Unlocking Digital Competition: A Perspective

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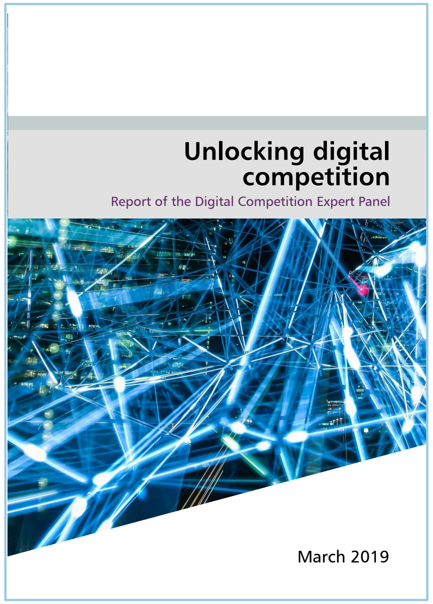
Disclaimer: These are not necessarily the views of any organisation with which I am associated!

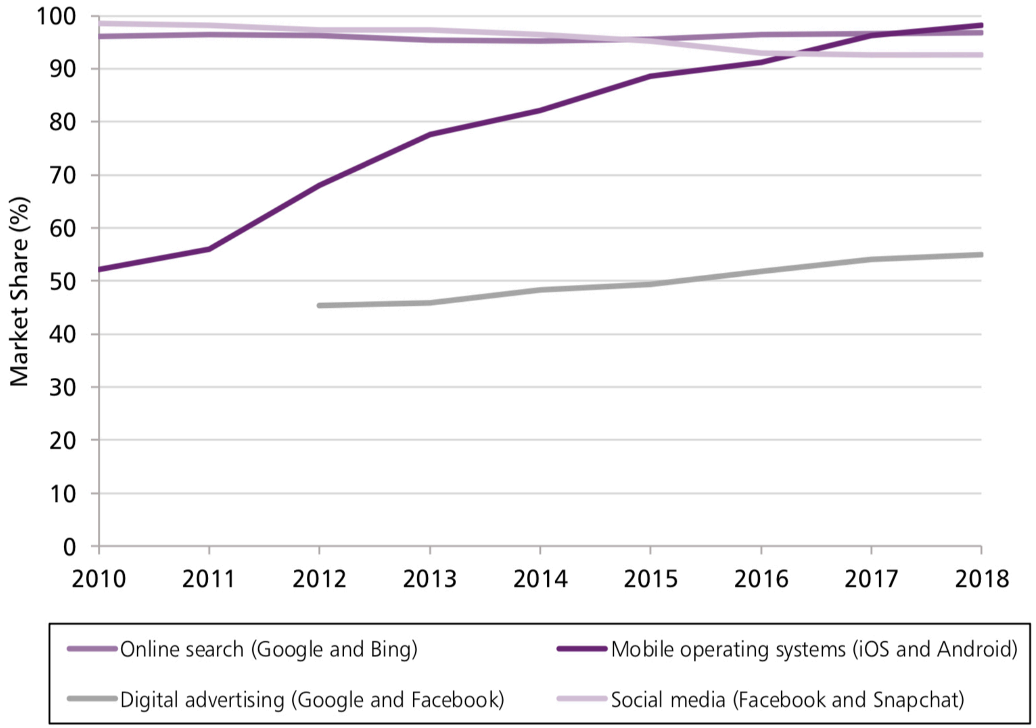
Background

- HMT commissioned a Digital Competition Expert Panel (DCEP), led by Jason Furman. 'Unlocking Digital Competition' published mid-March.
- Key questions:
  - What competition issues arise in the digital economy? Can existing competition law cope? If not, how should it change? Will this be enough, or will more be needed? If so what?
- Key recommendations for Government and CMA:
  - Establish a 'digital markets unit' to promote competition and innovation.
  - For competition law: 'Reset' merger control and speed up antitrust cases.
  - Engage internationally to encourage a coherent global approach.



Background – Indicative Two-firm concentration

Chart 1.B: Combined indicative market shares of current leading two companies in selected UK digital markets



Sources: StatCounter,[21] *Comscore,*[22] *and eMarketer and company reports*[23]

The challenges of digital platforms

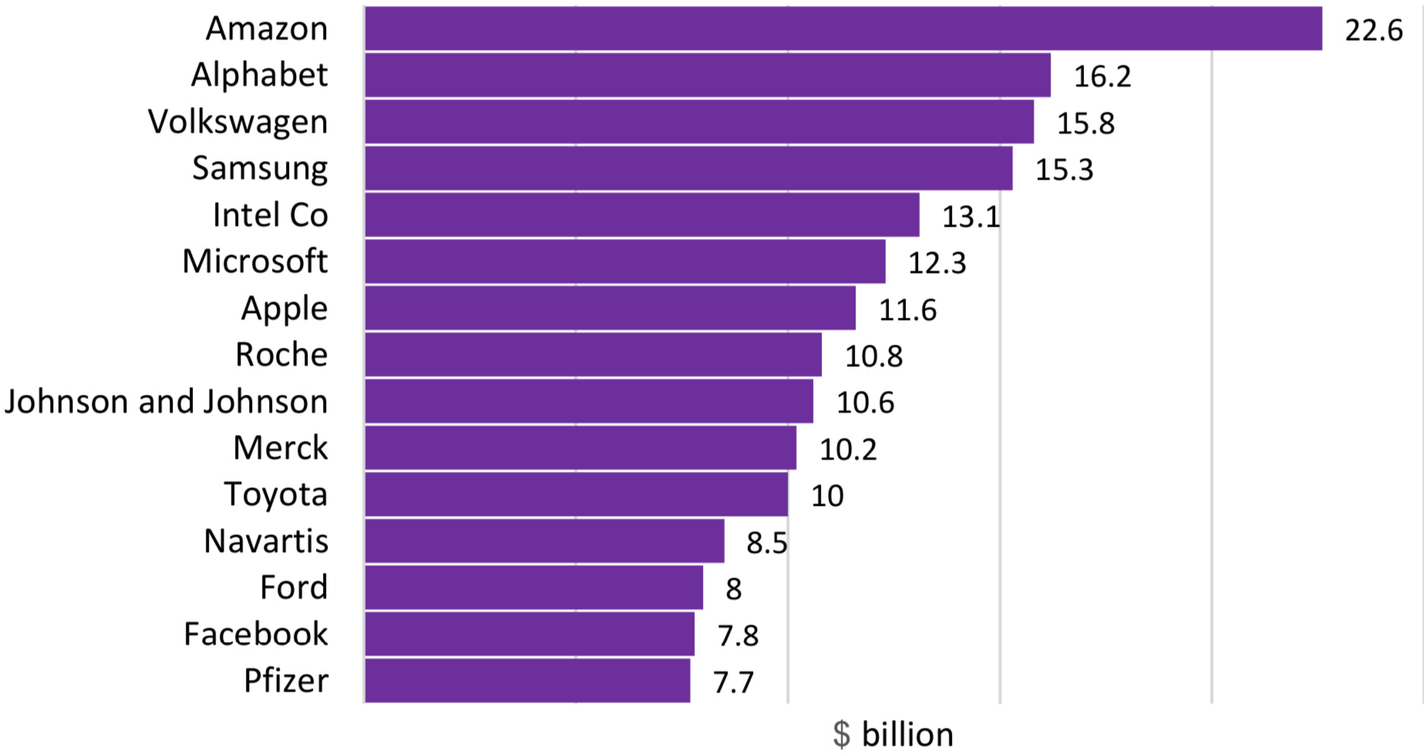
- We see a number of digital markets which have ’tipped’ to being concentrated, and where dominance has been (or risks being) extended into related markets.
- Key drivers:
  - Strong trans-global economies of scale and scope: Eg platform investment, brand reputation, customer/supplier relationships.
  - Network effects: Absent multi-homing and interoperability, markets may be inclined to ‘tip’. Also issues associated with ‘free’ being a minimum price.
  - The role of data: Key input, including into AI, also exhibiting strong economies.
  - Consumer behaviour/biases: Eg Single-homing, weak privacy self-protection, enhanced brand value, default and status quo biases relevant.
  - Strategic firm behaviour – see later.

The upside: Associated benefits

- Consumers benefit from high quality free (or low price) services.
- Digital comparison tools enhance consumer choice, and also competition.
- Suppliers benefit from gaining enhanced access to market and better IT solutions.
- Advertisers and consumers both benefit from targeted advertising.
- There has been plenty of innovation, much of it driven by the digital giants.
  - Potential to ‘sell out’ incentivises start-up innovation, and attracts VC.
  - The digital giants have financial resources, technological expertise and customer/supplier relationships to bring innovations to mass market quickly.
- Can be intense competition to win markets, and tippy markets remain tippy.
- Giants take cybersecurity and social concerns seriously and can be ‘coregulators’.

Inhouse R&D

Chart 1.A: Top 15 companies for global spending on research and development



Source: PwC 2018 Global Innovation 1000 study[13]

Potential harm to consumer welfare

- DCEP support for consumer welfare test, but long run and multi-dimensional.
- Direct harm to consumers:
  - Zero price may be too high. Payment via data or attention.
  - Distorted consumer choices if rankings/prominence/scoring of dependent business users distorted by commercial considerations.
- Indirect harm via business users:
  - Distorted rankings etc can also distort competition. (‘Best man’ may not win).
  - High prices charged for customer access likely to be passed on.
  - **Key:** Long term consumer harm if business innovation lessened or distorted.
- [Not covered: Risk of enhanced political power; Resilience risk.]

Is market tipping and leverage inevitable?

- Some driving factors are inherent in the economics of these markets.
- But there may also be strategic firm behaviour:
  - Acquisitions of potential competitors or of key inputs
  - Moves to limit multi-homing by consumers (eg MFNs, IO design choices)
  - Moves to limit multi-homing by suppliers/advertisers (eg Exclusivity clauses)
  - Self-preferencing (eg Google Shopping)
  - Tying and bundling (eg Google Android)
  - ‘Predatory innovation’
- Can competition law satisfactorily address such concerns?

Issues for merger law

- Concern that merger control has been under-interventionist.
- In last decade, Amazon, Apple, Facebook, Google and Microsoft have made over 400 acquisitions globally, and the pace has not slowed with 250 in last 5 years.
- Valuations for some have been exceptionally high (see next slide)
- Most have not been reviewed, or only reviewed at Phase 1.
  - Only Google/Doubleclick and Apple/Shazam received Phase 2 scrutiny.
  - Only Microsoft/LinkedIn was subject to remedies (Phase 1 commitments).
- Case-by-case retrospective assessment is difficult, due to non-observability of counterfactual, but overall false negatives seem more likely than false positives.

Table 1.A: Examples of high value acquisitions by large digital companies

Year	Acquirer	Company acquired	Transaction value ($million)
2006	Google	YouTube	1,650
2007	Google	DoubleClick	3,100
2011	Microsoft	Skype Technologies	8,500
2011	Google	Motorola Mobility	12,500
2012	Facebook	Instagram	1,000
2012	Microsoft	Yammer	1,200
2013	Google	Waze	970
2014	Apple	Beats Electronics	3,000
2014	Google	Nest Labs	3,200
2014	Google	Deepmind Technologies	625
2014	Facebook	WhatsApp	19,000
2014	Facebook	Oculus	2,000
2016	Microsoft	LinkedIn	26,200
2017	Apple	Shazam	400
2018	Amazon	Ring	1,000

Source: IG Group[105]

Recommendations for merger law

- **DCEP Proposal: CMA should prioritise scrutiny of digital mergers, with a focus on harm to innovation and potential competition**
- Jurisdictional issues - Eg if target has no turnover and no horizontal overlap? Not a problem for UK share of supply test, but could be elsewhere?
- Legal test - Given the uncertainty of future possibilities, can a balance of probabilities test cope?
  - **DCEP Proposal: Replace with wider 'Balance of harms' test.**
- Does application of merger control in digital platform markets need a reset?
  - **DCEP Proposal: Rewrite Merger Assessment Guidelines.**
  - Eg More use of theory to set context. Increased focus on long-term consumer welfare, on the counterfactual, and on acquisition value/deal documents.

Recommendations for antitrust cases

- Key problems identified: Deprioritisation of difficult cases and case length.
  - **DCEP Proposal: Retrospective analysis of cases/decisions not taken**
  - **DCEP Proposal: Streamline process of interim measures.**
  - **DCEP Proposal: Change CAT appeal standard from ‘full merits’ to JR.**
- But unlikely to solve all problems:
  - Partial nature of cases: Can’t address all issues arising. Have to prioritise.
  - Fines don’t create deterrence: But might higher fines be even worse?
  - Remedies too narrow, not forward-looking, hard to design, need monitoring.
  - Promotion of competition may go beyond limiting anti-competitive behaviour, and self-preferencing behaviour (on own ‘estate’) is hard to assess.

DCEP Proposal: A ’Digital Markets Unit’ with three objectives

1. Participative regulation of designated ‘Strategic Market Status’ platforms. Based on core principle around ensuring eg:
   - User access, prominence, rankings and reviews provided on a fair, consistent and transparent basis.
   - Users not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market.
2. Promotion of enhanced data portability and interoperability, via open standards, to facilitate switching and multi-homing.
   - (Potentially) stronger regulation of data controllers to increase consumer trust, enhance choice and facilitate entry by new players.
3. Promotion of data openness, eg to facilitate ’training’ of potential new AI.

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Comments? Questions?

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