

10

Regulation of the Digital Markets in the UK, US and the EU

Context, Criteria, Containment, *and Beyond*

MEHMET BILAL UNVER

It is widely acknowledged there is a need for *ex ante* regulation to cope with the competition and consumer harms arising from the digital markets. This chapter investigates the policy approaches of the EU, the UK, and the US from the viewpoint of ‘economic regulation’ based on a three-step analysis aiming to explore; what products and services are encompassed within the *context* of policy approach; what *criteria* are followed to designate the behaviours that need to be addressed; and what tools and remedies are *contained* to address such behaviours. Policy approaches are thereby reviewed to clarify how far each approach fits the principles of economic regulation. In conclusion, it is found that such principles are echoed to varying degrees within each policy approach. While reasonable peculiarities are visible within the meaning of *context*, for example based on the ‘core platform services’ (EU), ‘digital businesses’ (UK), and ‘covered platforms’ (US) respectively, the *criteria* to define undesirable market behaviours and ensuing remedies under *containment* pose unpredictabilities, particularly in the EU and the US approaches. Regulatory design and structure proposed in the UK approach with its substantiated links across the underlying three *chains* tips the balance to this policy framework. After all, it is concluded that unsubstantiated links within and across such chains particularly in the EU and US approaches contrast with a coherent economic regulation model and need reconsideration.

1. Introduction: Background Information

It is widely acknowledged that there is a need for *ex ante* regulation to cope with the competition and consumer harms arising from the digital markets. To respond to such harms, various regulatory measures were adopted or proposed in the EU, the UK, and the US in the recent years. Such *ex ante* measures are aimed to address

actual or potential market failures, for example ‘killer acquisitions’, self-preferencing, combining data from different lines of services without users’ consent, using discriminatory interfaces, and restricting interoperability with business users, given the shortcomings of the competition law and the rising concerns about entrenched market power of global tech giants.¹ Often being echoed with the so-called tech giants or GAFAM (Google, Amazon, Facebook, Apple, and Microsoft), it remains to be seen to what extent regulation of digital markets serves or fits the principles of economic regulation under the policy approaches across the globe.

Seeking answer to this question, this chapter takes ‘economic regulation’ as the baseline to explore and compare such policy approaches. In this field, leading scholarly work and debate surround different theories that are driven by the notion of the ‘free market economy’ and how to regulate its excessive forms and consequences, for example anticompetitive practices, unpredicted externalities, and inefficiencies.² Albeit with the presumption that the best *de facto* regulator is the market itself, the quest to find out how to best serve society distilled ‘utilitarian’ approach, which justifies limiting economic freedom in order to improve social welfare.³ Regulation, according to this view, is only justified where private forms of market failure correction, such as private law remedies, are more costly or less effective than regulatory intervention.⁴ Economic regulation largely builds on this utilitarian basis permitting distributive models and wide-ranging tools and remedies, for example to facilitate new entrants.

Resembling competition law, economic regulation starts from the premise that free markets are beneficial to society and has, so far, confined its intervention to cases where markets may not work as expected, particularly because of market failures, for example in the case of excessive usage of market power.⁵ Following this approach, market failures are acknowledged to constitute the natural boundaries

¹ See OECD (Organisation for Economic Co-operation and Development), *Ex ante regulation of digital markets* (OECD Competition Committee Discussion Paper, 2021) 9–12, www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm. See also Centre on Regulation in Europe (CERRE), *Digital Markets Act: Making economic regulation of platforms fit for the digital age* (2020) 16; J Cr mer, Y-A de Montjoye and H Schweitzer, *Competition policy for the digital era* (prepared for the European Commission, 2019) 10 and 52, ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Digital Competition Expert Panel, *Unlocking digital competition: Report of the Digital Competition Expert Panel* (Furman Report) (2019) 58–64, www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; C Booth and S Center, *Stigler Committee on Digital Platforms: Final Report* (2019) (Stigler Report) 80–92, www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.

² See WK Viscusi, JE Harrington, Jr, and DEM Sappington, *Economics of Regulation and Antitrust* (The MIT Press 2018) 458–74.

³ See J Drexler, W Kerber, and R Podszun, *Competition Policy and the Economic Approach* (Edward Elgar 2011) 76.

⁴ E Windholz and GA Hodge, ‘Conceptualising Social and Economic Regulation: Implications and Economic Regulation: Implications for Modern Regulators and Regulatory Activity’ (2012) 38 *Monash University Law Review* 212, 221.

⁵ See I Lianos, ‘Competition Law as a Form of Social Regulation’ (2020) 65(1) *The Antitrust Bulletin* 3, 4–5, doi.org/10.1177/0003603X19898626.

of economic freedom,⁶ representing the impetus throughout the last four decades shaping the economic regulation. Digital markets regulation would mean correcting excessive market conducts by setting out certain conditions for access and pricing, for which the notion of market failures becomes useful to draw policy lessons.

From this point of view, this chapter examines the policy approaches of the EU, UK, and US, against the widely acknowledged principles of economic regulation, drawing on market failures, if not being limited to this concept.⁷ Regulatory structure and design (architecture) of each policy approach is analysed based on the chains of ‘context’, ‘criteria’, and ‘containment’ against which proposed measures are reviewed. This three-step analysis aims to explore what products and services are encompassed within the *context* of each policy approach; what *criteria* are followed to designate the behaviours that need to be addressed; and what tools and remedies are *contained* to address such behaviours. Each policy approach is then discussed to clarify how far the proposed/adopted measures fit the principles of economic regulation.

Overall, it is found that such principles are echoed to varying degrees within the framework of each policy approach. Albeit with reasonable peculiarities concerning the *context*, for example based on the ‘core platform services’ (EU), ‘digital businesses’ (UK), and ‘covered platforms’ (US), the *criteria* and the *containment* chains are found to pose unpredictabilities, particularly within the EU and the US policy frameworks. Conversely, a bottom-up policy is visible in the UK approach that well illustrates inter-connection of the so-called chains of economic regulation with lessened risk of unpredictability.

In conclusion, the coherent design of the so-called chains, including the substantiated links across them, tips the balance to the UK policy framework. After and above all, it is underlined that architectural elements within a digital markets regulation play a key role for a coherent and promising model of economic regulation entailing substantiated links within and across such chains. Given this, the chapter concludes that the existing policy approaches for digital markets regulation, particularly those in the EU and US, should be reconsidered from the proposed economic regulation viewpoint based on three-chain architecture.

2. Economic Regulation: Main Pillars and Contours

Regulations are a form of government intervention in markets and consist of requirements to achieve certain standards or purposes. It is systematic and

⁶Market failure can be defined as an ability of the market to deliver goods and services to consumers in an efficient manner, ie because unrestricted competition cannot be sustained in the industry in question (OECD, *Striking the right balance between competition and regulation: The key is learning from our mistakes* (OECD 2002) 4).

⁷This chapter however does not focus on every aspect of digital markets regulations. It reflects on the analysis of behavioural measures excluding the structural tools and remedies.

designed to solve a particular problem or produce a particular outcome.⁸ To attain an identified set of outcomes a process is brought into place that involves a focused and sustainable attempt to change public behaviour based on the standards of which the purpose is called regulations.⁹ This implies a process that commences with certain policy objectives and is run towards achievable goals via a toolset and instruments which draw the boundaries of 'regulation'.

Interventions of economic regulation may pursue different objectives, for example effective competition, consumer protection, encouraging green investment, and innovation.¹⁰ Among these, ensuring effective competition represents the leading policy objective.¹¹ Given the widely accepted premise that market forces do not always guarantee that consumer utility and surplus is ensured, regulatory state intervention often targets market failures and aims to create competitive markets through economic regulation.¹²

While some form of regulation might be required to deal with market failures and inefficiencies, each situation needs to be assessed individually as regulation will not be efficient if it costs more than the harms that it seeks to address.¹³ Such an approach also means pre-empting or minimizing any harm to the society that would otherwise result from the conflicting or overlapping rules, for example *ex ante* and *ex post* interventions. Overall, this requires a sound regulatory vision through which stakeholders should be driven towards achievable outcomes based on guiding principles. Such a regulatory approach would pre-empt or minimise any harm to the society that would otherwise result from the conflicts of interest or overlapping rules, for example between *ex ante* regulations and *ex post* competition law.

Ex ante interventions introduced by any economic regulation embody substantial policy choices, most likely to lead through asymmetrical regulation to a relatively swift transition to competition.¹⁴ This makes dominant players first and foremost subject to *ex ante* obligations to achieve the policy objectives. Wholesale access and price regulations illustrate such economic regulations targeted at dominant players, for example undertakings having a certain market size and volume. Overall, policy makers should adhere to consistent pathways and regulations when addressing the inherent imbalances in the digital markets and achieving the

⁸ Windholz and Hodge (n 4) 219.

⁹ Windholz and Hodge (n 4) 217.

¹⁰ See UK government, Department for Business, Energy and Industrial Strategy, 'Economic Regulation Policy Paper' (January 2022), www.gov.uk/government/publications/economic-regulation-policy.

¹¹ *ibid*; OECD, *The OECD Report on Regulatory Reform Synthesis* (OECD 1997) 33, www.oecd.org/gov/regulatory-policy/2391768.pdf. See also MB Unver, 'End(s) of the Harmonization in the European Union: Centrifuging or Engineering?' (2021) 11 *Journal of Information Policy* 582, 605.

¹² See P Humphreys, 'Europeanisation, Globalization and Policy Transfer' (2002) 8(2) *Convergence: The Journal of Research into New Media Technologies* (Special Issue on Telecommunications Regulation in Europe) 52, 57.

¹³ OECD 2002 Report (n 6) 4.

¹⁴ E Pitt, 'Competition Law Telecommunications' in I Walden and J Angel (eds), *Telecommunications Law* (Blackstone Press 2001) 265–68.

desired objectives of economic regulation, with particular respect to dealing with market failures and inefficiencies.¹⁵

3. Overview of Digital Markets and their Regulation

3.1. Major Characteristics of the Digital Markets

In technology markets, we witness a change of the dynamics of market economy, comprising not only the well-known aspects of a new economy, such as high fixed cost and low marginal cost of developing and selling intellectual property, network effects, and rapid and disruptive innovation,¹⁶ but also the transformative features of Artificial Intelligence (AI) and big data analytics that facilitate novel ways of competition and innovation.

In fact, using AI algorithms to collect, label, and process data would cultivate new ways of competition and innovation, resulting in the traditional boundaries of digital markets being blurred. This is usually compounded by the indirect network effects exploiting platformisation of legacy digital markets and enabling an ecosystem in which various services, for example social networking platforms, search engines, and app stores as well as intermediation/hosting services such as home sharing, ride-sharing, and dating may be bundled with marginal or even zero profit in exchange for individuals foregoing control of their personal data.

Such ecosystem features reflect a digital landscape, altering the old economy markets from being mainly focused on marginal cost and efficiency to become data and innovation driven.¹⁷ Digital hubs of services are ever fast evolving to such ecosystems whereby different technological inputs and drivers, for example the Internet of Things (IoT) and AI, are all combined and the old competition tools are improved, for example via extended market leverage, and multiplied with new techniques, for example zero pricing for consumers.

While critical mass platform services once represented a mutual interdependency between businesses and platforms during the early days of the platform economy, this dynamic has now shifted to a situation where the former depend on the latter. In particular, GAFAM constitute an example of the problem of a few platforms controlling data and gaining market power due to the data-driven business model.¹⁸ Such dependency of business users is mainly driven and reinforced by structural advantages of GAFAM, being echoed with their position of

¹⁵ For similar views, see also M Bauer and others, 'The EU Digital Markets Act: Assessing the Quality of Regulation' (ECIPE Policy Brief, No 2) (2022) 3–7, ecipe.org/publications/the-eu-digital-markets-act.

¹⁶ Viscusi, Harrington, and Sappington (n 2) 379.

¹⁷ B Lundqvist, 'Regulating Competition in the Digital Economy: With a Special Focus on Platforms' in B Lundqvist and MS Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar 2019) 11.

¹⁸ *ibid.*

‘unavoidable trading partner’.¹⁹ These features, including the ‘winner takes all’ impact, make the ecosystem leaders well-positioned to control the dynamics of market economy.²⁰

Against this background, GAFAM (the big five) are regarded not just as individual companies engaged in mutual competition, but also as a ‘corporate platform elite’ utilising ‘superplatforms’ to control the gateways to digital markets.²¹ Overall, the controlling powers of these ecosystems can overshadow the competitive process, although consumers would still benefit from the platformisation of digital markets having ecosystem features. Ezrachi and Stucke raise the concern whether a level playing field is at all possible in a world ‘where entry is possible, but expansion will likely be controlled by super-platforms’.²² All these concerns signify the widely accepted need to set a new agenda of economic regulation for digital markets.

3.2. ‘Economic Regulation’ of Digital Markets

All the above factors are leading up to a new era of *ex ante* regulation, as driven by the expert reports,²³ and opening a new chapter of economic regulation on top of the antitrust cases.

Economic regulation becomes more puzzled given the most encountered competition problems being topped up with the ecosystem features renovating old economy markets. Mainly because of the need for speed and effectiveness, *ex ante* regulation seems to signify a mainstream policy for the GAFAM and other big market players. As manifested by wide-ranging reports,²⁴ a globalised consensus concerning *ex ante* (economic) regulation of digital markets is becoming visible.²⁵

As mentioned, policy makers are inspired by the competition law interventions so far against the actual and potential market failures in digital markets. These markets have repeatedly undergone competition law scrutiny and interventions

¹⁹ See P Alexiadis and A de Stree, ‘Designing an EU Intervention Standard for Digital Platforms’ (EUI Working Paper RSCAS 2020/14) 6, ssrn.com/abstract=3544694.

²⁰ See also K Dasgupta and M Williams, ‘The New Economics and Regulation of Digital Platforms: Lessons from the Old World of Regulation?’ 2020 (ITS Online Event, Calgary, 14–17 June 2020) 10–11, www.econstor.eu/bitstream/10419/224850/1/Dasgupta-Williams.pdf.

²¹ A Ezrachi and ME Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016).

²² *ibid.*

²³ See the Furman Report (n 1); the Stigler Report (n 1); Crémer, De Montjoye and Schweitzer (n 1). See also Australian Competition & Consumer Commission, ‘Digital platforms inquiry’ (Final Report, July 2019), www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

²⁴ See n 1 and 23 above. Across the reports, there is a broad consensus that the core problem that *ex ante* regulation is aimed to address is the imbalance of bargaining power resulting from the dependency of business users on the services provided by the gatekeepers, eg GAFAM controlling access to consumers and, thus, markets (D Geradin, ‘What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?’ (SSRN, 18 February 2021) 7, ssrn.com/abstract=3788152).

²⁵ See n 1 above.

particularly for the big players' strategic behaviours, for example combination of users' data from distinct lines of services in the same ecosystem;²⁶ self-preferencing in rankings;²⁷ creating unfair advantages to their own apps/services through exclusivity clauses/agreements;²⁸ using non-public data generated from business users in competition with them;²⁹ and putting the rival companies at a disadvantageous position against the consumers by charging unfair prices.³⁰

Notwithstanding, competition law issues and problems do not fully represent the policy responses in dealing with the related concerns and issues, which extend to data portability, 'side loading' of third-party apps, price and performance transparency for ads, etc. Despite the fact that all these concerns result in a broad political consensus, the scope and aims of the adopted or proposed measures differ across countries, incorporating regulatory design and structure.

4. Policy Approaches to Regulation of Digital Markets

4.1. General Overview

Concerning digital markets regulation, the EU, UK, and US follow distinctive approaches and legislative schedules. The DMA, after being approved by the EU Council and Parliament, entered into force on 1 November 2022. The UK and the US lag at the parliamentary level, although their policy stance is clear with respect to the nature and limits of *ex ante* regulation.

The policy approaches in the EU, the UK, and the US are examined in the following subsections. Aims, scope, and tools of *ex ante* regulation under each policy approach are summarised first, which is then followed by a review of each approach with a focus on regulatory design and structure.

²⁶ See Bundeskartellamt *Facebook* decision, 6th Dec Div, B6-22/16, 6 February 2019, currently on appeal, www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5. See also Bundeskartellamt, 'Bundeskartellamt prohibits Facebook from combining user data from different sources' (*News*, 7 February 2019), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

²⁷ See *Google and Alphabet v Commission (Google Shopping)* [2017] OJ C445/21, upheld in Case T-612/17 *Google and Alphabet v Commission* EU:T:2021:763.

²⁸ See *Google and Alphabet v Commission (Google Android)* [2018] OJ C445/21, upheld in Case T-604/18 *Google and Alphabet v Commission* EU:T:2021:763; *Google and Alphabet v Commission (Google AdSense)* [2019] OJ C 255, currently on appeal in Case T-334/19; *Google AdTech and Data Related Practices* (Cases COMP/AT. 40670) 22 June 2021 (Opening of Proceedings), 14 June 2023 (Statement of Objections).

²⁹ *Amazon Marketplace* (Case AT.40462) and *Amazon Buy Box* (Case AT.40703) Commission Decision C/2022/9442 [2023] OJ C 87.

³⁰ Competition and Markets Authority (CMA), 'Press release: CMA investigates Apple over suspected anti-competitive behaviour' (4 March 2021), www.gov.uk/cma-cases/investigation-into-apple-appstore.

4.2. The EU's DMA

The European journey of regulating digital markets has started with the Commission's DMA Proposal published in December 2020.³¹ The DMA was published on 12 October 2022 and became applicable on 2 May 2023.³² This Regulation aims to ensure 'contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users'.³³

The DMA shapes out regulation of the digital markets based on the specified 'core platform services' (CPSs) as listed under Article 2.³⁴ This broad list of CPSs is followed by the thresholds to designate 'gatekeepers', as set out in Article 3. Designation of gatekeepers is of paramount importance for the overall structure and functionality of the DMA, as all the prohibitions and obligations build on this concept.

Article 5 of the DMA imposes a number of prohibitions and obligations on gatekeepers, for example to refrain from combining and cross-using personal data sourced from the relevant CPSs; prohibition of most-favoured-customer clauses; enabling uninstallation of preinstalled software; applying no requirements on offering or interoperating with the gatekeeper systems regarding supportive technical services. A similar set of obligations are placed under Article 6 of the DMA which, however, are not self-executive and need to be specified by the Commission.³⁵ The distinction between the obligations under Articles 5 and 6 signifies a peculiar set up, posing complexity and unpredictability.³⁶ Furthermore, in the case of systemic non-compliance the DMA enables the Commission to impose new remedies, meaning further restrictions, requirements and complexities might loom on the horizon.³⁷

³¹ European Commission, 'The Digital Markets Act: ensuring fair and open digital markets', ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

³² See the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265 ('Digital Markets Act' or 'DMA'). See also European Commission, 'Competition Policy: Digital Markets Act (DMA)', competition-policy.ec.europa.eu/dma_en.

³³ See DMA, Art 1(1).

³⁴ According to Art 2(2) of the DMA, CPSs comprise (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services.

³⁵ Such obligations (susceptible of being further specified under Art 8) include, but are not limited to, prohibition of self-preferencing; refraining from combining personal data for the purpose of delivering targeted or micro-targeted advertising; enabling end users to switch between and subscribe to different software applications; enabling effective interoperability to the same operating system, hardware or software features.

³⁶ See P Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2021) 10 (SSRN, 1 December 2021), ssrn.com/abstract=3978625.

³⁷ See DMA, Art 18(1).

Under the DMA, the EU Commission is empowered to determine new gatekeepers as well as to enlarge the list of the CPSs following Articles 17 and 19. Moreover, the Commission is entitled to open investigations and proceedings, for example in order to specify further remedies on gatekeepers in the case of non-compliance, or to keep those obligations up to date.³⁸ Last but not least, Article 9 sets out a 'suspension' process on an exceptional basis, for example for the reasons of economic viability of the gatekeeper operations, and Article 10 envisages the possibility of exemptions on the grounds of public health or public security.³⁹ Under both procedures, the burden of proof is on the gatekeeper.

Considering the obligations of Articles 5 and 6 apply quasi-automatically and Articles 9 and 10 leave limited room for exemption, a reversal of the burden of proof seems to be hardly possible.⁴⁰ While the principles of equal treatment, proportionality, and due process are emphasised under the DMA,⁴¹ compliance with these principles does not guarantee a regulatory dialogue, as one would seek from the perspective of good regulatory practice.⁴²

4.3. The UK Government's Response

In the UK, the regulatory process was stimulated by the Furman Report (March 2019),⁴³ which was followed by the market study conducted by the Competition and Market Authority (CMA) (July 2020)⁴⁴ and the CMA advice to the government⁴⁵ (December 2020). Another indicative key milestone was the UK government's consultation document titled 'A new pro-competition regime for the digital markets' (July 2021) proposing an *ex ante* regulatory regime for the digital markets.⁴⁶ Finally, the UK government issued its response in May 2022,⁴⁷ sending

³⁸ See DMA, Art 8(2) and 12(1).

³⁹ DMA, Art 10(1)–(3).

⁴⁰ Cabral and others, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (prepared for the European Commission) (2021) 28, publications.jrc.ec.europa.eu/repository/handle/JRC122910.

⁴¹ DMA, Art 7(1)(b).

⁴² In a limited fashion, such a room can be argued to exist under Recital 65 and Art 8(3) with respect to re-evaluating the obligation(s) as to whether it is 'effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper'. Yet, lack of a broadly applicable provision incorporating reversed burden of proof and wide-ranging evidential tools can rebut this argument.

⁴³ See n 1 above.

⁴⁴ CMA, 'Online platforms and digital advertising market study' (1 July 2020) ('CMA market study'), www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

⁴⁵ UK government, 'Press release: CMA advises government on new regulatory regime for tech giants' (8 December 2020) ('CMA advice'), www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants.

⁴⁶ UK government, Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy, 'A new pro-competition regime for digital markets' (20 July 2021), www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

⁴⁷ UK government, Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy, 'Consultation outcome: A new pro-competition regime for

the message that they aim to regulate the digital markets in line with the Furman Report and the CMA market study.

According to the UK government's response, the Digital Markets Unit (DMU), a specialised unit established under the CMA in April 2021,⁴⁸ will implement the prospective pro-competition regime for digital markets. In this new *ex ante* regime, pro-competitive interventions (PCIs) are expected to target a small number of firms having substantial and entrenched market power that enables them to have Strategic Market Status (SMS). According to the UK government, possession of this market power should provide such firms with a 'strategic position' in at least one digital activity.⁴⁹ The government also indicated that there will be an exhaustive list of criteria to determine the SMS firms.⁵⁰ In addition, a minimum revenue threshold will be introduced by the government to clarify which firms are to be out of the scope of the SMS designation process.⁵¹ It is made clear by the UK government that the DMU will be mandated to publish guidance explaining all the relevant steps and concepts.⁵²

According to the UK policy approach, the DMU will set out the (bespoke) conduct requirements for the SMS firms based on specific categories. While the high-level objectives, namely 'fair trading', 'open choices', and 'trust and transparency', will inform the conduct requirements,⁵³ it is expected that the DMU will be empowered to remove or amend such requirements subsequent to the SMS designation. SMS firms will then have an opportunity to put forward evidence to establish that a particular conduct that would otherwise breach a conduct requirement would bring about benefits to consumers.⁵⁴ This 'exemption' process marks a stark distinction to the EU approach for the effective evidential process that would minimise the likely Type I and II errors.

It is underlined that the DMU remedies will be proportionate to address an 'adverse effect on competition' and 'will tackle the root causes of entrenched market power'.⁵⁵ In this regard, wide-ranging remedies, for example including not

digital markets' (6 May 2022) ('UK government response to consultation'), www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation.

⁴⁸ CMA, 'Collection: Digital Markets Unit' (7 April 2021), www.gov.uk/government/collections/digital-markets-unit.

⁴⁹ UK government response to consultation (n 47). This component of 'strategic position' has been introduced by the government in the period subsequent to the CMA's advice and particularly within the public consultation launched in July 2021, marking a distinction to the CMA's focus on addressing the sources of market power.

⁵⁰ UK government response to consultation (n 47).

⁵¹ UK government response to consultation (n 47).

⁵² UK government response to consultation (n 47).

⁵³ Under CMA market study, each objective, namely 'fair trade', 'open options', and 'trust and transparency' are correlated to and explained by a set of principles. According to the CMA, such principles need to be amended in line with evolving market conditions by the DMU to respond the complexities of the digital markets (CMA market study (n 44) 341–46, 357).

⁵⁴ UK government response to consultation (n 47).

⁵⁵ UK government response to consultation (n 47).

only interoperability between platforms and services but also ownership separation remedies, would be introduced, yet it is envisaged that the applicable remedies would follow a robust, evidence-based investigation through which any countervailing benefits should be considered along with any likely adverse impact.⁵⁶ According to the government's response, there will also be safeguards including consultation requirements and rights of appeal to prevent overzealous interventions, alongside the flexibility for trialling and iterating new remedies.⁵⁷

In general, the UK approach is less ambitious in terms of specific obligations and more focused on the high-level objectives, principles, and investigative tools needed to achieve pro-competitive digital markets.

4.4. The US Bills

Four bipartisan bills proposed in June 2021 lay down the ground for *ex ante* regulation of digital markets in the US. Such bills include the proposed American Choice and Innovation Online (ACIO) Act,⁵⁸ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act,⁵⁹ Ending Platform Monopolies Act (US Bill – HR3825),⁶⁰ and Platform Competition and Opportunity Act (US Bill – HR3826).⁶¹ While the first two bills are concerned with conduct of the digital market players and behavioural remedies, the latter two are related to structural problems and remedies. Notwithstanding this, the criteria used to designate the 'covered platforms' under the four bills are common.⁶² Below, two bills are examined with a view to fleshing out the US policy approach concerning the behavioural tools and remedies.

The proposed ACIO Act, which draws a general framework regarding discriminatory behaviours by 'covered platforms', sets out a wide range of prohibited conduct and remedies for these platforms.⁶³ The proposed ACCESS Act, on the

⁵⁶ UK government response to consultation (n 47).

⁵⁷ UK government response to consultation (n 47).

⁵⁸ American Choice and Innovation Online Act, HR 3816, 117th Cong, 1 (2021) (ACIO Act), www.congress.gov/bill/117th-congress/house-bill/3816/text?r=8&s=1.

⁵⁹ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, HR 3849, 117th Cong, 1 (2021) (ACCESS Act), www.congress.gov/bill/117th-congress/house-bill/3849.

⁶⁰ Ending Platform Monopolies Act, HR3825, 117th Cong, 1 (2021), www.congress.gov/bill/117th-congress/house-bill/3825/text.

⁶¹ Platform Competition and Opportunity Act, HR 3849, 117th Cong, 1 (2021), www.congress.gov/bill/117th-congress/house-bill/3826.

⁶² See ACIO Act, s 2(d)(1) and s 2(g)(4)(B); ACCESS Act, s 2(d)(1) and s 2(g)(4)(B); Ending Platform Monopolies Act, s 5(5)(B) and s 6(a)(1)(A); Platform Competition and Opportunity Act, s 3(d) and s 4(a)(1)(A).

⁶³ Prohibitions under the proposed ACIO Act are of paramount importance for the functioning of this Act, which include but are not limited to, no advantaging the covered platform's own products/services over those of another business user; no discrimination among similarly situated business users; no restriction or impeding the capacity of a business user to access or interoperate with the same platform, operating system, hardware, and software features available to the covered platform; no tying; no use of non-public data obtained from or generated on the platform by the activities of a

other hand, includes data portability and interoperability-related obligations. Within this framework are set out the rules for the covered platforms to ensure a set of transparent, third-party-accessible interfaces enabling the secure transfer of data to users/business users⁶⁴ as well as to facilitate and maintain interoperability with competing businesses upon certain standards issued by the technical committee at the Federal Trade Commission (FTC).⁶⁵

The proposed ACCESS Act's clear-cut structure and prescriptive norms⁶⁶ contrast with the general yet tailorable requirements, for example regarding non-discrimination, under the proposed ACIO Act. This latter approach is considered to be future-proof, enabling regulatory flexibility and limiting gaming⁶⁷ as well as including better and responsive interventions against the peculiarities of the covered platforms, for example based on their business models. Furthermore, the proposed ACIO Act provides the covered platforms with an 'affirmative defense' opportunity to be able to argue that the prohibitions should not apply to them, for example for the lack of harm.⁶⁸

Among the policy approaches examined, the US approach can be distinguished as it enables both civil and administrative actions. The FTC is empowered to commence a civil action to recover a civil penalty and seek other appropriate reliefs before the court, as well as having general enforcement powers under the US bills.

5. Review of the EU, UK, and US Approaches

5.1. Structure of the Review: Analysis Based on *Context*, *Criteria*, and *Containment*

Below, this study attempts to make a deeper analysis from an architectural outlook concerning the existing policy approaches. It aims to conduct a three-step analysis for each policy approach, following the *chains* of economic regulation explained below.

business user or its customers to offer or support own products/services; no restricting or impeding a business user from accessing data generated on the platform by the activities of the business user or its customers preventing portability by the business user of such data; no restricting or impeding covered platform users from uninstalling software apps preinstalled; and no self-preferencing (ACIO Act, s 2(a) and 2(b)).

⁶⁴ ACCESS Act, ss 3 and 4.

⁶⁵ ACCESS Act, ss 3 and 4.

⁶⁶ See ECIPE Policy Brief (n 15) 14.

⁶⁷ The Tobin Center for Economic Policy, 'International coherence in digital platform regulation: an economic perspective on the US and EU proposals' (Policy Discussion Paper No 5, 2021) 15.

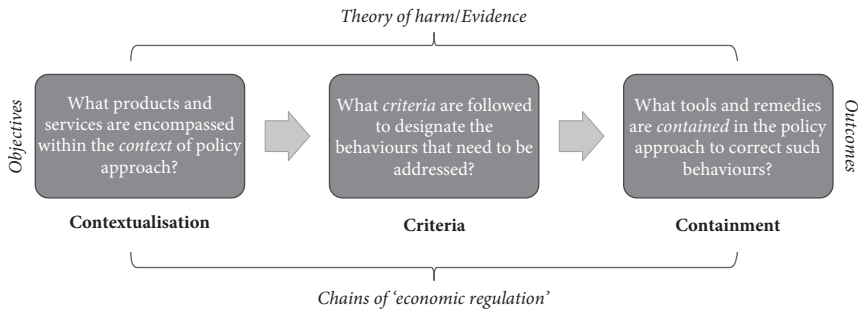
⁶⁸ See ACIO Act, s 2(c).

Respectively, this three-step analysis examines:

- *Context*: What products and services are encompassed within the *context* of this policy approach?
- *Criteria*: What *criteria* are followed to designate the behaviours that need to be addressed?
- *Containment*: What tools and remedies are *contained* in the policy approach to address such behaviours?

Following this three-step analysis, this chapter aims to explore any gap or deficiency arising from the EU, the UK, and the US approaches from an architectural point of view. Figure 10.1 illustrates the baseline architectural design of the so-called chains with a view to revitalising a perspective of economic regulation for the digital markets. Based on the illustrative chains in Figure 10.1, this chapter investigates each policy approach with respect to not only the inner boundaries of the chains but also interlinks between them to make an overall analysis.

Figure 10.1 Chains of ‘economic regulation’



As demonstrated in Figure 10.1, policy *objectives* should be set at the outset of each policy framework. *Context* designates the covered products and services that are susceptible to economic regulation. *Theories of harm* underlie the *criteria* paving the way for regulation of any of the covered products or services. *Evidence* is sought to find out whether certain market conduct or imperfections need to be addressed under the policy objectives and principles. To that end, the regulator needs to rest on the *criteria* to find out any need for intervention to end the market failure(s). The process then proceeds with the *containment* of the remedies to achieve the policy *outcomes*. Under this last chain, *evidence* is again needed for a best design of the remedies responding to the market failure(s).

This suggests two implications: (i) the sequential chains of ‘economic regulation’ need to fit in a policy framework; and (ii) all the chains and their components need to be inter-connected for a well-functioning model of economic regulation. The following analysis of the policy approaches is based on this understanding of the ‘economic regulation’.

5.2. Analysis of the EU's DMA

Context: Under the context of DMA, 11 different digital services called CPSs that are susceptible to *ex ante* regulation are listed, and this list can be expanded.⁶⁹ For instance, cloud computing services are listed as a CPS, whereas many types of the Internet of Things (IoT) services are not. Notwithstanding, if this vertical integration is seen as an advantage of existing market power towards an adjacent market, for example for the IoT services in question, the latter may qualify as a CPS when provided by a dominant cloud provider.

Likewise, new gatekeepers can be added into the list following an investigation under Article 17 even where the investigated service provider does not meet the quantitative thresholds required to be a gatekeeper.⁷⁰ Investigations and proceedings, for example, under Articles 17 and 19 can *feed back* regarding any need for new categories of CPSs, gatekeepers, and/or restricted practices. While such 'feedback' process would be a positive step forward, this can also be a source of unpredictability for the potential uncertainties, for example regarding the extent to which current obligations will be expanded, whether an implementing/delegated act or interim measure is required, and to what extent competition law interventions will be taken into account.

Arguably, lack of full clarity within the meaning of *context* is inevitable; however, this should not mean further engineering in a regulatory design. In fact, achieving predictability is best served by identifying the stepping stones and eliminating the stumbling blocks, thereby deterring a fragile model of regulation and discouraging the need for re-design or re-engineering of the regulatory model.

Criteria: 'Market contestability' and 'fairness' represent the key objectives of the DMA.⁷¹ The DMA does not offer guiding principles as to how these objectives can be achieved, except with a few indicative parameters that can be derived from Article 12(5) and recitals 32 and 33. For instance, from the contractual 'imbalance' between the parties or the concept of 'proportionality' as frequently referred to under the Regulation, some applicable tests or criteria can, barely, be derived.⁷² For potential criteria, reference can be made to the Article 12(5)(a)(i), which refers to 'creation or strengthening of entry/expansion barriers', suggesting this can create risks affecting contestability, reminiscent of legacy competition threats.⁷³ Likewise, some implications can be infused from Article 12(5)(a) which indicates

⁶⁹ See section 4.2.

⁷⁰ See section 4.2.

⁷¹ See DMA, Art 1(1).

⁷² See also Akman (n 36) 25.

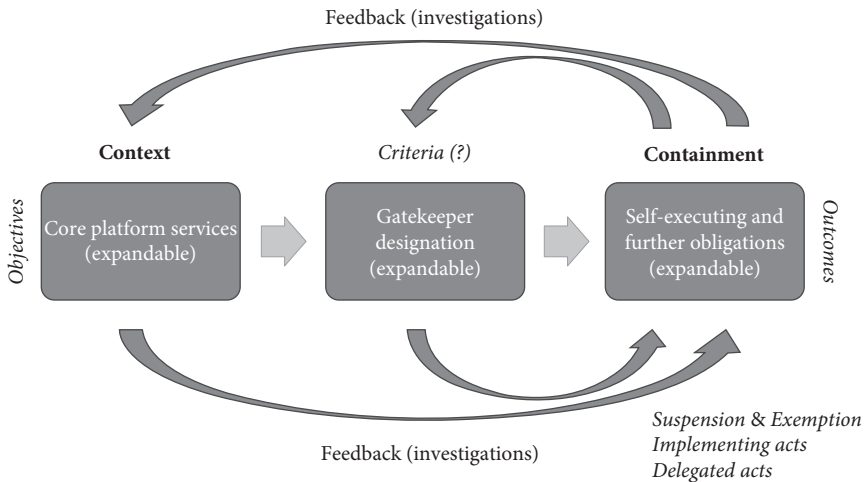
⁷³ Arguably, the two goals of the DMA including contestability are not as far removed from competition law as the DMA's proposal itself would suggest, and both these objectives are best understood as part and parcel of competition policy (P Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) *Journal of European Competition Law and Practice* 542, 544).

any gatekeeper ‘prevent[ing] other operators from having the same access to a key input’⁷⁴ can harm contestability. This provision may pose a potential conflict with the *ex post* interventions, as it may phase out competition law tools or doctrines, for example ‘essential facilities’, if a pro-active implementation approach is pursued.

Overall, absence of clear-cut criteria may potentially result in some gaps and unpredictable consequences under the DMA. Recitals 32–34 and some relevant provisions, for example Article 12(5), in conjunction with the qualitative thresholds under Article 3(1), in a cumulative reading, allude to the quasi-structural entry barriers and the mechanisms of controlling access as a potential threat of unfairness and non-contestability. This guidance, however, does not mean sufficient signposts as to the market behaviours that need to be addressed and can compromise soundness of the applicable obligations.

Economic regulations target certain outcomes to reach out to a competitive market and subsist on a set of standards or criteria enabling predictability and sustainability. In the absence of these clear links and signposts, regulatory engineering as well as a regulatory vacuum would emerge, threatening the relevant markets and depleting the human resources with no or minimum benefit for the stakeholders as well as the end users. This potential threat arising from the absent *criteria* means unsubstantiated links between *context* and *containment* chains, as demonstrated in Figure 10.2, where the chain of ‘criteria’ is technically removed, and ‘designation of gatekeepers’ functions as the *de facto* new chain between ‘context’ and ‘containment’. This situation, which represents an architectural deficiency, carries the potential for unpredictabilities.

Figure 10.2 Architectural design of the EU’s DMA



⁷⁴ See DMA, Art 12(5)(b)(ii).

On the positive side, investigations would enable two-way feedback process, as can be seen along the chains both expanding and stabilising the regulatory system. Whereas expansion would be seen in the short run, the feedback effect would tip the system to a more stabilised one in the long run. Both would feed into the regulatory system to filter out a better implementation, for example regarding designation of gatekeepers, newly prohibited practices, CPSs, and remedies. While a positive impact can arise based on the outputs of the feedback processes, all these are constrained with the regulatory design and structure. As a matter of fact, stabilisation can take a longer period than expected or may never take place. Positive feedback effect would thus be limited and/or outweighed by the negative effects, for example welfare losses and/or regulatory costs.

Containment: As the mainstream rule of the DMA, gatekeepers must comply with the Articles 5–7 obligations. While the Article 5 sets out the self-executing obligations, the obligations under Article 6 are formulated as ‘susceptible of being further specified’.⁷⁵ These behavioural obligations are clearly inspired by the earlier antitrust case law.⁷⁶ Yet, the rationale behind the two different categories and the way they will be assumed by the gatekeepers requires some clarification, particularly in view of the distinct CPSs or business models for which a tailored regulatory treatment might be needed. It is unclear which obligations in Articles 5 and 6 will be applied to which CPSs and whether the market players can correctly self-select the right ones.⁷⁷ It appears that further obligations can thus be engineered, based on various reasons and scenarios, such as non-compliance under Articles 8(2) or 18(1) or updating the obligations under Article 12(1).

Given the wide regulatory discretion and the potential unpredictabilities within the meaning of ‘containment’ as well as ‘context’ and ‘criteria’, the overall framework of the DMA poses a clear risk of engineering and a likely regulatory vacuum. This would however contrast with the main pillars and principles of economic regulation.

Closely related to this, what outcomes are achievable is another key question posing an additional layer of unpredictability for the EU regulatory system. Given the fact that maximisation of consumer welfare is not the *de jure* objective of the DMA, the desirable end goals to be achieved by the envisaged measures are unclear although the leading concerns are visible. This situation means leaving some space for erroneous interventions, more explicitly Type I and II errors.

How such errors are to be internalised within the DMA system remains to be seen. Within the DMA structure, it seems that potential Type I errors can be partially corrected under Articles 9 and 10 which are concerned with ‘suspension’

⁷⁵ Unlike the obligations under Arts 5 and 6, the obligations under Art 7 of the DMA are not imposed on all the gatekeepers but only those providing number-independent interpersonal communications services.

⁷⁶ Regarding the precedents of EU competition law that illustrate the footprints of the EU’s DMA, see Akman (n 36) 5–6.

⁷⁷ Akman (n 36) 27.

and ‘exemption’ of the obligations respectively. Since such provisions allow reversal of obligations on an exceptional basis, they can hardly be invoked to smooth the functioning of the DMA and correct the Type I or II errors.⁷⁸ Overall, not only effectiveness of this kind of corrective approach but also and more importantly the DMS structure and design is questionable from the perspective of economic regulation.

5.3. Analysis of the UK Government’s Response

Context: According to the policy approach proposed by the UK government, only activities whose core component is digital technologies will be covered. While the scope of the new regime will clearly be limited to ‘digital activities’, there is uncertainty as to the boundaries. On the other hand, the government have indicated that it will be working to develop a definition of such activities.⁷⁹

At present, the UK position seems to be quite flexible within the meaning of ‘context’. Marking a contrast to the EU’s DMA, the UK policy approach does not aim to cover pre-listed products or services, which potentially results in a definitional gap. Notwithstanding, this uncertainty regarding the chain of context within the UK approach does not seem to create an unsurmountable problem. First, according to the CMA advice and the UK government response, only a small number of digital firms are likely to meet the SMS test.⁸⁰ Second, the CMA not only suggests a quite high threshold in terms of firms’ size and revenue but also recommends that the DMU should initially prioritise the firms active in particular activities such as online marketplaces, app stores, social networks, web browsers, online search engines, operating systems, and cloud computing services.⁸¹

Criteria: The UK approach entails an asymmetrical regulatory system focused on SMS, for which the government aims to provide an exhaustive list of criteria, which accounts for the major global players. According to the UK government, the list of the criteria to define the SMS firms will be exhaustive. The CMA considers that the SMS position arises when users of the firm’s products and services lack good alternatives and there is limited threat of entry or expansion by rivals.⁸² In this regard, the five factors set out by the CMA would need to be taken into

⁷⁸Crucially, the Type I errors would be more likely, given Arts 12 and 17–19 that give way to new gatekeeper obligations, designation of new gatekeepers, and CPSs.

⁷⁹UK government response to consultation (n 47).

⁸⁰Both the UK government and the CMA consider that a small number of operators should be covered by the new *ex ante* regime, although the government has not yet detailed its proposed criteria to designate the SMS firms under legislation. The CMA, on the other hand, recommend the DMU prioritises firms with annual UK revenue in excess of £1 billion, and particularly those which also have annual global revenue in excess of £25 billion (CMA advice (n 45) 32).

⁸¹CMA advice (n 45) 32.

⁸²CMA advice (n 45) 28.

account, in particular to indicate whether a firm has a strategic position.⁸³ The cumulative impact of such factors can be understood to mean market behaviours that are likely to affect competition, ie raising entry costs or constraining the expansion of the smaller rivals, restricting interoperability, self-preferencing, and creating difficulties for third parties to advertise their own products and/or offer services. While a positive correlation between such market behaviours and the SMS presence can be signposted, this is of a less indicative nature in comparison to the EU approach since the UK policy, referring to such competition threats and using terminology of competition law, does not blacklist certain behaviours.

Furthermore, the UK approach relies on the guiding principles as well as the high-level objectives, ie fair trading, open choices, and trust and transparency, from the beginning. Although the extent to which the CMA market study and advice will be transposed in legislation and reflected into practice is uncertain,⁸⁴ well rooted and principles-based regulatory regime in the UK would mitigate this uncertainty.⁸⁵

Against this background, the concept of ‘conduct requirements’, as will be operationalised for the SMS players, would establish and effectuate the principles for economic regulation. It is envisaged that conduct requirements will eventually shape the way SMS market players should behave as per their respective business model. Given examples of such requirements include the following:

- requiring SMS firms not to apply discriminatory terms, conditions, or policies to certain users or categories of users, compared to equivalent transactions,
- preventing bundling or tying the provision of its other products or services by making access to them conditional on the use of the relevant designated activity and
- providing clear, relevant, accurate, and accessible information to users.⁸⁶

One could argue such conduct requirements would as equally determine the criteria to correct the market behaviours as they mean obligations for them. This

⁸³ With regard to the SMS, the CMA point out the conditions when: (i) a firm has achieved very significant size or scale in an activity, for example where certain products are regularly used by a very high proportion of the population or where the value of transactions facilitated by a specific product is large; (ii) the firm is an important access point to customers (a gateway) for a diverse range of other businesses or the activity is an important input for a diverse range of other businesses; (iii) the firm can use the activity to extend market power from one activity into a range of other activities and/or has developed an ‘ecosystem’ of products which protects a firm’s market power; (iv) the firm can use the activity to determine the rules of the game, within the firm’s own ecosystem and also in practice for a wider range of market participants; or (v) the activity has significant impacts on markets that may have broader social or cultural importance. (See CMA advice (n 45) 31).

⁸⁴ See also n 53 above.

⁸⁵ Regarding the UK history and principles of economic regulation, see UK government, Department for Business, Innovation and Skills (BIS), ‘The Principles for Economic Regulation’ (April 2011), www.gov.uk/government/publications/principles-for-economic-regulation. Relying on the same principles for many utility sectors (Economic Regulation Policy Paper (n 10)) the UK government’s response does not differ concerning digital markets.

⁸⁶ UK government response to consultation (n 47).

argument has some merit considering these requirements would function as guiding principles as well as have a prohibitive and obligatory nature. However, the fact that there will be some categories based on distinct business models would mitigate any uncertainty while suggesting the chains of the UK system are well inter-connected and can eliminate potential unpredictabilities.

In the UK, the DMU is expected to have fully-fledged powers in the course of design of the remedies, whereby no default obligation or remedy is placed under the 'containment' chain.⁸⁷ Before this, an exemption process within the chain of 'criteria' is provided for the SMS firms to substantiate that their conduct that would otherwise breach a conduct requirement brings about benefits to consumers. This would not only enable a genuine regulatory dialogue including a (reversed) burden of proof but also reinforce the regulatory system, with a key check-balance mechanism minimising the likely Type I and II errors.

The UK approach, while being responsive to the need for experimentation, strengthens the regulatory system and structure to mitigate the risk of unpredictability. Overall, both inner boundaries of the 'criteria' and its links with other chains as well as the policy objectives within the UK's proposed approach feature a robust regulatory regime.

Containment: As far as the chain of containment is concerned, the UK approach is not prescriptive in its framework for the so-called 'pro-competitive interventions' (PCIs). PCIs mean a variety of remedies⁸⁸ to be imposed where an 'adverse effect on competition' can be demonstrated. According to the CMA, any intervention in this regard 'must result from a detailed assessment and understanding of competition concerns in a particular activity, and for this assessment to consider the potential effectiveness and proportionality of any intervention as well as any risks and possible unintended consequences'.⁸⁹

It is envisaged that the DMU will have a broad discretion by which to specify and implement remedies in the overall process. The new regime is expected to mirror the Schedule 8 to the Enterprise Act 2002 in terms of remedy design powers.⁹⁰ On the other hand, the DMU's information-gathering powers seem to be more enhanced than those under the Competition Act and the Enterprise Act.⁹¹ Besides, the proposed system entails regulatory experimentation, for example ranging from accepting binding undertakings to trialling and iterating new remedies, which all point towards a *bottom-up* approach.

⁸⁷ Regarding the CMA's exemplary five types of PCIs, see n 83 above.

⁸⁸ The CMA's advice refers to the *data-related interventions, interoperability and common standards, consumer choice and defaults interventions, obligations to provide access on fair and reasonable terms and separation remedies* as the five key PCIs and emphasises the need for the DMU to provide guidance for these (CMA advice (n 45) 43).

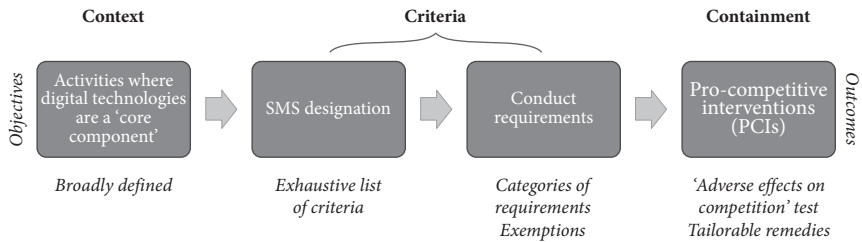
⁸⁹ CMA advice (n 45) 42.

⁹⁰ UK government response to consultation (n 47).

⁹¹ Under the UK approach, the DMU will be able to apply civil penalties to named senior managers who fail to ensure that their firm complies with requests for information, alongside the director disqualification for regulatory breaches (UK government response to consultation (n 47)).

Distinctive aspects of the chains within the UK approach are illustrated in Figure 10.3. Although the UK model offers well-elaborated and inter-connected chains along with a promising system of economic regulation, inner boundaries of each chain would need to be fine-tuned, particularly regarding how the principles ought to be applied in achievement of the policy objectives. Having said that, in the legislative process it is advisable to further reflect on the CMA’s suggestions, aiming at more settled inner boundaries.

Figure 10.3 Architectural design of the UK approach



5.4. Analysis of the US Bills

Context: Within the ‘context’ of the four US bills are designated three categories of digital platforms. According to this rather narrower approach, ‘online platform’ is defined to mean:

a website, online or mobile application, operating system, digital assistant, or online service that:

- enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;
- facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or
- enables user searches or queries that access or display a large volume of information.⁹²

The above list includes social media and music/video streaming, online intermediation services, and search engines, respectively. In this list, which is common across the bills, some of the platform services, ie number-independent interpersonal communications services, online advertisement, operating systems, web browsers, virtual assistants, and cloud computing do not appear to be included.⁹³ Although the definition of ‘online platform’ seems to allow new services to be included, this does not guarantee the predictability needed for economic regulation.

⁹² ACIO Act, s 2(g)(10); ACCESS Act, s 5(12); Ending Platform Monopolies Act, s 5(10); Platform Competition and Opportunity Act, s 3(h).

⁹³ See also The Tobin Center (n 67) 8.

Criteria: Under the US approach, not every online platform but only those ‘covered’ within the statutory limits are subject to *ex ante* regulation. In this regard, online platforms which meet three specific ‘criteria’ are qualified as ‘covered platforms’ for a period of 10 years.⁹⁴

While the first two criteria are quantitative in nature, the third criterion, the ‘critical trading partner’⁹⁵ assessment, means a qualitative threshold, which is reminiscent of the EU approach. In practice as long as a digital platform meets the quantitative criteria it will most likely satisfy the threshold, given the lack of any indicator to test this concept.⁹⁶ This implies a less expansive and intrusive approach in comparison with the EU’s DMA.

In terms of undesirable market behaviours, a distinction needs to be made between the proposed ACIO and ACCESS Acts. It should be underlined that the criteria to designate discriminatory/abusive market behaviours under the proposed ACIO Act are clearer given the listed prohibited conducts preceding any potential remedy. This proposed Act has similarities to the UK approach incorporating well-elaborated signposts functioning as the criteria.

Looking into the US approach, the thresholds applicable to the designation process would be considered within the initial phase of ‘criteria’ for their very indicative nature, as demonstrated in Figure 10.4. Hence, the ultimate functionality of this chain (‘criteria’) becomes complete when moving to the phase of ‘prohibited conducts’ under the proposed ACIO Act. This second phase, concerning the prohibited market conduct, is however absent in the proposed ACCESS Act, which poses a structural gap and deficiency. Overall, the two-pronged system of the US approach can be criticised, given the fragmented criteria that would give rise to complexity and unpredictability.

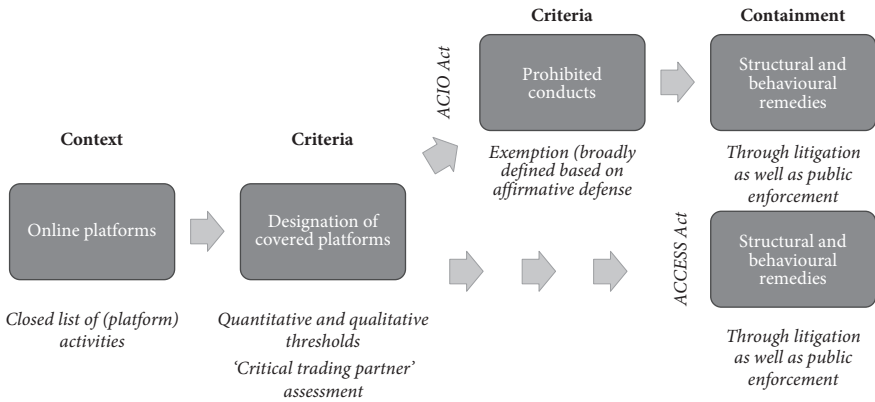
Containment: Moving to the chain of the ‘containment’, the remedies are of a mixed nature, given the two-pronged system design. Under the proposed ACIO Act, there exists a phase of ‘prohibited conducts’ which is followed by the compliance monitoring and remedy design, incorporating the judicial reliefs and sanctions. As in the UK approach, covered platforms’ practices are first calibrated through the requirements of prohibited conducts, namely the so-called second phase of the criteria, and then scrutinised as to whether the required standards are respected under the ‘containment’. Under the proposed ACCESS Act, covered platforms are directly subject to a set of obligations mainly focused on enhancing interoperability. Concerning this Act, which details interoperability obligations

⁹⁴The period of 10 years during which designation lasts is much longer than others, namely the EU and the UK policies. The timespan for review is set as three years in the EU’s DMA and five years in the UK government response.

⁹⁵According to s 2(g)(6) of the proposed ACIO Act, ‘critical trading partner’ means a ‘trading partner that has the ability to restrict or impede (A) the access of a business user to its users or customers; or (B) the access of a business user to a tool or service that it needs to effectively serve its users or customers.’

⁹⁶The Tobin Center (n 67) 9.

Figure 10.4 Architectural design of the US approach



and exemptions, one can question what makes interoperability distinctive in terms of the policy objectives.⁹⁷

Overall, the two-pronged US approach means structural complexity, considering that key signposts of the 'criteria' chain are bypassed moving towards the remedy design under the proposed ACCESS Act. This approach, in contrast with the ACIO Act, means absent well-elaborated inner boundaries as well as guiding principles and criteria under this chain. This refers to a situation, as in the EU's DMA, there is no substantiated link between the chains of 'context' and 'containment', when it comes to the proposed ACCESS Act. All the US bills nevertheless mark a distinction from the EU approach as they aim to effectuate regulatory dialogue with the stakeholders and include a reversal of the burden of proof, ie when the exemption is likely or review of the obligations is required.

6. Conclusion

6.1. Summary and Main Findings

Economic regulation means direct intervention into decisions by market players concerning market entry or exit, pricing, product features, etc to optimise the welfare gains, most often by mimicking a competitive market. The presence of policy objectives and achievable outcomes along with inter-connected chains of 'context', 'criteria', and 'containment', as discussed in this chapter, appear to be the

⁹⁷ For instance, according to the proposed ACCESS Act, s 6(c)(1): 'After designating an online platform as a covered platform, the Commission shall issue standards of interoperability specific to the covered platform.' This and other proposed measures under the ACCESS Act can be criticised given the directly applicable obligations based on interoperability standards and their implications.

key drivers for a well-functioning economic regulation. From this point of view, this study examines the policy approaches of the EU, UK, and US regarding regulation of digital markets, based on a three-step analysis embodying the so-called chains.

Inter-connection of these chains cuts across the regulatory design and structure to deal with the existing challenges of digital markets including market failures. These chains, when coherently designed and integrated to each other, can play a significant role in building up a sustainable and well-functioning model of economic regulation. This suggests a well-elaborated regulatory design – together with substantiated links and inner boundaries across the sequential chains – is key to a promising model of digital markets regulation.

However, in the EU case, as Figure 10.2 demonstrates, *cross links* and the *inner boundaries* of the chains are fraught with structural gaps and deficiencies. The former problem results from the absence of a chain (of criteria) between ‘context’ and ‘containment’, whereas the latter surfaces within the expansive regulatory approach, for example through designation of CPSs, gatekeepers, and newly prohibited practices and obligations, posing unpredictabilities. Lack of ‘regulatory dialogue’, ‘reversed burden of proof’, and ‘guiding principles’ should be noted as additional sources of concern, discrediting the high-level goals and intentions of the EU policy makers. The feedback effect as illustrated in Figure 10.2, although helpful to filter and find out the Type I and II errors, should not be expected to reverse this structural deficiency, overall.

The UK approach well represents a contrary situation, whereby one can witness a good combination of regulatory commitment and flexibility with a view to responding to market failures. This mainly stems from the policy objectives, milestones, and outcomes being linked to each other, along with well-established safeguards and checks and balances as well as guiding principles. In the proposed regime, all the chains appear to be flexibly set to enable adjustment of the conduct requirements and remedies in view of the business models. Although some uncertainties exist within the inner boundaries of the chains, eg regarding how to apply the principles under each high-level objective, the substantiated links across the chains and their overall coherency promise a good example of economic regulation model. To reinforce the proposed regulatory system with far more settled inner boundaries, the UK parliament should firmly reflect on the CMA advice and market study in the legislative process.

One can spot similarities between the UK and US policy approaches, particularly in view of the sequential and inter-connected chains of economic regulation. Except under the proposed ACCESS Act, no direct consequence is attributed to meeting the thresholds, and covered platforms are subjected to certain prohibitions to be followed by the tailorable remedies. Under the chain of ‘criteria’, a larger room is visible for the exemption based on the so-called ‘affirmative defense’, as in the UK approach. Yet, we do not know the extent to which there will be differentiation across the covered platforms concerning the prohibited conducts. This uncertainty needs to be underlined for the proposed ACCESS Act where

substantiated links do not exist across the chains of ‘context’ and ‘containment’. In fact, the direct link between such chains, namely meeting the thresholds of being a ‘covered platform’ and the obligations would cause a fragile structure and the likelihood of regulatory vacuum. With similarities to the EU approach, this situation would lead to unpredictability and potential in regulatory engineering.

6.2. Why Does the Compass of Economic Regulation Point to the UK?

Given the policy approaches of the EU, UK, and US, architectural elements in each approach altogether offers a comparative viewpoint as to digital markets regulation from the perspective of economic regulation manifested here, ie based on the chains of ‘context’, ‘criteria’, and ‘containment’. From this point of view, one can trace the effective and robust system of the UK approach in its proposed regime based on coherent and inter-connected chains of economic regulation enabling a sufficient degree of predictability as well as flexibility. Lack of some details in this proposed system does not seem to create a significant gap or deficiency for the sound structure including a number of safeguards and also checks and balances, as well as guiding principles.

There are distinctive features of the UK approach that are noteworthy here. First and foremost, the UK approach rests on a principles-based regulatory regime and bottom-up approach, which signifies a coherent and systemic understanding of economic regulation. At this notion and structure lie the well-elaborated and designed chains of economic regulation, which needs to be highlighted as a core aspect of the UK approach. For instance, the test of ‘adverse effect on competition’ which should be met for the PCIs not only bridges the ‘containment’ to the previous chain of ‘criteria’ but also reinforces better economic regulation against market failures including structural problems. Closely related to this, one can derive that all the sequential links build on the thrust of creating competitive digital markets which can be identified as another significant aspect guiding the UK system towards achievable outcomes. Finally, under the proposed regime, wide-ranging tools and remedies are set out, demonstrating a commitment to apply the PCIs, although the flexibility through the regulatory system is also kept on with many details being left to the DMU. From this point of view, the UK approach can be deemed a successful example of combining regulatory commitment with regulatory flexibility.

The EU’s DMA system embodies various gaps and unpredictabilities, which are closely related to the so-called chains lacking well-elaborated cross links and inner boundaries. This would arguably be diminished in time with the feedback effect based on the investigative tools and the implementing and delegated acts. However, the structure of the DMA does not allow enough room for regulatory experimentation that can effectively dissipate the concerns of regulatory engineering. Such

concerns are less relevant in the US approach, which erects more signposts for the stakeholders and greater room for differentiation, if not equally across the two proposed acts. In this regard, the US stays in between the EU and UK. While the US policy approach – particularly looking into the proposed ACIO Act – has key similarities with that of the UK, the latter marks a more coherent and promising model given its bottom-up approach including the bespoke codes of conduct and trialling and iterating type novel remedies.

Overall, as the UK approach suggests, substantiated links within and across the chains would enable robust models of economic regulation, mitigating potential gaps and uncertainties. Without such an architecture as well as the guiding principles and outcomes, the intended results from a digital markets regulation would not be achieved as expected. Given this, the existing policy approaches for digital markets regulation, particularly those in the EU and US, should be reconsidered from the viewpoint of economic regulation based on the three-chain architecture manifested above.

