Occasional thoughts on the regulatory framework around mobile, television, telephony and the internet

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Gatekeeper or Strategic Market Status? Defining who is subject to big tech regulation

- **The European Commission and the UK's CMA are taking different approaches to identifying which big tech firms should be regulated.**
- **Europe's approach offers certainty but is mechanistic. The CMA's approach is less certain but based on established economic principles.**
- **Does either offer a better template for regulating big tech companies?**

The European Union and the United Kingdom are taking different approaches to defining the "big tech" companies to be subject to regulation under the Digital Markets Act (DMA) and by the Digital Markets Unit (DMU) respectively. Both are taking at least one step away from traditional market definition process and dominance analysis used in the *ex ante* regulation of electronic communications markets and in competition law. In this issue of Hexagon, we compare the two approaches and assesses whether one is likely to lead to better outcomes than the other.

The European Union published its draft DMA in December 2020[i], which has the proposed purposes of controlling the market power of a few large digital platform companies so that European businesses and consumers can "reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment"[ii]. In the same month, the UK's Competition and Markets Authority (CMA) published its advice to the UK government "to drive vibrant competition and innovation across digital markets"[iii]. Whilst the DMA and the CMA's advice have similar purposes, the manner in which they identify companies subject to regulation are quite different.

The EU seeks to identify a number of "gatekeepers" who provide "core platform services", which are defined within the DMA[iv]. There are eight types of core platform services, such as online intermediation services, online search engines and cloud computing services.

The criteria for determining whether a core platform services is a gatekeeper are that: it has a significant impact on the internal market; it is an important gateway for business users to reach end users; and it enjoys, or is likely to enjoy, an "entrenched and durable position"[v].

These three criteria are themselves given revenue, user and time benchmarks that must be met. For example, if a core platform service has a European Economic Area (EEA) turnover

greater than €6.5 billion in the last three financial years; more than 45 million active end-users and 10,000 business users; and has met these thresholds in each of the last three years, it is deemed to be a gateway, and therefore subject to *ex ante* regulation[vi].

The DMA makes it the responsibility of the undertaking to inform the European Commission if these thresholds are met but the undertaking may also present an argument that it does not meet the conditions of Article 3(1) and so should not be designated as a gatekeeper.

The Commission may use a market investigation to establish that an undertaking meets the criteria for being designated as a gatekeeper even if it does not satisfy each of the thresholds described above. Thus, there is some room for manoeuvre for both undertakings and the Commission when designating any firm as a gatekeeper.

The UK's Competition and Markets Authority (CMA) published advice to government for creating more competitive digital markets in December 2020[vii]. This advice sets out a process for identifying firms with "strategic market status" (SMS) which would then be regulated[viii].

The Commission's proposal offers certainty but lacks the flexibility of the CMA's advice.

The test for whether a firm has SMS has four elements. First, the test is conducted with respect to a specific "activity" of the firm: defined as a group of products and services that can reasonably be described as having the same function or as, in combination, fulfilling a specific function. Google Search and Facebook's Social Media Platforms are given as examples of activities.

Secondly, the activity should be digital, that is based on the Internet.

Thirdly the firm should have entrenched market power within the activity. This arises when users of the firm's products and services lack good alternatives and there is limited threat of entry or expansion by rivals[ix].

Fourthly, the SMS test determines whether the firm's entrenched market power provides it with a strategic position. Five exemplar tests are set out for this, for example the firm can use its position to leverage its power into other activities and/or its ecosystem protects its market power[x].

The EU and the UK are, then, taking quite different routes. The EU's DMA is precise in setting out what is meant by a core platform service and the characteristics of an undertaking defined as a gateway. This has the advantage of being predictable and transparent.

The potential disadvantage of the EU's approach is that it is mechanistic: if the company provides one of a predefined list of platform services and meets certain criteria, then it is a gateway and subject to regulation. The EU approach could also be backward-looking in that the defined list of core platform services are what are in the market at the moment, rather than what may come to the market in future.

By contrast the UK's approach is far less prescriptive. Activities are not predefined nor are the thresholds a company must meet before being defined as having SMS. The process is, therefore, closer to the economics approach used in competition law and *ex ante* regulation of electronic communications to define a market and determine whether a firm is dominant. Defining an activity is similar to market definition but recognises that big tech applications are used by consumers for a range of activities and not just discreet products. Establishing the firm has SMS is like finding dominance, but again recognises the multiple activities of relevant undertakings.

The UK approach is therefore based on established economic principles but could be criticised for a lack of certainty.

Digital markets are fast moving, with new applications being developed at a rapid pace. Likewise, customer usage of a service can grown extraordinarily rapidly. The acid test for a regulatory regime for digital platforms is whether it is agile enough to capture new services and trends and so ensure that consumers and competition are protected from abuse.

The prescriptive approach proposed by the EU may well not have the agility needed to keep up with the market. The CMA's advice, however, being based on principles rather than a predefined list of services and thresholds could give the new DMU the right tools to intervene fast enough to ensure competition and innovation in the market are vibrant.

Ultimately, only time and probably the legal process that follows the designation of an undertaking as having gatekeeper or strategic market status will determine which approach better protects consumer and competition. At this stage, however, the CMA's proposal based on established economic principles looks more likely to meet its stated objectives than the Commission's prescription.

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[i] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) 15th December 2020
[ii] Ibid (p. 3)
[iii] CMA (2020) '*A pro-competition regime for Digital Markets*' December 2020
[iv] Ibid Article 2(2)
[v] Ibid Article 3(1)
[vi] Ibid Article 3(2)
[vii] Op cit endnote iii
[viii] Ibid Section 4 and Appendix B
[ix] Ibid Appendix B Para. 24 - 34
[x] Ibid Appendix B Paras. 35 - 55