

# *Searching the soul of antitrust: what is competition law for?*

*Tim Cowen 12 February 2020*

What is competition law for?

- Law and policy differ
- Justice “ The Overriding Objective” in applying law, &, justice in a just society raises 3 policy issues: Welfare, Freedom and Virtue.
- Outcomes: on industrial structure and distribution of wealth
- Causes & History
- Now & Future
- Conclusions

....*What do Intel, Microsoft and Google have in Common?*

Summer of 2004: hurricane Charley hit Florida: 22 lives, \$11billion damage. Orlando gas stations: (August & electricity and refrigeration failures) \$2 dollar bags of ice = \$10 dollars & generators usually selling for \$250 = \$2000

A 72 year old & her handicapped daughter charged \$160 for a \$40 motel room.

USA Today: *“After the storm come the vultures?”*

State AG Charlie Christ :

*“It is astounding to me the level of greed that someone must have in their soul to be willing to take advantage of someone suffering in the wake of a hurricane”*

Florida has a law against “Price Gouging”. 2,000 complaints

Days Inn West Palm Beach had to pay \$ 70,000 *in penalties and restitution.*

# Welfare, Freedom and Virtue

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# Welfare: raising price attracts supply?

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National Review  
@NR

Price-Gouging Is a Public Service

[bit.ly/2h4eayR](https://bit.ly/2h4eayR) via @KevinNR



PHOTO BY AP/WIDEWORLD

Orlando Sentinel

WORLDWIDE

Commentary

Commentary:

Hurricane Irma price  
gougers aren't greedy,  
they're heroes







# Welfare at a time of duress impacts on the vulnerable

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Raised prices provide incentives for suppliers to switch production, reflect what willing buyers and sellers consider to be the value of the goods and services.

Depends on open markets/absence of duress, and impacts on all: rich/poor, price sensitive non price sensitive, vulnerable or not.

Free markets promote welfare by creating incentives for people to produce what others want: the price signal is important to fuel the engine of the economy.

Individual freedom of choice drives the engine of the economy to produce and meet need freedom to trade supports suppliers.

Law is normative and promotes virtue: enforcement action needs to consider what behaviour to we want to encourage?

3 key elements: maximising welfare, freedom & promoting virtue

# Law and policy differ

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**USA F.Easterbrook** 1984 practical issues in deciding cases: Consumer welfare protects efficiency in markets – so let the market work “Monopoly prices eventually attract entry” “errors that tolerate baleful practices are self correcting”. Over intervention could undermine efficiency enhancing agreements. Followed **Bork & Chicago School**: focus on consumer welfare and efficiency. Do nothing – all will be well..

**M Sandel**: 2020 Justice and a just society require: a consideration of Welfare, Freedom (both consumer freedom of choice and producer freedom to trade) and Virtue; what behaviour do we want to encourage in the market economy?

2015/19 Open Markets. E Warren. FTC evidence (and meaning of Sherman Act): “Consumer welfare”, “total welfare”, or “protecting the Competitive process”. “Consumer welfare” has operated as a guiding light for investigation since the late 1970’s emphasizing allocation of resources and efficiency benefits.

**EU Debate on Policy 1990-2010**: Liberalisation/Consumer welfare/Single market/Ordoliberalism. Maastricht, Modernisation, Constitutional Treaty, Article 82 White Paper 2009/C 45/02. Kroes & Single Market Objective. CJEU: Glaxo 2009 1-9291. Lisbon, Almunia: “Consumer welfare is at the heart of our policy ” 12.03.2010 ‘General Guidelines’: ‘the objective of Article 81 is to protect competition on the market as a means of *enhancing consumer welfare* and of ensuring an efficient allocation of resources.’ OJ C 101/97, 27.4.2004 Recital 29 of Council Regulation (EC) No 139/2004.

**UK Phillip Blond** “Red Tory” 2009 and Res Publica: “Technopoly - *and what to do about it 2017*” Vince Cable; “*Taming the Tech Titans*”.

UK has adopted the “**Promotion of Competition**”.

How do these measure up?

# Exploitative abuse of dominance

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## “CMA fines Pfizer and Flynn £90 million for drug price hike to NHS” 7 Dec 2016.

Pre-2012, Pfizer supplied the anti-epileptic drug Epanutin to NHS on regulated terms. Epanutin prevents and controls seizures. About 48,000 UK patients. Switching to other drugs or versions risk of loss of seizure control. NHS had to pay.

Pfizer/Flynn deal: to escape price regulation:

- 100mg packs from £2.83 to £67.50.
- 2,600% overnight.
- NHS spend went from £2 million in 2012 to £50 million in 2013.
- UK prices many times higher than other European countries.

Pfizer appealed issue of evidence to CAT and won. CMA appealed to Court of Appeal: held **fairness** relates to value “in itself” or “benchmarked value”. CMA has a broad margin of discretion on evidence available. Upheld CMA in part but under a duty to conduct a *fair evaluation of evidence put forward* against the tests “excessive in itself” (cost+) or “benchmarked against normal or workable competition”. And “The starting point is that competition law is treated as a species of criminal law.” A non judicial body can apply penalties only if Article 6 ECHR rights exist through appeal on the merits. Can a criminal law be enforced sporadically or occasionally? Does law have to be applied without fear or favour? If Justice delayed is justice denied how long can enforcement take? Is general deterrence part of its purpose?



## Easter 2020: Pandemic.

- 2 million pints of milk poured down the drain
- Shortages of flour in supermarkets
- Supermarkets cancelled BOGOFs/raised prices
- Hand sanitiser/ventilator prices rose.

“From 10 March to 28 June 2020, the CMA has been contacted more than 80,000 times about coronavirus-related issues. The rate at which consumers contacted the CMA in June (around 3,500 per week) has fallen back from levels seen in May (almost 7,000 per week).”

What happened?

## Price inflation by sellers on online marketplaces

Carex hand lotion 250ml



Braun Thermoscan 7 IRT6520 digital thermometer



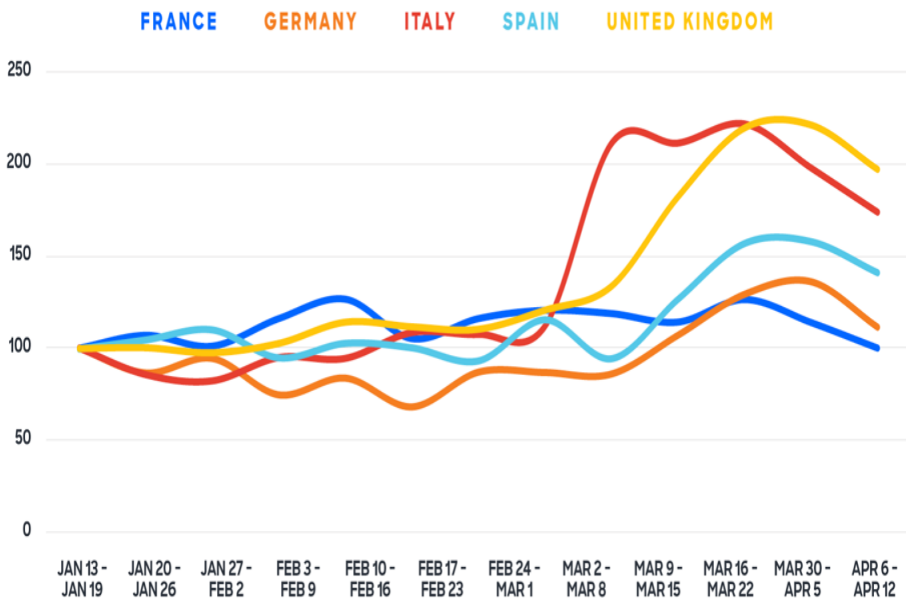
Dettol Antiseptic cleaning liquid 250ml



All prices found on active listings on eBay.co.uk and Amazon.co.uk between 16 and 19 March 2020.

## Food/Grocery Retail Sites/Apps: Visit Indices

WEEK OF JAN 13 - JAN 19 = 100

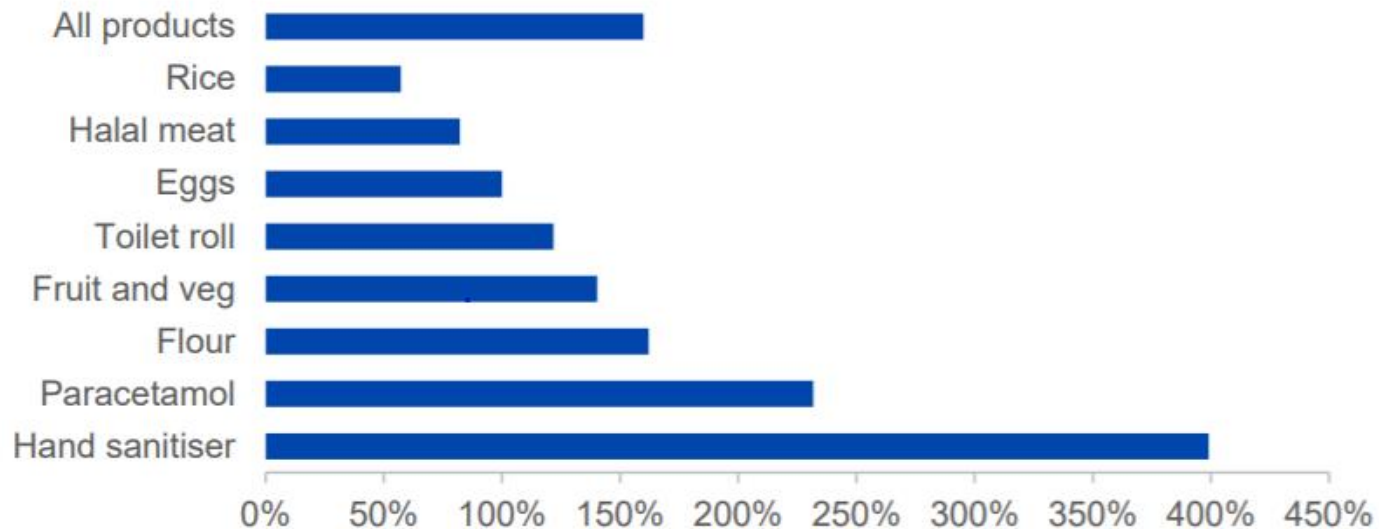


Comscore MMX Custom Reporting, Dec 2019 - Apr 2020

# Price rises in pandemic

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**Figure 1. Average (median) reported price increase for all, and selected, products**



*Note: price increase is calculated based on prices in the complaint and normal prices reported by consumers.*

*Source: CMA (2020)*

# UK Laws do address abuse of dominance and include prohibition of exploitation.

## UK lagging behind on laws to protect against price gouging

*As other countries issue fines and bans, Which? is calling for emergency legislation to stop price gouging and protect UK consumers*



By Hannah Walsh

7 Jun 2020

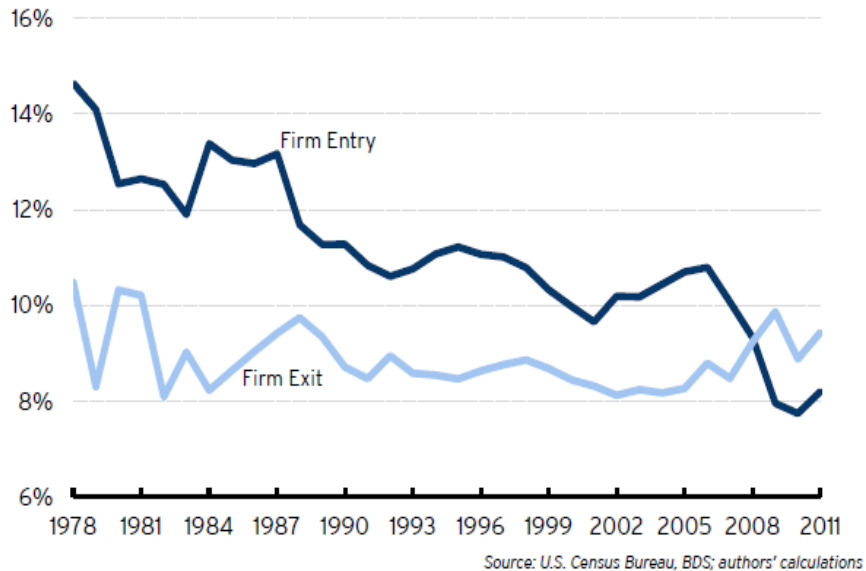
releases, contacts major players, allows strategic coordination, responds to enquiries and “investigates” a small number of cases.

- How does this measure against maximizing welfare, personal freedom and promoting virtue?
- Does CMA recognize that the most vulnerable are most affected and the situation is one where duress applies?
- Competition constrained by consumers ability to shop around, time, and supply chain shortages and lack of products?
- Supermarkets compete in geos: but those geos don't apply in lockdown Could BOGOFs be investigated?
- Longer term effects of verticals on market structure and supply chain switching?

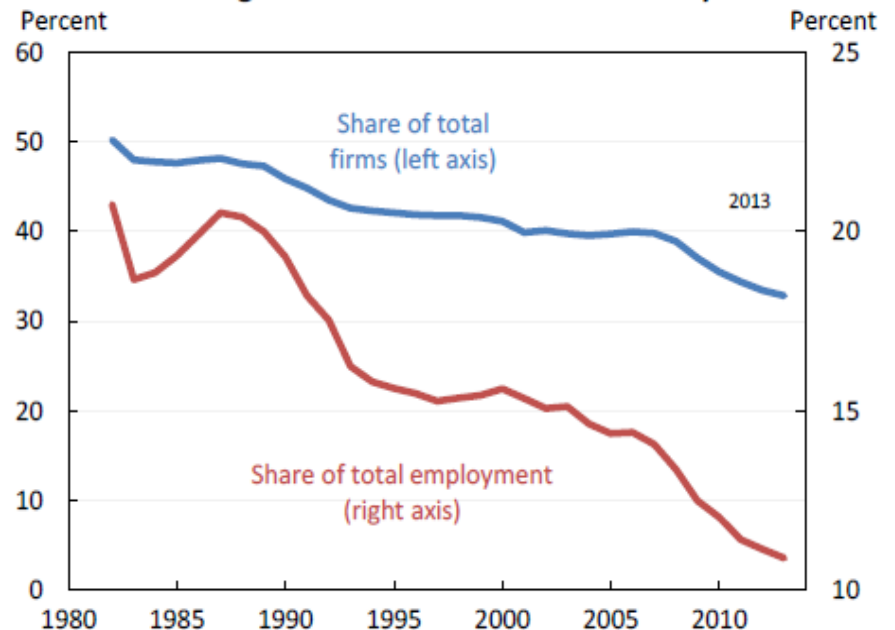
# Outcomes: structure and wealth distribution

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Figure 1.  
The U.S. economy has become less entrepreneurial over time  
Firm Entry and Exit Rates in the United States, 1978-2011



Young Firms as a Share of the Economy



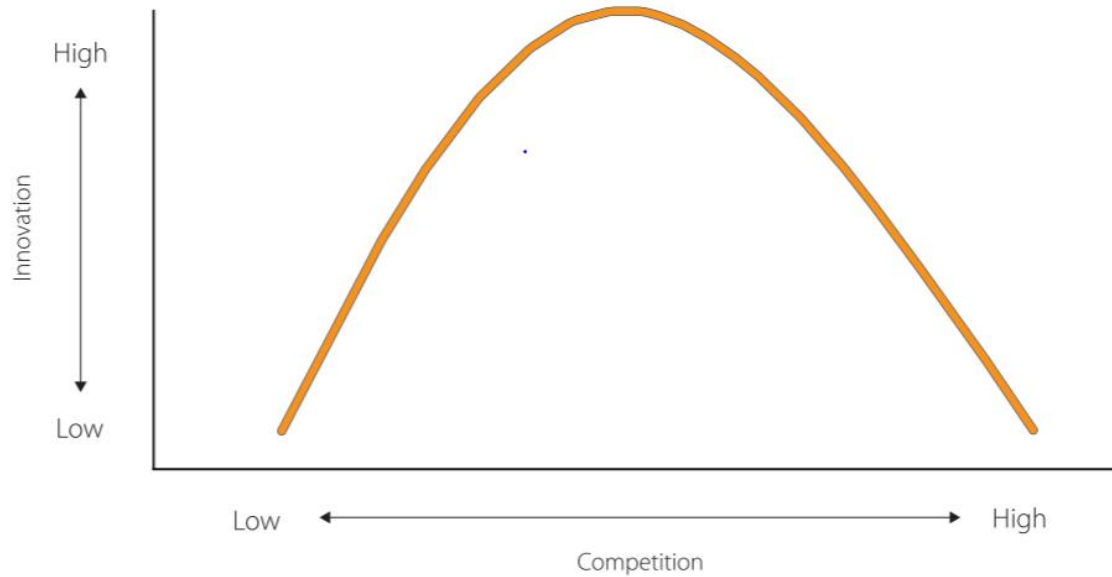


# Innovation outcomes depend on market structure

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In our model:

- At low levels of competition the “competition effect” dominates, leading to a positive relationship.
- At high levels of competition the “Schumpeterian effect” dominates, leading to a negative effect.
- Overall this leads to an inverted U-shape.

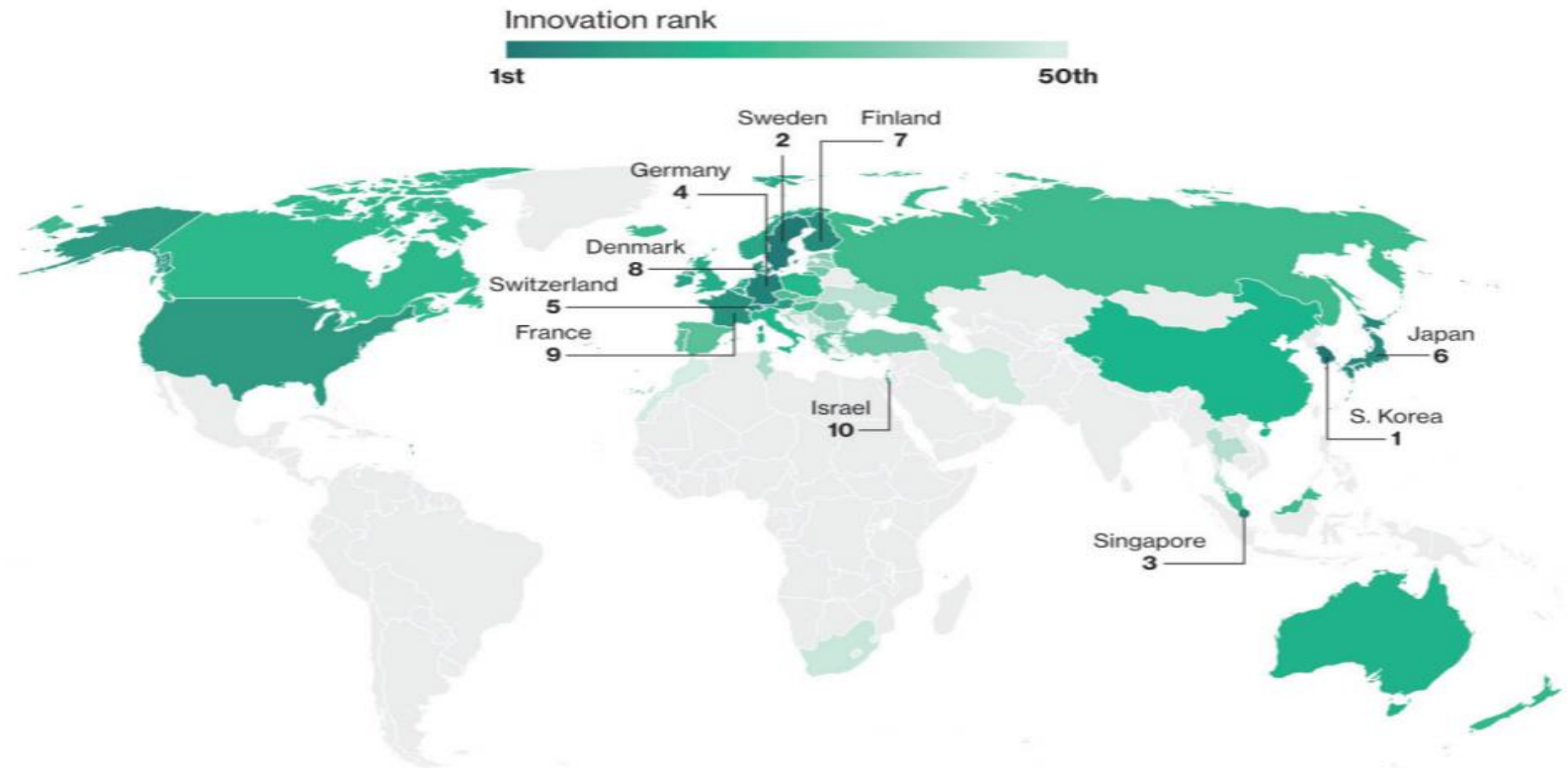


Source: Philippe Aghion et.al, 2005, 'Competition and Innovation: An Inverted-U Relationship'

# Innovation index

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South Korea, Sweden and Singapore top the list; U.S. drops out of top 10.



Sources: Bloomberg, International Labour Organization, International Monetary Fund, World Bank, Organization for Economic Co-operation and Development, World Intellectual Property Organization

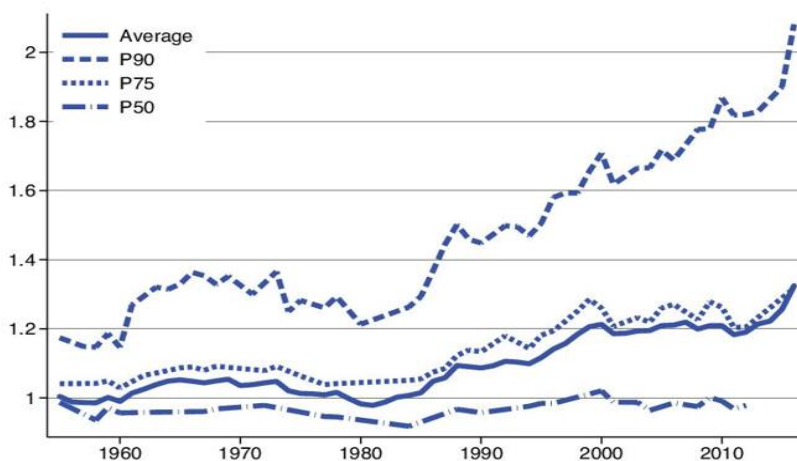
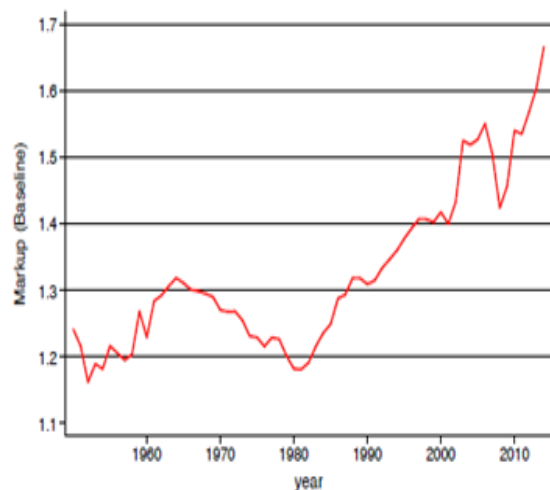
**Bloomberg**

# outcomes

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We find that from 1980 onward, markups have risen from 21% to nearly 61% in 2014, an increase of 40 points. For the same period, average profit rates have increased from 1% of sales to 8%.

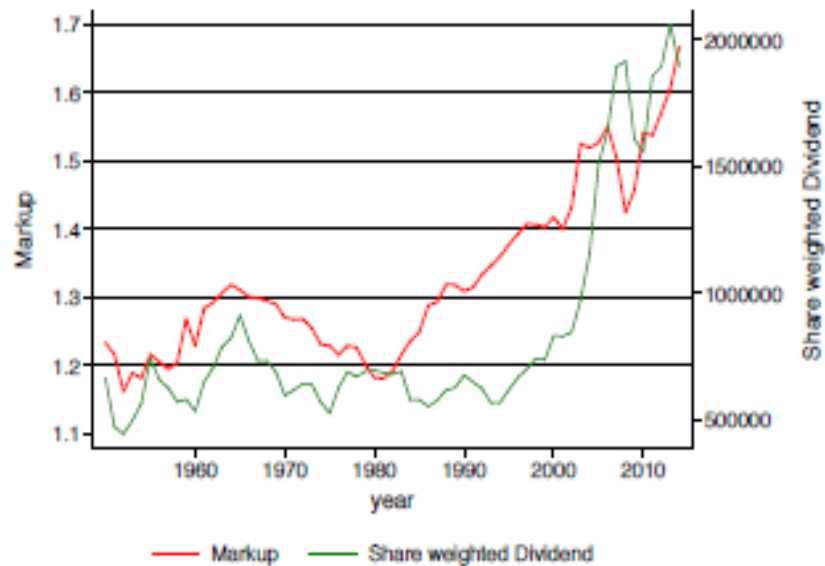
*Q J Econ*, Volume 135, Issue 2, May 2020, Pages 561–644, <https://doi.org/10.1093/qje/qjz041> De Loeker & Eckhout



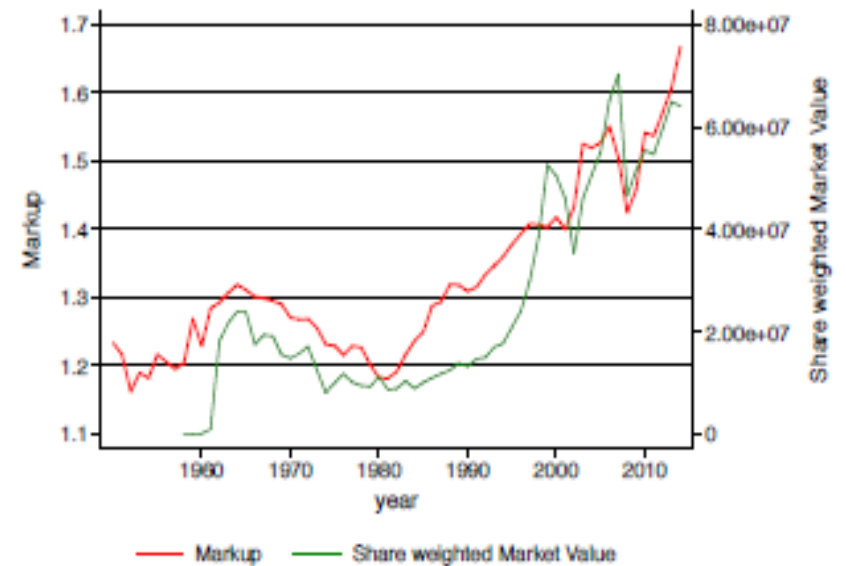
(B) Percentiles of the markup distribution (revenue weighted)

# outcomes

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(a) Average Dividends (weighted)



(b) Average Market Value (weighted)

# Concentration ratio increased over time 1997-2012

Change in Market Concentration by Sector, 1997-2012

Industry	Revenue Earned by 50 Largest Firms, 2012 (Billions \$)	Revenue Share Earned by 50 Largest Firms, 2012	Percentage Point Change in Revenue Share Earned by 50 Largest Firms, 1997-2012
Transportation and Warehousing	307.9	42.1	11.4
Retail Trade	1,555.8	36.9	11.2
Finance and Insurance	1,762.7	48.5	9.9
Wholesale Trade	2,183.1	27.6	7.3
Real Estate Rental and Leasing	121.6	24.9	5.4
Utilities	367.7	69.1	4.6
Educational Services	12.1	22.7	4.2*
Professional, Scientific and Technical Services	278.2	18.8	2.8*
Arts, Entertainment and Recreation	39.5	19.6	2.5*
Administrative/ Support	159.2	23.7	1.6
Health Care and Assistance	350.2	17.2	0.8*
Accommodation and Food Services	149.8	21.2	0.1
Other Services, Non-Public Admin	46.7	10.9	-0.2*

- NAICS sectors from 1997 to 2012.
- \* indicates the percentage point change by taxable firms Source: US Economic Census (1997 and 2012), Census Bureau.



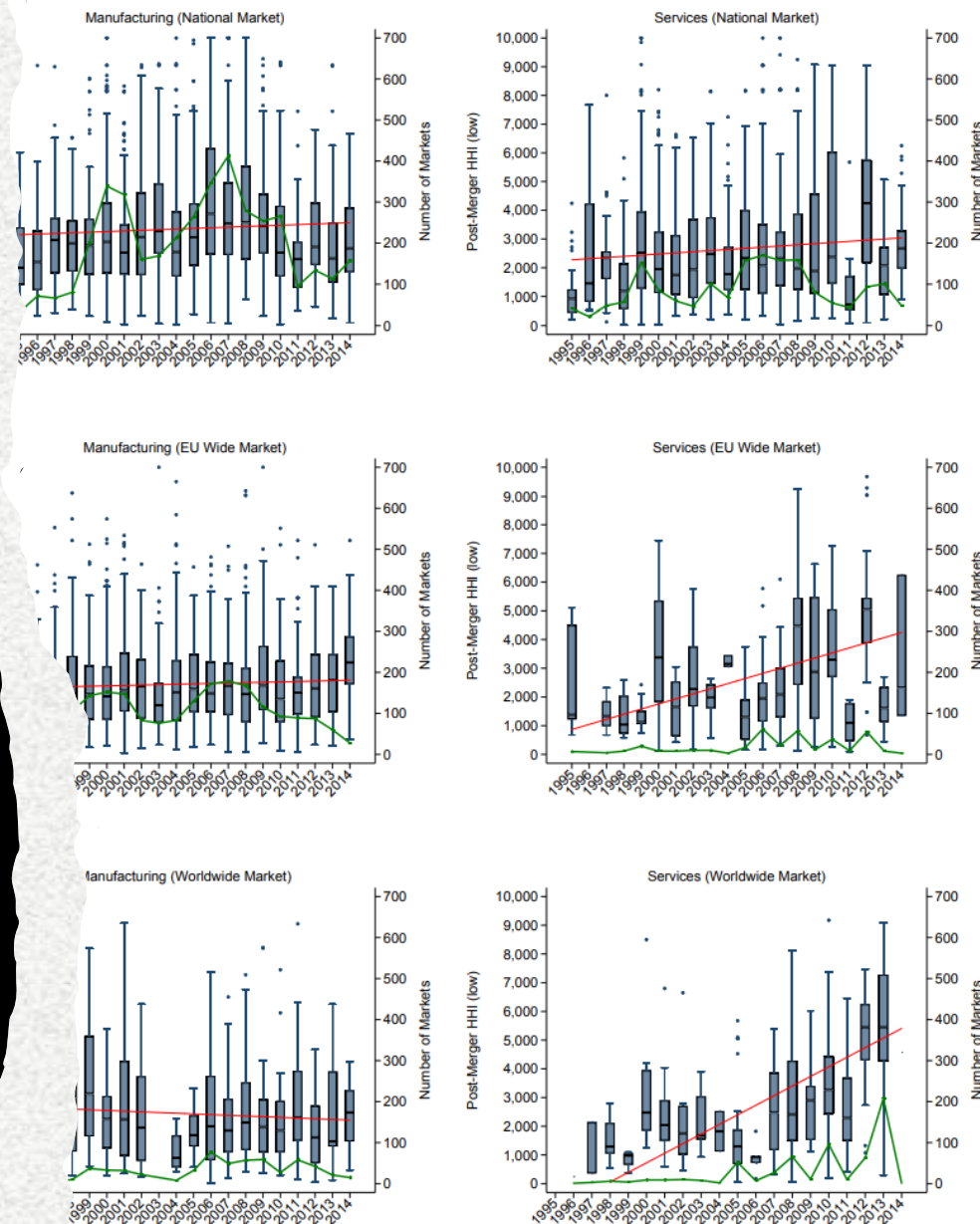
# Market Concentration in Europe: Evidence from Antitrust Markets

January 20, 2021

Pauline Affeldt, Tomaso Duso, Klaus Gugler and Joanna Piechucka

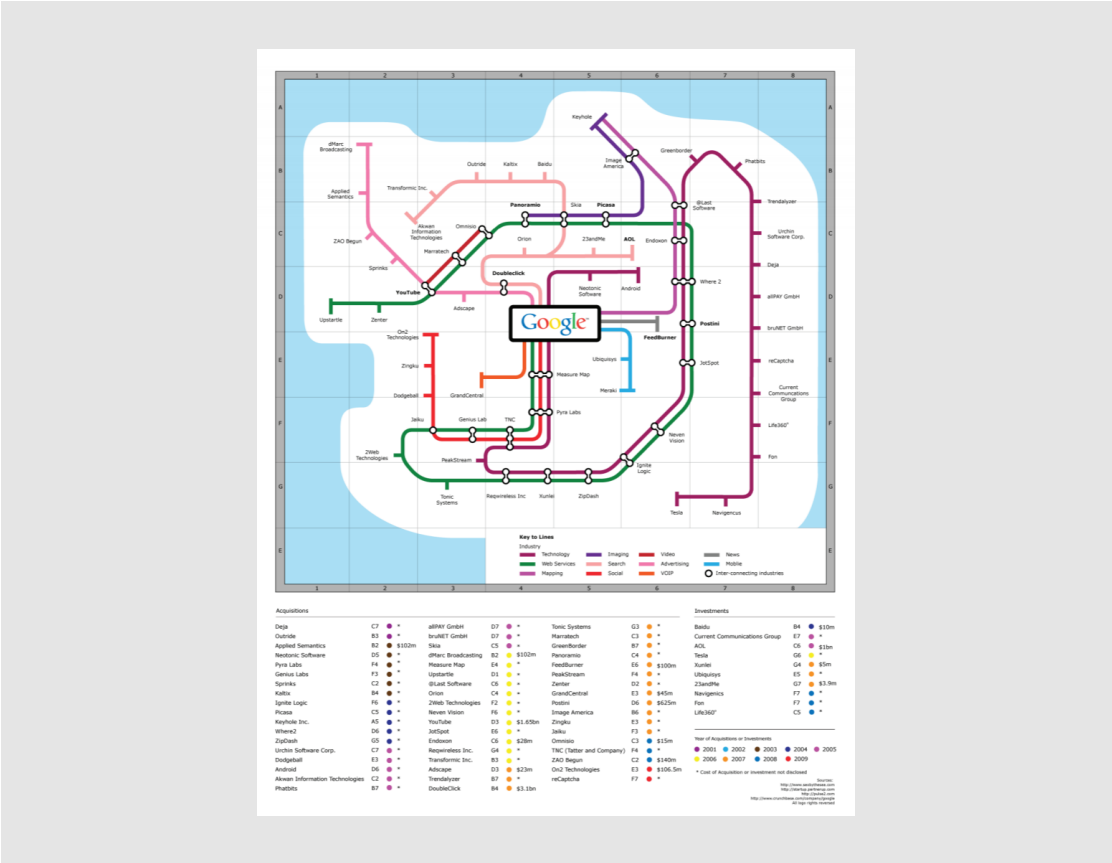
- Database identified over 20,000 product/geographic antitrust markets affected by over 2,000 EU mergers between 1995 and 2014.
- Concentration, as measured by the market-specific post-merger HHI, is larger than reported in the extant literature (at least) **by a factor of ten**.
- Also shows that concentration has increased over time on average.
- Strict past merger enforcement also negatively correlates with concentration.

Evolution of HHI in antitrust markets over time - geographic market definition/manufacturing vs. services



Source: Our elaboration on EU merger data.

**Causes of increased concentration over time:  
merger control a report card for authorities?**



- Merger control is negatively related to concentration;
- Enforcement was more stringent in 1995-2004 than in 2005-2014.
- Barriers to entry relate to concentration irrespective of time periods, sectors of activity, and geographic markets.
- Is increasing concentration is due to “good” (efficiency) or “bad” (increase of market power) reasons? It depends.
- “Our results on barriers to entry and past merger enforcement call for strict merger control enforcement.”
- Lear Report for CMA.

# Privacy & market concentration: Intended & unintended consequences of the GDPR

Garrett A. Johnson, Scott K. Shriver & Samuel G. Goldberg\* July 8, 2020

Table 4: GDPR & aggregate concentration: Three extensions

Data samples	HHI			
	Pre	Post	Diff.	Diff. (%)
<i>Role of personal data</i>				
Likely personal data	185.9	221.7	35.8	19.3%
Unlikely personal data	487.4	515.0	27.5	5.6%
<i>Role of consent</i>				
Sites with privacy extension	100.1	117.9	17.8	17.8%
Sites without privacy extension	153.6	179.4	25.8	16.8%
<i>Role of top 2 companies (Google &amp; Facebook)</i>				
All vendors	145.7	171.0	25.2	17.3%
All but top 2 companies	46.0	43.2	-2.8	-6.2%

- GDPR reduced data sharing online.
- Unintended consequence: increased concentration among vendors that provide support services to websites.
- Websites facing higher GDPR penalties drop more vendors.
- Websites drop smaller vendors increasing the relative concentration of the vendor market by 17%.
- Increased concentration arises among vendors that use personal data such as cookies, and from the increased relative shares of Facebook and Google-owned vendors, but not from website consent requests.
- Suggests that increased concentration is driven by vendor choices rather than changes in user behavior.

# Causes & policy toward markets 18<sup>th</sup> & 19<sup>th</sup> centuries

## Common law

- Freedom to trade
- Monopolies and patents granted by Royal prerogative
- Guilds : monopsony managing quality and capacity not price or quantity (Richardson 2001).
- *Hearn vs Griffin* competing stagecoach carriers:  
*"How can you contend that it is a restraint of trade; they are left at liberty to charge what they like, though not more than each other, and particular days and times are fixed.."*  
Capacity allocation/efficiency improving?
- *King vs Waddington* 1800  
forestaller of oats treated like a conspiracy to raise the price of salt.
- Common law conspiracy claims are still alive and well.

- Just price ( on a market) forestalling, engrossing regrating. (Pillory).
- Public interest obligations: common carriage, Pubs, draymen, ferries etc
- Trusts and professions: fair dealing and fiduciaries/duties of care .
- *Darcy vs Allen*; illegal grant for promoting idleness, Queen was considered to have been deceived about the public good since monopoly would raise prices and reduce quality.





***“Any given accumulation of commercial wealth may be indicative, on the one hand, of faithful industries, progressive energies, and productive ingenuities: or, on the other, it may be indicative of mortal luxury, merciless tyranny, ruinous chicane. Some treasures are heavy with human tears....***

**John Ruskin. Unto This Last (1862)”**

Consumer welfare is improved if markets are open: free markets are fair markets: economics based on greatest good for greatest number - (Benthamite).

17<sup>th</sup> Century Tariffs, Adam Smith, anti entrenched aristocracy & the French Revolution

Laissez faire/ Manchesterism: Sherman Act and Standard Oil (USA).

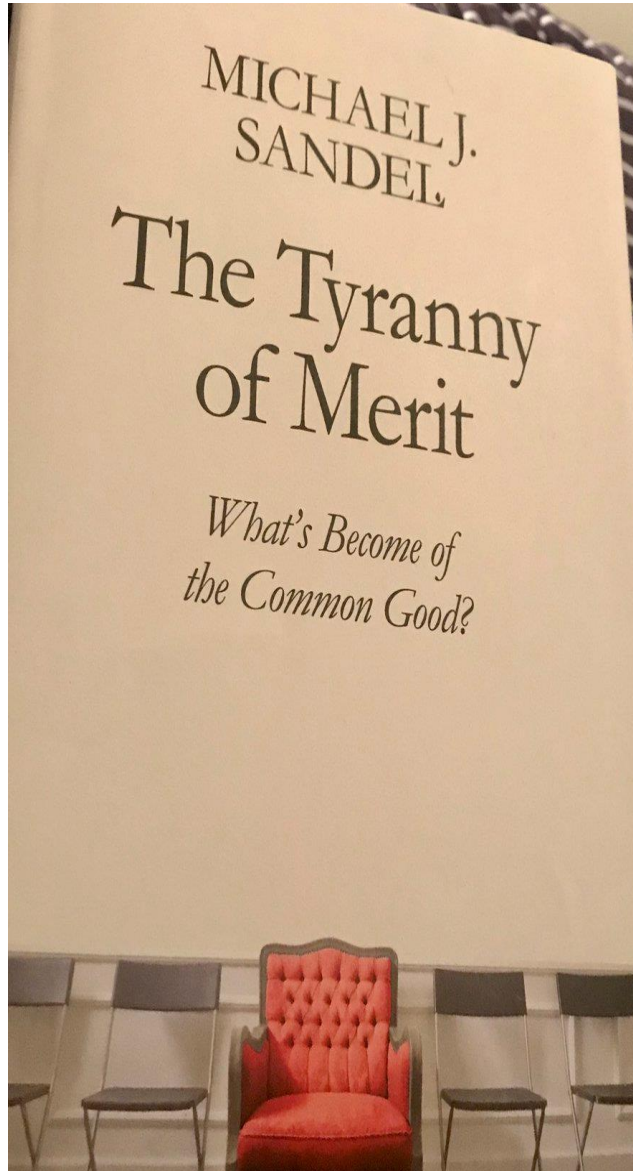
*Mogul Steamship vs McGregor 1892* cartels only illegal where there is an *intention* to conspire to injure rivals or use unlawful means.

Policy responses have included:

- labour market regulation,
- prohibitions on employment of minors,
- health and safety, environmental protection.
- Owning the means of production in the public interest : nationalisation UK and EU.
- Regulation of utilities ( mainly USA).
- Merger and restrictive agreement notification systems ( 1890's Austria Gerber)
- Ordoliberalism.
- Lisbon Treaty Social Market Economy



# 20th and 21st century



Mid century

- Short term consumer welfare/efficiency.
- Price theory, Bork, Regan etc.
- Individual hardship: Human Rights and the social contract.
- Justice determined impartially behind a veil of ignorance (Rawls),

1990's liberalisation:

- "Competition where possible and regulation where necessary." Maastricht Treaty & Single Market.
- Giddens: The Third Way. Regulation ? Class system issues Clause 4 Labour Party Manifesto.
- *Viking Lines* and social dumping Constitutional Treaty

Lisbon Treaty. [See A Ezrachi "Sponge"]

EU Law: "competitors should be able to compete on the merits for the entire market" but subject to Art 2 & 3 & other objectives. (*TeliaSonera*).

- Social market economy?
- Competition law as industrial policy?
- Equality of outcome vs justice on merit & opportunity / community interests (Sandel) .

2020 Corporate Objects/Stakeholder obligations/ ECSR & Good corporations. (British Academy/ Colin Mayer)

"Delaware case law is clear" that to act loyally, officers and directors "must, .....treat stockholder welfare as the only end..."

In 2013, Delaware created public benefit corporations. 2020 the Business RoundTable revised corporate purpose "[to create value for all our stakeholders](#)." promoting inclusive long-term growth. What is the UK equivalent a Community Interest Corporation?

# Technology platforms

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**Economies of scale and scope, high fixed cost/low variable costs/high network externality: inevitably create market power.**

**Consumer welfare test: efficiency creates monopoly.**

**Mergers and verticals both contribute to concentration:** (horizontals at least maintain competitive capacity).

**Intervention to “Promote Competition & Innovation”(DMU)** (telecoms and UK market investigations).

Other public interests? Plurality of the media?  
Privacy? Environment? Behaviour?





## Brexit

- EU Treaty Framework removes Lisbon's "constitutional safeguards"
- Recognition of Industrial Strategy and strong backing for public goods in education, transport and healthcare.
- Infrastructure Investment seen as a general-purpose technology (multiplier effect): both for telecoms fibre and tech platforms?
- Redistribution and *The Battle for the North*?
- Risk of corporatism / re-feudalization/ impact on small business?
- What is the impact of the market economy on behaviour?
- State Aid for community and public interest outcomes?
- Impact of Pandemic – the shift online – a UK Digital Markets Unit is being created: focus on mergers and verticals?
- Greater recognition of local and community interests?



# Conclusions

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Free markets are not fair markets. “Consumer welfare” is hopeless. It does impact distribution and does not measure up against Welfare, Freedom and Virtue. “Competition where possible, regulation where necessary” is out of date: neither address behaviour.

Market structure is important - mergers and vertical restraints create efficiency but reduce dynamic capacity and switching – incentives and opportunity and belief in public good - more important “in the round”?

The “motor of the economy” requires regular maintenance to achieve pro-social outcomes.

The “Promotion of Competition and Innovation” is needed and frequent intervention is required to deliver Welfare, Freedom and Virtue in a market economy.

What is competition law for?

- Law and policy are different
- Justice “ The Overriding Objective” in applying law, & justice in a just society raises 3 policy issues: Welfare, Freedom and Virtue.
- Outcomes: on industrial structure and distribution of wealth
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....*What do Intel, Microsoft and Google have in Common?*



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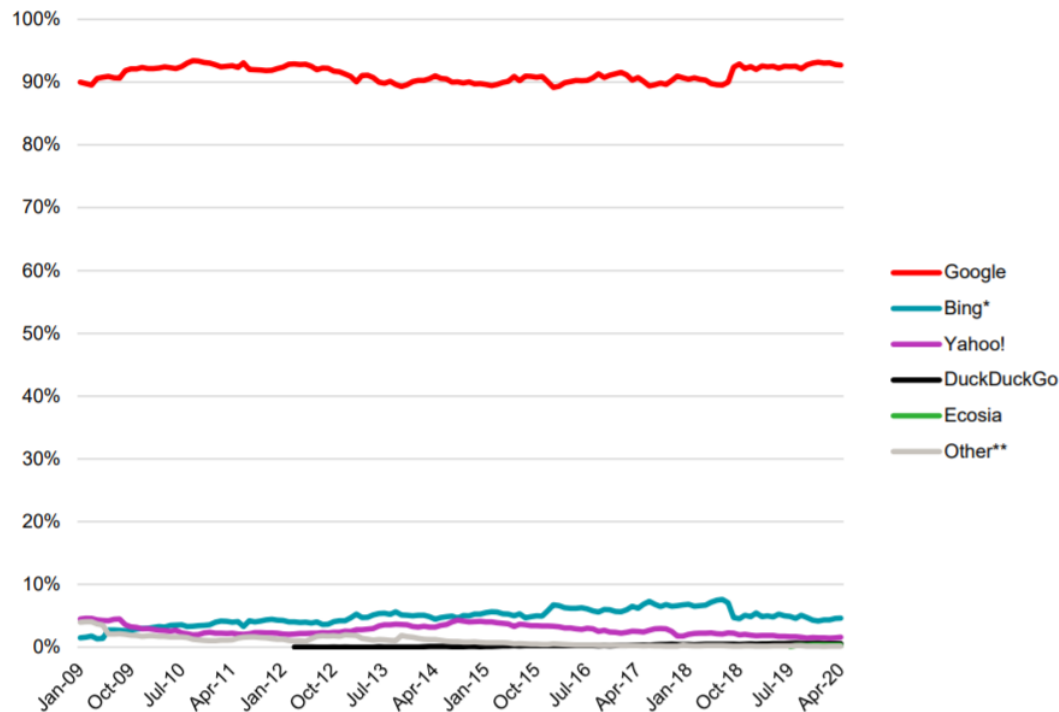
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# Search

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Figure 3.3: Shares of supply by page referrals from January 2009 to April 2020



Source: [Statcounter Global Stats](#).

Notes: UK data.

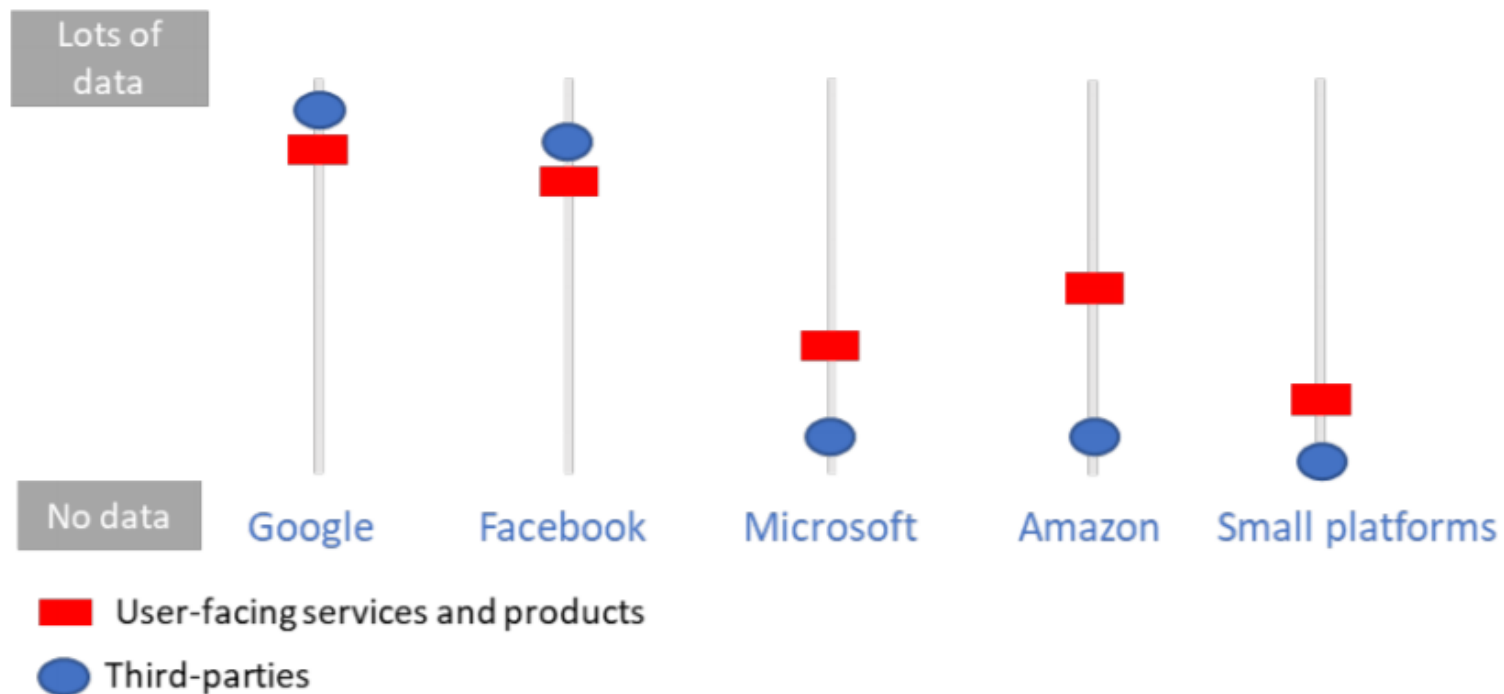
\* Bing's share represents that of Bing and MSN Search. MSN Search was rebranded as Bing in 1998.

\*\* 'Other' consists of: AlotSearch; AOL; AskJeeves; AVGSearch; Babylon; Baidu; Conduit; NortonSafeSearch; Snapdo; Webcrawler; WindowsLive; Yandex; and 'other'.

# Importance of data

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**Figure 2.3: Illustration of the scale of data collection by certain platforms, split by first and third-party data sources**



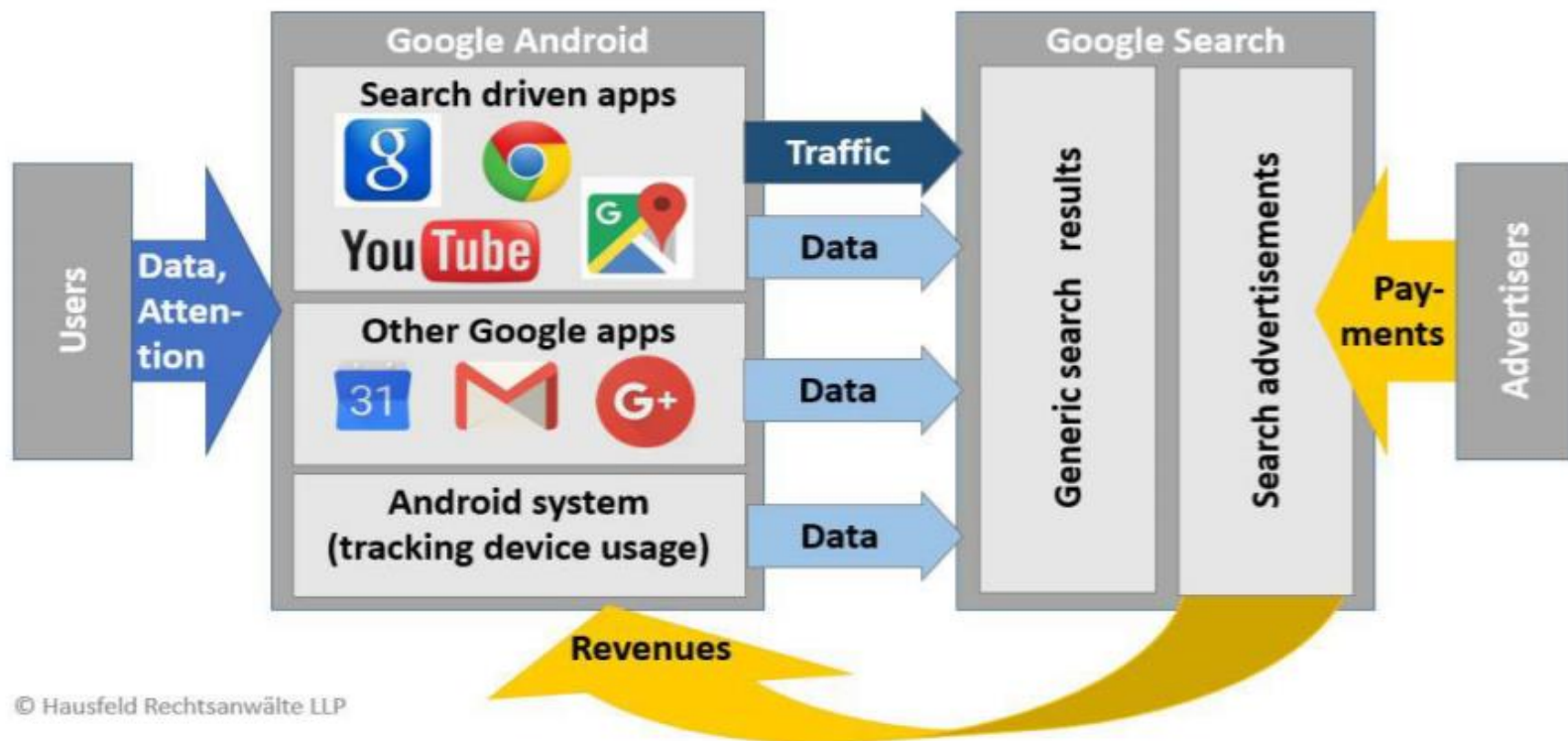
Source: CMA.

Note: Small platforms include Twitter, Snap, TikTok and Pinterest.

# Data flows

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**Figure 25: Interplay between the different forms of conduct in Sections 11 to 13 and the related flow of traffic, data and revenues to Google<sup>1403</sup>**



© Hausfeld Rechtsanwälte LLP



# Browser shares

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**Table E.1: Browser shares on desktop and mobile devices, UK February 2020**

<i>Desktop</i>			<i>Mobile</i>		
<i>Browser</i>	<i>Browser Engine</i>	<i>Share</i>	<i>Browser</i>	<i>Browser Engine</i>	<i>Share</i>
Chrome	Chromium	60%	Safari	WebKit	49%
Edge	Chromium	10%	Chrome	Chromium	41%
Opera	Chromium	1%	Samsung	Chromium	8%
Safari	WebKit	16%	Firefox	Gecko	1%
Firefox	Gecko	8%	Other	N/A	1%
Internet Explorer	Trident	4%			
Other	N/A	0%			

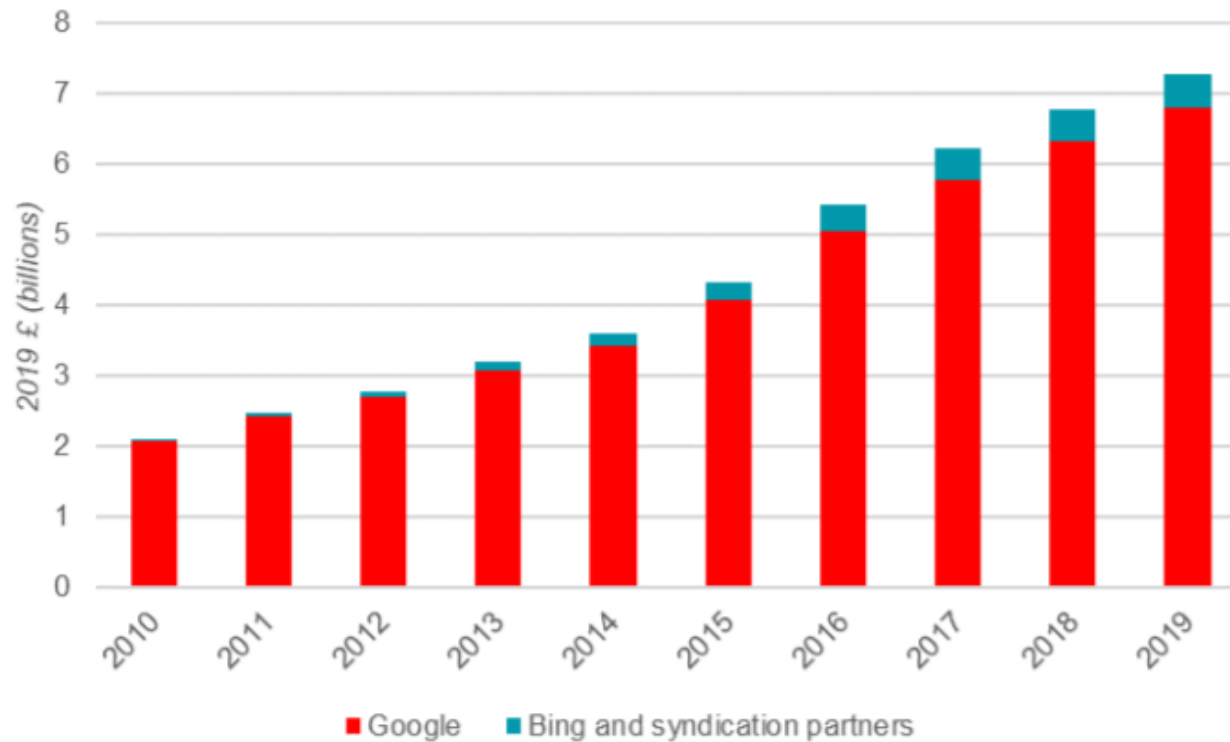
Source: [Statcounter GlobalStats](#)

Notes: Where 'desktop devices' includes laptops and 'mobile devices' includes tablets

# Search revenues

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**Figure 5.3: Estimated UK search advertising revenues by year (2010-2019)**

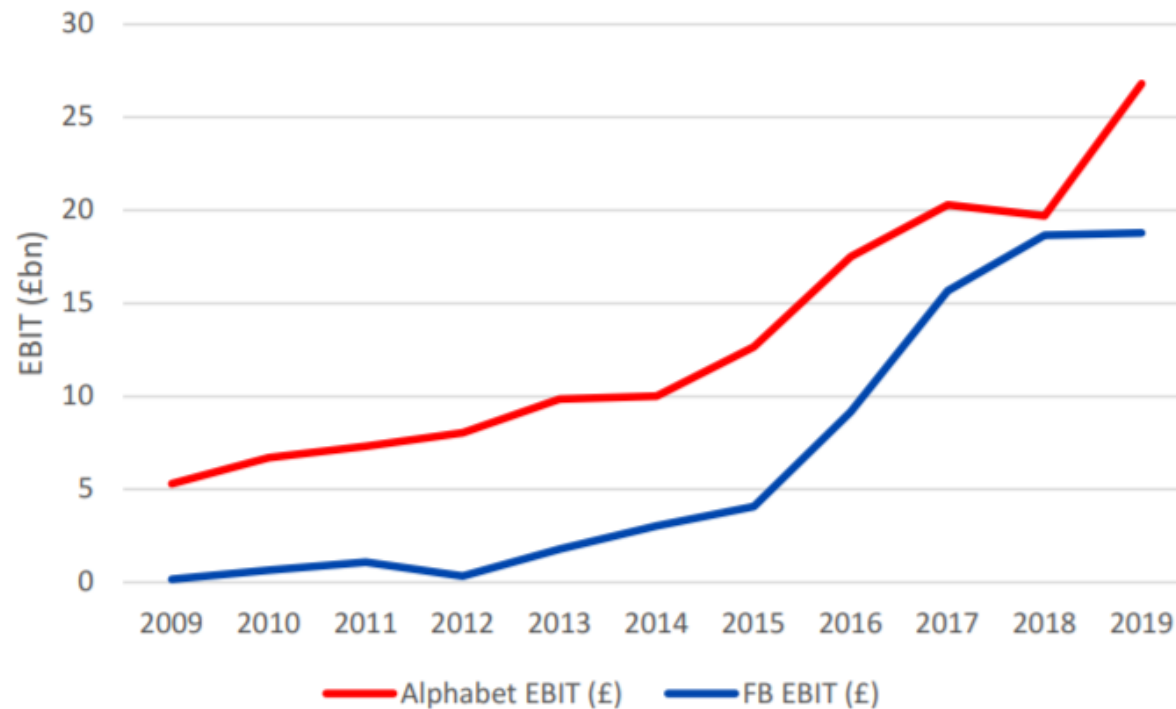


Source: CMA analysis of parties' data.

# Earnings

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Figure 2.10: Alphabet Group and Facebook EBIT 2009 to 2019

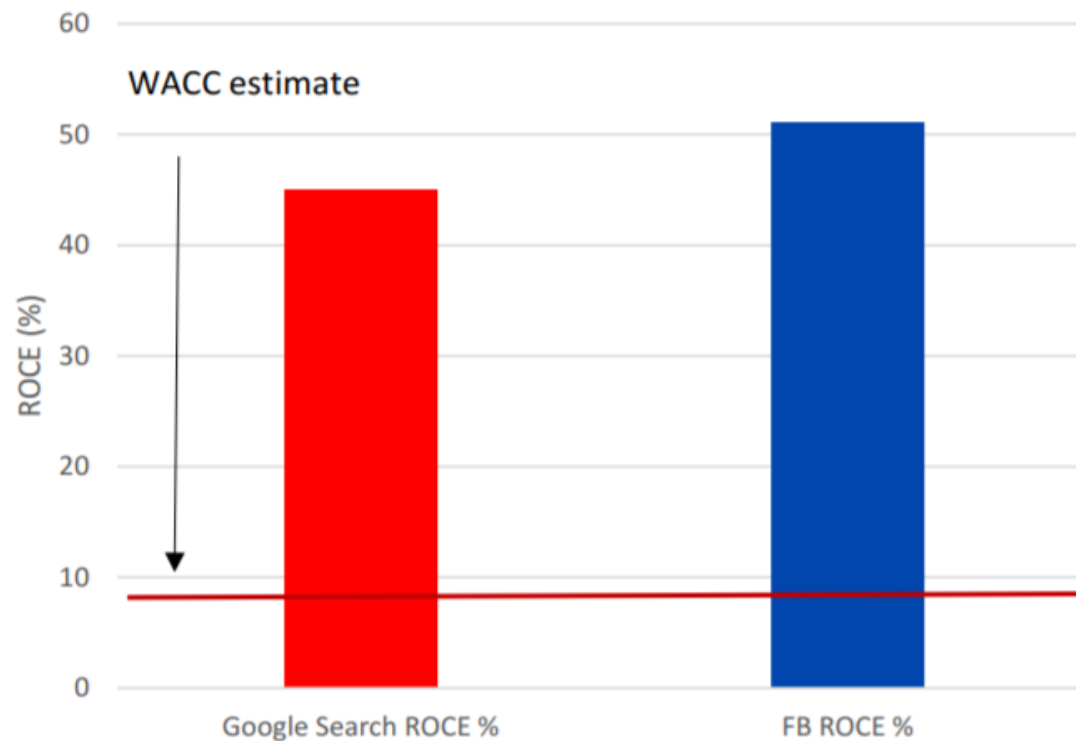


Source: CMA analysis of Alphabet Group and Facebook filed 10-K reports.

# Profitability

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Figure 2.11: Google Search and Facebook ROCE vs WACC estimates (2018)



Source: CMA analysis of Alphabet Group and Facebook financial data submissions.



# Proposed “privacy” changes

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- Exploitation of market power.
- Ad funded monopoly incentivizes data harvesting.
- Increased browser controls and sign on functionality in browser: undermines income for other publishers, News and plurality of the media.



# Awards and Recognition

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- **Global Law Experts** 'Communications Law Firm of the Year 2016'
- **CorporateINTL** 'Telecommunications Law Firm of the Year 2017'
- **Chambers & Partners** 'Competition, IT & Telecoms Leading Firm 2019'
- **Legal 500** 'Technology, Media and Telecoms Leading Firm 2019'
- **WhosWhoLegal** 'Telecoms Media & Tech Leading Lawyers 2018'
- **Best Lawyers** 'Media and Entertainment Law 2019'
- **Getting the Deal Through** 'National Experts, 2017'