THE PREFERRED INTERACTION BETWEEN COMPETITION LAW AND REGULATION IN THE DIGITAL ECONOMY

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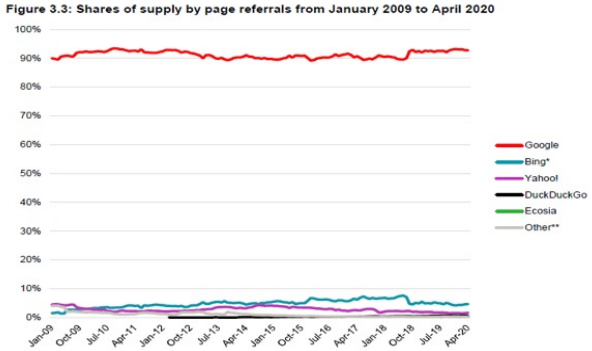
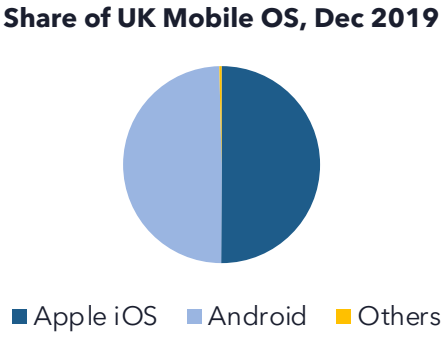
OUTLINE

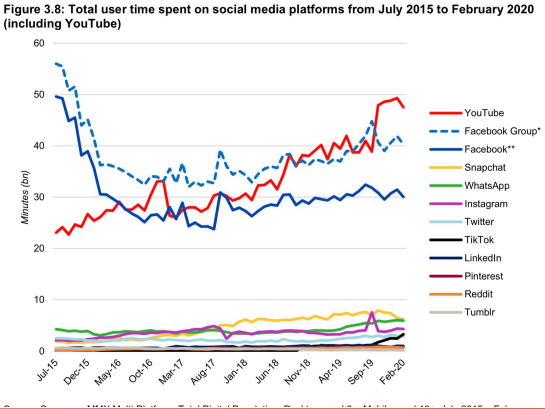
- What is the problem?
  - What problems do we see
  - Why is traditional competition law insufficient
- Questions of regulatory design
- The preferred interaction between competition law and regulation

WHAT IS THE PROBLEM?

- Many digital platform markets are highly concentrated, and these market positions have been extended into new services, creating whole digital ecosystems.
- In addition, platforms act as ‘gatekeepers’ between users, which also confers market power and affects access to users.







WHAT IS THE PROBLEM?

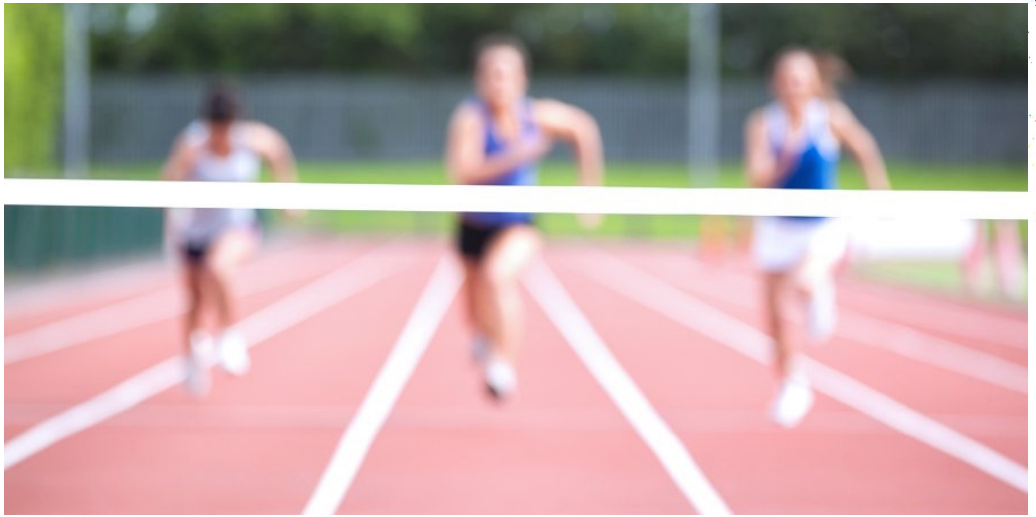
- Factors driving this include (both *within* markets and *across* markets):
  - Strong trans-global economies of scale and scope
  - Network effects and lack of multi-homing/interoperability
  - Critical importance of data as an input to machine learning algorithma/AI
  - Consumer behaviour/biases, including in relation to data protection.
  - Substantial M&A activity
  - Strategic anti-competitive conduct

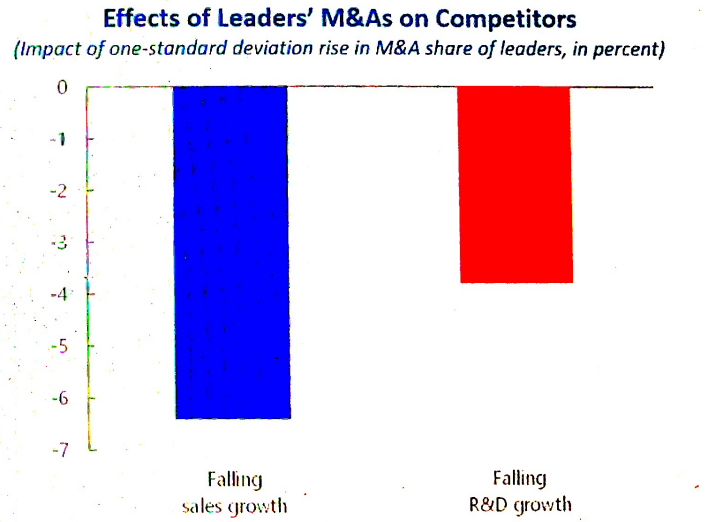
CONCERNS FOR INNOVATION

- It is true that incentivising innovation does require that there be some reward
- But there are nonetheless concerns that:
  - Entrenched incumbents have limited incentives to innovate themselves, if they don't face challenge
  - Third party innovative challenge is limited by:
    - limited access to relevant data
    - limited access to users
    - limited or distorted access to finance
    - lack of rents if successful

INNOVATION AS A RACE

- If runners are neck and neck, they put in maximum effort.
- The further ahead the leader is, the less effort both put in.





- M&As by industry leaders weaken competitors' growth and innovation

Axcigit et al (2021), IMF staff discussion note

SOME OF THE (MANY) GOOGLE CASES

Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine

Brussels, 18 July 2018

Google's job-search dominance demands EU interim measures, rivals claim

By Michael Acton and Lewis Crofts on 13 Aug 19 | 09:31 GMT

Google Inc + Add to myFT

Yelp files new EU complaint against Google over search dominance

Company urges Brussels to launch new charges against internet group

GOOGLE'S PRIVACY SANDBOX UNDER CMA MICROSCOPE

By Lynne d Johnson January 14, 2021

AND NOT JUST GOOGLE!

Booking.com ordered to amend Swedish price parity clauses

Charley Connor
31 July 2018

The Ninth Circuit's Decision in hiQ v. LinkedIn: Data Scraping May Have a Future, But for How Long?

Posted **September 27, 2019**

TECHNOLOGY NEWS OCTOBER 29, 2019 / 6:26 PM

Apple Pay in EU antitrust spotlight as regulators seek details

WIRED Technology | Science | Culture | Gear | Business

The EU's latest antitrust probe could hit Amazon where it hurts

EU Competition commissioner Margaret Vestager is turning her gaze to Amazon. The company is facing allegations that it may have abused marketplace data to prioritise its own products

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WIRES

Facebook in EU antitrust crosshairs, online marketplace now under scrutiny

PUBLISHED THU, OCT 31 2019•1:34 PM EDT

Tile will testify against Apple in today's Congressional antitrust hearing

Ben Lovejoy - Jan. 17th 2020 4:45 am PT @benlovejoy

ISSIE LAPOWSKY BUSINESS 05.13.2019 01:04 PM

Supreme Court Deals Blow to Apple in Antitrust Case

In Apple v. Pepper, the Supreme Court ruled in a 5–4 decision that Apple's App Store customers have standing to sue the company for antitrust violations.

Spotify is going to war with Apple, filing an antitrust complaint over fears that it is crushing competitors

Isobel Asher Hamilton Mar 13, 2019, 11:24 AM

SOME THEORIES OF HARM INVOLVE (FAIRLY) STANDARD ABUSE CASES

Case	Abuse	Home market (leverage from…)	Target market (leverage to…)
Google Shopping (EC, 2017) (and similar cases)	Favouring Google's own 'vertical' service in search results page (€2.4bn fine)	General search (Google.com)	Specialist search
Google Android (EC, 2018 and now US FTC case)	Requiring OEMs to set Google Search as the default if they install Google Play app store (€4.34bn fine). FTC case also covers Google $8bn payment to Apple for default status on Apple devices	Google Play app-store	Mobile search
Google Adsense (2019)	Requiring/incentivising sites not to use rival online ad services if they use Google (€1.49bn fine)	Online advertising	N/A
Apple v Spotify/Epic (ongoing EC/US)	No circumvention of Apple's app store. Requiring apps to use Apple payments	App store/iOS	Payments/music/ games

OTHERS ARE MORE DATA-FOCUSED

Case	Abuse	Relevant market
Google 'Privacy Sandbox' (CMA, ongoing)	Google removes potential to use cookies for third-party tracking from Chrome	Browsers
Amazon (EC ongoing). Similar EC FB case?	Amazon uses data from traders utilising marketplace and uses it to compete against traders, while not giving traders as good info about their own sales (customer info etc) and not allowing disintermediation.	Marketplaces
Apple/Facebook (no case as yet (?), but major dispute)	Apple's new privacy rules limit the Facebook app's access to consumer data, which in turn threatens the effectiveness of its advertising.	App stores

LOTS OF ANTITRUST – SO WHY PRO-COMPETITION REGULATION?

- Pro-competition regulation (complementary to antitrust) is justified on two main bases:
  - Some key drivers of concentration (economies of scale and scope, network effects, data effects) do not necessarily imply strategic anticompetitive behaviour. This can make antitrust cases – with huge potential sanctions – unsuitable/nonapplicable.
  - Even where antitrust could be used, cases tend to be very long, typically narrow and retrospective and unsuitable for setting out a clear framework of upfront 'rules of the road'. This is important for legal certainty and promoting innovation.
- But this has implications for regulatory design:
  - Aim is to make regulation far quicker and more administrable than antitrust – but risk that this could lead to regulation itself 'moving fast and breaking things'.

"Move fast and break things. Unless you are breaking stuff, you are not moving fast enough."
Mark Zuckerberg

STEPS TOWARDS REGULATION….AND SEVERAL NEW ACRONYMS!

- In Germany, a new Art 19a its competition law allows the Federal Cartel Office to designate a digital platform firm as being an ‘undertaking of paramount significance across markets’ (UPSCAM) and then imposing rules on them.
- In the UK, regulation of digital platforms with ‘Strategic Market Status’ (SMS) is planned, and a shadow ‘Digital Markets Unit’ (DMU) has been set up within the Competition and Markets Authority. [Recommendation for change in merger test for big tech firms.]
- In the EU, the Digital Markets Act (DMA) is planned for large online ‘gatekeepers’ offering specified Core Platfrom Services (CPS). [Mergers jurisdiction may be increased in order to capture additional big tech acquisitions]
- In the US, no regulation planned as yet, but major antitrust cases have been commenced against Facebook and Google. There is pressure to change the merger test (to make it easier to block tech mergers).
- Also major developments in Australia, China, Japan, etc.

COMPARING UK AND EU APPROACHES: OBJECTIVES OF REGULATION

- EU Digital Markets Act objectives:
  - Contestability (of core platform market – and maybe also complementary markets)
  - Fairness (of commercial terms with business users)
- UK objectives (feed into proposed principles – see next slide):
  - Fair trading
  - Open choices
  - Trust and transparency
- Overall, a fair degree of similarity in overall structure between the UK and EU approaches

POTENTIAL PRINCIPLES? (FROM CMA DIGITAL ADVERTISING REPORT)

Fair Trading	
1	To trade on **fair and reasonable contractual terms**
2	Not to apply **unduly discriminatory terms**, conditions or policies to certain customers
3	Not to **unreasonably restrict** how customers can use platform services
4	To **act in customers' best interests when making choices** on their behalf
5	To require **use of data** from customers only in ways which are **reasonably linked to the provision of services** to those customers

Open Choices	
1	Not to impose **undue restrictions** on ability of customers to use other providers that compete with the SMS platform or to compete with SMS platform themselves
2	Not to influence competitive processes or outcomes in a way that **unduly self-preferences** a platform's own services over those of rivals
3	Not to **bundle services** in market where the SMS platform has market power with other services in a way which has an **adverse effect** on users
4	To take reasonable steps to ensure that core services **interoperate** with third party technologies where not doing so would have an **adverse effect** on users
5	**Not to withhold, withdraw, or deprecate APIs** or otherwise change them in a way which has an **adverse effect** on users

Trust and Transparency	
1	To provide **clear information** to customers about the **services they receive** and the **data the platform takes** in an easily understood format
2	To ensure that **choices and defaults** provided by the platform are presented in a way that **facilitates informed consumer choice** over the use of their personal data
3	To ensure **advertising** is presented in a way that is **clearly distinguishable** from organic content
4	To **explain** the operation of **algorithms and advertising auctions** and to **allow audit** and scrutiny of their operation by the regulator
5	To give **fair warning** about **changes to the operation of algorithms** where these are likely to have a **material effect** on users, and to **explain** the basis of changes
6	To **comply with industry standards** and provide **access to relevant data** required for third-party verification and measurement
7	To be **transparent** about **fees** charged

UK DMU

'SMS' Designation criteria:
Substantial, entrenched market **power**, providing strategic position. NB Focus on 'designated activities'

Code of Conduct:
Bespoke, to be developed alongside designation process, to relate to designated activity

Pro-competitive Interventions (PCIs):
Additional requirements following market review. No ownership separation powers – but UK has MIs

Other aspects:
Merger information requirement and enhanced substantive test. Need to enhance consumer law.

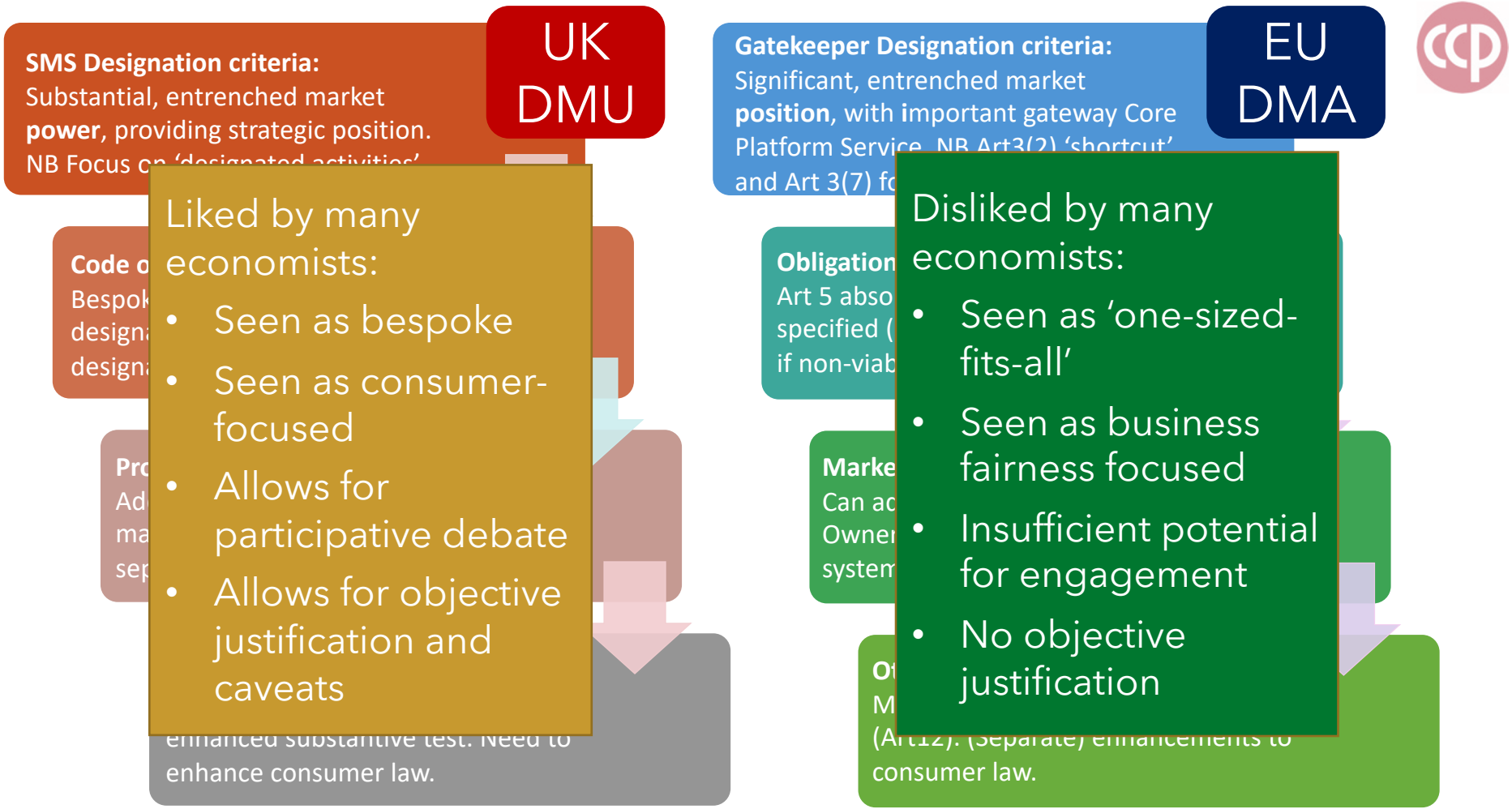
EU DMA

Gatekeeper Designation criteria:
Significant, entrenched market **position**, with **i**mportant gateway Core Platform Service. NB Art3(2) 'shortcut' and Art 3(7) focus on 'relevant' CPS.

Obligations for relevant CPS:
Art 5 absolute, Art 6 can be further specified (see Article 7). Suspension if non-viable or narrow PI grounds.

Market Investigations:
Can add to CPS list or obligations. Ownership separation powers if systematic non-compliance

Other aspects:
Merger information requirement (Art12). (Separate) enhancements to consumer law.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enhanced substantive test. Need to enhance consumer law.
Liked by many economists:
• Seen as bespoke
• Seen as consumer-focused
• Allows for participative debate
• Allows for objective justification and caveats
EU DMA
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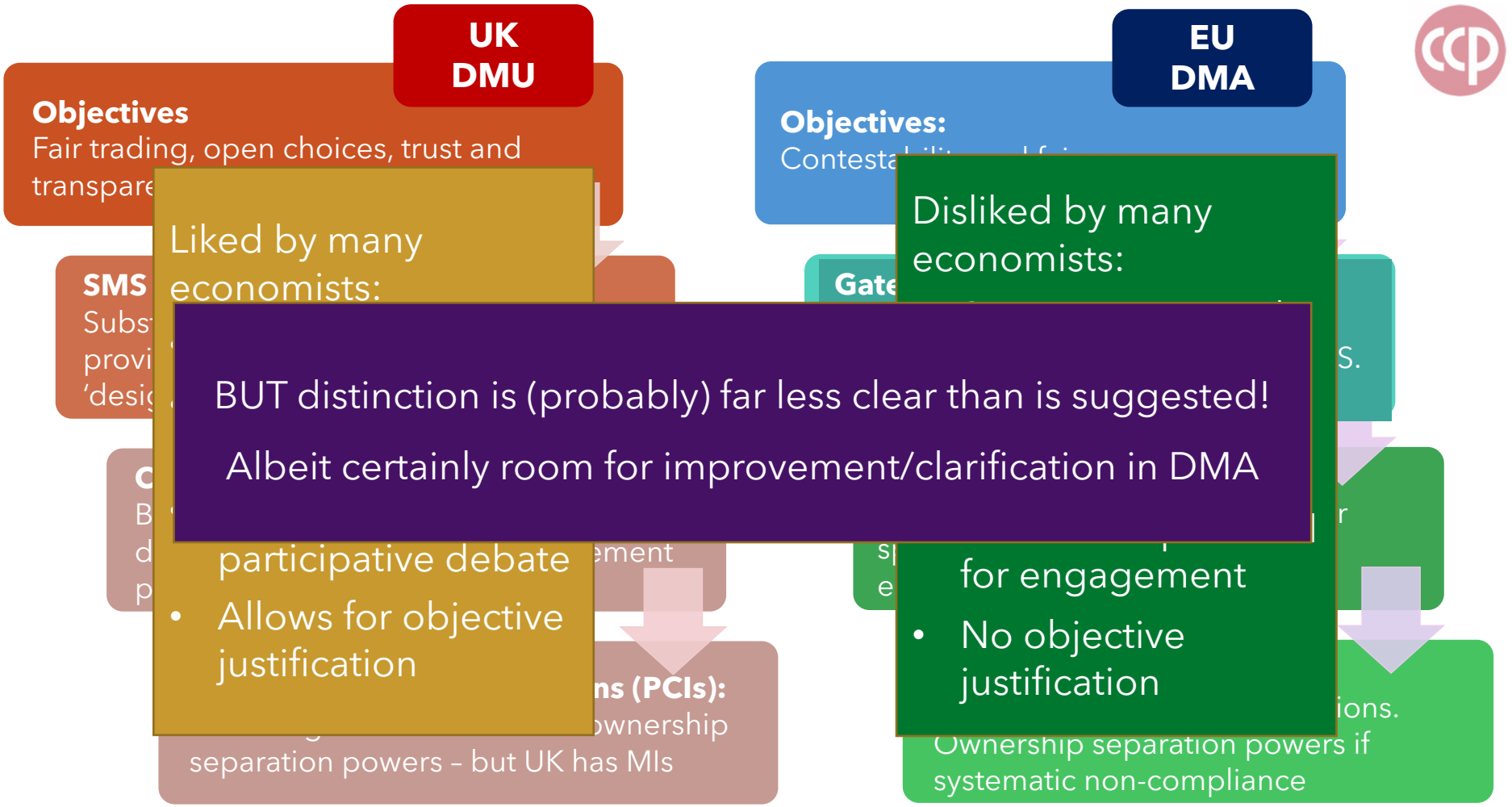
(Art12). (Separate) enhancements to consumer law.
Disliked by many economists:
• Seen as 'one-sized-fits-all'
• Seen as business fairness focused
• Insufficient potential for engagement
• No objective justification


UK DMU
Objectives
Fair trading, open choices, trust and transpare
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participative debate
• Allows for objective justification
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ownership
separation powers – but UK has MIs
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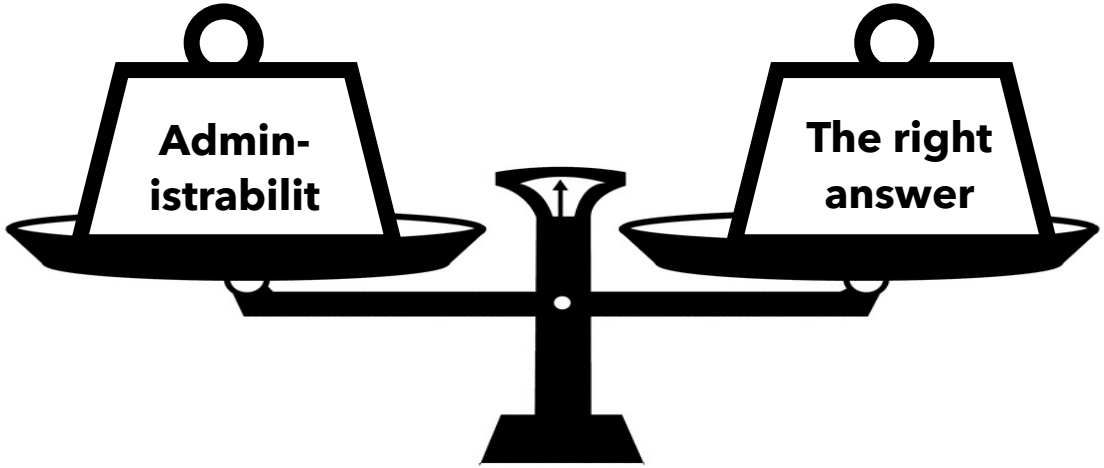
ions.
Ownership separation powers if systematic non-compliance
Disliked by many economists:
BUT distinction is (probably) far less clear than is suggested!
Albeit certainly room for improvement/clarification in DMA

	Proposed principles from CMA Dig. Ad. study	Draft DMA Obligations
Restrictions on platform use	• Not to impose *undue restrictions* on ability of customers to use other providers that compete with the SMS platform or to compete with SMS platform themselves (OC1) • Not to *unreasonably* **restrict** how customers can use platform services (FT3)	• No M**FN/parity clauses** (5.b) • No **anti-steering** (5.c) • Allow **'side loading'** of third party apps or app stores, unless threatens integrity (6.1c) • Allow **un-installing of apps**, unless essential to OS/device (6.1b)
Self-preferencing	• Not to influence competitive processes or outcomes in a way that *unduly* **self-preferences** a platform's own services over rivals (OC2)	• No **self-preferencing** in rankings (6.1d)
Bundling/tying	• Not to **bundle services** in market where the SMS platform has market power with other services in a way which has an *adverse effect* on users (OC3)	• No **tying** from CPS to ID services (5.e) • No **tying** from CPS to other CPS (5.f)
Interoperability	• To take reasonable steps to ensure that core services **interoperate** with third party technologies where not doing so would have an *adverse effect* on users (OC4) • **Not to withhold, withdraw, or deprecate APIs** or otherwise change them in a way which has an *adverse effect* on users (OC5) • DMU to have ability to mandate **interoperability** (PCI)	• No **technical restriction of switching or multi-homing** across apps using OS (6.1e) • **Access and interoperability** for business users and ancillary services to OS should be as for proprietary ancillary services (6.1f)
Ad transparency	• To **comply with industry standards** and provide **access to relevant data** required for third-party verification and measurement (TT6) • To be **transparent** about **fees** charged (TT7)	• **Price transparency** for ads (5.g) • **Performance transparency** for ads (6.1g)
Fair conduct	• To trade on **fair and reasonable contractual terms** (FT1) • Not to apply *unduly* **discriminatory terms**, conditions or policies to certain customers (FT2)	• No **prevention of complaints** to public authorities (5.d) • **FRAND access to app stores** (6.1k)
Data use	• To require **use of data** from customers only in ways which are *reasonably* **linked to the provision of services** to those customers (FT5)	• No **data fusion** without user consent (5.a) • No **use of data related to business users** to compete against them (6.1a)
Data access/ portability	• DMU to have ability to mandate real-time **data portability** (PCI) • DMU to have ability to mandate **access to query and click data** (PCI)	• Provide real-time **data portability for business- and end-users** (6.1h/i) • Data sharing obligation: **FRAND access to query and click data** (6.1j)

THE 'TRADE-OFF' BETWEEN ADMINISTRABILITY AND 'PERFECTION'

- Much industry concern that EU proposals are too 'one-size-fits-all', do not reflect differences in business models, do not allow for any sort of efficiency defence, and could have unintended side-effects. UK proposals viewed favourably by them by comparison.
- This suggests there is a a trade off:



THE 'TRADE-OFF' BETWEEN PRACTICALITY AND 'PERFECTION'

- But only partly true – if takes too long to reach 'perfection' then this is far from perfect!
- Moreover, EU argues that:
  - There is more flex than it appears (due to: obligations only applying to core gateway CPS, Art 7 specification process, ability to update via Market Investigations and delegated acts; and legislation liable to be revisited in full every 5 years);
  - The lack of flex that IS there is necessary to make the regulation administrable. Otherwise risk of regulator spending next 5 years arguing with well funded, litigious platforms, rather than driving behaviour change; pursuit of the 'right' answer leading to the wrong answer.
- Influential CERRE (EU thinktank) report was broadly supportive of overall DMA architecture but argued for some potential to escape obligation if (i) makes no sense or (ii) can be shown to be likely to harm innovation or contestability. Also a variety of other refinements proposed.
  - Particular concerns around trying to achieve pro-competitive interventions via obligations.

EXAMPLE OF PRO-COMPETITIVE INTERVENTIONS (AND TENSIONS)

1. Data silos – restricting sharing of data across activities (or at least without explicit user consent, or banning on using data for certain activities (eg competing against rival traders)
   - ➢ Good for creating fairer competition (and privacy), but could limit efficient data uses
2. Data portability – enabling end users to port their data to third party providers. This is already required under GDPR but in a very clunky form.
   - ➢ Good in theory, but can be hard to make work well, with risk of consumer inertia
   - ➢ Requires real time data, available directly to third parties in consistent form via open APIs, ideally with easily accessible consent dashboard for consumers.
   - ➢ Not straightforward – really need to pick and choose applicability – unlike DMA
3. Data access – giving third parties direct access to data (eg Google search data)
   - ➢ May be valuable, but tricky data protection issues. Also how to calculate FRAND?

THE PREFERRED INTERACTION BETWEEN REGULATION AND COMPETITION LAW

- Benefit of regulation: clear upfront ‘rules of the road’
- Challenge: It is not straightforward to define rules that can be widely applied (ideally self-executed) while ensuring effectiveness, proportionality and avoiding unintended harm.
- Implications for regulation:
  - Need to keep scope of regulation tight (to largest tech firms, to only those services which confer market power)
  - Need to ‘tread softly’ in terms of rules too. Indeed some of the obligations in the DMA may seem the minimalistic side (eg ban on tying applies only between regulated services – ie between services which are already conferring market power; ban on wide MFNs).
  - Therefore regulation cannot be expected to address all competition concerns relating to digital platforms, but rather to provide a basic underpinning pro-competitive framework.

THE PREFERRED INTERACTION BETWEEN REGULATION AND COMPETITION LAW

- Implications for competition law:
  - Even in the longer term, there is highly likely to be anti-competitive conduct that is not covered by regulation. Antitrust will remain an important complement tool.
  - Potentially also a learning device (could lead to new regulation going forward)
- Merger enforcement remains important too:
  - Just because conduct is regulated doesn't mean it can be relied on to solve merger concerns.
  - NB Debate around whether merger test needs strengthening for regulated digital platforms.
- Finally, there may be potential for NCAs to play a role in relation DMA too.
  - Recent CERRE (2021) paper argues for an enhanced role for national authorities – eg in receiving complaints, carrying out dispute resolution, and providing advice to EU.

QUESTIONS/DISCUSSION?

AND THANK YOU!