

# Antitrust Enforcement in Digital Space – An Update from Europe (and beyond...)

Keynote, *Competition and Consumer Law Conference* Law  
Council of Australia, Melbourne



Cristina Caffarra, Head of Competition Europe

August 2019

**CRA** Charles River  
Associates

...or, why we need (also) more aggressive  
& imaginative antitrust intervention



August 2019

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Associates

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*Views are my own and do not reflect those of CRA or anyone at CRA,  
nor those of any clients.*

*For disclosure, I have advised multiple players in digital space generally,  
including adverse to Google on Android and multiple other matters in Europe,  
and elsewhere, as well as work for Apple, Amazon, Microsoft, Uber,  
NewsCorp and multiple others. I am also advising regulators.*

Europe is *militant* (not radical, nor populist....)

Not really into the Big US debate: antitrust has moved away from traditional  
**ANTIMONOPOLY** values and settled on hyper-technocratic approach

*Populist diagnosis: “Consumer welfare is killing us!”*

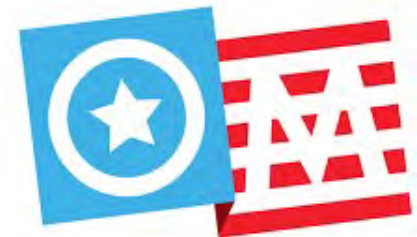
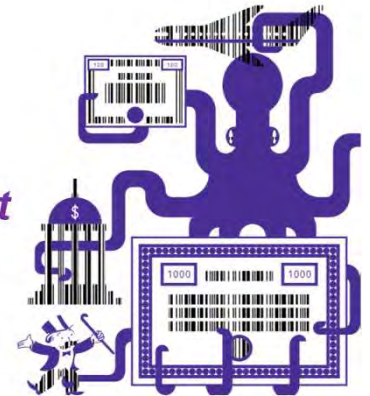
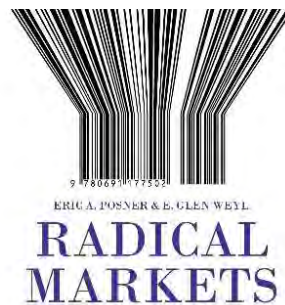
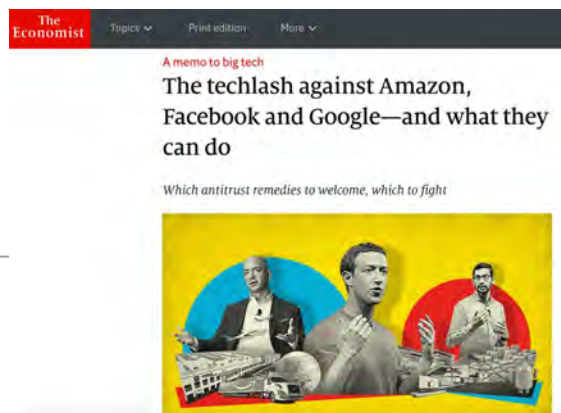
*Radical critique: the bounds of standard antitrust are “arbitrary”,  
need to go beyond the conventional scope*

Common motivation: perceived massive **growth of market power across  
economy**, antitrust enforcement too narrow, ignores domains that account for  
most market power in the economy

*Monopsony power in Labor Markets*

*Pervasive power of Institutional Investors (“the octopus”)*

*Allowed acquisitions of nascent potential rivals to squash any threat*



## Digital platforms: *what we are NOT saying*

- We **don't have "tech envy" in Europe**
- We **don't do this to protect competitors**
- We absolutely **understand the economics**:  
two sidedness, network effects, economies of scale and scope,  
"free" paradigm on the user side which requires monetisation  
on the other side. **Got it.**
- We understand **not all digital platforms are the same**  
and don't worry about all of them:  
we don't *"have a problem with tech"*.
- We understand Google, FB, Amazon are where they are  
because **the product is good, they innovate a lot,**  
**they integrate lots of complements and scout talent**  
(startups) that may otherwise fail to execute
- We understand that **rivals should go get their own data**  
**and there are multiple ways to generate "some" data**

COUNTRIES WITH  
EMERGING UNICORNS  
IN 2017

|    |   |                      |
|----|---|----------------------|
| 32 |  | United States        |
| 18 |  | China                |
| 4  |  | United Kingdom       |
| 1  |  | United Arab Emirates |
| 1  |  | India                |
| 1  |  | Indonesia            |

COUNTRIES WITH  
EMERGING  
UNICORNS IN 2018 TO  
DATE

|    |   |                    |
|----|---|--------------------|
| 84 |    | United States      |
| 25 |    | China              |
| 8  |    | Continental Europe |
| 7  |    | India              |
| 5  |   | United Kingdom     |
| 9  |  | Rest of the World  |

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## Why do we worry then?

Multihoming, differentiation, no switching costs online, rapid disruptive innovation, seamless downloading – **were all expected to protect us from “tipping”**

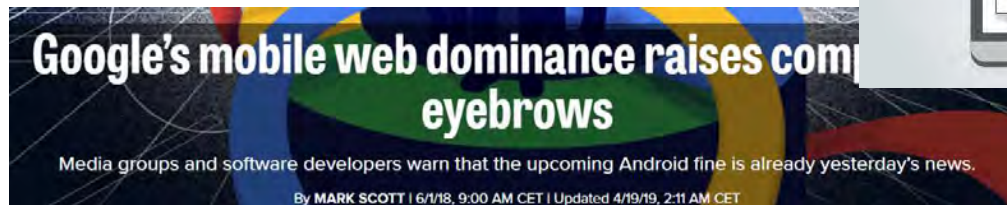
In fact, **consumers are funnelled into 3-4 main “attention brokers”** that soak up most attention online: **some markets HAVE ACTUALLY TIPPED**

Many reasons – **the virtuous cycle of “aggregators”, economies of scope in data, larger than expected economies of scale in logistics, and behavioural factors on the demand side.**

### Concerns:

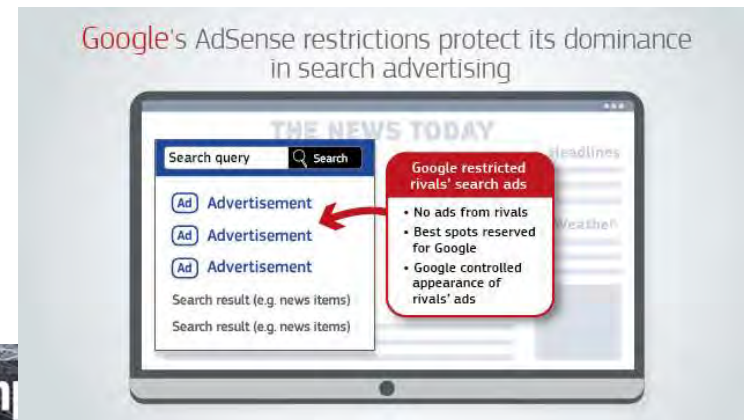
- “Insufficient competition” overall – **exclusion and exploitation** insufficiently diagnosed, **less choice and innovation**
- **“Unfair bargains” for user data** (no “sunshine” or “wind” or sand”....)

## The “Google wars” in Europe...



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's War on Publisher Paywalls

## BUT reality check: *remedies haven't worked*

### EC's characterisation of abuse in the shopping case



### Google's solution (in theory)



### Google's solution (in practice)



Plan was to "open up" Google's search results page to rivals. Reality was that 90%+ of "slots" still filled with Google results. Share for third parties subsequently rose but question marks over whether these were genuine rivals or just a "re-skinning" of Google's service

Cristina Caffarra, August 2019

## In practice

### Google's approach has been to:

1. Continue to leave out comparison shopping services from "free" Google links
2. Auction off access to the "box" at the top of the page
3. Google Shopping bids in this auction, but must be profitable on a standalone basis

**Google continues to win vast majority of auctions and remaining players get a little volume at low margin.** Competition between rival sites mean they "bid away" the value of the ad space and revenues/profits ultimately accrue to Google

**So what?** Isn't this fine: if shopping sites don't generate value why should they make money?

But, should it be permissible for Google to **design its own scheme** which delivers "equal treatment" but prevents rivals from differentiating themselves and competing?

**Competition between CSSs mean rents accrue to Google**



**Current remedy, sets a powerful precedent: Google can downgrade rival services in natural search and charge them for access to the SERP instead. Would we be happy with this outcome elsewhere?**

# Android remedies saga: “solutions” keep being ineffective

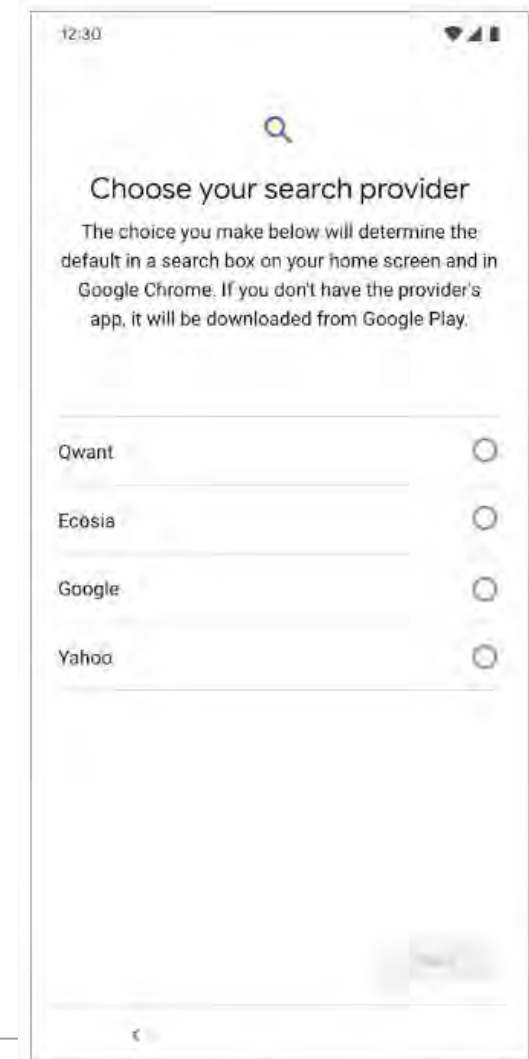
## New proposed remedy:

*“Next year, we’ll introduce a new way for Android users to select a search provider to power a **search box** on their home screen and as the default in Chrome (if installed). Search providers can **apply to be part of the new choice screen**, which will appear when someone is **setting up** a new Android smartphone or tablet in Europe.”*

### But:

- Only kicks in when a new Android device **started up for the first time**, so **no effect on the stock of existing Android devices**.
- **Threshold to participate in the auction is v. high**, no profitable search engine anywhere in the EU. Lump sum payment risky (made even if user switches later back to Google)
- **Google always included in the selection**
- **Users can ignore/circumvent the choice screen** (in which case Google Search remains the default)?
- Questions on Google being able to sell the right to be in the choice screen. **Is this efficient? Does it allow Google to monetize past exclusionary conduct?**

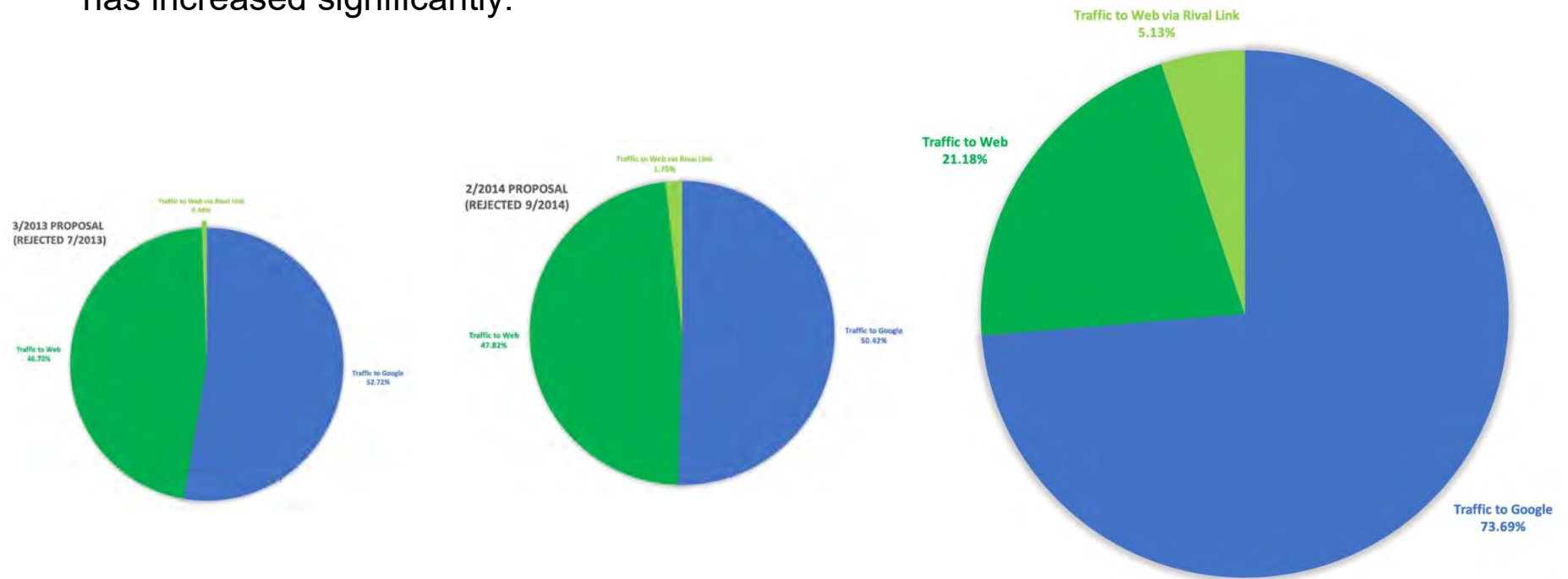
**European approach “it’s your job to fix the problem” lead to gamesmanship and delay (see Russia (!) instead).**



An illustrative version of the choice screen. Providers will vary by country.

## In a world of network effects, drawn out remedies entrench the effects of the conduct at issue

For example, experimental evidence in local search shows that, since it made its first remedy offer in 2014, the volume and share of search queries going to Google properties has increased significantly:



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...New EC cases being opened



**Ex-post case/fine  
re misinformation  
in *WhatsApp*  
notification.**

**Formal case about  
to be opened on  
data use and  
privacy**



**Focus on data  
accumulation and  
use, concerns about  
use of third party  
sellers' data to launch  
“copycat” products**



**Concerns about  
“Apple Tax” and  
whether this  
undermines services  
(e.g. Spotify) which  
compete with Apple’s  
own apps/services**

...much action also at national level, not just EC



**Pioneering case on “excessive” data collection and pooling.** Special provision of German law allow to treat breaches of consumer law by a dominant company an ABUSE of competition law. Exploitative, but also weakens rivals who can’t demand such terms.



**Dusseldorf Court annuls!! Ok: lawmakers now see need to reform law even more clearly**



Use of **Interim measures** to address urgency – e.g. Google/Amadeus directory



**Germany/Austria:** Concerns about “**unfair T&C**” – concluded with settlement on improved T&Cs, binding globally, **Italy. “Self preferencing”** in delivery/ fulfilment to detriment of logistics firms



Major focus on **mergers and killer acquisitions**



Concerns around “Apple Tax” and potential **foreclosure of “competing services”**

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... and “the conversation” has majorly changed in the US, too

**DOJ/FTC announce their “inquiries” into Digital platforms....**

**House Judiciary Committee Hearings  
(July)**



**The States are moving.... (remember Texas started Microsoft....)**

THE WALL STREET JOURNAL.  
**WSJ**

## **States to Move Forward With Antitrust Probe of Big Tech Firms**

Investigation would put additional scrutiny on an industry already under a federal spotlight

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Why does “traditional” antitrust still feel unequal to the task

**“Where’s the tie?” – “common law” structure of antitrust founded on precedent, but may not strictly “fit”**

**Not everything needs to look like an “applications barrier to entry” (Microsoft 2001)!**

**“Diagnostic tools too narrow and inapt to grasp current concerns”**

**AECT anyone?**

**“May come up with sensible TOH but agencies cannot design remedies”**

**“Exceedingly slow, too cumbersome, the Courts won’t follow”**

**“Cannot solve all the bad stuff in the world with antitrust”**

**Political reaction getting stronger, reflecting public anxiety and reminders that originally, antitrust laws were not solely motivated by economic efficiency but also a response to popular concerns about power of very large companies**

# Major contributions in the last 6 months



March 2019



**Digital advertising market study**

August 2019



George J. Stigler Center for the Study of the Economy and the State  
The University of Chicago Booth School of Business

Committee for the Study of Digital Platforms  
Market Structure and Antitrust Subcommittee



**Competition policy  
for the  
digital era**

A report by  
Jacques Crémer  
Yves-Alexandre de Montjoye  
Heike Schweitzer



**Digital Platforms  
Inquiry**

Preliminary report

December 2018

RÉPUBLIQUE FRANÇAISE  
**Autorité  
de la concurrence**

**Adtech investigation**

**CRA** Charles River  
Associates

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## Calls for specialist regulation and emphasis on a more “collaborative” approach

Calls for various **specialist agencies/bodies to be created** - a “**digital market unit**”, or a “**digital agency**”, or a **special tribunal** – either standalone or as a subset of an existing agency

Suggestions for “**codes of conduct**” to be agreed between multiple parties (digital companies and major constituencies of business users) and umpired/facilitated by digital agency or regulator.

**Implementing Jean Tirole’s “collaborative antitrust” approach.** His suggestion was it’s all too difficult, may want to create bodies which – like SSOs in standard setting – include stakeholders on different sides (e.g. patentees and implementers, here platforms, advertisers, publishers, data users, and consumers?) to work through issues.

**BUT need threat points. Timelines, and penalties for failure at a minimum. Otherwise a tea party, will not be quicker or more effective than infringement action...**

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Still think that antitrust enforcers need to “dial up”...

Even if antitrust cannot solve all of society’s problems...

...we are still very worried about malignant social effects **resulting from market power/anticompetitive conduct**

...what if (for example) the reason publishers and quality journalism are under threat has to do with **conduct** such that most benefits of digital advertising accrue to platforms themselves rather than publishers or users?

Need to understand which aspects of the evolution of ad-funded business models are just “creative destruction”/disruption and which are due to antitrust infringements

*“and were it left to me to decide whether we should have **Google** ~~a government~~ without newspapers or newspapers without **Google** ~~a government~~, I should not hesitate a moment to prefer the latter.” – T. Jefferson*



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# e-Competitions

Antitrust Case Laws e-Bulletin

**Concurrences**  
Antitrust Publications & Events

## Platforms

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“Follow the Money” - Mapping issues with digital platforms into actionable theories of harm

**DOMINANCE (NOTION), FOREWORD, COMPETITION POLICY, ECONOMIC ANALYSIS, ONLINE PLATFORMS**

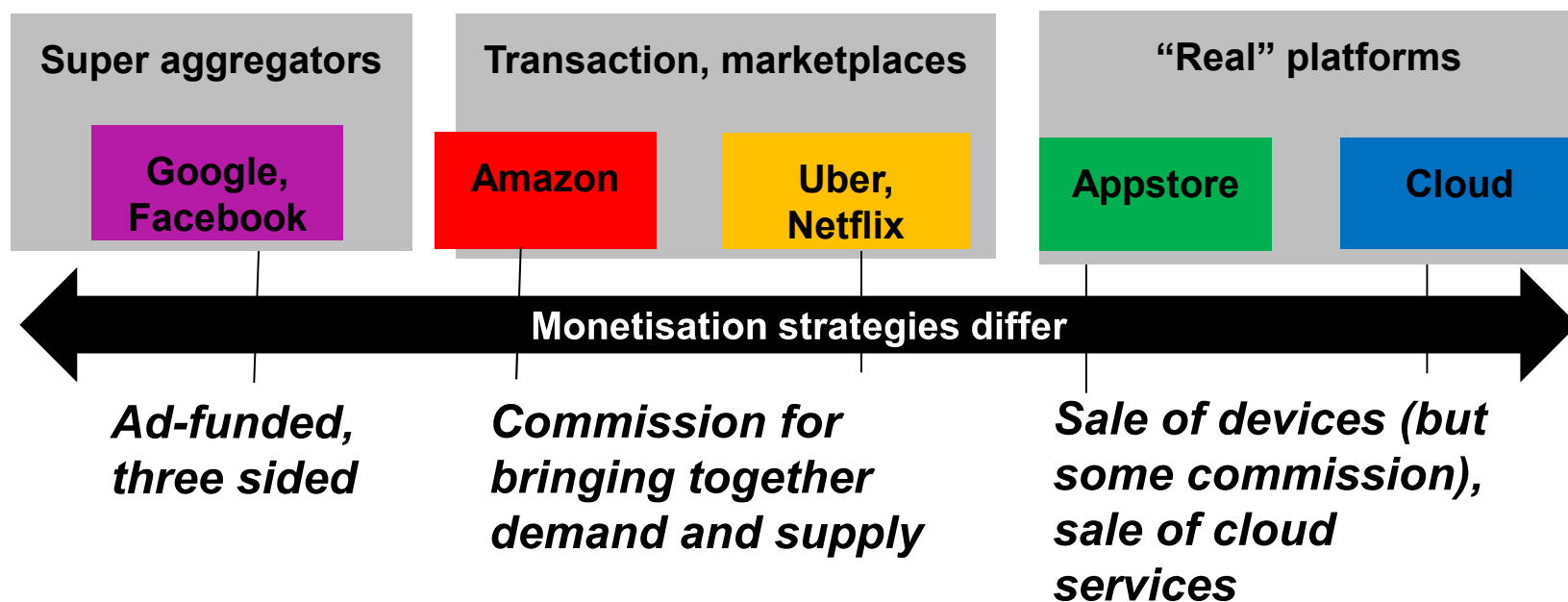
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**Cristina Caffarra** | CRA International (London)

e-Competitions Special Issue Platforms | 22 August 2019

- **Can use antitrust toolkit more expansively and aggressively to pursue wider catalogue of potential harms “Chilling innovation”? We worried too much about “type 1 errors”.**
- **“Follow the money” – need to understand how conduct is driven by incentives that reflect the business model**

“Follow the money”:  
not all GAFAMs or FAAMGs or FANGs  
raise concerns in the same way...



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...matters because different models create different incentives for “bad conduct”

### ***Advertising-funded models***

- Barrier to entry (“zero price”)
  - Hoard user data, exploit without consent, lower privacy settings. preserve privileged access to data
  - As a “traffic allocator”, “divert traffic” to oneself – through “self preferencing” or “demotion”
  - “Appropriate” network effects by undermining opportunities for multihoming
    - Colonise adjacent markets and pre-empt the growth of rivals who could then expand into a challenge in the primary market
      - Impose increasingly controversial / exploitative terms

### ***Vs transaction platforms, matchmakers, “real” platforms...***

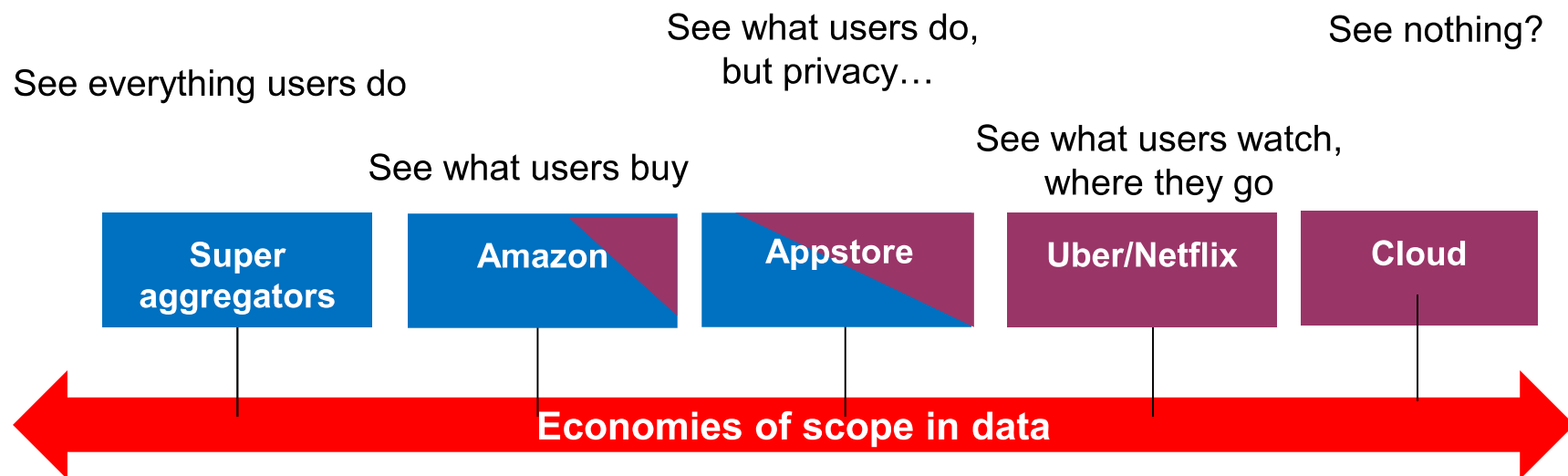
Amazon’s “dual role”?

Apple’s Appstore?

Microsoft’s Cloud?

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...of course “not as simple” as all that...



**But a starting point for the questions we need to ask**

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So how do we “power up”?

**Exclusion/foreclosure stories** still very powerful mechanisms (see Android). **But** need to **explain incentives to foreclose specifically in each case given business model** (ad funded not same as an ecommerce platform or a device seller)

**And not everything needs to fit into hegemony tying/leveraging paradigm**

**Self preferencing** is vertical foreclosure – don’t be shy. A “traffic allocator” can do that, and together with *demotion* it’s a powerful.

**Dual role?** We have done a lot on foreclosure in vertically integrated settings (broadcasting, etc), need to “translate” insights from this into digital settings

**Exploitation/unfair trading stories** is where it’s at.

Platform can flex power by **creating friction, and imposing terms and conditions on suppliers that they would not otherwise accept, but do so because they have no other way of accessing users.**

**Need to power up exploitation as a category of harm *other than excess pricing!***

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## So how do we “power up” exploitation?

**How to we think about exploitation?** Classic definition involves *direct consumer harm*, distinguishing it from *exclusion of rivals*.

**If we expand “consumers” to include “customers”, we can deal under “exploitation” also with conduct that harms firms that do not compete directly with the dominant platform, but do business on it as complements.**

To include:

- **Coercion:** imposing on counterparties practices they would not otherwise adopt but favour one’s own model and business, distorting competition and damaging consumers (example: First Click Free)
- **Conduct that favours asymmetric access to/ hoarding of data** (example: AMP)
- **Misinformation:** distorting/restricting information available to consumers when choosing between products

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## What else?

### Interim measures

**“Interim stock taking go-no go decisions”** like at the UK CMA.

**Interim measures** big thing in France.

**Interim measures.** Would Google have been terminally hurt if it had been told to suspend FCF for a while?

**EC just used it in Broadcom – first time in 20 years.** General consternation “it is not the right case” etc. But principle needs to be commended.

### Remedies design

**Address circumvention** when a “cease and desist” order is handed down.

Reputational effects do not pre-empt recidivism because of lack of transparency...

**Broader remit for remedies involving exclusionary abuses in industries subject to lock-in/network effects which permits going further to reset market conditions to what they would have been but for the conduct.** A remedy that would have worked at the outset falls far short of what is required after multiple years, and some degree of resetting needs to be considered.

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## Regulation – key for data access and use

What models for regulation? Could the “**end to end connectivity**” **analogy in telecom** (another industry with massive network effects, investment costs etc) be useful?

### Supply side:

- **Access to data** – could involve access pricing but in limited circumstances e.g. bulk data for training algos? (we want to preserve incentives for generation / acquisition of own data)
- **IP-style restrictions limiting data exclusivity in time?**

### Demand side:

**Mandating portability** ie FB has to make it easier to port own data elsewhere.

**Mandating interconnection and interoperability between platforms on data use.**  
Need to figure out how it would work.

# Testing ground for multifaceted TOH: digital advertising

**Google/FB's are in effect advertising businesses (90% of Google's overall revenues in 2018 - \$117 bn – were from ads)**

- Platforms' data allows ads to be targeted and in principle to demonstrate performance
- Analytics reduces in principle need to target ads indirectly based on content (beer ads on sports pages)
- Advertising increasingly *programmatic* and impersonal (allocated via ad exchanges) with advertisers agnostic as to where ads are shown

**Ability to use data from search/SNs to identify relevant consumers and build “super profiles” shifts value added from content producers to firms with greatest data/analytics capability**

**FB/Google reportedly accounted for ~60% of US digital ad spend in 2018/19**

**Old paradigm: use content to target advertising**



Decathlon  
Caperlan Lure ...  
£11.99  
Decathlon UK

**New paradigm: advertising allocated using ad exchanges and targeted using personalised data**



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## Concerns around content/journalism and society at large

Publishers attempted to react either by embracing ad-funded model or moving to alternatives (subscriptions or donations). No-one appears to have “cracked” the ad-funded model with even the largest news sites still typically loss making

After years of testing, The Wall Street Journal has built a paywall that bends to the individual reader

**GUARDIAN LOST £7 MILLION LAST YEAR**

The New York Times Company tanks 20% after saying ad revenue will decline next quarter (NYT)

Daniel Strauss  
Aug 7, 2019, 02:00 PM

SHARE

*“Publishers that are funded by algorithmic ads are **locked in a race to the bottom in pursuit of any audience they can find – desperately binge-publishing without checking facts, pushing out the most shrill and most extreme stories to boost clicks. But even this huge scale can no longer secure enough revenue.***

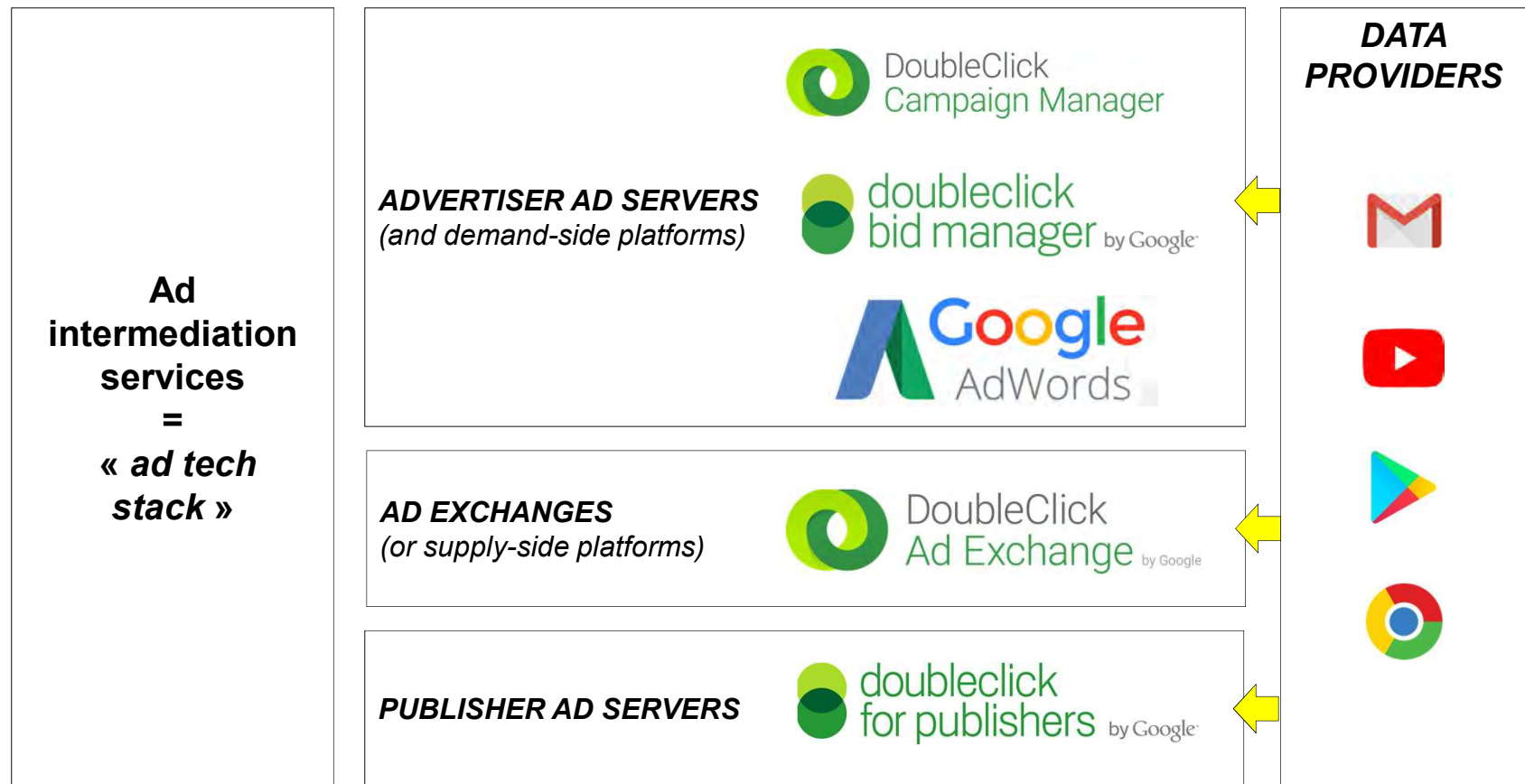
*On some sites, journalists who learned in training that “news is something that someone, somewhere doesn’t want published” churn out 10 commodified stories a day without making a phone call.”*

- Katherine Viner, (Guardian editor-in-chief)

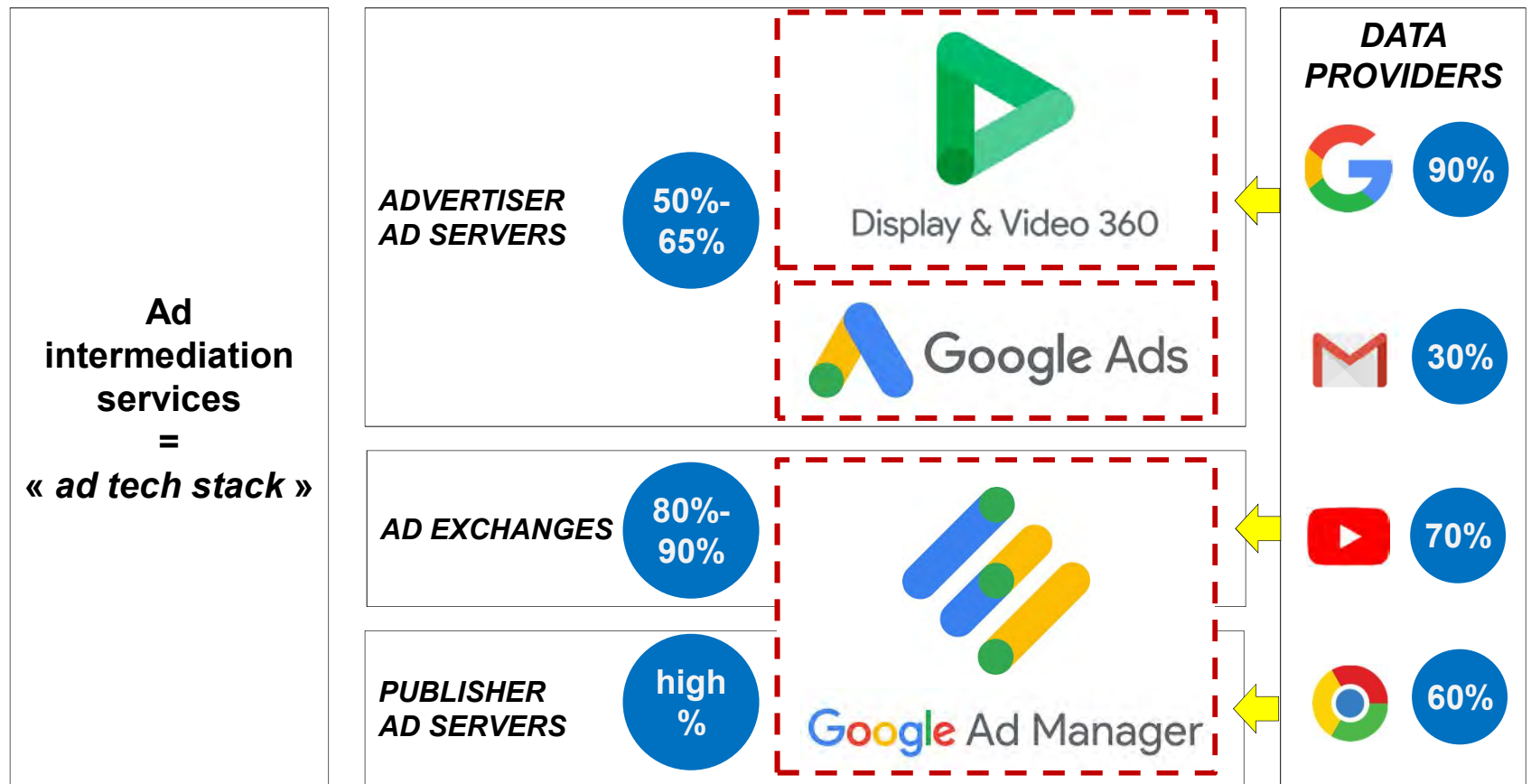
**Acceleration of titles closing down, journalists being laid off (and worse)**

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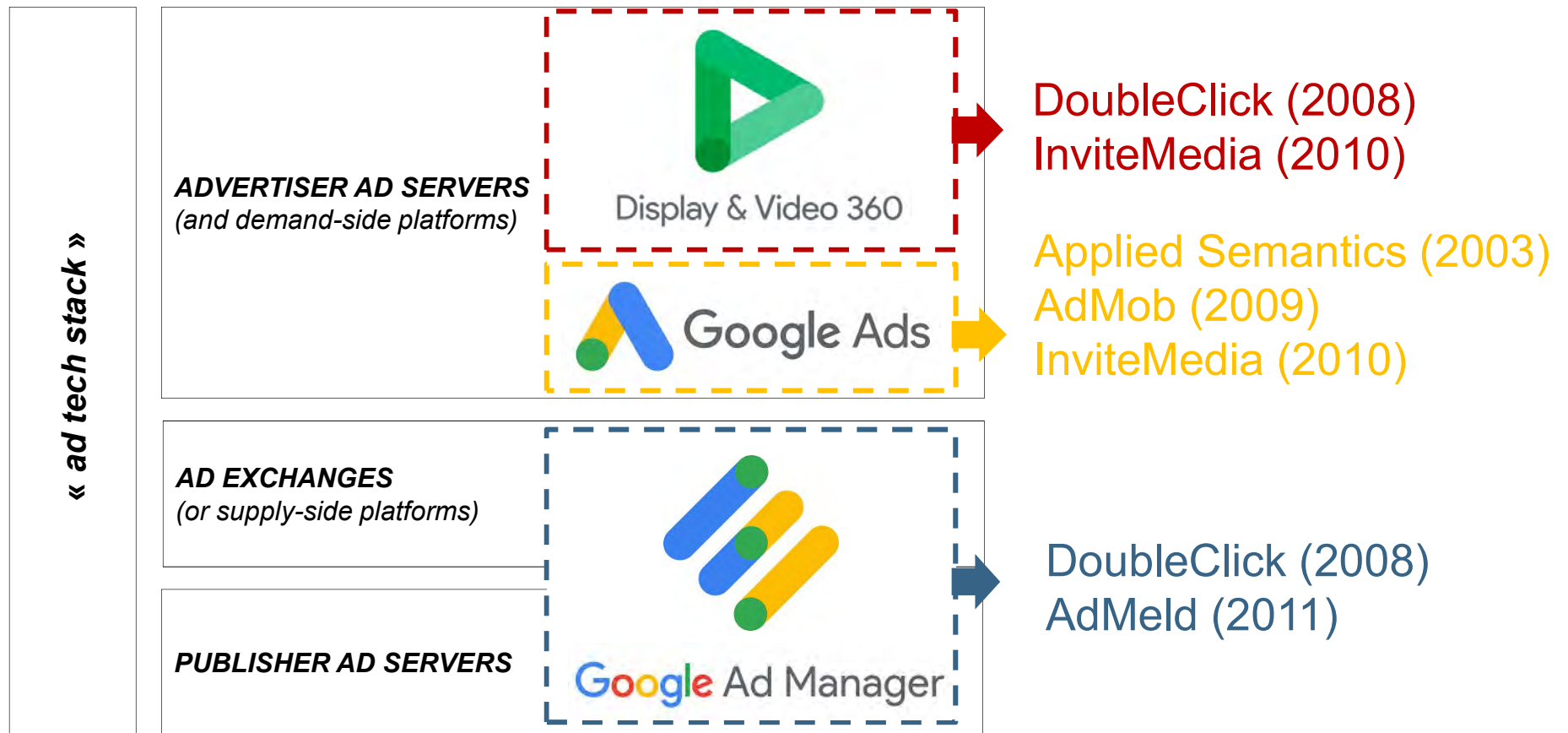
## Google present throughout ad tech stack...



... has extended power through the stack...



...through acquisitions – as well as conduct



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## Multiple concerns about conduct in the ad tech space

### Combination of (potentially):

1. **Tying-style arrangements between stages** (AdWords is only place where advertisers can buy e.g. Search/YouTube advertising, and demand of advertisers using AdWords can only be accessed via AdX)
2. **Degradation of functionality** (of AdX when used with non-DFP ad servers)
3. **“Tying”/ “self-preferencing”** (AdX over other ad exchanges or SSPs)
4. **Aggressive pricing (likely below cost)** for some services
5. **Opacity and “hidden fees”**
6. **Other conducts:**
  - Limiting access to **data IDs**, restricting rivals’ ability to target. Use of **GDPR** as a justification
  - Promoting in-house web format (accelerated mobile pages, **AMP**) in search results. Format has implications for publishers’ data collections, use of ad tech, header bidding...)

**All of these activities interact with one-another and need to be understood overall in terms of their effects**

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## What about mergers, and “killer acquisitions”?

Not a new story: taking up a challenger who is “eating one’s lunch” is common

**In digital, issue perceived to be acute because we are not just looking at buying potential replacements, but “today’s complement can become tomorrow’s substitute”**

**...and we actually are hardly “looking”!**

**BIG potential welfare loss in expectation terms**

**Debate:**

**“How can you tell”?**

**“Do we ultimately care terribly about type 2 errors”?**

**“Is there evidence there could be “chilling effects” on innovation”?**

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## Why do we care so much? Policy conclusions

**Original** seminal paper 2018 (Cunningham (LBS), Ederer & Ma (Yale)) – looks at pharma, inspired by Questcor/Mallinkrodt, highly regarded as the best policy paper of last few years.

***Confirms that protecting existing profits provides an incentive not only to slow own replacement innovation but also to suppress others' innovation***

***This is most true in situations where there is already low competition – more concentrated markets***

***Incumbents are careful to fly below the radar***

***Why do we care overall: their analysis suggests that***

***eliminating the adverse effect on drug project development from killer acquisitions would raise the pharmaceutical industry's aggregate drug project development rate by nearly 5%.***

***It's huge.***

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## What about tech?

Research to identify true “kills” cannot be so dispositive because **not so easy to rule out alternative explanations**

Yes, yes, **we know that acquisition of a startup by a large player is MOSTLY good** insofar as it provides execution capabilities and resources

But still we know there are incentives to take up and snuff out some plays:

Filters (Susan Athey)

- **“Verticals” that can provide an entry path** – make sure that in verticals nobody gets too big or too strong
- **Intermediaries that account for a big block of traffic** and can shift big blocks to another platform
- innovative services, scale-driven services, or services with network effects, - things like **ad-driven news media, review websites**
- Components in the vertical service stack that can become bottlenecks – **ad exchanges, ad servers, ad intermediaries...** (too late now)

“The 400 acquisitions we have not looked into”

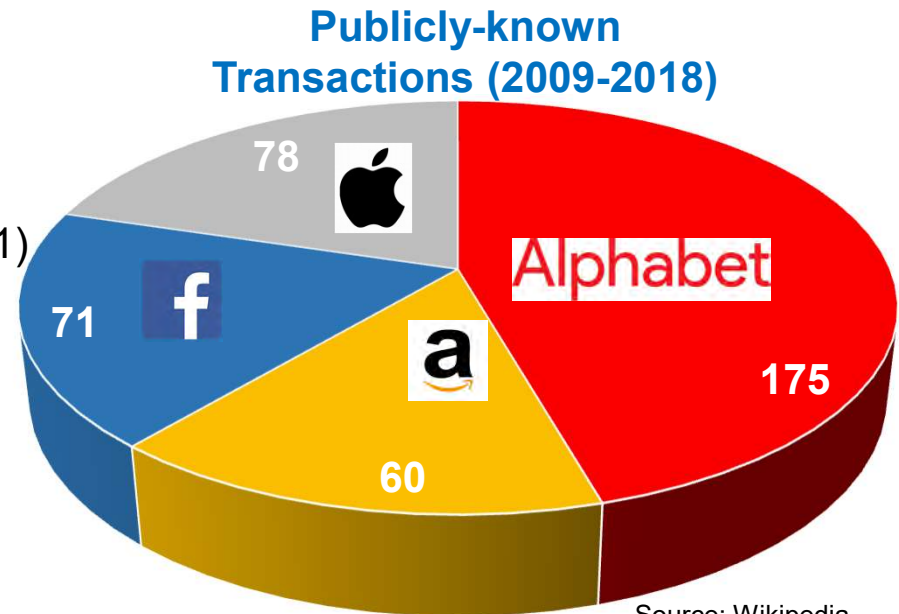
**GAFA have made 393 acquisitions in the last decade (2009-2018)**

- Half of them (200) in the last 5 years (2014-2018)
- Targets integrated to build complementary offerings (e.g. YouTube/Google) and expand reach (e.g. Google’s Next Billion Users)
- Likely an underestimate as some not public

**But “we have not looked at any of them”**

Except for the very largest:

- Alphabet: \$12.5b Motorola Mobility (2011)
- Amazon: \$13.7b Whole Foods Market (2017)
- Facebook: \$19b WhatsApp (2014)
- Apple: \$3b Beats (2014)



## Span multitude of capabilities (I)

Alphabet

| Target business                             | % of M&A<br>(2009-2018) |
|---|-------------------------|
| Mobile related (apps, payment, advertising) | 10%                     |
| Social media related                        | 7%                      |
| Cloud-related                               | 5%                      |
| Advertising-related                         | 4%                      |
| Robotics                                    | 3%                      |
| AI  | 2%                      |
| VR related                                  | 2%                      |
| Online video                                | 2%                      |
| Photography related                         | 2%                      |
| Security                                    | 2%                      |
| Others                                      | 61%                     |

Digital Coupons E-books Home automation  
Music Indian Railways Travel Video search  
Wind turbines Facial Recognition Language  
processing Smartwatches Child-friendly apps  
Branded content Machine Learning Restaurant  
Satellite Touch-typing Voice Education

Google's Next Billion Users initiative

| Target business | % of M&A<br>(2009-2018) |
|-----------------|-------------------------|
| Software        | 30%                     |
| Technology      | 12%                     |
| Retail          | 8%                      |
| Publishing      | 5%                      |
| Cloud Computing | 3%                      |
| Delivery        | 3%                      |
| Security        | 3%                      |
| Video streaming | 3%                      |
| Others          | 32%                     |



Mapping Comic books Gaming  
Grocery Music E-commerce  
Education Talent Robotics  
Pharmacy Payments  
Voice Recognition Social Network

Source: Wikipedia

## Span multitude of capabilities (II)

| Target business  | % of M&A (2009-2018) |
|------------------|----------------------|
| Social media     | 15%                  |
| Mobile related   | 11%                  |
| VR               | 7%                   |
| Photo related    | 3%                   |
| Voice related    | 3%                   |
| Location related | 3%                   |
| Advertising      | 3%                   |
| Others           | 55%                  |



Gaming E-commerce Email Facial  
 Recognition Fitness American Farm Bureau  
 Government ID recognition Machine Learning  
 Photos Travel Publisher Rural communications

| Target business | % of M&A (2009-2018) |
|-----------------|----------------------|
| Maps            | 12%                  |
| Health          | 8%                   |
| Speech related  | 5%                   |
| AR              | 4%                   |
| AI              | 3%                   |
| Others          | 69%                  |



Headphones Audio Camera Artist  
 Magazine Books Education HDR  
 Photography Motion Capture  
 Wireless charging  
 3D scanners Music Search

Source: Wikipedia

## Lear retrospective for CMA

### Proposes changes to approach to information gathering:

- Dawn raids
- Use of valuation as a tool: “high valuations” provide evidential value of competition concerns
- Better understanding of monetisation and online advertising.
- More than a two year timeframe

Specific cases: some lessons to be learned (need to **consider monetisation and be more forward looking on likely developments**). BUT no clear answers: clearance of Instagram and Wayze deals “might” have been fine if efficiencies justified the loss of competition, but provides no final view nor much guidance on how an authority should take such a view ex ante if it cannot even be done ex post

**That’s nice, but not very enlightening.**

Ex-post Assessment of Merger Control  
Decisions in Digital Markets

Final report

... in any event the CMA are trucking

### Changing CMA approach:

- Major focus on internal documents and potential competition
- Valuation as an economic tool

### Comes down to a judgment

Do we care so much about Type 2 errors?

Do we really believe innovation would be “chilled” in Silicon Valley?

What's the real evidence on innovation incentives?

## CMA merger control



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## Conclusions

Hear too often that “antitrust is inadequate to the task”.

*“Antitrust is not designed or equipped to deal with many of the major social and political problems associated with the tech titans, including threats to consumer privacy and data security, or the spread of hateful speech and fake news. Indeed, it is not even clear that more competition would provide consumers with greater privacy, or better combat information disorder: unregulated, competition might instead trigger a race to the bottom, and many smaller firms might be harder to regulate than a few large ones”, Carl Shapiro*

**Not my view**

**Regulation is a complement for *certain issues*. Privacy IS a competition issue. Antitrust *matters* if we can “wield power” and not be too timid or intimidated by lack of precedent, obsolete courts and notions that “we cannot do that”. We need to develop theories of harm properly, need the economics and the law. Not an impossible task. Regulation takes time too!**