The future of digital: how can we ensure consumers and businesses benefit?

Post-event insights

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On 4 February 2021, economics and finance consultancy Oxera hosted a virtual roundtable discussion between regulators, platforms, advisers and academics on the future of digital. The discussion centred on how to ensure that consumers and businesses continue to enjoy the varied benefits that digital services unlock.

Background

Oxera Partner Robin Noble introduced the event, summarising how governments and authorities around the world are getting to grips with the broad range of issues that digital services present. For example, the European Commission recently unveiled its proposals for a Digital Services Act (DSA) to address the liabilities and responsibilities of digital service providers; and a Digital Markets Act (DMA) to address issues of gatekeeper power by platforms. In the UK, the Digital Markets Taskforce has proposed new measures to apply to the largest digital players. In Germany, the parliament recently adopted amendments to the German Competition Act to give the Bundeskartellamt (Germany's national competition regulator) increased powers over digital companies. While in the USA, the DoJ (Department of Justice) and FTC (Federal Trade Commission) have launched legal actions against Google and Facebook, respectively.

Despite this progress by policymakers and authorities, many questions remain over the best way to tackle the issues being raised, while tensions are emerging between conflicting regulatory objectives. For example, while there is a general consensus that both static and dynamic competition are critical in well-functioning digital markets, tensions arise when it comes to achieving this balance. In particular, dynamic competition relies on two conditions in markets:

- contestability—to allow firms with innovative solutions to compete fairly for customers;
- appropriability—to allow innovators a fair share of the value they generate, so as to justify their risky investment of time and capital.

This leads to tensions, as measures designed to increase the contestability—such as access to incumbents' data, or mandated interoperability—may well achieve increases in static competition, but they are also likely to reduce the actual or perceived appropriability of value by innovators. This may harm innovation incentives and reduce dynamic competition in the long run.

Similar policy tensions exist between:

- privacy and competition;
- liability for third-party content and the contestability of markets;
- fairness (including practices that may be **perceived** as unfair to certain parties, such as restricting access), efficiency and security on platforms.

Our first panel considered these tensions and questions at a strategic level, discussing the objectives and market outcomes policymakers are aiming to achieve; while our second panel delved deeper, contrasting the detailed proposals for change that are being considered in jurisdictions worldwide.

Panel 1: strategic overview

Chaired by Oxera Partner Sir Philip Lowe, our first panel comprised: Rocio Concha, Director of Policy and Advocacy and Chief Economist, Which?; Makan Delrahim, former Assistant Attorney General, US DoJ Antitrust Division; Markham Erickson, VP Government Affairs and Public Policy, Google; Olivier Guersent, Director-General for Competition, European Commission; Carolyn Jameson, Chief Trust Officer, Trustpilot; and Thomas Vinje, Partner and Chairman of the Global Antitrust Practice Group, Clifford Chance. A summary of the panellists' discussion is presented below.

Is more antitrust enforcement the answer?

A question coming up time and again in the digital debate is whether antitrust rules have been sufficiently well enforced in the sector. Citing the scale and power of a small number of large players, some on the panel were inclined to believe that there has been under-enforcement, particularly in the USA.

It was explained that many of the antitrust concerns being raised in digital markets are like those in traditional markets. However, the scale created by digitisation means that they pose greater challenges. This, in turn, raised the question of what the goal of competition policy should be. Is it a broad 'political' tool, designed to tackle the size of corporate players; or a focused, economic tool, protecting well-functioning competition to maximise consumer welfare?

The panel reiterated that within the EU and US regimes, the focus of competition policy remains the protection of the competitive process (and not individual competitors) as the best way to benefit consumers. Given this, antitrust enforcement was considered an essential, but not sufficient, tool for authorities. Long-running legal cases are particularly problematic in digital markets that feature strong network effects, making them prone to tipping. By the time a decision is reached, the competition may have been killed off—although the detailed analysis of an antitrust case is useful down the road as it builds a greater understanding of the structures and practices found in these markets.

What are the issues?

A wide range of concerns have been raised in digital markets, spanning issues as diverse as privacy, online harm, free speech and democracy, as well as the more familiar issues of market power and restrictions to competition. The panellists highlighted several ways that these issues can lead to consumer harms, including:

- excessive collection and use of personal data—with evidence suggesting that consumers are often surprised by the amount of data being collected, but do not feel that they have a choice;
- insufficient protections from abuse online—with evidence suggesting that a large proportion of products sold over platforms fall short of European safety standards, and consumers are being misled by fake reviews;
- abuse of algorithms—with sophisticated online scammers gaming platform algorithms to exploit consumers.

For some on the panel, these harms are the result of insufficient competitive or regulatory incentives for platforms to protect consumers online. This was thought to make the case for greater collaboration between competition and consumer protection agencies to create a holistic regulatory framework, including both competition interventions and reforms to consumer protection laws.

It was felt that this broad toolset is particularly important in digital, where public authorities must be nimble in responding to various unforeseeable issues (e.g. the online trolling of NHS staff and spread of fake news by COVID deniers).

What should the new rules focus on?

It was highlighted that the integration of ex ante regulations with ex post competition enforcement is not new. This mode of supervision is well practiced by the Commission—as well as national agencies—in 'traditional' sectors such as energy, financial services and communications. The panel explained that, to be an effective complement to antitrust in digital markets, regulation should focus on ensuring contestability before markets tip. In particular, policymakers should:

- focus on preserving innovation, creating value for consumers by increasing their access to technological advances;
- collaborate on rules with private technologists, avoiding both lengthy delays in policymaking and any unintended side effects from inhibiting technological advances;
- be globally harmonised, to maximise the user efficiencies stemming from scale economies, network effects and minimal marginal costs.

The panel noted that this is precisely what the DMA is setting out to achieve: an ex ante regulation to complement EU and member state competition law. It was explained that the proposals are designed to closely mirror competition law practices, with rebuttable criteria to identify gatekeepers, and obligations inspired by the Commission's decisional practice and court precedent.

What challenges do regulators face?

The panel highlighted the risk of policymakers over-simplifying the challenges faced in this space. On the one hand, calls to 'regulate digital' suggest a single problem, with a single solution—which does not reflect reality. The Internet is complex, with vastly different companies and business models creating different incentives—even when they may seem somewhat similar. On the other hand, taking too broad a focus can create an unsolvable problem.

It was explained that in the fast-moving digital environment, policy is always trying to catch up. Greater coordination between regulators, both nationally and around the world, was felt to be one solution, but also increased collaboration between regulators and the firms they oversee. This will help to ensure a practical operational model, allowing all parties to reassess and flex to what is working—and what is not—as unforeseeable consequences of new digital products and regulations emerge.

How do we ensure that consumers benefit?

While there was a consensus around the need for added protections in digital markets, it was highlighted that many consumers are already getting a good deal, enjoying a growing range of innovative new services and quality improvements—often free of charge.

It was explained that the aim of any new regulation must be to ensure that both consumers and businesses continue to benefit from lower prices, reduced costs, greater quality and continued innovation. The entry of large digital platforms into new areas of business was highlighted as an important historical driver of these gains—particularly where they can 'shake up' stagnant industries to the benefit of consumers. For some panellists, claims that these large digital platforms enjoy a monopoly position did not appear consistent with the observed market outcomes, those being falling prices and rapid innovation.

Similarly, claims that mergers between large digital platforms and smaller startups represent 'killer acquisitions' was questioned by some, with panellists pointing out that this theory fails to explain the virtuous circle of innovation, acquisition, development and reinvestment that is often seen in these markets—with examples of recent successes ranging from mobile operating systems to databases, and video streaming to video calling.

Can markets fix themselves?

The panel also considered whether markets can solve these issues themselves, allowing consumers to select offerings that match their preferences. It was highlighted that, in some cases, this is being observed. For example, Apple has opted to position its ecosystem as privacy-centric, providing users with a choice over data tracking. In contrast, Facebook has opted to provide users with free services in return for access to their data, which is used to target advertising.

However, ideological differences between the EU and US approaches became apparent. While the panellists on both sides agreed that markets may self-fix in the long run, it was felt that the EU tends to favour new regulation to resolve issues faster than the markets can.

A hybrid, middle-ground was discussed, whereby a public–private 'Digital Markets Rulemaking Board' (DMRB) could be established, with a structure similar to the USA's proven Municipal Securities Rulemaking Board (MSRB). It was suggested that the combination of private and public members could allow the board to benefit from the technical knowhow of market participants, while retaining the societal trust of a public body. Furthermore, this hybrid approach—of self-regulation with public oversight and enforcement—could help provide the flexibility needed in digital markets, while preventing the risk of 'free-riding' by competitors that undercut standards.

What makes an effective remedy?

Finally, the panel reflected on past experience to suggest forms of interventions that are more likely to be successful remedies in these markets.

There was a consensus that any intervention must be swift, with the Microsoft cases (Media Player, Internet Explorer) and Google cases (Android, Shopping) cited as examples of where remedies became harder to implement as time passed. Likewise, tackling non-compliance quickly was seen as important—with the Commission praised for its rapid action against Microsoft in this regard.

'Restorative remedies' were also felt to be important, with the aim of returning to a level of competition that would be expected absent the harmful behaviours. Interoperability and carefully designed choice screens were seen by some as important tools to support this.

Panel 2: comparison of proposals

Our second panel picked up the debate from the assumption that additional regulation is needed, to reflect on the precise form that intervention should take. The panellists compared the details of different proposals being put forward in different jurisdictions to consider how these would work in practice.

Chaired by Oxera Partner Dr Avantika Chowdhury, the panel consisted of: Eliana Garcés, Director of Economic Policy, Facebook; Thomas Graf, Partner, Cleary Gottlieb Steen & Hamilton; Anne-Claire Hoyng, Director of Global Competition and Consumer Law, Booking.com; Bill Kovacic, Global Competition Professor of Law and Policy, George Washington University; Andreas Mundt, President, Bundeskartellamt; Nicolas Petit, Professor of Competition Law, European University Institute. Again, a summary of the discussion between the participants is presented below.

Which firms are in scope?

The panel explained that to determine which firms are designated as gatekeepers, the DMA includes three cumulative criteria (set out in Art.2(1)) supported by quantitative thresholds for turnover, market capitalisation and user numbers (Art.2(2)). However, the Commission can also designate platforms that do not meet these thresholds based on qualitative criteria around the platform's position now, or anticipated in the future (Art.6).

In contrast, the UK's 'strategic market status' (SMS) proposals were felt by some to better reflect established regulatory best practice, with SMS designations to be led by an evidence-based, economic assessment of whether a firm has substantial and entrenched market power in one or more digital activities.

The panel also considered how Germany's recent updates to competition law—the so-called Digitalization Act, in force since 19 January 2021—compare to the UK and EU proposals. It was felt that the new provisions are more like the UK's SMS regime, with the designation of firms being based on individualised assessments of 'paramount significance for competition across markets' rather than broadly prescribed size thresholds.

How are the obligations applied?

In the case of the DMA, the panel explained that once a firm has been designated as a gatekeeper, the obligations set out in Arts 5 and 6 are self-enforcing, with fines to sanction non-compliance (Art.26). That is to say, the DMA requires no specific evidence of harm from the prohibited behaviours. However, some on the panel questioned whether there is sufficient evidence to support this generalised presumption that the prescribed behaviours are problematic. It was noted that the case law is not well formed, with many cases on which the obligations were based still going through their full legal process.

In contrast, Germany's new rules were described by the panel as reflecting 'competition law with some ex ante regulatory influences and features'. For example, they do not require dominance in a formal antitrust market, but, equally, the rules are not self-enforcing and require a distinct prohibition based on an individual assessment. Furthermore, it was explained that the Bundeskartellamt will, over time, shape the new rules through cases—although these go straight to the Federal Supreme Court to help speed up the decision process.

How flexible are the obligations?

The panel felt that there is little distinction between Arts 5 and 6, with both sets of obligations becoming applicable after being designated a gatekeeper (per Art.3). However, it was noted that while the Art.5 provisions are self-enforcing, the Art.6 obligations require more interpretation. For example, fair, reasonable and non-discriminatory terms cannot be algorithmically determined and require specific, case-by-case assessments. This is provided for by Art.7(7), which allows gatekeepers to ask the Commission for individualised guidance on their proposed measures—building in some degree of tailoring to the rules.

It was also noted that the DMA provides some, very narrow exceptions to the obligations, but stops short of any 'objective justification' for the behaviours. In practice, it was felt that it would be hard for firms to build an exceptions case, even where there is good reason. The example was given of Art.6.1(f), which calls for a broad interoperability by gatekeepers. It was explained that this would require a detailed examination, as there can be technical or economic reasons that make interoperability infeasible.

It was further explained that applying the same 18 obligations (from Arts 5 and 6) to every different gatekeeper, irrespective of business model, is not ideal. Examples were given of this leading to:

- restricting conduct that is not unfair: while Art.5(c) may be appropriate in the case of app stores—to ensure that developers can make in-app sales without the platform's payment services—it may be inappropriate for comparison services, funded by customer acquisition fees;
- insufficiently correcting conduct that is unfair: such as the remedies applied to the Google Shopping service, which some feel have not gone far enough to restore competition.

It was suggested that instead of automatically applying all 18 obligations to every gatekeeper, these articles could be positioned as a 'menu' of options that the Commission can choose from. This would allow a tailored set of obligations for different core platform services and business models.

It was highlighted that a more tailored approach is a feature of German law, but that this flexibility comes at a cost. More flexible rules (such as those in Germany) are often met with calls by firms for more legal certainty, while more mechanical rules (such as those proposed in the DMA) are met with calls for more flexibility. The panel noted that for regulatory flexibility to be effective, it should sit within a well-defined analysis framework—rather than granting the regulator seemingly spurious decision-making powers.

It was explained how German law aims to strike a balance between flexibility and clarity—laying out principles for what firms can and cannot do, while still leaning towards a case-by-case analysis (rather than a list of prohibited behaviours and strategies).

Similarly, it was noted that the UK's proposed SMS regime gives more focus to differences in business models—with codes of conduct allowing for more specific and tailored solutions to issues identified within specific enterprises.

The panel noted that finding this balance is made harder in digital markets by the sheer variety of different services and business models in operation, each raising different issues. The sector is not as homogeneous as traditionally regulated sectors, such as energy or communications. Indeed, it was noted that rigid criteria can lead to outcomes that are hard to explain, such as two identical platform services being treated differently if one belongs to a larger group of enterprises.

Do the provisions protect innovation?

The panel discussed how many of the mechanisms considered issues by the DMA are also responsible for creating a large proportion of the value that digital platforms provide. For example, while some may consider data a barrier to entry, in many cases it is also a fundamental source of value and innovation for the digital economy. Likewise, obligations that blunt incentives to enter adjacent markets could reduce the trend for digital disruption.

Facebook was cited as one example of how businesses can access customer data, conduct A/B testing and perform business analytics that they would not otherwise have the scale to achieve. As such, the panel argued the need for policy that establishes conditions for safe and trusted flows of data, rather than blanket prohibitions, to ensure that the innovation ecosystem can continue.

It was explained that users' willingness and ability to multi-home is also a significant driver of innovation in the digital economy, with platforms forced to continually evolve their offerings if they are to keep their users' attention. It was felt by some that these complex competitive dynamics are not well reflected in the current proposals. Others suggested that while users do multi-home, and platforms are innovative, we have no robust counterfactual for the level of innovation that could be achieved if there was even more competition in digital markets.

What is the scope for dialogue?

Finally, the panel considered the opportunity for constructive dialogue between firms and regulators. While competition law may engender too much debate—leading to slow decisions—some on the panel felt that the Commission 'over-compensated', with the DMA reversing the burden of proof and moving away from established principles of competition.

It was explained that while policymakers may wish to avoid the complexities of digital markets to arrive more quickly at functioning regulations, this results in ill-fitting, formulaic proposals based on simplified characterisations of the market. Similarly, an increased reliance on presumptions with little robust evidence reduces the scope for firms to provide counter-evidence, leading some on the panel to express their doubts around the rebuttals process—which the Commission itself has said will apply only in 'exceptional' circumstances.

In contrast, the UK provisions were felt to offer more scope for learning by the regulator. Greater opportunity for dialogue between agencies and firms, as well as an adherence to good regulatory principles, were considered important features to work towards beneficial consumer outcomes.

Finally, the panel highlighted that many national agencies have been active in the sector, building a wealth of expertise and 'competition for ideas' within and between them. It was felt that the DMA should incorporate more cooperation and coordination between the Commission and the member states' agencies to capitalise on this, as well as promoting international collaboration through forums such as the International Competition Network and OECD.

Wrap-up

Three main takeaways came out of the two panel discussions.

1. None of the proposals are 'classic' regulation, but none are classic competition policy either. However, with a multitude of issues, services and business models in digital, it stands to reason that authorities will require multiple tools.
2. The new rules must be fast and fair. Setting up new, dedicated agencies can take a long time. It is better to build on the existing experience and infrastructure with reformed powers than start from scratch.
3. The innovative nature of digital markets is key to their long-run success. For regulators, this means fostering innovation among small players while preserving innovation incentives for large players. A poorly designed regime could quickly extinguish the prevailing innovation culture.

While there are differences in approach between jurisdictions, they share common goals of promoting competition, choice and innovation for consumers while preventing harm.

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