative also holds significant implications for how political responsibility and authority are delineated, in terms of competence).

[13] See David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (rev edn, Harvard University 1997). Vogel's conclusions arise from the observation that incumbent economic agents, in contexts of asymmetric competition, can benefit from the implementation of regulatory barriers since they have the resources to bear these costs, unlike potential market entrants—an idea originally formulated by George J. Stigler. See George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 The Bell Journal of Economics and Management Science 3.

[14] The expression, in turn, was employed by Robert Daines to describe, through data gathered during the 1980s and 1990s, processes by which states such as Delaware would attract investments and companies by reducing and relaxing regulatory and corporate governance. See Robert Daines, 'Does Delaware Law improve firm value?' (2001) 62 Journal of Financial Economics 5252. Earlier investigations, such as those conducted by William L. Cary, had already discerned a trend toward weakening corporate law in the USA, particularly focused in the state of Delaware, dating back to at least the 1970s. See William L. Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 The Yale Law Journal 663.

According to this narrative, the bloc's institutional architecture, initially focused on integrating its common market, laid down the groundwork for establishing a pro-regulation agenda beyond its borders.[15] The relevance of the European Union and its markets in a globalized economy would lead to the voluntary transmission of its regulatory standards to other jurisdictions by transnational companies. In this sense, the Brussels Effect would rely on five core elements: the significance and influence of the European market for a specific jurisdiction; the influenced jurisdiction's ability to adopt and implement the European model; the inclination of the influenced jurisdiction to embrace high regulatory standards; the regulated companies' resistance to regulation—indicating a lack of responsiveness to regulatory changes; and the non-divisibility of a regulated company's production or operation across different markets, encouraging it to embrace a globally applicable regulatory standard.[16] Some illustrative examples of this dynamic are competition policy, digital economy regulation, consumer protection standards, and environmental protection.[17]

While the Brussels Effect may prompt concerns about restricting innovation, protecting exclusively the European market, and exercising an alleged "regulatory imperialism", this does not suggest that these dynamics are immune to challenges in the near future, whether arising externally or internally.[18] China's progress in regulating technology industries,[19] the challenges posed by globalisation and international multilateral institutions,[20] as well as the increasing economic geo-fragmentation,[21] are examples that may curb the European Union's regulatory influence. Additionally, the crisis in the trade bloc, particularly after Brexit, could also potentially fragment the influence of the Brussels Effect by destabilising its material foundation.[22]

Nevertheless, the Brussels Effect persists as a common allegory for describing the regulatory dynamics emanating from the European Union as a focal point of influence in shaping transnational economic governance, especially in Global South jurisdictions. This narrative also provides an analytical framework to examine the ideal conditions under which

[15] See Bradford (n 8) 7-24.
[16] See Bradford (n 8) 26-62.
[17] See Bradford (n 8) 99-231.
[18] See Bradford (n 8) 265-288.
[19] See Matthew S. Erie and Thomas Streinz, 'The Beijing Effect: China's Digital Silk Road as Transnational Data Governance' (2021) 54 New York University Journal of International Law and Politics 1.
[20] See Jutta Brunnée, 'Multilateralism in Crisis' (2018) 112 Proceedings of the ASIL Annual Meeting 335.
[21] See International Monetary Fund, *Geoeconomic Fragmentation and the Future of Multilateralism* (IMF 2023).
[22] See Agustín José Menéndez, 'The Existential Crisis of the European Union' (2013) 14 German Law Journal 453; and Desmond Dinan, Neill Nugent and William E. Paterson (eds), *The European Union in Crisis* (Bloomsbury 2017).

the trade bloc, in contrast to other central nations or international networks, exerts influence and establishes points of convergence in the regulatory frameworks of various jurisdictions.

2. European Convergence? The Regulation of Digital Platforms in Brazil

Despite some comments on the expressions of the European regulatory convergence in other jurisdictions, there is a lack of more specific studies on the Brussels Effect's consequences in Brazil.[23] In this sense, the recent movement around the regulation of digital platforms may serve as a case for testing the presence of this convergence dynamic in the country. According to Bradford, these players exemplify a situation capable of enabling a Brussels Effect.[24] As companies that encounter few geographical limitations to their non-divisible operations, digital platforms could, in this sense, serve as conduits for transmitting regulatory parameters across diverse jurisdictions, where different centres simultaneously influence the regulation of the same business entity.[25]

However, this paper argue that the Brussels Effect falls short as a narrative that fully captures the regulation of platforms in Global South countries, at least in the Brazilian case. Through an analysis of three cases—data privacy and protection, competition policy, and disinformation control— we show that there is evidence of a divergence in the design of these regulatory mechanisms from European standards. Simply put, despite the rhetorical influence of Europe over the regulation in the country, this does not imply full harmonisation. Instead, Brazilian laws on the matter possess distinct features that essentially differentiate them from those of the European Union.

2.1 Data privacy and protection

One the most cited examples of the global influence of the European Union as a regulatory power is its contribution to the development of data protection regulations in other jurisdictions, including Brazil. This influence can be traced back to 1995 with the implementation of the Personal Data Protection Directive (95/46/EC) and gained scale with the enforcement of the General Data Protection Regulation (GDPR) in 2018. In contrast to European directives that

[23] As an exception, Bradford provides some minor examples of the Brussels Effect in Brazil, such as side comments on the regulation of agrobusiness production in the country. See Bradford (n 8) 189.
[24] Bradford dedicates a section of her work to elucidate how the digital economy represents a domain where the regulatory influence of the European Union has markedly expanded. See Bradford (n 8) 131-169.
[25] For a comment suggesting that we could observer a Brussels Effect in proposed regulations of content moderation of digital platforms in Brazil, see Thales Bueno, 'Efeito Bruxelas: o 'poder invisível' da Europa por trás do PL das Fake News' (*Tilt UOL*, 17 October 2023) <https://www.uol.com.br/tilt/analises/ultimas-noticias/2023/10/17/efeito-bruxelas-o-poder-invisivel-da-europa-por-tras-do-pl-das-fake-news.htm> accessed 11 May 2024.

demand their adoption by member states, regulations such as the GDPR hold immediate validity and applicability, expediting the harmonisation and standardisation of norms across the European territory.[26]

Extending its impact beyond the European community, the GDPR has traversed international boundaries, emerging as a genuine "gold standard" in establishing regulatory benchmarks for global data privacy and protection and catalysing movements for legal reform. Recent data estimates that 137 out of the 194 countries in the world have enacted privacy and data protection laws,[27] with many drawing inspiration from the European regulatory framework.[28] Some studies suggest, for instance, that within six months of the GDPR's implementation, numerous websites and technology providers, even those beyond the geographical confines of the European Union, proactively implemented measures to mitigate the risks of non-compliance.[29]

The phenomenon of the global expansion of the GDPR to other jurisdictions originates, first of all, in the provisions of European legislation that grant it extraterritorial applicability. According to the regulation, entities processing data with the aim of offering goods or services to data subjects located in the European Union or monitoring behaviour within its borders are subject to the provisions of the GDPR, regardless of their location (Article 2(1)).[30] On the other hand, by requiring that international data transfers can only be made to locations that, according to the European Commission, ensure adequate levels of protection, the norm influenced

[26] See Théodore Christakis, *European Digital Sovereignty': Successfully Navigating Between the "Brussels Effect" and Europe's Quest for Strategic Autonomy* (Grenoble Alpes Data Institute 2020) 23.
[27] See UNCTAD's database on data protection and privacy legislation worldwide, available at: <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> accessed 02 February 2024.
[28] See Jennifer Bryant, '3 years in, GDPR Highlights Privacy in Global Landscape' (*IAPP*, 25 May 2021) <https://iapp.org/news/a/three-years-in-gdpr-highlights-privacy-in-global-landscape> accessed 02 February 2024 ("[a]s the first comprehensive privacy law, the GDPR has inspired legislation around the world, from Brazil's General Law for the Protection of Personal Data to China's proposed Personal Data Protection Law and India's proposed Personal Data Protection Bill, to name a few. In the U.S., both California and Virginia approved legislation drawing inspiration from the GDPR, while other states like Washington continue to work on proposals. In India, J. Sagar Associates Partner Sajai Singh said the GDPR served as a template for the proposed PDPB, the final draft of which is expected to be tabled before Parliament soon. India is looking to implement an even broader scope, he said, including a definition of sensitive personal data requiring compliance even if no data is collected in India but is processed there").
[29] See Christian Peukert and others, 'Regulatory Spillovers and Data Governance: Evidence from the GDPR' (2022) 41 Marketing Science 746. See also Kevin E. Davis and Florencia Marotta-Wurgler, 'Filling the Void: How E.U. Privacy Law Spills Over to the U.S.' (2024) Journal of Law and Empirical Analysis 1.
[30] "1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system".

countries to adopt similar provisions as a way to overcome insurmountable barriers to trade and the international flow of data (Article 45(1)).[31]

In addition to these factors, the indivisible nature of data and its storage systems plays a role in converging around European parameters. Companies that deal with data management encounter significant expenses when implementing customizable protection practices tailored to different jurisdictions. Consequently, they frequently opt for standardising their data management systems using uniform and stringent criteria. For instance, in cloud services, providers typically deliver a standardised level of robust protection to all users due to the complexities and expenses associated with fragmenting and customising such configurations.[32]

The convergence around European data protection parameters also had a distinctive influence in the Global South. In Latin America, about 90% of countries already have general data protection laws or are in the process of implementing them.[33] Even in countries that had rules on the subject before the GDPR, many have approved or proposed substantial reforms, with nearly 80% of them adopting standards inspired by the GDPR.[34]

Brazil was not an exception to this trend. Previously having only fragmented laws dealing with fundamental rights related to privacy and information security, the country took a significant step in following a global trend by approving Law No. 13,709/2018, the General Personal Data Protection Law (*Lei Geral de Proteção de Dados Pessoais* or LGPD). This rhetorical influence of the European framework was underscored during the legislative discussions that led to the enactment of the law, when political figures emphasised that the country needed to align itself with the global trend. This would help the country to stimulate its business environment, making it more appealing for foreign investments.[35] As noted in Deputy

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[31] "1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation".
[32] See Mark Verstraete and Tal Zarsky, 'Cybersecurity Spillovers' (2021) 47 BYU Law Review 929, 933.
[33] See Arturo J. Carrillo and Matías Jackson, 'Follow the Leader? A Comparative Law Study of the EU's General Data Protection Regulation's Impact in Latin America' (2022) 16 Vienna Journal on International Constitutional Law 177, 208 ("[w]e can see that by 2021 most countries in the region – 90% (18 of 20) by our count – have a general data protection law or are trying to enact one. Since 2016, a sweeping 'third wave' of legal reform has spread data protection regimes inspired by the GDPR to several new countries, as well as led several others to update their pre-existing legal frameworks in line with the Regulations' transnational standards").
[34] See ibid 206.
[35] "Regardless of the economic crisis context, it is safe to say that the country has been missing valuable opportunities for international financial investment due to the legal isolation it faces, as it lacks a comprehensive national law for the protection of personal data (LGPD)" (free translation). See Federal Senate of Brazil, Presentation of a Favorable Report on Chamber Bill No. 53/2018 by Senator Ricardo Ferraço <https://legis.senado.leg.br/sdleg-getter/documento?dm=7751566&ts=1630450893276&disposition=inline&_gl=1*sur5cc*_ga*MTcxMDA5MDk3My4xNjk

Orlando Silva's report on the issue, "[a] significant source of inspiration for the projects comes from the European framework".[36]

Similar to the GDPR, the LGPD brought: (i) guiding principles for the processing of personal data; (ii) a broad conception of personal data; (iii) the requirement that all personal data processing should have a corresponding legal justification; (iv) an exhaustive list of legal hypotheses for data processing; (v) a detailed characterisation of data subjects' consent and the requirements for its expression; and (vi) the introduction of data subjects' rights.[37]

However, according to a comparative analysis between LGPD and GDPR, among the 24 matters addressed in the law, 15 were considered "reasonably similar", eight were "reasonably inconsistent" with each other, and one was "inconsistent" with the European regulation.[38] In this sense, even with the strong European influence, complete harmonization of laws has not been achieved. While the LGPD establishes ten legal bases, the GDPR provides only six.[39] The specific design of these lawful bases also reflected the unique interests of the Brazilian environment during the legislative discussions on the law. One example is the credit protection lawful base under the LGPD. Diverging from the European regime, the LGPD explicitly states in its Article 7(X) that credit protection can serve as a basis for processing personal data, without the need for consent. Brazilian regulation regarding data processing in the context of credit, overall, is more permissive than the European counterpart.[40] In this context, the final version of the rule sought to reconcile "the importance of credit protection and the increase in adherence to positive [credit] registries, with the requirement of consent from the data subject as a condition for any processing" as established in first drafts of the data protection bill[41]—clearly reflecting the local economic interests at stake.

4NTA3NDQ2*_ga_CW3ZH25XMK*MTY5ODYxODQ0My4yLjAuMTY5ODYxODQ0My4wLjAuMA> accessed 02 February 2024.

[36] Chamber of Deputies of Brazil, Opinion of the Rapporteur No. 1 on Bill No. 4,060/2012 <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1663305&filename=PRL%201%20PL406012%20=%3E%20PL%204060/2012> accessed 02 February 2024.

[37] See Ondřej Filipec and others, 'Personal Data Protection in Brazil: How Much Europeanization?' (2022) 22 International and Comparative Law Review 81, 100.

[38] See OneTrust DataGuidance and Baptista Luz Advogados, *Comparing Privacy Laws: GDPR v. LGPD* (OneTrust DataGuidance and Baptista Luz Advogados 2019).

[39] See Filipec and others (n 37) 97.

[40] See Juliano A. S. Maranhão and Ricardo R. Campos, 'Proteção de Dados de Crédito na Lei Geral de Proteção de Dados' 16 Direito Público 132, 147.

[41] See ibid.

In addition to disparities in the law's content, there are also specific institutional settings related to its enforcement. In Brazil, the local data protection authority was initially affiliated with the executive branch.[42] During Jair Bolsonaro's administration—marked by authoritarian traits—the authority had a significant military presence, what raised concerns about the privacy regime in Brazil, as it potentially compromised the impartiality and independence necessary for effective data protection enforcement.[43] It was not until four years after the LGPD was enacted that the ANPD gained status as a special regulatory agency, with expanded powers and functional independence.[44] However, the agency is still in the process of establishing itself as the privacy watchdog in the country.

2.2 Competition policy

Discussions regarding the influence of European competition policy globally, considered one of its main centres for theoretical formulation and practical application, in parallel with the U.S., are not new.[45] However, the rise of dominant digital platforms and the European Commission's adoption of a stricter enforcement of competition policy (particularly when compared to the American approach) have bestowed a new vector of influence upon European competition policy.[46] Moreover, the recent evolution of competition regulatory mechanisms in the European Union is also noteworthy, as it triggers new waves of institutional transformations in other jurisdictions, with a particular focus on digital platforms. In this sense, the enactment of the Digital Markets Act (DMA) in 2022 in the European Union was motivated by the belief that the existing competition legislation would not be adequate to deal with the challenges

[42] See Ana Carolina Westrup, 'Lei geral de proteção de dados em vigor, ANPD militarizada' (*Le Monde Diplomatique Brasil*, 03 May 2021) < https://diplomatique.org.br/lei-geral-de-protecao-de-dados-em-vigor-anpd-militarizada/> accessed 13 May 2024.
[43] See ibid.
[44] See Law No. 14.460 of 2022 (Brazil).
[45] See Marcus Pollard, 'More Than a Cookie Cutter: the Global Influence of European Competition Law' (2014) 5 Journal of European Competition Law & Practice 329; Anu Bradford and others, 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16 Journal of Empirical Legal Studies 731.
[46] See Eleanor M. Fox, 'Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide' (2019) 98 Nebraska Law Review 297, 315 ("[t]here are three reasons why the United States might wish to take Europe's big data initiatives more seriously. First, European competition law is the law in a substantial part of the world. If the U.S. wants to be relevant in international transactions, it must appreciate European perspectives. Second, top down regulation is a possible substitute for antitrust. If the antitrust agencies ignore abuses of economic power that people care about, more intrusive regulation is likely to fill the gap. European competition policy gives some insight into how antitrust, complemented with consumer protection and privacy protection, can be an alternative to more intrusive regulation. Third, Europe may be right in some not insignificant ways").

presented by the rise of gatekeepers[47]—dominant players controlling digital environments frequented by commercial and non-commercial users.[48]

The DMA can be interpreted not only as a modernisation of the European ordoliberal tradition in competition policy[49] but also as a reversal of a trend towards greater convergence with the model adopted by the U.S. for competition regulation, symbolised by the agenda of the more economic approach.[50] In this sense, this framework is based on two main principles: contestability and fairness. The idea of contestability involves ensuring entry and rivalry in digital platforms, addressing the structures and behaviours of major entities that create significant barriers to current or potential competition in digital markets. Fairness, in turn, relates to ensuring a balance of rights and obligations in the relationship between commercial users and digital platforms, particularly considering the economic dependence of the former on the latter.[51] Based on these principles, the DMA structures asymmetric competition obligations to gatekeepers, such as the access to the infrastructure of digital platforms, the prohibition of discriminatory or non-egalitarian practices, as well as the prohibition of self-preferencing of own products or services within these environments.[52]

[47] On the unique characteristics of competitive dynamics in digital ecosystems controlled by gatekeepers, see Damian Geradin, 'What is a Digital Gatekeeper' (*The Platform Law Blog*, 24 February 2021) <https://theplatformlaw.blog/2021/02/24/what-is-a-digital-gatekeeper-2/> accessed 02 February 2024; Thomas E. Kadri, 'Digital Gatekeepers' (2021) 99 Texas Law Review 951; and Michael G. Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Industrial and Corporate Change 1199.

[48] "1. An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future" (Article 3.1).

[49] See Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 Journal of European Competition Law & Practice 542.

[50] See Ane C. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016); Josef Drexl, Wolfgang Keber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar 2012); and Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck 2007).

[51] According to DMA's preamble: "(31) To safeguard the contestability and fairness of core platform services provided by gatekeepers, it is necessary to provide in a clear and unambiguous manner for a set of harmonised rules with regard to those services. [...] (32) For the purpose of this Regulation, contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services. [...] (33) For the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage. [...] (34) Contestability and fairness are intertwined. The lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the possibility of business users or others to contest the gatekeeper's position. A particular obligation in this Regulation may, therefore, address both elements". For a comment on these principles, see Jacques Cremer and others, 'Fairness and Contestability in the Digital Markets Act' (2023) 40 Yale Journal on Regulation 973.

[52] For an overview of the institutional aspects of the DMA, see Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561.

Beyond catalysing similar regulatory approaches in European jurisdictions including Germany[53] and Austria,[54] the DMA has influenced competition policy worldwide. In the U.S., for example, several bills with provisions resembling the European framework have been introduced, aiming to enhance the competitive treatment of digital platforms,[55] such as the American Innovation and Choice Online Act and Competition and Antitrust Law Enforcement Act.[56] The post-Brexit proposal of the Digital Markets, Competition, and Consumers Bill in England also illustrates this influence.[57]

Compared to this context, competition policy enforcement over digital platforms by the Brazilian competition authority (*Conselho Administrativo de Defesa Econômica* or CADE) is marked by an inconsistent approach in addressing antitrust investigations.[58] Several key investigations that led to convictions by the European Commission, such as *Google Search (Shopping)* (Case AT.39740), were curiously closed by the Brazilian competition authority.[59] Even when dealing with related issues such as digital ecosystems and gatekeepers, CADE appears to be more focused on reaffirming its own analytical tools rather than aligning with European standards.[60]

More recently, Brazil has also experienced its own proposals for *ex ante* regulation of dominant digital platforms. On November 10, 2022, the Bill No. 2,768/2022—often being referred as the "Brazilian DMA"—[61] was presented to the Brazilian National Congress to

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[53] In this context, Article 19a was introduced into German competition law with the aim of providing a new tool to the Bundeskartellamt to address cases of market power abuse by digital platforms. See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law & Practice 513.

[54] In this context, a series of substantial reforms was implemented in Austrian competition law, encompassing merger review and anticompetitive agreements. See Michael Mayr, 'Austria Introduces Significant Changes to its Competition Law' (*Kluwer Competition Law Blog*, 20 September 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law/> accessed 02 February 2024.

[55] These legislative initiatives should also be considered in the context of hearings on digital platforms in the U.S. Congress. See Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majory Staff Report and Recommendations* (U.S. House of Representatives 2020).

[56] Emily Birnbaum, 'Big Tech Divided and Conquered to Block Krey Bipartisan Bills' (*Bloomberg*, 20 December 2022) <https://www.bloomberg.com/news/articles/2022-12-20/big-tech-divided-and-conquered-to-block-key-bipartisan-bills> accessed 02 February 2024.

[57] See Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act' (2023) 3 Concurrences <htttps://www.concurrences.com/en/review/issues/no-3-2023/international/uk-analysing-digital-markets-competition-and-consumers-bill-through-the-prism> accessed 02 February 2024.

[58] See Caio Mário da Silva Pereira Neto, Ricardo Ferreira Pastore and Raíssa Paixão, 'Competition Law Enforcement in Digital Markets: The Brazilian Perspective on Unilateral Conducts' (2022) 67 The Antitrust Bulletin 622.

[59] See CADE's Investigation No. 08012.010483/2011-94.

[60] See Marcela Mattiuzzo and Arthur Sadami, 'CADE Dismiss Stone/Linx Competition Concerns and Clear Merger' (*Lexology*, 29 July 2021) <https://www.lexology.com/commentary/competition-antitrust/brazil/vmca/cade-dismiss-stonelinx-competition-concerns-and-clear-merger> accessed 02 February 2024.

[61] See, e.g., the event *Reflexões sobre o "DMA Brasileiro": A Difícil Escolha entre Regular e Reprimir*, organised by the Getúlio Vargas Foundation, available at: <https://www.youtube.com/watch?v=FtHi6GINqas> accessed 02 February 2024.

introduce an asymmetric *ex-ante* regulatory framework for companies wielding "essential access control power" (Article 2nd, § 1st)—akin to the concept of "gatekeeper". However, even though its explanatory memorandum explicitly states that the bill is directly influenced by the DMA,[62] its core provisions hardly resemble European standards. For instance, despite the fact that the Brazilian proposal envisages the prohibition of a variety of discriminatory practices, they depart from the European approach, which is based on contestability and fairness. Instead, the Brazilian provisions derive from a broad and non-exhaustive list of principles (Article 4th), including freedom of initiative, free competition, consumer protection, reduction of regional and social inequalities, repression of economic power abuse, and enhancement of social participation in the discussion and management of public interest matters. Moreover, the authority entitled for enforcing the proposed regulation will be the Brazilian National Agency for Telecommunications (*Agência Nacional de Telecomunicações* or ANATEL), which is likely to involve an essentially different approach compared to an administrative body with an institutional background in competition policy.

It is worth noting that the discrepancies concerning European standards in the discussion of ex ante regulation of dominant digital platforms in Brazil are likely to grow. An indicator of this is the Brazilian Ministry of Finance's Economic Reform Secretariat's inquiry into the economic and competitive aspects of digital platforms. Dozens of contributions were submitted, with the participation of numerous local stakeholders.[63] All of this raises doubts about how closely a potential Brazilian regulatory framework will mirror the DMA standards.

2.3 Disinformation control

Since 2015, the European Union began developing strategies to combat the spread of online disinformation. In that year, in response to Russian campaigns,[64] the European Council created

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[62] "In contrast, the European Commission's 'Digital Markets Act' aimed at digital gatekeepers, is highly detailed and was approved in 2022. We believe it is appropriate to introduce a regulation aligned with the European Commission's approach, albeit in a less detailed manner. This is because we are dealing with issues of utmost relevance that require regulatory responses much quicker than what is feasible in competition enforcement. These issues are novel enough to suggest that imposing a strict ex-ante framework with a series of absolute prohibitions on economic agents may not be appropriate" (free translation). Chamber of Deputies of Brazil, Explanatory Memorandum for Bill No. 2,768/2022 <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2214237&filename=PL%202768/2022> accessed 02 February 2024.

[63] See Ministério da Fazenda, 'Tomada de Subsídios - Aspectos Econômicos e Concorrenciais de Plataformas Digitais' (*Presidência da República*, 19 January 2024) <https://www.gov.br/participamaisbrasil/concorrencia-plataformas-digitais> accessed 14 May 2024.

[64] See European Council, European Council Conclusions, 19-20 March 2015' EUCO 11/15 ("[t]he European Council stressed the need to challenge Russia's ongoing disinformation campaigns and invited the High Representative, in cooperation with

the East StratCom Task Force (ESCTF) as part of its European External Action Service (EEAS).[65] It was only in 2018, however, that the European Union produced its main framework on the subject, the Code of Practice on Disinformation, revised in 2022. The document established non-mandatory commitments such as transparency measures in political advertising, the demonetisation of disinformation disseminators, the suspension of fake accounts, the development of implementation plans and monitoring mechanisms by the signatories, as well as the production of self-assessment reports, annual assessments, and supervision programs.[66] While major digital platforms voluntarily adhered to its terms,[67] extending their reach to other jurisdictions, a notable case occurred during the 2020 U.S. elections when these players removed misinformative content, despite the traditionally permissive approach to freedom of expression in the country.[68]

While not without criticism, the Code of Conduct on Disinformation served as a preliminary trial for the Digital Services Act (DSA), adopted in 2022 as the most ambitious effort to date in regulating content moderation.[69] The DSA framework mandates that internet intermediary services, including social networks, hosting services, online marketplaces, app stores, and search engines, implement a wide range of measures to ensure transparency and reduce the dissemination of harmful content. It regulates how gatekeepers should structure their private decision-making processes at a meta-level. The DSA shifts most of the responsibility for combating disinformation to the platforms themselves, employing an approach that establishes general rules of responsibility for intermediary service providers, creating a regime of due diligence obligations, and strengthening cooperation among relevant national authorities.[70] Moreover, it introduces a multistakeholder monitoring system wherein

Member States and EU institutions, to prepare by June an action plan on strategic communication. The establishment of a communication team is a first step in this regard").

[65] To a large extent, the activities of the ESCTF, originally designed to counter the Russian narrative, involve communication strategies through publications aimed at combating misinformation, primarily for the European audience, as well as fact-checking. See Charlotte Wagnsson and Maria Hellman, 'Normative Power Europe Caving In? EU under Pressure of Russian Information Warfare' (2018) 56 Journal of Common Market Studies 1161.

[66] For a policy overview of the Code of Practice on Disinformation, see James Pamment, *The EU Code of Practice on Disinformation: Briefing Note for the New EU Commission* (Partnership for Countering Influence Operations Policy Perspectives Series 2020).

[67] Several digital platforms, including Meta, Google, Microsoft, and TikTok, have become signatories of the Code of Conduct on Disinformation. See European Commission, 'Signatories of the 2022 Strengthened Code of Practice on Disinformation' (*European Commission*, 16 June 2022) <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation> accessed 02 February 2024.

[68] Regarding the transition of approaches by platforms in content moderation in the U.S., see Evelyn Douek, 'Governing Online Speech: From "Posts-As-Trumps" to Proportionality and Probability' (2021) 121 Columbia Law Review 759.

[69] Sharon Galantino argues that the DSA replicated some of the issues found in the Code of Conduct on Disinformation, particularly due to the broad definition of 'disinformation', leading to uncertainties on how regulators should address the spread of information. See Sharon Galantino, 'How Will the EU Digital Services Act Affect the Regulation of Disinformation?' (2023) 20 SCRIPTed – A Journal of Law, Technology & Society 89.

[70] See Martin Eifert and others, 'Taming the Hiants: The DMA/DSA Package' (2021) 58 Common Market Law Review 987.

individuals, national authorities, and "trusted flaggers"—private, non-governmental, or public entities with prior knowledge of the subject—can identify and report the spread of illegal content (Article 16). Following the enactment of the DSA, some observed immediate signs of convergence as its governance model expanded to other jurisdictions,[71] including the U.S., where the regulation collided with existing state laws prohibiting content moderation by digital platforms.[72]

Brazil was also part of a European-pushed trend for controlling disinformation on digital platforms over the last years. The Brazilian presidential race in 2018 was distinguished not only by heightened political polarisation on social media but also by the extensive dissemination of disinformation, predominantly orchestrated by far-right movements[73]— a strategy[74] closely mirrored what was observed during the 2016 U.S. elections, which propelled Donald Trump to the White House.[75] Disinformation persisted as a consistent form of political mobilisation in subsequent years, particularly during the COVID-19 pandemic, when sanity control measures such as mask-wearing and quarantines became highly politicised by President Jair Bolsonaro.[76] Some years later, the 2022 presidential elections in Brazil were also notably characterised by the widespread dissemination of disinformation, once again fuelled by Bolsonaro's election campaign.[77] In this context, public institutions began responding to disinformation.

However, Brazil's trajectory diverged significantly from the European approach to the issue, notably characterized by the pronounced influence of courts in delineating and enforcing

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[71] See Asha Allen and Ophélie Stockhem, 'A Series on the EU Digital Services Act: Tackling Illegal Content Online' (*Center for Democracy and Technology*, 2 August 2022) <https://cdt.org/insights/a-series-on-the-eu-digital-services-act-tackling-illegal-content-online/> accessed 2 February 2024.

[72] See Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation' (2023) 24 Chicago Journal of International Law 115.

[73] For a record of these growing digital disinformation concerns in Brazil. See Patrícia Campos Mello, *A Máquina do Ódio: Notas de uma Repórter sobre Fake News e Violência Digital* (Companhia das Letras 2020) 15-28. It is noteworthy that, according to the 2018 Ipsos Misperceptions Index, Brazil ranked fourth in terms of inaccurate perceptions of reality about its own country when compared to 37 different nations. See IPSOS, *Perils of Perception: 2018* (IPSOS 2018).

[74] See Aryovaldo de Castro Azevedo Junior, 'Fake News e as Eleições Brasileiras de 2018: O Uso da Desinformação como Estratégia de Comunicação Eleitoral' (2021) Más Poder Local 81.

[75] For data and insights on the impact of the spread of fake news on the 2016 U.S. presidential election, see Alexandre Bovet and Hernán A. Makse, 'Influence of Fake News in Twitter During the 2016 US Presidential Election' (2019) 10 Nature Communications 1; Nir Grinberg and others, 'Fake News on Twitter During the 2016 U.S. Presidential Election' (2019) 363 Science 374.

[76] See Julie Ricard and Juliano Medeiros, 'Using Misinformation as a Political Weapon: COVID-19 and Bolsonaro in Brazil' (2020) 1 Misinformation Review 1; Flavia Bellieni Zimmermann, 'Presidential Elections and Post-Truth Politics: A Crossroads for Brazil's Democracy' (*Australian Institute of International Affairs*, 10 February 2022) <https://www.internationalaffairs.org.au/australianoutlook/presidential-elections-post-truth-politics-crossroads-brazils-democracy/> accessed 02 February 2024.

[77] See FGV DAPP, *Desinformação On-line e Contestação das Eleições: Quinze Meses de Postagens sobre Fraude nas Urnas Eletrônicas e Voto Impresso Auditável no Facebook* (FGV DAPP 2022); and Natalia Viana, Alice Maciel Laura Scofield and Juliana Dal Piva, 'From Bannon to Bolsonaro, Misinformation and Brazil's Coup Attempt' (*The Brazilian Report*, 5 October 2023) <https://brazilian.report/power/2023/10/05/bannon-bolsonaro-misinformation-coup/> accessed 02 February 2024.

regulations concerning the control of disinformation. The role of the judiciary unfolded in two main phases. First, spanning from 2019 to 2021, the control of disinformation by courts took a reactive and somewhat erratic approach. Second, since 2022, the judiciary designed a more institutionalized approach, especially driven by the Brazilian Supreme Court (*Supremo Tribunal Federal* or STF) and electoral courts, marked by more preventive and comprehensive actions.

During the beginning of the first phase, in March 2019, the Chief Justice of STF, Dias Toffoli, initiated Inquiry No. 4,781/DF, known as the "Fake News Inquiry".[78] It was launched due to the increased harassment of STF Justices, both in-person and, more significantly, through virtual means. The Fake News Inquiry brought significant prominence to the STF in the fight against disinformation, with a notable role played by Justice Alexandre de Moraes in conducting this investigation.[79] In September of the same year, the Brazilian National Congress also established a hearing to address the issue. Although suspended in early 2020 amid parliamentary efforts to contend with the COVID-19 pandemic, the hearing shed light on how the federal public budget was being utilised to fund disinformation networks.[80]

As the 2022 elections approached, there was a significant transformation in the institutional landscape regarding this matter, leading to the second phase of responses to disinformation. Former President Jair Bolsonaro initiated an intense campaign against the soundness of the Brazilian electoral process, publishing fake news on alleged frauds in the 2018 and 2022 elections.[81] During a meeting with foreign ambassadors, Bolsonaro propagated falsehoods regarding electoral fraud, prompting the Higher Electoral Court (*Tribunal Superior de Justiça* or TSE) to unanimously greenlight an administrative investigation against Bolsonaro aiming to

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[78] For an overview of the case, see 'The Case of the Brazil Fake News Inquiry' (*Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-the-brazil-fake-news-inquiry/> accessed 02 February 2024.

[79] See Cedê Silva, 'Brazilian Supreme Court Kicks Off Cases on Social Media Moderation' (*The Brazilian Report*, 30 May 2023) <https://brazilian.report/power/2023/03/30/court-social-media-moderation/> accessed 02 February 2024; Ana Paula Candil and Paula Mariane, 'Brazil's Supreme Court to Set the Tone of Content-Moderation Regulation' (*MLex*, 23 May 2023) <https://mlexmarketinsight.com/news/comment/comment-brazil-s-supreme-court-to-set-the-tone-of-content-moderation-regulation> accessed 02 February 2024. In this regard, other investigations also played a significant role, such as Inquiry No. 4,828/DF (Inquiry into Antidemocratic Acts), which assessed the organization of antidemocratic events, including the launching of rockets against the court's headquarters, and Inquiry No. 4,874/DF (Digital Militias Inquiry), which investigated evidence of a criminal organization with a strong digital presence aiming to undermine democracy and the rule of law.

[80] See Celso Campilongo and others, 'Democratic Legitimation through the Electoral Procedure: Fake News and Electronic Voting in Contemporary Brazil' in Gabriel F. Fonseca, Lucas F. Amato and Marco A. L. L. Barros (eds), *Contemporary Socio-Legal Studies: Empirical and Global Perspectives* (Faculdade de Direito da Universidade de São Paulo 2023).

[81] See Diane Jeantet and Carla Bridi, 'EXPLAINER: Bolsonaro knocks Brazil's voting system' (*AP*, 06 September 2022) <https://apnews.com/article/jair-bolsonaro-caribbean-voting-donald-trump-elections-fb592d5165e5bb07c0426199d86b5787> accessed 14 May 2024.

secure the presidential run.[82] The widespread dissemination of disinformation during the 2022 Brazilian elections[83] prompted TSE, led by Justice Alexandre de Moraes (also a member of STF), to endure this preventive and proactive approach by courts, adopting measures such as the removal of posts and the banning social media accounts.[84]

Certainly, the role of courts, particularly exemplified by Moraes' actions, has stirred high controversy not only within Brazil but also internationally.[85] However, this approach represents a uniquely institutional response to tackling disinformation. By leveraging the judiciary as a referee in the online political discourse, Brazil has charted a distinct path from that of other jurisdictions.[86] It is noteworthy that only following Lula's election in 2022 and an attempted coup on January 8, 2023,[87] did legislative debates take centre stage in public discourse. During the past year, Bill No. 2,630/2020 (Fake News Bill) gained renewed momentum, aiming to mitigate the spread of disinformation through digital channels, particularly on social media platforms and private messaging apps, by establishing a framework of responsibilities and penalties for platforms. Initially influenced by the DSA, the project underwent numerous amendments during its journey through legislative debates, resulting in a significantly altered text that mirrors various dynamics of Brazilian parliamentary politics. Ultimately, the Brazilian National Congress shelved the bill in 2024, opting instead to create a working group for further

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[82] See 'TSE instaura inquérito para investigar ataque às urnas' (*CNN Brasil*, 02 August 2021) <https://www.cnnbrasil.com.br/politica/tse-instaura-inquerito-para-investigar-ataque-as-urnas/> accessed 14 May 2024. Following Bolsonaro's defeat in the 2022 Brazilian elections, the TSE ruled in favor of his conviction for electoral violations. As a result, he was stripped of his political rights and barred from participating in future elections—a move that would be deemed bold even by European standards. See Ricardo Brito and Gabriel Araujo, 'Bolsonaro barred from holding public office in Brazil until 2030' (*Reuters*, 30 June 2023) <https://www.reuters.com/world/americas/political-career-brazils-bolsonaro-dangles-by-thread-electoral-trial-nears-end-2023-06-30/> accessed 14 May 2024.

[83] Studies indicate that the daily average of fake news surged from 196.9 thousand before the initial round to 311.5 thousand thereafter. This increase was primarily observed on Twitter (57%), WhatsApp (36%), and Telegram (23%), with false content spanning topics related to politics and religion. See 'Estudo mostra que uso de fake news cresce no 2o turno; "desinformação está mais complexa e sofisticada", diz pesquisadora' (*G1*, 25 October 2022) <https://g1.globo.com/politica/eleicoes/2022/noticia/2022/10/25/estudo-mostra-que-uso-de-fake-news-cresce-no-2o-turno-desinformacao-esta-mais-complexa-e-sofisticada-diz-pesquisadora.ghtml> accessed 14 May 2024.

[84] In the first round alone, the TSE removed 334 posts from both Bolsonaro and Lula campaigns. See Weslley Galzo, 'TSE remove das redes sociais 334 postagens sobre presidenciáveis durante a campanha eleitoral' (*Estado de São Paulo*, 14 October 2022) <https://www.estadao.com.br/politica/tse-remove-das-redes-sociais-334-fake-news-sobre-presidenciaveis-durante-a-campanha-eleitoral/> accessed 14 May 2024.

[85] Moraes was criticized by both the progressive and conservative voices. See 'Is Brazil's Alexandre de Moraes actually good for democracy?' (*The New York Times*, 22 January 2023) <https://www.nytimes.com/2023/01/22/world/americas/brazil-alexandre-de-moraes.html> accessed 14 May 2024; and 'Elon Musk challenges Brazilian judge over order to block X accounts' (*The Washington Post*, 8 April 2024) <https://www.washingtonpost.com/world/2024/04/08/elon-musk-brazil-disinformation-twitter-moraes/> accessed 14 May 2024.

[86] See Jack Nicas, 'To Fight Lies, Brazil Gives One Man Power Over Online Speech' (*The New York Times*, 21 October 2022) <https://www.nytimes.com/2022/10/21/world/americas/brazil-online-content-misinformation.html> accessed 14 May 2024; and Mac Margolis and Robert Muggah, 'Brazil breaks new ground in the global fight against fake news' (*openDemocracy*, 30 Januart 2023) <https://www.opendemocracy.net/en/democraciaabierta/brazil-crack-down-fake-news-disinformation-lula-restore-trust-internet/> accessed 14 May 2024.

[87] See Jack Nicas and André Spigariol, 'Bolsonaro Supporters Lay Siege to Brazil's Capital' (*The New York Times*, 8 January 2023) <https://www.nytimes.com/2023/01/08/world/americas/brazil-election-protests-bolsonaro.html> accessed 02 February 2024.

discussion,[88] leaving the TSE as the main enforcer and architect of regulations against misinformation in Brazil and marking the divergence from other approaches.[89]

3. Towards a more complex narrative of regulatory convergence

The examples discussed in this paper highlight that operations of digital platforms in Brazil have not necessarily resulted in the transmission of European regulatory standards to the country. Instead, these cases point to a more nuanced narrative to describe the influence of the European Union on digital platform regulation. What the development of data privacy and protection, competition policy, and disinformation control in Brazil seem to have in common is that the European standards serve as a rhetorical catalyst for regulation, even though not translated in substantive content. As a "regulatory powerhouse", the European Union was often invoked as a kind of "gold standard" to justify the need for regulating digital platforms in in the country.

Similar to the rhetorical influence exerted by the United States for liberalizing reforms in the Global South during the 1990s,[90] as epitomized by the "Washington Consensus",[91] the European Union now seems to play a similar role. In this regard, a "Brussels Consensus"[92] translates this rhetorical catalyst in influencing the adoption of economic governance measures within these jurisdictions, including Brazil. It describes the processes of regulatory convergence driven by the persuasive impact of European regulatory "excellence" or "best practices". Unlike

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[88] See Tatiana Dias, 'Arthur Lira matou o PL das fake news' (*Intercept Brasil*, 10 April 2024) <https://www.intercept.com.br/2024/04/10/arthur-lira-matou-o-pl-das-fake-news/> accessed 14 May 2024.

[89] See Bruna Santos, 'Brazil's 'Fake News Bill' sets global precedent with dangerous implications' (*The Brazilian Report*, 24 April 2023) <https://brazilian.report/opinion/2023/04/24/fake-news-bill-dangerous-implications/> accessed 14 May 2024.

[90] See Sarah Babb, 'The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor' (2013) 20 Review of International Political Economy 268.

[91] For an overview of the concept of "Washington Consensus' as an agenda for liberalising markets at micro and macro levels, see John Williamson, 'Democracy and the "Washington Consensus"' (1993) 21 World Development 1329; John Williamson, 'From Reform Agenda to Damaged Brand Name' (2003) 40 Finance and Development; John Williamson, 'The Strange History of the Washington Consensus' (2004) 27 Journal of Post Keynesian Economics 195; and John Williamson, 'A Short History of the Washington Consensus' (2009) 15 Law and Business Review of the Americas 7.

[92] The term was originally employed in reference to the idea of the Washington Consensus, translating the process of the importation of this agenda of macroeconomic and monetary policy liberalisation to Europe. See Alberto Monteverdi, 'From Washington Consensus to Brussels Consensus' in Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (Springer 2017); Roberto Tamborini, 'The "Brussels consensus" on Macroeconomic Stabilization Policies in the EMU. A Critical Assessment' (2003) 1st EUI Alumni Conference: Governing EMU: Political, Economic, Legal and Historical perspectives. European University Institute; Erik Jones, 'The Collapse of the Brussels–Frankfurt Consensus and the Future of the Euro' in Vivien A. Schmidt and Mark Thatcher (eds), *Resilient Liberalism in Europe's Political Economy* (Cambridge University Press 2013). More recently, however, it has also been used to represent aspects of the uniformisation of European regulatory standards in matters including the regulation of artificial intelligence as well as competition policy. See Christian Ahlborn and Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Claus-Dieter Ehlermann and Mel Marquis (eds), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Hart Publishing 2008); and Pablo Ibáñez Colomo, 'Whatever Happened to the 'More Economics-Based Approach'' (2020) 11 Journal of European Competition Law & Practice 473.

the Brussels Effect, which is more associated with the functioning of global markets and their transnational players, the Brussels Consensus relates to the symbolic power[93] mobilised in legislative debates surrounding these regulations, elevating the European Union to a position of regulatory exemplar, with ostensibly optimal and replicable standards for other jurisdictions.

As a final note to the discussion on the different narratives on regulatory convergence, it is crucial to focus on aspects of institutional design and decision-making, particularly in a context where uncertainties arise regarding the different drivers of translating these standards to Brazil. Simply replicating regulatory models, even if proven successful, does not address the intrinsic incompleteness of design in regulation,[94] as its success often relies on additional arrangements that underlie its structures. As indicated by the cases above, the dynamics of reproducing regulatory models may face substantial challenges given the diversity of institutional realities outside the European context. These challenges become even more complex when considering that reforms themselves grapple with pre-existing institutional choices, entangled in processes of path dependence[95] and lack of state capacity.[96] Some of the discussions on the regulation of digital platforms, as mentioned earlier, are evidently in their early stages, making it premature to predict their evolution over time. Nevertheless, challenges of this institutional nature should not be disregarded during pivotal moments in regulatory frameworks, constituting a crucial aspect of the agenda for regulators and policymakers, encompassing planning through the execution of these reforms.[97]

Conclusion

This paper contributes to the discussion on the influence of European law in the regulation of digital platforms. Our findings suggest that, at least in Brazil, the Brussels effect is incomplete in describing how these processes unfold in the country. Instead of simply adopting

[93] To some extent, this also involves dynamics of tacit domination and resistance that may occur in regulation, as a field of dispute between regulatory centres. See Pierre Bourdieu, 'Social Space and Symbolic Power' (1989) 7 Sociological Theory 14.
[94] See Mitchell Reich, 'Incomplete Designs' (2016) 94 Texas Law Review 807.
[95] See Paul A. David, 'Clio and the Economics of QWERTY' (1985) 75 American Economic Review 332; and Paul A. David, 'Path Dependence: A Foundational Concept for Historical Social Science' (2007) 1 Cliometrica 91.
[96] See Matt Andrews, Lant Pritchett and Michael Woolcock, *Building State Capacity: Evidence, Analysis, Action* (Oxford University Press 2017) 10 ("[l]ike the truck in this game park, many developing countries and organizations within them are mired in a 'big stuck,' or what we will call a 'capability trap': they cannot perform the tasks asked of them, and doing the same thing day after day is not improving the situation; indeed, it is usually only making things worse. Even if everyone can agree in broad terms about the truck's desired destination and the route needed to get there, an inability to actually implement the strategy for doing so means that there is often little to show for it—despite all the time, money, and effort expended, the truck never arrives").
[97] This perception further emphasizes the utility of incremental reforms built upon existing institutional contexts. See Charles E. Lindblom, 'Still Muddling, Not Yet Through' (1979) 39 Public Administration Review 517; Charles E. Lindblom, 'The Science of "Muddling Through' (1959) 19 Public Administration Review 79.

European standards, the development of data privacy and protection, competition policy, and disinformation control in Brazil was linked to distinctive characteristics in their very design, indicating an institutional drifting apart process. This is not to diminish the relevance of Europe in this process. Rather, we observe that despite serving as a relevant rhetorical catalyst in the adoption of these regulations, Europe's influence does not necessarily translate into their substantive content. While further studies are needed to fully understand this phenomenon, this paper certainly points to the incompleteness of the Brussels Effect to describe the regulation of digital platforms in the Global South.

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