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Brugge

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Natolin

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Global Competition Law

Centre

## ***Unlocking Digital Competition***

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HMT Digital Competition Expert Panel



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**Nothing To See Here**



**Move Along**

# Background

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❖ Oct 2018: HMT commissioned a Digital Competition Expert Panel (DCEP), led by Jason Furman.

❖ 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?



## ❖ DCEP key recommendations for HMG and CMA:

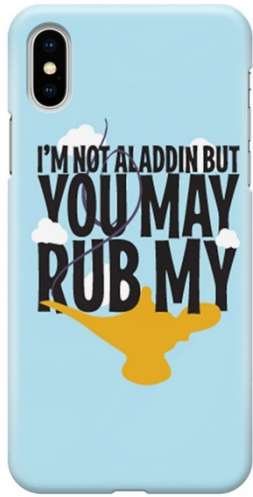
- Establish a ‘digital markets unit’ to promote competition and innovation.
- For competition law: ‘Reset’ merger control and speed up antitrust cases.
- Engage internationally to encourage a coherent global approach.



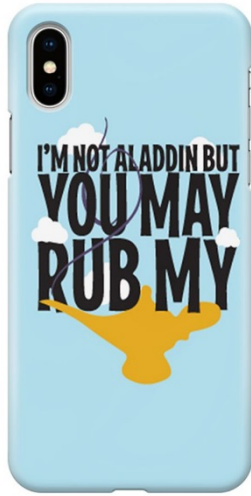
# The upside: benefits from digital platforms

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- ❖ 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'.



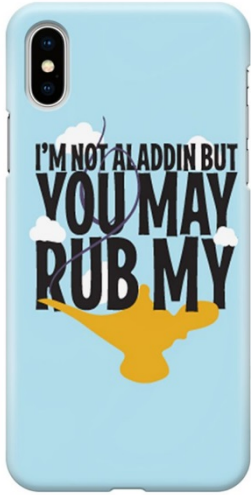




## *Tippy markets*







## Tippy markets



# The challenges of digital platforms

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- ❖ A number of digital markets have 'tipped' to being concentrated, and 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'.
  - 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 – ie where antitrust could come in





actual lyrics



actual lyrics



actual lyrics

# Is market tipping and leverage inevitable?

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## Is market tipping and leverage inevitable?

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# Is market tipping and leverage inevitable?

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- ❖ Some driving factors are inherent in the economics of these markets: scale economies, network effects, use of data, demand-side biases
- ❖ 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?

# Substantial potential harm to consumer welfare

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- ❖ 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.
- ❖ Indirect harm via business users:
  - High prices charged for customer access likely to be passed on.
  - Distorted rankings etc can distort competitive outcomes. (Unlevel playing field)
  - **Key:** Market power can dampen incentives to innovate. (Eg Microsoft IE)

# Issues for merger law

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- ❖ 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 ...

# Issues for merger law

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- ❖ **Most deals / ‘aqui-hires’ have not been reviewed, or only reviewed at Ph 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.**

# Recommendations for merger law

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- ❖ **DCEP Proposal: CMA should prioritise scrutiny of digital mergers, with a focus on harm to innovation and potential competition**
- ❖ Legal test - Given the uncertainty of future possibilities, can an SLC on the 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.**
  - Increased focus on long-term consumer welfare, on the counterfactual, and on acquisition value/deal documents.

## Recommendations for antitrust cases

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## Recommendations for antitrust cases

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**nothing to see here, move along?**

**Just do more of the same but faster?**



# DCEP Recommendations for antitrust cases

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- ❖ 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.**

# DCEP Recommendations for antitrust cases

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- ❖ But unlikely to solve all problems:
  - Enforcement will still take a LONG time
  - Partial nature of cases: Can't address all issues. Have to prioritise.
  - Remedies too narrow, not forward-looking, hard to design, need monitoring.
  - Promotion of competition requires going beyond limiting anti-competitive behaviour.

# DCEP Main Proposal: A 'Digital Markets Unit' with 3 objectives

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1. **Participative regulation** of designated '**Strategic Market Status**' platforms.

**Code of Conduct** based on core principles 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.
3. Promotion of data openness, eg to facilitate 'training' of potential new AI.

## HMG BEIS Smart Data Review

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*“agree with the Digital Competition Expert Panel that there is a strong case for establishing a pro-competition Digital Markets Unit, tasked with securing competition, innovation and beneficial outcomes for consumers and businesses in the digital economy”*





KENDOR PRESENTS

Grade 5a  
duration 2:55

**Ride Of The Valkyries**  
(from Die Walküre)

by Richard Wagner  
arranged by John Jay Hilliger

FULL SCORE

All Horns 4 = 7a

1st Horn in F

2nd Horn in F

3rd Horn in F

4th Horn in F

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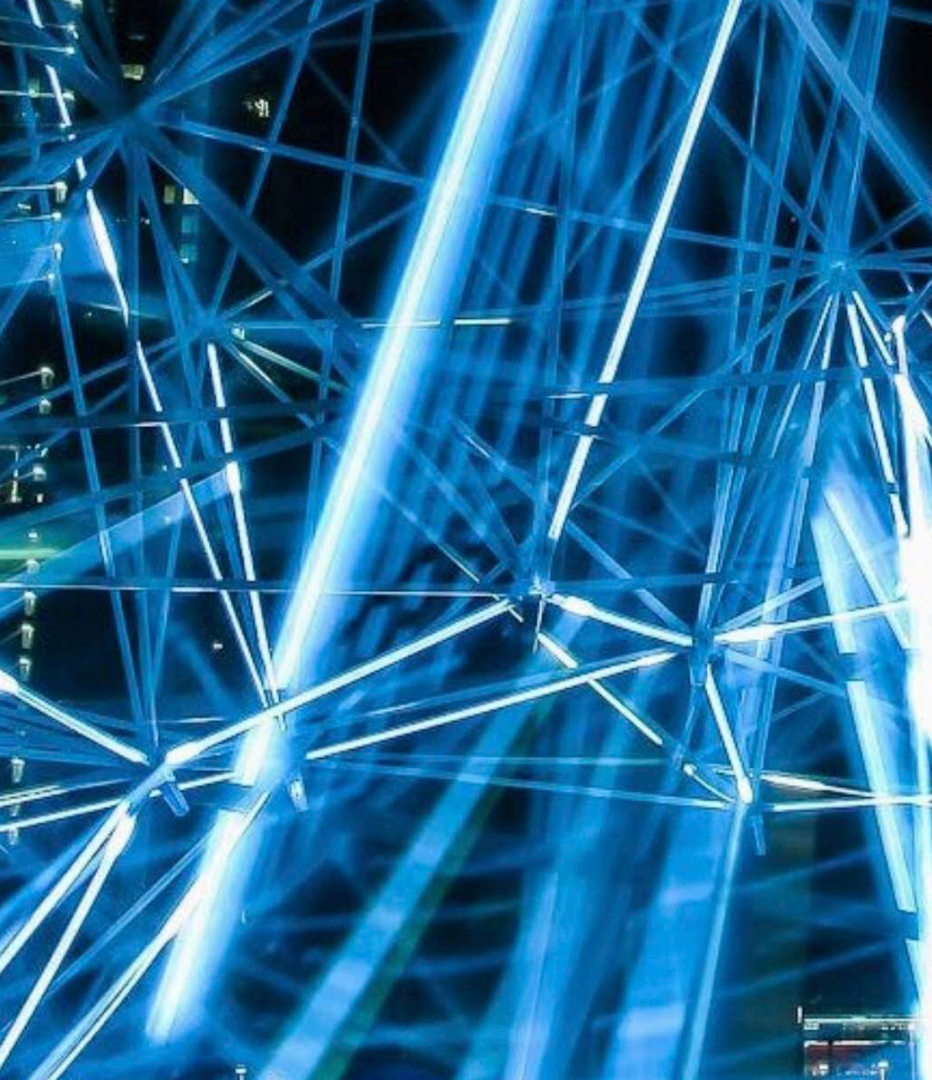
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“You’re a *bad* Silicon Valley CEO, aren’t you? You need to be *regulated*, don’t you?”





# Unlocking Digital Competition

*Multi-homing @:*

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