COMMENT OF THE GLOBAL ANTITRUST INSTITUTE ON THE COMPETITION & MARKET AUTHORITY'S CONSULTATION ON NEW DIGITAL MARKETS COMPETITION GUIDANCE

Introduction

The Global Antitrust Institute ("GAI") submits this Comment to the Competition & Market Authority (CMA) in response to its request for public views regarding the new digital markets competition regime guidance.[1] This Comment is based on our extensive experience and expertise in competition law and economics.[2] As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the GAI commends the CMA for inviting public submissions regarding competition in the rapidly changing digital platform sector.

The CMA's request for public input (hereinafter "Consultation") follows enactment of the UK Digital Markets, Competition and Consumers Act 2024 (the "DMCC Act").[3] The enactment of the DMCC Act follows recent international developments regarding public control of digital platforms, including the EU's Digital Markets Act (DMA) and similar new or proposed laws in other jurisdictions, including Germany (Section 19a of the German Competition Law), India, Brazil, Japan, et al. The Consultation focuses on two guidance documents: (i) the digital markets

---

[1] *Consultation on new digital markets competition guidance, Competition & Markets Authority, United Kingdom.* (June 11, 2024), https://connect.cma.gov.uk/cma-new-digital-markets-regime.

[2] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University, is a leading international platform for economic research and education that focuses on the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. Professor of Law Douglas H. Ginsburg is a Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Adjunct Professor Abbott B. Lipsky, Jr. is Director of the Competition Advocacy Program for the GAI, former Acting Director of the FTC's Bureau of Competition, and former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Dr. Alexander Raskovich, the GAI's Director of Research, formerly served for more than three decades as a research economist in the Antitrust Division of the U.S. Department of Justice. Dario Oliveira Neto is Director of the GAI's Latin America Competition Advocacy Program and a former Adviser to the President of the Administrative Council for Economic Defense (CADE), the antitrust authority of Brazil.

[3] *Digital Markets, Competition and Consumers Act 2024.* (June 04, 2024), https://bills.parliament.uk/bills/3453.

competition regime guidance[4] and (ii) the guidance on the merger reporting requirement for firms with "strategic market status" (SMS)[5] – the British term for the analogous "gatekeeper" designation of digital companies in the EU's DMA. While the first guidance document includes an initial explanation of the substantive and procedural aspects of the 9 chapters of the DMCC Act, the second document provides general information and advice to companies and their advisers on the merger reporting duty for SMS firms. The Consultation invites input regarding these two pieces of draft guidance on the CMA's new functions.

This Comment identifies several economic considerations that suggest caution regarding the application of pro-competition interventions (PCIs)—new tools available for CMA enforcement in digital markets—before developing greater experience with the application of existing antitrust law to digital platforms and the associated proof of harm to consumers. Such experience will provide a better understanding of the reasons for the success or failure of particular antitrust approaches. This Comment describes economic methodologies that support these suggestions.

---

[4] *Digital markets competition regime guidance, CMA 194con Draft, Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024.* (May 24, 2024), https://ehq-production-europe.s3.eu-west-1.amazonaws.com/dd8054596c46ce007497e2d106f96747e2284751/original/1716561443/88f1e743109299eaabfcabd60754accf_Digital_markets_competition_regime_guidance.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKICO37GBEP%2F20240620%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-Date=20240620T150128Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=bdc8a9133777ed447a35f6f95a6ca801ae210a4737c4ae87bb24bfb07b03577f.

[5] *Guidance on the mergers reporting requirements for SMS firms, CMA 195con Draft.* (May 24, 2024), h https://ehq-production-europe.s3.eu-west-1.amazonaws.com/5e3a7cedfd1300d1ab668c5b3417ed25999bbcca/original/1716561481/7cc9895214eba82fee0cfd22cbfd1fda_Guidance_on_the_mergers_reporting_requirements_for_SMS_firms.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKICO37GBEP%2F20240620%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-Date=20240620T150135Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=24c92d076547f25f472ca7a514019440e213723b06aa7c01f1dced5718aa29d7.

I. CONDUCT RESTRICTIONS IN DYNAMIC MARKETS SHOULD BE BASED ON PERSUASIVE EVIDENCE OF HARM TO THE COMPETITIVE PROCESS

Rules governing competitive conduct should be designed to minimize the cost of erroneous decisions, including false positives (erroneously prohibiting procompetitive or neutral conduct) and false negatives (erroneously allowing anticompetitive conduct). Antitrust assessment of particular conduct often hinges upon estimated or predicted competitive effects. Such assessments are necessarily uncertain due to data limitations or other challenges of formulating and applying sound theories and techniques of analysis. The administrative costs of formulating and enforcing legal rules, as well as compliance costs, should also be considered.[6]

In the context of highly dynamic sectors such as those involving digital platforms, the probability and costs of false positive errors are enhanced (relative to more stable, established sectors) by the greater degree of uncertainty involved.[7] The law's reliance on precedent magnifies the cost of erroneous rulings, as incorrect outcomes bind not only the parties to a specific case but also all subsequent market participants that become subject to the same rule. Further, in highly innovative markets, competitive forces – including entry or expansion into new services by existing platforms – may mitigate risks of reduced competition more quickly than can the process of reforming or eliminating restrictive legal prohibitions.

Because new entrants in the digital sector often displace existing products and business methods, government intervention to limit and manage competition whenever a degree of market

[6] Organisation for Economic Cooperation and Development (OECD), *Abuse of dominance in digital markets*, at 10 (2020), https://web-archive.oecd.org/2021-10-31/566602-abuse-of-dominance-in-digital-markets-2020.pdf.
[7] See Geoffrey Manne, *Error Costs in Digital Markets*, *in* GLOBAL ANTITRUST INSTITUTE (GAI) REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).

power arises "in the market" may be much less effective than reliance on the success of competition "for the market". In selecting among regulatory alternatives, policy makers should remain mindful that innovation is the most important source of economic progress, and that innovations are cumulative, often stimulating major follow-on innovations. Thus, laws and regulations that block one innovation may cut off an entire lineage of future improvements. Therefore, in determining the appropriate standards for public control of digital platforms, the legal system should prudently consider all the available evidence before condemning business conduct as harmful to competition.

II. STRUCTURAL MEASURES SUBSTITUTE BRUTE FORCE FOR RIGOROUS ANALYSES OF COMPETITION AND FORMULATION OF RESTRICTIONS

The Consultation seeks input, beyond other substantive and procedural topics, on how it should address the existence of an adverse effect on competition (AEC) and how it should implement pro-competitive interventions (PCIs) for those companies designated as having strategic market status (SMS). The Act provides in Section 19 (5) that CMA intervention will occur only to advance three specific objectives: (a) fair dealing,[8] (b) open choices,[9] and (c) trust and transparency.[10]

[8] Section 19 […] (6) The fair dealing objective is that users or potential users of the relevant digital activity are — (a) treated fairly, and (b) able to interact, whether directly or indirectly, with the undertaking on reasonable terms.
[9] Section 19 […] (7) The open choices objective is that users or potential users of the relevant digital activity are able to choose freely and easily between the services or digital content provided by the undertaking and services or digital content provided by other undertakings.
[10] Section 19 […] (8) The trust and transparency objective is that users or potential users of the relevant digital activity have the information they require to enable them to — (a) understand the services or digital content provided by the undertaking through the relevant digital activity, including the terms on which they are provided, and (b) make properly informed decisions about whether and how they interact with the undertaking in respect of the relevant digital activity..

In addressing these goals, the GAI respectfully suggests that the United Kingdom consider placing less weight on market concentration and individual firms' market share. These measures, while relevant, have insufficient causal correlation with competitive performance. Aside from the extensive economic literature demonstrating this, digital industries in particular have demonstrated an ability to embrace innovation, allowing new entrants and competitive offerings to displace incumbents.[11] As a result, competition in digital industries in particular cannot be assessed effectively by reliance on structural information.[12]

Since 2021, when leadership of the U.S. federal antitrust agencies changed, both U.S. and EU agencies have placed increasing weight on structural factors, such as market share, firm size, and market concentration. However, there is no valid empirical support for relying on these variables to predict anticompetitive conduct or performance. Knowledge of other market circumstances is a major factor and a requirement before one can infer any likelihood of competitive harm.[13] Market shares and concentration have been used appropriately as a floor, so that firms falling below a specific size, and firms competing in unconcentrated markets, enjoy a "safe harbor" protecting them from unwarranted antitrust scrutiny, allowing them to compete and innovate without fear of an investigation or a lawsuit.[14] Furthermore, in certain markets, increased

[11] Geoffrey A. Manne and Alec Stapp, "This Too Shall Pass: Unassailable Monopolies That Were, in Hindsight, Eminently Assailable", Truth on the Market (April 01, 2019), https://truthonthemarket.com/2019/04/01/this-too-shall-pass-unassailable-monopolies-that-were-in-hindsight-eminently-assailable/

[12] Jorge Padilla, Douglas H. Ginsburg, and Koren Wong-Ervin, Dynamic Competition and Antitrust: Quick-Look Inferences From the Analysis of Big Tech's R&D Expenditure Ratios, forthcoming in the Antitrust Law Journal (2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4721216

[13] *See* Organisation for Economic Co-operation and Development (OECD), *Market Concentration - Note by BIAC*, 129th OECD Competition Committee Meeting (2018), *https://one.oecd.org/document/DAF/COMP/WD(2018)72/en/pdf* (hereinafter "*Market Concentration Note*").

[14] *See* U.S. Dep't of Just. and Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010), § 5.3 (a limited number of hard-core cartel offenses are deemed illegal without regard to competitive effect, hence enforcement against such practices is generally warranted without regard to structural factors). (Note that these Guidelines were replaced as of December 18, 2023.)

concentration may be beneficial if circumstances demonstrate that innovation or the provision of higher-quality products requires the additional resources available only to larger firms.[15] But this possibility cannot be assumed without sound definition and detailed scrutiny of the individual market involved.

The Act created a legal threshold to apply the rules only to undertakings with Strategic Market Status (SMS). This legal concept resembles the "gatekeeper" rule of the DMA. In order to be designated as having SMS, a company must have a digital activity (Chapter 2, Section 3), and be linked to the United Kingdom (Chapter 2, Section 4), and the CMA must conduct an assessment to discover whether the undertaking has substantial and entrenched market power (Chapter 2, Section5). In this sense, and differently from DMA's gatekeeper rule, the CMA must carry out an assessment of a period of at least 5 years. Although this assessment has a mandatory turnover condition (Chapter 2, Section 7), the CMA has a degree of discretion when designating an undertaking as having SMS – differently from the European Commission designation rule of gatekeepers on Article 3 of DMA, which is a more prescriptive rule for designation.

When assessing the designation of a company as having SMS, it is crucial to keep in mind that greater market concentration commonly results from greater efficiency provided by new and innovative business models, benefitting users. This is especially likely to be true regarding technology markets, which can evolve quickly, where there is broad scope for innovation that may quickly change the overall structure of the market, the positions of particular firms, and the character of the available products and services.

[15] *See* Market Concentration Note, *supra* note 13.

Even if market shares remain relatively stable for long periods, this is not necessarily an indicator of consumer harm, as there could be an immense amount of procompetitive economic activity and innovation involved in maintaining a firm's market position.[16] Consequently, focusing antitrust enforcement resources on structural characteristics can lead to poor predictions of the metrics that actually matter, including consumer welfare, rates of innovation, and cost of production. Furthermore, digital markets do not have characteristics that have historically attracted antitrust enforcement interest.[17]

Digital markets are characterized by dynamic, robust competition. In these circumstances, the operation of the competitive market offers better opportunities to reach good economic performance than does *ex ante* regulation. Imposing regulation may prevent firms from pursuing some avenues of innovation and thereby constitute a more serious policy failure than applying the prevailing system of antitrust law (even considering the imperfections of that system).[18] The UK should adopt PCIs only when the CMA has clearly established the existence of a market failure and that the PCI will enhance consumer welfare in that specific market.

---

[16] *See, e.g.*, Daniel Martins, *Apple Invests More in Research And Development Today Than Ever*, TheStreet, Sep. 21, 2023, https://www.thestreet.com/apple/news/apple-invests-more-in-research-and-development-today-than-ever.

[17] As Professor Herbert Hovenkamp has explained, "Which industries should the antitrust authorities pursue? You look for industries characterized by slow growth, oligopoly, rigid market shares, and not very big increases in productivity—industries of poor performance. You try to make those industries perform better. With Big Tech, we're looking at probably the most productive part of the economy. The rate of innovation is high. They spend a lot of money on R&D. They are among the most significant patent holders. There's very little evidence of collusion. They compete quite vigorously with each other. They pay their workers relatively well and have fairly educated workforces. None of this is a sign that these are industries we should be pursuing. That doesn't mean they don't do some anticompetitive things. But the idea that we should target Big Tech strikes me as fundamentally wrong-headed". *See*, Robert Armstrong and Ethan Wu, *What Big Tech Antitrust Gets Wrong: An Interview with Herbert Hovenkamp,* FINANCIAL TIMES, Jan. 19, 2024, https://www.ft.com/content/4eec8bc3-c892-4704-ae66-a4432c6d4fd7.

[18] At least one recent study attempts to quantify this effect. *See* Philippe Aghion et al., *The Impact of Regulation on Innovation*, 113 AM. ECON. REV. 2894 (2023) (estimating that "[r]egulation reduces aggregate innovation by 5.7 percent").

III. *EX ANTE* REGULATION IS PRONE TO ERRORS THAT CAN BE VERY DIFFICULT TO RECTIFY

The DMA and the DMCC Act are each fundamentally an *ex ante* determination that certain forms of conduct, when undertaken by specific digital platforms defined as "gatekeepers" or having "SMS," in regard to specific services (*e.g.* social network, browser), are *per se* illegal. In the case of the DMA, this rule applies without regard to potential procompetitive effects of such conduct. In the case of the DMCC, some type of efficiency defense is possible according to Chapter 3, Section 29 (Countervailing benefits exemption).[19] As a result, the foundational legal and economic principles of competition analysis are displaced by an inflexible mandate. DMA proponents argue that this approach minimizes legal costs and creates clear, bright-line rules to prevent anticompetitive conduct. While these objectives should be considered in assessing a body of law or a regulation, minimizing administrative costs (including both private- and public-sector costs), is not and should not be regarded as the sole objective of rules governing competition. Rather, there are business behaviors and conduct that, in certain instances, can harm the competitive process and, in turn, harm consumers. Identifying when harm is occurring and when it is not occurring are critical because condemning procompetitive conduct is immensely costly to society, just as is permitting anticompetitive conduct. Thus, competition law or regulation should consider *both* administrative costs *and* error costs. The mere fact that the DMA and the DMCC were passed gives no information on whether consumers will ultimately be better off – nor does it indicate that administrative costs will be lower relative to the counterfactual. Either way, bypassing

[19] Section 29 – Countervailing benefits exemption […] (2)The countervailing benefits exemption applies where— (a) the conduct to which the investigation relates gives rise to benefits to users or potential users of the digital activity in respect of which the conduct requirement in question applies, (b) those benefits outweigh any actual or likely detrimental impact on competition resulting from a breach of the conduct requirement, (c) those benefits could not be realised without the conduct, (d) the conduct is proportionate to the realisation of those benefits, and (e) the conduct does not eliminate or prevent effective competition.

competition law in the name of saving administrative costs via regulation is an exceedingly poor bargain.

IV. RULE OF REASON VS. GATEKEEPER / SMS APPROACH

The DMA introduces the term "gatekeeper," which the European Commission (EC) defines as a digital platform that "provide[s] an important gateway between businesses and consumers in relation to core platform services."[20] As previously discussed, the DMCC introduces the term "Strategic Market Status" and, according to Chapter 2, Section 2 (Designation of Undertaking), (2), "the SMS conditions are that the undertaking has – (a) substantial and entrenched market power (see section 5), and (b) a position of strategic significance (see section 6), in respect of the digital activity.

Regarding the DMA's gatekeepers, these include smartphone operating systems such as Alphabet's Google Android, social media platforms such as Meta's Facebook and ByteDance's TikTok, and search engines such as Google Search. The CMA has not yet designated any company as having SMS. A company deemed to be a gatekeeper for a core service (DMA) or having SMS (DMCC) must follow a list of obligations. The most notable include a ban on self-preferencing and mandatory interoperability with rival services.[21] These *ex ante* prohibitions contrast with the case-by-case analysis employed under the rule of reason in the U.S. and "by-effect" analysis in the EU, which seek to allow procompetitive conduct while condemning anticompetitive behavior.

---

[20] Press Release, European Commission, Digital Markets Act: Commission designates six gatekeepers (Sept. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328.

[21] EUROPEAN COMM'N, *The Digital Markets Act: ensuring fair and open digital markets*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited Apr. 4, 2024).

For example, security experts have warned that WhatsApp, a designated gatekeeper for instant messaging service, will be forced to compromise its encryption services because the DMA's interoperability requirement will disrupt its network.[22] Under the DMA, however, there will be no opportunity to consider this potentially serious risk to the security of information within that network and, under the DMCC, it is not clear whether a "privacy" defense could be used as a countervailing benefit of exemption. This is just one illustration of the disadvantages of prescribing *ex ante* rules, as distinct from the case-by-case analysis characteristic of existing competition law.

Similarly, prescriptive *ex ante* rules cannot account for relevant differences among the distinct markets that may be affected. Digital services rely on a variety of business models that involve distinct relevant markets, different customers and uses, and other distinct characteristics. Grouping all of these under the broad umbrella of "digital markets" short-circuits the fact-based assessments required for proper competition analysis. Inevitably, such an inflexible approach is likely to reduce competitive performance relative to case-by-case analysis, since it is unlikely that the same *ex ante* regulatory limitations will have equivalent effects across the entire range of markets and conduct subject to the many restrictions and requirements of the DMA or the DMCC.

The argument for new regulation is also undermined to the extent that, under current antitrust law, agencies already have authority to impose upon an offending company obligations like those required by the DMA. A very recent example is the European Commission's €1.84 billion fine imposed on Apple for abuse of dominant position.[23] "The Commission found that

[22] Corin Faife, *Security experts say new EU rules will damage WhatsApp encryption*, THE VERGE, Mar. 28, 2022, https://www.theverge.com/2022/3/28/23000148/eu-dma-damage-whatsapp-encryption-privacy.
[23] *See* Press Release, European Commission, Commission fines Apple over €1.8 billion over abusive App Store rules for music streaming providers (March 4, 2024), https://ec.europa.eu/commission/presscorner/detail /en/ip_24_1161.

Apple used 'anti-steering' provisions to prevent iOS app developers from informing iOS users about alternative and cheaper music subscription services available outside of the app. This is illegal under EU antitrust rules [Article 102(a) TFEU]."[24] However, this is the same anti-steering conduct that is now prohibited *ex ante* by DMA Articles 5(4) and 5(5). Therefore, the EU could have declared Apple's anti-steering conduct illegal according to Article 102(a) and imposed an appropriate remedy using existing competition law. Prohibiting certain practices through antitrust-law enforcement can minimize the risk of both false-positive and false-negative errors, to the ultimate benefit of competition and consumers.

Finally, it is impossible to make accurate predictions at this time that *ex ante* digital market regulation will be successful in another jurisdiction. For example, in 2023, South Korea's Fair Trade Commission announced a plan to introduce the Platform Competition Promotion Act (PCPA) – a law based on the DMA. However, in early 2024, South Korea paused work on this legislation[25] to gather further input. Prudence suggests that the implementation of such ex ante rules should await observation and assessment of the European Commission's experience with application and enforcement of the DMA, before moving forward with significant PCI decisions.

For a critical view of the EC's decision on the Apple case, *see* Randall Picker, *The European Commission Fines Apple 1.84 Billion Euros and Spotify Still Isn't Happy*, PROMARKET, March 19, 2024, https://www.promarket.org/2024/03/19/the-european-commission-fines-apple-1-84-billion-euros-and-spotify-still-isnt-happy/. For the US *Epic v. Apple* case, in which the US has decided on a different ground of similar illegal antitrust allegations of Apple conduct regarding the iOS App Store, *see* John M. Yun, *How* Epic v. Apple *Operationalizes* Ohio v. Amex, YALE J. ON REG. BULLETIN (forthcoming) (Geo. Mason L. & Econ. Rsch. Paper NO. 24-05 2021), available at SSRN: https://ssrn.com/abstract=4742671.

[24] *See* Press Release, *supra* note 23.

[25] *See*, Kwon Soon-wan, *South Korea hits pause on anti-monopoly platform act targeting Google, Apple,* THE CHOSUN DAILY, Feb. 08, 2024, https://www.chosun.com/english/national-en/2024/02/08/A4U4X6TWEFFOXF7ITCS 5K6SZN4/.

V. FLAWS WITH THE NOTION OF GATEKEEPERS / SMS

Beyond the question whether *ex ante* regulation will be more effective than *ex post* assessment of competitive practices in the digital sector, there are other fundamental questions about the DMA's notion of gatekeeper firms or the DMCC's notion of an undertaking that has SMS. Meredith Broadbent, senior advisor at the Center for Strategic and International Studies, notes in her report on the DMA that European firms are concerned that the current usage thresholds that are met only by American and Chinese companies may one day apply to them.[26] Essentially, these firms are concerned they will be punished for becoming too successful, and some may hesitate to make the investments necessary to grow if as a result they become gatekeepers subject to the various obligations of the DMA.

The gatekeeper framework gives little recognition to the creative destruction that has long characterized the digital technology sector. History demonstrates clearly that if innovation is allowed to flourish, gatekeepers will eventually be displaced by other innovative firms or by new services. In 2006, the social media website MySpace became the most-visited website in the U.S., surpassing even Google and Yahoo! At the time, MySpace was perceived to be invincible. By 2009, however, Facebook had displaced MySpace. Now the sector is fiercely competitive, involving multiple firms such as TikTok, Instagram, X (formerly Twitter), Snapchat, Pinterest and others.

---

[26] *See* Meredith Broadbent, *The Digital Services Act, the Digital Markets Act, and the New Competition Tool: European Initiatives to Hobble U.S. Tech Companies,* CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/201109_Broadbent_Digital_Services_Act_Digital_Markets_Acts.pdf.

Experience has been similar in other digital markets and in other countries. In 2008, the social media platform Orkut, a Google subsidiary, was the most visited website in Brazil and India[27]. However, Facebook won the competitive race throughout the years, and Google decided to close Orkut in June 2014. And this digital replacement phenomenon is not only applicable to the social media market. The PCs (TRS-80, Atari, etc), Mobile (Nokia, Blackberry, HP), Search Engine (Yahoo and Microsoft), Instant Messaging (AOL), Retail (Walmart), Music, and Video (Blockbuster) digital markets also have experienced successive winners in competition for the market.[28]

Applying *ex ante* restrictions to the gatekeepers of today ignores recent economic history and undermines competition by handicapping some competitors and favoring others. Further, as mentioned previously, even if an incumbent enjoys persistent success over a relatively long period, as Microsoft's Windows has, this is not necessarily an indicator of market deficiencies. Instead, it is perhaps more likely an indicator that the product continues to create a great deal of consumer surplus.

VI. "SELF-PREFERENCING" FAILS TO MEET THE CRITERIA FOR *PER SE* CONDEMNATION

In recent competition-policy debates, "self-preferencing" by digital platforms is frequently identified as a practice in need of antitrust or other additional regulatory intervention. The term "self-preferencing" is relatively new to the policy lexicon, and there is no generally accepted definition. However, it usually seems intended to refer to platform practices giving some form of

[27] *See* Venkat Ananth, *The Rise, Fall and Subsequent Death of Orkut,* Mint (2014), https://www.livemint.com/Consumer/zAYIirsyDYC2ZVcNxGkXcJ/The-rise-fall-and-subsequent-death-of-Orkut.html.
[28] *See*, Geoffrey A. Manne and Alec Stapp, *supra* note 11.

priority to the platform's own products or services over those of third parties. Recommending a platform's own products on its mobile application but not those of rival suppliers of the same product is one example. Such methods, however, are not unique to digital markets.[29] They occur in all sectors of the economy in various forms, including for example labeling and shelf placement of physical products in brick-and-mortar stores.

In response to the fast growth of the industry, antitrust authorities worldwide have become increasingly aware of self-preferencing practices by digital platforms. Several agencies have been concerned about its potential anticompetitive effect in digital markets and, consequently, have proposed regulatory measures to prohibit self-preferencing. The EU established the DMA as a separate *ex ante* regulatory framework specifically targeting large online platforms to prevent not just direct harm but the possibility of future harm, claiming this is justified by the fast evolution of large online platforms and their significant network effects.[30]

The EU "do's and dont's" listed in the DMA expressly include self-preferencing: a designated gatekeeper company must not treat its own products and services more favorably than similar ones provided by third parties on the gatekeeper's platform.[31] Japan also introduced the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), which would allow designation of a "specified digital platform provider" (SDPP).[32] Although the Act does not directly

---

[29] Duquesne, et al., *What Constitutes Self-Preferencing and its Proliferation in Digital Markets*, GLOBAL COMPETITION REVIEW (Dec. 8, 2023), https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/ article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets#:~:text=At%20the%20most%20basic%20level,that%20operate%20on%20the%20platform.

[30] *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0842&qid=1628694331470.

[31] *See The Digital Markets Act: ensuring fair and open digital markets*, *supra* note 26.

[32] Ministry of Economy, Trade and Industry, Summary of Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/sum_tfdpa.pdf (last visited Apr. 19, 2024).

prohibit conduct by SDPP's, it requires them to report the practice and to provide reasons for search rankings that favor their own products or services. The DMCC Act has also expressly included self-preferencing as one of the "permitted types of conduct requirement"[33] on Section 20(3)(b) that permits CMA to act and operate a PCI.

Professor Michael Salinger, a former Director of the Bureau of Economics, U.S. Federal Trade Commission, has explained how self-preferencing may result from a rational business decision to choose a vertical or conglomerate merger in order to eliminate double marginalization (EDM).[34] This generally has the procompetitive effect of reducing prices. Accordingly, self-preferencing conduct should not be condemned *per se* (for example, by treating it as an exclusionary strategy).[35] He further explains that self-preferencing conduct in vertical mergers may result from a change in price incentives within the supply chain, which will result in reduced profits for competitors.[36] Depending on the model, data, variables, and calibration used for a vertical merger, analysis may predict a gain or a loss for consumers. This possibility of different outcomes poses a significant challenge for enforcement policy.[37] For this reason policymakers may indulge their own version of self-preferencing, by choosing presumptions over the difficult work of case-by-case analysis.[38]

---

[33] Section 20 – Permitted types of conduct requirement […] (3) Requirements are within this subsection if they are for the purpose of preventing a designated undertaking from — […] (b) using its position in relation to the relevant digital activity, including its access to data relating to that activity, to treat its own products more favourably than those of other undertakings.

[34] Michael A. Salinger, *Self-preferencing*, *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 10, 330, 333 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).

[35] *Id.* at 335, citing Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

[36] *Id*. at 340.

[37] *Id*. at 343.

[38] *Id.* at 343.

Given that consumers may benefit from vertical integration, a *per se* rule strictly prohibiting self-preferencing conduct is not consistent with protection of competition rather than competitors. A case-by-case analysis using an effects-based approach continues to be the better way to assess the competitive effect of self-preferencing conduct, compared to *per se* condemnation of all such conduct.[39]

While antitrust agencies in the U.S. and other countries have raised concerns about self-preferencing, the focus on harm has been misplaced. Most notably, decreasing reliance on – and even rejection of – the consumer welfare standard among some enforcement agencies has fundamentally altered the consensus view of antitrust interpretation that has been widely followed around the world for more than 40 years. At that time, in response to economic and legal scholarship scrutinizing then-recent U.S. enforcement experience, the U.S. Supreme Court – in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[40] – endorsed the principle that antitrust law focuses on preventing harm to competition rather than to competitors. This basic theme has been repeated in numerous U.S. antitrust decisions since, and has been accepted by competition authorities in a number of other jurisdictions. For example, in 2014, the Court of Justice of the European Union, deciding the Intel rebate case, stated that:

> 133. In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market (see, inter alia, judgment of 27 March 2012, *Post Danmark,* C-209/10, EU:C:2012:172, paragraph 21 and the case-law cited).

[39] Jonathan Jacobson & Ada Wang, *Competition or Competitors? The Case of Self-Preferencing*, 38 ANTITRUST MAGAZINE 13 (Fall 2023) (describing analysis of self-preferencing conduct under U.S. antitrust law).
[40] 429 U.S. 477 (1977).

> 134. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (see, inter alia, judgment of 27 March 2012, *Post Danmark,* C-209/10, EU:C:2012:172, paragraph 22 and the case-law cited).[41]

As Professor John Yun points out, "harm to rivals is a component of almost every anticompetitive theory of harm (e.g., foreclosure and predatory pricing), [however] the ultimate arbiter is the impact on consumers."[42] There is an inherent danger in equating procompetitive conduct, such as technological advances and innovation, with anticompetitive foreclosure.[43] For example, Amazon may promote products through its "Fulfillment by Amazon" program over those distributed by third-party manufacturers. While this no doubt leads some consumers to choose products fulfilled by Amazon rather than third-party distributors, that is not necessarily an action constituting the type of conduct the antitrust laws are meant to prevent.[44] Prohibiting conduct *ex ante* ignores the potential procompetitive benefits of this and other forms of self-preferencing.

Amazon may prefer its own delivery service because it can better guarantee the quality of distribution, including timeliness and other service variables and terms regarded as important by customers. Informing customers of products for which Amazon can guarantee quality and ensure

---

[41] *See* Judgment of 6 September 2017, Intel, C-413/14 P, ECLI:EU:C:2017:632, paragraphs 133 and 134, https://curia.europa.eu/juris/document/document.jsf;jsessionid=936D0183BBC46E430369989BE5CC60D1?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=312251.

[42] John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72:2 SOUTH CAROLINA L. REV. 305 (2021).

[43] GLOB. ANTITRUST INST., *Justified Regulatory Reform in Antitrust Requires Cost-Benefit Analysis: Global Antitrust Institute Comment to the Australian Competition & Consumer Commission's Digital Platform Service Inquiry*, Interim Report No. 5 (Regulatory Reform) (Geo. Mason L. & Econ. Rsch. Paper No. 23-03, Jan. 23, 2023), available at SSRN: https://ssrn.com/abstract=4335282 (hereinafter "ACCC Comment"),

[44] Yun, *supra* note 48, at 430 ("[T]he claim that harm to rivals, in of itself, constitutes harm to the competitive process is one that was long ago—and properly—discharged by antitrust jurisprudence."); *see also*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 488, 489 (1977) ("[I]njury of the type the antitrust laws were intended to prevent . . . should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

quick delivery allows customers to select products best serving their needs. If a rigid rule is imposed and platforms are barred from preferring their own offering on their own platforms, they may choose not to sell competitors' products at all. This may be a more serious threat to competition than the preferencing conduct itself. Restricting such practices without considering these procompetitive benefits is potentially a costly policy approach.

A recent article by Emilie Feyler and Veronica Postal[45] reviewed the economic literature on self-preferencing algorithms (the rules by which automated data-processing techniques determine, for example, how individual search results are ranked in a list), since they are the ones that are mainly addressed by digital platform regulations and current antitrust cases worldwide. They conclude:

> There is no consensus from the economic literature on whether procompetitive benefits or possible anticompetitive considerations prevail in the context of self-preferencing algorithms used by digital platforms. Nor is there a consensus on the welfare effects of a policy intervention to correct bias in algorithmic recommendations. Determining the net impact of self-preferencing algorithms on competition and consumer welfare requires individualized analysis accounting for the workings of specific algorithms, competitive context, and market environment.

As noted in a GAI submission to the German *Bundesministeriums für Wirtschaft und Energie* and the Australian Treasury on the Australian Competition & Consumer Commission's Digital Platform Services Inquiry:

> [A] platform may engage in self-preferencing for legitimate and procompetitive reasons. This point is self-evident from its widespread use across the digital economy – irrespective of a firm's market share. Considering "bias" as inherently a cause of competitive harm runs the risk of equating procompetitive conduct, such as technological advances and innovation, with anticompetitive foreclosure. For example, a digital platform's offer of an

[45] *See* Emilie Feyler and Veronica Postal, *Can Self-Preferencing Algorithms be Procompetitive?,* CPI ANTITRUST CHRONICLE, June 2023.

> enhanced product that provides additional benefits to consumers could be considered anticompetitive. The critical question should be whether the underlying conduct benefits consumers through innovation and an improved product rather than whether it makes life more difficult for rivals. The mere existence of own-content bias itself does not answer this critical question. Conduct that harms rivals merely because it provides a more valuable product and, therefore, attracts consumers is the essence of competition. It illustrates the core logic of the maxim that competition law protects competition, not competitors.[46]

In the final report produced by the Australian Competition and Consumer Commission (ACCC), the agency considered digital platform practices, such as self-preferencing. The report recognized, however, that self-preferencing conduct "often" has positive effects.[47]

Self-preferencing can have substantial procompetitive benefits. It manifests itself in many forms, such as private labeling, shelf-space positioning, and using proprietary technology and inputs. Antitrust approaches that condemn practices *ex ante* – absent persuasive evidence of systematic harm from such practices – moves antitrust away from an effects-based approach to that of an earlier era when many procompetitive practices were mistakenly condemned *per se*.[48] This regulatory approach can be particularly harmful to consumers in the growing and innovative economy of the United Kingdom.

---

[46] GLOB. ANTITRUST INST., *Before the Federal Ministry of Economic Affairs and Energy "GWB Digitalization Act" Comment of the Global Antitrust Institute, George Mason University 11-12 (*Geo. Mason L. & Econ. Rsch. Paper No. 20-31, Nov. 11, 2020), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728105.; *see also*, ACCC Comment, supra n.49, at 10.

[47] "Although self-preferencing conduct is often benign, self-preferencing conduct that leverages market power over a key online service into a related service, which is not justified by a procompetitive rationale, can distort competition and decrease consumer welfare." *See* Australian Competition & Consumer Commission (ACCC), *Digital Platform Services Inquiry*, Discussion Paper for Interim Report No. 5: updating competition and consumer law for digital platform service, (February 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services% 20inquiry.pdf (hereinafter "ACCC Public Inquiry").

[48] *See* ACCC Comment at 11 (citing Bruce H. Kobayashi & Joshua D. Wright, *Antitrust and Ex-Ante Sector Regulation, in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020)).

VII. COMPULSORY INTEROPERABILITY MAY RESTRICT COMPETITION AND INNOVATION, AND SHOULD BE APPROACHED SKEPTICALLY

Among the competition authorities that have enacted or are considering enhanced antitrust limits or regulation of digital platforms, several have addressed the concepts of mandatory data sharing and interoperability obligations.[49] The DMCC Act has also expressively included interoperability as one of the "permitted types of conduct requirement"[50] on Section 20(3)(e) that permits CMA to act and make a PCI.[51] The discussion in this section explains that such additional limitations on digital-platform conduct, while ostensibly competition-enhancing in the short run, are more likely in the long run to reduce competition and incentives to innovate.

Competition authorities and private-sector advocates for mandatory interoperability argue that it will reduce consumer switching costs, lower barriers to entry, and enable more robust competition, given the perceived dominance of large digital players.[52] Missing from these assessments is whether disrupting a firm's basic business methods and requiring it to share resources acquired through its own substantial and costly investments will result in an ultimate benefit to competition and consumers. As U.S. Supreme Court Justice Stephen Breyer pointed out in a case involving regulatory requirements for such mandatory sharing, "[I]ncreased sharing by

[49] *See, e.g.,* Digital Markets Act *supra* note 37; ACCC Public Inquiry *supra* note 53.
[50] Section 20 – Permitted types of conduct requirement […] (3) Requirements are within this subsection if they are for the purpose of preventing a designated undertaking from — […] (b) using its position in relation to the relevant digital activity, including its access to data relating to that activity, to treat its own products more favourably than those of other undertakings.
[51] Section 20 – Permitted types of conduct requirement […] (3) Requirements are within this subsection if they are for the purpose of preventing a designated undertaking from — […] (e) restricting interoperability between the relevant service or digital content and products offered by other undertakings.
[52] Organisation for Economic Cooperation and Development (OECD), *Data portability, interoperability and digital platform competition - Summaries of contributions,* OECD Competition Committee Meeting, at 4 (2021), https://one.oecd.org/document/DAF/COMP/WD(2021)44/En/pdf. Hereinafter "OECD Interoperability Report."

itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[53]

A principal concern underlying common interoperability measures is to enable and promote competition by ensuring that services offered by different suppliers can communicate and work with one another. However, such measures can also negatively affect innovation incentives, limiting their procompetitive potential.[54]

Another asserted benefit of interoperability obligations is that they could provide competitive discipline for market leaders by boosting rivals' success and putting all digital platforms on a level playing field. However, it is unclear whether such a policy would actually succeed. In fact, mandatory interoperability could reinforce the market position of incumbents and provide platforms with additional mechanisms to impede rivals. If a dominant platform implements product and service features and protocols of its own proprietary design across an entire market, it may have increased opportunities to use its unique in-depth knowledge of the platform to disadvantage other platform users (its competitors). This could be a means to enhance use of its market power.[55]

Dominant firms may engage in a multitude of strategies to maintain "moats" around their core products and mitigate the effect of interoperability measures.[56] For example, under a regime mandating publication of APIs,[57] market leaders might engage in "bad" coordination, *i.e.*, releasing

---

[53] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 429 (1999) (Justice Breyer, concurring).
[54] *See* OECD Interoperability Report, *supra* note 54 at 22.
[55] OECD Interoperability Report at 23.
[56] Amelia Fletcher, *Digital Competition Policy: Are Ecosystems Different?,* OECD Competition Committee Meeting Note at 9 (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf.
[57] APIs, application program interfaces, are an often-discussed method of implementing interoperability. This method requires digital platforms to have a common technical interface to enable communication and interaction. A

small, inefficient upgrades to the APIs, which can have a fatal effect on the rival firms forced to adopt the new system.[58] The market leaders could also standardize the technology in an overly technical manner with the intent to hinder rather than facilitate entry.[59] Finally, incumbents would have unprecedented and disproportionate visibility into competitor activities, which they can use to engage in anticompetitive strategies.[60]

Data sharing or interoperability obligations require some system to define and enforce such obligations. In discussing the impact of forced sharing requirements, Justice Breyer said the following about subsequent regulatory burdens:

> Even the simplest kind of compelling sharing . . . means that someone must oversee the terms and conditions of sharing. . . . Rules that force firms to share every resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms. . . . Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to the single competitor, risk costs, that . . . may make the game not worth the candle.[61]

---

web service or an API provides this interface. When provided by a digital service to third parties, APIs theoretically can allow streamlined access to a defined set of data or functionality from the service. For a more extended discussion of what APIs do, *see* OECD Interoperability Report at 12–13 (citing Chris Riley, *Unpacking Interoperability in Competition*, 5:1 J. OF CYBER POLICY 94, 99 (2020), available at: https://doi.org/10.1080/23738871.2020.1740754).

[58] *See* John M. Yun, *The Role of Big Data in Antitrust*, 241–242 (citing U.S. FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000)).

[59] *Id. See, e.g.*, Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 REV. OF NETWORK ECON. 460, 477 (2008) (providing an example of how the cable modem services industry improved after the FCC removed the "open access" regulation).

[60] *See* Gabriel Nicholas and Michael Weinberg, *Data Portability and Platform Competition: Is User Data Exported From Facebook Actually Useful to Competitors?*, ENGELBERG CENTER ON INNOVATION L. & POLICY, NYU SCHOOL OF LAW at 21 (Nov. 2019), https://www.law.nyu.edu/sites/default/files/Data%20Portability%20and%20Platform%20 Competition%20-%20Is%20User%20Data%20Exported%20From%20Facebook%20Actually%20Useful%20to%20Competitors.pdf

[61] *AT&T v. Iowa Utilities Board*, 525 U.S. at 428–430.

Conclusion

Competition authorities throughout the world are now considering a variety of policy responses to the enormous range of issues raised by the growth and success of digital platforms. To address the competition aspects of these issues, some, such as the EU and Germany, have already implemented additional sectoral regulation or made substantial changes to existing competition law. The UK is the most recent example with the enactment of the DMCC Act. As with any substantial change to public policy, care should be taken to ensure that policy innovations do more good than harm. In the dynamic sector of digital platforms, where growth and evolution are rapid and profound, premature changes in policy and law can have significant negative long-run effects. Care in the design of new rules and institutions is justified because early investment in policy research and careful case-by-case analysis can provide significant benefits in avoiding the imposition of costly and anti-competitive restrictions in response to perceived problems that turn out to be short term. Mistaken legislative, legal and regulatory changes tend to be extremely difficult to undo and can therefore result in limitations on competition and innovation for decades. The application of the CMA's new powers should be limited to the cases in which the previous assessment realized by the authority has duly proven a market failure and that a specific intervention would solve that problem, thereby enhancing the consumer welfare of British consumers of digital activities.