

The future of UK digital regulation

Roundtable discussion summary

November 2020



On 7 October 2020, Oxera hosted a virtual roundtable discussion between regulators, platforms, advisors and academics on the future of digital regulation in the UK. The discussion centred on the recent [call for information](#) from the UK's Digital Markets Taskforce (DMT).

Led by the CMA, the DMT is a close collaboration between the UK's competition authority (CMA), media and telecoms regulator (Ofcom), and data privacy regulator (ICO). It was set up with a remit to advise the UK government by the end of 2020 on the implementation of the recommendations set out in the [Furman Review](#) and the CMA's own online platforms and digital advertising [market study](#).

Our event asked three broad questions.

1. How should the 'strategic market status' (SMS) threshold be defined?
2. What should be in scope of the digital regulatory regime?
3. Are there lessons to be learned from existing sectoral regulation?

We summarise the key messages that emerged from the discussion around each of these topics below. The event was run under the Chatham House rule, and as such we do not attribute any of the points made to a specific attendee or organisation.

Defining strategic market status

We began with an informal straw poll of participants to ask whether a new SMS threshold is required, or whether existing measures, such as the 'significant market power' (SMP) threshold from the telecoms sector, would suffice. Two thirds of the group agreed that a new SMS standard *is* necessary, but that considerably more work is needed to properly define a workable standard for the digital sector.

A key concern was around the basis on which SMS is being defined. It was noted that good policy proposals generally start with a clear set of *issues* in well-defined *markets*, before defining a standard to determine which *firms* should be subject to regulation. However, some participants felt that in the case the design of digital regulation, the process was happening in reverse—with the debate focused on the practices of a small group of large players and how to define SMS so as to ensure these firms were caught by it.

To avoid this, there were calls for more detailed work to clearly define the objectives of any reforms,

before identifying the specific *bottlenecks* preventing growth by new start-ups and existing competitors.

For example, participants agreed that the CMA has already laid the foundation for this more rigorous approach with its digital advertising market study, which sets a benchmark for examining how digital markets function (at least those related to the online advertising ecosystem). Once established, a digital regulator could build on this with further studies into different activities the digital economy, taking the time to properly define the markets and problematic behaviours before designing a regime that can tackle the issues identified.

The close parallels between SMS and the 'gatekeeper' concept being discussed at the European level were also noted. The European discussion has focused on the critical role that some online platforms play in allowing businesses to access end-customers. It was felt that a more focused debate around specific issues such as these would lead to a better definition of SMS and more concrete remedies. In contrast, taking a formalistic or box-ticking approach to identifying SMS was expected to be unhelpful to inform the design of any remedies that might be needed.

Importantly, while familiar issues of market power and access to bottlenecks play a role, these were not the only concerns discussed. Issues that exist beyond the tech sector—such as access to capital and incentives to innovate—were also felt to play a part; it was also highlighted that the variety of business models available to platform operators (e.g. ad-funded, subscription-based, transactional) create different incentives and issues (e.g. clickbait, data hoarding, or self-preferencing). While these differences in business models should not automatically lead to presumptions of beneficial or problematic outcomes, they were seen as important considerations to assist in the design of remedies that might be required in different circumstances.

Similarly, a platform's scale or size of its user base was not thought to be a universally good basis for assessment. On the one hand, the existence of broad ecosystems could mean market shares are *not* reflective of the true power some providers have; on the other hand, for open platforms in particular, or in the presence of multi-homing, large user bases do not necessarily give rise to market foreclosure concerns.

As such, there were calls for the regime to consider the characteristics of specific *activities*, and not individual *firms*, when making SMS designations.

Scope of the regime

An important first question regarding the scope of the regime was how to define ‘digital markets’. It was agreed that this must strike a balance between being so broad as to be meaningless and so narrow as to be arbitrary, while also being ‘future proofed’ against the emergence of new digital products.

For example, a question was raised over why a predominantly online supermarket could be treated as a digital operator, while traditional players with substantial online operations may not. It was agreed that this risk of arbitrarily segmenting markets is something that should be taken into consideration.

It was also felt that an excessively broad approach could stifle innovation. This may result from firms limiting their technical development to avoid becoming ‘digital’, or perhaps because they sense the opportunity to ‘free ride’ on the technical capabilities built by others. A definition focused on *issues* (such as interoperability, or data access) was suggested as a way to define digital ‘spaces’ rather than relying on universal definitions. This was particularly the case for regulatory obligations that might apply to a digital sector or activity as a whole, rather than from an SMS designation.

Next, we asked which issues should be in scope of an ex ante digital regulatory framework more generally. A spectrum of different issues arise in digital markets (see Figure 1), ranging from market power (encapsulated in questions of competition and fairness) to consumer protection (such as questions of intermediary liability and the use of personal data). These issues have different causes and different remedies, and it was thought to be inappropriate to use one tool to address them all. In this regard, the SMS regime was seen as one of a

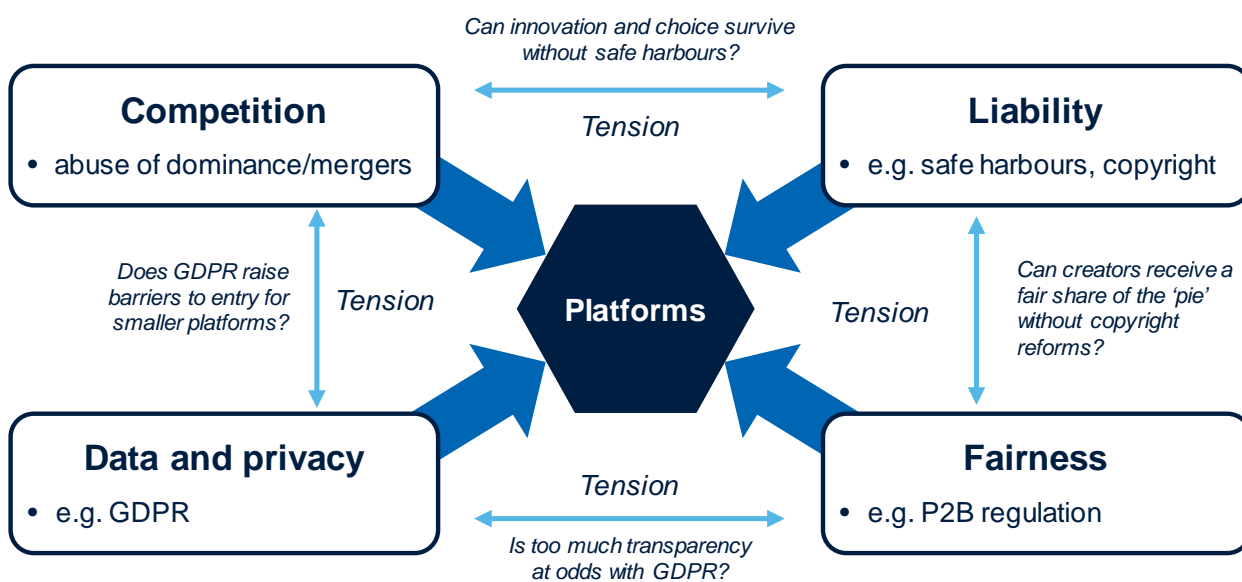
suite of tools aimed at tackling issues related to market power and/or control of key economic bottlenecks in digital markets, working together with other tools aimed at addressing different concerns—for example, interoperability, data portability, fairness and transparency, etc.

Furthermore, the tensions between these different issues were discussed, highlighting how solutions in one dimension (e.g. data access to alleviate market power concerns) could compound issues in another (such as privacy). This raised the question of whether a cooperative, multi-agency approach—with different agencies taking the lead on different issues—would work, or whether a sector-specific digital regulator is needed to make these trade-offs. Similar questions were raised about how overlaps with *existing* sector regulations would be managed—such as conflicting concerns of stimulating FinTech while maintaining the checks and balances needed for a stable financial system.

It was further explained that in some cases, the trade-off might be between different groups of society, with a proposed intervention causing harm to one in order to benefit another. For example, in the context of UK’s online harms white paper, it was reported that the start-up economy would likely be harmed by the proposals, but that it might be a price worth paying for a safer internet. It was noted that decisions such as these in some cases go beyond the remit of appointed authorities and should be taken by elected officials, to reflect the balance being struck by society at large.

Returning to the question of the scope of an SMS regime, this led to a discussion around which online activities or digital markets (e.g. online advertising, marketplaces, social networks, search, operating

Figure 1 Tensions between different aspects of digital regulation



systems) might satisfy a rigorous threshold test, such as the three-criteria test outlined in the SMP framework in telecoms, so as to warrant further ex ante intervention. As shown in Figure 2, under the SMP framework, a market is considered susceptible to ex ante regulation only if it can be shown that:

- there are high, non-transitory barriers to entry;
- the market will not become competitive within the next three to five years;
- competition law is not enough to remedy the market failures identified.

For digital markets, a potential need for an additional criterion to capture cross-market leverage concerns was discussed. The question of whether this criterion needed to be part of the SMS designation, or whether it would be captured in the assessment of remedies, was left open.

While the definition and scope of the SMS regime remains a highly contentious issue, there was broader agreement that even if a market does not satisfy a set of well-defined criteria that would warrant ex ante SMS regulation, it might still be appropriate to apply broad-based sectoral obligations to ensure a well-functioning marketplace (in a similar way to the sector-specific regulations found in telecoms—see Figure 2). For example, high standards of data protection and fairness towards users could be considered equally important for any platform operator, not just those with SMS. It was proposed that sectoral obligations such as these could be applied in a manner similar to the EU’s Platform-to-Business regulation—ensuring fairness and transparency without impinging on the business model. However, the coverage of any such obligations would still need careful consideration, as well as whether these remedies go far enough to achieve their intended aims.

Finally, we discussed what it could mean for a firm that is found to have SMS. The Furman Review and the CMA’s digital advertising market study put forward proposed remedies on data access and

interoperability. However, opinions differed on whether these would be appropriate remedies to a finding of SMS. In particular, it was highlighted that data does *not* necessarily lead to lock-in effects, with many examples of start-ups building a strong market position from a good idea without already having a pool of user data (e.g. *TikTok, Zoom, Snapchat*). Indeed, it was explained that for many digital start-ups, access to data is *not* considered to be a major constraint.

Furthermore, academics present in the room talked about recent research in the field showing that mandated data sharing and interoperability can actually soften competition and reduce innovation incentives, as competitors and entrants can free-ride on the data-gathering and technology innovations of incumbents.

The future digital regulator would need to balance these risks against the expected benefits of such interventions. To do so it was felt that the focus should not be on complex interventionist remedies, but rather on improving *market outcomes* for consumers, in terms of the new products and services they could enable. This might require more research to understand the precise challenges faced in creating these new products and services.

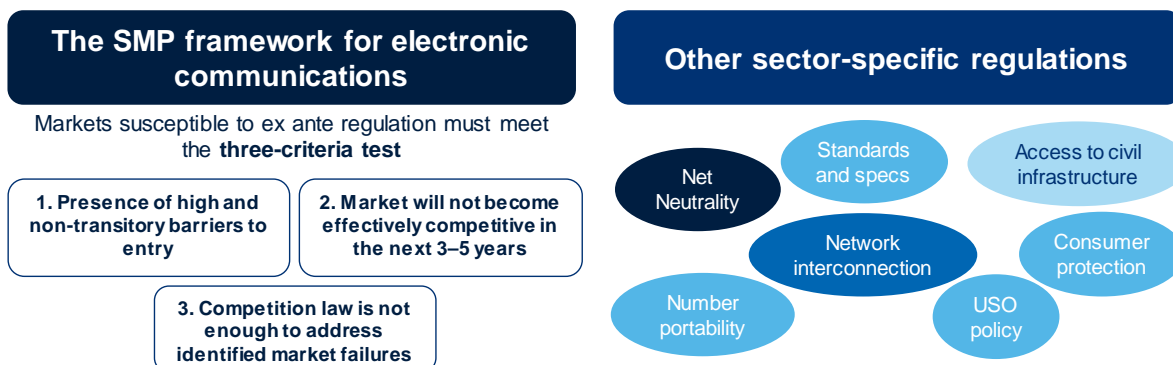
Lessons from other sectors

We began with a poll of the participants, which showed broad agreement with the idea that digital markets *are* different to other sectors such as telecoms or financial services—in that they feature not just different economic characteristics, but their own unique policy challenges.

For example, the limited liability regime for platform operators has been an important enabler of innovation and experimentation, but has also allowed a proliferation of harmful content online, while the use personal data has fuelled the growth of free services, but may come at the cost of privacy.

As such, the standards and regimes from other sectors cannot just be ‘lifted and shifted’ to be applied to digital. For example, it was noted that

Figure 2 Electronic communications regulatory framework



digital start-ups are unlikely to favour an industry regime that resembled the (heavily regulated) telecoms sector. Rather, they would prefer a dynamic sector where firms can rise (and fall) quickly. Again, it was said that the regulator must properly understand the barriers to growth faced by digital competitors *before* designing remedies aimed at reducing these barriers.

However, where there are similarities, valuable lessons may be learned. The telecoms sector was proposed as one potentially rich source of inspiration, as it faces the full spectrum of regulatory options tools being discussed for digital. This includes the application of general competition tools, ex ante access regulations via the SMP regime, open communications standards, consumer protections, and voluntary as well as mandated codes of conduct.

In particular, the ex ante SMP framework applied in telecoms was thought to include useful instruments, such as the well-defined three-criteria test for determining markets susceptible to regulation that is rooted in rigorous competition principles. Furthermore, a system of checks and balances on top of a bias *against* intervention helps to ensure that remedies are not applied in an arbitrary or unnecessarily prolonged manner.

However, a word of caution was provided on this front by those with first-hand experience of being regulated under the telecoms framework. While the regime was originally conceived to encourage competition and make the regulator redundant, the reality is that after more than two decades, the scope of regulation has grown as new areas of concern have been identified and new specific measures have been introduced.

This view was echoed by those with experience from the financial services sector, who described how a light-touch regime designed to prevent harm from behavioural bias has increasingly relied on more stringent enforcement measures to protect consumers.

Furthermore, experience has shown that intervening in complex markets can often have unexpected consequences. Open Banking was given as an example of where such problems can arise. Despite being considered as the first great success for data portability by many, those on the inside report continuous difficulties with the remedy and a growing cost with running the regulatory solution.

Former regulators present in the room noted that while forward looking cost–benefit analyses (CBAs) are an essential part of good regulation design, they can only do so much. While advances in behavioural economics can help to correct some aspects, shortcomings still arise, and more use should be

made of backward-looking CBAs to assess the *actual* impact of remedies to learn lessons and make any necessary adjustments.

A way forward

While a variety of views were expressed and discussed during the event, some consensus emerged around certain topics.

For example, a consensus emerged that more work is required to truly understand what drives different parts of the digital economy and better define what is meant by improved outcomes before designing remedies that can achieve them. The CMA's online market study was a great first step in that direction, and there is clearly appetite for more studies.

Similarly, it was felt that the designation of SMS would benefit from a firm grounding in concrete and well-defined concepts such as market power, or unavoidable trading partners, to avoid arbitrariness or the singling out of certain market players.

Participants also felt that further clarity was needed around the scope of the regime, with more details around which *activities* and *markets* are to be included.

Greater collaboration and communication was also called for, both between regulatory agencies and the firms in the market to provide guidance as they seek solutions to new issues. Greater collaboration was also called for *within* firms, where more can be done to educate product teams on the lessons from recent competition inquiries to achieve better digital product designs.

Likewise, the need for a continued close cooperation between the key agencies (CMA, Ofcom, ICO, and FCA) was also identified. The issues at stake go beyond the scope of any one agency, though it was recognised that the roles and responsibilities of each agency is likely to evolve over the next five years as a result of these digital changes.

Overall, the careful, analytical approach being taken by the DMT to define the scope of the regime was welcomed and encouraged by the participants. Their willingness to engage in open and constructive dialogue with the industry and other stakeholders is strong testament to that.

We would like to end by thanking all participants for their contributions during the event, as well as wishing the DMT the best of luck in the months ahead as they finalise their recommendations.

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