The unregulated regulator

How the Digital Markets, Competition and Consumers Bill could undermine dynamism in digital markets

By Matthew Sinclair

Summary

The Digital Markets, Competition and Consumers (DMCC) Bill is a proposed new law which is intended to 'stamp out unfair practices and promote competition in digital markets'. It would give the Competition and Markets Authority (CMA) extensive powers to intervene in those digital markets, and shape how they operate.

Many of these markets, such as digital advertising and social media, have shown the potential for dynamic competition in recent years. The largest players have been losing market share to new kinds of challengers, with the combined market share of the top two in digital advertising (Google and Facebook) falling relative to Amazon and TikTok, for example. New services have brought valuable benefits to UK consumers and businesses, with video calling becoming commonplace and generative AI built into an increasingly broad range of digital services.

The Bill risks undermining that process – and the UK's reputation as a business-friendly and responsible regulatory environment – by giving the CMA exceptionally broad powers to reshape digital markets. A lawyer at Linklaters has described this power as 'quasi-legislative'. It grants the CMA the authority to regulate the price structure (and other terms and conditions) in digital networks, rewarding some platform users at the expense of platforms or other users in the same way as if a government had created a transfer through new taxes and subsidies. Given the ubiquitous nature of digital markets and digital products, the DMCC will give the CMA powers to intervene in almost every feature of our economic, professional, and personal lives. There will also be an incentive to use these powers wherever possible, as they will be subject to few checks and balances, increasing discretionary regulation of the economy as a whole.

The extent of these powers and the lack of restraint on their use creates an uncertain and unpredictable policy environment for businesses. This will make it harder for firms to bring new services to market. It will therefore over time lead to consumers in the UK no longer being among the first in the world to access many new digital tools, and undermine the UK's place as a prime destination for global tech investment. This will undermine UK economic performance.

Having this kind of power sit with the CMA, rather than ministers answering directly to Parliament, will also mean the full range of effects on wider public policy priorities is not taken into account in important competition decisions.

Regulating digital markets is necessarily complex, and with increased regulation comes an increase in the risk of unintended consequences. Interventions can fragment networks; create an artificial standardisation that limits dynamic competition; prevent market entry from adjacent markets; and fail to adapt with changing technologies and business models. All of this could further worsen outcomes for UK consumers over time.

Given the complexity of digital markets and the scale and importance of the networks being regulated, it is right that regulation is cautious and subject to proper external scrutiny. The DMCC as currently proposed does not meet that standard. For example, there are unnecessary limits on appeals, and consumer benefits associated with how digital platforms do business will not be properly considered. Some of the interventions in the Bill are also too important to be implemented by officials without democratic involvement. Parliament should debate interventions with such wide-ranging effects.

Ministers should therefore amend the Bill to reinsert the normal and necessary checks and balances. Or – even better – they should take advantage of a rare opportunity to watch another jurisdiction go ahead (the EU with its Digital Markets Act) and learn from its experience. It is more important to get the challenging task of regulating digital markets right than to move fast.

The DMCC provides huge, unchecked power to the CMA

The Digital Markets, Competition and Consumers (DMCC) Bill is a proposed new law which is intended to 'stamp out unfair practices and promote competition in digital markets'. The Bill, which the Department for Business and Trade recently introduced into Parliament, would grant a huge swathe of new powers to the CMA. It includes four main kinds of intervention:

(1) Conduct requirements, with digital platforms designated as having 'strategic market status' (SMS) subject to firm-specific codes of conduct.
(2) Pro-competition interventions (PCIs), similar to existing market investigations but intended to move faster for those designated as SMS.
(3) Merger control, giving the CMA an even greater ability to intervene in more mergers, and increasing its role in mergers of non-UK businesses operating here.
(4) Consumer protection rules, particularly around fake reviews and subscription traps.

Apart from the changes to consumer protection rules, these new powers will be managed by a new Digital Markets Unit (DMU) within the CMA, which has already been established ahead of this statutory framework. The Bill's provisions will be backed up by the threat of large fines, of up to 10% of global turnover. (The same figure as in the Online Safety Bill, raising the prospect of a company losing 20% of its turnover to the UK alone for separate offences.)

The natural comparator for the DMCC is the EU's Digital Markets Act (DMA), which is running about a year ahead of the UK regulation in terms of process. Both are far-reaching interventions premised on a view that there are significant problems with competition in digital markets. However, even compared to DMA, DMCC is distinctive in that:

- It provides an enormously broad remit to the CMA; and
- There are few checks and balances on that power.

An enormous remit for the CMA

Once platforms are defined as having strategic market status (based on CMA analysis against a broad criteria), the CMA has enormous latitude to intervene as it sees fit. It can address broadly defined problems (e.g. using data 'unfairly') without a need to consider the balance of effects on consumers. Conduct requirements alone can include:

- How to trade on 'fair and reasonable' terms (an established standard in other settings known as FRAND – fair, reasonable and non-discriminatory).
- How complaints are handled.
- How information is communicated to users and how services change.
- Which options are presented to consumers and how different services offered by a company work together.
- How a company's services interact with those offered by its competitors.
- How the company uses data.

The EU DMA seeks to address many of the same concerns but is much more specific about the threshold for being regulated and the obligations which will be imposed. Unlike the DMCC, which gives the CMA complete discretion to impose different rules for different companies, the obligations under the DMA are uniform based on the type of service and scale of the company.

While the discretion provided to regulators in this instance provides flexibility, it also means that platforms will need to try to plan for an extremely broad range of potential regulatory outcomes. This kind of uncertainty will mean firms find it harder to bring new services to market, with consequences for UK consumers and medium-term economic performance.

While in principle the DMCC regulates large businesses, new businesses that hope to grow (the equivalents of Amazon, Facebook or Google in their early years) would nonetheless be affected. Business owners would have to grow their firms in the hope that their business model would be viable once subject to open-ended CMA scrutiny.

The result would be an enormous amount of political power being given to a regulator outside democratic legislation. A lawyer at Linklaters has described this power as 'quasi-legislative'.

In particular, the power to insist on 'fair and reasonable' terms effectively means a power to regulate the price structure (and other terms and conditions in digital networks), rewarding some platform users at the expense of the platform or its other users (including non-commercial users) in the same way as if a government had created new taxes and subsidies. While the intention is that the process would normally work by requiring commercial negotiations, the DMCC includes a backstop 'final offer mechanism' in which the CMA would step in to settle negotiations between the SMS tech firm and its counterparty.

Those new CMA powers in the DMCC to insist on 'fair and reasonable' terms are similar to the News Media Bargaining Code in Australia, which was proposed and passed by the Australian Government after consultation with its competition regulator. In the UK, such rules will simply be implemented by the regulator using powers in the DMCC without any further Government or Parliamentary involvement. Nor is there is any limitation to a single sector (i.e. news). Instead, the powers can apply to any sector in the economy.

Tech industry commentator Benedict Evans has described why powers of this sort can be more akin to a tax and subsidy programme than competition enforcement:

> "No-one has ever paid to link, regardless of their market power. No-one has ever asked me to pay to link to them, and if asked I would refuse, and I have no market power at all. You don't have to ask the hypothetical "what would happen if Google and Facebook had less market power - would they pay for links?" You can just look at, well, *every other site on the internet.* (emphasis in original)
>
> "But if you do accept the novel theory that links being free for 25 years is a market failure, there's a further breach of basic logic: if all links have value, why should only newspapers be paid? If all links were paid, then newspapers' share would be a pittance. But newspapers are worth more to society! They deserve it! Well, perhaps they do - but 'we like them more' is not a competition law argument. It's an argument for a subsidy from public funds. There are perfectly coherent arguments to be made for such a subsidy, but I'd suggest that if you do want a subsidy, you should be honest and debate it on that basis, instead of basing it on entirely imaginary, Alice-in-Wonderland theories of internet economics."

Costs imposed on businesses by regulation (like taxes) are ultimately paid by shareholders, workers or consumers. While the incidence (the distribution of costs across those groups) is an empirical question, it seems plausible in this case that this will essentially be a veiled tax on the consumers of digital services (the quality-adjusted cost of which will rise in the UK) in order to subsidise commercial interests.

CMA decisions using this discretion could have a range of wider consequences:

- Economic consequences, to the extent that they affect the services available to UK consumers (including business consumers).
- Distributional consequences, to the extent that regulation inevitably entails judgement over the distribution of platform costs (e.g. pricing for advertisers vs consumers).
- Strategic consequences, to the extent that these regulations affect global businesses in ways that could be seen as hostile by foreign governments. In the past, US administrations have threatened tariffs in response to taxes on digital services (many provided by US multinationals) are proposed. This could create challenges for ministers pursuing future trade deals, for example.

Despite the magnitude of these potential consequences, and their potential political consequences, decision-making would no longer sit with ministers able to consider the full range of costs and benefits and directly accountable to Parliament.

It is important to remember that these very broad powers are being applied to digital markets. But digital markets play a significant role in almost every sector in the economy, given so many firms and consumers make extensive use of digital platforms as intermediaries. Over time, the CMA might be able to intervene in almost any market through regulating the digital platforms over which those sectors do business. Indeed, given that the CMA will be subject to much less external oversight when using its digital competition powers, there will be an outright incentive for it to intervene in a broad range of markets via digital platforms to achieve all kinds of potential objectives.

Combining a broad scope with very broad powers means a disproportionate increase in the overall discretionary control of British economic activity.

The Bill contains few checks and balances

It is not uncommon for governments to grant competition regulators significant powers. But those powers are usually balanced with constraints and oversight. In the DMCC, those checks and balances have been weakened in several ways.

First, appeals are limited, with the Department for Business and Trade's Competition Appeal Tribunal only able to judge whether the correct process has not been followed, not the merits of the case.

Attempts to shift to a judicial review standard have repeatedly been rebuffed. In March 2023, the former head of the Government Legal Service, Sir Jonathan Jones, wrote:

> *The new DMU will be taking highly significant decisions in a new and developing regulatory context. There is a strong case for subjecting those decisions to a standard of appeal that allows the tribunal to determine whether the decision is 'materially wrong'.*

In 2019, the then Chairman of the Competition Appeals Tribunal, Peter Freeman, wrote:

> *The need for [full-merits appeal] is in no way diminished by the challenges of applying competition law in the digital economy; if anything, the need is even greater ... It is rather curious to find proposals to weaken the rigour of judicial scrutiny appearing in a package of reform proposals intended to address issues from the digital economy and the Big Tech challenge, given how important those issues are.*

The lack of full-merits appeal is likely to lead to CMA errors going unchallenged – and indeed will undermine the incentive for the CMA to act cautiously in the first place.

Second, while in principle the new law allows for a consideration of consumer benefits, which are common for digital networks that facilitate competition in adjacent sectors, this will be limited in important ways.

With codes of conduct, instead of countervailing consumer benefits being considered at the outset, companies can point to them as a defence after a finding of a breach. Those companies are required to prove that the conduct was indispensable for and proportionate to a consumer benefit. This high standard of evidence (compared to the lack of analysis required to impose conduct requirements) combined with an unrealistic process (where companies would have to intentionally breach their code of conduct) will mean behaviours that would benefit consumers overall (perhaps by increasing competition in adjacent markets) are not allowed.

With PCIs, the CMA is not even required to consider consumer benefits before intervening. Nor is it required to establish a clear link between the original concern and how a PCI would improve the situation. Given that these are large potential interventions, along the lines of a market study, Stephen Dnes argues that without 'stronger evidentiary requirements, the PCIs risk discretionary government control over large companies'.

All this matters because it exacerbates the risk the law poses to regulated businesses. While ongoing appeals can create uncertainty, the lack of appeals creates a broader and more profound uncertainty, because CMA intervention based on such broad powers is not predictable. If firms do not know whether they will be able to appeal decisions that go against them, or need to get to the stage of being found to have breached the rules before they can point to compensating consumer benefits, then they will have an incentive to adjust their behaviour more than is socially optimal, becoming overly cautious in deploying new services. This will exacerbate the unintended harms associated with the Bill. Broadly speaking it will mean that the market is over-regulated. (Again, there are close parallels here with the Online Safety Bill.)

Digital markets have already moved on

The DMCC is a product of a long process of gestation. The Furman Review, commissioned by HM Treasury in 2018, was intended to understand the changing nature of competition in digital markets and consider a policy response. Its final report was published in 2019. Since then, there have been multiple consultations, White Papers and investigations addressing specific sectors. The process has also been handed from minister to minister, resulting in a piece of legislation that reflects the interests of the regulator more than a consistent Ministerial vision.

A lot has also changed since the publication of the Furman Review. The digital advertising market is a good example and worth considering as part of the context for the Bill.

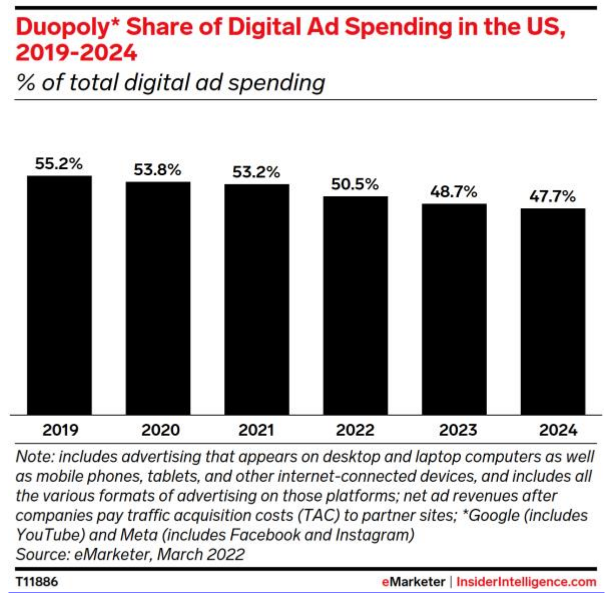
The digital advertising market is important as both a very large market and one that underpins the commercial significance of other digital platform markets. In particular, Google's search engine and Facebook's social network are important to those businesses primarily because they ultimately facilitate their role as advertising platforms. Indeed, while commentators often discuss competition in the 'social media' or 'search engine' market, in practice the principal source of revenue in both cases is advertising. These businesses are competing with each other and with other companies to help businesses connect with the customers most likely to want their goods and services.

The Furman Review looked at a world in which those two largest providers were increasing their share in the digital advertising market. This picture is consistent with a world in which the winners take all, using their respective strengths to lock in market share and extract stable monopoly rents from their commercial stakeholders (advertisers and the media).

Yet the picture since it was published has been quite different: those two largest platforms (Google and Facebook) have lost combined market share and are projected to lose more in the coming years. While the two graphs below are not perfectly comparable, the change in the trend is clear (and apparent to those watching the market).

The Furman Review

Now



This is happening because of what is clearly a dynamic competitive process. Major competitors are either offering a new and different kind of service to consumers (TikTok and short video sharing) or providing a more direct proposition for advertisers (Amazon and ads within its e-commerce platform). Again, a narrow understanding of the market is leading people to underestimate the potential for other companies to enter and compete where digital platforms make their money.

There is no sign that this competitive process is over and it is bringing new options for consumers. The obvious next wave is Disney, Netflix and other video on demand players entering the digital advertising market as a complement to their subscription business. Netflix already has an advertising-supported tier which has been successful. Not to mention other e-commerce businesses launching their own advertising services.

This would not be the first time that digital markets might appear to have become locked down, but then turned out to be far more dynamic. It is comic in retrospect, but commentators were at one point speculating over whether Rupert Murdoch's purchase of MySpace had established durable control of the Internet discourse. Research for BEIS that I co-wrote in 2017 looked at five case study markets and found that 'entry is common and tends to materially affect the market' and 'effective entry does not appear to be less likely in more concentrated digital markets'. Experience since then has only confirmed those findings.

The DMCC reflects a moment when it was tenable to view the market structure as having settled. But that risks creating a regulatory structure for digital markets that treats them like static networks, with regulatory approaches imported from markets without the dynamic quality that digital markets have again and again shown they retain.

The DMCC could have significant unintended consequences

There is always a risk of inadvertent harmful consequences when regulating any market, a risk that an intervention results in harms the regulator has not been able to anticipate. These harms are often unrelated to the premise of the regulation. This risk is much greater in digital markets because:

- Network effects are a massive consumer benefit, not just a source of market power
- Standardising to make a market look more 'competitive' undermines dynamic competition
- Market entry from adjacent sectors is commonplace
- Technologies and business models change quickly

This does not mean that the right answer is no regulation. However, these are also very large markets in terms of revenues and associated consumer and business impacts. That means that not only are unintended consequences particularly likely, they are also particularly harmful when things do go wrong.

Accordingly, public policy should err on the side of caution. We should look for every opportunity possible to test the water before diving in. The regulatory structure should, if anything, include more checks and balances than in less dynamic industries.

Network effects are a massive consumer benefit, not just a source of market power

Network effects (where a platform becomes more attractive because it is used by more people) are a central justification for regulatory intervention: larger platforms are more attractive to consumers; they attract more customers; and that positive feedback loop results in market power. This is crucial to the thesis that digital markets are distinctive and require competition powers beyond those employed in other markets.

Network effects do not simply translate to a winner takes all market, however, because:

- Larger platforms can also be less valuable, leading to a search for alternatives (reverse network effects). Creators can face more competition; larger platforms attract more bad or malicious content; sometimes consumers simply like exclusivity. It is a commonplace observation that the comment sections on the largest media platforms are the most toxic, and that creators often find more opportunity in newer platforms.

- Consumers often do not need to choose, they can multi-home. For example, they may have many apps that provide a messaging function of some kind on their phone. This means that so long as a platform can establish itself as useful in a certain use case, or niche, it can grow at the expense of larger platforms.

- There are multiple strategies that platforms can use to get to a 'critical mass' in even a mature digital market. Instagram, for example, established itself (slide 26) in part by providing a useful service (photo filters) that did not rely upon network effects and grew as a network based on the user base that attracted, with users at first posting their photos to other social networks (e.g. Twitter). It also benefited from users being able to find each other based on connections in other social networks (again including Twitter) which has become harder with changes in platform policy and data regulation.

- Network effects themselves are a double-edged sword. If a platform starts to lose some customers, then it will also lose network effects and become less attractive to other users. This can mean that digital market shares are large but brittle. This is clearly what has happened to successive social networks (e.g. MySpace, which as mentioned above people erroneously thought had a durable market share) as they have lost scale and this has accelerated their decline.

All this means that network effects as a source of durable market power have severe limitations. It explains why digital platform companies, while profitable, are generally all too aware that their position is not safe, leading most to invest heavily in research and innovation. In 2020, the top seven companies by research and development spending globally were all tech companies that operate digital platforms and could be subject to regulation under the DMCC. They were doing this in order to challenge each other's market shares (e.g. Meta investing in AR/VR in order to try to displace Google and Apple's mobile ecosystems); establish new markets with innovative new services (e.g. Google's investment in autonomous vehicles, or Microsoft in cloud gaming); or try to stay ahead of that dynamic competitive process (e.g. Apple responding to Meta with its own Apple Vision product). All of this creates exciting new goods and services for consumers and does not reflect a stagnating market, but a creative and dynamic one.

Of course, the above does not mean that network effects are not large and profound. Large networks will create efficiencies that could be lost with intervention in those markets seeking to limit their growth. This might particularly be true in digital markets that often rely upon matching multiple parties (e.g. consumers looking for entertaining content, creators making that content, and advertisers seeking to reach the consumers) with niches (consumers want specific content, creators make specific content well and advertisers want to reach consumers interested in specific products). In those markets, a healthy ecosystem will include a mix of large networks and smaller networks targeting niches.

Without the right legislative framework, regulators could focus on transient symptoms of network effects (their impact on market structure) rather than their principal role (a source of economic efficiency). This could fragment networks and hurt the consumer interests they are supposed to protect.

Making a market look more 'competitive' can undermines dynamic competition

Friedrich Hayek distinguished in a 1946 lecture between perfect competition and the reality of dynamic competition through innovation and differentiation. He described a risk that can be seen in digital markets regulation today:

> *The belief in the advantages of perfect competition frequently leads enthusiasts even to argue that a more advantageous use of resources would be achieved if the existing variety of products were reduced by compulsory standardization.*

There is clearly a risk of exactly this happening in some of the interventions being demanded by competition authorities and envisaged in the Bill. Interoperability, in particular, demands standardisation to some extent so that users can exchange. More wide-reaching interoperability will require greater standardisation; it requires a common understanding of what a message is and can contain and how it can be expressed. That standardisation then has two effects:

(1) It makes the process of changing services over time more bureaucratic. Any change can break the interoperating systems and therefore has to be negotiated and staged.

(2) It makes it harder for new platforms to distinguish themselves by offering different services, or delivering them in a different way, which closes off the most common route to overcome the advantages associated with established network effects.

This is why the interoperable SMS system has changed less over time than proprietary instant messaging, for example, and why mobile network operators do not market themselves by offering better texts. Compulsory standardisation could impede actual competition in the name of idealised competition.

Market entry from adjacent sectors is commonplace

One of the concerns among policymakers is that platforms will leverage their strength in market A to establish themselves in market B. This might mean that participants in market B do not have a level playing field. For example, the CMA argued that Microsoft's acquisition of Activision Blizzard would strengthen a market position in cloud gaming already underpinned by its operating "the leading PC operating system (Windows), and a global cloud computing infrastructure (Azure and Xbox Cloud Gaming)".

Yet if it is hard to enter a market, and there are incumbents providing a good standard of service, then businesses coming in from other sectors, with other associated strengths, might be the most realistic and effective source of competition. Again, there is a risk of privileging an idealised competition where people can enter from their garage against effective, real competition that exists now from other large digital platform companies.

If we look at the digital advertising sector again, it is notable that the major competitors are not challenging Google by building a better search engine, or Facebook by building a substantially similar social media platform. Amazon has a diverse advertising business, but it is centred on its established e-commerce business. It competes as a means for consumers to find products. TikTok provides a short video sharing platform to consumers and seeks to differentiate its advertising offer by integrating advertisers with the creator ecosystem. This process could be undermined by the strictures of codes of conduct under the DMCC.

Technologies and business models change quickly

The CMA is clearly aware of the consequences of closing down innovation in business models. For better or for worse, it was one of the concerns it cited about the acquisition of Activision Blizzard by Microsoft, and its impact on the nascent cloud gaming sector. Regulation will inevitably involve making judgements on these kinds of business model decisions, however, such as:

- Whether more open or more curated platforms are preferable.
- How platform costs should be distributed between different sides of multi-sided markets.

That distributional point is particularly important because platforms have a vital role in distributing costs across the market. As Ricardo Gonçalves noted in a Europe Economics Staff Working Paper: 'A network, in its attempts to set prices so as to maximise its profits, actually produces a socially optimal outcome, because the objectives of the network exactly coincide with those of society.' This because 'a reduction of output in one market may raise profits in that particular market, but because of the network externality, it reduces profits in the other market proportionally more, thus reducing overall profits.'

Regulators intervening in an attempt to shift that balance to favour politically sensitive industries or reduce overall network costs (which could be higher than optimal in markets where contestability is limited, although as the analysis above describes that will be less common than it often seems) are likely to frequently upset that balance. This will lead to networks being under-developed at a potentially significant cost to consumers.

There is a huge risk that this freezes the evolution of business models for digital markets and inhibits practical competition by removing a source of differentiation between platforms. There is a balance that needs to be struck between more open (and therefore sometimes less safe, or less cohesive) networks and more curated networks. Regulatory intervention to decide the right answer where it is felt that closed networks impede competition should be careful, with extensive scrutiny and high standards of evidence. That way it can avoid deciding these trade-offs that would be better left to the market and consumer choice.

Recommendations

Now that the Bill is being brought before Parliament, it is a natural moment to step back and consider whether it is a good fit with the Government's current policy aspirations and governing philosophy. We believe that it is not – and that substantial change is needed if it is to be fit for purpose.

If ministers want to proceed with a major intervention to regulate digital markets, they effectively have three options:

(1) Proceed as planned.
(2) Keep the current Bill broadly as it stands, but with more checks and balances.
(3) Pause the Bill and benefit from watching the DMA launch.

1) Proceed as planned

The Government can obviously proceed as planned, depending on its ability to pass the law in Parliament. There are a number of potential costs, however, reflecting the likely unintended consequences described above.

The UK currently tends to be a leading market in technology, with new services launching here before other large, developed economy markets. Google's generative AI tool Bard, for example, launched in the UK before the EU. This could easily change as the UK becomes a riskier market with a need for a more complex consideration of the effect within an SMS firm's code of conduct when any new service is launched, or the effect on how its code of conduct might change over time.

Looking back, regulation of this sort could have complicated existing tech firms developing and deploying a wide range of services:

- New or more sophisticated services for consumers – e.g. Google Maps, or Amazon's Alexa.
- Services that enable more dynamic competition in other markets, by making it easier to build new businesses, e.g. public cloud services such as AWS, Microsoft Azure and Google Cloud.
- Services that compete with existing players in major digital markets – the big example of this in recent years, as noted above, is Amazon and TikTok increasing market share in digital advertising.

The potential effect on consumers of this kind of regulatory delay to new services has been studied before in the context of other network industries. In research for the Brookings Institution in the 1990s studying an Federal Communications Commission delay to the introduction of cellular service, Hausman found:

> *I estimate that the annual lost consumer welfare was approximately $24.3 billion in 1983 dollars or about $33.5 billion in 1994 dollars (table 4). Thus, the lost compensating variation was about $76 per subscriber per month, which is equivalent to an average monthly service price (with the assumed 50 percent increase) of about $120 per month. Even if I assume that demand for cellular would only have been half as great in 1983 as it was in 1994 because of decreased functionality, I still estimate an annual welfare loss of approximately $16.7 billion.*

He argued that this loss occurred because potential 'losses in consumer welfare did not appear to figure into the FCC's regulatory approach'. The framework established by the DMCC has exactly that potential weakness and could easily lead to similar results. There is an extensive research literature showing the value of existing digital services. For example, Brynjolfsson and Oh found "the increase in consumer surplus created by free internet services to be over $100 billion per year in the U.S. alone" in research in 2012.

Downstream of that effect on consumer services is likely to be an effect on investment. In theory, competition regulation will apply based on the services offered in the UK market, not where those tools are developed. In practice, if the UK is not one of the leading markets where new digital services are deployed, it will make less sense over time for companies to build those tools here. It is a common intuition that the large domestic market is part of the reason for the success of the US. If the UK consumer market is less sophisticated, that will have the opposite result.

This effect will be exacerbated because it is coming alongside merger decisions and legislation (in the form of the Online Safety Bill) that many in the tech sector have seen as unreasonable. In fact, the UK is gaining a reputation as a hostile regulatory environment, which will undermine the Government's aspirations to attract technology investment. That is on top of other recent policy choices that are likely to discourage investment, such as increasing corporation tax, or tougher scrutiny by HMRC of R&D tax credit claims.

2) Keep the current Bill broadly as it stands, but with more checks and balances

A better option is to keep the Bill, but include normal checks and balances that such a piece of legislation would have, and thereby reassure regulated companies that they will be able to manage its effects. This could include:

(1) Allowing normal appeals, removing the shift to a judicial review standard, so that there is an effective second opinion on major CMA decisions under the DMCC. Other approaches, whether the current proposal or new kinds of limited appeals, are likely to lead to more mistakes by the CMA making their way into market decisions, with major effects on consumers.
(2) Improving the procedural framework, ensuring that consumer impacts are fully considered at each stage by the CMA, reviewing the 'indispensability' standard and shifting the consideration of countervailing benefits in particular to the start of the code of conduct process.
(3) Either removing some kinds of conduct requirements entirely (as interventions that should not be undertaken by a regulator without democratic involvement), restricting them to specific markets and types of intervention (as in the EU's DMA), or setting a general duty on the CMA to minimise the range of requirements in each given SMS firm code of conduct.
(4) Requirements for regular reviews either of the Bill as a whole, or for assessments of how competition is operating, so that codes of conduct are scaled back as and when markets become more obviously competitive.

There would still be the potential for large unintended harms, but these kinds of changes could materially impact how the DMCC affects business decisions. In particular, they might limit the extent that the additional risk the law creates for regulated companies will discourage the deployment of new services.

3) Delay the Bill and watch the DMA launch

When the Bill was first conceived, there was a sense that the UK could pioneer these new regulations. It is now going to follow the DMA (likely by at least a year). But that creates a different kind of opportunity.

By following the EU, the UK can learn from its experience, see which requirements in the DMA prove most effective, where there are disproportionate costs and where there might be gaps in the regulatory regime. This would allow the UK to learn from the EU's example and develop a framework others might seek to emulate, rather than simply posing an alternative to the EU based on the same evidence base and similar analysis. If the DMA proves a deterrent to technology companies, it will also position us to attract their business and investment.

It is important to remember here that this would not leave us in some kind of regulatory no man's land. The CMA will still have its extensive existing powers, which it is already using freely to regulate digital markets (for better or for worse) – as in the Microsoft/Activision Blizzard decision.

Given the scale of the decisions involved and the potential for unintended consequences, it is more important to get new powers right than to implement a new framework fast.

The Government could therefore announce that it is considering amendments to the Bill to address concerns around the extent of the powers being granted to the CMA, and to formally review the lessons for UK policy of the DMA's coming into force. This process of learning and working within existing powers would fit well with the Government's approach to other regulatory challenges in digital markets, e.g. its AI framework.

While normally finalising legislation might provide certainty, in this case, given how open the process will be for how the CMA uses its powers over years, it is unlikely to product that effect.

In the case of AI, the Government noted that by 'rushing to legislate too early, [they] would risk placing undue burdens on businesses.' Whereas the flexibility in the DMCC is achieved by having enormous, unchecked discretionary powers for the CMA in a single major Bill, in the AI framework the Government has instead set out principles for how it believes regulation should emerge and retained the ability to introduce specific legislation as required.

At least for now, the goal is to use the existing regulatory toolkit effectively rather than removing well-established restraints. It is also worth bearing in mind that the DMCC could itself undermine the framework for AI, by making the UK a riskier place to operate innovative businesses and impeding the kind of innovation (including new business models and consumer services integrated with existing tools) needed for new AI applications to deliver their full benefits.

Conclusion

The DMCC is a major intervention that expands the CMA's powers of economic regulation across a broad range of economic activity. While the process of developing new rules has been going on for some time in one form or another, this Bill is new and needs full scrutiny before it goes ahead. There is too great a risk otherwise that we might undermine the open and dynamic digital markets that have served the UK well up to this point.

Whether it is simpler for ministers to scrap the Bill, amend the Bill, or pause it now that we are no longer in some kind of race with the EU, there is no ticking clock here that means we should not take the time to get this right.

Right now, digital markets are showing their dynamism. UK consumers will pay a heavy price if we undermine that process by stepping in with what looks like a regulatory sledgehammer. The costs of error will be huge. But if we can instead reassure the technology sector that the UK remains a friendly and responsible public policy environment, the rewards will be just as significant.