IEA Perspectives 4

DIGITAL OVERLOAD

How the *Digital Markets, Competition and Consumers Bill's* sweeping new powers threaten Britain's economy

Dirk Auer, Matthew Lesh, Lazar Radic

September 2023

International Center for Law & Economics

Institute of Economic Affairs

Foreword by Rt Hon Sir Robert Buckland KBE KC MP

About IEA publications

The IEA publishes scores of papers, books, blogs and more each and every year – covering a variety of stimulating and varied topics.

To that end, our publications will, in the main, be categorised under the following headings, from May 2023 onwards.

Hobart Editions

Papers or books likely to make a lasting contribution to free market debate, either on policy matters or on more academic grounds

IEA Foundations

Primers or introductions to free market concepts, ideas and thinkers

IEA Perspectives

Majoring on current policy-focused issues

IEA Briefings

Short, punchy reports on contemporary issues

IEA Special Editions

Spotlighting lecture transcripts, celebrated writers and more

Much of our work is freely available on the IEA website. To access this vast resource, just scan the QR code below – it will take you directly to the IEA's Research home page.

Contents

About the authors **4**

Foreword **6**

Summary **8**

Introduction **10**

Designations, conduct requirements and pro-competition interventions **13**

The lack of procedural safeguards **22**

The threat to British consumers, investment, and innovation **29**

Conclusion **33**

References **35**

About the authors

Dirk Auer manages International Center for Law & Economics' (ICLE) work on competition and antitrust issues in the United States, the United Kingdom, Europe, and abroad. Dirk joined ICLE as a Senior Fellow in October 2018 and was promoted to his current position in January 2022. In addition to his work with ICLE, Dirk also serves as an adjunct professor at the University of Liège, where he teaches European competition law and the economics of competition law.

Matthew Lesh is the Director of Public Policy and Communications at the Institute of Economic Affairs, where he has written about digital regulation. His papers include *Breaking The News? Should digital platforms be required to fund news publishers?*, *Expanding the Web: The case against net neutrality* and *An Unsafe Bill: How the Online Safety Bill threatens free speech, innovation and privacy*. He often appears on television and radio, is a columnist for London's *CityAM* newspaper, and has written for dozens of publications including *The Times*, *The Telegraph* and *The Spectator*. He is also a Fellow of the Adam Smith Institute and Institute of Public Affairs. Matthew graduated with First Class Honours from the University of Melbourne with a Bachelor of Arts (Degree with Honours) and completed a Masters in Public Policy and Administration at the London School of Economics, where he received the Peter Self Prize for Best Overall Result.

Lazar Radic is Senior Scholar for Competition Policy at the ICLE, and Adjunct Professor of Law at IE University. Lazar is a qualified lawyer and has worked in band one law firms in Spain and Serbia, both in the competition law department. He holds degrees in Law and Political Science from the University of Madrid, LL.Ms from the University of Amsterdam (EU and International Law, Cum Laude), and the European University Institute (Comparative and International Laws). Lazar's PhD, also from the European University Institute, explored the intersection between political philosophy and competition law.

Foreword

The global economy is changing, and the United Kingdom stands to greatly benefit from the growing importance of the digital sector. Our country has always excelled at innovation, and there is great potential with digital technologies for the UK to be a world leader. But the Digital Markets, Consumer and Competition Bill (DMCC) risks putting up barriers to innovation and investment that could greatly restrict the growth of the UK's digital sector.

This important paper from the Institute of Economic Affairs and the International Center for Law & Economics analyses the Bill and discusses many of the issues I and other Parliamentarians have been highlighting to colleagues in Government. Whilst well intentioned, this Bill would grant substantial powers to the new Digital Markets Unit, risking an overreach in regulation without the necessary checks and balances.

One area of particular concern is the proposed Judicial Review mechanism for appeals, rather than one based on merit. By not allowing appellants to question the rights and wrongs of a decision affecting them, but only its legality, the DMU would be given free rein to make unchallengeable decisions that affect large swathes of the economy. Colleagues and I have heard from companies in the digital sector who have all expressed anxiety about the diminution of accountability that these plans entail.

Regulation of this growing sector is clearly necessary, but it mustn't be done in a way that discourages investment. Sadly, the Bill in its current form would have that impact. Regulation must never be overdone, and must always involve accountability. This paper not only highlights the challenges that the Bill in its current form poses, but also sets out clear ways in which it could be improved. There is still much time for the Government to put forward a more sensible regulatory regime, thus

avoiding an overstretching of powers that could damage a burgeoning part of our economy.

Rt Hon Sir Robert Buckland KBE KC MP
MP for South Swindon
Secretary of State for Justice (2019-2021)
Solicitor General for England and Wales (2014-2019)

Summary

- The Digital Markets, Competition and Consumers Bill (DMCC or 'the Bill') endows the UK's Competition and Markets Authority (CMA) with extensive new powers to tackle alleged anticompetitive practices in digital markets.
- The CMA will be able to both prohibit or require a wide array of conduct at an incipient stage and impose far-reaching remedies with limited accountability or consideration of consumer benefits.
- The DMCC's powers are defined broadly, meaning the CMA will have significant discretion to direct the development of digital markets; this is unlike the European Union's Digital Markets Act, which, although still far reaching, contains more clearly defined thresholds, requirements and prohibitions.
- The CMA will be able to designate any large company satisfying certain criteria and undertaking 'digital activity' as having Strategic Market Status (SMS). That could bring hundreds of companies into the scope of the regime, empowering the CMA to exert substantial control over broad swaths of the economy over time.
- The DMCC empowers the CMA to take crucial decisions at every step of the process — e.g. in designating relevant activities, imposing conduct requirements and pro-competition interventions, investigating breaches, adjudicating wrongdoing and imposing significant fines — without full merits review.
- It will only be possible to challenge the CMA on process grounds under the judicial review standard, giving it great power.

- The DMCC ignores important tradeoffs inherent to the proposed prohibitions and obligations, such as the privacy and security implications of requiring ‘interoperability’ or the convenience to users of ‘self-preferencing’.
- The ‘final offer mechanism’ backstop enforcement power marks a fundamental incursion on freedom of contract for private businesses, which could find themselves required to accept unfavourable terms in relation to third parties. The CMA will be asked to arbitrate commercial conflicts between large digital firms and their competitors, leading to a significant risk of rent-seeking behaviour by third parties, regulatory capture and politicised decision-making.
- The regime will undermine investment in the UK digital sector, and associated innovation, because of the risk of cumbersome, unclear and ever-changing rules – along with a lack of accountability. New features could be delayed or not introduced for British users as firms seek to minimise the risk of falling afoul of the new regime and incurring hefty fines and stringent remedies. The UK’s position as a ‘science and technology superpower’ will thus be undermined.

Introduction

The Digital Markets, Competition and Consumers Bill (DMCC), introduced into parliament in April 2023, is the UK government's response to alleged anticompetitive practices in digital markets.[1] But in its current form, the Bill threatens to do more harm than good.

In this paper we address Part 1 of the Bill, which concerns its provisions on digital markets.[2] In this area, the government's underlying concern is that network effects, economies of scale and the accumulation of user data have led to the creation of monolithic technology giants that can exercise market power in ways that lead to higher prices and poor outcomes for consumers, and furthermore that their power is entrenched, in the sense that their market position is very hard for new entrants to challenge. Advocates of the legislation believe that new regulatory powers are necessary to address these competition issues. The particular point that digital companies are heavily entrenched has been questioned elsewhere, for example by Baye and Prince (2020: 1287). They argue that technology markets are highly dynamic and that, while it may be tempting for policymakers to intervene in an attempt to remedy an immediate concern, history suggests that competition often permits new and superior technologies to supplant entrenched ones. This paper, however, is more narrowly focused on the DMCC, the powers it gives to regulators, the lack of procedural protections, and the issues this raises for the UK economy.

1 These issues were outlined in the government's Digital Competition Expert Panel, also known as the Furman (2019) report, and the consultation on a new pro-competition regime for digital markets (DCMS and BEIS 2022).

2 Shalchi and Mirza-Davies (2023) describe Part 2, and Conway, Fairbairn, and Pyper (2023) describe Parts 3-6.

Part 1 of the DMCC will:

1. empower the CMA to designate companies as having ‘strategic market status’ (SMS) with respect to designated digital activities;
2. allow the CMA to design bespoke ‘conduct requirements’ for each SMS firm, dictating important aspects of the operation of its service, how customers are treated, and relations with other businesses in relation to designated activities (e.g. preventing a search engine from prioritising its services in results);
3. allow the CMA to undertake what are presumed to be pro-competition interventions (e.g. requiring open data sharing);
4. mandate transparency in relation to mergers;
5. equip the CMA with extensive enforcement powers, including the imposition of large fines and a ‘final offer mechanism,’ as a backstop enforcement tool.

In practice, it endows the CMA, acting through the newly created Digital Markets Unit (DMU), with extensive new powers to categorically prohibit certain types of conduct at an incipient stage and impose far-reaching remedies with limited consideration of countervailing consumer benefits.

The CMA will also be able to take crucial decisions at every step of the process — e.g. in designating relevant activities, imposing conduct requirements and pro-competition interventions, investigating breaches, adjudicating wrongdoing and imposing significant fines — without full merits review. It will only be possible to challenge the decision-making on process grounds under the judicial review standard. In simple terms, courts will not assess whether the CMA was ‘right’, but whether the correct procedures were followed.

In addition, the procedural safeguards contemplated by the Bill may enable overenforcement in ways that hurt consumers. In practical terms, this could mean new products will not be developed in the UK and that new features could be delayed or not introduced for British users, as firms seek to minimise the risk of falling afoul of the new regime and incurring hefty fines and stringent remedies. This could, in turn, deter post-Brexit investment in the British economy and damage job creation in high-tech industries.

Granting extreme executive powers without sufficient oversight marks a departure in British governance from the rule of law in favour of expansive regulatory discretion, which is ill-advised on both principled — i.e., respect for the rule of law as a guiding democratic principle — and practical grounds.

To avoid turning the UK into a 'tech turn-off', it is vital that the DMCC be revised to narrow the CMA's discretion and that meaningful procedural guardrails are incorporated to counterbalance its far-reaching powers. Absent this, the damage caused to the British economy may be hard to reverse.

Designations, conduct requirements and pro-competition interventions

The DMCC grants the CMA broad powers in designating companies as having ‘strategic market status’ (SMS). Companies with SMS are subject to special control, and the CMA can impose conduct requirements and so-called ‘pro-competition interventions’ on them. However, as argued below, these powers may lead to the CMA making interventions without fully considering various tradeoffs or unintended consequences of its actions, which is likely to lead to significant ‘rent-seeking’.

The DMCC’s designation criteria

The CMA will be able to designate a company as having SMS where it takes part in a ‘digital activity linked to the United Kingdom’, and, in relation to this digital activity, has ‘substantial and entrenched market power’ and is in ‘a position of strategic significance’ (s. 2),[3] and has a turnover of at least £1 billion in the UK or £25 billion globally (s. 7). The government has previously stated that the ‘regime will be targeted at a small number of firms’ (DBT and DSIT 2023).

Except for the monetary threshold, these are all broadly defined. ‘Digital activity,’ is defined to include providing services or content through the internet (s. 3). In itself that could include a very large number of firms, so long as they also fall within the turnover and market power thresholds.

3 At the time of writing, the Bill is in progress through Parliament. References to section numbers are those of the Bill as it was introduced rather than later amended versions.

The definition of a 'link to the United Kingdom' merely means that there are a 'significant number' of users in the UK (s. 4). The concept of 'substantial and entrenched market power' is never fully explained, although the CMA is required to make a forward-looking assessment of the firm's position (s. 5). That is inevitably conjectural. 'Strategic significance' is similarly only vaguely defined (s. 6).

There is a crucial question, therefore, as to how much the monetary threshold limits the number of firms. As of March 2022, there were 530 companies with more than £1 billion in revenue in the United Kingdom, according to the Office for National Statistics (ONS), employing 3.9 million people.[4] The practical limitation on the number of firms that might find themselves with 'Strategic Market Status' therefore seems questionable.

A wide range of sectors, including supermarkets, retailers, banks, insurance firms, telecommunications companies, and pharmaceutical makers — to name just a few — all theoretically satisfy this criterion, as they all offer some sort of service through the internet, whether food delivery or a booking service, and could be argued to have strategic significance and/or some market power. Even if these sectors are not directly associated with SMS, it is worth noting that large digital companies provide services to a wide range of markets, from travel and retail to news media, advertising and entertainment. Thus, CMA will have the power to interfere in a variety of new ways across wide swaths of the economy even if SMS is limited to a small number of firms.

Conduct requirements and pro-competition interventions

Following the designation of a firm as having SMS, the CMA will be able to impose both conduct requirements or so-called 'pro-competition interventions' (PCIs), including 'pro-competition orders'.

(1) Conduct requirements will regulate how a firm behaves in relation to particular digital activities, so as to achieve any of three kinds of objectives: 'fair dealing', 'open choices', and 'trust and transparency' objectives (s. 19(5)).[5] These broad categories encompass swathes of — often benign — behaviour, and there is little reason to believe this scope will be meaningfully narrowed by the list of specific powers the CMA will have

4 Private email with the Office for National Statistics, 9 June 2023.

5 These objectives are themselves defined, although loosely and broadly, in the Bill, s. 19(6-8).

in pursuing them. These powers are listed in s. 20 of the Bill, and notable amongst them are requirements that an SMS firm trade on 'fair and reasonable terms' or to prevent such a firm from, for instance, as 'using data unfairly'; using its position in a digital activity to treat its own products more favourably than those of other firms (often labelled 'self-preferencing'); behaving in other areas so as to increase its market power in the activity where it has SMS status, or to bolster the strategic significance of its position; requiring *or incentivising* [emphasis added] users of one of its products to use others; or restricting interoperability between its products and those of other firms.

(2) A 'pro-competition intervention' is a requirement put on an SMS firm that, rather than seeking to limit the effects of any market power, actively seeks to promote competition. In an explanation of the approach, the government has said that they will be used to 'tackle the sources' of SMS firms' market power and be 'targeted interventions to address the root cause of competition issues in digital markets'.[6] Although there is considerable detail about the manner in which the CMA must conduct its investigations prior to making a PCI, there is little in the DMCC to provide clarity on what kind of instructions might then be given. It is first said that an SMS firm can be subject to an order concerning how it 'must conduct itself, in relation to the relevant digital activity or otherwise' (s. 44(3)).[7] Subsequently, it is indicated that orders may include provisions permitted in enforcement orders under the Enterprise Act (2002), and that requirements may be imposed 'on a trial basis for the purpose of assisting the CMS in establishing requirements that would be effective' in achieving the goals of the order, *and* that this may require the firm in question to act differently in respect of different users or customers (s. 49 (1), (3), and (4)).

The latter provision may create scope for lobbying of the CMA by parties interested in acquiring an advantage over their competitors in their dealings with an SMS firm. But the former is perhaps more striking. It seems to invite experimentation by the regulator, and that surely must threaten to disrupt the business of the firm subject to what might be a succession of orders varying the requirements on it. Furthermore, it seems to invite the imposition of ill-considered regulation on the basis that it is in any case 'only a trial'.

6 Department for Business & Trade and Department for Science (2023)
7 There is a further provision concerning entities 'exercising functions of a public nature' (s. 45(3(b)) which is not the focus of this paper.

As to what kind of measures may be anticipated, there is further indication in the rather extensive list of 'work' that might be done under the regime provided by the government.[8] The list provided includes ensuring third parties are offered 'fair and reasonable payment terms for content hosted by SMS firms'; 'mandating interoperability between social media platforms'; under certain conditions, obliging SMS firms to allow customers access to alternative app stores.

The proposed interventions

A number of clear dangers arise from the ways in which these powers could be used by the CMA.

Self-preferencing

'Self-preferencing' occurs when a company gives preferential treatment to one of its own products. An example would be Google displaying its shopping service at the top of search results ahead of alternative shopping services. Critics of this practice argue that it puts dominant firms in competition with other firms that depend on their services and this allows companies to leverage their power in one market to gain a foothold in an adjacent market, thus expanding and consolidating their dominance.[9] However, this behaviour can also be procompetitive and beneficial to users.

For instance, companies may choose to favour their own products or services because, as Radic and Manne (2022) argue, they are better able to guarantee their quality or quick delivery. Amazon, for instance, may be better placed to ensure that products provided by the 'fulfilled by Amazon' (FBA) logistics service are delivered in a timely manner compared to other services (ibid.). Consumers may benefit from self-preferencing in other ways, too. If, for instance, Google were prevented from prioritising Google Maps or YouTube videos in its search queries, it could be harder for users to find optimal and relevant results. If Amazon is prohibited from preferencing its own line of products on the marketplace, it may instead opt not to sell competitors' products at all.

8 Department for Business & Trade and Department for Science (2023).
9 Khan (2019) argues for the restriction of this behaviour.

The power for the CMA to prohibit the requiring or incentivising of customers of one product to use another would enable the limiting or prevention of self-preferencing and other similar behaviour. Granted, traditional competition law has sought to restrict the 'bundling' of products by *requiring* them to be purchased together, but to prohibit incentivisation as well goes much further.

It also needs to be recognised that 'open' and 'closed' platforms are different ways of supplying similar services.[10] There is then scope for competition between these alternative approaches. By prohibiting self-preferencing, a regulator might therefore close down competition to the detriment of consumers. This point was made in the context of American regulation in the International Center for Law and Economics (2022), where it was argued that,

> For Apple (and its users), the touchstone of a good platform is not 'openness', but carefully curated selection and security, understood broadly as encompassing the removal of objectionable content, protection of privacy, and protection from 'social engineering' and the like. By contrast, Android's bet is on the open platform model, which sacrifices some degree of security for the greater variety and customization associated with more open distribution. These are legitimate differences in product design and business philosophy. [internal citations omitted]

Increasing market power and 'bolstering' strategic significance

It is widely claimed that because of network effects, digital markets are prone to 'tipping' whereby when one producer gains a sufficient share of the market, it quickly becomes a complete or near-complete monopolist. Although they may begin as very competitive, these markets therefore exhibit a marked 'winner takes all' characteristic.[11] The UK government has expressed the view that competition concerns require swift action so as to limit the extent to which market power becomes entrenched.[12] This concern appears to be the motivation for granting the power, contained

10 A taxonomy of approaches for platform firms is offered by Auer (2020).

11 This argument has, however, been questioned. The central counterpoint is that, despite a large market share, the key players in the digital space do not have significant market power. They are constantly challenged by each other and start-ups. This process has been called 'dynamic competition'.

12 DCMS and BEIS 2022, para 120.

within the DMCC Bill, to prohibit firms from behaving so as to increase their market power or 'bolster' their own strategic significance (s. 20(3)(c)).

However, there are many investments and innovations that will – if permitted – benefit consumers, either immediately or in the longer term, but which may have some effect on enhancing market power or strategic significance. Indeed, improving a firm's products and thereby increasing its sales will often lead to increased market power. The notion of 'bolstering' strategic significance has similarly equivocal implications.[13]

In both cases, there seems to be a serious danger of a very broad inhibition of research, innovation, and investment – all to the detriment of consumers. In so far as such rules prevent the growth and development of SMS firms, they may also harm competition, since it may well be the SMS firms that – if permitted – are most likely to challenge the market power of other SMS firms. The case of Meta's introduction of 'Threads' as a challenge to Twitter (or 'X') appears to be an example.[14] Here, CMA interventions that have the aim of prohibiting the 'bolstering' of a strategic position in one area may in fact prevent entry by one firm into a market dominated by another. In that case, policymaker action protects monopoly power.[15] A much subtler approach to regulation is required.

Interoperability and data portability

A requirement of 'interoperability' means that SMS firms could be forced to ensure that their products integrate with those of other firms. For example, requiring a social network to be open to integration with other services and apps, a mobile operating system to be open to third-party app stores, or a messaging service to be compatible with other messaging services. Without regulation, firms may or may not choose to make their software interoperable. The DMCC will allow the CMA to require it. Another example is data 'portability', which allows customers to move their data from one supplier to another, in the same way that a telephone number can be kept when one changes network.

---

13 'To prop up, support, uphold' seems to be the most apposite of the meanings suggested in the OED.

14 The point that Threads has, for the time being, not been introduced in the European Union is of course notable, and appears to be due to the effect of regulation. In this case, the suggestion of those interviewed by Kelly (2023) is that the issue may be one of 'self-preferencing' rather than anything in the character of 'bolstering'.

15 This point is developed by Petit (2020).

In DCMS and BEIS (2022, para 104), the government suggested the power to require interoperability might be necessary to 'overcome network effects and barriers to entry/expansion'. Clearly, portability similarly makes it easier for users to switch from one provider to another and, to that extent, intensifies competition or makes entry easier. However, both come with costs to consumer choice, in particular by raising difficulties with security and privacy, as well as having questionable benefits for competition.

A closed system, that is, one with comparatively limited interoperability, can help limit security and privacy risks. This can encourage use of the platform and enhance the user experience. For example, by remaining relatively closed and curated, Apple's App Store gives users the assurance that apps will meet a certain standard of security and trustworthiness. Thus, 'open' and 'closed' ecosystems are not synonymous with 'good' and 'bad', and instead represent two different product design philosophies, either of which might be preferred by consumers. By forcing companies to operate 'open' platforms, the powers contained in the DMCC Bill could undermine this kind of inter-brand competition and override consumer choices.

Apart from potentially damaging user experience, it is also doubtful whether some of the interoperability mandates, such as those between social media or messaging services, can achieve their stated objective of lowering barriers to entry and promoting greater competition. Consumers are not necessarily more likely to switch platforms simply because they are interoperable.

Choice screens

The government envisages the powers contained in the DMCC Bill being used to address SMS firms' ability to influence user 'choice of apps through pre-installation, defaults and the design of app stores' (DBT and DSIT 2023a). This would likely mean the imposition of requirements to provide users with 'choice screens', for instance requiring users to choose which search engine or mapping service is installed on their phone. Choice screens may facilitate competition, but they may do so at the expense of the user experience, in terms of the time taken to make such choices. There is a risk, without evidence of consumer demand for 'choice screens,' that the CMA will impose its preference for greater optionality over what is most convenient for users.

Other assorted concerns

Numerous other concerns can be raised about the apparent intent of the DMCC. Some are of a character such that it is simply very difficult to see what might be intended – or what in fact the result might be once a regulator is granted the vaguely specified powers in question. An example arises in s. 20(3)h, which allows the CMA to impose conduct requirements to prevent an SMS firm from 'restricting the ability of users or potential users to use products of other undertakings'. Who is to know what might be counted as 'restricting' such an ability and what would, thereby, be brought within the domain of regulation?

The rent-seeking risk

The danger of agency capture is a perennial risk in regulation. Nevertheless, the conduct requirements and pro-competition intervention powers in the DMCC Bill seem to create a particular vulnerability. They invite the CMA to become the arbitrator in commercial conflicts between SMS firms and between them and other competitors.

An acute vulnerability to the process is very strongly implied by the structure of the legislation. It makes for the identification of firms as having strategic market significance and then gives the CMA power to impose rules, which the Bill leaves unspecified. What might have been expected is that the Bill would create a definition of SMS status and a collection of conduct rules applying to designated firms. The fact that the specification of those rules is left until after designation is presumably explained by the idea that the rules will be customised to the designated firm.

It may be argued that such customisation is a practical necessity, but the point is that the scope for lobbying as to what those rules should be could hardly be clearer. That lobbying can be expected both from SMS firms in relation to rules applying to themselves; other SMS firms in relation to rules applying to each other; and from other parties with an interest in the behaviour or future of the SMS firm in question. The UK's approach is unlike the EU's equivalent Digital Market Act (DMA), which specifies a set of requirements that will be applied to all in-scope digital services and does not allow for bespoke interventions.

Furthermore, as Lambert (2022) emphasised before the publication of the DMCC Bill,[16] three characteristics of approaches like that of the DMCC suggest that it is inferior to the application of competition policy through the courts. These are considerations of focus, political susceptibility, and duration of control. He notes that the courts have a clear focus on applying the law, whereas an agency like the CMA is unlikely to be so focused and will therefore be a more attractive target for lobbying efforts. Secondly, the staff of an agency lacks the kind of independence that is normal for judges, not least because they may have their future employment with the regulated firms in mind. Thirdly, the fact that the regulator needs to be constantly dealing with the regulated firms puts them in contact in a way that runs a clear risk of the regulator starting to see things too much from the point of view of the firm. Lambert (2002: 112) concluded that competition law enforced through the courts is ‘far less susceptible to adverse public-choice concerns than are agencies like the United Kingdom’s DMU’.

The publication of the Bill raises further concerns. The Bill explicitly invites potential or actual competitors to provide testimony to the CMA before the imposition or revoking of a conduct requirement. It *requires* the CMA to conduct consultation on the imposition, removal or conduct requirements (s. 24) and on PCIs (s. 48). There is thus an obvious risk that competitors will seek to influence this process for their own benefit. The nature of the problem then is that the CMA (or any similar agency) is very poorly placed to understand all aspects of the problem with confidence, and hence is in no position to make rules that actually favour the consumer’s interest (or any other specific goal).

And finally, in the DMCC Bill (s. 20(4)) there is actually provision for the Secretary of State to amend the types of conduct requirements that can be imposed. So here there is a further opportunity for rent-seeking in the political realm. Amongst other things, this discretion could result in the politicisation of enforcement and create the risk that future governments will divert the DMCC from its initial purpose in favour of particular sectional interests.

16 Although the Bill was not published, he describes the approach on which he is commenting as the British one envisaged in the creation of the Digital Markets Unit (Lambert 2002: 111-2).

The lack of procedural safeguards

The DMCC Bill not only grants the CMA expansive discretionary powers, as discussed above, but it will also provide powers to investigate, enforce, and apply penalties – with limited counterbalancing safeguards to reduce the risk of poor outcomes for consumers.

Investigatory and enforcement powers

The CMA will have enforcement powers to ensure compliance with its conduct requirements and pro-competition interventions. It will be able to undertake investigations into suspected breaches of conduct requirements (s. 26), which could result in the imposition of enforcement orders (s. 31). The DMCC grants the CMA powers to require relevant information, including requirements to extract, obtain or generate certain information (s. 67(4)), and the power to require firms to 'vary their usual conduct' or 'perform a specified demonstration or test' in order to generate or obtain the information (s. 67(5)). This could not only create significant regulatory costs by requiring a business to carry out potentially limitless research tasks and feature tests to *generate* information, but could also mean handing over proprietary information. This means giving the CMA, at their discretion, the power to, for example, change results in a search engine or on a shopping website used by millions of people in the UK. To the extent necessary to obtain the required information, this gives the CMA the power to direct a company to change how their business operates *before* the conclusion of an investigation or a finding of wrongdoing.

As in other cases, there are extensive investigatory powers. The CMA will be able to require an individual to attend an interview and answer questions (s. 70). A CMA officer can enter a premise without a warrant

with two working days' notice if they have 'reasonable grounds to suspect' that information is accessible and relevant to a breach investigation (s. 72) or with a warrant approved by a court or tribunal, including using 'force' when they have 'reasonable ground for suspecting' that it is necessary (s. 73). There are also criminal sanctions for destroying or falsifying information (s. 91), providing false or misleading information (s. 92), or obstructing an officer (s. 93).

If an investigation concludes that there has been a failure to comply with an enforcement order, a final offer order, a requirement under a pro-competition intervention, or a conduct requirement commitment, the CMA can impose a fine (s. 83). Depending on the details of the breach these penalties can be a combination of up to 10 per cent of global turnover and 5 per cent of daily worldwide turnover for each day a breach of an order or commitment continues (s. 84). That means financial penalties of up to billions of pounds. Additionally, a third party can seek compensation for losses due to a breach of a requirement under the digital markets regime (s. 99), opening up companies with SMS status to further litigation.

These investigatory powers and penalties are similar in kind to established competition law. But, in competition law, these powers can only be exercised for a relatively limited number of purposes established in existing law. The decision to replicate these enforcement mechanisms for the novel and broad digital markets regime thus highlights the extensive and powerful nature of the DMCC Bill.

The countervailing benefits exemption

The DMCC (s. 29) provides for a 'countervailing benefits exception' to conduct requirements. This applies when behaviour that breaches a conduct requirement is found to provide sufficient other benefits to consumers without making effective competition impossible, and is 'indispensable and proportionate' (s. 29(2)(c)) to the achievement of the benefit.

This appears to provide some possibility of relief from overly stringent regulation. However, the requirement that the behaviour be 'indispensable' is an extremely high bar to clear.

Indeed, it is hard to see how that could be shown. For example, a limitation on interoperability might provide a benefit to user security and safety. But the exemption would apply only if the CMA were persuaded that this

limitation was the *only* way to achieve such protection, and that could be very hard or impossible to demonstrate. As explained in more detail below, this problem is compounded by the fact that CMA decisions will only be subject to judicial review. Firms will thus be unable to challenge the authority's factual assessments on questions such as indispensability and proportionality.

Even the chance that such a thing could be shown will be of little value to SMS firms since the exemption can apply only once an investigation into a breach of a conduct requirement is underway.[17] This means that *before* the exemption can be considered the SMS firm in question must already have breached a conduct requirement. Considering the difficulty of showing that the conduct in question is 'indispensable', and perhaps a concern that if a breach appears deliberate, if not exempted, it may attract a heavier fine, the exemption may be of no practical use at all.

The final offer mechanism and price regulation

The DMCC also includes a 'final offer mechanism' that the CMA can use in some cases where a conduct requirement relating to fair and reasonable payment has been breached and the CMA considers other powers would not resolve the breach within a reasonable time period.[18] The key aspect of the mechanism is that the two parties to a transaction (at least one of them being an SMS firm) submit suggested payment terms for a transaction. The CMA then decides between the two offers, with no option to take a third or intermediate course. The intention of the approach is that both parties will be incentivised to put forward a reasonable offer, as the party that favours itself too much will lose to the other party's bid.

A similar power exists in a limited sense in the Australian context, with respect to relations between news publishers and digital platforms under the 'News Media Bargaining Code' system. If the final offer mechanism were adopted in the UK context for this purpose, it would risk undermining a key premise of the internet: that websites are free to link among themselves without payment. It could also have anticompetitive implications for the news industry by providing larger payments to incumbents, discouraging journalistic innovation, and perhaps even limiting news on digital platforms (Lesh 2023).

---

17 This is implied by the fact that the possibility of such an exemption arises only in s. 29, which concerns investigations into breaches of conduct requirements.

18 The exact statement of when the final offer mechanism may be used is in s. 38.

In the DMCC Bill, however, this mechanism could be applied to any SMS business relationship with third parties. This would be entirely unprecedented as there is, to our knowledge, no similar power available to any other competition regulator anywhere else in the world. While, as the government says, this does not involve 'direct price setting' (DBT and DSIT 2023), it does mean the CMA will have the power to decide between two alternative offers and, thus, will be determining the distribution of revenues.

The 'final offer mechanism' derives from the CMA's ability to make a conduct requirement in relation to fair and reasonable pricing. This interferes with the principle that fair and reasonable are determined through mutual agreement between the parties. The final offer mechanism takes this issue one step further by creating an enforcement process that parties will be required to follow. Usually, a contract can only be entered between two parties based on voluntary consent — that is, both sides freely agree to the terms. The CMA will have powers to prevent a firm from walking away (e.g. they could insist a platform continue to host UK news media). The final offer mechanism thus creates a fundamental incursion on freedom of contract for private businesses, which could find themselves coerced into accepting unfavourable terms for relations with third parties.

There are other practical issues with this approach. In fast-moving digital markets, it is likely any arrangements will quickly go out of date, as they would struggle to be constantly renegotiated as companies enter and exit various markets. Furthermore, there is a significant risk of attempted 'rent-seeking', as has arguably been the case with respect to news publishers. A decisionmaker could also lack the necessary knowledge or market understanding to decide among competing options. In sum, the final offer mechanism is a further example of the expansive procedural powers contained within the DMCC Bill.

Judicial review vs full merits review

Many of the issues discussed in the previous sections would raise fewer concerns if defendants could benefit from a 'full merits review' of CMA decisions (meaning the ability to appeal against decisions of the CMA on the basis of whether the CMA was correct in its interpretation of the law and application of it to the facts). After all, existing competition laws arguably give enforcers far broader powers than even the DMCC Bill. Those powers, however, have been narrowed by courts following a

common law-inspired approach.[19] However, it appears that this judicial fine-tuning will be almost impossible under the review standard contemplated by the DMCC Bill. Applications for review of the CMA's decisions, such as the imposition of a penalty, will only be possible under the 'judicial review' standard (s. 101(6)(a)). In principle, this limits any review to procedural issues rather than reevaluating the underlying merits of the decision itself.[20] Under existing law, the grounds for judicial review would be that (1) the CMA has acted beyond its legal powers; (2) the decision was so unreasonable that no reasonable authority could have made it (under the Wednesbury standard); (3) that the CMA failed to follow the correct procedures; or, increasingly, (4) where fundamental rights (such as peaceful enjoyment of property) are engaged, the question of 'proportionality' can be raised. Importantly, under judicial review a court cannot substitute what it thinks is the 'correct' decision but rather can only send it back to the public body for reconsideration.

Like any other regulatory body, the CMA can and does make mistakes; otherwise, there would be no need for a specialised Competition Appeals Tribunal. Competition cases involving digital markets, however, have the added difficulty of implicating conduct with ambiguous and uncertain effects on social welfare, which often require sophisticated analysis to untangle. There is no good reason why this analysis, on which the merits of an intervention will be based, should be free from scrutiny. Indeed, the Rt Hon Sir Robert Buckland (2023) KBE KC MP, the former Secretary of State for Justice and Lord Chancellor, has suggested that 'the Government will have to look again at merit-based appeals, because judicial review principles are just too narrow, in order to deal with the potentially powerful and wide remit of the CMA'. In addition, the limited review standard could also breach designated companies' rights of defence and, by extension, hamper the DMCC Bill's effectiveness by opening up even substantively sound decisions to legal challenges on fundamental rights grounds — such as the European Convention of Human Rights and its UK implementation in the Human Rights Act 1998. Thus, a robust standard

---

19 See, e.g. *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943) ('Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.')

20 It is sometimes argued that in British competition cases, the Competition Appeals Tribunal operates something of an enhanced judicial review, so that it is somewhat more akin to a consideration of the merits of a decision. To the extent that that remains true, concerns are lessened. However, as pointed out by Jones and Egerton-Doyle (2023), if the intention were to continue in that way, it would have been easy to make this clear in the drafting of the Bill. Rather, it seems there is a commitment to strict Judicial Review.

of review benefits not just targeted undertakings but also the CMA by reducing the likelihood that its decisions will be reversed on appeal.

Sir Jonathan Jones, former head of the Government Legal Service, and Egerton-Doyle note that the type of decisions being made by the CMA (acting through its DMU) are similar in kind to those when enforcing existing UK competition law, which 'are subject to a full merits review if appealed' (Jones and Egerton-Doyle 2023). They go on to note that obligations in existing competition law are also clearly outlined in statute and have judicial precedents:

> The position for the SMS regime could not be more different: the DMU will have power to decide *who* it is going to regulate, *set the rules* that apply to them, and then *enforce* those rules. This makes the DMU effectively legislator, investigator and executioner. [emphasis in the original]

The government has justified the use of the judicial review standard on the grounds that the CMA would have the necessary expertise and should be deferred to, that it is similar to other regulators that use the judicial review standard, and on the basis of the need for 'robust outcomes at pace' DCMS and BEIS (2022, paras 151 and 148). This is, however, highly questionable. As things stand, the CMA has no experience exercising these powers and will have no superhuman capacity to predict the future direction of digital markets. Thus, it seems highly unlikely that it will always make the right decision.

Jones and Egerton-Doyle also note that the system will be 'entirely new and not based on any existing law'. It will apply to a range of markets, from online marketplaces to social media, and thus cannot be compared to narrower sector regulators (such as Ofgem or Ofcom), whose decisions can only be appealed under the judicial review standard. In any case, if the CMA does have the expertise to reach the correct decisions, then the government should not fear additional scrutiny. Furthermore, questions about the speed of decision-making can at least be partly resolved by placing time limits on merit reviews.

Perhaps more fundamentally, moving from a judicial review to a full merits review standard would — to some extent, at least — shift the onus of the final interpretation from the CMA to the courts, who will be able to provide a definitive public precedent as to the meaning of the law. This would

create valuable checks and balances. The institution that is primarily tasked with enforcing rules (the CMA) would no longer bear sole responsibility for deciding what standards should govern actual cases and how they should be interpreted. In other words, the CMA would no longer be the main prosecutor and adjudicator — the latter role would, to a far greater extent, be exercised by the courts. Over time this might lead to fewer challenges as a settled understanding of the law is reached.

The judicial review standard would also be far lower than that applied to appeals against similar competition regulators elsewhere in the world. In the European Union, for example, decisions taken by the Commission pursuant to the Digital Markets Act are subject to review on points of fact and law by the Court of Justice, which can undo its decisions and review any penalties imposed.[21] In the United States, agencies can only take competition enforcement action through litigation, in which both sides present their arguments before a judge, meaning the courts (not the regulatory agency) ultimately make a determination of the merits of a case – and initial judgements can also be appealed to higher courts. Even under China's Anti-Monopoly Law (The National People's Congress, 2009) it is possible to apply for administrative reconsideration at no cost *and* to undertake administrative litigation, both of which can include reanalysis of the underlying facts and evidence.[22]

The grant of expansive new powers — backed up by large penalties, but without any mechanism for decisions to be meaningfully contested — risks embedding significant regulatory errors. In practice, it will be impossible to test whether the CMA's decisions are correct. This would not only undermine the basic principles of the rule of law but could, as will be discussed below, make the UK a particularly hostile environment for innovation and investment.

---

21 Under Article 263 TFEU, the European Court of Justice exercises a control of legality over the Commission's decisions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. This is a 'comprehensive way to review the law, the facts and their appraisal' (Laguna de Paz 2013). Under Article 261 TFEU, the European Court of Justice exercises unlimited jurisdiction over fines or periodic penalty payments imposed by the Commission.

22 Under Article 63 of China's administrative reconsideration law, a court can withdraw a decision on the basis that the 'main facts are not clear, or the evidence is insufficient', see China Law Translate (2023). There are clearly additional issues around judicial independence in China.

The threat to British consumers, investment, and innovation

Prime Minister Rishi Sunak (2023) has emphasised the need to make the UK a 'science and technology superpower'. In its current state, however, the DMCC seriously risks undermining investment in a thriving UK tech ecosystem and associated innovation.

The risk to investment

The World Bank has found that investor confidence and foreign direct investment flows are heavily influenced by such things as regulatory transparency and effective legal recourse (Hebous, Kher, and Tran 2020). Yet the DMCC Bill goes much further than comparable regimes by providing the CMA with power to design bespoke interventions for individual firms, both using the conduct requirements and pro-competition interventions. By contrast, for example, the European Union's DMA provides (comparatively) clear guardrails, only allowing intervention for a relatively limited number of purposes. If the Bill becomes law, the CMA's ability to set wide-ranging requirements, and adapt them over time, will reduce regulatory transparency and create significant uncertainty. Businesses are likely to become more hesitant to invest in the UK market because of unclear and potentially ever-changing rules. Additionally, as discussed above, the CMA's decisions will only be contestable on limited grounds, thus providing narrow safeguards when these very broad powers are exercised. There is a risk that the significant uncertainties created by the DMCC's lack of legal safeguards will undermine investment.

Various commentators have noted this risk. Bourne warned that the DMCC would contribute to 'the growing perception that economic regulation in the UK seeks to find reasons to stop things happening, rather than

facilitating the innovations that spur progress'.[23] Afolami (2023), member of parliament and chair of the Regulatory Reform Group, has warned that the Bill — and, in particular, the judicial review standard — risks damaging the UK 'in comparison with our competitors' by making the UK a less friendly place to innovate and invest.

The government's impact assessment for the DMCC claims that companies reducing investment in the UK is a 'relatively low' risk because of the 'open, transparent, and participative approach the DMU will take to regulation, including consultation with affected parties' (DSIT and DBEI 2023, para 244). The promise of a participative approach does not, however, necessarily provide assurance. There is a significant risk that parties are listened to, but then ignored and left no recourse in the face of potentially extreme powers. An even worse outcome would be that a cosy consensus builds up with whoever is best able to establish a rapport with the regulator – whether that is the SMS firms themselves or their competitors, customers, and suppliers, who will all be consulted.

This will only add to the perception held by some that the UK in general, and the CMA in particular, which *The Economist* has recently referred to as 'the world's most zealous regulator' (2023: 51), is taking a particularly harsh approach to digital regulation. It can be fairly presumed that the CMA's harsh approach risks discouraging some of the world's most successful tech companies from making investments in the UK economy. There is evidence that the CMA has, in general, been getting more aggressive. Linklaters' analysis suggested the 'deal mortality' in Phase 2 cases (i.e. compromising prohibition, unwind, and deal abandonment upon entering Phase 2) has risen from 30 per cent in the period 2013-2017 to 57 per cent in the period 2017-2023, with the same Linklaters' study finding that deal mortality and remedies now account for 75 per cent of all merger Phase 2 outcomes, compared to only 56 per cent in the period of 2013-2017 (Kar et al., 2023). While this finding is theoretically not incompatible with an overall more lenient approach to mergers (for instance, the CMA could simultaneously be approving the vast majority of mergers in Phase 1), *The Economist* has also found that the CMA blocked the most mergers of any competition authority for the second year running; thus indicating that the CMA is taking a more interventionist approach against *all* mergers, not just Phase 2 mergers (*Economist* 2023: 51). Business leader Sir Jim Ratcliffe also recently warned that

23 R. Bourne, 'Handing regulators a blank cheque will make Britain a tech turn-off', *The Times*, 8 June 2023 (https://tinyurl.com/y6a77hua).

the CMA is 'increasingly hostile to business,' after the CMA blocked a proposed acquisition of concrete-additives business Sika AG by INEOS (Mendel 2023).

In the digital space, the CMA's decision to block the *Microsoft/Activision Blizzard* merger — despite the deal being approved with conditions elsewhere in the world, including the EU, Brazil, South Africa, China, South Korea, and Japan — raises further questions.[24] The case has been very controversial, with defenders of the CMA's decision arguing that it reflected the correct application of the law. Putting aside the specific merits of the decision, however, there is significant concern that the CMA reaching a different decision to other competition regulators damages Britain's standing. Financial journalist Matthew Lynn (2023) warned that it 'undermines the UK's reputation as a country that is pro-business, pro-enterprise, and pro-innovation'. Microsoft's Brad Smith said in response to the CMA decision, 'There's a clear message here — the European Union is a more attractive place to start a business than the United Kingdom.' (Espiner and Harris 2023). The CEO of Activision noted that this decision 'contradicts the ambitions of the UK to become an attractive country to build technology businesses' (Cryer 2023). Indeed, it may even be that the decision is modified since when a US court declined to grant an injunction preventing the merger, the CMA, unusually, said they were prepared to consider a new proposal, addressing their concerns, from Microsoft.[25]

There are therefore clear indications of the dangers to investment posed by heavy-handed regulation. As it becomes harder to do business, make product changes and launch new services in the UK, it will be a less natural place to invest to build those products. The proposals of the DMCC Bill would make the British environment even stricter than it is, and the dangers are therefore all the greater.

24 See, on the one hand, Commission Decision M.10646 *Activision/Blizzard* of 15 May 2023; and, on the other, Competition and Markets Authority, Anticipated Acquisition by Microsoft of Activision Blizzard, Inc, Final Report (26 April, 2023), available at: https://tinyurl.com/mr8u5hv5

25 S. Plama and R. Waters, 'US judge denies FTC attempt to block Microsoft's Activision deal'. *Financial Times*, 11 July 2023 (https://tinyurl.com/ytc6cf9d).

The risk to innovation

Ultimately, the Bill will require digital platforms to seek special permission to operate their businesses in certain ways and, otherwise, prevent or mandate certain activities. In an earlier analysis of then-current proposals concerning the creation of 'Digital Markets Unit' within the CMA, Hewson and Veljanovski (2022: 22) warn that the proposals:

> risk second-guessing and replacing business decisions with those of the DMU [and] underestimate the intensity of work that goes into developing digital products and services, and the amount of trial and error involved. Successful innovations are unpredictable, and success is often only determined by live testing in the market.

Here, the risk is that these interventions limit dynamic competition and discourage innovation.

In response to concerns about the regime reducing innovation, the government's impact assessment claims that 'The procedural safeguards built into the regime are expected to ensure the DMU weighs up all potential costs and benefits, including innovation effects, and intervene only where the overall benefits outweigh the costs' (DSIT and DBEI 2023, para 263). But this assumes an extreme, if not impossible, level of insight about unknown and unforeseeable events on the part of the regulator.

There are, however, serious grounds to doubt the CMA's insight. In July 2020, in a report about the need to introduce a pro-competition regime, the CMA (2020) demonstrated a highly static approach to the development of digital technology. They said that a large user base meant that 'Facebook is a "must-have" network for users to remain in contact with each other'. Yet, increasingly, younger users are not found on Facebook but rather alternative platforms such as TikTok. There was also concern that a large user base enabled 'Google to train its search algorithms in ways that other search engines cannot.' Yet, earlier this year, Google was shaken 'out of its routine' over fears about rapid progress made by OpenAI/ Microsoft using ChatGPT, a competitor to Google's core search business.[26] These are highly dynamic markets, and intervention risks undermining the development of new products. Consumers will ultimately lose out from innovations that are not brought to market.

26 N. Grant, 'Google Calls in Help from Larry Page and Sergey Brin for A.I. Fight', *The New York Times*, 23 February 2023 (https://tinyurl.com/4rxk63a9).

Conclusion

The DMCC grants the CMA extensive, discretionary powers to designate selected companies and reshape markets through conduct requirements and pro-competition interventions, and it does so with insufficient regard to important tradeoffs inherent to the prohibitions and obligations envisaged by the legislation. Although the DMCC is accompanied by a 'countervailing benefits exemption', this is likely to be of little – and possibly no – practical value in offsetting the risks it creates. Coupled with the absence of a full merits review, the result is extreme legal uncertainty and an asymmetry of power between the CMA's powers and companies' ability to contest the exercise of those powers. Ultimately, the DMCC will amount to the CMA telling some of the most successful and popular platforms on the planet how to run their businesses, with no right for the affected firms to challenge the CMA except on procedural grounds. The DMCC Bill therefore risks damaging investment, innovation, and the competitiveness of the British economy. It makes the ambition of turning Britain into an innovation superpower much more distant.

Considering these fundamental problems with the Bill, the best solution may very well be to withdraw it from parliament and reassess whether these powers are necessary. But, if this cannot be agreed, there are some ways that the Bill could be amended to reduce the risk to consumers, innovation, and investment:

1. The DMCC's decisions should be subject to a time-limited full merits review, instead of simply a judicial review.
2. The DMCC should provide a limited list of the platform services or relevant activities covered by the Bill. Only companies operating such services should be considered for SMS status. This would

much more clearly align the regime with the government's intention for the new powers to apply only to a small number of companies.

3. The DMCC should establish clear quantitative and qualitative criteria for determining the meaning of ambiguous terms such as 'significance', 'substantial', 'significantly influence'; or at least empower courts to do so.

4. The CMA should be required to prove consumer or competitive harm on a case-by-case basis, before imposing conduct requirements, or PCIs. It follows that there should be no presumption against vertical integration or self-preferencing; nor should there be a presumption in favour of interoperability. Furthermore, the CMA should be required to demonstrate how proposed interventions, under conduct requirements or PCIs, will be beneficial for consumers.

5. The DMCC should not empower the CMA to choose between competing, legitimate business models or to make product design decisions — especially absent any proof that consumers would support such decisions.

6. It should not be excessively difficult, or impossible, for companies to invoke countervailing consumer benefits. Unless the DMCC Bill requires a showing of harm before imposing a conduct requirement (on which, see point 4 above), the 'indispensability' criterion from s. 29(c) should be replaced by a requirement simply that the breach is reasonably justified by countervailing benefits.

7. Mitigating privacy and security risks should be explicitly mentioned as constituting a countervailing consumer benefit under s. 29(2) and 44(2).

8. The prohibition contained on carrying out activities that bolster a company with SMS's strategic significance should be eliminated.

9. The notion of 'fair and reasonable prices' should explicitly be defined in the DMCC Bill as the market price that would have existed without the identified anticompetitive conduct of the company with SMS. It should be for the CMA to demonstrate — using a robust counterfactual analysis, including, but not limited to, comparative studies of prices for similar products in other countries — what a 'fair and reasonable' price is in each case.

References

Auer, D. (2020) On the Origin of Platforms: An Evolutionary Perspective. Truth on the Market, 7 July https://tinyurl.com/y6ndp6c6

Baye, M. R. and J. T. Prince (2020) The Economics of Digital Platforms: A Guide for Regulators. In The Global Antitrust Institute Report on the Digital Economy eds. J. D. Wright and D. H. Ginsburg. Arlington, VA: The Global Antitrust Institute. pp. 1250-1297. https://tinyurl.com/jmtzdk53

Buckland, R. (2023) Contribution to Parliamentary Debate: Digital Markets, Competition and Consumers Bill. Hansard, clmn 913, 17 May

China Law Translate (2023) Administrative Reconsideration Law of the People's Republic of China (Revision Draft), China Law Translate, 12 January. https://www.chinalawtranslate.com/arl/

Competition and Markets Authority (2020) New regime needed to take on tech giants. https://tinyurl.com/2jvcmbtu

Conway, L., C. Fairbairn, and D. Pyper (2023) Digital Markets, Competition and Consumers Bill 2022-23: Consumer provisions. London: Crown Copyright. https://tinyurl.com/yckj7dr3

Cryer, H. (2023) UK authority blocks Microsoft's purchase of Activision Blizzard. https://tinyurl.com/45dkxmhn

Department for Business & Trade and Department for Science Innovation & Technology (2023) A new pro-competition regime for digital markets: policy summary briefing. Crown Copyright. https://tinyurl.com/2bavx64z

Department for Culture, M. S. and Department for Business Energy & Industrial Strategy (2022) A new pro-competition regime for digital markets. Consultation Document. Crown Copyright. https://tinyurl.com/3k4ed97h

Espiner, T. and W. Harris (2023) Furious Microsoft boss says confidence in UK 'severely shaken'. https://tinyurl.com/3ac6rs4c

Hebous, S., P. Kher, and T. T. Tran (2020) Regulatory Risk and FDI. In Global Investment Competitiveness Report 2019/2020 pp. 128-169. https://tinyurl.com/3ar89hfr

Hewson, V. and C. G. Veljanovski (2022) Powering Up: How will the Digital Markets Unit affect competition and innovation? London: Institute of Economic Affairs. https://tinyurl.com/3v6m6786

International Center for Law and Economics (2022) International Center for law and Economics Amicus Curiae Brief submitted to the U.S. Court of Appeals for the Ninth Circuit 20-21. https://tinyurl.com/ywu553vb

Jones, J. and V. Egerton-Doyle (2023) The New Digital Markets Unit: What test should apply to appeals against its decisions. Competition Law Insight https://tinyurl.com/53uzwdkk

Kar, N., J. Ford, V. Egerton-Doyle, L. O'Brien, and E. Cochrane (2023) Platypus: UK Merger Control Analysis. https://tinyurl.com/23j47zjz

Kelly, M. (2023) Here's why Threads is delayed in Europe. The Verge, 10 July https://tinyurl.com/y9ukhjxa

Khan, L. M. (2019) The Separation of Platforms and Commerce. Columbia Law Review 119(4): 973-1098. https://tinyurl.com/26k9nb9n

Lambert, T. A. (2022) Addressing Big Tech's Market Power: A Comparative Institutional Approach. SMU Law Review 75(1): 73-116. https://tinyurl.com/3rrfhbdn

Laguna de Paz, J.C. (2013) Understanding the Limits of Judicial Review in European Competition Law. Journal of Antitrust Enforcement, 2(1), 203-224. https://doi.org/10.1093/jaenfo/jnt014

Lynn, M. (2023) The UK's treatment of Activision shows it is closed for business. The Spectator, 26 April https://tinyurl.com/ddwcebx5

Mendel, J. (2023) INEOS boss Sir Jim Ratcliffe brands CMA 'increasingly hostile to business' after $1bn deal snub. *CityAM*, https://tinyurl.com/4ny4smpb

National People's Congress (2009) Anti-Monopoly Law. https://tinyurl.com/2xbssbt4

Petit, N. (2020) Big Tech and the Digital Economy: The Moligopoly Scenario. Oxford: OUP.

Radic, L. and G. Manne (2022) Amazon Italy's Efficiency Offence. Truth on the Market, 11 January https://tinyurl.com/2uht4fvw

Shalchi, A. and J. Mirza-Davies (2023) Digital Markets, Competition and Consumers Bill 2022-23: Digital markets and competition provisions. London: Crown Copyright. https://tinyurl.com/2jku3w6n

Sunak, R. (2023) Plan to forge a better Britain through science and technology unveiled. https://tinyurl.com/msuctv76

International Center for Law & Economics

The Institute of Economic Affairs
2 Lord North Street
London SW1P 3LB
Tel 020 7799 8900
email iea@iea.org.uk

International Center for Law & Economics
1104 NW 15t h Ave. Suite 300
Portland, OR 97209
United States of America