Pros & Cons of the Digital Markets, Competition and Consumers Bill:

An Academic Perspective

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Which features does the new UK pro-competition regime need to have?

• Dialogue with the Government, the Parliament (vertically) and other digital regulators (horizontally within the DRCF) on the elements and priorities of UK digital agenda

• CMA remains completely independent in its governance & decision-making but becomes 'more mindful' of the broader UK strategic digital interests

• The mindfulness of the broader UK digital interests is 'bundled' in the package of granting the CMA greater discretion in applying the new rules

• Unlike the current competition rules (which can be applied in a formulaic, axiomatic, 'scientific' way), the new ones do not have predetermined "right" & "wrong" outcomes

• Not having categorical "good" and "bad" outcomes implies that the main normative compass in making decisions is not anymore within the system itself – it may well be (in hard cases in particular) outside the system of competition policy narrowly defined

• Greater discretion of the CMA in shaping obligations, applying fines and engaging in regulatory dialogue comes alongside with greater accountability to the Government

• The main objective of the new regime is to ***create*** competition at the sectors, which are otherwise deeply entrenched and monopolised by a few largest digital companies

• Defending interests of smaller undertakings (business users), consumers (end users) and innovation are only ancillary objectives – not the primary ones.

• Both components of the new regime – greater discretion of the CMA on one side and their greater embeddedness into the UK digital agenda are inseparable and they can work only in tandem

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Seven systemic advantages of the DMCCb in comparison with the EU Digital Markets Act

• Greater emphasis and greater CMA discretion on contestability-goals (Chapter 4, Pro-Competition Interventions) than on fairness-goals (Chapter 3 Conduct Requirements). *Optional* mechanism of efficiency defence gives the CMA a very important leverage during the regulatory dialogue with undertakings with Strategic Market Status (uSMSs).

• Full discretion of the CMA in delineating digital activities. In comparison with the DMA predefined core platform service. This allows the CMA to consider *any* digital activity (subject to designation requirements). Currently, under the DMA a lot of regulatory resources is being *used* to define concrete limits of each core platform service; many important digital sectors in the EU are not covered by the DMA.

• Full discretion of the CMA in defining concrete parameters and concrete obligations (fairness- and contestability-related conduct requirements) of uSMSs as long as these requirements meet broad regulatory goals. Looking at how every paragraph, sentence and adjective of every obligation of the DMA is being discussed already, and wide room for interpretation is left, it is a more prudent, efficient and indeed only workable formula to delegate this *ad hoc* competence to the CMA (Secs 20 & 44(3) DMCCb).

• Much wider than in Art 25 DMA use of the mechanism of commitments. Commitments is an important tool for the regulatory dialogue. Regulatory dialogue – is the quintessence of new digital competition law. It is not about *penalising* but about *calibrating* parameters enabling effective competition. It is hard to emerging more appropriate format than the one enabled be the mechanism of commitment. The DMCCb could be improved by providing a more proactive definition of the term (under the ex-post logic the substance of commitments must be proposed by uSMSs; but it would be more in line with participatory competition policy if the initiative is formally delegated to the CMA).

• Very prudent and innovative transposition to digital competition law the "final offer mechanism" allowing the CMA to cut the Gordian knot when considering the most complex access-related obligations – these mandate uSMS to provide access to important facility under fair, reasonable, and non-discriminatory price. Defining the amount is always a complicated endeavour. The mechanism of final offer by using very basic game-theoretical instruments impels both parties to propose the most suitable price – aiming to convince the CMA to choose between the two offer the most reasonable one. So far, the mechanism only covers fairness-related obligations (Secs 38–43 DMCCb). It should also be expanded to contestability-related ones as well (by analogy with the DMA, which has some access-related obligations based on fairness – e.g., Art 6(12) DMA – and some on contestability – e.g., Art 6(11) DMA.

• Much softer (with one stunning exception discussed below) and much more flexible designation requirements in terms of the link to the UK (Sec 4 DMCCb) – this provision is by far more flexible than its broad equivalent in Art 2(b) DMA. The UK regime allows establishing the link to the UK if *any* of the three loose conditions is satisfied: 'the digital activity has a significant number of UK users'; 'the undertaking that carries out the digital activity carries on business in the United Kingdom in relation to the digital activity'; or 'the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom'. Additionally, Sec 6 DMCCb requiring for the designation the presence of a position of strategic significance appears to be more flexible than its DMA equivalent. Under Sec 6, it is sufficient for the undertaking to meet *only one* of the four broad conditions: (a) having a position 'of significant size or scale in respect of the digital activity'; (b) to have 'a significant number of other undertakings' using that digital activity; (c) possibility to extend market power 'to a range of other activities' or (d) to 'determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise'. In contrast, the abovementioned Art 3(2)(b) requires much higher quantitative criteria for meeting a similar criterion. Finally, the turnover requirement also appears to be relatively easy to meet for the 'usual suspects' as while the sum of the turnover is larger in the UK, it measures the global – as opposed to the DMA requiring the EU – annual turnover. The required global annual turnover in the DMCCb is £25 billion (or £1 billion for the UK). Importantly, this formula allows the UK to regulate undertakings coming from foreign jurisdictions which are not *yet* actively present in the UK market in terms of their business model, but which are already generating their digital impact and popularity in the UK – those not started converting their digital muscles into the monetary one. Such an approach permits for the CMA an earlier start in comparison to the Commission's mandate.

• Greater flexibility for the CMA to select, tailor, differentiate, update and repeal obligations of the designated undertakings. Concerns were expressed during the DMA discussions as to the need for a more flexible regime of revoking some of its obligations. The mechanism has been finally adopted. The DMCCb went much further than the formula of Art 12 DMA permitting the Commission to update obligations of Arts 5–7. While the instrument of delegated acts allows sufficient flexibility, the Commission cannot do it individually at the level of obligation for each specific gatekeeper. Under the proposed UK regime each fairness- and contestability-related obligation is tailored individually for each undertaking with strategic market status. It is with the mandate of the CMA to amend, reshape and indeed revoke conduct requirement. This approach in its very nature is more suitable for the principles of tailored asymmetric regulation, permitting the CMA to calibrate its toolkit in accordance with its enforcement priorities, broader strategic vision, tactical relation with each undertaking in respect to specific – or any other – DMCCb obligation as well as the rapidly changing objective circumstances.

Four systemic disadvantages of the DMCCb in comparison with the EU Digital Markets Act

The Bill contains several significant disadvantages, which if applied literarily – and the defendants will be using all its competences and skills for applying the requirements literarily – or interpreted in a defence-friendly way would paralyse the mechanism outright.

Most of them are easily avoidable at the third reading. Some though are of a more systemic nature.

The main ***procedural*** pitfall is being identified in the *devil-in-details-type* of juristic complexity and casuistic, allowing the relevant undertakings to vexatiously filibuster the effective implementation of the new pro-competition policy by the CMA.

The main ***normative*** pitfall is that the bill develops a narrower and more conservative (rather than more expansive, forward-looking, proactive, market-design) conception of the notion of 'pro-competition' (pro-competition regime, pro-competition interventions, pro-competition outcomes). This reading of the notion of 'pro-competition' limits the ambition and potential of the new regime.

• The DMCCb requires too many sequential procedural steps from the authority before, during and after each of its actions: starting from designation and ending at imposition of penalties. Each procedural requirement – however reasonable it may appear to be in the eyes of the legislator – will be thematised, problematised, re-interpreted by the defence – those having the ability to use the brightest legal, economic, data and behavioural science and technology minds and skills. The overarching imperative of the legislators must be 'make things easier' not 'make the enforcer more accountable'. The DMCCb is full of compulsory public consultations. They are introduced in remarkable contrast to the DMA procedures. The latter envisage neither mandatory public consultations nor even the right of third parties to provide evidence. The enforcer knows what, how and why they want to do. If further information is needed, they may consult relevant parties. The fears in the DMA discussions were that even allowing third parties a room for submitting evidence would risk slowing down the mechanism. The phrase 'spamming the regulators' is more and more often being explicitly used in the regulatory circles. Each undertaking with strategic market status, by definition, serves many thousands business users. Each of those users has some form of a legitimate interest. By being overly welcoming the system risks becoming stuck. The DMCCb is expected to launch an experimental modality of regulating digital markets. Consultations are important for the enforcer only when they feel the need to get missing information. Public consultation requirements must be made optional, using for example the formula envisaged for CMA consultation on introducing enforcement orders: the CMA 'may consult such persons as the CMA considers appropriate before making an enforcement order' (Sec 31(5) DMCCb) should be extrapolated to all consultations. One can spend all regulatory time and efforts scrutinising pros and cons of the meticulous arguments about whether and to what extent a specific conduct of an undertaking with strategic market status or a specific situation on the market is pro- or anticompetitive or both and whether and to what extent it should be justified – if this is the essence of the reform, we are guided by a wrong star.

• Quasi-criminal nature of the rules (and to a large degree this also concerns the DMA). Alongside its presupposed benefits (high fines, access to information and premises, criminal liability triggering deterrence), it increases significantly – often insurmountably – the standard of proof for the enforcer. The formula is not undisputable even for ex-post competition law purposes – yet at least ex-post competition procedure is established and will always remain to be evidence-based. The increased standard of proof is mitigated by secrete, highly sensitive and easily disposable information collected during down raids and high fines imposed on the infringers. The rationale of pro-competition rules is different. It is much less about discovering and penalising, and much more about understanding and steering the designated undertakings. The liability is needed for disciplinary – not for restorative – purposes. Its function is not to compensate, but to force to comply. The decisions of the CMA should not be so much based on evidence. The new pro-competition approach for digital markets is characterised by its experimental nature and is much more discretionary than its ex-post counterpart. Decreasing fines and police-style investigatory powers with the symmetrical decrease of the standard of proof (one cannot be confident in experimenting) would also make the enforcers less risk-averse and the entire procedure less antagonistic. Otherwise, imposing fine of 10% of the total value of the turnover of the designated undertakings for non-complying with a requirement, which until entry of the DMCC into force was blatantly *ultra vires* would be correctly identified as disproportionate. The new policy must be designed as a game full of trials and full of errors – these cannot be acceptable under the quasi-criminal modality. It is a very different enforcement protocol, and a very different regulatory philosophy. It would be much more strategic to design a system, which on one hand would give the CMA greater discretion and less demanding expectation to justify each of its procedural steps while counterbalancing it with much less investigatory competences and much smaller (though imposed more often) fines.

• Designation requirement of Sec 5 DMCCb: demonstrating that the undertaking has 'substantial and entrenched market power'. While all other designation requirements are commendable, very welcoming and are on average much *better* than those developed in the DMA, the wording of Sec 5 is simply illogical, unachievable, and can be seen as opening Pandora box in terms of likely challenges in court by the relevant undertakings. It mandates the CMA when defining if an undertaking has substantial and entrenched market power to 'carry out a forward-looking assessment of a period of at least 5 years, taking into account developments that— (a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity, and (b) may affect the undertaking's conduct in carrying out the digital activity'. There are so many self-evident reasons why this provision should be fundamentally redrafted. No designation procedure can ever meet the literal – and the defendants will be correctly insisting in courts on the strict literal reading of the – requirements of this section. 5 years in digital markets is next to eternity. Nobody can model how the relevant digital activity will look in 5-year time, and how it would look without the designation. The requirement is impossible to meet outright, and equally it is illogical since there is no reason in doing a 'forward-looking' assessment for

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

• Compulsory obligation imposed on the CMA to consider efficiency defence representations made by the designated undertakings when evaluating a possible breach of fairness-related obligations of the designated undertaking. It is much easier to justify the breach of conduct requirements than an instance of participating in an anticompetitive agreement (and the efficiency defence is essentially transposed – with a factual error in provision in Sec 29(2)(d) from the rationale of 101(3) TFEU); yes, not many cases are brought under 101(3), but many are block exempted. Additionally, it will consume so much regulatory resources and time – and for completely unnecessary reason. The new rules are experimental; there is no axiomatic right/wrong answers. Each situation is unique, and it is for the CMA to decide whether to grant exemption or not. The interests of different competitors, their business and end users are very heterogenous; and each reasonable economic conduct is beneficial for some and harmful for others. Who, how and mainly for what purpose should engage in these highly technical 51 vs. 49 guestimations? This formula has been categorically refused in the DMA – and for very right reasons. A simple solution to all these shortcomings of the efficiency defence for fairness-related obligations would be in making these requirements optional for the CMA to apply – as it is indeed the case with contestability-related obligations. Changing efficiency defence from mandatory to discretionary would transform it from a regulatory burden to a powerful precondition of an effective regulatory dialogue.

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