Flowchart 2: 

*New Economy Example*

**Question:** when does a regulator regulate?


- Tables provided for illustration only, to aid those seeking to implement ‘SMP regulation’. The actual markets exemplified are not real markets but are shown purely in order to provide an example of how the process may work in practice.

- Application of the rules requires access to evidence both for market definition and market analysis:
  - consumer surveys; market questionnaires
  - market data: pricing, market shares, quality of service, patterns of consumers switching between different operators.

*Three-Criteria test:*

1. The presence of high and non-transitory structural, legal or regulatory barriers to entry in the market.

2. The market structure does not tend towards effective competition within the relevant time horizon (having regard to the state of infrastructure-based and other competition behind the barriers to entry)

3. Competition law alone is insufficient to adequately address the identified market failure(s)

These criteria are applied cumulatively – only if they are all met is a market susceptible to ex ante regulation.

The test applies to overall market characteristics and structure, not to a specific operator (which is the focus of an SMP assessment).
Step 1: Define product (Step 1(a))/ geographic markets (Step 1(b)) at the retail level. Are there geographic differences? Find what PRODUCT markets (1(a)) exist in a GEOGRAPHY (1(b))

- Yes

Step 2: Are these markets effectively competitive at the retail level, in the absence of regulation? Apply the 3 criteria test. Test met?

- Yes

Step 3: Define the most upstream wholesale market for that (those) retail market(s).

Step 4: Repeat the same test as in Step 2, but this time to the wholesale market. Apply the 3-criteria test. Test met?

- Yes

Step 5: Does any operator in this market have Significant Market Power?

- No

Step 6: Apply proportionate and appropriate remedies

Repeat analysis for the next downstream input

1. COLOUR CODING: In these flowcharts:
   - Pale blue denotes a ‘yes answer’ and in some cases the consequences that derive from such an answer
   - Orange denotes a ‘no answer’ and in some cases the consequences that derive from such an answer
   - Grey denotes general information on the way in which SMP analysis is carried out
   - Green denotes the choice of an example / the conclusion reached: as the analysis is carried out, we focus on one market at the time and we assume that the analysis has shown that: (i) there is a specific market definition; and (ii) after the analysis, the market as defined requires SMP regulation.
Step 1(a) – Define Product Market at retail level:

What electronic communications do consumers use? Voice, SMS, Data

**Demand side substitutability:** would consumers switch to one other type of service in response to a Small but Significant Increase in Price in another type of service? (e.g. from a voice call to a VoIP call? Or would they use an SMS or email instead of calling?)

- **Yes** – consumers will switch (high OTT take-up, minimal difference in quality)
- **No** – consumers will not switch

**Apply the SSNIP test on supply side:** would a supplier of voice and SMS be able to provide an OTT service [in response to a SSNIP] (and vice versa)?

- **Yes**
- **No** – supplier cannot become an OTT (or vice versa)

- **There is one market for data, voice and SMS.**
- **There are two separate product markets: one for data and one for voice/SMS**

Example given: There is one market that includes data and voice/SMS
Step 1(a) – Define Product Market at retail level (cont’d):

Example given: There is one market for data + voice/SMS services

How do consumers access these services? Mobile, Fixed, Cable

Demand side substitutability: do consumers switch to access data services in response to a Small but Significant Increase in Price in another type of service? (e.g., from mobile broadband to fixed broadband or vice versa)

- Yes – minimal difference in quality, switching easier due to technology, spread of Wi-Fi etc.
- No (differences in reliability, quality, usage, etc.)

Apply the SSNIP test on supply side: would a supplier of mobile data be able to switch to supply through cable or fixed in response to a SSNIP?

- Yes – significant convergence
- No

There is one product market for data access through mobile and fixed networks.

Example given: There is a single market for data + voice/SMS services that can be accessed via mobile, fixed or cable platforms

There are two separate markets: one for mobile and one for fixed (including cable).
Step 1(a) – Define Product Market at retail level (cont’d):

Example given: Single market for data + voice/SMS services on all platforms

Are there differences depending on type of consumers? E.g.: Enterprise v Residential?

Yes

Demand side substitutability: do enterprise consumers switch to enterprise data services in response to a Small but Significant Increase in Price in residential services (and vice versa)?

Yes

No - enterprises need bandwidth, resilient services, etc.

Apply the SSNIP test on supply side: would a supplier to a residential consumer be able to provide services to an enterprise in response to a SSNIP?

Yes

There is one market for data access through a fixed location to all customers.

No

There are two separate markets: one for residential fixed data access customers and one for enterprise customers

Other Questions – Repeat the same exercise

Are there other differences by customer (pre-paid and post-paid, high value and low value)?

Are there differences in technology (2G, 3G and 4G for mobile, standard and superfast for fixed)?

Example given – there is one product market for data + voice/SMS services that includes all platforms and all types of customers and technologies.
Step 1(b) – Define Geographic Market at retail level:

Example given – there is one product market for data + voice/SMS services

Are there differences depending on geographic area? By city, region, urban/rural, exchange or catchment are?

Apply the SSNIP test on demand side: would a consumer be able to access services from different providers in response to a Small but Significant increase in Price elsewhere?

Yes – choice between fixed, mobile and OTT providers

No – some operators are only present in certain areas (e.g. urban).

Apply the SSNIP test on supply side: would a supplier in urban areas be able to provide services in rural areas in response to a SSNIP?

Yes

No

Are there significant differences in competitive conditions between urban and rural areas (or other geographic areas)?

No

Yes

There is a single national market for data services at a fixed location.

There are two separate geographic markets: one rural and one urban.

Example given – there is a national market for data + voice/SMS services
Step 2 – Is it necessary to regulate? Apply 3-criteria test / retail level

**APPLY SAME TEST TO EACH RETAIL MARKET IDENTIFIED**

Example: national market for data + voice/SMS services (includes fixed and mobile)

Absent any regulation (retail or wholesale), are there a sufficient number of players active for effective competition?

- **NO**: apply the 3 criteria test
- **YES**: the relevant retail market is COMPETITIVE: no need to regulate

**TEST 1** - Are there high and non-transitory barriers to entry? NB: can be:

- **Structural**: market entry or expansion of competitors is difficult. E.g. economies of scale; capacity constraints, high sunk costs, vertical integration
- **Legal/regulatory**: planning permissions for roll out of network;

**TEST 2** - the market structure does NOT tend towards effective competition? E.g. consider market shares, pricing, the state of infrastructure and service competition, barriers to expansion etc

**TEST 3** – is competition law insufficient to address the potential market failures?

- **NO**: if the answer to one of the three questions is no, the relevant market is competitive – no need to regulate.
- **Only if the answer to the all three questions is yes, the relevant retail market is not competitive consider the relevant wholesale market**

Example given: The national retail market for data + voice/SMS services is competitive. No need to consider the wholesale upstream market. No ex-ante regulation is necessary.