A Competition Policy for the Digital Economy

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Plan

- Problem
- Algorithmic pricing
- Data
- Burden of proof
- Mergers
- Conclusions

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PROBLEM

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Do we have a problem in the digital economy ?

Structural features

- Markets increasingly concentrated
- Strong network effects
- Importance of data

Additional enforcement challenges

- Zero-price markets
- Double-sided platforms
- New business models/strategies (eg algorithmic pricing)
- Competition for the market
- Role of disruptive innovation

ALGORITHMIC PRICING

Algorithmic pricing

An algorithm is a series of rules according to which a computer resolves a given problem

- can be set once and for all by a human agent or allow for deep learning/AI

Generally pro-competitive

- recognised by the Commission in *Phillips*, *Pioneer*, *Asus* and *Denon & Marantz*
- see also *Meyer v Kalanick* (SDNY)

Algorithmic collusion

- Could be used to monitor, implement, facilitate collusion
  - *Phillips etc.* – monitor
  - *Posters* – implement
  - *US v Airlines Tariff Publishing Company* – facilitate through hub-and-spoke arrangement
- Collusion by deep learning/AI algorithms
  - attributing "conduct" of algorithm to undertaking automatically? But see Case C-74/14 *Eturas* (awareness required – mere message by system administrator and technical implementation not sufficient)
  - requiring "human oversight" (but note 2020 White Paper limits this requirement only to high risk AI by sector)
  - reconsider tacit collusion law?
    - argument that tacit collusion could become more pervasive
    - still necessary to have certain market features eg no spare capacity and homogenous products but transparency and ability to retaliate are inherent in use of algorithm

DATA

Do data raise novel competition issues?

- Privacy standards as qualitative parameters of competition
  - *BRT v SABAM*, *Tetra Pak II*, *DSD*
- Horizontal theories of harm
  - Case M.7813 – *Sanofi / Google / DMI JV*
  - *Facebook* (BKA)
    - unconvincing on the proposition that Facebook's acquisition of off-Facebook data was an exercise of market power but correct on the general principle that a qualitative deterioration of privacy standards can in theory be an exercise of market power
- Exclusionary theories of harm
  - acquisition of commercially sensitive data of a competitor: Case COMP/M.8788 – *Apple / Shazam*
  - data as a barrier to entry: Case M.8180 – *Verizon / Yahoo* (issue considered but merger cleared) and Case M.8124 – *Microsoft / LinkedIn* (merger cleared in P1 with commitments)
  - data as an essential input: considered in Case M.8124 – *Microsoft / LinkedIn*, para 276 (whether LinkedIn data were essential for customer relationship management – or CRM - software providers)

BURDEN OF PROOF

Proposals to reverse the burden of proof

- eg Competition Policy for the Digital Era – 20 May 2019 – Report prepared for the Commissioner for Competition
  - the specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs
  - strong network effects and high barriers to entry
  - proposal to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct
- But the burden of proof is already reversed for dominant undertakings
  - Commission only needs to prove that conduct is **potentially** anti-competitive and it is then for the undertaking under investigation to adduce evidence to invalidate this finding

Burden of proof in digital cases 1

- *Google Shopping*
  - dominance
  - form of conduct, ie "self-preferencing"
  - foreclosure but … what is foreclosure?
    - traffic diversion + search traffic cannot be replaced by other means
    - conduct thus "capable of having, or likely to have" a foreclosure effect – **note** "or" – so capability is sufficient
  - Anti-competitive effects
    - higher merchant fees, higher prices, less innovation
    - **no proof of such effects** but only theory that capability of harming competitors = anti-competitive effects

Burden of proof in digital cases 2

- *Google Android*
  - dominance
  - form of conduct
    - distinct products
    - coercion
  - foreclosure but … what is foreclosure?
    - tying Google Search with Play Store gives Google a significant competitive advantage over competing general search service provides
    - conduct "tends to restrict competition" or "is capable of having that effect" - **note** likelihood is missing …
  - anti-competitive effects
    - conduct maintains Google's dominant position in search, increases barrier to entry, deters innovation and teds to harm, directly or indirectly, consumers
    - **no proof of such effects** – analysis largely conclusory and recycling of facts already used to prove that competitors are disadvantaged

Final reflections on the burden of proof

ARE WE REALLY SAYING THAT WE WANT TO PROHIBIT CONDUCT THAT IS NOT CAPABLE OF HARMING COMPETITORS?

AND IF AT THE END OF THE INVESTIGATION THERE IS NO PROOF THAT CONDUCT HARMS COMPETITOR, THEN WHY SHOULD WE PROHIBIT IT?

MERGERS

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Problem

Perception that

- acquisitions in neighbouring markets (same eco-system but not same market)
- acquisitions of nascent competitors
- acquisitions of start-ups without a developed product, market share or revenue may harm competition

may harm competition, and that

current merger control rules are inadequate to deal with the issue because of

- filing threshold
- substantive test and evidence required for prohibition

Thresholds

- Need to balance perceived (ideally proven) risk of harm against administrative burden for agencies and cost for businesses
- German and Austrian solution?
- "Blacklisting" certain companies that will have to inform of all mergers?
  - Furman Report in the UK, Recommended action 8: Digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions
- Abuse of dominance rules?

Substantive test and evidence

- New product that might in the future challenge dominant position
  - *Mallinckrodt*: FTC monopolisation case concerning acquisition by Mallinckrodt of rights to development of drug that threatened its monopoly in the US market for adrenocorticotropic hormone (ACTH) drugs
  - *Thoratec Corp / HeartWare International, Inc*: FTC merger case concerning the attempted acquisition by Thoratec of Heartware. The target was running clinical trials of a device that would/could have threatened the acquirer's monopoly in the US market for left ventricular assist devices (LVAD)
  - *Google / Double Click*
- New product in different market that might in the future displace dominant position
  - *Microsoft / Netscape*: s 2 and Art 102 case concerning Microsoft's strategy of eliminating competing internet browsers that could have challenged, as platform softwares, Microsoft's dominance in PC operating systems
  - *Facebook / Instragram*: CMA merger case
  - *Illumina / Pacific Biosciences*: FTC merger case concerning whether the new product being developed by target (long-read gene sequencing) could have become a competitor of short-read gene sequencing, a product in respect of which the acquirer was dominant

Substantive test and evidence

- New products still being developed and effects on innovation
  - *Dow / Du Pont*
  - *Bayer / Monsanto*
- Potential entrant
  - *Facebook / WhatsApp*
  - *Facebook / Instragram*
- Tools and analytical frameworks capable of dealing also with the start-up problem, if any
- Furman Report, Recommended action 10: balance of harms

CONCLUSIONS

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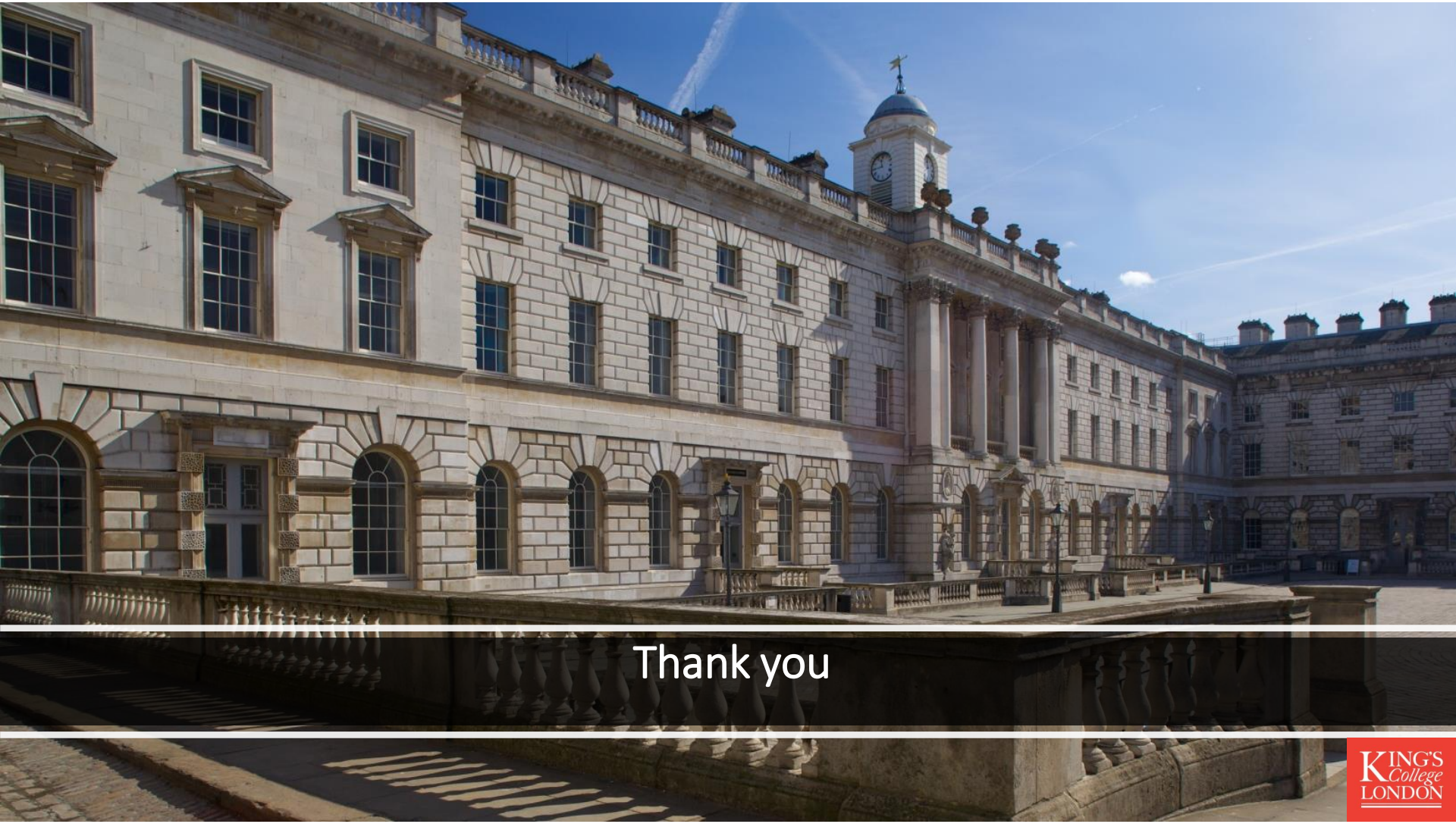
Thank you