British Prosperity Unit

The Digital Markets, Competition and Consumers Bill: How to protect prosperity and innovation in the digital economy

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About the British Prosperity Unit

The British Prosperity Unit (BPU) was established by the Legatum Institute in 2023 to lead the Institute's work on economic policy and government reform in the United Kingdom. The United Kingdom is facing the demands and opportunities presented by Brexit, restored sovereignty, and the changing currents of globalisation. The BPU will develop policies, based on rigorous economic and legal analysis, to enhance British economic competitiveness, reduce the burdens of the state, and foster economic growth.

Executive Summary

The Digital Markets, Competition and Consumers Bill (the Bill, or DMCC) is before Parliament. This Bill would grant extensive powers to a new Digital Markets Unit (DMU), to be formally constituted from a current informal grouping within the UK Competition and Markets Authority (CMA). The aim of the law is to update the post-1998 UK competition law settlement to address supposed problems in technology markets.

These problems include previously competitive markets becoming dominated by a small number of big players, who can tip the market into a winner-takes-all scenario. This enables the dominant businesses to utilise their customers, data, and technology in multiple adjacent markets to boost their own products by promoting them to users above products made by rivals. This phenomenon has agitated antitrust regulators around the world over the last decade, and this Bill is the British attempt to wrestle with it.

However, many of the proposals in this Bill are heavy-handed, and provide unprecedented regulatory powers to the CMA, with reduced accountability. If unamended, the Bill will implement an unpredictable new regulatory regime for the digital economy with numerous unintended consequences, and it is unlikely to solve the problems it claims to fix.

It will be essential to get the details right in any reform. This paper explores the concerns behind the desire for legislation and compares this with the detailed legislative proposals. While the paper notes the view of the Bill about aspects of digital markets, it also raises concerns about parts of the Bill which are unlikely to support high-quality regulatory outcomes.

The principal features of the Bill[1] can be summarised briefly:

1. **Designation.** The DMU would gain the power to designate companies as having **strategic market status,** and subject them to new regulations.

2. **Broad power to regulate.** Provided that the CMA can show "substantial and entrenched market power" and a "position of strategic significance" then deep regulation can happen across the entire corporate group.

3. **Conduct regulation and intervention powers.** Two core regulatory avenues then arise: (1) a Code of Conduct and (2) Pro-Competitive Interventions. Both allow the DMU to order significant changes to business conduct, including product design, without a substantial evidence base for doing so.

4. **Powerful procedural changes.** There are also extensive procedural powers, including: an ability to delegate work into designated companies; to require a Reporting Officer; and investigation of perceived potential breaches without warrants.

5. Regarding **mergers**, the Bill requires mandatory notification of all acquisitions by designated companies, without the finality of a reasonable time period for challenge, increasing costs and frictions to investing in the UK.

1 All references to the Bill refer to the 12 July Public Bill Committee version – Bill 350 2022-23 (as amended in Public Bill Committee).

While there are legitimate concerns about the application of orthodox competition law instruments to online markets, the above aspects raise concerns about overreach which should be addressed in the Parliamentary process.

Concerns with the Bill

Chief among these is a major concern about the adoption of a discretionary and potentially arbitrary approach to regulation by the CMA, moving away from the evidence-based system we have today. The Bill removes the evidence requirements usually imposed on the regulator for acting, thereby reducing its predictability and transparency, instead of modernising evidence assessment to take account of the uniqueness of digital markets. The paper assesses stronger and weaker aspects of the Bill and recommends beneficial changes, with particular attention to the underlying evidence base and the expert recommendations which gave rise to it.

The paper recommends the following changes to the Bill:

1. **Turning designation criteria into binding Terms of Reference for the DMU's investigations.** The current proposal does not track intervention back to the underlying concern giving rise to designation. The designation criteria should instead track the *relevant issues*, and not the company boundary, in transparent Terms of Reference which govern investigations.

2. **Introducing a requirement for a transparent evidence basis for Codes of Conduct and Pro-Competitive Interventions (PCIs).** The Bill proposes a wide range of Conduct regulation and PCIs on a loose objectives-based approach. The powers should instead be restricted to the relevant issues from the Terms of Reference to prevent mission creep. A consistently framed evidence base is important as it can be used to define things like changes to orders and compliance with them, by tracking back to the underlying Terms of Reference.

3. **Targeting the costly reporting requirements in the mergers regime**. Regarding mergers, there is a serious risk of the system being overwhelmed by thousands of notifications. This should instead be targeted on the concerns driving designation. There are also serious due process concerns and a need to trim notifications to the power that can be used to address them.

   There is a significant underlying question: if wishing to see growth via investment in small companies, is there not a critical role for larger ones buying up smaller ones, in those scenarios where competition concerns are absent? Many technology companies lack intellectual property protections, so merger activity is critical both to investment and to scaling up.

   The proposed very extensive reporting requirement will discourage investment precisely by those most able to make it. This contradicts important policy aims relating to innovative company formation and impedes the spread of a Silicon Valley Sand Hill Road startup culture to the UK – a major loss, apparently based on unscientific suspicion of large companies, since there is no *targeted* expression of concern.

4. **Rowing back on the proposed enforcement overreaches.** There are serious overreach issues in the current proposals. These include powers of entry without a warrant, and powers to fine individuals. There are new powers to order trials even outside investigations. The DMU would be able to require the creation of evidence even absent an open investigation.

Combined with the conceptual expansion of the regime, these process concerns will remove any meaningful checks and balances unless altered.

The Bill expands regulatory power on a market-wide regulation model, increases the regulator's punitive abilities, while reducing due process at the same time. This cherry picks between regulatory rulemaking and adjudication and it will lead to dangerous conceptual confusion.

5. **Due process.** There are concerns with finality and with the overreliance on judicial review, which contradicts the relevant expert recommendation which emphasised speedy resolution rather than revisiting questions. Thus, this paper recommends tying back investigations to the underlying concerns to encourage getting it right the first time. This helps to prevent reopening investigations into companies without proper evidence, which would be a recipe for permanent challenges, delay, and unclarity.

   To ensure proper access to justice for investigated companies, the paper recommends using a hybrid appeal standard, rather than judicial review. This will allow for the proper scrutiny of the regulator's decisions. It comports to the recommendations of experts like Jason Furman. Fundamentally, the DMU has nothing to fear from appeal if its work is of a high standard, especially as it would still retain significant policy discretions on this hybrid approach.

Full details of these recommendations can be found in this paper on pages 39-50.

Unless Parliament speaks up now, its voice will be lost to technocratic discretions. While that would be appropriate if the Bill were to apply an objective technical evidence base, such as market power, there is instead an attempt to apply broad multi-variate aims which are political in character. This should be rejected in favour of attention to true areas of technical concern by comportment to the recommendations of the pertinent expert reports, notably the Furman Review. These are technical, rather than political, in nature – as should be any new law.

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Glossary

Aims-based regulation – The use of aims rather than evidence to justify intervention.

Appeal – Challenging a decision in court including its factual matrix.

Benchmarking – The exercise of analysing performance using external evidence sources.

Codes of conduct – A rulebook written to address concerns about a designated company.

Competition Act 1998 – The legislation chiefly addressing the UK prohibition on cartels and abuse of a dominant market position.

Competition and Markets Authority (CMA) – The UK competition regulator.

Concentration – The measure of the number of companies present in a market.

Consumer impacts – A concept used to identify how end consumers are affected by regulation.

Consumer welfare – The benefit of end consumers.

Cost-benefit analysis – Analysis of the net costs and benefits from regulation.

Countervailing benefits test – A proposed framework for analysis of the consumer impact of a restrictive measure.

Designation – The inclusion of a company in the proposed Digital Markets regime.

Digital Markets Unit (DMU) – The proposed specialist regulator for digital matters sitting within the CMA.

Double jeopardy – A second investigation of the same matter.

Due process – Adequate legal process prior to an outcome.

Enterprise Act 2002 – The legislation chiefly addressing the CMA's powers to review mergers and market performance.

Entry – A company entering the market for the first time.

Error costs – The net impact of incorrect decisions.

First mover market – A market in which a technology product is launched first.

Furman Report and Furman Review – An influential 2019 expert paper on digital competition entitled *Unlocking digital competition: Report from the Digital Competition Expert Panel.*

Henry VIII power – Clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.

Hybrid appeal – An intermediate option between an appeal and judicial review standard, allowing a degree of challenge to factual analysis but deferring to policy determinations.

Initial Enforcement Order (IEO) – A hold-separate order available to the CMA in merger review matters.

Innovator's exception – The provision of a safe harbour for innovators who meet a requirement to have no undue restraint on competition.

International best practices – Guidance documents from international bodies containing consensus frameworks, e.g., the International Competition Network (ICN) and Organisation for Economic Cooperation and Development (OECD).

Judicial review – The review of the legality of a decision by a court or tribunal, but not its merits or underlying facts except to check for basic rationality.

Market definition – A definition of a type of goods or services for competition law analysis.

Market power – The ability persistently to charge prices above costs, to reduce output, or otherwise to be free of competitive constraint.

Market wide evidence – Evidence of the entire market in question as currently undertaken under the Enterprise Act Market Investigation power, but truncated under aspects of the Bill.

Merger notifications – Filings to flag merger activity by designated companies.

Network effects – The impact of one user on the other of a product where their utility functions interact.

Pro-competitive interventions / PCIs – Interventions into the business of a designated company with the aim to improve competition.

Regulated access – The provision of access to the property of another via regulation.

Regulatory lag – The difference between the time when a utility's costs increase due to regulation and when the utility is allowed to raise its rates.

Remedies – Regulatory interventions to address perceived competition problems.

Returns to scale – See, ***scale economies***.

Revolutionary innovation – Fundamental changes to a market derived from new insight.

Scale economies – Decreasing cost of supply from increasing size of operations.

Strategic significance – A new term in the proposed framework distinct from market power and based on factors such as scale without regard to its merits or genesis.

Technological tying – The integration of two products by technological means.

Terms of Reference – The reference document defining the concerns underlying inclusion of a company.

Tipping – Where the market moves towards a smaller number of providers.

Unrelated activities – Activities not related to the underlying concerns from the Terms of Reference, and therefore excluded from the scope of regulation.

Winner takes all scenario – Where just one company comes to serve the entire market, at least for a period of time.

Introduction

Where did this Bill come from?

The application of competition policy to large technology companies is contested territory. Where some see problems with the large scale of companies,[2] others embrace the benefits of scale.[3] Where some would fundamentally alter the underlying aims of competition policy to engineer a wide range of asserted societal benefits,[4] others would preserve the consumer-centric focus of modern competition policy – but perhaps tweak it to account for the particularities of large technology companies.[5]

Parliament must engage with this rich debate as it decides which steps to take in UK competition law relating to large technology companies. The fundamental thesis of this paper is that, while there are aspects of modern technology markets that call for departure from aspects of existing competition law, care is required to avoid the loss of valuable aspects of the current competition policy regime, which dates from the 1998 Competition Act.

Chief among the benefits of the prevailing orthodoxy is the emphasis on evidence and on consumer impact from antitrust intervention. There are risks from embracing discretionary antitrust, not least from the perspective of the consumer and from difficulties in weighing up incommensurate goals.[6] It has long been an aim in some quarters to infuse UK competition law, and UK and English business law more generally, with multiple open-ended criteria. It is striking that this has not succeeded.[7] It bears emphasis that the DMCC is not the forum for such a change. This is because the DMCC is based on a specific concern, namely that particularities of internet-based businesses require a specific departure from the general competition law position. Care will be needed, as the Bill is debated, to avoid inadvertently changing large areas of UK competition law – and business law more generally – when this is not the aim and is not supported by the surrounding policy context.[8]

2 B Lynn, *Cornered: the New Monopoly Capitalism and the Economics of Destruction* (Trade Paper Press, 2011).

3 R D Atkinson and M Lind, *Big is Beautiful* (MIT Press, 2019).

4 M Vestager, "Fairness and competition policy" (Speech, 10 October 2022); L Khan, "Amazon's Antitrust Paradox," 126 *Yale LJ* 710 (2017).

5 R Gilbert, *Innovation Matters* (MIT Press, 2020).

6 R Bork, The Antitrust Paradox (Free press, 2 ed. 1993) (warning of risks of harm to consumers as a paradoxical impact of laws designed to protect competition can be instead to increase costs).

7 Both the Competition Act 1998 (especially, ss. 2 and 18) and the Enterprise Act 2002 (especially, ss. 22, 33, 131, and 134) refer to competition as the metric by which to assess cases; s.61 of Consumer Rights Act 2015 only applies its broader fairness concerns to business-to-consumer transactions; *JSC BTA Bank v Khrapunov* [2018] UKSC 19 (finding narrow scope for unlawful means conspiracy restricted to intentional harm and criminal activity (L Sumption)).

8 Department for Business, Industry and Skills, *A new pro-competition regime for digital markets* (July 2021) (references to entrenched market power, and not broader aims, as the policy concern).

It is striking that other parts of the Bill address consumer protection reforms, yet do not align with the DMU proposals. Whereas the consumer protection powers would retain the fundamental posture of (broad if not quite complete) freedom of contract unless consumer protection is at play, the DMU powers fundamentally alter freedom of contract in business-to-business settings. Thus Part I of the DMCC is essentially a proposal to have a business protection law, despite the concurrent consumer protection reform in Part 3 proposing no such thing (see e.g., definition of consumer as person operating "wholly or mainly... outside of business" retained in cl.141(2)).

Fundamentally, the question is one of evidence. How, exactly, should the law approach digital markets which may be complex, fast moving, and which may defy helpful benchmarks used elsewhere to distinguish strong cases from weak ones? How would one develop analysis of something that is free to use, but which a *different* subscriber base pays for, as with most ad-funded products? How might helpful vertical integration be retained, as with entry by large firms into unrelated markets, without accentuating concerns about market power in existing markets?

Without sufficient evidence, from which we can derive the nuances of these issues – such as whether or not consumers benefit – it will not be possible to implement proportionate, principled, and just regulations.

These and many other rich questions must all be answered by enforcers and courts. As Parliament makes this once in a generation intervention into UK competition policy, it will be necessary to keep an open mind to areas of legitimate reform, while avoiding the excesses of a revolution. This will help to promote transparent, high-quality evidence-based regulation in the coming years.

There are also significant risks from error. The UK could lose its status as a first mover market in technology launches. There is significant scope for tension with the government's AI strategy and data law reforms which are both designed to decrease red tape and encourage more innovation. Benefits from helpful entry by large technology firms could be lost. Innovation might come to follow the tramlines of regulated access, resulting in unimaginative "me too" approaches based on existing products, rather than the revolutionary innovation seen from competition for the market.

The paper seeks to address these concerns in a constructive way by proposing changes to the Bill. The paper proceeds in the following format:

The next chapter, 'Legal analysis: what does the Bill do?' provides a summary of the powers in the Bill, based on in-depth legal analysis of its measures. This is followed by the third chapter, 'Competition policy context and theory', which provides the intellectual and political context for these proposals, by examining (1) aspects of the current law thought to limit legitimate enforcement concerns, before (2) mapping these against different underlying visions of competition policy. It then (3) moves on to consider how these visions have been expressed in pertinent expert reports before (4) considering how these differing visions would affect practical policy examples arising in enforcement. Finally, it (5) considers constructive changes to promote high quality regulation.

The last chapter, 'Proposed amendments to the Bill' then recommends specific changes to achieve sensible, evidence-based reform while trimming back the excesses of a risky revolution in this key area of UK economic policy, before the paper concludes.

Legal analysis: What does the Bill do?

The principal features of the Bill can be summarised relatively briefly:

1. **Designation.** The DMU would gain the power to designate companies as having **strategic market status.** This would be based on a very broad test essentially only requiring engagement in digital activities and having turnover exceeding £25bn worldwide or £1bn in the UK.[9] It is essentially a "naughty step" for large companies.

2. **Broad power to regulate.** Provided that the CMA can show "substantial and entrenched market power" and a "position of strategic significance" then deep regulation can happen across the corporate group ("undertaking", an EU law concept piercing the corporate veil). The critical definition of a "position of strategic significance" then sits behind a Henry VIII power and is subject to amendment without parliamentary oversight.

3. **Conduct regulation and intervention powers.** Two core regulatory avenues then open up: (1) a Code of Conduct and (2) Pro-Competitive Interventions. Both allow the DMU to order significant changes to business conduct without a substantial evidence base for doing so. On the crucial question of scope, regulation is permitted well beyond the digital activity in question and can instead encompass anything relating to pertinent "aims." There are sweeping powers to order changes to conduct and to alter business practices in ways not currently possible under the Competition Act 1998, and which would normally only arise in a market-wide investigation under the Enterprise Act 2002 following a multi-year market-wide review. Combining the two creates a power of life and death over designated companies irrespective of the wider market, and it is not in UK competition law or policy for very good reason.

4. **Powerful procedural changes.** There are also extensive procedural powers encouraging over-reach, notably including an ability to delegate work into designated companies; to require a Reporting Officer; and abilities to investigate breaches without warrants. Essentially, designated companies would be treated like cartel conspirators even though their companies have, for the most part, helped consumers by providing innovative products. There are even abilities to fine individual executives. There is an urgent need to dial back some of the hidden powers.

5. Regarding **mergers,** there is concern that the apparent climbdown on the mergers power does not ring true when read with other CMA powers (notably, Initial Enforcement Orders once aware). The core point here is requiring notification of all acquisitions by designated companies, yet without finality of then facing a reasonable time period for a challenge. There is ample scope for strategic use of existing powers which allow transactions to be called in – potentially, on the eve of closing as the Bill is currently drafted.

In summary, even if conceding that there is a case for some aspects of competition law to change to accommodate the advent of large technology companies, the Bill is not a fair, reasonable, or

9 Significantly, this status could arise simply because of non-UK growth, as where all relevant growth is ex-UK. This strongly suggests that more targeting is required to avoid an unduly broad jurisdictional reach.

evidenced approach to the concerns. On the contrary, it would provide vast and unaccountable powers to a new bureaucracy with no clear framework to ensure high quality regulation.

It seems that the scale of the change here is noted across a range of constituencies.[10] In essence, the changes would alter the post-1998 competition law consensus so as to be able to regulate any large business on a discretionary basis.

This section explains the proposals in the Bill and suggests concrete changes to address the concerns, to take a targeted approach to concerns about large technology companies commensurate with an evidence-based approach.

10 See especially L Gormsen, "Post-Brexit rules for big tech give almost boundless power to the competition watchdog" *City AM* 7 August 2023.

Competition policy context and theory

This section examines the intellectual debates in modern antitrust policy, and charts the influence of different schools of thought on British policymakers, and their responses to the development of the modern digital economy.

A. Perceived limitations of underlying concepts

What are the internet-specific competition law concerns?

It is helpful to define what the internet-specific concerns are. These can be briefly summarised as:

1. Concerns that network effects fundamentally alter aspects of competition law analysis. Network effects arise when products become more valuable with more users. This can be particularly difficult to model where monetary prices are zero.
2. A related concern that strong scale economies can increase barriers to entry.
3. A tendency of markets, therefore, to tip towards "winner-takes-all" scenarios, at least on a static analysis.

These are not necessarily bad. Many are good: lower unit costs from scale economies decrease prices; network effects make services more useful for more users. Care is therefore needed to ensure that a sound evidence base exists showing consumer harm before intervening, and the law should not lightly dispense with this requirement.

Importantly, the issues are not new. From at least the 1980s, theories had developed suggesting that competitive relationships in so-called platform or ecosystem markets were more complicated than those in conventional ones.[11] This is clear if examining each concept in depth:

1. **Network effects.** Network effects arise where a product is more valuable the more it is used. Instead of the usual situation where demand curves slope downwards, reflecting greater demand the lower the price, where network effects are present value and thus demand can increase with increasing use by others.

   For example, if a telephone service has more users, the network is more valuable. Such effects can arise directly on the network – the telephone network – but also indirectly in

11 See especially Petit, *Big Tech and the Digital Economy* 74-75 (OUP, 2020) (summarising economic literature contributions dating back to at least 1950); H Leibenstein, "Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand" 64(2) *Q J Econ* 183 (1950); H Varian and C Shapiro, *Economics of Information Technology* (CUP, 2004); C Shapiro and H Varian, *Information Rules* (Harv. Bus. Rev. Press, 1998); N Economides, "The Economics of Networks," 14 *Intl. J. Ind. Org* 678 (1996); M Katz and C Shapiro, "Systems Competition and Network Effects" 8(2) *J. Econ. Perspectives* 106 (1994). As early as 1981, Michael Porter noted the complex relationships between multi-business firms: M Porter, "The Contributions of Industrial Organization to Strategic Management," 6(4) *The Academy of Management Review* 617 (1981).

markets adjacent to it or otherwise affected by it (voicemail recorders).

Network effects are far from new. They are often positive. This has even been the subject of jokes.[12] Apart from Bell and Watson asking to see each other, who would have use for a telephone with just a handful of other users?[13] Thus, in the complex dynamic of a multi-sided market,[14] great care is needed not to lose sight of potential positives from network effects.

2. **Increasing returns to scale.** Closely related to the network effects, but technically distinct from them, is the concept of increasing scale returns. Again, this is not a new concept: many "smokestack" industries of the twentieth century displayed the characteristic that larger units gave rise to deceased average costs. However, if combined with network effects, a barrier to entry (if not necessarily to expansion) can arise. This is because fixed costs fall proportionately as more users use the service. In principle, all entrants face these entry costs; but there may be some competition law relevance in the fact that existing player expansion and new entry will thus not always be equivalent. In such a scenario, scale economies might magnify network effects.

   While many businesses successfully compete despite the entry costs, it is still the case that they are magnified compared with industries with lesser returns to scale. As with network effects, it is important to recall that there is no prescription from this fact as to competition policy outcomes. For example, low average costs are *good*, ceteris paribus, and if there is still competitive constraint this feature simply indicates a better outcome as fixed costs come to be shared by more users. Again, caution is needed and an open mind must be kept as to the critical question of whether the role of scale is positive, or negative.

3. **Tipping.** The result of network effects and increasing scale returns is that markets can "tip" in favour of fewer providers. The pre-eminent experts on the topic provide the example of restaurant reservation services.[15] Although there is scope for a degree of competition between

12 The popular television show *Family Guy* once made mirth of the low value of network effects in a scene in which Victorian telephone users face the limitations of small network effects: "What number are you calling?" "Seven." "No, this is three." "Oh, sorry."

13 It is also important to consider the development of network effects over time, both positive and negative. For example, the first telephone call was on a very small network since Alexander Graham Bell simply called his assistant Thomas Watson with the famous words "Mr Watson, come here, I want to see you." The story is retold in R Alfred, "March 10, 1876, Mr Watson, come here…" *Wired* (10 Mar 2008). (Bell reportedly did not want a telephone in the house.) The network effects of the first telephone call were very limited as with just two users the sole network effect is whether the other person is there to pick up the telephone. Indirect network effects are thus likely to be zero at least in the short term as the only effect thus arises in the market in which there are direct network effects (presence or absence of Watson to pick up the phone).

As the phone network spread, however, an indirect network effect arose with telegraphs and letters as demand there fell with the increasing use of the telephone. These changes were positive to consumers as the telephone is an improvement over the telegraph and the letter, but it is also true that barriers to entry could arise, notably for equipment interconnection to the new telephone network.

The relationship between network effects and technological change was memorably discussed by William Baxter and President Ronald Reagan, amidst concern that Baxter's proposal to break up the AT&T telephone system was too aggressive given falling telephone call prices. President Reagan: "When I was young, it cost 2 cents to mail a letter… and $2 to make a phone call. By the 1980s, each was 20 cents." Baxter: "Well, Mr President, when I finish AT&T, I will be happy to take on the Post Office." Discussion quoted in Gilbert, op cit., p.131 (citing Schmalensee (1999)).

14 The term was coined by Jean-Charles Rochet and Jean Tirole: "Platform Competition in Two-Sided Markets", 1(4) *J. European Econ. Assoc.* 990 (2003). For an early account of the concept's development, see J Rochet and J Tirole, "Two-sided Markets: A Progress Report" 37(3) *RAND J. Econ* 645 (2006).

15 D Evans and R Schmalensee, *Matchmakers* (MIT press, 2016).

services,[16] it is unlikely that a restaurant would engage fifty reservation services. Thus, unlike markets for widgets, rivalry is diminished in the short term where tipping is present.

The interesting question relating to the loss of rivalry is the conditions under which that matters and according to which affected group (consumers; producers; intermediaries). It can prove significant to establish whether there will be "multi-homing" or "single-homing," that is, whether there is scope for co-extensive use of tipped products. This is especially important as differentiation is a strong form of competition and undue intervention can make competition via differentiation harder. There are very significant examples: multi-homing between Instagram and TikTok would not have been readily predicted, but has proven to be a significant source of competition. The matter would be quite different if talking about Microsoft Windows or the telephone network at the peak of their market power. Again, there is no substitute for open-minded and transparent factual analysis.

The above three factors might alter aspects of both dominance law and merger review. However, the existence of these phenomena does not call for a discretionary approach, as proposed by the Bill. It calls, instead, for the collection of *different* evidence. The question of which evidence then becomes crucial, and it differs between different visions for competition policy.

B. The "end-of-history" category error in seeking rivalry for its own sake

It is unlikely that perfect competition would exist in digital markets, at least in the short term.[17] Real world enforcement examples will *always* be some distance from perfect competition models.

Deep questions follow as to whether regulation seeks to enable dynamic change, or to limit it.[18] The framing of laws has a significant positive role to play if this can require a dynamic approach, and thus exclude pressures towards stasis.[19]

For example, the prominent EU Commission intervention against Google's Android contracting

16 UK Competition and Markets Authority, JustEat / Hungry House merger inquiry final report (10 Mar 2017).

17 In a contemporary context, see Gilbert, op. cit., p.41 (tracking currents of thought on appropriate level of intervention in the context of imperfect competition). The point was explored in depth by FA Hayek, "The Meaning of Competition," in *Individualism and Economic Order* (Chicago UP, 1948). Hayek notably emphasised that perfect competition is an unlikely scenario, implying both (i) that intervention would be needed but also (ii) that it should be modelled on realistic benchmarks and not abstract utopianism.

18 Postrel observed that a core question in modern policy is openness to change vs a desire to limit it. V Postrel, *The Future and its Enemies* (Free Press, 1998). This dynamism/stasis distinction is highly relevant to the DMCC. Aspects of the Bill seem, at least potentially, to allow the DMU to cater to the protection of stasis. This can be avoided by framing powers and evidence requirements around the enhancement of dynamism, and by limiting the scope for unduly static application of the law.

19 A classic example of the pivotal role of the law in preventing stasis arose in the aftermath of successful deregulation of US aviation pricing. Following deregulation, Alfred Kahn pushed for the law to require competition and consumer interests to be emphasised, to prevent industry re-capture of the regulator: see Airline Deregulation Act, Pub. L. 95–504, 49 U.S.C. § 1371, §§102(a)(4) and (5) (Diminishing if not quite eliminating scope for regulatory capture by requiring "The placement of maximum reliance on competitive market forces and on actual and potential competition" and "The development and maintenance of a sound regulatory environment which is responsive to the needs of the public"). The history is told in the Pulitzer Prize winning history T McCraw, *Prophets of Regulation* (Belknap, 1984). With regard to the DMCC, it is notable that requirements can be added to the Bill to prevent abuses of the law to harm consumers, which can otherwise arise if the interests of consumers and industry are opposed.

practices highlights this.[20] On the one hand, Android competes with iOS and appears to reduce market power in the direct network effects market (operating systems). Yet there are also considerations of competition in related markets, notably search advertising and online display advertising. These markets may be so much more complex than the canonical example that difficulty arises in applying the same model.[21]

This is a critical distinguishing feature of digital markets, as the application of a perfect competition model to a market in which there is competition via differentiated innovation can mean that winner-takes-all characteristics are a form of competition. As argued by Evans and Schmalensee, to assume that any particular generation of apps or platforms is the final one is to commit an end-of-history category error.[22] The Bill itself reflects this error, and as such appears like an attempt to freeze the digital economy in aspic.

Thus, the "winner takes all" complaint can be as much an argument against intervention as it is one for it. Influentially, Schumpeter argued that scale is positive and that the application of a perfect competition model to complex markets is an error. In his classic work *Capitalism, Socialism and Democracy* (1942), Schumpeter coined the well-known quotation regarding the tendency of "creative destruction" periodically to sweep market power away over time.

While the creative destruction concept is the most relevant concept from the work for technology markets, it is also just one part of the inspiration drawn from Schumpeter in the post-1970s period.[23] Schumpeter also argued that large-scale business units would better shoulder complex risk, and that this would give rise to lower unit costs and higher rates of innovation. In particular, he cautioned against any assumption that the benchmark should be perfect competition, since this could forego the perceived efficiencies of larger business units especially as regards innovation.[24]

The essential point from Schumpeter is that, somewhat counterintuitively, there is a scenario in which competition is at its strongest in the medium- or long-term when there are fewer competitors: in its strongest form, this might be thought a concept of *competition without competitors*. The challenge runs deep, as it then means that intervention should not occur simply to promote competition for its own sake.

This chimes with comments of enforcers and courts over the years. In the enforcement community, although hardly a Schumpeterian, then-US Attorney General Thurman Arnold once

20 EU Commission, Case AT.40099 *Google Android.*

21 The CMA can attest to this in its 2019-20 *Online platforms and digital advertising market study*, in which there were so many annexes that the alphabet had to be reused (Annex ZA, Assessment of pro-competition interventions).

22 D Evans and R Schmalensee, op cit.

23 "Creative destruction is the essential fact about capitalism. Stabilized capitalism is a contradiction in terms... Every piece of business strategy acquires its true significance only against the background of that process and within the situation created by it. It must be seen it its role in the perennial gale of creative destruction; it cannot be understood irrespective of it." J Schumpeter, *Capitalism, Socialism and Democracy*, Ch. 7, pp.82-3 (3 ed., 1950). It is also interesting to note the influence of Schumpeter on later thinkers, notably Kenneth Arrow who agreed that scale increases appropriability of returns to innovation. See K Arrow, "Economic Welfare and the Allocation of Resources to Invention" in C Rowley (ed) *Readings in Industrial Economics* (Palgrave, 1972) 622 ("monopoly may create superior incentives to invent [because] appropriability may be greater under monopoly than under competition"). The authors are grateful to Joseph Coniglio for this observation.

24 "Perfect competition is not only impossible but inferior, and has no title to being set up as a model of ideal efficiency. It is hence a mistake to base the theory of government regulation of industry on the principle that big business should be made to work as the respective industry would work in perfect competition." Schumpeter, op. cit., p.106).

noted that arguing about scale per se is an exercise in "arguing whether tall buildings are better than low ones."[25]

In the courts, this principle found its clearest expression from Judge Hand, that: "the successful competitor, having been urged to compete, must not be turned upon when he wins."[26] The point was also put in a 1949 edition of *Fortune* magazine: "Business should justify its profits, not apologise for them."[27] The essential idea is that large business scale is beneficial and should be welcomed provided that the associated outcomes are good. The justification that *Fortune* seemed to have in mind was to avoid *undue* profits. Implicitly, profits from innovation and associated with good consumer outcomes would be a feature and certainly not a bug of a competition policy, even if – perhaps even *because* – large scale units result.

Concentration and competition

In the immediate postwar period, a new view came to the fore, which argued against business concentration, in the interest of greater competition.[28] The intuition is simple: more competitors, more competition. "Harvard school" thinkers in the United States noted positive gains to efficiency from deconcentration, and ordoliberal thinkers in Europe associated with the Freiburg School agreed but for the different reason that deconcentration was seen to promote personal autonomy.[29]

The position came under increasing strain, because if incorrect it would deny scale that might be efficient.[30] It is important to consider this history before intervening in markets where scale benefits, and may drive growth that would be forgone by forced deconcentration.

However, scale can sometimes exclude rivals who are more efficient. The essential point is to differentiate bad examples of market tipping from good, since both scenarios exist. The question is one for evidence, and the legislation ought to make no starting assumption regarding scale.

Business scale today

The most recent work on business scale, notably the book *Big is Beautiful* by Robert Atkinson and Michael Lind, notes that there are complementarities between large and small businesses such that it would be an error to have a starting assumption for, or against, any particular scale of business unit.[31] The authors note that many innovations flow from large business units; that they provide the majority of employment; and that scale economies and consumer outcomes

25 Thurman Arnold, *The Bottlenecks of Business*, 122 (1940; reprint Beard Books 2000); cited in Petit, op. cit., p.27.

26 *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). The quotation, familiar to every antitrust student, can be debated as to its actual application in the case. A similar point later found prominent expression in Justice Scalia's admonition that: "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

27 Fortune, "Business is still in trouble," *Fortune* (1949) 69 as reported in L Glickman, *Free Enterprise*, 44 (Yale UP, 2019).

28 See especially Bain, *Industrial Organization* (Wiley, 1968). As we shall see below, some contemporary calls for changes to the law harken back to this history, despite its markedly different industrial context, and in some cases exceed it.

29 See further J Coniglio, "Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism," 1(2) *CPI Antitrust Chronicle* (2017).

30 It is notable that the critiques arose on both static and dynamic analysis: see H Demsetz, "Industry Structure, Market Rivalry, and Public Policy," 16 *J. Law & Econ* 1 (1973). The authors are grateful to Joseph Coniglio for this observation.

31 Atkinson and Lind, op cit.

are often positive where large-scale operations are involved.[32] Yet policy routinely discriminates against scale with clearly specified, much less benchmarked, basis.

Instead, the authors advocate analysis of the *respective* roles of large and small business and the complementarities which each can bring from their comparative advantages. This has very significant implications for small business. For example, if investment is flowing to small businesses from larger ones, or large business' services are useful to smaller businesses, then the complementarity is helpful and not harmful to small business.[33]

Undue intervention, without an evidence base, may harm the very parties it is supposed to protect. At its worst, such an approach could amount to an attempt to hold back a tide that otherwise would raise all boats, large and small.[34]

Much then depends on whether there is evidence of pricing power in a particular industry based on evidence, to raise concerns that market power is excessive. In particular, it is important to avoid conglomerate theories of harm, which allege harm from the scope and scale of business activities – for example, the expansion of large players such as Amazon into different business lines.[35] Such a view risks a serious false positive if the Atkinson and Lind thesis (below) is correct: the complementarities of large and small business would be lost, essentially because of a prejudice against scale.

It is very significant that the current law does not take any position on this issue and instead leaves it to evidence. This is an important aspect of the Competition Act 1998 and the Enterprise Act 2002, and must be preserved.

Challenges to evidence-based approaches to digital markets

In contrast with the post-1998 settlement and its emphasis on evidence, a competing viewpoint favours relaxation of evidence standards chiefly through the broadening of relevant factors to consider. On this vision, aspects of desired policy would predominate over aspects of evidence. Where for Atkinson and Lind *Big is Beautiful*, for Tim Wu there is *The Curse of Bigness*.[36] These

32 A striking example is the supermarket: few would argue that there should be forced deconcentration towards higher-cost high street grocers; the task is instead to *develop* laws to address aspects of the (broadly helpful) scale economies from the large scale operators. The DMU might have a crucial role to play in taking an evidence-based approach to potential cases of true competitive harm, while not foregoing the cost-saving scale-based innovation. The authors are grateful to Erin Bibb for this observation.

33 A practical example would be the use of platform-based advertising by a local business, thereby increasing sales. The question is how competitive the advertising market is, and not whether the vendor of advertising services is large, not least as the beneficial service might well arise *precisely because* it allows access to scale (e.g., tailored adverts from a large platform bringing in new customers to a local business, because of rich data insights from large-scale data handling).

34 It might be argued that large businesses have power over small ones. It is unclear exactly how this arises if there is not market power. Such a concern is also rejected in general law, notably boundaries to the law of duress and the absence of a cross-cutting inequality of bargaining power doctrine in English law (Pao on v Lau Yiu Long [1979] 3 All ER 65; National Westminster Bank plc v Morgan [1985] UKHL 2). In any event, if there is a concern about imbalance, it is likely to arise on the basis of particularities of specific markets and would call for specific regulation of those concerns via a tailored business law reform, rather than an expansion of cross-cutting competition law

35 Khan, *Amazon's Antitrust Paradox*, op. cit.

36 T Wu, *The Curse of Bigness*, op. cit. Cf. Atkinson and Lind, *Big is Beautiful*, op. cit.

thinkers channel the contribution of Louis D. Brandeis and his suspicion of large business.[37] Their viewpoint coalesces around the Brandeis quotation that the law should protect "small dealers and worthy men."[38] It is not specified *which* small dealers, how their interests are to be prioritised, or how to differentiate the worthy from the unworthy. This risks a discretionary, rather than evidence-based, approach to regulation.

The essential point is that value is seen in smaller scale operation for its own sake *over* these objections. A parallel is drawn between the size of business and undue political influence.[39] There is comfort with price rises provided that smaller scale business operations result, as came in for criticism at a time of food inflation following Wu's comments about deconcentration in sugar, which by prioritising a concern with scale seemed to understate the importance of low pricing.[40] One might note a whiff of elitism in Wu's favouring higher average costs at time of strained budgets, without first establishing affirmative evidence that this deconcentration would be beneficial to consumers.

The underlying assumption of this approach is that regulation is to be trusted more than business and that a regulator should be given the benefit of the doubt.

The chief mechanism by which the neo-Brandesians would change the law would be to reverse the so-called "monist" or single-aim policy focus inherited from Judge Robert Bork, who argued that antitrust regulation should be driven by a single objective of increasing consumer welfare.[41]

Moving away from a consumer welfare approach would be a major change. It would have significant impact on enforcement practice and should be done only with conscious caution as to the values that replace it.

It might be that this is desired by Parliament, but it should not be done by accident, and critically the values that Parliament *does* wish to see followed should be carefully selected, prioritised, and stated in the legislation itself.

Major changes likely to result from not doing so would include:

- **Breaking up large businesses:** As scale is considered negative, there would be calls to break up companies. The assumption is that increased competition would outweigh administrative costs and possible lost efficiencies;[42]
- **Discretionary approaches to evidence:** The consumer welfare standard would be replaced by a wider range of evidence which would then be assessed on a discretionary basis with no clear legal framework and significant regulatory-capture risks;

37 For a summary, see L Philips, "The Economics and Ideology of American Fair Trade: Louis Brandeis and Open Price Associations, 1911-1919" 9 *Business and Economic History On-Line* 1 (2011) (noting Brandeis' support for coordination between small firms so as to compete with larger ones, even if higher prices would result); T Kirat and F Marty, "The Convergence of Antitrust Thought in the Late 1930s and its Subsequent Collapse," *ProMarket*, 17 May 2023.

38 The famous quotation arises in *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

39 Khan, *Amazon's Antitrust Paradox,* op. cit.

40 P Gramm and C Wilson, "The New Progressives Fight Against Consumer Welfare," *Wall Street Journal,* 3 April 2022.

41 R Bork and W Bowman. "The crisis in antitrust." 65(3) *Columbia Law Review* 363 (1965); cf. H Blake and W Jones. "In defense of antitrust." 65(3) Columbia Law Review 377 (1965); see also R Bork, W Bowman, H Blake, and K Jones. "The Goals of Antitrust: A Dialogue on Policy" 65 *Columbia Law Review 3*63 (1965).

42 For an early and damning critique of the difficulties inherent, see W Kovacic, "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration." 74 *Iowa Law Review* 1105-1130 (1989).

- **Wider range of values to support wider intervention:** Antitrust remedies would be seen as an avenue for the achievement of goals other than competition preservation;
- **Capital market impediments:** Mergers and acquisitions would be prohibited if large players are involved, regardless of their efficiency properties and consumer impact;
- **Negative impacts on competitiveness:** If an evidence-based approach is replaced with the hopeful use of discretion, there would be a negative impact on competitiveness from the increased error costs in intervention.

The introduction of additional political values should be undertaken cautiously, with legislative and additional parliamentary oversight. Essentially, the neo-Brandesian position is to embrace political aims in the enforcement of the law.

It follows that particular care is needed before Parliament contradicts a consumer welfare approach. As we will see in the paper below, this was not the recommendation of the Furman Report in the first place, which was instead to retain a consumer welfare approach because of the clarity and predictability this brings to evidence. Chiefly through vagueness, the Bill instead risks empowering the CMA to become a multi-value regulator.

At the very least, it might be wise to contain the resulting broad discretion with guiding principles, as would happen with other multi-factor analyses.[43]

C. Changes to the toolkit

In this policy context, it will be important to retain an evidence basis for competition law intervention. It remains very much to be seen whether the law should proscribe any particular vision. For example, a law might be crafted for "small dealers and worthy [people]." On this vision, the CMA would then write guidance to distinguish good from bad business – a task the DMU might not even want itself, considering the inherent difficulties.

It is unclear exactly what this expansive approach would mean in practice. It might simply be a move towards a model of a stronger regulator imbued with greater discretionary powers to direct business activity. That regulator would then be free to ignore effects-based analysis. Effectively, no fault antitrust results.

To avoid this outcome, we need to consider whether existing tools are broken and which specific changes might be needed if imperfections are perceived.

Are the existing tools broken?

There is debate about whether it is desirable to accommodate these features into existing analytical tools, or to change the tools fundamentally as is proposed by the Bill.[44] The existing

43 See e.g. s.3 Communications Act 2003 (providing multiple aims).

44 See e.g. H Shelanski, "Antitrust and Deregulation," 127 *Yale LJ* 1922 (2018); H Shelanski, "Information, Innovation and Competition Policy for the Internet" 161(6) *Univ. Pa. Law Review* 1963 (2013); cf G Manne and D Auer, "Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins," 28(4) *George Mason L. Rev.* 1281 (2021); G Manne and J Wright, "Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google," 34 *Harvard Journal of Law and Pub. Pol.* 1 (2011); M Lemley, "Industry-Specific Antitrust Policy for Innovation," *Colum. Bus. L. Rev* 637 (2011); M Lemley and D McGowan, "Legal Implications of Network Economic Effects," (1998) 86 *California Law Review* 479.

tools available to the CMA are already powerful and expansive:

- **Powerful market study and market investigation tools:** The very DMU which would be empowered by the DMCC prominently noted that online music streaming did not give rise to competition concerns after a significant market study that took place under the existing laws.[45] The CMA's Mobile Ecosystems Market Study failed not for a lack of powers but for process issues relating to their use.[46]
- On the crucial question of **data and trials,** senior CMA officers have disclosed that they hold as much as four terabytes of data on online search advertising; that they hold 160 terabytes of data in total; and that they have already had success with trials and testing initiatives within existing investigatory frameworks.[47] It is hard to think what more data they require.
- **Commitments procedures:** Significant changes have been achieved using the existing toolkit, notably oversight of the removal of cookies from the Google Chrome browser by the CMA,[48] and intervention to address perceived market-power exploitation in app payments.[49]

These interventions suggest that the focus might best be placed on using the existing tools, perhaps with increased resourcing or greater speed. Significantly, the powers have never been fully used since Brexit. Formerly, EU Regulation 1/2003 effectively constrained the full use of the Enterprise Act because EU law took precedent over the Enterprise Act if there was an EU-level effect; hence pivotal cases such as *Google (Android)* being EU Commission matters and not CMA ones, (this explains why Enterprise Act action before Brexit often had a local character, e.g., local transportation markets). There are extensive Schedule 8 powers which have never been fully used and ought to be given a chance before adding more.[50] More powers could always be added later if they are seen to fail.

The experience recalls the 2006 conclusion of the US Antitrust Modernization Committee – specifically created by Congress to consider the role of antitrust in high-tech markets – that "[t]here is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features."[51]

This is also supported if expanding the analysis to consider innovation in addition to consumer welfare. As the prominent antitrust economist Gilbert writes in *Innovation Matters:* "The antitrust laws do not need to be changed to address innovation… the antitrust statutes are

45 UK CMA, Music Streaming Market Study, Final Report (29 November 2022). Disclosure: the author was engaged as a consultant in relation to the streaming study.

46 Apple Inc. v CMA [2023] CAT 21.

47 See especially, T Schrepel and T Groza (eds.), "The Adoption of Computational Antitrust by Agencies: 2021 Report," *2 Stanford Computational Antitrust* 79, 112; see also, Stefan Hunt, "The Technology-Led Transformation of Competition and Consumer Agencies: The Competition and Markets Authority's Experience," (UK CMA, 14 June 2022).

48 UK CMA, Case 50972 Privacy Sandbox, Commitments (4 February 2022). Disclosure: the author was engaged as a consultant in the Privacy Sandbox matter.

49 The CMA is currently considering responses received to proposals for commitments to address perceived competition concerns in Google's in-app payments.

50 The authors are grateful to Stephen Hornsby for the observation as to the former truncation of the Enterprise Act powers before Brexit.

51 Antitrust Modernization Commission Act of 2002 (P.L. 107-273). The Report and Recommendations also state: "In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis." (Recommendation 2)

broadly flexible [but] courts have applied them in ways that raise barriers to the enforcement of dynamic competition."[52] Is it necessary to change a toolkit that appears to be working, at least when its procedural due-process requirements are followed?[53] If the issue is specific court precedents, could those not be adapted on a tailored approach?[54]

Nonetheless, there is also a view that certain requirements of the core antitrust toolkit – whatever their source – do not work well in the context of high-tech markets.[55]

The next section considers which tools these are.

Specific reforms

Which, then, are the tools giving rise to a risk of error? Core issues relate to (1) limitations in the application of market definition concepts; (2) difficulty in proving future effects, notably including innovation; and (3) concerns about the speed of intervention in the context of market tipping.

1. **Issues with market definition.** The orthodox starting point for competition analysis is to define a relevant market.[56] This is the definition of products or services in which competition is then analysed. Definitions can be significant: a market for fruit is broader than that for bananas, and concerns about lost banana competition would accordingly diminish on a fruit definition.[57]

   Modern competition analysis has arrived at the position that evidence should primarily be quantitative, if possible, to avoid perceived error risk in over-reliance on qualitative evidence whose weighting could be subjective. The logic is that if trade moves to alternatives from a price-rise on a given market definition, then there is likely to be at least a degree of substitution, such that competition from that other product should be analysed. Therefore, regulation must account for the observed substitution pattern.

   The issue arising in technology markets is that many goods and services are free – or at least, have no monetary price.[58] While this is often positive for the consumer, it also means that it is challenging to conceptualise the substitution pattern. Risks arise through attempts to judge

52 Gilbert, op. cit., p.35. This comment carries particular weight considering Gilbert's prominent role at the US Department of Justice as Deputy Assistant Attorney General for Economics in relation to technology cases.

53 Apple Inc. v CMA [2023] CAT 21.

54 For example: the requirement to prove an absence of alternative distribution methods derived from Advocate General Jacobs' Opinion in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co*. could be relaxed to require only foreclosure risks. The requirement to show a non-de minimis effect in a related market in *Streetmap.EU Ltd. v Google Inc* [2016] EWHC 253 (Ch) could be revisited if there are concerns that this unduly overlooks network effects. Disclosure: the author was engaged as a consultant in the *Streetmap* case.

55 See discussion of the Furman Report below.

56 It is notable that this is actually contested territory, and not specifically in relation to technology markets: there is a view that direct evidence of competitive effects suffices for analysis, such that definition of a particular market is superfluous by definition. L Kaplow: Why (Ever) Define Markets? 124(2) *Harv. L. Rev. 437* (2010). A rejoinder notes the administrative importance of market definition in antitrust cases such that the concept clarifies practical analysis, even if it may seem strictly speaking to be superfluous if effects can themselves be proven: G Werden, "Why (Ever) Define Markets? An Answer to Professor Kaplow," 78(3) *Antitrust Law Journal 729*.

57 Case 27/76 *United Brands v Commission*.

58 Petit, op. cit., 241-246.

quality, as there is no quantitative evidence base by which to assess quality – unlike price.[59]

Yet a strict adherence to quantitative analysis in a zero-price market could result in anomalous results. Switching may be between several free products, and competition may be strong. In such a scenario, checking for the impact of price rises would miss the bigger picture of several free providers.

Different but no less significant limitations arise from the potentially complex relationship between a user base and other groups such as advertisers and publishers of online content. Requiring proof of and commitment to a specific market definition before mounting a legal challenge may be an undue restriction if the issue is the relationship between different markets and this can be evidenced.[60]

The interesting question from a competition policy perspective is not *how* this information is categorised, but rather how well it is assessed.[61]

However, there is a strong reading that UK competition law *does* insist on the application of this category, the theoretical limitations above notwithstanding.[62] A case team would thus risk legal challenge if they accepted Professor Louis Kaplow's implicit recommendation to depart from the Enterprise Act, however helpful that might be to high quality analysis.[63]

That in turns suggests that if there is to be a move away from market definition doctrines, then it ought to be accompanied by a requirement for evidence of direct effects to take its place.

2. **Proof of effects**. Closely related to difficulties with evidence for relevant market specification is difficulty in what that evidence would say, even if readily available. As with the relevant market, there are difficulties in modelling future gains which may be very large – or very small – depending on how the tipping dynamics work out.

   This is a deep challenge: an antitrust policy that focused on static effects in a dynamic market would risk seriously understating impacts over time. Yet there is also no crystal ball.

59 Case AT.40099 *Google Android* (rejecting a requirement to apply a SSNIP test and crediting a range of different evidence at *63-*64 on a discretionary basis). This contrasts with the noted – and perhaps equally undesirable – finding in *Kinderstart.com, LLC v. Google, Inc.* Case No. C 06-2057 JF (RS) (N.D. Ca., March 16, 2007) (no market if no price). See further: J M Newman, "Antitrust in Zero-Price Markets: Applications," 94 *Wash. U. L. Rev.* 49 (2016).

60 Compare UK Competition and Markets Authority, *JustEat / Hungry House merger inquiry* final report (10 Mar 2017) op. cit.; Ohio v. American Express Co., 585 U.S. ___ 138 S Ct 2274 (2018); and Case C-382/12 P *MasterCard and Others v Commission* (respectively accounting for multi-sided market analysis in a number of practical ways under EU, UK and US antitrust law, without the requirement for prior legal reform).

61 In rejoinder to Kaplow, Werden noted an important role for market definition in case administration, argumentation and framing. The same point would apply even if relaxing market definition: there must still be some means to frame case analysis for consistency and rigour. Thus the debate is not about abolition of the concept as much as it is about its optimisation. Werden, op. cit.

62 For example, the prohibition on abuse of dominance in the Competition Act 1998 speaks of "abuse of a dominant position **in a market**", and the Enterprise Act speaks of "a substantial lessening of **competition within any market or markets**" in merger review, and whether addressing Cross-market or Ordinary References, a Market Investigation's Terms of Reference must speak to "**features of a market**" or "**more than one market**". (S.18 CA98; S.22 and 33 EA; S.131(1)(and (2A) EA.

63 It might be noted that UK competition law does not require adherence to looking at only one side of the market: see, e.g. JustEat/HungryHouse; and inherited EU law on point (EU v MasterCard). However, this is not the same thing as saying that market definition can be dispensed with, such that a failure to state a market would still be a risk for an enforcer.

As the Nobel prize winning economist Edmund Phelps famously noted, "Innovations... are not determinate from current knowledge, thus are not foreseeable. Being new, they could not have been known before."[64] The point is eloquently captured in the US *Horizontal Merger Guidelines*: "certainty about competitive effect is seldom possible and not required for a merger to be illegal."[65]

This uncertainty issue can be just as much a prescription for *not* empowering a regulator to predict the future, depending on the policy posture relating to informational uncertainty. There are however some critically important implications for competition law. Certain key tests, notably on product design and technological tying, currently require proof of foreclosure from the market.[66] Seekers of access to an input required for competition must show that access is indispensable and may also need to show that a new product is impeded by access denial.[67]

While there are good reasons for aspects of these tests, and they should by no means be abandoned wholesale, it is also true that such evidence may prove elusive in nascent markets. If there is genuinely an enduring market power problem, it may be that the strength of this market power means that foreclosure is not provable since no competition exists. This chicken-and-egg problem arises specifically from the strong network effects and scale economies present and arguably calls for a relaxation of these specific aspects.

3. **Speed:** Closely related to the above concerns is the perceived need for high-speed intervention. Proving a relevant market and collecting evidence of foreclosure can take months. While there certainly are businesses which endure this test, it is plausible that an enforcement gap could exist surrounding delay from enforcement simply because it takes too long for intervention to occur even in meritorious cases. This is one of the most prominent concerns driving the DMCC Bill.

   It is crucial to note that this is as much an administrative issue as it is a legal one; and that it is not confined to digital markets. It may not even be a failure: the former Competition Commissioner and current Chairman of the Competition Appeal Tribunal, Peter Freeman CBE KC (Hon), is fond of asking the challenging questions: which procedural safeguard, exactly, is considered otiose? How would fairness be preserved without that specific safeguard?[68] Freeman's challenge is deep and raises the important question of the *net* gains and losses from increased speed. It will always be important to consider the quality of the evidence, whether it is so obvious that it can be collected in a week, or instead requires several months' work to ensure that justice is done. We must avoid drifting into either de facto over-regulation, or under-regulation thanks to the prioritisation of speed.

64 Edmund Phelps, *Mass Flourishing*, p.32 (Princeton Univ. Press, 2006).

65 US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 1, Overview (2010).

66 Case T-201/04 *Microsoft* para 842. See also Case T-30/89 *Hilti v Commission*[1991] ECR II-1439, upheld in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667 (tying of nails and nail guns), and Case T-83/91*Tetra Pak v Commission* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951 ('*Tetra Pak II*') (tying cartons and carton machinery).

67 *Bronner*, op. cit; see also Case C-418/01. Judgment of the Court (Fifth Chamber) of 29 April 2004. *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* (noting role of blocking of new product as plus factor in access analysis under Art. 102 TFEU).

68 See, e.g., P Freeman, "Beware the Ides of March," *European Competition Journal* 563 (December 2012); see also W Kovacic and D Hyman, "Competition Agency Design: What's on the Menu?" *GW Law Faculty Publications and other works* 628 (2012) (discussing prior generation of UK reforms).

Thus, on all three core points, there is still an underlying need for evidence. It is simply a question of *which* evidence and whether it should take a different form in some regards. There is no case for a wholesale departure from the need to prove a case on an evidenced basis.[69]

D. Expert reports: The Furman Review and its progeny

We now turn to the role of expert reports and the perceived issues they have identified.

The pivotal moment in the intellectual genesis of the DMCC was the decision by HM Treasury to commission the report *Unlocking Digital Competition*, known commonly as the Furman Review, reflecting the role of Professor Jason Furman as Panel chair. Similar reports were also published by the Stigler Center and the EU Commission.[70]

This section will summarise the Review's findings and recommendations. Significantly, these are more restrained in places than the DMCC Bill proposals.

Context to the Furman Review

The Furman Review's Terms of Reference principally addressed whether changes to competition policy were needed for the emerging digital economy, with specific reference to digital markets, mergers, opportunities for pro-competitive interventions, and issues arising in advertising-funded markets.

The Review took a relatively balanced position, noting benefits from digital innovation including high quality, low-price advances, as well as the role of large technology companies in lowering barriers to entry, in line with a nuanced view of the relationship between direct and indirect network effects. However, the report expresses some concerns:

1. At the time, tipping into a particular market, as outlined above, was considered a core concern based on the perceived tipping characteristics of the day, especially relating to social media;
2. Markets were perceived to be increasingly concentrated, with the Review raising concerns about decreased economic efficiency from this, including price, innovation, and quality concerns;
3. Concerns were raised about data collection proving difficult for smaller entrants, impeding innovation, as was the tendency for large firms to buy out smaller ones;
4. Regulatory lag was noted based on information advantages in large firms.

69 Indeed, one of the most promising aspects of the Bill and the DMU is that they might speed up and improve regulatory quality, including evidence handling, through the use of specialised expertise in high technology settings. This is emphatically not the same point as *removing* evidence requirements but rather the development of expertise so as to further high-quality evidence gathering. The authors are grateful to Erin Bibb for this observation.

70 Cremer et al, *Competition Policy for the Digital Era* (Final Report, EU Commission, 2019); Stiger Committee on Digital Platforms: *Final Report* (16 September 2019). See also: US House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets* (Oct 2020); cf. W Kovacic and D Sokol, "Understanding the House Judiciary Committee Majority Staff Antitrust Report," *CPI Antitrust Chronicle*, Jan 2021 (noting issues with divergent focus and lack of clear recommendations in report: "The case studies are elaborate and rich in detail; the discussion of the doctrinal reforms, many with great significance for the entire US antitrust system, is slim by comparison." *2).

Peak Furman?

These concerns have not weathered well. Looking back, it seems that the first concern (1) on tipping has been somewhat overtaken by market developments showing strong contestability, especially in social media, e-commerce and market messaging:

- The advent of TikTok to compete with Meta and YouTube;
- Generative AI models which threaten market power in legacy Web 2.0 properties, like Google Search;[71]
- The creation of Threads to compete with Twitter;
- The advent of Shopify in e-commerce;
- The growth of Amazon in online advertising, contesting the perceived enduring market power of Google and Meta with potential interaction with perceived market power in search;
- The proliferation of multi-homing in messaging services, such that Meta's WhatsApp competes with many other providers;
- TikTok's reported entry into gaming to compete with Microsoft and Activision.

Concern (2) on concentration also seems not to be borne out. Innovation proved possible, even in the core examples of tipped markets. It is thus unclear that there is a relationship between concentration and bad consumer outcomes of the type contended.[72]

There also appears to be a defeatist assumption in the Furman Review that there will never be new entry, and thus on-platform competition is essential. However, the passage of time since the report was written has called recommendations surrounding vertical disintegration into question. There are also serious concerns that complementarity between businesses, especially if via acquisition, is underplayed.

The data-related remedy seeking to address point (3) on data access raises a concern. The underlying point here may well be that regulation increases the cost of even low-risk data use.

71 As noted in the Legatum Institute's June 2023 comments on the draft CMA Strategic Steer: "Over the past two years, Meta (Facebook)'s market capitalisation fell by 2/3 (2021-2) before recovering to 2/3 of its former value (2022-3) around the advent of ChatGPT and other Large Language Models ("LLMs"), Google's share price dropped significantly, falling 11% from the 30 November launch of ChatGPT to 28 February." (pp.6-7).

72 A lesser-spotted aspect of Kwoka's influential work on concentration is that the data set – quite properly – seeks to model macroeconomic issues and not just digital ones, such that result encompass a wide range of industries including many *legacy* ones. His analysis is cross-cutting and is epitomised by such episodes as airline mergers. Yet even the architect of airline deregulation, Alfred Kahn, had concerns about market power there. It is not clear that scale and digital markets have the same relationship as in other industries. Indeed, the core point underlying the Bill is that there should be differentiation because of these specific characteristics.

There have also been changes to this framework designed specifically to address issues with barriers to low-risk data use since the Review.[73]

By contrast, the Review strongly advocates data portability and in places appears to use this interchangeably with interoperability.[74] There may well be a substantial role for interoperability if an evidence base exists to support it, but it is not the same thing as user-initiated data portability. Indeed, interoperation of apps in a multi-homing scenario can cut against the differentiation that serves consumers. SMS messaging provides a good example of a lack of differentiation being replaced, initially, on a differentiated basis from *good* "tipping" away from an inferior product (under SMS, all networks had access to a standardised product).

In today's more differentiated market, no one would want a "FaceTok" app with half of each, or "InstaSnap". Competition between the providers may often be served best when they do not interoperate, if this promotes competition via differentiation.

What exactly did the Furman report recommend?

It is notable that the Bill exceeds the Furman conclusions and recommendations in its proposals.

The core concern relates to speed (4, above). This then supports the Code of Conduct proposal as a means for speedier enforcement.[75] The point was not to change the underlying law in substance – yet we shall see, below, that this is exactly what the Bill does. Very significantly, the Review concluded that the consumer welfare standard should still apply. In these critical regards, the Bill significantly exceeds the Furman review and ignores its expert recommendations.

The other major speed-related concern (4) was that Enterprise Act market investigations were too slow. This is debatable: if there is strong evidence of harm, settlement procedures exist to address them that can be used relatively quickly in the form of undertakings in lieu of a reference.[76] These would be exercised in the relatively short one-year timeframes of the Market Study stage.[77]

Indeed, the Market Study into Online Advertising advocated by the Furman Review did not proceed to the Market Investigation stage and thus concluded within a year. That does not seem unduly slow considering the market complexities involved. The better approach to this is to improve resourcing and analysis rather than to truncate the need for it, which will only promote mistakes.[78]

73 See especially Data Protection and Digital Information (No. 2) Bill's cl. 3A (defining Personal Data so as to arise only where evidence shows a reasonable risk of linking to identity); cf. s.3 Data Protection Act 2018 (use of possible rather than reasonable risk approach); see also UK Information Commissioner's Office, "ICO call for views: Anonymisation, pseudonymisation and privacy enhancing technologies guidance", publishing draft Guidance applying a risk-based approach to data use (see especially ch.1-4). Disclosure: the author was engaged as an expert consultant in relation to the ICO's Guidance review.

74 Furman Report, p.5.

75 Furman Report, p.64.

76 S.154 Enterprise Act.

77 S.131B Enterprise Act.

78 It is also interesting to consider the role of clarity in relation to speed. For example, existing commitments procedures are slow and are given to vagueness if they depart from the underlying legal position. A carefully crafted code of conduct might have significant scale economies, but then error costs increase and so it becomes all the more important for the evidence to support the code to be based on relevant expertise and carefully crafted evidence. The authors are grateful to Erin Bibb for this observation.

E. Practical examples of policy fault lines

At this stage, it is interesting to look back at the different visions for competition policy and the expert reports, and to consider how some practical questions would be answered differently according to the contrasting aims.

1. Is rivalry itself a virtue?

The most striking tension in the above visions is the difference in emphasis on rivalry. For the Schumpetarian, rivalry is leapfrog rivalry for the market as a whole – yet in the Furman Review, there seemed to be an emphasis on ensuring that entry was possible, perhaps for its own sake. If there are periods of time where the winner-takes-all for a period but is then replaced, as the facts show, then it is helpful for there to be no starting assumption in favour of rivalry. That would otherwise be a preference for rivalry for its own sake, despite the strong *successive* competition over time.

It follows that the Bill, in seeking to distinguish digital markets and their treatment, ought not to have any bias in favour of short-term rivalry for its own sake. Rather, there should be attention to evidence of outcomes such that the potentially consumer-friendly scenario of successive competition is not arbitrarily excluded.[79]

There is a significant concern with the position that rivalry should be preserved for its own sake. Unless an arbitrary position is to be taken at which concentration is thought to be "just right", then a so-called Nirvana fallacy arises in that there is no clear mechanism by which to assess whether the level is correct.[80] This could lead to serious levels of regulatory discretion, and regulators making essentially political decisions in their judgements.

Moreover, competition by entry into adjacent markets, as with Amazon in adverts, will be at its strongest where *pro-competitive* synergies are allowed to be brought to that other market. It is critical that these moves are not closed off, even though by definition they harm competitors. If blocked by regulation, competition in the tipped market would then be weaker – exactly the opposite of what the policy should aspire to achieve.

2. How should innovation be accounted for?

A very interesting aspect of the new laws is their position on innovation. It has always been a curiosity of competition law that, despite the importance of innovation as a value, it is hardly ever addressed head-on. It is almost as though innovation is so important that competition law dare not breathe its name.[81]

The point was given voice in another significant intervention from Judge Easterbrook:

> "An antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the cost of production would be a calamity. In the long run, a continuous rate of change, compounded, swamps static losses."[82]

79 Considering consumer impact is an obvious role for DMU expertise, as the DMU ought to have the internal expertise to consider outcomes on users rather than the impact on affected businesses. That would suggest an emphasis on market analysis, rather than an obsession with scale. The authors are grateful to Erin Bibb for this observation.

80 H Demsetz, "Information and efficiency: another viewpoint." 12(1) *J. Law & Econ. 1-22* (1969).

81 It may simply be that doctrine is humble in the face of difficulties in definition.

82 Easterbrook, "Uncertainty and Antitrust," op cit.

Parliamentarians must take this into account, and think of the long-running costs of regulation, and the benefits and opportunities of innovation that may be lost if this Bill is implemented without amendment.

Innovation poses particular challenges for competition law analysis given the particularities of online markets. In a conventional market, innovation is simply an internal cost function of the businesses involved. It thus need not be modelled independently as it simply becomes a factor in price.

There are arguments that innovation is itself valuable and that digital markets analysis ought therefore to differ, as there are potential scenarios in which relaxation of market power has spurred innovation. There are prominent examples in the "inverted U" literature derived from Philippe Aghion.[83]

Mandatory licensing as pursued for AT&T's transistor patents and Xerox's photocopier patents are thought to have increased rivalry by addressing a market power issue that might otherwise have seriously held back innovation. [84] There is also said to be a role for innovation analysis in merger reviews.[85]

Innovation analysis can be accommodated without a move to a purely discretionary approach. There is a scenario where analysis is broadened for digital markets, but only so as to include innovation analysis as well. Thus, the difficulties of a multi-factor analysis are avoided, while also accounting for the issue that direct analysis of innovation may have a role to play that would not show up in a pure price-based analysis. That would call for structured evidence rules surrounding innovation, rather than a move to a fully discretionary approach.

This reveals a major limitation in the Bill: it appears not to seek to account for innovation, but rather concede a need for utility-style regulation. There ought instead to be a focus on innovation. This might consider analysis focused on factors including innovation links between markets; the role of disruptive innovation; the relationship between innovation and market share; and any innovation-specific offences or defences that might be desired.[86] It is concerning that no such analysis is currently present in the Bill, which instead focuses on scale and regulating outcomes where scale is large. This lacks clear focus on innovation, despite that being a stated aim of the reform package.

It would be important to avoid a scenario where, de facto, a non-adaptive list of perceived abuses – as might be written under the cl.19-20 Conduct Powers – fails to account for the role of innovation in displacing perceived concerns. That would be ironic to the extent that the

83 P Aghion, N Bloom, R Blundell, R Griffith and P Howitt, "Competition and Innovation: An Inverted-U Relationship" 120(2) *Q. J. Econ.* (2005) 701.

84 Grindley and Teece comment that the AT&T licensing remedy "remains one of the most unheralded contributions to economic development – possibly far exceeding the Marshall plan in terms of wealth generation it established abroad and in the United States" P C Grindley and D J Teece, "Licensing and cross-licensing in semiconductors and electronics", 29(2) *California Management Review*, 8 (1997) (as cited in Gilbert, *Innovation Matters*, op. cit., 133, and Watzinger et al "How antitrust enforcement can spur innovation" op. cit.).

85 Gilbert, *Innovation Matters*, pp.2-3 and ch.5 (summarising recommendations on role for innovation analysis in merger reviews, notably *GM/ZF and Dow/Dupont*).

86 See further: T Schrepel, "A Systematic Content Analysis of Innovation in European Competition Law," *Amsterdam Law & Technology Institute (ALTI) Working Paper 2-2023 / Dynamic Competition Initiative (DCI) Working Paper 1-2023* (April 2023) (Providing detailed analysis of fragmented approach to innovation in current law and recommending proposals to integrate innovation analysis).

law seeks to promote innovation. Significantly, this criticism is made of the EU's toolkit whose core provisions are not adaptable and thus assume that there are issues arising in particular categories on a permanent basis distinguished by category rather than market characteristics over time.[87] It will be important for the Bill to avoid the overly-rigid posture seen in the analogous EU law, especially as its proponents state that the Bill's virtue compared to the EU's regime is its purported flexibility.

3. What about free products?

A very striking aspect of online markets is the prominent role of free goods and services. If a consumer focus is lost, then these free products would be at risk. There are particular concerns that increased costs from protecting less efficient rivals might harm consumers, especially if there is no evidence basis by which to assess whether this is taking place. For this reason, it is essential to require a focus on consumer impacts as part of the evidence base if at all possible.

4. New product entry by existing players

An acute policy concern surrounds unrelated product-entry by existing players. In principle, this is good: if a large company invests in an unrelated product line, then there is simply more capital formation and more competition. Thus courts have cautioned against discouraging new products and developed tests to distinguish competition from undue exclusion:

> Product innovation generally benefits consumers and inflicts harm on competitors, so courts look for evidence of exclusionary or anticompetitive effects in order to distinguish between conduct that defeats a competitor because of efficiency and consumer satisfaction and conduct that impedes competition through means other than competition on the merits.[88]

When, then, do the principled concerns arise? This can occur where there is a relationship between a market in which there is market power, and related markets. This is because the economic rent in the market with market power is sometimes affected by the relationship with the other market. In that scenario, exclusionary effects may bolster market power or prevent its diminution.

Very significantly, this should then be checked using evidence *relating to that other market*. As Petit notes,[89] the issue becomes clearest with some practical examples:

- In *US v Microsoft*, concerns arose that Microsoft's market power in Windows was artificially maintained by harming entry from competing browsers. Formally, the browsers market is that in which an indirect network effect arises: network effects in Windows arise in the browsers market but only because of network effects in the operating system and not in the browser. Thus, a competitive threat from the browser can be diminished because of *existing* market power in an already-tipped market (Windows).
- In *EU v Google (Android)*, Google had entered an operating system market in which it was not active. While there might be relationships between search advertising and operating systems, these would be significantly less extensive because the market entry took place in a market that had not already tipped (new entry into Android).

87 The authors are grateful to Thibault Schrepel for highlighting this aspect of the contrasts between the DMCC and its EU counterparts.

88 *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d. Cir. 2015).

89 Petit, op. cit, 213-222.

There is an acute need to note the difference between the tipped and the untipped entry scenario. Where a market has already tipped, it is plausible that actions to prevent indirect entry would preserve this monopoly. Where that is not so, then the new entry would be lost despite there being no principled concern.[90] For example, if taking the position that large vertically integrated companies should not expand, then the Android entry would be lost even though there is no obvious means by which the entry itself is preventing a demonstrable competitive threat.[91]

The argument here arises from the so-called replacement effect where an existing business effectively competes with itself. This argument arose from Arrow and posits that innovation will slow down where there is a conflict of interest with existing business lines.[92] While there is some credibility to this phenomenon in some regulated industries this likely derives from regulatory powers, more than it is from company powers.[93] It is also notable that many innovations have arisen from large vertically integrated players despite the replacement effect, and that Schumpetarian competition for the market might well drive incremental innovation just as much as revolutionary innovation.

For example, Steve Jobs remarked: "If you don't cannibalise yourself, someone else will."[94] The iPhone was created by Apple despite the obvious cannibalisation of iPod sales; the iPad was created despite its ability to cannibalise laptop sales. The noted book *Only the Paranoid Survive* by Intel's then CEO, Andrew Grove, expresses a similar sentiment. Thus, it seems risky to have any starting assumption as to the role of large-scale businesses in innovation.

There is also strong evidence that conglomerate effects arising from large players expanding their portfolio are often positive. Consumers have been the main beneficiary of such expansions, but the following examples may well have been vetoed by the regime proposed by the DMCC Bill had it been in operation at the time:

- **Google/Android:** When Google bought Android in 2005 for $50 million, just eight people worked at Android. Android had been seeking funding for a more open operating system, spotting an opportunity for an operating system that would not be tied to a phone manufacturer.[95] There was no plausible competition between Android and Google, and if Google later restricted aspects of the Android platform, this logically follows from *any* acquisition and is thus instead a critique of those activities.

90 More formally, there is an important distinction between: (1) static competition between substitutes, and (2) competition between current and future complements. In the latter scenario, concerning a *different* market, entry barriers in the complementary market may be less relevant than they would be as regards head-to-head competition in the static competition market. Thus it would be risky to assume that a high share in market A is itself a concern, unless there is a proper analysis of the relationship between complements, substitutes, scale, and barriers to entry and expansion which are all multi-directional. The authors are grateful to Thibault Schrepel for this insight.

91 There is of course a relationship between e.g., search defaults and competition in search, but this is a general property of default settings and not in itself a reason to argue against Google having an operating system.

92 Gilbert, p.210, pp.48-51.

93 H Shelanski, " Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy" 24(1) *Yale J. Reg.* 56 *61: "Over the next several years the FCC vacillated over AT&T's ability to bar competing "customer premises equipment" (CPE), allowing states to bar an early answering machine called the Jordaphone in 1954 and, in a bizarre decision, upholding AT&T's prohibition on use of the Hush-a-Phone, a simple device that covered a telephone's mouthpiece to increase privacy, in 1955. But following the U.S. Court of Appeals' sharp reversal of the Hush-a-Phone decision, the trend turned strongly against AT&T's extension of its monopoly into CPE." This striking experience suggests a critical role for judicial oversight of regulation.

94 See H Yu, "Apple's Dwindling Sales Show Importance of Self Cannibalization," (International Institute for Management and Development, April 2016).

95 M Reynolds, "If you can't build it, buy it" *Wired* (25 November 2017).

Yet to those antitrust regulators inspired by Brandeis and his suspicion of big businesses, Google would not be allowed to enter operating systems at all. Thus, no link between ad-funded internet services and phone handsets would arise. The cross subsidy in the Android model – cheaper OS and phone in exchange for data – would be very difficult to implement.[96] This would mean that there would be one fewer business model for the consumer. The likely outcome would simply be that fully vertically integrated models such as iOS would still have a monopoly position.

The monist approach avoids this outcome by asking simply: is there evidence of harm to competition from the purchase? Thus, no arbitrary tilt arises as between larger and smaller acquirers. The same question is asked of everybody. This allows innovation by prohibiting regulators from stopping it, unless there is evidence of harm to competition.

- **Google/YouTube:** When Google bought YouTube in 2006, it had mostly been operating above a San Mateo pizzeria and had just 67 employees. The bet was risky: $1.65 billion on a business that had only existed for a year. In that time, it had built a monthly audience of 19.1 million viewers. In other words, it existed in a fluid market. Contemporaneous press coverage notes potential rivalry for the company from Yahoo, and sounds a note of caution that the audience could easily switch away, leaving the $1.65 billion acquisition as a stranded asset.[97]

In conventional antitrust analysis, the relevant relationship would be between the competition for Google's existing search advertising and that on YouTube. It may well be that there is a competitive relationship, and provided that notification is required (as it will be under the Bill) it would be checked for signs of lost competition. There would also be a need to consider other businesses and whether pathways remained for other businesses to compete with YouTube and Google such that the vertical integrated unit would be constrained by competitors. As with the Instagram vs TikTok scenario, there was subsequent entry, in this case from Netflix, Amazon Prime, Disney+ and other streaming providers. While this would not be known at the time, it gives credibility to the Schumpetarian point that competition emerges over time and that market power – if such there was – is rarely enduring.

On a neo-Brandesian approach, the analysis would be very different. The large scale of Google would be seen as a de facto reason not to approve a transaction. Concerns would likely be accentuated by the presence of a large company in a media market. This is particularly curious as YouTube amounts to decentralisation in the supply of entertainment and news and seems particularly well positioned to compete with legacy media providers: in some ways, personal YouTube uploads are the definitive example of digital decentralisation. Thus, a stasis bias seems to emerge from neo-Brandesian prescriptions. There is also no clear mechanism to account for the obvious efficiency benefits from integrating Google and YouTube, especially the application of a scale economy in search algorithms that can be applied to both general and specialised search. This is consumer friendly as it enables content to be found more easily and for a deeper market for content to emerge.

96 R Picker, "The European Commission Picks a Fight with Google Android over Business Models" *ProMarket*, 23 July 2018. It is notable that without the controlling contract, implementation of a standardized deployment would then require contracting with each manufacturer. As this could still be regulated under Art 102, it is unclear why the vertical integration benefit of ownership is to be denied, even if there is concern about standardization within a particular OS. Moreover, the competing OS (iOS) is notably more closed, yet also contains a default setting for Google Search: P Kunert, "Google Pays Apple $18bn to $20bn a year to keep its search in iPhone," *The Register*, 10 Oct 2023. The intervention in the case of Android, but not in the case of iOS, thus appears to be anomalous.

97 CBS News, Google buys YouTube for $1.65bn, Oct 6, 2006.

- **Facebook/Instagram:** Facebook's 2012 purchase of Instagram was reviewed by the UK Office of Fair Trading. The review considered the range of alternative photo sharing websites, the complementarities between social media and photo sharing websites, and the small size of Instagram at the time. As Instagram was just one rival, and employed only thirteen employees and had no advertising revenue, on a conventional approach no competition was seen to be lost.[98]

  The analysis would look very different on a multi-factor approach. As with WhatsApp, the large acquirer would draw scrutiny, as no doubt would the very high purchase price ($1bn). The fact that Instagram grew to a $7 billion revenue business by 2018 would be seen not as evidence that Facebook had successfully grown the business, but as lost competition. The implicit assumption is that the thirteen employees in Instagram could have done this by themselves, which opposes business literature suggesting a critical role of vertical integration in scaling up.[99] Even if conceding that *someone else* might have done it, if the scale-up resulted form a large operator purchasing it, then presumably the bigness problem would still arise as where Google, Amazon or Microsoft might have bought it. Thus, the change can be seen to be a denial of scale-up through vertical integration *precisely because* the acquirer is large. There is a serious false positive risk from lost vertical integration benefits if there is no lost competition from the transaction.

  In a policy context, it is striking to note that (1) $1bn buyouts are examples of growth and success, provided that market power does not arise and (2) any putative market power in the transaction, as with competition that perhaps would have existed with Facebook, was overtaken by events. Instagram must now compete hard with a competing product, TikTok, whose algorithm arguably outcompetes that of Instagram. At the very least, the argument from monopoly seems unsound. As press coverage noted, a US FTC case against Facebook/Instagram failed even to mention TikTok in its pleadings, despite its clear relevance to the competition policy risks.[100]

- **Facebook/WhatsApp:** The review of the merger of these messaging services undertaken by the EU in 2014 was decided on conventional grounds including the question of alternative messaging services. For instance, arguments revolved around whether SMS messaging was at the time a substitute for WhatsApp messages.[101] That would then determine whether risks of harm to competition would arise.

  The analysis would look very different on a multi-factor approach. Rather than analyse effects, if scale is itself considered to be bad, the regulator would decide on the merits of the acquirer. Thus, Facebook's status as a large social media platform would come under close scrutiny and Facebook would, effectively, be unable to expand via purchase.

5. Data driven markets on a multi-factor approach

Many data-driven markets are free for consumers to use, as noted above. Allowing intervention based on data use, as the Bill does, rather than competition analysis, can drive unprincipled

98 UK Office of Fair Trading, Case ME/5525/12 *Facebook/Instagram; Gilbert, Innovation Matters*, p.33-4.

99 Atkinson and Lind, *Big is Beautiful*, op. cit.; See also, T McCraw, *Creating Modern Capitalism* (Harvard UP, 1997).

100 B Kendall, "Facebook Hit With Antitrust Lawsuits by FTC, State Attorneys General" *Wall Street Journal*, 9 December 2020.

101 Case Comp/M.7217 *Facebook/WhatsApp* Para 33.

anti-consumer results.

This arises if the consumer is taken to have preferences relating to the use of less data. This is a species of the well-known privacy paradox in which free products are used despite stated preferences for more privacy.[102] There may be a deep consumer protection question surrounding the appropriate level of regulation of free products. This may well simply be a revealed preference for free services,[103] provided that harm does not arise. The current legal posture is that the consumer protection framework does not regulate free online services: no price, no harm.[104] Aspects of the Bill, as seen below, risk undermining this even though access is free, on the basis of a hypothetical preference for data control. It may well be that, provided that appropriate safeguards are applied, there is no strong consumer preference relating to data use. The issue may rather be one of general data protection law.[105]

Yet empowering antitrust regulators might well allow the benefits of specialised data protection regulation to be foregone. For instance, the German Federal Competition Authority notably fined Facebook for excessive data collection. If there is no consumer harm from low-risk data use, as where safeguards are used,[106] then this is simply a loss to consumers in the market in which there is demand.[107]

The same can be seen in the early Google/DoubleClick merger. This early technology merger involved the acquisition of the cookie-based advertising business DoubleClick by Google in 2007.[108] The US Federal Trade Commission voted 4-1 to allow the merger. The relevant question in the orthodoxy is to consider the competitive relationship between search and online display advertising. The Commission rejected the call for data privacy concerns from data combination to be considered as an independent area of concern unless resulting from harm to competition: "the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition."

102 See especially, Acquisti, Taylor, & Wagman, The Economics of Privacy, 54 *J. Econ. Lit.* 442, 476-478 (2016); see also UK CMA Online Platforms and Digital Advertising Market Study, Appendix F (recounting survey evidence showing stated preference divergence from online activity). See further, Geo. Mason. Univ Program on Economics and Privacy, Comments on US Federal Trade Commission Advanced Notice of Proposed Rulemaking on Commercial Surveillance and Data Security ("GMU Pep comments") (21 November 2022), pp.6-7 (precis of privacy paradox survey evidence and consumer behaviour).

103 See especially the discussion of the revealed preferences of consumers towards free content at pp. 10-11, citing E Brynjolfsson et al., Using Massive Online Choice Experiments to Measure Changes in Well-being, 116 *PNAS* 7250, 7251-53 (2019).

104 S.33(1) and (2) Consumer Rights Act 2015. This exemption for free services applies the point that one should not complain of free provision, as memorably articulated by Harper Lee: "His food doesn't stick going down, does it?" (referring to criticism by a guest of a host despite the host's provision of a free meal eaten at the host's house) H Lee, *To Kill a Mockingbird*, ch. 24 (JB Lippincott, 1960).

105 As regards the relationship between data privacy and competition, see especially J Cooper and J Yun, "Privacy & Antitrust: It's Complicated," 2022 Ill. J. L., Tech. & Poly. 382 (2022).

106 ICO Guidance call for views, op. cit.

107 See especially O Budzinski, M Grusevaja and V Noskova, "The Economics of the German Investigation of Facebook's Data Collection," 5(1) *Market and Competition Law Review* 43 (noting potential analytic divergence between regulatory decision and economic analysis of service).

108 See *Statement of Federal Trade Commission Concerning Google/DoubleClick* FTC File number 071-0170. The decision is sometimes contested and it is noted that one of the 4-1 majority (Kovacic) has since expressed reservations: ""If I knew in 2007 what I know now, I would have voted to challenge the DoubleClick acquisition." S Lohr, "This Deal Helped Turn Google Into an Ad Powerhouse. Is That a Problem?" *New York Times* (21 September 2020). Very significantly, however, this statement is based on competition concerns, and not a free-standing privacy concern, such that the conclusion as to the appropriate role of antitrust law stands.

Care should be taken to establish evidence of consumer harm before intervening in data-driven markets.

6. Is a fairness focus the answer?

The post-1998 UK competition law settlement is notable for excluding open reference to fairness. Consistent with broader business law, fairness concepts are applied in the consumer setting but generally not in business to business transactions.[109] Thus, the competition law question is only and always: is competition diminished?

As will be seen below, the Bill would change this position where applicable by applying broader conceptions of fairness well beyond anything already used (e.g., FRAND licensing).[110] Prominent voices caution against expansion of antitrust to consider relational concerns about businesses precisely because they do not map to robust specification of competitive harm.[111]

It is not for nothing that English law has been at pains to avoid reliance on broad concepts of fairness and good faith.[112] The reason is not that unfairness is prized. It is that fairness is a shifting concept. Thus, for a body to determine fairness is often simply to displace party autonomy by deciding *for them* what is fair.

The concept is familiar to any child who has said of the pizza or the pie: "you cut, I choose". Regulatory definitions of fairness can sometimes result in the opposite: I cut, I choose for you.

This risk of arbitrariness has been avoided in contemporary competition policy by focusing on market power, which ensures that evidence of output effects is instead considered, thus avoiding potentially arbitrary distributional concerns. More formally, the tension arises between so-called pecuniary effects – transfers of wealth with no net impact – and technical externalities by which total output is diminished, although it should be noted that the two concepts sometimes overlap, as where an unduly high access price excludes a new entrant from service at a lower price point.

A fairness approach also contrasts with targeted approaches to identified issues. The logical case for a shift to a fairness approach in online markets is not particular to them. The same argument would arise with any party. There might be a constituency for such a change, but it would need to address the well-settled point from wider business law that a broad-brush fairness approach is expressly rejected there. Certainly, there would be inconsistency in shifting online competition

109 s.61 of Consumer Rights Act 2015 only applies its broader fairness concerns to business-consumer transactions; *JSC BTA Bank v Khrapunov* [2018] UKSC 19 (finding narrow scope for unlawful means conspiracy restricted to intentional harm and criminal activity (L Sumption)); see also *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 (rejection of duty to deal absent market power) and *Walford v Miles* [1992] 2 AC 128 (rejecting fair dealing standard for contract law on basis of vagueness).

110 Fairness is sometimes considered as part of the licensing practices of standards bodies, but is not a free-standing competition law analysis.

111 H Hovenkamp, *The Antitrust Enterprise* (Harvard UP, 2005), 110.

112 *Walford v Miles* op cit.

law to a fairness standard while not doing so for other competition law or other business law. Such a change would notably overrule a recent UK Supreme Court decision to the contrary.[113]

It is notable that the DMCC changes consumer law as well, but no one is suggesting that the consumer law should be replaced to include a business-to-business fairness doctrine. It is puzzling to see this change to the competition regime.

F. What needs to change?

As above, it may be that existing competition law tools can simply be used for technology markets. There is no reason in principle to perceive an inability to act considering that there are currently multiple cases open at the DMU using the existing law.[114] There are also findings of good consumer outcomes as noted in those very cases, notably the Music Streaming Market Study.

If however a new law is needed, it will be essential to frame it around sound principles. A good law would seek to maximise total output and innovation by addressing market power issues.[115] That is the starting point of modern competition law. The issue with digital markets is simply what that means and how that might be achieved. Nothing that we have seen would justify abandonment of market power-based tests. Indeed, many issues are simply side trials which distract from this fundamental question. For instance, a tipped market may or may not have good consumer outcomes. There may be high levels of competition even if a relevant market cannot easily be specified. That says nothing about market power or outcomes in itself.

Specific recommendations to achieve this follow. For investigations:

1. **Relevant issues statement.** If market definition is relaxed, it should only be with reference to an affirmative statement of the competition issue perceived. There should be specific terms of reference and not merely the designation of activities. This would provide transparency over principled reasons for departure from conventional market definition.

2. **Network effects.** Network effects should be stated and not just inferred. For example, the activity in which network effects arise and perceived concerns from them should be provided on a transparent basis in terms of reference.

3. **Tipping**. Evidence of tipping to, and tipping from, market equilibria should be considered. The possibility that end-to-end competition exists despite designation should also be considered (e.g., Microsoft Office and Windows competing with the Google suite). There should be attention to whether there is successive entry into the market over time.

4. **Effects analysis.** Even if current requirements to prove foreclosure are relaxed, the requirement should not be abolished. There is still an evidence base relating to output that can be considered.[116]

113 *JSC BTA Bank v Khrapunov*, op. cit.

114 W Hayter "CMA's Digital Markets Unit: exciting opportunities to influence the regulation of big tech." CMA Blog, 7 January 2022.

115 Petit notes that tipping itself is welfare-neutral such that output should be the focus of analysis instead: op cit., pp.64-5 (noting absence of evidence base in aspects of both neo-Brandesian and Chicago accounts: respectively, an is/ought problem on optimal structure, and absence of evidence treated as evidence of absence).

116 A very interesting example is in Petit, op.cit, p.73 (use of direct evidence of platform business' dynamics to infer proxies for output and profitability metrics).

5. **Consumer welfare.** Even if the consumer focus is diluted, e.g., for analysis of intermediate layers of supply chains, it should still be looked at where relevant. Thus dilution of consumer welfare proof requirements should be framed as an exception based on clear evidence.

6. **Leverage theories.** If there are leverage concerns they should be clearly specified in terms of the perceived defect in market performance, and not assumed on the basis that they are possible. There should be a clear statement of why leverage risks arise.

7. **Exclusion of unrelated activities.** A safe harbour for truly unrelated activities not posing network effects risks would be beneficial to avoid the loss of positive entry where there are no network effects. This could be thought of as an unrelated market entry defence.

8. **Innovator's defence.** A related concept would be an innovator's defence where there is a new product and no evidence of undue exclusion, as prominently advocated by Gilbert.[117]

9. **Speed.** Issues with speed are promoted by a shorter and clearer evidence base. A clear focus on market power would achieve this.

As regards remedies:

1. The **terms of reference** noted above should be referred back to when designing remedies. They should be publicly accessible and provide detail on the relevant evidence base for the concern.

2. **Remedies** should be required to address competition lost, and not just rivalry lost.

3. **Statement on evidence of positive change.** The Enterprise Act requires evidence that regulation improves outcomes compared with a non-regulated scenario. As a notable risk is that network effects persist, e.g., after breakup of a large company into smaller parts, this requirement should be retained.[118] This avoids a greener-grass fallacy.

4. **Evidence of inter-linkages between markets should be specified.** Remedies should account for the very different scenarios arising from different types of network effects. For

117 In *Innovation Matters*, Gilbert argues for a safe harbour for innovation where there is no undue restriction on competition (ch.8). This goes further than the currently proposed cl.29 as it would focus on proof of innovation rather than proof of future market effects.

118 Petit, p.177 (noting scenario where Facebook is broken up into four components but tipping simply happens again). Economides similarly notes that rivalry can depress surplus in non-interoperation scenarios in "Competition Policy in Network Industries: An Introduction" (2004) *NET Institute Working Paper No* 04-24, Center for Law and Business Research Paper No 03-10; thus, implicitly, if full interoperation is not due (as where inefficient entry would arise from it) then breakup absent interoperation may simply consume resources before tipping occurs again. The essential point is to be wary of remedies simply being taken over by the very network effects that they are supposed to fix.

On the critical question of how to approach the question of whether large scale is anti-competitive, Economides very significantly noted that "there should be no presumption that anti-competitive actions are responsible for the creation of market share inequality"; that the "but for world against which actions in network industries are to be judged should not be perfect competition but an environment of significant inequality and profits;" "firms do not reach their high output and market domination by exclusion, coercion, tying, erecting barriers to entry or any other anti-competitive behaviour; "no anticompetitive activity has led firms to this equilibrium." N Economides, "Public Policy in Network Industries," (20016) *New York University Law and Economics Working Papers* 78, 21 (as noted and discussed in Petit, p.177).

example, an already-tipped market might call for a stricter remedy,[119] whereas entry into an untipped market would be welcome.

5. **Risks of error costs.** Vertical integration may result from undue intervention. For example, Google might simply have introduced bundled phones and operating systems, rather than the Android OS. That would be the loss of competition between operating systems.

6. **Cost-benefit analysis** should be included in both the creation and review of remedies. Even if wider evidence is used than just consumer welfare, this should still be specified. Particular care is needed regarding the costs and benefits of breakups which can be very large.[120] A periodic global review of DMU activities, including all remedies, would be helpful as part of the budgeting process used with the industry levy to ensure that cost-benefit analysis is tracked over time.

7. **Benchmarks** should read on actual activities and changes and not hypothetical perfect competition against which to compare the outcomes.

119 Case C-226/11 *Expedia Inc v Autorité de law concurrence and Others*. It is notable that Petit supports the existence of a scenario of principled intervention even on per se grounds where strong direct network effects are thereby diminished in an already-tipped market, using *Expedia* as an example: Petit, p. 217. The issue is avoiding per se treatment where it is *not* due.

120 Gilbert, p.185; W Kovacic, "Failed Expectations," op. cit.

Proposed amendments to the Bill

The proposed amendments are displayed chapter by chapter, in a table format, making clear what the legal status quo is, the proposed changes in the Bill, and Legatum Institute's recommended changes. This will highlight the magnitude of the proposals in the DMCC Bill, and indicate the scale of departure from the post-1998 UK competition consensus.

In summary

These recommendations provide important due process protections to the new, and unprecedented regulatory regime. They will future-proof the regime, and reduce potentially damaging unintended consequences, which could harm the ability of entrepreneurs to seek investment from big companies.

The package will ensure good governance and regulatory principles are embedded into the Bill, so that the future powers handed to the CMA come with the requisite accountability attached. This will ensure that the regime acts in accordance with justice and the rule of law, and will maintain the CMA's reputation as a fair-minded, evidence-based regulator.

If these recommendations are implemented in the Bill, businesses both large and small will be able to have confidence in the predictability and effectiveness of the new rules.

Chapter 2 – Strategic Market Status

Bill proposal: Companies would be designated with a special status allowing open-ended regulation.

The fundamental idea is to designate companies to speed up cases. This concept is principled and reflects expert recommendations.

However, the basis to do so is not principled. Companies can be designated in part because they are large. This would change the law to "big is bad" rather than looking at evidence of whether companies are unduly powerful in the marketplace.

There is also in theory jurisdictional overreach beyond the UK and an overly broad definition of "digital" that could catch any modern company.

Existing law	DMCC Bill	Authors' recommendation
A dominant position must be shown in a relevant market. Regulation is ex post.	Ex ante regulation arises from a new designation power (cl.2).	Ex ante regulation, if needed, should read on a stated evidence base that is then used throughout the case to show what it was that raised the concerns justifying ex ante regulation. Such an evidence base should consider consumer impacts if evidence is available. This evidence base should contain specific elements to promote transparency, as a failure to gather, provide and link to this evidence would then be reviewable, including under judicial review.
There is no special status for digital firms.	Evidence requirements are relaxed in relation to "digital activities" (cl.3). A read-across to the Communications Act 2003 even caters for fax machines	Digital activities should be more tightly defined so that only principled exceptions to the normal position are caught
There is no starting presumption, good or bad, about the scale of a business.	A company can be designated as "strategically significant" in part based on scale alone (cls.5 and 6).	The evidence base for designation risks penalising scale. Market-wide evidence of market power risks should be the only focus.
Market-wide evidence is considered.	Evidence focuses primarily on the designated company (cls.5 and 6).	There should be a clear requirement to consider the market-wide position – not just the impact on the regulated company.
There are no bright-line turnover rules.	A bright-line turnover rule can be met based on foreign turnover alone (cl.7).	The jurisdictional test should require both £25bn worldwide turnover **and** £1bn in the UK to ensure appropriate jurisdictional reach.

The proposed changes would retain the ability to designate companies. However, the CMA would be required to focus on evidence of market power. References to size alone would go.

This evidence would then be used as a point of reference for all regulation. This ensures that regulation is based on the underlying concerns, avoiding impressionistic approaches.

This also improves legal accountability including under judicial review, by mandating a structure for the underlying evidence base (e.g., to contain details of market power and the perceived risks). This helps with transparency. It is a balanced proposal: Policy discretion remains, but the evidence base used under it must be stated or the decision would be reviewable including under judicial review. UK turnover would be the basis for designation, preventing overreach. Companies would only be caught if they are truly digital businesses.

Chapter 3 – Conduct

Bill proposal: Sweeping new powers to write a new rulebook aimed at particular companies, without reference to the underlying evidence base.

The Bill would allow the DMU to write a rulebook. This is designed to speed up cases. Very significantly, the expert recommendations behind it proposed this to speed things up. They **did not** propose changes to the law – just to the use of a rulebook to avoid duplicative work.

Consumer evidence need not be assessed, even if available. This also departs from the expert recommendations, which retained a consumer focused approach.

By contrast, the Bill would allow open-ended aims-based regulation without regard to consumer impacts or even the underlying basis for designating the company. A very wide range of remedies can flow. This would replace UK competition law with a discretionary model to the extent the DMCC applies.

Existing law	DMCC Bill	Authors' recommendation
Distortions from abusive business practices must be proven ex post.	A rulebook will be written with ex ante prohibited conduct.	Ex ante rules may be sensible at times, but they should read on a transparent evidence base showing why the departure from ex post was suitable.
Evidence is used to assess cases.	Loose aims-based regulation is permitted without regard to the underlying reasons for designation (cl.19)	The power to regulate should be tied back to the competition reasons to designate the company in the first place.
Remedies are based on the evidence from the case.	A wide range of powers arises that may not have anything specifically to do with a competition problem (cl.20)	Ditto.

The position of consumers must be considered in an Enterprise Act market investigation.	The CMA may consider the position of consumers but is not required to do so. There are onerous duties to prove that competitor impact is indispensable to consumer, benefit before consumers are taken into account (cl.29).	There should be a safe harbour for innovators. The CMA should be required to consider consumer evidence where it is available.

The changes would ensure that the concerns underlying designation inform the rulebook. Open-ended aims-based regulation is removed.

Remedies would also have to track on the same evidence base. This promotes transparency, targeting, and proportionality.

Consumer impact evidence must be considered if available. This addresses true supply chain issues if not consumer facing as then no such duty would arise. But if there *is* consumer facing impact, the evidence must then be assessed.

Chapter 4 – Pro-competitive interventions

Bill proposal: The DMU can tinker under the bonnet of designated companies without reference to the underlying evidence base.

The Bill would allow a wide range of interventions designed to improve competition. If based on evidence, this can be helpful. But the evidence base is lacking. Unlike the Enterprise Act, the DMCC does not require a proper market-wide review of evidence, yet allows use of the very wide powers of the Enterprise Act.

The effectiveness of remedies should be assessed. This requires a statement of evidence from the regulation stage as a frame of reference for later analysis. In the Bill, open-ended intervention without a clear evidence base undermines benchmarking.

Existing law	DMCC Bill	Authors' recommendation
The CMA can order changes seeking to improve competition after a market-wide Enterprise Act review (EA02, s.134).	The CMA can single out a company and order it to change its business, even without a market-wide review (cl.45).	The power to order changes to the business (PCIs) should be tied to the reasons for designating it in the first place.
Remedies are broad (EA02, ss. 161 and 164; Sch 8). However they must relate to an identified competition problem from the investigation (EA02, s.138).	The same very broad remedies are available, including powers to rewrite contracts, regulate price, and order divestments – but on a broad aims-based approach (cl.46).	The breadth of powers available to the DMU should be cabined by a clear evidence base showing the underlying concerns.

Testing must be specified during the investigation via a *pre-specified* order to provide information (EA02, Sch 8, Rule 19).	Testing can relate to a subset of "guinea pig" users and can change on future review points, removing finality (cl.50(3), (4) and (5)).	There should be reasonable finality, including testing. Care is needed over singling out groups of users for testing. Testing frameworks should be neutral and non-discriminatory.
The CMA must check that remedies make a difference to consumers compared with no remedy (EA02, s.138(5) and (6)).	There is a power, but no duty, to take consumer interests into account (cl. 45(2)).	The CMA should be under a duty to consider evidence of consumer impacts if available.

The proposed changes would ensure that interventions relate to market-wide evidence. Evidence of concerns would replace open-ended aims-based regulation.

Benchmarking of remedies is required on consumer evidence if it is available.

Chapter 5 – Mergers

Bill proposal: Mergers must always be notified even if they have nothing to do with the designation concerns.

There was a climb-down on more extensive merger review powers following the BEIS consultation. This is critical as undue red tape impairs capital flows. There is a significant risk of undermining Silicon Valley style startup and venture capital culture, because the buyouts required can be impaired or even prohibited.

Significantly, the threat remains despite the climbdown. This is because extensive CMA powers can be used even based on the narrower proposed notification. The notification is also broader than the underlying legal power to challenge – by definition, undue red tape.

The proposals are vague and depart from international best practice frameworks, which instead emphasises clarity and certainty.

Existing law	DMCC Bill	Authors' recommendation
The CMA can prohibit a merger if, on balance, there is evidence of a substantial lessening of competition (EA02, ss.35-36).	The CMA gains no new powers, but will require notification of all mergers by designated parties.	The notification requirement should be tailored to the reasons for concerns from designation. Otherwise, notifications will be required even where there is no link to a concern.
The CMA can prohibit a merger if, on balance, there is evidence of a substantial lessening of competition (EA02, ss.35-36).	The CMA gains no new powers, but will require notification of all mergers by designated parties.	The notification requirement should be tailored to the reasons for concerns from designation. Otherwise, notifications will be required even where there is no link to a concern.
The CMA can challenge the acquisition of material influence if there is evidence of a competition concern (EA02, ss. 22, 33).	The CMA will be able to challenge based on minority share acquisitions that may fall short of material influence (cl.57).	This is red tape for its own sake: there is no power to **challenge** unless there is material influence, so there should be no requirement to **notify** unless there is material influence. The thresholds are stricter than those for National Security review i.e. the powers relating to hostile foreign acquisitions. But "Big Tech" mainly hails from an allied country (the USA).
The CMA must operate a bright-line jurisdictional test based on turnover and product supply shares (EA02, s.23).	A vague and open-ended jurisdictional test includes all sorts of financial consideration (cl.57).	There should be a bright-line test in line with ICN and OECD expert recommendations.

The changes would instead require notification of transactions only if the matter relates to the concerns underlying designation. This addresses the concern, but drastically reduces red tape. This is actually helpful to the DMU to prevent drowning in unrelated notifications.

The requirement to file would also comport to the power to challenge, further avoiding unnecessary filings.

International best practices on clarity surrounding filing requirements would be applied.

Chapter 6 – Investigatory Powers and Compliance Reports

Bill proposal: Companies can be forced to create information – but also get to fund the appointed experts. There is a burdensome compliance regime similar to GDPR.

The Bill would fundamentally change evidence in competition law cases. Today, *markets* can be studied, but *companies* can only be investigated with reasonable cause. Under the Bill, companies **would be required to provide evidence to prove the case against them.**

Then, **the same companies would pay for an expert to interpret the evidence,** subject only to a DMU veto on appointment. This is ripe for regulatory capture.

Information-gathering powers would be greatly expanded, even where there is no open investigation. The Bill also proposes broad and untargeted compliance reporting.

Existing law	DMCC Bill	Authors' recommendation
There is no ongoing duty to report to the CMA unless this is agreed as part of commitments.	The CMA will gain a power to apply a GDPR-style reporting framework.	The CMA should use normal evidence gathering and complaints procedures rather than GDPR-style red tape.
The CMA can gather **existing** information to check for infringements or concerns (EA02, s.174).	The CMA can order the **creation** of information (cl.68). This is tantamount to self-incrimination.	The CMA should only be able to access information already in existence.
The strictest penalties are reserved for intentional or reckless obfuscation (CA98, ss. 43-44; EA02, s.174A).	Named individuals can be fined for *failing to prevent a breach by the company* even though they are not themselves at fault (cls.69, 86(2(a)).	Any true issue is with companies. Individuals should not be in the crosshairs unless they cross the line into obfuscation.
The CMA uses its experts to assess evidence.	The designated company appoints an expert and pays for it subject to CMA veto (cl.78).	The CMA should use levied funds to build its own expertise. Under no circumstances should industry appoint an expert.
The CMA can enter premises but only if it has an open investigation (e.g., CA98, s.27(1)).	**If the information creation and industry funded experts** framework fails, the CMA can engage in extensive searches including observation of employees and users, and ordering tests **even if no investigation is open** (cl.70).	The powers should be linked to an open investigation based on reasonable cause (e.g., an evidenced complaint).

The changes would require an open case based on reasonable cause, before information gathering powers arise. There would be no ability to force the creation of information. This is simply the application of orthodox evidence principles.

The industry-funded experts would be replaced by DMU experts – still paid for by the levy, but not appointed by industry.

The broad GDPR-style compliance proposals are replaced by a common law reasonable cause model. This targets regulation on true concerns, i.e., where there is reasonable cause.

Chapter 7 – Enforcement and Appeals

Bill proposal: Executives in big tech companies are treated like cartelists. Companies can seek compensation even where consumers have not been harmed.

In the Bill, individual managers can be fined. Significant powers taken from cartels are applied, missing the point that these executives are engaged in activity whose costs and benefits are debatable (e.g., product integrations into online platforms). The inevitable news of individual punishments would seriously harm the UK's reputation in technology investment – effectively a neon sign saying "don't invest here."

There are proposals to allow companies to claim damages even if consumers and competition are not harmed. This is the technological equivalent of ambulance-chasing claims. Expensive litigation will arise regardless of the net costs and benefits of the cases.

Effectively, an unfair competition tort would result – even though the Supreme Court rejected one as recently as 2018.

Existing law	DMCC Bill	Authors' recommendation
Individuals are only targeted for reckless or intentional obfuscation (CA98, ss. 43-44; EA02, s.174A) or a hardcore cartel (EA02, s. 188). Director disqualification is only used for significant infringements in which a director is implicated (CMA Guidance Paper 102, paras. 4.4-4.9).	Powers against individuals arise against a nominated senior manager (cl.86). Director disqualification is extended to DMU breaches (cl.98) without any gating as to severity or impact of the conduct. Criminal penalties could even arise from simply not agreeing to generate information (cls.97 and 68).	The company, and not the individual, is the concern unless there is intentional or reckless obfuscation. Individual-facing remedies should be gated accordingly. Individual managers should not be turned into scapegoats, especially as this would undermine whistleblowing.

Companies claiming compensation must prove a breach of competition law or a loss from a finding of breach. The Supreme Court has limited the scope for unfair competition torts because of concerns that business necessarily involves winners and losers.	Companies would be able to sue based on open-ended concerns about the fairness of designated companies (cl. 100). This short circuits the needs to prove harm to competition.	There should be no special treatment – companies should have to prove a case as with any other tort, to avoid scenarios where tort law cases are net negative.

The changes would trim back powers against individuals so that they are not treated like cartelists. This avoids risks to the UK's reputation from overzealous cases against individuals and keeps the focus where it belongs – on companies.

The very broad business tort is removed. Companies can still get compensation where they can prove a loss. This avoids the risk of cases where there is no true harm to competition, the market, or the consumer.

Chapter 8 – Administration and Appeals

Bill proposal: Judicial review is used. This means that companies cannot appeal factual determinations in any meaningful sense, even though they are singled out. The CMA's Board also has a diminished role.

Serious accountability concerns arise from the Bill. The CMA Board's role is limited. Opening investigations are Board decisions, but even highly significant decisions, once open are not. This limits the scope for accountability via the appointments process. Indeed, there is very little attention to the crucial question of ministerial and Parliamentary oversight.

The judicial review proposal means that factual analysis cannot be challenged unless the DMU is totally irrational (e.g. regulating because it is a Thursday). As with adjudication, companies are singled out – but legal accountability is modelled on the much more permissive market-wide rulemaking where it is assumed that there is a market-wide evidence base.

That creates a gap. It means that companies cannot challenge decisions outside of the CMA process. This undermines checks and balances.

Guidance can be written on any basis. This means that consumers do not need to be emphasised or even considered. This may be the most significant lacuna in the Bill but it has been largely ignored.

Existing law	DMCC Bill	Authors' recommendation
Appeals on the merits exist for Competition Act infringements (s.46 CA98). The more deferential judicial review standard is only available for *market-wide* reviews (s.179 EA02).	Judicial review is used even though individual companies are singled out (cl.102).	A hybrid appeal standard should be used. This was recommended by the Furman Review. It provides a middle path to give companies reasonable due process protections. Notably, judicial review should also be avoided because it is slow. A stricter review standard will encourage getting it right the first time.
Guidance is written with the consumer in mind.	Guidance can be written without the consumer in mind (cl.114).	The Guidance power should be required to read on consumer interests.
The CMA Board is relied on for oversight, notably by deciding on Enterprise Act Market Study notices, and whether to open a Market Investigation (ERRA 2013, Sch 4 Rule 29).	*Opening* an SMS and PCI investigations proceed via the board, but *designation* of a company and the rulebook written against it can proceed via a delegated power (cl.105(8)).	Major decisions should go through the Board, especially on designation and conduct regulation.
There is limited political or Parliamentary oversight of appointments. This applies only to the most senior roles which are appointed by the Dept. for Business and Trade (CEO, Board, Panel Members).	There is no specific rule on pathways to appoint DMU personnel. As the decisions subject to mandatory Board oversight are few (cl.105(8), above), delegation into staff is potentially very broad.	Appointments of senior DMU staff by the Secretary of State or even by Parliamentary confirmation would significantly increase accountability. Senior DMU appointments should be subject to DBT confirmation just as with the CEO, Board, and Panel members.

The CMA is an independent regulator without political oversight; political matters such as newspaper mergers are referred out to the Secretary of State. The lack of oversight for the standard case reflects the technical nature of the post-1998 competition policy settlement: no politics, thus no significant political oversight.	The DMU is designed to engage with some thorny public policy issues, e.g., payments to the press, but is still proposed to be independent of material political oversight.	The DMU will inevitably engage with thorny policy questions. Pathways to Parliamentary oversight should be considered, even if they are set up later (e.g., a Select Committee).

Under the proposed changes, the judicial review standard would be replaced with a hybrid appeal standard in line with expert recommendations. That would allow a reasonable degree of accountability over factual analysis, while still preserving CMA discretion over true policy decisions. Guidance would be required to consider the consumer interest.

The proposed changes would also put major decisions through the Board. This brings deep expertise to bear on major questions: notably, designation and the rulebooks. This also helps to enhance oversight as the Department of Business and Trade confirms the Board and Panel appointments.

As the DMU will make some significant policy decisions, a degree of Parliamentary or ministerial oversight – or both – is recommended in relation to appointments and review of the actions undertaken. An alternative would be to trim back the DMU powers to a clear technical basis (e.g., market power only) but if this is not done, then a degree of political oversight logically follows to avoid unbridled policymaking.

Part 3 – Markets

Bill proposal: There is a proposal to expand Enterprise Act Market Studies and Market Investigations, even though the new DMU powers would address the relevant concerns.

Somewhat puzzlingly, the Bill contains *both* the new DMU powers and changes to the existing Enterprise Act regime. There is no need for both.

The major change is that Enterprise Act analysis could proceed based only on "**features**" of a market rather than analysis of **the whole market.**

The Enterprise Act changes are not needed as the concerns motivating the Bill are specific to digital markets. Changing the Enterprise Act in this way risks short-circuiting the new sector-specific regime.

This would undermine important safeguards in the Enterprise Act. There is no case for doing this.

Existing law	DMCC Bill	Authors' recommendation
There is a requirement to state a market or links between them, to calibrate Enterprise Act Market Studies and Investigations.	A feature of a market would be enough – even if **not related to digital.** (cl.131)	The case for reform to target "features" only relates to digital markets. *Either* the Enterprise Act should change, or there should be new DMU powers – not both.

The changes propose keeping this critical aspect of the Enterprise Act regime as is, because there is a new sector-specific regime to address the true areas of concern relating to digital markets.

Conclusion

At the time of the last UK competition law reforms, prominent voices noted:

> Thomas Wolfe memorably observed "you can't go home again." But, when it comes to competition law, a country can and should periodically go home again – to revisit the origins of its existing arrangements and consider how to improve them. It is less important where a nation begins with its competition law than whether it seeks improvements over time. A habit of routine assessment and adjustment increases the likelihood that a jurisdiction will progress toward better (not best) performance and practice.[121]

Is the DMCC Bill an exercise in "revisiting the origins of … existing arrangements," to "seek improvements over time" as Kovacic and Hyman recommended in 2012? We have seen something quite different this time: a proposal not for reform, but for revolution.

In the context of the surrounding evidence base and expert views, the Bill contains significant overreach. This amounts to an industry-funded inquisitorial process that will significantly reach beyond the UK, while also putting businesses off from investing and launching products in the UK. This is a real risk and not just rhetoric because there will be a perception that evidence-based approaches to regulation are in the descendant. We have seen significant overreach contradicting the original Furman recommendations; especially, the Furman Review's recommendation to apply a hybrid appeal standard and not judicial review, and its decision to retain the consumer welfare standard — two pivotal expert panel recommendations, and both contradicted by the Bill.

Even if it were accepted that the evidence base for the Furman Review is still current – and it is now approximately five years old – the Bill does not address the core Furman concerns which were (1) the need for speed and (2) issues with overly static regulation. On (1), speed is not guaranteed as there is great ambiguity in the Bill. This flows from the absence of an overriding principle, such as market power or consumer welfare. This is an unnecessary ambiguity and it will slow things down. It bears emphasis that the Furman recommendation of a code was designed only to speed things up, and not to move away from a fundamental focus on market power.

There is also an absence of the procedural safeguards contemplated by the Furman Review. This raises concerns because the starting point is one where procedural safeguards have not always been followed.[122] Certain interventions have taken a great deal of time and might have been quicker.[123] There have been significant mid-flight changes in prominent cases, notably *Microsoft/Activision.*[124] Essentially, the Bill would empower the DMU well beyond even the

121 Kovacic and Hyman, op cit, 14.

122 Apple Inc. v CMA [2023] CAT 21 (failure to observe time limit in relation to Market Study).

123 The most notable example may be the EU Commission's Google cases, which have taken over a decade (e.g., 2009 complaint by Foundem followed by Statement of Objections in 2015 with a 2016 supplement; liability found in 2017; General Court judgment in November 2021; appeal to EU Court of Justice pending as of this writing). See also the UK CMA's Google Privacy Sandbox commitments: complaint in late 2020; commitments only in 2022.

124 UK CMA, Microsoft/Activision Blizzard merger inquiry. For commentary, see e.g. N Lomas, "UK's CMA confirms decision to block Microsoft-Activision but opens fresh probe of restructured deal proposal" *TechCrunch* (22 August 2023).

significant interventions in the EU Digital Markets Act and Digital Services Act, which departs from the aspiration to have more nimble and flexible regulation following the UK's departure from the EU. There is also a notable departure from the EU-wide and wider global consensus, [125]which is currently reflected in the post-1998 settlement.

As a result, major policy objectives are at risk. Unless anti-growth issues are addressed, there is likely to be a significant small business impact from decreased capital formation. Buyouts from large players may be threatened even absent a competition concern. Concerns about "capital deserts" adjacent to *some* digital players can be addressed without this broad-brush approach. Instead, there is extra red tape and cost wherever designated companies are involved. This is not targeted and will decrease capital formation at the margin, harming small business investment just because the purchaser is large.

On a £1 million business sale, 5% lost returns are conceivable from additional costs.[126] This may be very welcome to City solicitors, but it is bad policy that is likely to have a significant marginal effect on capital formation and sale for small businesses, despite no commensurate benefit. It would be very easy to remove this burden on small business simply by tailoring notification requirements so that they are only triggered by specified concerns from the designation stage.

The AI strategy of the government is to provide clarity and a safe harbour for low-risk innovation. This is particularly threatened if the largest investors in innovation are subject to a harsh new regime rather than a targeted one based on evidence of true concern.[127] There is a risk of a return to the heavily criticised pre-1998 settlement which is seen to have been heavily politicised.[128] The world is watching to see how UK competition policy develops and there would be a clear and positive answer to those watching if the concerns outlined in this paper were visibly taken into account.

Finally, Parliament's voice will only be weak, unless it speaks up now. The extensive Henry VIII powers in the Bill would result in very limited Parliamentary oversight over key provisions, including several implicating deep due process concerns. There would be unaccountable technocratic control, which is acceptable if behind an objective evidence standard such as market power. This is not acceptable if it strays into broader policy objectives. Parliament should therefore ensure that a clear and technical basis exists in line with the expert recommendations, rather than effectively appointing a discretionary regulator with very significant powers not hemmed in by any Parliamentary scrutiny.[129]

The fundamental issue with the Bill is that it combines market-wide review powers and remedies designed for general regulation of industry with the ability to target particular companies based on their particular conduct. This blurs the line between adjudication and rulemaking. As the market-wide powers in the Enterprise Act do not single anyone out, they do not contemplate

125 See especially L Fullerton and M Alvarez, "Convergence in International Merger Control," 26 *Antitrust* 20 (2012).

126 Estimate based on £500 per hour city solicitor spending 100 hours – if anything a low estimate considering the scale of the designated companies and extensive work therefore involved.

127 See especially UK Government, "National AI Strategy," 22 September 2021 (setting out AI regulatory approach seeking to provide clear safe harbour for low risk use while still addressing genuine high risk cases).

128 B Lyons, D Reader and A Stephan, "UK competition policy post-Brexit: taking back control while resisting siren calls" 5(3) Journal of Antitrust Enforcement 347 (2017) (noting difficulties with politicization of pre-1998 framework).

129 The data fairness aspects of the Bill are a striking case in point, as they will allow DMU intervention in relation to ad-funded press outfits. The DMU would also have an ability to alter the terms of trade for advertising and thus gain significant influence over the press. See Part 1 discussion of consumer preferences in ad-funded markets.

safeguards such as appeals by the individual firms targeted. This is a "horse-tiger" Bill with serious and negative resulting implications.[130]

This due process lacuna is serious. It denies a foundational point in the British legal tradition, namely that unlike those generally regulated, those singled out are entitled to an appeal of pertinent fact-finding, and not just to a review of a regulatory process. This is the simple principle of having one's day in court before someone other than the original decision maker, derived from Magna Carta,[131] and it should not be lightly erased.

130 The Chinese phrase "horse horse tiger tiger" (mamahuhu) denotes the perils of "so-so" shortcuts. An idiom guide describes the origin of the phrase as follows:

> "Once upon a time, there was a painter. One day the painter was drawing a tiger when a man came to him and asked to have a horse picture instead. Unwilling to start a new painting, the artist just randomly added a horse body under the tiger head.
>
> When the customer saw it he found it weird and left so the painting was hung in the family living room. In the following days, the artist's eldest son came and asked his father what the painting depicted. The artist said: "That's a tiger!" Afterward, the younger son came along and asked him the same question, but, this time his father said it was a horse.
>
> Later on, the elder son saw a horse. Thinking it was a tiger, he killed it, incurring costs for the father who had to pay the horse's owner for damages. The younger son then encountered a tiger. Mistaking it for a horse, he died in the attempt to ride it.
>
> From then on, everybody called the painter Mr. Horse-Tiger.
>
> Nowadays the term is used to describe someone who is careless or a situation which is just "so-so" or 'not bad'."
>
> LTL-School.com, "Why Does "Horse Horse Tiger Tiger" Mean "So-So" in Chinese?" (30 January 2023).

To the extent that the DMCC Bill blends Enterprise Act regulation with Competition Act adjudication, despite the different nature of regulation and adjudication, it might be considered a Horse-Tiger law with all the future tensions between the two concept that implies.

131 Cl. 39 Magna Carta.

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