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**The UK's Digital Market Regulation:  
The Need for a Proportionality Principle  
in the CMA's New Framework**

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# The UK's Digital Market Regulation: The Need for a Proportionality Principle in the CMA's New Framework

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## *Abstract*

The application of the principle of proportionality in competition law enforcement is of utmost importance. However, there are concerns regarding its effective implementation under the DMCC Bill, primarily due to the restricted extent of judicial review. The lack of a comprehensive evaluation of the merits in the DMCC Bill could impede the meticulous assessment of proportionality in CMA decisions, potentially resulting in the adoption of measures that are not commensurate with their goals. This raises concerns about the possibility of implementing disproportionate measures. There is a pressing requirement for the CMA to provide more comprehensive instructions on how to apply the proportionality principle, specifically in terms of incorporating efficiency considerations, to guarantee the efficient implementation of the principle.

## **I. Introduction**

The adoption of the Digital Markets, Competition, and Consumer (DMCC) Bill on 24 May 2024 following Royal Assent has brought the most significant reform to the UK's competition and consumer protection law since the creation of the Competition and Markets Authority (CMA).<sup>2</sup> The DMCC Bill establishes a new digital markets regime with specific conduct rules for firms with 'strategic market status' (SMS) and empowers the CMA to enforce these rules. For this purpose, the CMA's established Digital Markets Unit (DMU) that has been empowered with new tools to investigate and tackle competition challenges in digital markets.<sup>3</sup>

Nevertheless, a significant issue regarding the implementation of the DMCC arises from the extensive level of authority it gives to the CMA in customizing precise regulations for a company identified as having SMS status. Although discretionary power allows for nuanced and context-specific regulation, it carries the risk of inconsistent and unpredictable enforcement. There is also a need for the proportionality principle to be more effectively applied to the chosen measures.

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<sup>2</sup> Digital Markets, Competition and Consumers Act 2024 <https://bills.parliament.uk/bills/3453> accessed 20 June 2024. The new digital markets regime is expected to enter into force in autumn 2024 following consultation on CMA guidance.

<sup>3</sup> Digital Markets Unit (DMU) was established in 2021 to oversee a new regulatory regime for the most powerful digital firms, promoting greater competition and innovation in these markets and protecting consumers and businesses from unfair practices <<https://www.gov.uk/government/collections/digital-markets-unit>> accessed 2 July 2024.

This is a particularly pertinent question because the CMA's decisions are subject only to judicial review rather than a full merits review.<sup>4</sup> The CMA is mandated to impose conduct requirements only if they are proportionate to their objectives.<sup>5</sup> Yet, the restricted extent of judicial review presents a notable obstacle to ensuring the proportionality of regulatory measures within the new framework. Judicial review is concerned solely with the legality of decisions, which encompasses aspects such as procedural fairness, irrationality, and compliance with the law. It does not explore the substantial advantages of the decisions. This constraint implies that the CMA's decisions regarding fairness and reasonableness are less likely to be examined, making it uncertain how the proportionality of specific regulatory actions can be ensured. Therefore, there is a possibility that the decisions made by the CMA may remain valid, even if they contain significant errors, as long as they adhere to legal and procedural requirements.<sup>6</sup> This could potentially lead to undermining the intended balance between regulation and market freedom and innovation.<sup>7</sup>

The CMA has tried to alleviate these concerns by issuing draft guidance shortly after the adoption of the DMCC Act.<sup>8</sup> The Guidance aims to bring greater clarity of expectations to firms with SMS and ensure more consistent application of the rules. The guidance covers several key areas. It outlines the process for assessing whether a firm has SMS and details the steps for conducting such investigations. It explains how conduct requirements (CRs) will be imposed on firms designated with SMS. The guidance also describes the assessment of adverse effects on competition (AEC) and the implementation of pro-competition interventions (PCIs). The CMA will use investigatory powers, such as requesting information from firms, including algorithms that are specified.

Additionally, the guidance addresses monitoring compliance with imposed competition requirements, evaluating their effectiveness, and reviewing and updating them as necessary. It also details the enforcement of breaches of competition requirements, the approach to imposing penalties, and administrative matters related to the regime's operation. The possibility of incorporating regular consultations with industry stakeholders and independent experts is welcomed as it could enhance the legitimacy and fairness of the CMA's decisions. By engaging with a broad range of stakeholders, the CMA can ensure its decision-making is well-informed and balanced, addressing regulatory objectives and industry concerns.

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<sup>4</sup> The DMCC stipulates that the CMA's decisions will be subject to judicial review appeal grounds. The House of Lords and Commons debated whether the standard of appeal should be full merits or more limited judicial review. The final version of the DMCC adopted judicial review, except for the appeals of penalty decisions, which are reviewable on merits.

<sup>5</sup> DMCC Act, chapter 3, para 19 (5).

<sup>6</sup> The section on UK case law below will discuss some examples from the CMA's decisional practice where decisions were considered disproportionate.

<sup>7</sup> An important decision to illustrate this concern in the Microsoft Activision merger that was blocked by the CMA during the first proposed merger. Microsoft agreed to acquire Activision excluding Activision's non-EEA cloud streaming rights. Following a consultation on the Parties' undertakings in lieu of reference (UILs), the CMA decided to accept the UILs offered by the Parties pursuant to section 73(2) of the Act, and on 13 October 2023 published its UIL Final Acceptance Decision. The decision, raised questions about whether it truly balanced regulation with market freedom and innovation.

<sup>8</sup> Digital markets competition regime guidance CMA194, con DRAFT Guidance on the digital markets' competition regime set out in the Digital Markets, Competition and Consumers Act 2024, 24 May 2024 (hereinafter 'the Guidance'). The DMCC Act establishes a framework empowering the CMA to enforce rules for firms with SMS. The DMU created within the CMA is tasked with using new investigatory tools to address competition issues and apply these conduct rules elaborated in the draft Guidance.

The proportionality requirement embedded in the CMA's Guidelines ensures that CMA regulatory interventions are balanced and appropriate to the possible competition harm they aim to address.<sup>9</sup> This requirement stipulates that any actions implemented by the CMA must be commensurate with the harm identified, while also avoiding excessive and restrictive regulations that could impede innovation or market freedom. The principle of proportionality mandates that the CMA meticulously assess the magnitude and extent of its actions, guaranteeing that they are indispensable and fitting considering the particular circumstances of each case. Nevertheless, the guidance provided by the CMA indicates that decisions should be proportionate, without providing further details on the specific requirements or implications of this principle. The absence of specific information in the DMCC Bill may pose difficulties in guaranteeing that the decisions made are appropriately balanced. The principle of proportionality requires that any measure taken should be suitable to achieve its aim, necessary as the least restrictive means, and balanced in relation to the gravity and duration of the infringement.

This paper aims to assess the effectiveness of the draft guidance in ensuring the principle of proportionality. It will specifically focus on key aspects such as the conduct requirements and the proposed analytical approach by the CMA. I will examine the degree to which the CMA's preliminary guidance establishes a structure that can ensure compliance with proportionality requirements, and whether efficiency defenses can be incorporated into this structure.

The discussion will also analyse the potential of integrity, security, and privacy as defenses and evaluate the role of the Anticompetitive Effects Test (AEC) in relation to the proportionality requirement. The objective is to offer a detailed examination of the legal and economic obstacles and possibilities brought about by this stipulation, with a focus on the necessity for accurate and unambiguous directives.

## II. The Principle of Proportionality

In this section I first summarize what the principle of proportionality means in the law and explain the economic rationale of this fundamental legal principle. I then review how the principle of proportionality has been applied in the case law of both the EU and the United Kingdom. I also discuss what proportionality means for the evidentiary standards that need to be applied to ensure the necessity of intervention, the need for mechanisms to challenge proportionality.

### 2.1 *The principle of proportionality*

The principle of proportionality is a fundamental principle in both national and international legal systems, including the EU and the UK that requires that any action taken by institutions or States must not exceed what is appropriate and necessary to achieve the legitimate objectives pursued.<sup>10</sup> It is important to note that a 'principle' of law differs from a rule of law. The rule of law generally designates some specific norm conferring rights or imposes duties on people, which may be enforced in courts.<sup>11</sup> A principle of law is something more general - what one might call an ideal

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<sup>9</sup> The Guidance, para 4.34; 5.14; 7.71; 8.40.

<sup>10</sup> The principle of proportionality is a foundational principle of EU law, explicitly articulated in Article 5.4 of the Treaty on the European Union (TEU). This article states that the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. The application of this principle is further elaborated in Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, which details its implementation. Additionally, the principle of proportionality is embedded in Art 12 TEU and 69 TFEU; Art 276 TFEU and Art 296 TFEU. See also Marios Costa and Steve Peers, *Steiner & Woods EU Law* (15th edn, OUP 2023) 163.

<sup>11</sup> Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer 1996)

of reason and justice. It is a fundamental concept that supports the very institution of law by guiding the application and interpretation of specific legal rules.<sup>12</sup>

From a legal perspective, the principle of proportionality means that any intervention must be appropriate (suitability test), as well as necessary (necessity test) and not excessively burdensome relative to the objective sought (proportionality *stricto sensu*) for the person subject to the intervention.<sup>13</sup> The suitability test examines the relationship between the means and the end, questioning whether the chosen measure is appropriate for achieving the intended aim.<sup>14</sup> The necessity test requires the court to determine whether the chosen measure is necessary to achieve the proposed goal, meaning that the measure should be the least restrictive option available.<sup>15</sup> The third test, proportionality *stricto sensu*, assesses whether the measure imposes an excessive burden on the individual despite being suitable and necessary.<sup>16</sup> The principles of proportionality ensure that such measures are appropriate, necessary, and balanced in protecting rights to the legal standards, thereby maintaining the rule of law and fairness in judicial processes, which is essential for the legitimacy of the law. It ensures that law-making remains primarily with democratically elected legislators rather than activist courts.<sup>17</sup>

## 2.2 *Economic Rationale*

From an economic point of view, the proportionality principle focuses on ensuring that regulatory measures are cost-effective and do not impose excessive burdens on businesses. Overall, the proportionality principle requires that any measure taken to address anti-competitive behavior must be specifically targeted (suitable), impose the least economic burden (necessary), and be balanced in providing a net positive impact on welfare regarding its economic impact.

Portuese conducted the first systematic study of the application of the principle of proportionality from a law, economics, and comparative perspective in 2013.<sup>18</sup> This study demonstrates the efficiency rationale of the EU principle of proportionality, which inherently involves a cost-benefit analysis (CBA), a fundamental tool in economic assessments of regulatory interventions.<sup>19</sup> The CBA framework evaluates the anticipated costs of regulatory measures against the expected benefits, ensuring that the benefits justify the costs incurred.<sup>20</sup> This approach ensures that regulatory actions are effective and efficient, minimizing unnecessary burdens on businesses while maximizing positive outcomes for consumers and the market. Drawing on relevant literature, Portuguese concludes that incorporating CBA into the proportionality requirement can enhance the robustness of regulatory decisions.<sup>21</sup> From an economic perspective, the principle of proportionality ensures that regulatory interventions are cost-effective and do not excessively burden businesses. Using cost-benefit analysis in this context ensures that the benefits of the intervention justify the economic costs incurred.

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<sup>12</sup> H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 2004).

<sup>13</sup> Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) ELJ 158, 165.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid

<sup>16</sup> Ibid.

<sup>17</sup> Ibid, 162.

<sup>18</sup> See Aurelien Portuguese, 'Principle of Proportionality as Principle of Economic Efficiency' (2013) 19(5) European Law Journal 612-635.

<sup>19</sup> Ibid, 614.

<sup>20</sup> For example, a study by Eric A. Posner and E. Glen Weyl, 'Benefit-Cost Paradigms in Financial Regulation' (2014) 43(2) J Legal Stud S1 analyses how financial regulatory agencies should perform BCA for financial regulations.

<sup>21</sup> Ibid, 635.

## 2.3 Application of the principle of proportionality by the courts

### A. At the EU level

The principle of proportionality is enforced on competition law enforcement actions or remedies at EU level through the European Courts. These must be suitable and necessary to achieve the intended objective of protecting competition and must not go beyond what is required to achieve that objective.<sup>22</sup>

The Court of Justice of the European Union (CJEU) has applied the proportionality principle in different contexts in all areas of EU law to balance various rights and interests.<sup>23</sup> In the context of competition law, the proportionality principle is a well-established concept in determining sanctions in case of infringements of Art. 101 and Art. 102 of the Treaty of the Functioning of the European Union (TFEU), Merger Control the assessment of Art. 101 (3) TFEU, particularly the fair share rule, objective justification, and efficiency defenses under Art. 102 TFEU and the efficiency test in Art. 101 (1).<sup>24</sup>

Applying the principle of proportionality in determining the fairness and appropriateness of fines imposed for antitrust violations serves as a cornerstone to ensure that fines are suitable, necessary, and not excessively burdensome.<sup>25</sup> However, the court is under an obligation to check how the Commission applied the Penalty Guidelines<sup>26</sup> in the estimation of the fine and whether all required factors are considered; only after this can the principle of proportionality be applied.<sup>27</sup> The principle of proportionality mandates that penalties must not be disproportionate, balancing deterrence and fairness.<sup>28</sup> The EU courts reinforced that deterrence is a fundamental objective of competition law but emphasised that fines must adhere to the proportionality principle. As such, they must ensure that they are not excessive relative to the severity of the infringement, maintaining a balance between effective deterrence and fairness.<sup>29</sup>

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<sup>22</sup> Case C-133/93 *Crispoltoni v Fattoria Autonoma Tabacchi* [1994] ECR I-4863, para 41.

<sup>23</sup> For example Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: FEDESA and others* [1990] ECR I-4023; Case 114/76 *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & Co. KG* [1977] ECR 1211; Case 116/76 *Grows-Farm GmbH & Co. KG v Hauptzollamt Hamburg-Jonas* [1977] ECR 1231; Joined Cases 119 and 120/76 *Tedeschi v Denkavit Commerciale Srl* [1977] ECR 1555; Case 104/75 *De Peijper* [1976] ECR 613; Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141; Case C-353/99 *Heidi Hautala v Council of the European Union* [2001] ECR I-9565; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.

<sup>24</sup> Jacques Steenbergen, 'Proportionality in Competition Law and Policy' (2008) 35 Legal Issues of Econ Integration 259.

<sup>25</sup> From Case T-49/02 *Brasserie Nationale v Commission* [2005] ECR II-3033, para 170, it is established that the courts are '*under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant.*'

<sup>26</sup> The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty. See also Oana řtefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 European Law Journal 753, claiming that '*soft law instruments are considered by the European Courts an important and specific part of the body of European norms that they should use when deciding cases submitted for their judgment*'.

<sup>27</sup> Case C-397/03 *Archer Daniels Midland v Commission* [2006] ECR I-4429, referring to para 93 of the judgment of Case T-224/00, *Archer Daniels Midland v Commission* [2003] ECR II-2597.

<sup>28</sup> Article 49(3) of the Charter of Fundamental Rights of the European Union (hereafter the 'Charter').

<sup>29</sup> Case T-110/07 *Siemens AG v Commission of the European Communities* [2011] ECR II-477, para 323; Case T-461/07 *Visa Europe Ltd and Visa International Service v Commission of the European Communities* [2011] ECR

Further, the General Court clarified the relationship between fines and the gravity of infringements.<sup>30</sup> The Court considered that fines should be proportionate to the factors used in assessing the gravity of the infringement. This meant that the penalty should reflect both the nature of the infringement and its impact on the market, ensuring that it was appropriate and not unduly harsh.<sup>31</sup> In addition, the EU courts have identified several factors for assessing the gravity of infringements, such as the nature of the infringement, its impact on the market, and its duration.<sup>32</sup> However, the academic literature criticizes the courts' approach to consistently applying the proportionality principle due to the lack of clear guidelines on the relative weight of these factors and the corresponding fine levels.<sup>33</sup> The principle of proportionality should also consider the infringing company's ability to pay fines without facing insolvency. This ensures that penalties do not lead to disproportionate economic hardship, preserving the business's ability to operate while ensuring compliance.

The principle of proportionality is also applied in commitment decisions under Article 9 of Regulation 1/2003 (which provides the European Commission with broader discretion compared to infringement decisions under Article 7 due to the forward-looking nature of commitment decisions), which involve assessing future market activities based on proposed commitments.<sup>34</sup> The Commission is not required to identify less restrictive alternatives to the proposed commitments, allowing it greater flexibility.<sup>35</sup> However, commitments must fully eliminate the identified competition concerns, which can sometimes result in remedies that appear disproportionate to the initial issues.<sup>36</sup> In addition, commitments are voluntary offers from the parties involved, and the Commission cannot impose remedies unilaterally in these cases.<sup>37</sup> This voluntary nature differentiates commitment decisions from infringement decisions, which are subject to a stricter proportionality test and more rigorous judicial review.<sup>38</sup> In general, the EU courts have emphasized that the principle of proportionality, as a fundamental aspect of European Union law, serves as a standard for assessing the legality of all Union institution actions, including decisions made under Article 9(1) of Regulation 1/2003.<sup>39</sup>

These examples show that enforcing proportionality checks regulatory decisions, balancing deterrence and fairness. The principle of proportionality has been crucial in preventing excessive penalties, ensuring that the fines reflect the nature and impact of the infringement. The

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II-1729, para 293; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S and Others v Commission of the European Communities* [2005] ECR I-5425, paras 227–203; Case C-549/10 P *Tomra Systems ASA and Others v European Commission* [2012], para 105.

Joined Cases T-56/09 and T-73/09 *Saint-Gobain*, para 379.

<sup>30</sup> Case T-38/07 *Shell v Commission* [2011] ECR II-4383.

<sup>31</sup> Case T-38/07 *Shell v Commission* [2011] ECR II-4383, para 175.

<sup>32</sup> Case C-3/06 P *Groupe Danone v. Commission* [2007] ECR I-1331, paras 36–39; Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07 *ThyssenKrupp* [2011] ECR II-5129, para 320.

<sup>33</sup> Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37(4) *World Competition* 435, 450.

<sup>34</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003 ("Regulation 1/2003"). See Ioannis Lianos, 'Competition Law Remedies in Europe' in Ioannis Lianos and Damien Geradin (eds) *Handbook on European Competition Law* (Edward Elgar Publishing 2013) 362.

<sup>35</sup> Ibid, referring to the Opinion of AG Kokott, Case C-441/07 P, *Commission v. Alrosa Company Ltd* [2010] ECR II-5949, para. 74.

<sup>36</sup> Ibid, 410.

<sup>37</sup> See Clemens Ritter, 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?' (2016) 7(9) *JECL & Pract* 587.

<sup>38</sup> Ibid, 429.

<sup>39</sup> See Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, para 36.

proportionality principle compels authorities to justify the severity of their sanctions, ensuring that each decision is thoroughly evaluated and balanced against the potential economic impact on the infringing company. This approach fosters a fairer regulatory environment and promotes trust in the enforcement mechanisms.<sup>40</sup>

Moving forward, the European courts will have to address the proportionality principles in appeals of their decisions on the DMA. This will further illustrate how the proportionality principle ensures that new regulations are fair and balanced. Understanding these consequences is crucial as it highlights the role of the principle of proportionality in shaping a just and equitable regulatory landscape in the EU. The same principles are relevant in the UK.

#### B. At the UK level

UK case law demonstrates the application of proportionality in different competition law investigations. This ensures that interventions are economically efficient by balancing the harm from anticompetitive behaviors with the potential economic impact on business. For example, in *TESCO v OFT* (now CMA), OFT sought an order for Tesco to disclose witness statements and other related evidence collected during the OFT's investigation.<sup>41</sup> The CAT had to determine whether such a disclosure order was appropriate and if any of the documents were privileged under litigation privilege, considering the principle of proportionality that demands a careful balance between deterring anti-competitive behavior on the one hand and ensuring that the regulatory interventions are just and appropriate on the other. The CAT refused the OFT's application and found that a disclosure order was neither necessary nor proportionate in the circumstances.<sup>42</sup>

In the context of market investigations, the CMA assessed the proportionality of the remedies requiring more publicly available information on consultant fees in *BMI Healthcare Limited*.<sup>43</sup> The CAT evaluated whether the remedies were necessary to restore competition and whether they imposed an excessive burden on the healthcare providers and upheld the CMA's decision, concluding that the remedies were proportionate and essential.<sup>44</sup> In the context of regulatory control, Hutchison 3G's challenge to OFCOM's decision on mobile call termination charges, the CAT assessed the proportionality of the price controls imposed by OFCOM.<sup>45</sup> OFCOM had set price controls on the charges that mobile operators could levy on each other to protect consumers and promote competition in the mobile telecommunications market. The CAT evaluated whether these price controls were necessary to achieve the objectives of consumer protection and competition promotion and whether they were the least restrictive means to accomplish these goals.<sup>46</sup> The tribunal upheld OFCOM's decision, finding that the price controls were proportionate and essential for maintaining a competitive market.<sup>47</sup>

The CAT assessed the proportionality of remedies in the CMA's requirements in Ryanair's appeal against the CMA decision.<sup>48</sup> According to the CAT, unless the facts significantly change, the CMA

<sup>40</sup> See Koen Lenaerts, 'Proportionality as a Matrix Principle Promoting the Effectiveness of EU Law and the Legitimacy of EU Action' (2022) RRDE 13.

<sup>41</sup> Case 1188/1/1/11 (1) *Tesco Stores Ltd* (2) *Tesco Holdings Ltd* (3) *Tesco Plc v Office of Fair Trading* [2012] CAT 6.

<sup>42</sup> *Ibid*, para 28.

<sup>43</sup> CMA, Private healthcare market investigation, Final Report, 2 April 2014, CMA25, paras 11-73 [https://assets.publishing.service.gov.uk/media/533af065e5274a5660000023/Private\\_healthcare\\_main\\_report.pdf](https://assets.publishing.service.gov.uk/media/533af065e5274a5660000023/Private_healthcare_main_report.pdf)

<sup>44</sup> AXA PPP had challenged the Competition and Markets Authority's CMA decision, Case 1228/6/12/14 *Axa PPP Healthcare Limited v CMA* [2015] CAT 5, para 54.

<sup>45</sup> *Hutchison 3G UK Ltd v. Office of Communications (OFCOM)* [2008] CAT 11.

<sup>46</sup> *Ibid*, para 180-84.

<sup>47</sup> *Ibid*, para 225.

<sup>48</sup> *RYANAIR HOLDINGS PLC v. Competition and Markets Authority* [2015] CAT 14.

is not under an obligation to conduct a new proportionality assessment for remedies that have already been determined to be proportionate. Supporting the CMA's assessment, the CAT pointed out that mandating evaluation without modifications would go beyond the statute's requirements and result in recurring challenges. In addition, the CMA supports the perspective that proportionality should prevent the imposition of fines, affirming that it will avoid imposing fines disproportionate to the undertaking's size and financial condition.<sup>49</sup> For example, in *Durkan Holdings v OFT*, the CAT examined whether the OFT's fines were proportionate to the anti-competitive behavior identified.<sup>50</sup> The CAT considered the gravity of the infringement and the economic impact of the fines and reduced the fines substantially, because it considered the original penalties disproportionate given the circumstances.<sup>51</sup> These cases demonstrate the importance of court review to ensure that the CMA's actions are proportionate.

## 2.5 The principle of proportionality in the CMA's soft law

The CMA issues various forms of guidance to ensure transparency and clarify its approach to enforcing competition law. While not legally binding, they are highly influential and significantly shape enforcement practices and compliance strategies. The CMA stresses that it is bound by the principle of proportionality at almost every stage of its enforcement activities to ensure that its enforcement actions are fair, reasonable, and balanced, avoiding excessive burdens on businesses while effectively addressing anti-competitive practices. For example, the CMA states that the principle of proportionality underlies its Prioritization Principles when deciding which projects to undertake.<sup>52</sup> Specifically, the CMA evaluates whether the resources required for a project are proportionate to the expected benefits, while considering the timing and resource requirements of the proposed project in relation to other ongoing work across the CMA.<sup>53</sup>

However, this is not the issue with obligations imposed on firms and the question of whether they impose disproportionate costs on them.<sup>54</sup> However, the CMA also considers the proportionality principle in other areas that affect the firms against which it intervenes. For example, in its transparency and disclosure guidance, the CMA clarifies that it may disclose specific information if it is satisfied that the disclosure is proportionate to what it seeks to achieve in connection with its investigations.<sup>55</sup>

The proportionality principle is also considered in the CMA's investigation procedures guidelines, showing that the CMA will consider whether the imposition of interim measures is appropriate in the relevant circumstances and proportionate for the purpose of preventing, limiting, or remedying significant damage to a particular person or category of person, or is or is likely to be contrary to the public interest.<sup>56</sup> The proportionality requirement is also a leading principle outlined in the

<sup>49</sup> OFT 432 Guidance as to the appropriate amount of penalty, September 2012, updated in December 2021, with CMA 73 < <https://assets.publishing.service.gov.uk/media/622f73c58fa8f56c170b7274/CMA73final.pdf> > accessed 23 June 2024.

<sup>50</sup> Case No. 1121/1/1/09 *Durkan Holdings Ltd v. Office of Fair Trading* [2011] CAT 6.

<sup>51</sup> Ibid, para 180. The CAT considered whether the CMA's decision and the imposed fine were proportionate to the infringement in *Ping Europe Ltd v. Competition and Markets Authority* [2018] CAT 13; *Ladbible Group Limited v. Competition and Markets Authority* [2020] CAT 25; *Royal Mail plc v. Office of Communications (OFCOM)* [2019] CAT 27; *Lexon (UK) Ltd v. Competition and Markets Authority* [2021] CAT 5.

<sup>52</sup> Prioritisation Principles CMA188, 30 October 2023.

<sup>53</sup> Ibid, para 3.16.

<sup>54</sup> Ibid.

<sup>55</sup> Transparency and disclosure: Statement of the CMA's policy and approach, CMA6, January 2014, para 4.18.

<sup>56</sup> Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, last updated 31 January 2022, Para 8.12.< [https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases](https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases) > accessed 25 June 2024.

CMA's Penalty Guidance, which both the CMA and the UK Competition Appeal Tribunal (CAT) must have regard when considering the appropriate level of penalties.<sup>57</sup> With the latest update of the Penalty Guidance from 2021, the CMA introduces key changes in the six-step penalty-setting process that the CMA follows, introducing additional details concerning the financial indicators that it will typically use to assess proportionality and deterrence, which indicates the importance of proportionality in defining the appropriate fines.<sup>58</sup> In particular, the CMA evaluates the proportionality of penalties holistically, ensuring the final amount is appropriate and not necessarily the lowest possible, reflecting the seriousness of the infringement and deterring future anti-competitive behavior.<sup>59</sup> This assessment considers the infringement's nature, the undertaking's role, its impact on competition, and the undertaking's size and financial position.<sup>60</sup> In addition, the CMA clarifies that the penalties may be reduced to avoid being disproportionate, and adjustments are made if the penalty exceeds the statutory cap.<sup>61</sup>

A comprehensive assessment of whether the CMA decisions are, in fact, proportional does not exclude a measure of discretion. The EU Courts have, for example, traditionally granted the European Commission some margin of discretion in fining decisions.<sup>62</sup> However, this deference does not impede the EU Courts from conducting an independent and comprehensive review of both the facts and the law.<sup>63</sup> Indeed the decisional practice of the CJEU makes clear that any margin of discretion the Commission may have does not prevent the Courts of the European Union from reviewing the Commission's interpretation of economic information and thus the proportionality of decisions.<sup>64</sup>

The courts must ensure that the evidence is factually accurate, reliable, consistent, comprehensive for assessing complex situations, and capable of substantiating its conclusions. In his opinion in *Telefonica*, Advocate General Wathelet articulated this position, arguing that the General Court must fully assess the proportionality of fines imposed by the Commission.<sup>65</sup> Even though the Commission has a 'substantial margin of discretion,' the Court is nonetheless free to conduct a comprehensive and independent review of the relevant facts and the law, which, according to AG Wathelet, is 'necessary,' not just 'desirable or allowed.'<sup>66</sup> This position is considered to be in line with the European Convention on Human Rights (ECHR)<sup>67</sup> and the Charter, which require the court to have unlimited jurisdiction<sup>68</sup> when reviewing appeals against decisions and the fine

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<sup>57</sup> Competition and Markets Authority, "CMA's guidance as to the appropriate amount of a penalty, CMA73, 16 December 2021 (hereinafter 'the Penalty Guidance') <<https://assets.publishing.service.gov.uk/media/622f73c58fa8f56c170b7274/CMA73final.pdf>> accessed 25 June 2024.

<sup>58</sup> The changes are not examined in this paper.

<sup>59</sup> The Penalty Guidance, Para 2.25.

<sup>60</sup> The Penalty Guidance, Para 2.26.

<sup>61</sup> The Penalty Guidance, Para 2.27. Some commentators criticize the CMA's guidance on the ground that the Guidance inappropriately seeks to create a foundation for imposing ever larger penalties, see Nissim Massarano, 'The virtue of a proportional response—an assessment of the CMA's new penalty guidance' (12 September 2022) <<https://www.cliffordchance.com/briefings/2022/09/the-virtue-of-a-proportional-response---an-assessment-of-the-cma.html>> accessed 25 June 2024.

<sup>62</sup> Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation n° 1/2003 [2006] OJ C210/2 ('Fining Guidelines'); See also Case T-235/07 *Bavaria* [2011] ECR II-3229, paras 265–266.

<sup>63</sup> Gilliams (n 33) 456.

<sup>64</sup> Case C-389/10 P *KME Germany* [2011] ECR I-13125, para 121.

<sup>65</sup> Opinion of Advocate General Wathelet in Case C-295/12 P *Telefonica* [2013] para. 126, referring to *KME Germany* (n 25) para. 136

<sup>66</sup> *Ibid.*, para 126.

<sup>67</sup> The concept of plenary jurisdiction is implied through the requirements set out in Article 6 of the ECHR, which ensures the right to a fair trial.

<sup>68</sup> Pursuant to Art. 261 TFEU and Art. 31 of Regulation 1/2003.

imposed by the Commission.<sup>69</sup> Only allowing this judicial scrutiny ensures that fines are not only deterrent but also fair and proportionate.<sup>70</sup>

### 3 Is the DMCC Compliant with the Principle of Proportionality?

While the need to consider proportionality is thus enshrined in most of the own guidelines and stated principles of the CMA, the cases in which the CMA has lost on proportionality grounds at the CAT shows that these principles will not always be satisfied in practice if there is not a court that can enforce them. Although the CMA is very aware of the issue of proportionality, the question is how it can be held to its own standards in the framework of the DMCC. It is, therefore, central to the application of the principle of whether the court can fully assess the proportionality of the CMA decisions under the DMCC under the standard of judicial review.

A judicial review standard in the UK does not allow for a full review of proportionality because it focuses solely on the legality and procedural aspects of decisions rather than their substantive merits. For example, the distinctions between rationality and proportionality reviews were emphasised by the House of Lords in the *R (on the application of Daly) v Secretary of State for the Home Department* case.<sup>71</sup> Lord Steyn made it clear that, the court's level of scrutiny is higher under proportionality than it is under traditional unreasonableness. This is because proportionality requires evaluating the decision-maker's balance rather than merely determining if it falls within a reasonable range. It necessitates paying close attention to the relative importance of many interests and factors, which makes it a more thorough review. This case illustrates that judicial review in the UK focuses on the legality and procedural aspects of decisions rather than their substantive merit. This is relevant for competition law cases as seen in the *British Sky Broadcasting Group plc (BSkyB) v Competition Commission*, where the court emphasized that judicial review is distinct from a full merits-based review, emphasising that judicial review focuses on the legality, rationality, and procedural fairness of the decision-making process rather than re-evaluating the substantive merits of the decision.<sup>72</sup>

In addition, the court rejected the argument that the CAT should apply a more intense standard of review than regular courts simply because it is a specialist body. This suggests that the standard principles of judicial review apply across different forums. It also means that under judicial review, the fairness and reasonableness of the CMA's decisions are not thoroughly examined, which is necessary for a comprehensive assessment of proportionality. The foregoing suggests that enforcement of the principle of proportionality requires a full merits review of a claim made by a firm that proportionality in a regulatory decision was not preserved. The principle of proportionality thus demands an in-depth examination of the facts and the law, which goes beyond the limited scope of judicial review under UK law. This strongly supports the view that a full merits review would have been necessary to guarantee the enforcement of the principle of proportionality of measures adopted by the CMA in the framework of the DMCC. It can thus not be guaranteed that regulatory measures adopted by the CMA will be proportionate and sufficiently justified.

The DMCC bill thus gives the CMA significantly more discretion in making decisions than has been the case under the typical deference of the courts to the decisions of competition and

<sup>69</sup> Wouter Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which The European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 *World Competition* 5.

<sup>70</sup> Opinion of Advocate General Wathelet, para 129.

<sup>71</sup> [2010] EWCA Civ 2.

<sup>72</sup> [2010] EWCA Civ 2, In the Court of Appeal (Civil Division) on appeal from The Competition Appeal Tribunal (Mr Justice Barling, Prof. Peter Grinyer And Mr Peter Clayton) [2008] CAT 25.

regulatory authorities and EU and UK law. Under the traditional deference to such decisions not only to judicial review but a full merits review is applied to the principle of proportionality as seen in the cases law discussed above

In the face of the controversial choice of judicial review as the standard for CAT scrutiny for regulatory matters under the DMCC, the CMA has made efforts to create decision-making processes designed to enhance transparency and accountability. This includes broad consultation at every step of the decision-making process.

By actively seeking input from stakeholders throughout the process, the CMA aims to gather comprehensive information, consider diverse perspectives, and make well-informed decisions. This inclusive approach helps identify potential issues early on, allowing for necessary adjustments before making final decisions. The purpose of the continuous consultation ensures that stakeholders are aware of the CMA's rationale and methodology. By openly communicating the steps and considerations involved in decision-making, the CMA attempts to foster trust and clarity, which is crucial for maintaining credibility and public confidence.

According to Section 3.2 of the CMA Guidance on the DMCC Bill, transparency is essential for effective regulation and fair enforcement. In addition, engaging stakeholders throughout the decision-making process helps the CMA gather valuable insights and data from those directly affected by its policies. This engagement can lead to more balanced and informed decisions, allowing the CMA to understand the practical implications of its measures. The importance of stakeholder feedback in shaping fair and effective regulatory outcomes is emphasized in Section 4.1 of the CMA Guidance on the DMCC Bill. Lastly, identifying concerns early in the consultation process can mitigate the risks of implementing disproportionate measures. By addressing potential issues before finalizing decisions, the CMA can ensure its actions are proportionate and aligned with stakeholders' expectations. This proactive approach not only enhances the quality of decision-making but also reduces the likelihood of disputes and challenges later. Section 5.4 of the CMA Guidance highlights the role of early issue identification in achieving balanced and justified outcomes. This consultation framework is welcomed to ensure that CMA's regulatory actions are both effective and fair. However, there are some limitations.

The CMA may encounter challenges in managing the expected consultation at every stage of the decision-making process. The consultation not only has the capacity to enhance decision quality, but also to improve transparency and stakeholder engagement. Nevertheless, it lacks the equivalent degree of external scrutiny that a comprehensive evaluation of the merits offered. Stakeholders may still perceive the process as lacking rigor. If a thorough evaluation of the merits is not carried out, there is a risk that some decisions may not be sufficiently scrutinized for their proportionality. This could lead to outcomes that lack fairness. When comparing judicial review to a thorough assessment of the advantages, it becomes evident that judicial review has a narrower range. This observation emphasizes the importance of the proportionality principle.

Under judicial review, the courts primarily assess whether the decision was made lawfully, rationally, and fairly, rather than re-evaluating all aspects of the case. This limitation means that some disproportionate decisions may not be fully scrutinized. Moreover, without full scrutiny, there is a risk that efficiency considerations, which are inherently pro-competitive and crucial to the objectives of the digital market's regulation, may be overlooked. If decisions are not thoroughly examined for proportionality, there is a potential for disproportionate measures to disregard pro-efficiency arguments. This could result in actions that inadvertently harm competition and innovation, ultimately undermining the digital markets regulation's goal of promoting a competitive digital market. Given the CMA's discretion under the DMCC Bill and the more

constrained judicial review process, it becomes crucial for the CMA to provide clear and detailed guidance on how it applies the proportionality principle. This would help ensure that its decisions can withstand judicial scrutiny, focusing on whether they were reasonable and adhered to the principle of proportionality. In their judicial review capacity, the courts would then need to ensure that the CMAs followed the CMA's own guidance, thus maintaining a check on the CMA's discretion.

The principle of proportionality is essential for fair and effective competition law enforcement, and as such, its application becomes even more critical under the DMCC Bill's framework. To address the limitations of judicial review, the CMA could provide detailed guidance on the application of the principle of proportionality. This guidance should include clear criteria for assessing the suitability, necessity, and proportionality *stricto sensu* of measures. Additionally, the guidance should incorporate an efficiency defense and explain how companies can rebut allegations of disproportionate measures. One notable aspect of the DMCC Bill is the absence of an explicit efficiency defense. An efficiency defense allows firms to argue that their conduct, while potentially anti-competitive, generates efficiencies that outweigh any negative effects on competition. These efficiencies could include cost savings, innovation, or improvements in product quality and consumer welfare. The lack of an explicit efficiency defense in the DMCC Bill raises concerns about whether legitimate efficiencies might be overlooked in competitive assessments.

Highlighting efficiencies in competitive assessments is crucial because they can offset potential harms and lead to overall positive consumer outcomes. Incorporating an efficiency defense would align the DMCC Bill with best practices in competition policy, ensuring a balanced approach that considers both the potential harms and benefits of business conduct. In line with the DMA, the CMA's Guidance could consider incorporating defenses such as integrity, security, and privacy within the proportionality framework. These defenses recognize that while potentially restrictive, certain business practices might be necessary to protect crucial aspects of digital markets.

For example, in some circumstances, ensuring digital infrastructure's reliability and security can justify certain restrictive practices. In addition, some measures aimed at protecting user data and preventing cyber threats might require specific business conduct that could otherwise be viewed as anti-competitive. Finally, protecting user privacy is paramount, and practices aimed at safeguarding personal data should be considered within the proportionality assessment. Incorporating these defenses would provide a more nuanced approach, allowing the CMA to recognize and accommodate legitimate business needs while addressing competitive concerns.

The combination of a robust consultation process and detailed guidance on proportionality can partially compensate for the lack of full merits judicial review. These mechanisms can ensure that decisions are well-founded, transparent, and fair, thus enhancing their legitimacy and reducing the likelihood of successful legal challenges.

#### 4. Conclusion

I have examined several crucial aspects of the CMA's Guidance concerning the DMCC Bill, with a specific emphasis on the principle of proportionality. The proportionality principle is a fundamental legal principle that plays a crucial role in maintaining a balance between effective regulation and minimizing market distortion. It involves weighing the arguments for and against competition to achieve economic efficiency. Assessing proportionality requires conducting a cost-benefit analysis to ensure that the advantages of regulatory actions are greater than their drawbacks, and that the actions are essential and suitable for achieving the regulatory objectives.

In addition, the principle of proportionality ensures that competition law interventions are economically efficient by balancing the need to address anti-competitive behaviour with the potential economic impacts on businesses and consumers. The cases from EU and UK law demonstrate how the principle of proportionality is used to achieve these economic objectives, ensuring that competition law serves its purpose without imposing undue economic costs. By systematically weighing the costs and benefits, the CMA can ensure that its actions are economically justified and aligned with broader market objectives. For that reason, the proportionality requirement needs to be more precisely defined to be effective.

The CMA's method of seeking input and providing comprehensive instructions on proportionality are crucial measures in guaranteeing just and appropriate decisions in the absence of a complete judicial review based on merits. Although these measures can improve transparency, stakeholder involvement, and decision-making quality, they are not sufficient to completely substitute for a comprehensive evaluation based on merits. To optimize their efficiency, the CMA must diligently execute and conform to these procedures, guaranteeing that all decisions are defensible, equitable, and consistent with the principles of proportionality. This strategy will effectively preserve trust in the CMA's regulatory framework while simultaneously protecting the rights of businesses and consumers.

The CMA's commitment to incorporating the principle of proportionality into all aspects of its enforcement activities is highly appreciated. To accomplish these objectives, the recommendations of the paper primarily focus on the development of comprehensive instructions for implementing the proportionality requirement. This includes providing guidance on how to incorporate the Anticompetitive Effects Test (AEC) to strike a balance between legal and economic viewpoints. It is recommended to include specific provisions for efficiency defenses within the proportionality requirement. This should involve acknowledging potential defenses concerning integrity, security, and privacy, like what is outlined in the Digital Markets Act (DMA).