



Regulatory oversight of digital markets: is a new approach required? A pros and cons debate

Competition Law Association

**Derek Holt, Managing Director
Mat Hughes, Managing Director**

11 July 2019

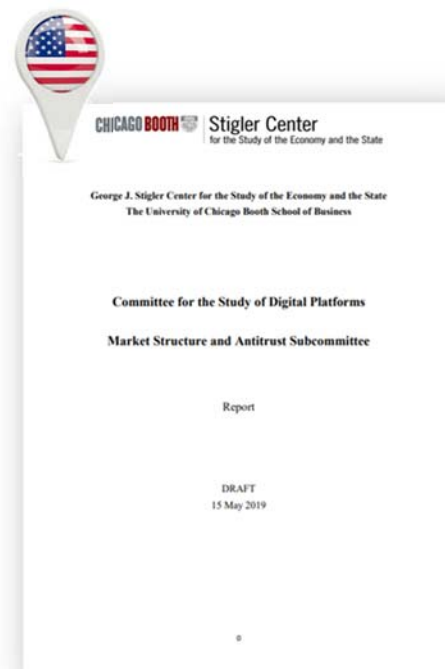
**Note: This presentation is not
aimed at setting out our personal
views but to further debate**

Changes to competition regimes are being widely assessed

Influential reviews recently published in many jurisdictions



+ CMA market study into Digital advertising (3 July 2019)



Similar reviews have been undertaken, or are in progress, in many other jurisdictions, including:
Australia, France, Germany, Israel, the Netherlands and Japan

Agenda

1

What are the competition concerns in digital markets?

2

Is a new regulatory approach required?

1. What are the competition concerns in digital markets?

What can make digital markets different?

Digital markets are varied but some attributes are particularly prevalent

Multi-sided
markets and
zero pricing

Importance
of data

Network
effects

Strong
economies of
scale and
scope

Consumer
biases

Concentrated markets, incumbent persistence, sub-optimal outcomes for users?

Individual characteristics are not new or unique, but they are more likely to be found in combination in digital markets

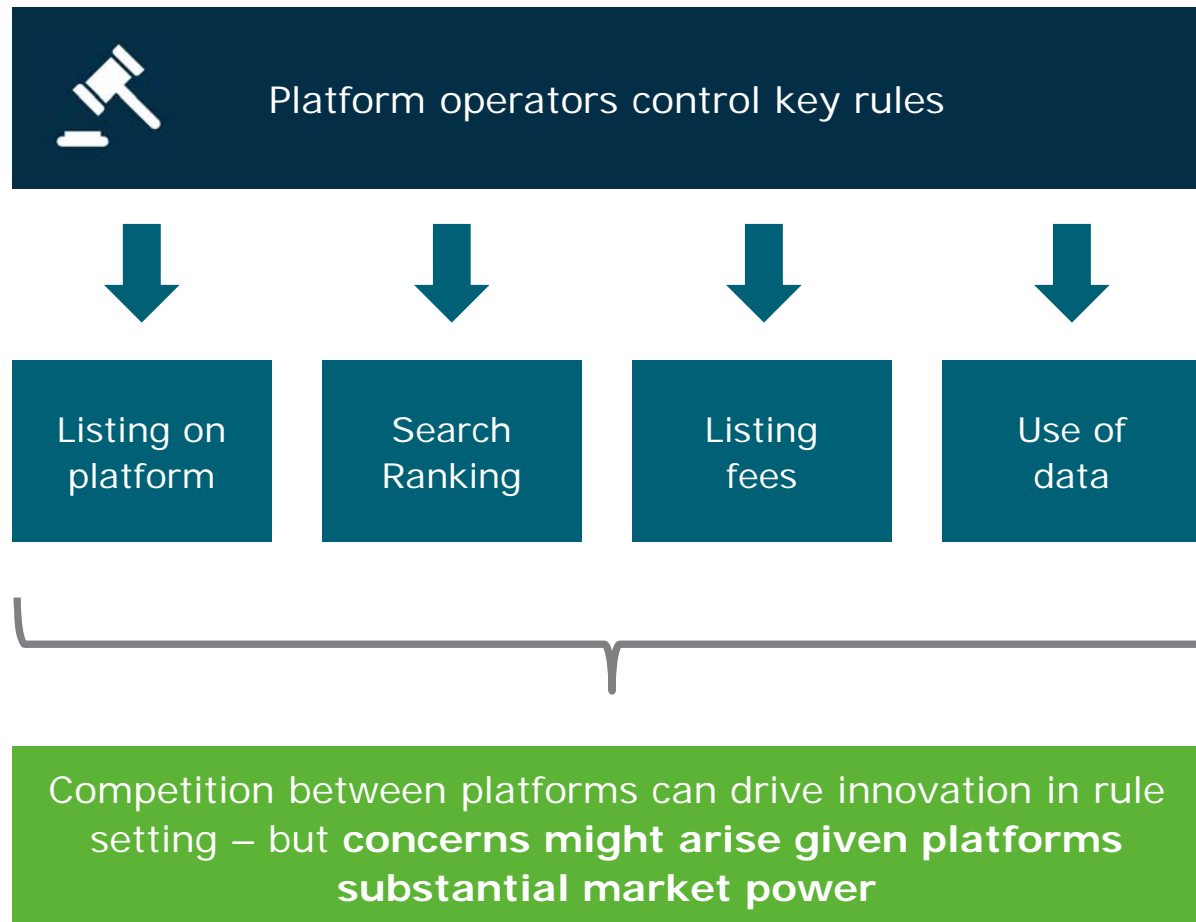
Rejoinder: All generalisations are false

- Platforms are not all the same
- Why do economists like evidence based competition law/policy? What does this look like?



- Market share may not be a good guide to revenue threats. Eg:
 - Growth of Duck Duck Go
 - Is Facebook for old people?
 - Where does product search really start?
- Why are we really here? Mercedes Benz?

Platforms yield benefits, but control over platform rule-setting can result in competition concerns



Theories of harm

Theme 1:
Discrimination/self
preference

- E.g. Google Shopping

Theme 2: Promotion
of single-homing

- E.g. Google Android: pre-installing of Google
- Most favoured nation clauses (hotel bookings, insurance comparison sites, Amazon)

Theme 3: Exploitative

- Compulsory trading partner/bargaining power
- E.g. Google scraping of news snippets
- E.g. Amazon launching products to compete with best sellers
- Lack of privacy competition

Themes the CMA will consider in its market study of online platforms and advertising markets

Theme 1: Market power on consumer side

- Market power may arise from network effects, switching costs and economies of scale
- Zero data price may not be competitive
- Volume and variety of data can yield efficient targeting but may increase market power

Theme 2: Data practices

- Limited ability/willingness of consumers to engage
- Limited choice for consumers on data
- Feedback between data collection practices and market power in advertising (and vice versa)

Theme 3: Market power in digital advertising

- Integration of platform and intermediation may protect/create market power
- Lack of transparency re: advertising value and high digital advertising prices (and pass-on...)
- Fair/competitive distribution of advertising revenues

Rejoinder: Tired of anti-trust?

- A theory of harm is not evidence of current/future consumer harm.
- Preferencing/discrimination:
 - Be careful about discouraging efficient vertical integration
 - Is this the right standard, rather than foreclosure? (Royal Mail)
 - What role for economic effects? NB controversial:
 - *Streetmap v Google*
 - *Google Shopping*
- Is the market digital advertising? Are there really network effects in digital advertising?
- Exploitation: Free is not cheap enough? What do you get for free?
- Does self-interest = self-restraint

2. Is a new regulatory approach required?

UK Furman report proposals

1

Merger Control

Greater priority on scrutinising digital mergers

Use balance of harms test

Rewrite Merger Assessment Guidelines

2

Competition Law investigations

Retrospective analysis of cases not taken

Streamline interim measures process

Changes to the appeals standard (JR not full merits)

3

New Digital Markets Unit

Increased regulatory oversight of 'Strategic Market Status' platforms

Greater data mobility and interoperability

Access to data held by firms

Comparison of the UK, EU, and US perspective

Proposals	UK Furman	EU Crémer	US Stigler
Improve data interoperability and portability	✓	✓	✓
Update merger control	✓	✓	✓
Standardise and limit the appeals procedure	✓	✗	✗
Shift burden of proof	✗	✓	✗
Additional ex ante regulation needed	✓	✗/?	✓
Establish a digital regulator	✓	✗	✓

Option 1: Ex-ante Regulation for strategic platforms

What might this entail?

- “Fair, consistent and transparent access”, non-discrimination provisions
- Price, quality, data transparency?
- Transparency on terms of use, limits to suspension rights (EC P2B Regulation)
- Prohibition of anticompetitive bundling

Benefits?

- Lower entry barriers for rivals and providers of new services
- Agree rules upfront and apply across multiple markets rather than case-by-case
- Won't take years to address problems by which time competition dead
- Broader scope for remedies compared with abuse of dominance

Risks?

- What is the evidence of consumer harm which supports intervention?
- One-size fits all risk?
- Unintended consequences

Options 2 and 3: Data mobility, inter-operability and open data

What might this entail?

- Personal data mobility from incumbent to third party at “click of a button”
- Open standards (already used in browsers, email)
- Requirement for platforms to divulge data

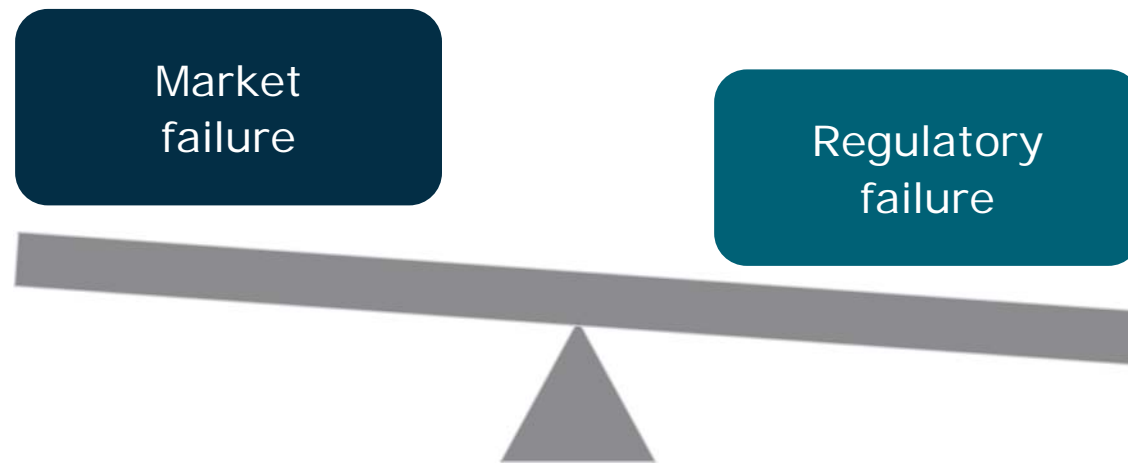
Benefits?

- Reduce switching costs, incumbency advantage
- Encourage new services
- Puts power in hands of consumer whose data is collected
- Consumers could be rewarded directly for data
- Efficient profile management

Risks

- Unknown but likely high cost and complexity
- What data should it this apply to?
- Will consumers bother? Or, if they do:
 - Possible chilling effect on original innovation (rather than imitation)?
 - If data is less valuable, will consumers face higher prices in other respects?

Balancing market and regulatory risks

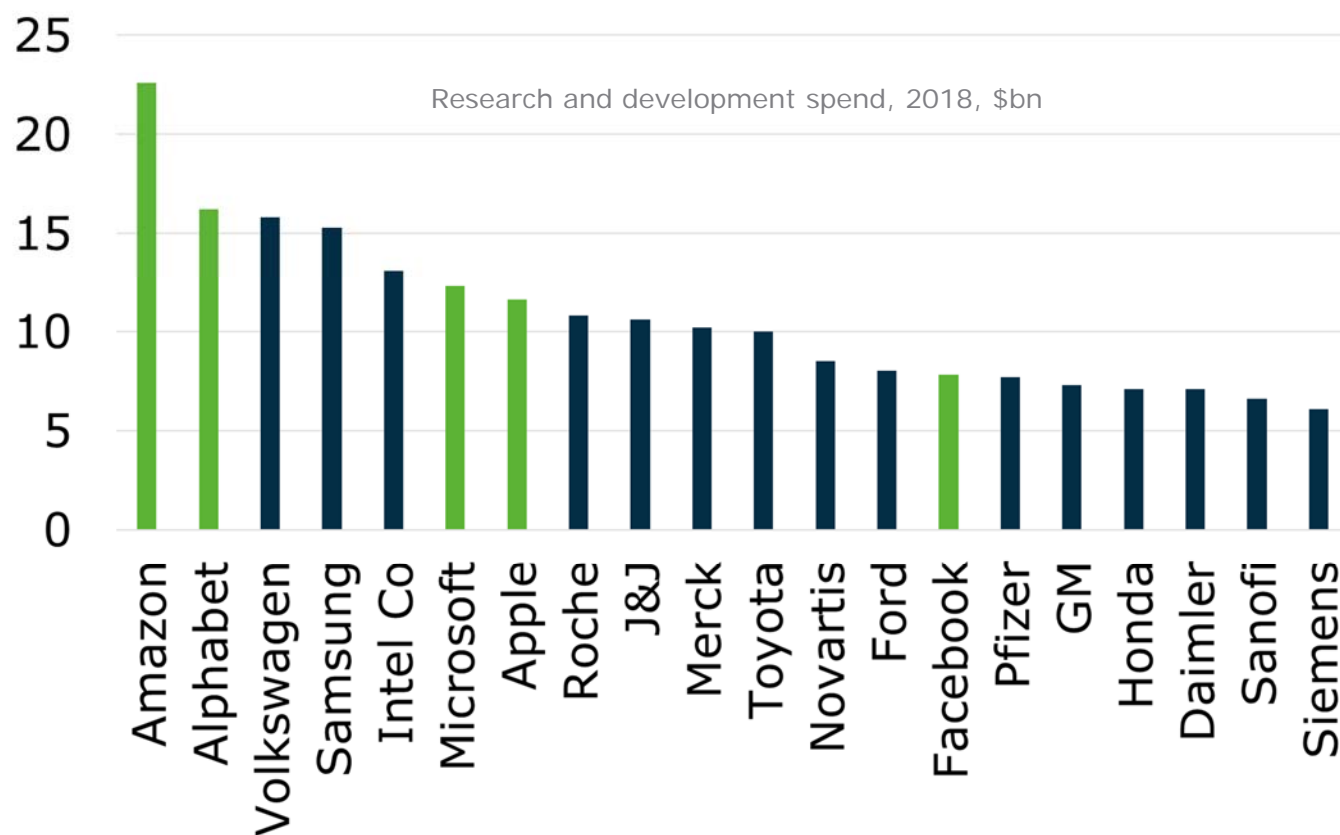


Assessment of regulatory risks involves considering:

- Proportionality and likely effectiveness
- Risks of unintended consequences from intervention in this market ... and other markets
- Lower risk alternative interventions
- Information asymmetry, capture, regulatory bias

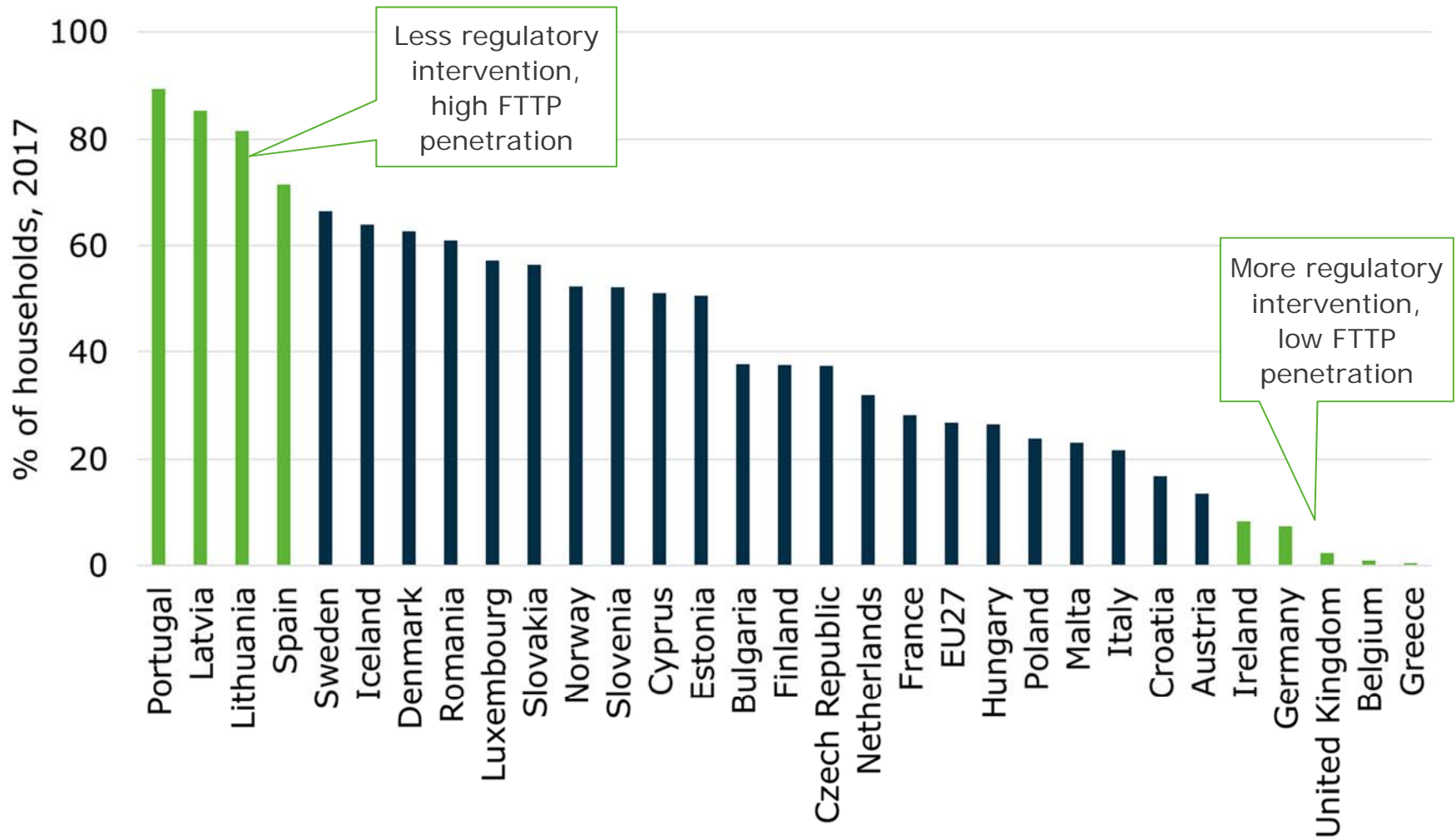
Risk of regulatory failure?

"it is impossible to predict how digital markets will change". *Furman para 5.2*



Unintended consequences?

Fibre-to-the-premises broadband coverage, % of households, 2017



AlixPartners

WHEN IT REALLY MATTERS.