A new pro-competition regime for digital markets

Individual response to Public consultation by Oles Andriychuk

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Theoretical context:

1) This legislative proposal is timely. It requires some refinements.

2) Competition policy undergoes a paradigmatic transformation. The field is moving from the axiomatic determinism and insulated, inward-oriented exclusivism of neoclassical Law & Economics to a more polycentric coexistence of diverse approaches to defining the nature of economic competition, its role in economic governance and its interaction with other important societal interests.

3) The 'protective' arm of competition policy is being currently complemented by the 'proactive' one. Naturally, the latter modality can rely less on legal, economic and material certainty. It tolerates greater role of indeterminacy, a coexistence of several alternative choices, with comparably robust theoretical underpinning.

4) Such theoretical pluralism implies the absence of the abstractly and universally 'right' answers, discoverable necessarily by advanced economic modelling or in established legal precedents.

[1] This paper represents my personal academic opinion and should not be attributed to the position of the Centre I co-direct.

5) There is no consensus among competition scholars as to the normative, functional and methodological elements of the discipline. Each reasonable approach has its supporters and critics. This gives policymakers richer menu of prioritised choices.

6) The foundational changes characterise the development of the entire area of competition law, economics and policy. They have even more explicit and obvious presence in the emerging area of digital competition law.

7) The successful designing of the new pro-competition regime for digital markets should benefit not only UK business- and end users, but it should also promote the competitive process at all levels of digital supply chain, both vertically and horizontally, as well as contribute to the overall economic growth and societal wellbeing.

8) Supposedly, the main focus of the comparable initiatives in the EU and US is placed on the protection and promotion of ***intra-platform*** competition. A possible shortcoming of such approach is that it acknowledges implicitly the current architecture of digital markets at the top level of digital supply chain, aiming primarily at incremental improvements and adjustments of the functioning of the competitive process *within* platforms.

9) Protection and promotion of intra-platform competition should be complemented with measures aiming at restoring, improving and adjusting competition at the top level: ***inter-platform c***ompetition.

10) Inter-platform competition has two fundamentally different dimensions: (i) competition between different platforms with strategic market status, competing with each other for greater share in each other's markets (also known as ecosystems); and (ii) competition between platforms with strategic market status on one hand and newcomers on the other. Only the latter requires regulatory promotion and protection. While the former does not

appear to be problematic per se, it evolves rapidly, driven by the natural market forces.

11) The bespokeness and the asymmetric scope of the rules, the flexibility in selecting the rules' addressees as well as their substantive vagueness, openness and future-proofness are an essential component of all procompetitive initiatives in digital markets. It is not a bug of the emerging digital competition law, but its fundamental distinctive feature. Only asymmetric responses are capable to deliver solution to asymmetric challenges.

12) The DMU should be informed by the Government about the broader strategic interests and priorities in the area of digital governance. Such messages should not be treated as imperative instructions. However, these *external* factors do have to be taken into some consideration when deciding upon each 'hard' case.

Consultation question 1: What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?

The answer to the question if the DMU should be provided with a supplementary duty to have regard to innovation depends on the intended mode of its use. If it is regarded for the reasons, relevant to substantiating *intervention*, it may be accepted. If, however, the notion of innovation is applied by the defendant for justifying *non-intervention* or for accepting innovation as an efficiency defence or objective justification, such formula may be counterproductive for the reasons explained below.

Innovation is a term having various overlapping meanings and dimensions. There is no single objective metric for measuring innovation. The

key question is who benefits from the innovation? Is innovation evolving in the direction expected by the enforcer? What type of innovation should the DMU accept? Is it the innovation in delivering a greater online experience for end users? Their greater experience from engaging more comprehensively in filter-bubbles and echo-chambers? Is it the innovation in developing more advanced and robust tailoring and matching expertise? Is it the innovation in improving surveillance techniques of the Digital Panopticon?

All universally acknowledged shortcomings of the digital society are being underpinned by robust innovation.

Similar to the concept of 'consumer welfare' dominating the discussions in competition law, economics and policy for several decades, the *flavour*, the *scope* and the *beneficiaries* of innovation are more important than innovation in abstract. The dynamic of evolution of the digital society demonstrates an unprecedented growth, and there is no evident need in 'promoting' or 'enhancing' innovation per se. There is a need in promoting and incensing those types of innovation, beneficial for the strategic priorities of our society. Accepting such an imperative however opens the door to another type of risk: digital interventionism.

The task of the DMU is to strike a delicate balance between these two extremes. It should be neither mathematically neutral, nor politically biased. Over the last decades the regulatory pendulum of competition policy was much closer to the former, and it is now objectively moving to the latter. The task of the DMU is to steer, nurture, shape this objective trend, allowing the digital society to benefit from its obvious advantages but only to the point, not encroaching the fundamental normative values of healthy liberalism and democracy.

Consultation question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?

There are obvious risks with assigning the DMU with these wider policy issues. But there is no alternative. The perception of competition policy as an insulated, inward focused, distilled from the broader societal context and underpinned by mathematical determinism of 'objectivity of data and economic evidence' is rudimentary and myopic. The promoters of such scientific purism of competition policy either have an ideological agenda of maintaining the status quo or are embedded too deeply into the theoretical assumptions of the previous period of competition policy.

By liberating itself from the tenets of scientific determinism, competition policy becomes more open to broader societal challenges and opportunities. It was always an important factor of economic policy, and it is getting much more important in the current circumstances.

The question is not *if* but *how.* And this question is much more difficult to answer than the *if* one. If neither consumer nor innovation are the ultimate goals of proactive digital competition policy, what are the goal/s? These goals, values and interests are not monolithic; they are context dependent. Identifying them correctly is a skill and an art of effective economic governance.

Competition policy is getting much more open to other economic and non-economic societal interests. However, such interests can be either promoted or taken into account only if they can be underpinned by the traditional legal and economic theories. Abandoning the exclusivism of legal

and economic analysis does not imply abandoning the legal and economic analysis as such.[2] Only the exclusivism of such analysis has to be abandoned.

Consultation question 4: Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the best use of sectoral expertise, and why? Do we have the correct regulators in scope?

The answer to this depends on the political choice taken by the Government. Both formal and informal arrangements may be effective and ineffective. Less depends on the form. More on the substance.

The discussions on the relationship between competition and privacy, competition and sustainability or competition and international trade reveal one regularity: the intensity of the processes taking place in each *silo* is so high and the discussions are so pervasive that each subfield looks at the broader societal processes only through its own intra-disciplinary prism. Attempts of establishing an effective communicative process between different *silos* are seldom successful. Too many known and unknown unknowns (which are often hiding behind the façade of phonetically identical terms – homonyms) prevent an effective dialogue.

A possible solution may be in establishing a protocol of priority between different sectoral regulators. Many systemic problems in the digital economy may be addressed through the perspective of one policy (e.g., competition) or another (e.g., privacy). Clearly, there are numerous opportunities and synergies, but it is critical to agree at the outset which agency would be

[2] Oles Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', Modern Law Review, forthcoming.

providing the narrative in each specific case, and which would be assisting in pursuing that narrative in each specific case. In a different (even if concurrent) investigation the roles may be swoped between the agencies. It is critical to establish this cooperation, and the establishment of the Digital Regulation Cooperation Forum is clearly a step in the right direction.

Consultation question 5: How can we ensure that regulators share information with each other in a responsible and efficient way?

Clearly, the DMU would be the most suitable candidate for this coordinating role in terms of offering an institutional structure. The platform for having this communication may be the DRCF.

Consultation question 7: What are the benefits and risks of limiting the scope to activities where digital technologies are a "core component"? What are the benefits and risks of adopting a narrower scope, for example "digital platform activities"?

The situation appears to mirror the DMA *core platform services* (CPSs). Under the DMA proposal, there 8 such services: '(a) online intermediation services [such as e-commerce market places or online software applications services]; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services [messengers]; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation

services, provided by a provider of any of the core platform services listed in points (a) to (g)'.[3] The discussions preceding the first reading of the proposal in the European Parliament reveal various amendments aiming to extend the list to other CPSs. The immediate candidates for the expansion would be web browsers, voice assistants, video-streaming, mobile payment services, online on-demand audio media services,[4] digital labour platforms[5] or virtual assistants.[6]

There is no consensus as to how many CPSs must a platform operate in order to meet quantitative criteria for designating as gatekeeper. The proposal indicates one CPS. Some stakeholders propose two or more.[7] Designating the platforms with SMS requires 'surgical precision'. It should neither over- nor under-qualify.[8] It is even less clear how many CPSs of each designated gatekeeper will be captured by the obligations of the DMA.

The main recommendation is that the conditions for designating undertakings with SMS must be clear and straightforward. It is likely that every adjective in the definition will be subject to intense litigation. If the enforcers intend allocating their limited regulatory resources effectively, the proposal must leave very little doubts as to the process of designation.

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[3] The DMA Proposal, Art 2(2).
[4] Amendments 414–463 (Amendments by individual MEPs).
[5] The Draft JURI Opinion, The Scope section.
[6] The Draft ECON Opinion, Amendment 30.
[7] The Draft Report proposes to increase the threshold for defining an undertaking as a gatekeeper from €65 billion to €100 billion as far as market capitalisation concerns, as well as from €6.5 billion to €10 billion for the turnover in the last three financial years. The document also proposes to add as an additional condition the provision of not only one but, at least, two CPSs with 45 million active monthly users each – The Draft Parliamentary Committee on the Internal Market and Consumer Protection Report, p. 32).
[8] Oles Andriychuk, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition', World Competition, Vol. 43, No. 3, 2021 (forthcoming): 'Designation of gatekeepers requires surgical precision, and it should not be reduced to a mechanistic box-ticking exercise. It is a mastery of navigation between the Scylla of over – and the Charybdis of under-qualification. The former would lead those scaled-up platforms, which are in fact the most likely alternatives to the entrenched incumbents, to be included in the category of gatekeepers too soon. The latter may lead to the possibility of excluding some of those under- takings that do play a systemic gatekeeping role in the digital markets from the scope of the DMA outright.'.

By linking the SMS with the notion of the significant market power (as intended in the proposal), the law risks redirecting the limited regulatory resources – and time – to proving the self-evident (first proving, and then explaining; and then justifying; and then defending; and then correcting some casuistic technicalities).

The drafters of the DMA have disassociated intentionally the criteria for designating gatekeepers from the established conceptions of ex-post competition law (such as market power). This appears to be the most suitable format. The drafters of the current proposal, on the contrary, have linked the criteria for designating gatekeepers to the established conceptions of ex-post competition law. In my view this creates unnecessary risks.

The discussed proposal appears going even further. It envisages the system, requiring a cumulative prove of (i) substantial market power; (ii) entrenched market power; and (iii) strategic position. If the concerns of the drafters are about the risks of over-designation, there must be less categorical safeguards discovered. At least at the level of definitions, attempts should be made to disassociate the new status from the established conceptions as applied in ex-post competition law.

The format of three *qualitative* criteria of Art 3(1) DMA concretised (but not exhausted) by three *quantitative* criteria of Art 3(2) DMA appears to be much more suitable, easier to enforce and leavening the DMU much greater competence and confidence.

Consultation question 8: What are the potential benefits and risks of our proposed SMS test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?

The risk of the proposed SMS test is that it requires too many boxes to be ticked before the substantive issues can be addressed. Each of those boxes is justiciable and can be challenged on any minor/micro procedural technicality. There is no need in being so demanding in defining the status of the SMS as there is no requirement for the DMU to open proceedings on the eventual designation of *all* undertakings meeting potentially the criteria of the softer SMS requirements.

Also, the submission juxtaposes the proposed format to "the alternative of a mechanistic approach to the SMS assessment based on quantitative thresholds for specified indicators". There are much more nuanced and workable formats than the mentioned "mechanistic" quantitative one. Art 3 DMA offers a remarkable example of combining qualitative and quantitative criteria, allowing the expected certainty against over-inclusiveness as well as the necessary flexibility against excessively high cumulative tests.

The law is driven by the ethos of assigning the DMU with a greater flexibility in shaping pro-competitive digital markets. The excessive requirements for the SMS appears not to go in the same direction. The history of ex-post competition law enforcement shows that often time spent on defining relevant markets and dominance exceeds time spent on defining the abuse (let alone workable remedy). Time is in fact one of the main reasons necessitating the emergence of the new proactive digital competition rules.

Consultation question 9: How can we ensure the designation assessment provides sufficient flexibility, predictability, clarity and specificity? Do you agree that the strategic position criteria should be exhaustive and set out in legislation?

It is conceptually impossible to design the rule ensuring simultaneously sufficient flexibility and clarify. Flexibility always imply some elements of indeterminacy and openness to interpretation. Clarity leaves little room for flexibility. These objectives are antithetical.

The proposal must give priority to flexibility and future-proofness over *mechanistic* certainty and clarity. Otherwise, there is a risk for designing a law, focused mainly on combating the practices, which are neither systemic nor forward-looking – and thus the impact of the legislation on the pro-competitive functioning of digital markets would be smaller.

Consultation question 12: Do these three objectives [Fair trading; Open choices and Trust and Transparency] correctly identify the behaviours the code should address?

These three objectives appear to identify correctly the main avenues for shaping pro-competitive markets. They are also sufficiently wide and general to allow further categorisation for most of known anticompetitive unilateral practices.

Consultation question 13: Which of the above options for the form of the code would best achieve the objectives of the pro-competition regime, particularly in terms of flexibility, certainty and proportionality? Why?

Option 1 (principles, developed and updated by the DMU in consultation with stakeholders, would be firm-specific and not set in legislation).

Option 1 appears to be the most suitable as it allows the DMU to act depending on the rapidly changing context. This would also give the DMU an opportunity to tailor specific obligations to the specific market problems and specific market conduct.

Option 2 (principles would be set in legislation and applicable to all SMS firms. The DMU's role is to enforce the principles).

Option 2 appears to be the least suitable. The role of the DMU would be critically dependent on how accurately the principles are designed in the legislation. In the rapidly evolving digital markets and in the highly litigious digital environment, any procedural uncertainty in definitions may be interpreted against the intentions of the DMU, constraining thereby its flexibility and ultimately the effectiveness of its actions.

Option 3 (Principles would be set in legislation. The DMU would have subsidiary powers to develop firm-specific legally binding requirements based on legislative principles).

Option 3 appears to be a compromise between Option 1 and Option 3.

The DMA offers another remarkable example for categorising two groups of obligations: self-executing and those susceptible to being further specified. The latter group provides the necessary flexibility to design individual meaning for each relevant obligation of each gatekeeper during the regulatory dialogue. The bargaining power of the enforcers is strengthened by the fact

that both groups of obligations become binding ex-tunc. If the parties reach a compromise, the obligations become binding ex-nunc. This formula provides the necessary incentives for gatekeepers to participate constructively in the regulatory dialogue.

It is important to emphasise that the scope of the regulatory dialogue may well go beyond the discussion of the specific obligations. This is a distinctive feature of *smart* asymmetric regulation. The power of the DMA enforcers is not only in the obligations it specifies and shapes as relevant (*stick*) but even more so in the obligations it specifies as not (*carrot*). Clearly, such a modality requires delegation of significant discretional competences to the DMU. It also implies the top level of competence and strategic vision about the features and direction of the competitive process, the DMU is expected to promote and shape.

Consultation question 14: What are your views on the proposal to apply principle 2(e) (see Figure 4 below) to the entire firm? Should any explicit checks and balances be considered?

The wording of principle 2(e) [Not to make changes to non-designated activities that further entrench the firm's position in its designated activity/activities unless the change can be shown to benefit users] – as well as the wording of most other principles – appear to be a bit too soft and permissive.

For example, Principle 2(b) “Not to bundle or tie services in a way which has an adverse effect on users”. Tying and bundling are primarily exclusionary, not exploitative abuses. They seldom harm customers/users. They mainly harm competitors by foreclosing markets. Prohibiting undertakings with SMS to

bundle “in a way which has an adverse effect on users” means that only exploitative instances of tying and bundling and some vertical exclusion would be prohibited (with the effect likely being similar to the behavioural remedies in Microsoft WMP 2007 case). The last part of the sentence appears to be unnecessarily constraining with regard to the competence of the DMU.

As far as Principle 2(e) concerns, it indeed should be applied to the entire firm. Otherwise, many in-house optimisations may be done to ‘outsource’ internally to non-designated activities some functions, which allow further entrenchment. Such leveraging would be impossible to remedy.

Additionally, Principle 2(e) appears to have a weakness similar to the one of Principle 2(b). It prohibits making changes to non-designated activities, which would further entrench the firm’s position unless ‘the change can be shown to benefit users’. The entrenchment is by definition an exclusionary conduct, having a harmful impact on the competitors. It is perfectly possible that such entrenchment would have a positive impact on users. Most of the instances of further entrenchments bring numerous benefits to the users of the services. The problem of the entrenchment concerns primarily inter-platform competition. Furthermore, the formula “unless the change can be shown to benefit users” has two additional ‘exits’: (i) conditional form ‘can be shown’ and (ii) benefits to users. Which benefits? The term ‘benefits’ offers unlimited substantive scope. Any reasonable practice by undertakings with SMS *can be shown* as *having potential* of bringing *some* benefits to *some* users.

Consultation question 15: How far will the proposed regime address the unbalanced relationship between key platforms and news publishers as identified in the Cairncross Review and by the CMA? Are any further remedies needed in addition to it?

Digital advertising constitutes one of the central elements – if not the central element – of the online economy. The CMA has conducted a remarkable Online platforms and digital advertising market study, which has identified a number of systemic problems in the field, dominated by a well-known duopoly. One of the 'easiest' regulatory solutions would be to follow the ACCC route mandating some compensation to the media for using their copyrighted content. This is an important step in the right direction. But such a measure along is not sufficient to remedy a remarkable imbalance in the field. We observe a quick de-industrialisation scenario, where the entire advertising supply chain is being fundamentally recalibrated. The role of the media industry is diminishing. The procompetitive interventions should be targeted at helping to promote and create competition in the area of digital advertising rather than only protect the copyright owners by mandating some (fairly symbolic) compensatory scheme for local press.

Consultation question 18: To what extent is the adverse effect on competition ("AEC") test for a PCI investigation sufficient for the Digital Markets Unit to achieve its objectives?

First, selecting legal terminology, which has an established background in current competition law is suboptimal. It can bring to the new regime, underpinned by the new vision about competition in digital markets some old conceptions and procedural *anchors*.

Second, if the purpose of the PCI is indeed a "pro-competitive intervention", the reason for such intervention – just as a matter of semantic – cannot be totally subordinated to the preventative modality. If the proposal makes no PCI possible without establishing the AEC, it makes little reason for having a 'pro-competitive' regime. It would suffice to have a regime, *protecting* competition rather than seeking to having one, *promoting* it.

Consultation question 19: What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity, in the circumstances described above [requiring swift reaction]?

Not empowering the DMU to implement PCIs outside of the designated activity may lead to grotesque situations of inability to remedy an urgent systemic problem if part of it formally goes beyond the designated activity. This power however should be subject to systemic checks and balances.