

Cool Britannia: On the UK's pragmatic approach to regulate Big Tech

(i) The UK and regulatory pragmatism

Cool Britannia is not exactly in vogue nowadays. There may be, however, reasons to be optimistic about a potential cool approach taken by the British authorities on digital regulation. The traditional pragmatism perhaps intrinsically linked to the British common law legal system may reflect a different stance on markets requiring some form of State intervention in the form of regulation but at the same time a degree of flexibility. This could be the case of the digital world. This market desperately cries for State intervention but also it yearns for flexibility and pragmatism. Perhaps a sensible approach is to design intervention but considering competition as the best form of regulation. This means that the competitive process -as opposed to competition law or the competition authority- will deliver something closer to an optimal outcome. Digital markets, specifically the markets segments which have been extensively studied such as search engines and social media, are prone to natural monopoly due to strong economies of scale, network effects and the use of data. This is not a theoretical construction but a finding backed by evidence as these segments are entirely controlled by well-known platforms such as Google and Facebook. It is not the purpose of this research to discuss the fairness or unfairness of this situation but instead to focus on the advantages and shortcomings of the potential regulatory strategies to be applied in the United Kingdom (UK) to regulate Big Tech. Some initial ideas in the European Union (EU) show a preference for a rule-based approach based on prohibitions such as blacklisted practices (i.e. [See Inception Impact Assessment on Digital Services Act Package](#)). By contrast, the UK approach could prove to offer a more novel perspective as it is pragmatic and it does not try to reinvent the wheel. It is based on a principle-based regulatory regime and a planned collaborative approach between market players. However, this view is incomplete if this regulatory pragmatism is not confronted with its own limitations as precisely some of the features that may allow the principle-based regime to succeed show some of its potential shortcomings. This research is focused on the digital regulatory strategy proposed by the UK Competition and Markets Authority (CMA) as explained in the [final report on digital platforms funded by digital advertising](#) (CMA report) and the report '[Unlocking the Digital World](#)' delivered by a panel of experts chaired by Professor Jason Furman (Furman report).

(ii) The uncomfortable truth of the British regulatory pragmatism: Solution or delusion?

The Furman report (2019) provided a first outline of the digital regulatory strategy. It proposed a code of conduct enforced by a digital regulator. The code of conduct can be understood as principle-based approach regulation (Digital PBR) applicable to platforms with significant market power. The Furman report suggested that the content of Digital PBR will be developed following a collaborative method between the digital regulator and market players. Regulation based on principles has been considered as 'light touch regulation' this is a hybrid between the absence of rules and prescriptive detailed rules. The main goal is giving some degree of discretion to market players so they can devise their own compliance mechanisms. Thus, it is a less intrusive form of regulation if compared, for example, with rules based on prohibitions or duties.

This same approach has been echoed by the CMA report (2020) as it is -to some extent- a good rehearsal of the Furman report. It reproduces the idea of a digital regulator and the development of Digital PBR regulation following a collaborative approach between the digital regulator and market players. However, the CMA introduced a new idea, this is the development of the so-called 'pro-competitive' interventions. In spite of the tautological and unfortunate choice of words from the CMA, these are in reality market interventions as nobody will argue in favour of 'anti-competitive' interventions. This proposal involves far-reaching reforms on market structure involving, among others, the potential sharing of data and divestiture remedies.

Digital PBR is, however, far from being the silver bullet. Its effectiveness will depend on several elements. There are three important considerations to be analysed in this regard. Firstly, principle-based regulation assumes that the regulated industries are well-equipped and eager to comply with this regulatory strategy. As mentioned before, the Furman report is based on mutual collaboration between the regulator and regulated firms for the development and implementation of Digital PBR. This regulatory strategy is not novel but instead it is somehow closer to meta-regulation which is a mixture between some kind of State intervention

and self-regulation (i.e. regulation designed by the regulation industries). The assumption from meta-regulation and PBR regulation is that the regulated industry will genuinely commit to comply with the objectives of this regulatory strategy. Regulated entities will be entitled to design their own compliance mechanism in a flexible way with some degree of State intervention. Trust is an essential element for the success of this regime, if the industry does not genuinely commit, either because some entities are ill-intentioned, ill-informed or a combination of both of them, then it is likely that PBR Regulation will fail and it will be inevitable to create a stricter rule-based approach. For example, digital platforms could devise creative compliance mechanisms or simply delay compliance and then opt for long litigation proceedings. Thus, PBR regulation is an apparent optimal solution as it strikes a fair balance between State intervention and the absence of regulation, however this strategy will work to the extent that the regulated industry is willing to make it work. The question is if, from the perspective of an objective observer, Big Tech such as Google and Facebook are likelier to genuinely commit to the success of Digital PBR.

Secondly, the expectations on the outcomes of Digital PBR requires further testing and analysis. The regulatory strategy chosen by the Furman report resembles to some extent the traditional discussion between the pros and cons of regulation based on deterrence and regulation based on persuasion. Proponent of deterrence suggest that clear-cut rules will achieve the expected outcome as failure to comply with a specific set of prohibitions or duties will result in the imposition of a penalty. On the other hand, persuasion is based on collaboration. It is well-known that monitoring compliance and actively enforcing rules is costly, but not just in terms of resources but also in terms of time. Thus, persuasion seeks to discharge some of the functions from the enforcer and transfer them to the regulated entities. This does not necessarily mean absence of State intervention but instead the assumption of a different role. For the reasons mentioned before, Digital PBR as proposed by the Furman report resembles a mixture between collaboration and flexibility but subject to State supervision. However, the Furman report did not analyse why is this strategy the best option to fix digital markets then, for example, traditional rule-based regulation. In the same way, the Furman report did not analyse the inevitable pitfalls arising from Digital PBR. There are two issues to be discussed in this regard. First, the development of precise and prescriptive rules generates benefits such as eliminating uncertainty regarding the extent of each obligation. It also sends a message to the regulated industry as failure to comply will be followed by punishment. Principle-based regulation may achieve the same outcome but its laxer approach could be misinterpreted as weakness. Second, the imposition of penalties can become inevitable even if a collaborative approach is adopted. Non-compliance must be investigated in an infringement procedure and it will be hard to tell how different this procedure would be if compared, for example, to a competition infringement. The CMA has accepted that if the collaborative approach fails then penalties will inevitably follow. These penalties -same as any other decision from the digital regulator- will be subject to judicial review. The CMA confirmed this will require a lengthier process. Thus, the risk is that Digital PBR may not fulfil its original intended purpose based on speediness and effectiveness unless it is consistently and coherently applied.

Thirdly, the role of the CMA. At first glance, its role has been, if one wants to be optimistic, sub-optimal. The CMA's report rehearses many of the solutions included in the Furman report. The problem is that the CMA does a very good job reproducing Furman as it also repeats some of its omissions. For example, as mentioned before, it does not analyse the pitfalls of Digital PBR and it does not suggest how to design the digital regulator. A bolder and much more analytical CMA becomes essential for the success of Digital PBR. As discussed in the reports, one possible solution regarding the implementation of the digital regulator is to create it as a unit within the CMA. This design will prevent regulatory capture as the new unit will benefit from the CMA's experience. Reports from other jurisdictions have already made such suggestion as the digital regulator may -at an initial stage- be part of the competition authority and later operate as a separate entity (i.e. [Stigler Committee Report on Digital Platforms](#) and [report on digital platforms from the Australian Consumer & Competition Commission](#)). The CMA is certainly well-placed to assume the role of digital regulator. However, as mentioned earlier, a more proactive and analytical CMA is of outmost importance.

(iii) The apparent triumph of the UK's principle-based approach

The regulatory strategy based on principle-based regulation and collaboration between the digital regulator and the industry has to be welcomed not just because of its initial traits of originality but also as it may provide the right solutions in a market highly dynamic and highly dependent on innovation. There are three reasons to be optimistic about Digital PBR.

Firstly, it offers a fresh perspective on digital regulation and it avoids excessive legalism. This means opting for a regulatory strategy without relying on highly intrusive rules and leaving some room for market players to decide the best way to comply with the objectives set in the regulation. As it has been suggested, part of the alleged failure of utilities regulation in the British telecoms sector was its inflexible character. This regulatory strategy not only did not promote competition but was regarded as a barrier to entry and a potential limitation to innovation. The protection of incentives to innovate is perceived as the favourite mantra from dominant market players used as a shield against any significant overhaul. These claims do not make sense if their aim is avoiding any kind of intervention. However, the angle discussed in this case is how to design a proper regulatory strategy and whether the protection of innovation is a valid argument. Limits to innovation must be taken very seriously as consumers could be harmed by thwarting the development of new products and services. A principle-based approach, assuming it is designed in the right way, not only may favour compliance due to its inherent flexibility but it also sends the right message to new entrants. If one day a new

market player becomes the new Google or the new Facebook they will not be subject to onerous and complex rules limiting the development of new services and products.

Secondly, open-texture regulation based on broad principles has at least two important advantages related to enforcement. One is that -due to the dynamics of digital platforms and the development of new on-line services and technological gadgets- it is not possible to foresee future developments. A principle-based approach does not tie the hands of the regulator as it can interpret and apply the principles in future scenarios. This allows the regulator to have the upper-hand on the enforcement of Digital PBR as the latter will be enforced, say, in a Darwinian way following an approach based on the evolution of the market. Another advantage is the case-by-case application of a principle-based approach. The enforcer can apply a much broader or narrower interpretation by considering different elements such as efficiencies arising from a given practice. For example, a digital platform such as social media -holder of a vast and almost unique dataset- develops a new unrelated service such as an online dating service. The social media does not force consumers into signing up to this new service but it only promotes it using its social media platform. In this case, the digital authority will have to decide if this behaviour amounts to self-preferencing. It could be argued that the platform is leveraging from one market segment where it has significant market power (i.e. social media) to enter into another market segment (i.e. dating online service). However, this practice could also be justified based on innovation, for example, a new service for consumers based on a powerful dataset generating a much more accurate service (i.e. matching to-be couples in a highly accurate way). Furthermore, maybe in the future all social media will already be designed including a dating application as an option, thus blurring the boundaries between one market segment and the other. In this imaginary case, a principle-based approach could prove to be superior as the authority will be able to exercise wider discretion and consider all relevant factors involved as opposed to just enforcing a set of monolithic prohibitions.

Thirdly, the UK's approach as explained by the Furman report and the CMA report takes a less interventionist approach to correct the flaws of digital platforms and shows some encouraging signs based on spurring competition as a powerful vehicle to shake-up market structure. This is opposed to a more traditional European belief that the enforcer is the engine spurring competition into the market. Only two traits will be explained below in support of this idea. One is the tendency -constantly repeated in the CMA report and the Furman report- to empower consumers. For example, the CMA proposed the objectives based on 'open choices' and 'trust and transparency' with a clear view of boosting consumer choice. For example, the open choices objective contains a prohibition as platforms are not allowed to influence outcomes by favouring their own service over rival services. This could be the case when a search engine gives more prominence (i.e. higher rank) to a search result with the objective of benefitting its own services. In a way, the CMA intends to protect choice as consumers should not be influenced by the design of a search engine or by the way search results are presented. A similar duty arises in the case of 'trust and transparency'. Platforms must inform consumers on the data they provide to the platform in an accessible way and enable realistic understanding of their terms and conditions. The goal of providing information to consumers does not seek a partial ban on the collection of data but instead it encourages informed choice. This presupposes that consumers will carefully consider which platform offers the best terms and conditions in terms of the data provided. While this assumption can be challenged on several grounds such as whether it is a realistic objective, it also shows encouraging signs as consumers will ultimately decide if Google remains Google (i.e. by far the most relevant search engine) or if a new competitor or several competitors will take over this market segment. In the same way, some of the market interventions proposed by the CMA have the aim of empowering consumers to decide how much data they provide and how this same data will be used, for example, by opting-out for personalised advertising. A similar pattern is followed by the CMA in cases involving interoperability remedies. For example, the most restrictive interventions such as content-interoperability in social media are rejected by the CMA because they could stifle innovation. This intervention makes platforms more standardised and future development could be conditioned to the compliance of prescriptive rules. To avoid a clash with innovation, the CMA proposed measures empowering consumers in social media such as accessing connections (e.g. inviting Facebook contacts to join a different platform) and cross-posting (e.g. posting on LinkedIn and being able to share the same content on Facebook). In the same way, the most intrusive interventions such as mandating the sharing of data between competitors -for example, access to click and query data in the case of search engine- are also considered but its scope is rather limited and it is suggested that such access should be subject to a balancing exercise, this is also consistent with the findings of the Furman report.

(iv) Lessons for a (long overdue) cool European approach?

Pragmatism, flexibility and a dynamic approach seems to be an appropriate response to the challenges brought by digital platforms. There is no doubt that this has the potential to become a sort of renaissance from a regulatory perspective of the old-fashioned cliché Cool Britannia. However, until and unless a cooler and more proactive CMA emerges then the British regulatory lessons are, at best, ideas waiting to become solutions.

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URL: <https://www.biicl.org/blog/10/cool-britannia-on-the-uks-pragmatic-approach-to-regulate-big-tech>
