# BRAVE NEW WORLD?

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**BRAVE NEW WORLD?**
By Stephen Kinsella & Karla Perca Lopez

**UPPING THE "*ANTE*" ON COMPETITION REGULATION: GAMBLING WITH THE FUTURE OF BIG TECH?**
By Ben Bradshaw, Peter Herrick & and Sheya Jabouin

***EX ANTE* REGULATION IN AN ERA OF FAST-PACED INNOVATION – CONNECTING THE TIME AND LOCUS OF REGULATION**
By Alberto Quintavalla & Leonie Reins

**BEWARE *EX ANTE* REGULATION: INTRODUCING "CUT AND PASTE" *EX ANTE* REGULATIONS IN CANADA AGAINST SELECT BIG TECH COMPANIES IS JUST BAD ECONOMIC AND LEGISLATIVE POLICY**
By John Pecman & Huy Do

**WILL THIS MARK THE END OF A FINANCIAL ASSAULT ON THE INCARCERATED AND THEIR FAMILIES?**
By Mignon Clyburn

**BRUSSELS EFFECT? CONVERGENCE AND DIVERGENCE ON PLATFORM REGULATION IN TRANSATLANTIC COMPETITION POLICY**
By Will Leslie & John Eichlin

**REGULATORY SANDBOXES: *EX ANTE* REGULATION OR COMPETITION POLICY?**
By Cristina Poncibò & Laura Zoboli

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The UK's Competition and Markets Authority is expected soon to get new powers to regulate digital companies with Strategic Market Status ("SMS"). Once the new regime is in place, the nature of the relationship between the newly regulated companies and the DMU will significantly change. The first challenge for both will be to navigate the transition towards this new relationship, which will be a continuous, long term relationship. This shift may be a challenge for both given the often-confrontational nature of their interactions so far. The second challenge will be for the CMA to choose between its different enforcement powers. There are several factors that the CMA may consider in making this decision, but it would be reasonable to assume that the CMA will have an incentive to choose to use its *ex ante* powers. This raises the question of what space will be left for abuse of dominance cases in digital markets, especially as behaviors addressed under both tools can be similar.

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The UK's Competition and Markets Authority ("CMA") is expected soon to get new powers to regulate digital companies with Strategic Market Status ("SMS"). While in the EU the Digital Markets Act ("DMA") has already conferred similar powers on the European Commission, in the UK, after months of uncertainty, the Digital Markets, Competition and Consumer Bill is expected to be introduced this month. In addition to its current antitrust, mergers, market investigations and consumer enforcement powers, the CMA (more precisely, the Digital Markets Unit ("DMU"), currently operating in shadow form) will formally become an *ex ante* regulator from as early as Q1 2024.[2]

# 01

## FROM ANTITRUST TO "TRUST"

Once the new regime is in place, the nature of the relationship between the newly regulated companies and the DMU will substantially alter. The first challenge for both will be to navigate the transition towards this new relationship.

Interactions between the CMA and SMS firms so far have taken place in the context of antitrust investigations, merger reviews, consumer enforcement cases and market studies or investigations. Therefore, a dialogue only began when there was a perceived "problem," and often where there was a complaint.

The new reality will necessarily be a continuous, long-term relationship, rather than entirely case-specific. It is therefore in the interest of a well-functioning regime, as well as of the DMU and SMS firms, to develop a relationship based on trust. This may be a challenge for both, given the nature of their interactions so far.

SMS firms will not only need to comply with the new rules, but also consider how they should manage the new relationship with the DMU (including for example, information requirements, reporting obligations, stakeholder workshops, etc.), with regulatory affairs teams and technical experts likely playing a more prominent role, rather than interactions being driven purely by legal teams in highly confrontational contexts. The DMU will need to find the right balance between trust and the risk of regulatory capture.

It is also far from clear yet what will be the status and involvement of third parties, whether competitors, customers, or consumer bodies. We would expect they would still be bringing complaints and raising issues with the DMU, but will they be given a more active role in relation to monitoring compliance and developing their own continuous relationship with the DMU?

# 02

## HOW WILL THE DMU'S *EX ANTE* POWERS COEXIST WITH THE CMA'S POWERS?

The second challenge will be for the CMA to choose between its different enforcement powers, especially where many of the behaviors that the new regime intends to tackle can also be addressed by using its current tools.

In the EU, it appears that the DMA will be the primary tool of choice, with the traditional antitrust powers reserved for "new" behaviors. These new behaviors could then inform new obligations to be added to the DMA at a later stage,[3] much as the DMA itself was based on experience of particular difficult cases.

In the UK, the likely evolution is less clear. At present the CMA and regulators with concurrent competition powers[4] cooperate with each other and coordinate case allocation

2 Assuming Royal Assent in January 2024, however timings are still uncertain.

3 For example, France's Autorité de la Concurrence's 2023-2024 roadmap mentions that "The DMA and competition law are two complementary and mutually reinforcing tools. Competition law will apply to operators and practices not covered by the DMA and will guide future developments of this text." See https://www.autoritedelaconcurrence.fr/sites/default/files/2023-03/feuille-de-route-2023-2024-EN.pdf.

4 Sector regulators can enforce competition law to deal with anti-competitive agreements or abuses of a dominant position in their respective sectors (with some exceptions, e.g. to issue guidance on penalties or on commitments and to make procedural rules).

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according to the concurrency framework established in 2014.[5] When deciding on which tool to use, regulators must take into account the primacy of competition law, (that is, whether the use of their competition powers under the Competition Act ("CA98") is more appropriate) before using their sectoral powers. Each regulator is expected to determine which tool is more appropriate on a case-by-case basis.

It remains to be seen how the CMA will determine whether its CA98 powers or its new *ex ante* regulation powers will be more appropriate, especially in cases where potentially anticompetitive behaviors could be investigated using either tool.

Reasons provided by regulators in the recent past for choosing to use their sectoral regulator powers over their antitrust powers were often that the issues did not involve competition concerns. Other reasons included that the use of sectoral regulation allowed a more targeted approach to a problem of wider relevance in the market, that it would allow a timelier outcome,[6] or that regulatory powers would be able to achieve a more comprehensive solution.[7]

What factors will the CMA consider in making a choice? The CMA is likely to consider the expected speed of intervention, the ability to investigate and intervene beyond narrowly defined relevant markets, and the expectation for a change in market conditions resulting from an investigation. Other relevant considerations will likely be whether complaints are made in relation to a breach of antitrust rules or *ex ante* codes of conduct, potential deterrence effects, and resources required. The appeals standard may also play a role – if the *ex ante* powers are subject to judicial review, rather than the full merits appeal that follows antitrust decisions (which provides more accountability for the substantive analysis underpinning decisions), the regulator might be tempted to lean towards the former route.[8]

Although there may be pros and cons associated with each of these factors, overall, it would be reasonable to assume that the CMA will have an incentive to choose to use its *ex ante* powers. One major reason could be that it has already taken a designation decision, and has already conducted an assessment of competition conditions and established tailored codes of conduct, while at the same time, the expectation for a participative approach introduces flexibility to enforcement, and decisions are subject to defined timescales.

# 03
# CONCLUSION

The nature of the relationship between the DMU and SMS firms will change once the new digital competition regime is in operation. It will transition from a primarily confrontational, case by case relationship, to one where a degree of trust is needed. It will likely take some time until SMS firms and the DMU develop this trust. Frictions caused by either side, including for example actual or perceived attempts to circumvent the rules and a prior history of a lack of cooperation by SMS firms, or disproportionate use of the new powers by the DMU, would likely hinder this process.

The CMA will also need to find the right balance between the use of its traditional tools and *ex ante* regulation. Which tool is more appropriate? The answer in part will be determined by the final shape of the framework after the legislative process is complete. However, the existence of this new *ex ante* regime raises the question of what space will be left for abuse of dominance cases in digital markets, especially as behaviors addressed under both tools can be similar. After all, a new digital regulation regime was considered necessary to provide for a faster, more flexible, and more forward-

5 The concurrency were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 and provide for cooperation between the CMA and the sector regulators in relation to their concurrent powers. See for example the 2022 Annual Concurrency Report, available at https://www.gov.uk/government/publications/annual-report-on-concurrency-2022/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2022#fn:1.

6 For example, see the 2021 Annual Concurrency Report: "Ofwat was satisfied in one case that its functions under Part 1 of the Competition Act 1998 were exercisable, but that it was more appropriate for it to proceed by exercising functions using the Water Industry Act 1991. In its enforcement action against Thames Water, Ofwat considered that 2 of the issues under investigation would be better dealt with under the Water Industry Act 1991 for 2 main reasons. First, with respect to issues around the accuracy of customer data made available to water retailers when the business retail water market opened, it would allow a more targeted approach to address strategically significant issues regarding data quality which have wider relevance in the business retail market and water sector. Secondly, with respect to the fairness of certain credit terms applied to water retailers, it would allow for a more timely outcome." See https://www.gov.uk/government/publications/annual-report-on-concurrency-2021/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2021.

7 See for example CAA's primacy assessment in its final decision report on Project Palamon (2020) "the enforcement tools under TA00 would be more likely to achieve a comprehensive solution to all aspects of the complaint, rather than one discrete allegation under the CA98 […] A CA98 investigation would be limited to looking at alleged competition law infringements under the framework of Chapter I and Chapter II; this would not cover a number of the complainants' allegations. We consider that the CAA's finite resources are used most effectively by considering the allegations in the round under TA00." See https://publicapps.caa.co.uk/docs/33/CAP2100%20Project%20Palamon%20–%20Final%20Decision.pdf.

8 The CMA has expressed concerns about the appeals process for CA98 cases (see for example the CMA's response to the Government consultation on Reforming Competition and Consumer Policy). In its advice to Government, the Digital Markets Taskforce, led by the CMA, recommended a judicial review standard for appeals to DMU decisions "Recommendation 9d: The DMU's decisions should be judicially reviewable on ordinary judicial review principles and the appeals process should deliver robust outcomes at pace". See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022615/Reforming_Competition_and_Consumer_Policy_publication_4.10.21.pdf and https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf , respectively.


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looking alternative to antitrust rules when dealing with competition issues in digital markets.[9] Given that ambition, is the primacy of competition law still a valid principle?

Though it is early days and much of the focus has been on the jeopardy of ex ante regulation for SMS firms, there may also be certain benefits. For instance, an *ex ante* regime may provide more certainty and smoothed out compliance, rather than the "shocks" of infrequent but confrontational enforcement. Depending on how the regime works in practice, the fees for regulation may turn out to be less than the costs of litigation. Moreover, it has to be possible that light touch regulation achieved through regular dialogue may throw up fewer decisions of a type that could give rise to follow on damages actions.

The extent to which the UK model will differ to the model chosen in the EU is still unclear. Will the participatory approach proposed for the UK regime result in a different type of regulatory relationship between SMS firms and the DMU compared to gatekeepers' relationship with the European Commission or national competition authorities? Will there be any differences in how regulators balance *ex ante* regulation and *ex post* enforcement? It will be important to see if there is an approach that ultimately results in better outcomes for consumers.

9 See for example, the Furman Review report: "Existing antitrust enforcement, however, can often be slow, cumbersome, and unpredictable. This can be especially problematic in the fast-moving digital sector." See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

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