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Competition Law and Policy in the Digital Era: A Political Economy Approach

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What is competition law?

*Rational self-interested agents +
competitive markets* □ **Welfare**

‘It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.’

But... ‘competition sows the seeds of its own destruction’



Cartels



Agree to collectively raise price or limit some aspect of competition



Monopolization

The Coca-Cola logo is written in its signature red script font.

Charges very low prices

Distributors & Points of sale



EXCLUSION

If Pepsi **excluded** from the relevant market
consumer will **pay more** & have **less choice**

Anticompetitive Mergers

Close rivals
substitutes



The merger **would remove existing competition** between the two closest competitors on the Irish routes

New entity can profitably increase prices without losing customers



The Rules

EU competition law		US antitrust	
Art. 101 TFEU	Agreements between undertakings restrict competition	Sherman Act s. 1	Every contract in restraint of trade
Art. 102 TFEU	Any abuse of a dominant position by an undertaking	Sherman Act s. 2	Every person who shall monopolize , or attempt to monopolize
EUMR Art. 2(2)	Any concentration which would significantly impede effective competition	Clayton Act s. 7	mergers that may substantially lessen competition , or tend to create a monopoly

So... we have competition law to prevent the negative effects of market power



Designed for the **economy of the tangibles!**
Focuses on **price** and **output!**

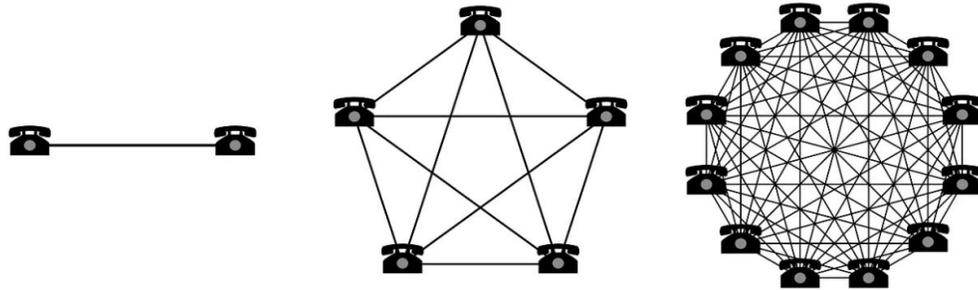
Economic input:

Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition is referred to as market or monopoly power. □ reduced output and loss of economic welfare. (OECD, 1993)



What changes in digital markets?

Information: (once created, information can be transmitted to a large number of people at very low cost) □ **extreme returns to scale.**



Higher Organic Search and Word-of-Mouth Referrals

More New Users and Active Participants on Platform



Network Effects

Enhanced Technical Capabilities from User Feedback and Data

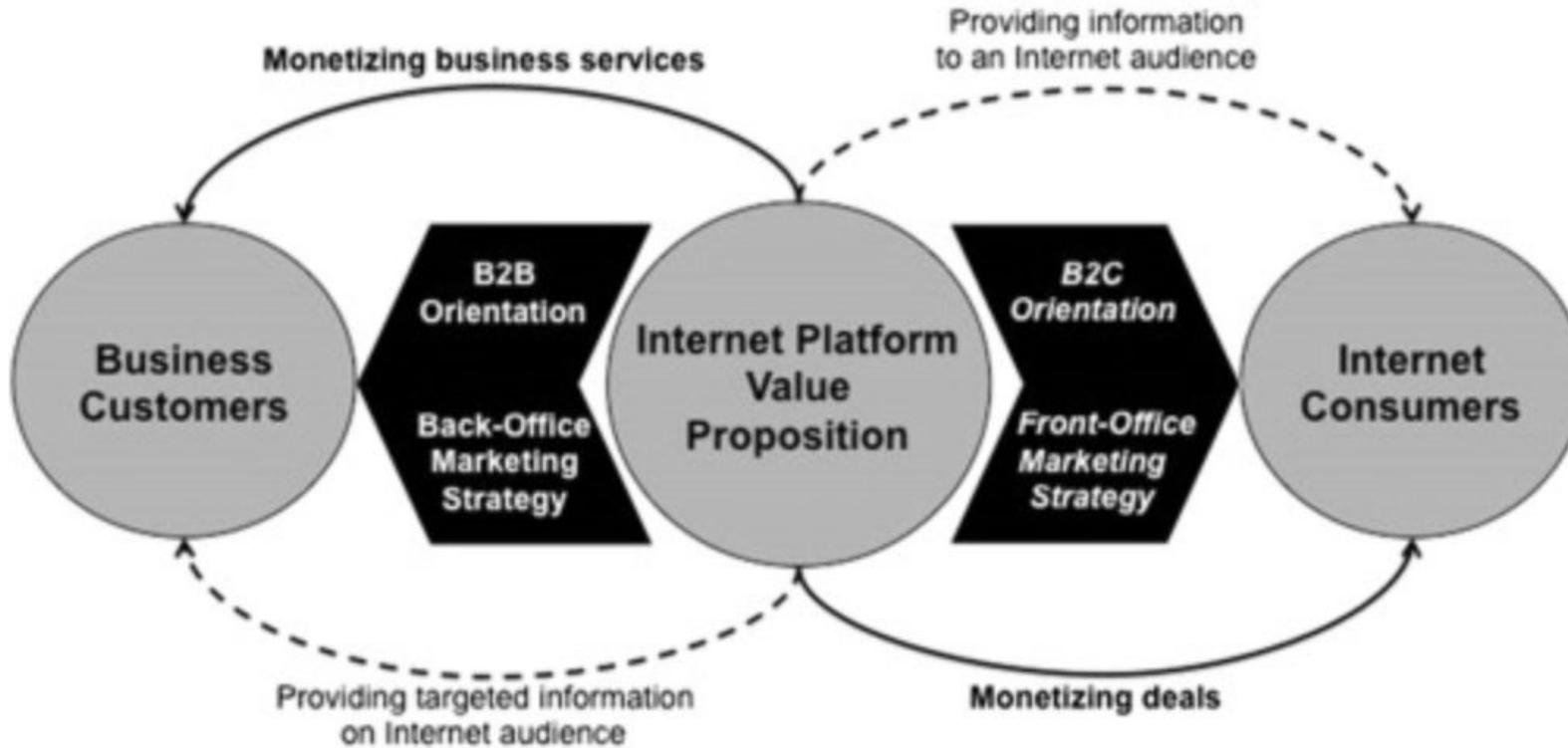


Improved Value Proposition and User Engagement



B2B&C

Business provider with benefits for Internet users



B2C&B

Business infomediary with benefits for business partners

Revenue of the three biggest two-sided marketplaces



Operating income of \$6.2 billion in Q3 2020



197 million visitors monthly



\$2.89 billion in revenue in Q4 2020



185 million active buyers



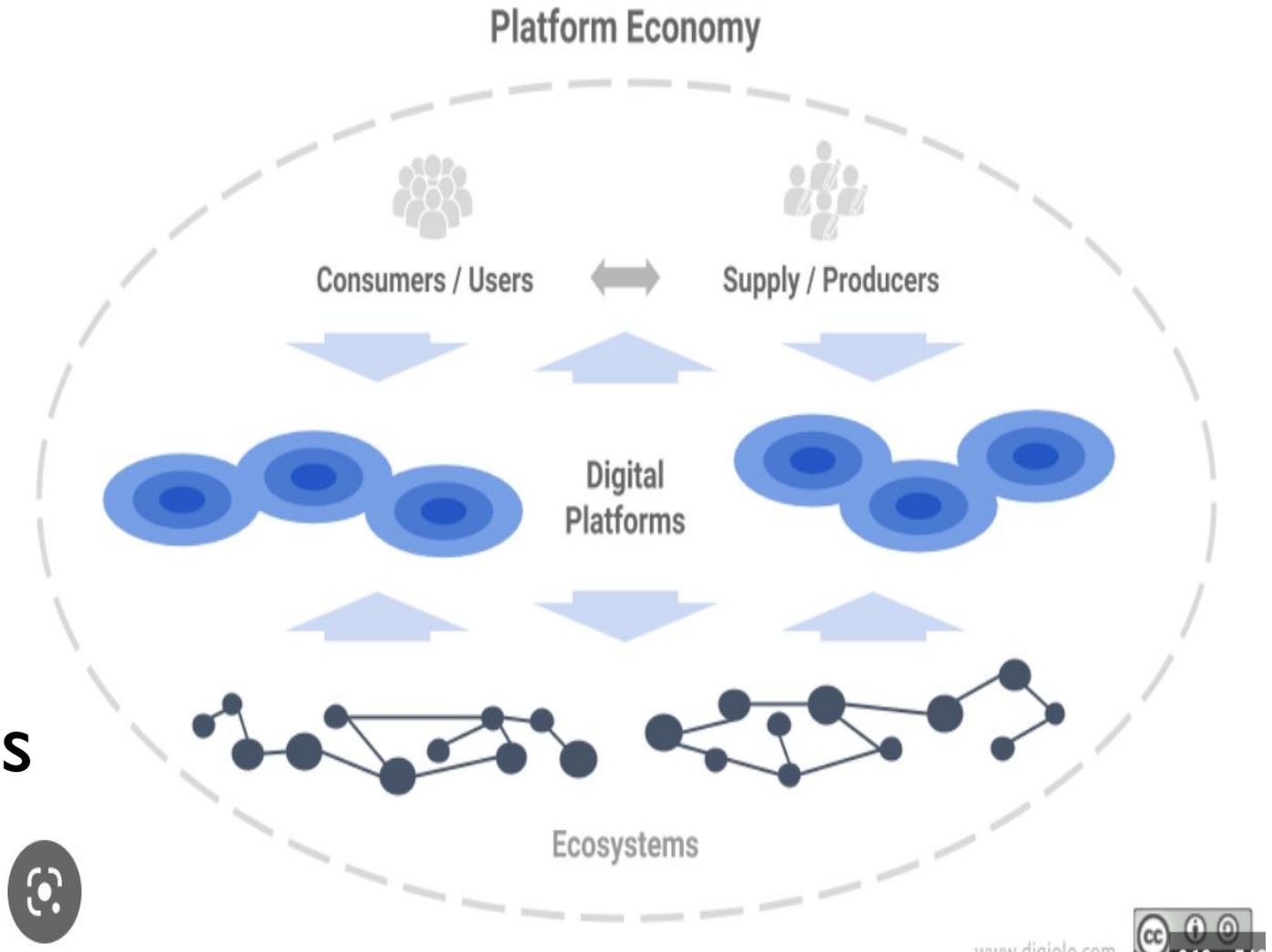
\$3.17 billion earnings in Q4 2020



93 million monthly active platform customers

From
markets/platforms
(neutral
intermediaries) to
ecosystems.

Not markets but
algorithmic simulations
of markets!



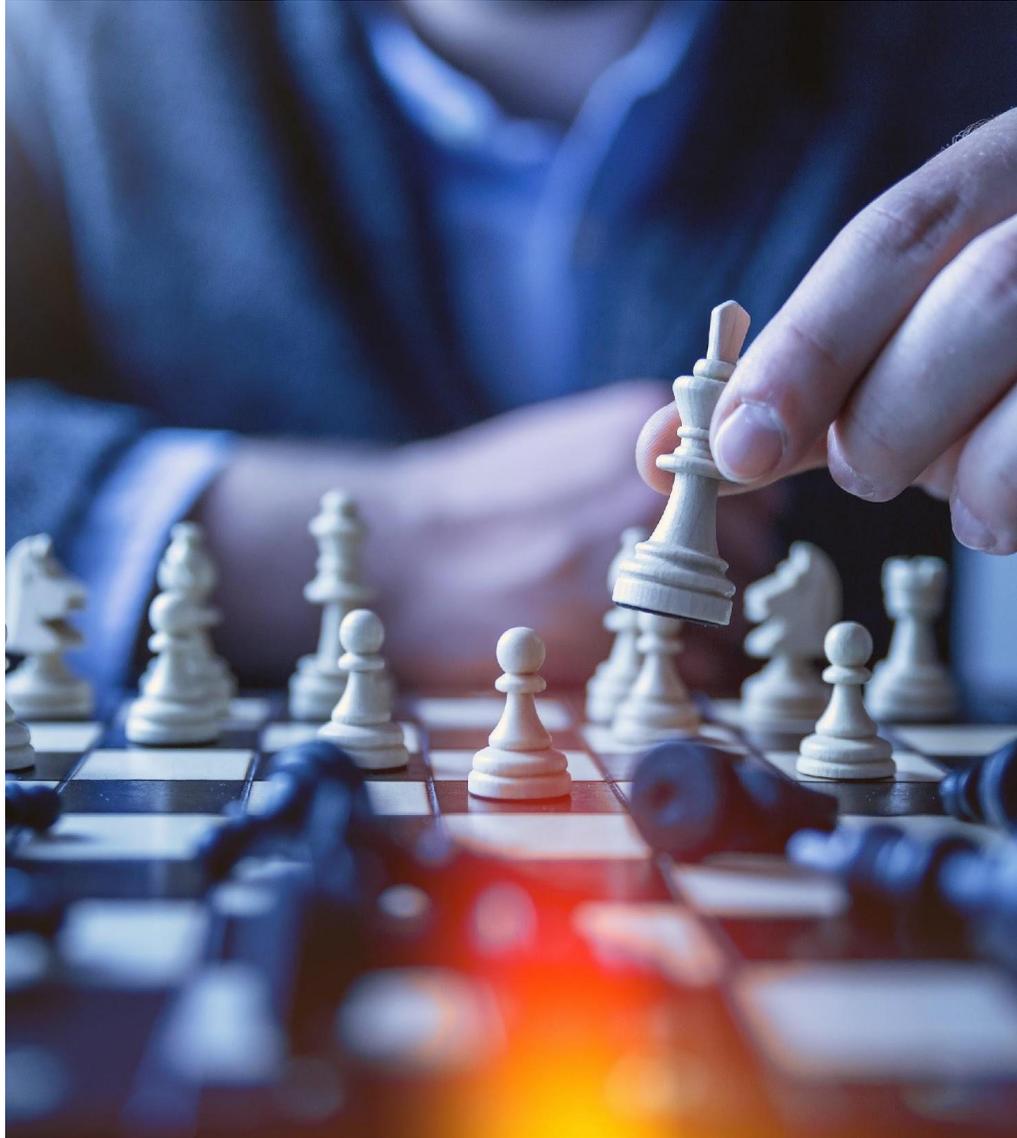


Epic v Apple (2021):

Epic challenged the **30% revenue cut** that Apple takes on each purchase made in the App Store. Wanted to **bypass** Apple (Fortnite) (Apple **anti-steering clauses**)

Court decided in favor of Apple on 9/10 counts, but found against Apple on its anti-steering policies under the [California Unfair Competition Law](#).

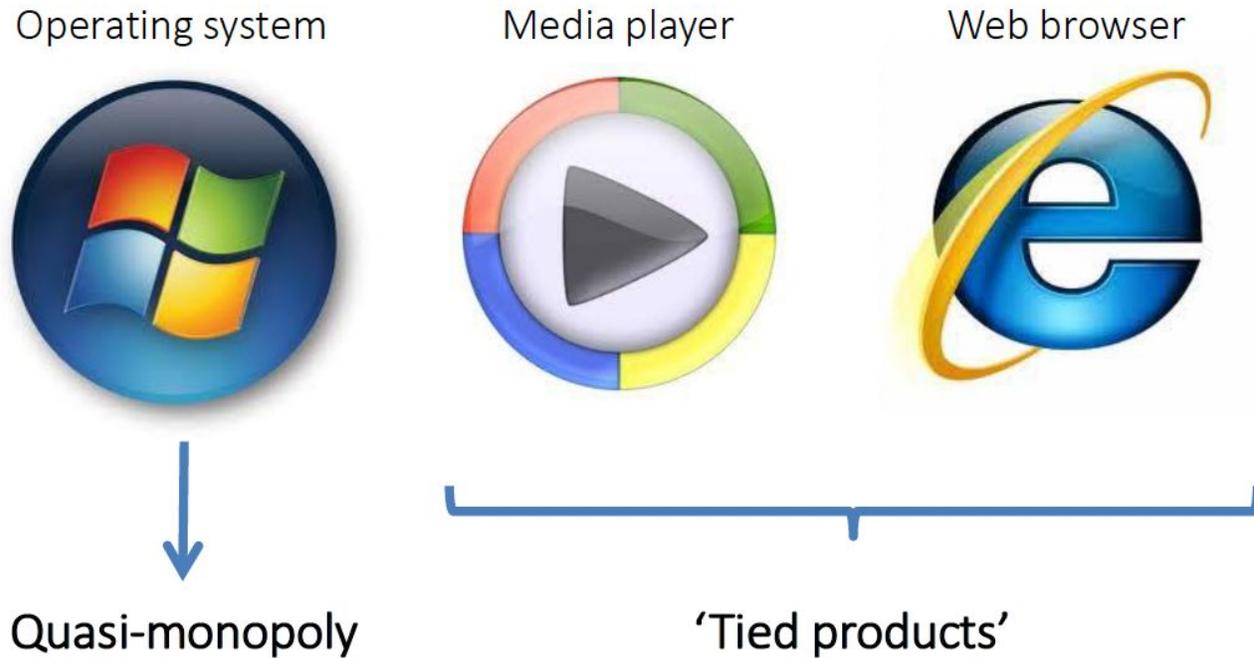
A world of ecosystems?



New possibilities to restrict competition

- **Incapacitation of consumers** (dark patterns; default bias, lock-in)
- **Algorithmic collusion** (sellers can increase price without communicating no violationn)
- **Incapacitation of rivals** (*Google Shopping, Google Android*)

Monopolist Playbook?



Remedy:

- Windows with/without WMP
- Choice screen

Is it unlawful to tie these products?

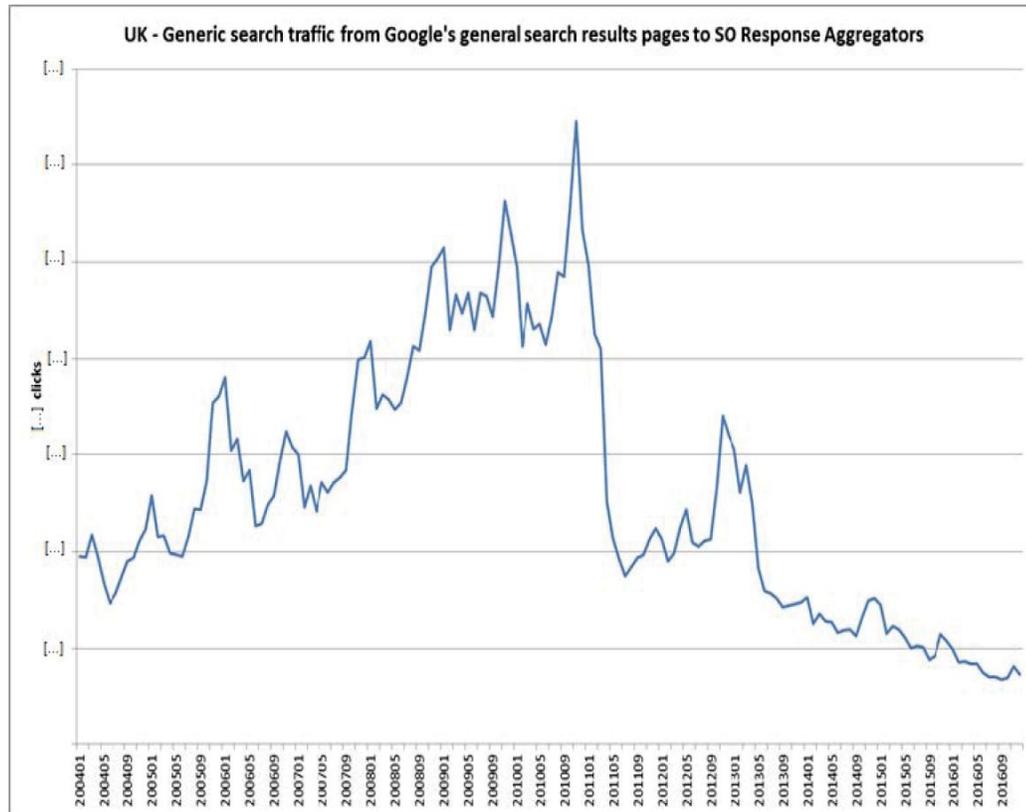
Google Shopping: Abusive Leveraging – 2.42 bn fine

- What is the relevant market?
- What is the abuse?
- What is the harm?



Anticompetitive Effects?

Graph 27: United Kingdom – Generic search traffic from Google's general search results pages to the 361 SO Response Aggregators



- ◆ **Converse** economic model from the one that brought it success ('certain **abnormality**') – market tipping.
- ◆ **Traffic** was of paramount importance for CSSs & NOT easily replaceable (consumers: default bias)

Google's Contested EU Antitrust Fine is Peanuts



* Based on Alphabet's total revenues in 2019
Fine was issued in EUR (2.4 billion)
Sources: Alphabet, Reuters

Remedial design

Option 1: Cease and Desist - Make Google a Relevance-Based Search Engine Again

What this would look like is up to Google...

10 blue links?



Similar to now?



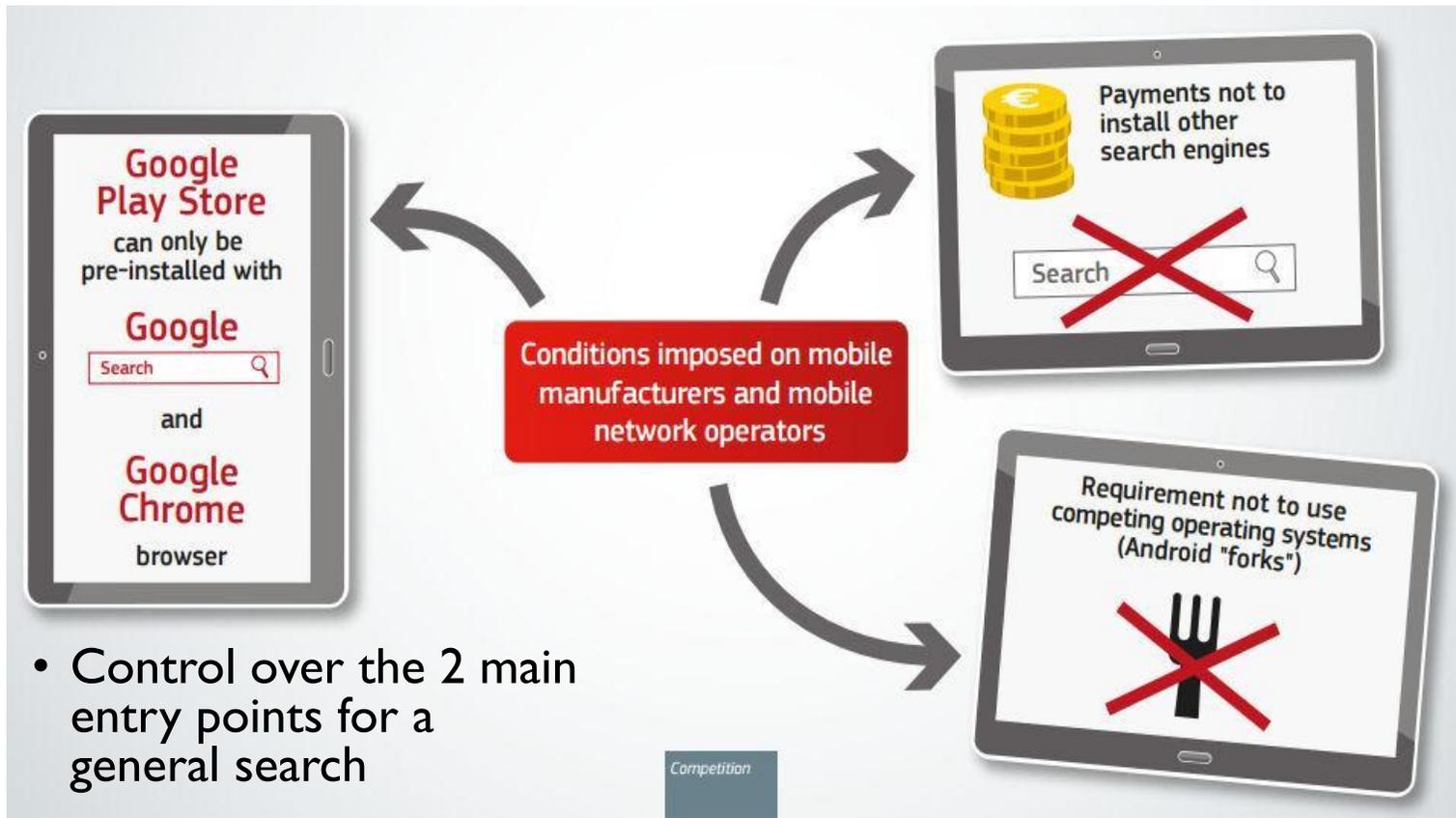
Something else?



But:

- No self-preferencing—selection and placement based entirely on likely relevance to the user's query, and
- No anti-competitive penalties (by design or effect)

Google Android: Anticompetitive Tying (Fine: 4.3 bn)



Pre-installation □ significant advantage (competitors could not offset) AND that OEMs were reluctant to negotiate with rivals.

72% of 1 500 respondents in Germany, Poland, UK used the browser that was pre-installed on their smartphones (status quo bias)

NB: Google refuses to pay fine/allow deleting preinstalled apps in India!

Google Ad Sense (Fine: 1.49 bn)

Google's AdSense restrictions protect its dominance in search advertising



G: intermediary / **advertising broker**

> 70% market share in the online search advertising intermediation market

Restrictive clauses in contracts with third-party websites □ **preventing** its rivals (Microsoft, Yahoo) **from placing their search adverts** on these websites.

Third-party websites: important entry point for **other suppliers** of online search advertising intermediation services (Microsoft and Yahoo)

Amazon Marketplace: copycat strategy + preferential treatment



FTC similar case:
Amazon artificially raised prices by prohibiting third party sellers from discounting/forcing them to use its logistics

Amazon Marketplace Commitments

Amazon promised:

- **not to use non-public data relating** to, or derived from, the independent sellers' activities on its marketplace, **for its retail business** OR to sell its **private label products**.
- **to treat all sellers equally when ranking the offers** in the Buy Box
- **to set non-discriminatory conditions and criteria** for the qualification of marketplace sellers and offers to **Prime**; & allow Prime sellers **to freely choose any carrier for their delivery** services.
- Duration: 7 years

An elephant is walking away from the camera on a muddy, rutted path that winds through a dense, lush green forest. The path is wet and reflects the surrounding foliage. The forest is thick with various types of trees and undergrowth, creating a sense of a secluded, natural environment. The lighting is soft, suggesting an overcast day or a shaded forest interior.

Killer acquisitions &
innovation kill zones
(‘elephant path’)

FB/Instagram (2011, 1 bn –
current value 100 bn)

FB/Whatsapp (2019, 19 bn)

Why applying competition law in the digital sphere is difficult?

- Market power? - Non price parameters of competition
- Market definition? - Platforms and ecosystems
- Conduct? – New forms + may be integrated in the business model & product design
- Effects? – Harm to consumers (short v long term?)? Harm to rivals? Innovation?

In need of a political economy approach...

- Instead of focusing only on **efficiency** and narrow **consumer welfare**...
- ...engage with the **broader political economy** □ **innovation, contestability & opportunities to compete**
- Future **structure** of the economy, **economic power** and **distribution of profits** □ **healthy ecosystems**
- Resist the ‘**catch-all antitrust**’ imagery □ regulatory **complementarity**

