

COMPETITION POLICY NEEDS TO  
ENTER MAINSTREAM PUBLIC DEBATE

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**RADIX**

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FOR THE  
**RADICAL  
CENTRE**

**FREEDOM TO CHOOSE**

WHY COMPETITION POLICY  
AFFECTS US ALL



'BECAUSE TO TAKE  
AWAY A MAN'S FREEDOM  
OF CHOICE, EVEN HIS  
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THE WRONG CHOICE,  
IS TO MANIPULATE HIM  
AS THOUGH HE WERE A  
PUPPET AND  
NOT A PERSON.'

Madeline L'Engle

# FREEDOM TO CHOOSE

## WHY COMPETITION POLICY AFFECTS US ALL

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### ABOUT RADIX

Radix is a non-aligned think tank for the radical centre. We welcome people from all parties and none.

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We focus our efforts on policy initiatives that can drive towards system change rather than putting sticking plasters on the existing system.

Our goals are to revitalize our liberal democracies, re-define capitalism, and address the issues of globalisation and multi-lateral relations.

We want all citizens to live securely, with dignity, be active participants in society, and be free to pursue their own interpretation of the good life.

### ABOUT THE AUTHOR

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He is the co-author of “Technopoly – and what to do about it” published by ResPublica in 2018.

Tim led BT’s competition law and public policy team for many years. He has dealt with almost every type of case in telecoms and competition law – advising on the application of the law and leading transactions and litigation. For example, he has acted on all major merger cases affecting the sector – either for parties to transactions or third parties affected by them. More recent cases include Google/Double Click, AT&T/ T Mobile, Syniverse/Mach, Facebook/WhatsApp, BT/EE and H3G/O2.

Tim was awarded the title of ‘Distinguished Visiting Fellow’ at the European Business School in London and has lectured as a visiting professor at the City of London Law School, and at Imperial and Queen Mary Colleges in London. He is a Barrister and holds an MA (Cantab) in law.

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I would also like to acknowledge the fact that “Freedom to Choose” was originally Milton Freidman’s response to JK Galbraith’s “Age of Uncertainty” and that elements of both are picked up in this paper.

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# SUMMARY AND RECOMMENDATIONS

## *Freedom of Choice is the cornerstone on which markets and our very democracies are built.*

This paper explains that markets and democracies are under threat if the market doesn't work well.

Consensus has been established in the past year that markets are not working, and that concentration is a major problem.

First identified by the Council of Economic Advisors to President Obama, more recently by the EU Commission<sup>1</sup> and the UK Treasury, it is now recognized that concentration in technology markets is a particular problem.

On 3 June 2019 Andrea Coscelli, CEO of the Competition and Markets Authority (CMA), commenting on the Lear report,<sup>2</sup> which identified that the CMA missed serious issues in leading cases, stated:

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*“Over the last decade, Amazon, Apple, Facebook, Google, and Microsoft combined – the so called GAFAM quintet – have made over 400 acquisitions globally, with more than half of these – close to 250 – just in the most recent five years. However only a handful of these mergers have been scrutinised by competition authorities, and none have been blocked... Is it right that across all 400 of these acquisitions, there has not been a single prohibition?”*

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**MARKETS HAVE BECOME  
DOMINATED – IN PART  
BECAUSE NOTHING  
WAS DONE TO STOP IT  
HAPPENING**

All these reports show that digital platforms have got bigger and bigger. They have acquired small players in markets which are subject to “tipping”<sup>3</sup> – where a winner will take most of the market. Network effects and “extreme returns” to scale allow them to become entrenched.<sup>4</sup>

1. Competition Policy for the Digital Era 2. Lear report for the CMA June 3 2019 3. See Jean Tirole, Economics for the Common Good Ch14 & Technopoly and what to do about it June 2018. 4. 5 propositions in the Furman Report March 2019 and Australia's ACCC reached the same conclusion in December 2018: 'The ACCC considers that, like Google, to a large extent, Facebook is insulated from dynamic competition by barriers to entry and expansion, advantages of scope, and its acquisition strategies.'

## WHAT ARE THE AUTHORITIES TO DO NOW?

Answers include “break up” – the favoured solution of Facebook founder Chris Hughes and politicians such as Senator Elizabeth Warren and Sir Vince Cable MP, and those looking for durable change.

Alternatives include “access remedies”. These would create competition by moving to a world of open protocols providing open access to platforms in order to reinvigorate the market for apps. Maybe even competition for all the layers that have been “built over” the underlying open protocols in the telecommunications infrastructure.

Others suggest changes to institutions and practices.

The Furman Review and the EU Commission Report both proposed stricter prohibitions for specially selected players as well as speedier enforcement action.<sup>5</sup>

This paper identifies that, in part, the problem is caused by past practice of looking at short term consumer welfare. Authorities now need to refocus on the promotion of competition and consumer choice.

FREEDOM TO CHOOSE SHOULD BE THE CENTRAL IDEA BEHIND COMPETITION POLICY

In part the problem is also simple inaction; the solution is in taking action and doing so quickly, but, in addition, a fundamental idea needs to be re-established.

### FREEDOM TO CHOOSE IS THAT CENTRAL IDEA:

- Freedom to Choose is the basic idea driving markets to produce ranges of goods and services that people want. It is why we have a rich and colorful range of goods on our shop shelves.
- Freedom to Choose creates incentives on firms to create and innovate. That continuous creativity needs to be stimulated and protected.
- Freedom to Choose has a political dimension. If people feel they have no choice, and nowhere to turn; if our horizons are crowded and our world is one of coercion and constraint; it easily becomes one of resentment.

DOING NOTHING VERY MUCH ABOUT KNOWN ISSUES APPEARS TO BE THE PREFERRED RESPONSE FROM OFFICIALS

5. Competition Policy for the Digital Era, 4th March 2019

At a further level of detail, many of the recent reviews accept that some transactions that were not looked at were likely to have been anticompetitive.

Many were by dominant companies – and the deals would have enhanced or increased their dominance, contrary to the law. But they were never even reviewed.

The reports don't propose that any deals should be unwound. Nor do they propose that the unexamined should now be put under the microscope.

They propose some change but, in principle, too little. None of them address how to restore confidence in institutions.

It is nevertheless clear that truth and reconciliation imply a recognition of the causes. A clear break from the past is now needed.

Logically, where markets have become uncompetitive then the restoration of competition and promotion of consumer choice is required.

But a clear break from the past requires political support.

How the market works is so central to politics it is surprising that the activities of competition authorities have operated largely outside the mainstream political debate for so long. Anything that affects life chances, and outcomes for ordinary working people is always going to matter a lot.

6. See T May's articulation of the "citizens of nowhere" and Stephen Kinnock and Joe Jervis "Spirit of Britain Purpose of Labour." 2019 7. See Sir Vince Cable's speech "Taming the Tech Titans" May 2018

## GIVEN THE POLITICAL IMPLICATIONS, WHY HAS COMPETITION POLICY REMAINED OUTSIDE MAINSTREAM POLITICAL DEBATE?

Competition policy is already in the spotlight in elections. The functioning and structure of markets (or the control or nationalisation of the means of production) is key to the debate between the historic political divisions of Left vs Right in many western democracies.

In political science terms competition policy is also highly relevant to the new divisions between "cosmopolitan" and "communitarian" visions of the world.<sup>6</sup>

For example, in a communitarian future local communities and high streets need to be nurtured and the social value of location and community recognized. At present the issue of plurality and diversity of businesses in local communities has been ignored to the benefit of multinationals promising efficiency and lower prices.

The "March of the Tech Titans"<sup>7</sup> has had a clear and obvious impact on smaller businesses. The difficulties competing with the likes of Amazon are being felt everywhere. Soulless and deserted town centres are as much a consequence of current competition policy as they are of fiscal policy – or a combination of other policies that have ignored the importance of locality and communities.



## DESERTED TOWN CENTRES ARE AS MUCH A CONSEQUENCE OF FAILED COMPETITION POLICY AS ANYTHING ELSE

Some countries, such as the UK, have suggested addressing the issue through the tax system.<sup>8</sup> Others, such as Germany, have used access to platforms and competition enforcement policy. This approach sees non-discriminatory use of online market-places and platforms as a vehicle for small businesses to sell their wares worldwide; re-establishing the original promise of open and fair markets to recreate an open and fair internet and a role for people at its centre.

### WHAT DOES THIS MEAN FOR PEOPLE IN THE STREET?

For one thing it means that people see the shiny objects in their hands and know that something is wrong. In the past 18 months they have learned that their personal space is being invaded. They now know their data is traded for profit; that they are living in filter bubbles; and that they are being fed a daily diet of fake news and falsehoods.

Concentrated markets and lack of choice, the use of news feeds rather than news publications are also destroying freedom of choice in a different way.

Freedom in a democracy depends on quality of information, a variety of viewpoints and diversity of opinion. People are increasingly only presented with pre-screened and limited choices. Options that have been 'tailored' to 'their' past inferred preferences and skewed by the financial incentives of the dominant platforms.

## PRESENTING PEOPLE ONLY WITH PRE-SCREENED AND 'TAILORED' INFORMATION UNDERMINES THE PLURALITY ON WHICH OUR DEMOCRACIES DEPEND

### FREEDOM TO CHOOSE HAS BEEN REPLACED BY MASS MANIPULATION.


Competition authorities deny they have a place in ensuring plurality in supply. This paper argues this approach is misguided.

Since productive efficiency and increased innovation are recognized as central to the operation of all markets then plurality and diversity are important in all markets. Innovation is optimal when there are a good number of players. Market structure is, in fact, important, in all markets.

8. See the Chancellor Philip Hammond's 'Amazon' speech to the Conservative Party Conference 2018.



## RECOMMENDATIONS



### PROMOTION OF COMPETITION AND CONSUMER CHOICE SHOULD REPLACE 'CONSUMER WELFARE' AS THE TEST FOR ACTION

This paper makes three recommendations:

- First that the test for action on competition should be the promotion of competition and consumer choice.
- Second, remedial action means actively taking steps and imposing remedies to restore competition and consumer choice.

It may mean that current businesses may need to be broken up; or that layers in the technology stack are opened-up and access remedies created to enable competition to thrive.

- Third a clear break from the past is needed; the authorities have to get a lot more active and move more quickly.

These three things can probably and most easily be achieved ***through a public prosecutorial system*** as was the favored option in the UK until very recently.

# WHY 'FREEDOM TO CHOOSE'?


*What do Facebook, Google, Amazon, Theresa May and Jeremy Corbyn have in common?*

On the face of it – not much. But a moment's thought reveals that they all use coercion – and don't like freedom of choice.

Facebook harvests people's data and promotes ads. Google harvests data and promotes its own ads for its own products. Amazon is likewise a place where people are farmed for their data and provided with products to meet their every need. We have seen the backlash against tech or "Techlash" – and EU level findings of massive levels of manipulation and record breaking multi-billion Euro fines.

Theresa May has been trying to force MPs into supporting her Brexit deal reducing choice to her deal or "No deal". This provoked a backlash from her own MPs and disagreement in the House of Commons given there are many other choices, including a referendum on the deal, staying in the EU and revoking Article 50.

Meanwhile, Jeremy Corbyn wants to nationalise industries and make decisions for us all; whether we want them or not.



FREEDOM TO CHOOSE IS  
AN ESSENTIAL BULWALK  
OF OUR LIBERAL  
DEMOCRACIES

Coercing someone into making decisions, whether in business or politics, is very different from informing and persuading. In some cases it can be illegal. In all cases it is annoying. In many cases it provokes a backlash.

Let us hope that feeling of resentment can be channeled into reform. After all, freedom to choose is essential to basic economic, press and political freedoms - and essential to liberal democracy.

Free and individual choice is a unifying idea; and may be one of the few things that everyone agrees everyone should have<sup>1</sup> even if we disagree on its limits. Freedom, for a person choosing a newspaper, looking for things online, or making decisions in a polling booth is about freedom to choose. Being able to choose requires certain basics: unbiased and unvarnished information and basic facts free from manipulation of what one is and is not allowed to see.

1. And it may also have got us all kicked out of the garden of Eden, but, while wide ranging, this paper avoids religion.

## *Free choice also requires there to be alternatives to choose from.*

We have many laws that protect our freedoms; free speech, freedom to associate, freedom to vote – perhaps least known and most important is competition law that guarantees that there are multiple suppliers to choose from.

With monopoly and oligopoly being the enemy of free choice, competition law is an antidote to “economic concentration”. It controls mergers and prevents dominant players and cartels from stifling diversity. It can be used to break companies up and to create choice.

However, it needs to be enforced to be of any use.

Now, given public recognition that tech platforms are a daily problem, after calls from leading politicians to break them up, formal public consultations are underway on competition policy and its enforcement. Parallel consultations are running in the UK, the EU and the US.

**REFORM TO COMPETITION  
POLICY NEEDS TO ADDRESS  
BOTH ECONOMIC AND  
POLITICAL FREEDOMS**

We also know that Facebook and Instagram were used as vehicles of Russian interference in the US election; demonstrating that information can be controlled to affect both economic and political choice. Any reform to competition policy needs to address both economic and political freedom.

## *A refreshed democracy is possible if it can promote people’s freedom to choose in both dimensions.*

Until now, competition policy was seen as the preserve of technocrats and competition lawyers; not an area of law that makes the blood boil or is appropriate for broad public debate.

**POWER OVER FREE CHOICE  
IS EQUALLY UNWELCOME,  
WHETHER IT IS EXERCISED  
BY DOMINANT PLAYERS,  
CARTELS, OR THE STATE.**

That is changing. I outline below that a renewed focus on the importance of freedom of choice to deliver innovative markets suggests that freedom of choice is central if not the **central policy goal** that underpins both free markets and liberal free market democracy.

Coming at a time when the political left or right are claiming that greater public intervention in markets will lead to public benefit, Power over free choice is equally unwelcome, whether it is exercised by dominant players, cartels, or the state.

# INNOVATION IS DRIVEN BY FREE CHOICE

When choosing what they want to buy, people stimulate businesses to supply. And when people choose what they want to do with their lives they need choices to allow them to fulfil their potential; whether choice of employer, career or calling.

People's choices create diversity.<sup>2</sup>

Take beer as a well-known example. Basic ingredients are all the same: malt, hops, sugar and water - and a bit of yeast. We can imagine how early brewing came about, and how it created similar watery, warm undifferentiated products for many years.

Today we have hundreds if not thousands of different varieties of beer, or lager or stout or whichever appellation and derivation applies or appeals to meet individual tastes and taste buds. And those tastes need to be packaged and presented. Tastes also change, meaning businesses need to adapt themselves and need to be dynamic to meet or anticipate changing demands.

It is often a race to keep up or a race to persuade people to buy more of one product or brand than another. Even now, craft brewing can be started by budding brewers with limited means to meet changing demands.

2. The example of competition driving differentiation was explained to me many years ago in by Paul Grout - Professor of Political Economy at Bristol University. It is a readily understandable example of the process - while it is not the full story of competition in beer and ignores important issues that come from tied houses and intervention over many years.

The dynamic is one that drives constant product innovation and differentiation; a virtuous cycle of competition and innovation.

*It is only partly about the price of a pint.*

There is a social side to this as well - the process creates the world around us, of breweries, pubs, communities, and a very British way of life. All built on people's choices.

## ALL MARKETS ARE REGULATED MARKETS

We also know that suppliers seek to avoid people having too many choices. There is an urge to limit too much competition - why should brewers or bakers in a 13th century town compete with one another? Why not form a guild, limit membership and set prices? Or simply agree not to compete? Alternative players and choices can then be limited, prices can then rise, and the effort involved in competing and innovating can be avoided - but that way consumers pay more and benefit less. So, from before medieval times we have regulated markets. Roman markets were regulated markets.

IT IS ONLY NATURAL FOR SUPPLIERS TO WISH TO LIMIT FREEDOM OF CHOICE - WHICH IS WHY MARKETS MUST BE REGULATED

If beer is thought of in some ways an unworthy or inappropriate example for a discussion of policy, other examples could be given.

Perhaps most worthy would be innovation in healthcare.

Healthcare is perhaps where modern innovation has the greatest claim on being able to increase human health and happiness – with waves of insight, innovation, and new technology increasingly treating previously life-threatening conditions.

Recent advances in collecting Big Data sets and Big Data analytics now allow companies to identify illnesses and develop treatments more easily and quickly.

One advantage of Big Data is that it allows interrogation of massive data sets of human activity by computers, cross correlating and identifying trends and health conditions early, and allowing new prescriptions and remedies to be fashioned. Big Data analysis of health and other data in Scandinavia (through cloud computing and cross-correlation of massive data sets) enabled one company to identify the fact that 1 in 20 thousand red headed cyclists had a life-threatening heart condition if they ate bananas in the morning before cycling; and to prescribe a different breakfast!

*However, healthcare is also an example of the risks.*

In 2014 Google bought Nest (smart home devices) and DeepMind. DeepMind mines data and develops artificial intelligence. It uses UK health records, and Google made public assurances that it would not change the contracted protection of personal data for the Royal Free Hospital patients that DeepMind had obtained.

In November 2018 Google absorbed the company and questions have been raised about data protection that remain unanswered.

Hopefully, even these few examples show how important the innovation engine is to the economy. And that it is a process that is dependent on the first step: the exercise of free consumer choice.



To be clear, the process of competition or rivalry between firms informs customers about the attributes of different products and discovers and meets customer needs. But meeting consumer choices is the key process that requires firms to adapt and differentiate.

## PRICE COMPETITION - THE MAIN FOCUS OF 'CONSUMER WELFARE' ASSESSMENTS - IS INSUFFICIENT TO DRIVE PRODUCT INNOVATION

Price competition, often the primary focus in consumer welfare assessments, while a feature of competition between different products, is not the start of the process and doesn't on its own deliver innovation and product differentiation.

It may deliver lower prices and pressure on companies to escape commoditisation, a spur to creation of new and better products, to compete and add a different flavour to the mixture, to present the potion in a different way, or to innovate in processes or organisational change to cut costs and avoid the fate of thin margin commodity businesses.

Beer is also an example of something that could be a thin margin commodity product – but the innovation driven by customer choice delivers diversity and variety to meet widely differing consumer preferences. This explains the existence of Guinness.

### FROM FREE CHOICE TO MASS MANIPULATION

Data and big databases about people's needs, wants and desires is the current battleground among many companies including the Tech Titans.

Before people know what they want they have to have information about it – and those that have billions of search histories or can track previous purchases can anticipate what people like and anticipate what they will want.

However, power over data and the ability to manipulate consumer attention can easily distort customers' ability to make free choices. When every search is 'tailored' by previous usage, and every search page 'prioritised' with suppliers' products, when customers have been led into thinking they are getting the most relevant results, people start living in their own bubbles and become insulated from alternatives.

*When choice is 'managed', our choices our narrowed and our freedom is affected.*

The major platforms have become machines for the manipulation of people's choices. These manipulation machines have control over, or already limit, what people see, and probably what they think they might want and the opinions they form.

Facebook's experiment with its news feed has been shown to affect people's moods, its "Like" button to give people a buzz of recognition and reinforcement and its business can be used to undermine opinion and the free press.

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*"Of all the social goods now in flames the one we must protect first is trustworthy journalism. In the nine years since Google bought the mobile ad company AdMob, annual ad revenue at Google and Facebook has soared, to more than \$95bn and almost \$40bn, respectively. During this period, ad revenue at newspapers fell from around \$50bn in 2005 to under \$20bn today."*

**Barry Lynn**

*Open Markets Institute*

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As most recently disclosed by the UK Department for Digital, Culture, Media and Sport (DCMS), under cover of ancient Parliamentary jurisdiction, and via the US Congress, Facebook's system provides the ability to manipulate and distort people's free choices and is likely to have affected the US election; so, influencing what they buy is perhaps 'small beer' by comparison?

*So...if freedom and democracy demand 'eternal vigilance', how do we watch over and keep the system working?*

Laws exist.

They oblige publishers to research and investigate and publish facts or face the consequences in court when they libel or misrepresent and denigrate reputations. Laws also exist to maintain plurality of the media – e.g. the 21st Century Fox/Sky decision by the Competition and Markets Authority (CMA) which would have required separation of Sky news to preserve plurality of the news media.

Laws also empower competition watchdogs to prevent or prosecute those that would join forces with competitors or act in a way that causes the market mechanism to fail.

Laws left unenforced are, rather obviously, less than useless.



**LAWS, LEFT UNENFORCED,  
ARE, RATHER OBVIOUSLY,  
LESS THAN USELESS**

To be fair the authorities do routinely challenge cartels and abuses of market power and vet mergers to prevent the market from becoming uncompetitive. Merger to monopoly or merger to oligopoly can be prohibited. The powers exist to investigate business activity that abuses a dominant position and massive fines can be imposed.



However, for the past 20 or 30 years they have not been used to block mergers and control the abuse of dominance as often as they could have been.

I will return to the current competition policy debate in a moment before the briefest diversion into the politics, philosophy, economics and wider legal context which is so important to appreciate why competition policy is a dry subject but is in fact important to the wider world.

# POLITICS, PHILOSOPHY, ECONOMICS AND THE LAW

*At a political level the market mechanism with its outcome of variety and abundance is associated with the narrative of Western civilization.*

Famously, according to Francis Fukuyama, the success of the market mechanism contributed to the fall of the Berlin wall and the “End of History?”

In principle, the so called “free market” system operates on choices being freely made by millions of people delivering the greatest good to the greatest number.

By contrast, notorious examples abound of the perils of state planning and state defined socialism’s inability to understand the fine detail of people’s needs or keep foodstuffs on shelves.

Drab state-controlled markets seem to have existed in a colourless parallel universe for much of the twentieth century, where faceless planning was blamed for the useless products that people did not want.


This narrative suggests that the open market mechanism and its basis in liberal philosophy naturally overcame the alternatives. Fukuyama argued that the worldwide spread of liberal democracies and ‘free market’ capitalism of the West signalled the

end point of humanity's sociocultural evolution and became the final form of human government hence his question as to whether this was “The End of History?”

*However, the truth is that there is no such thing as a free market. All markets are regulated. They only work well for society if regulated well.*

The opening-up of trade and previously closed sectors such as financial, telecoms and utilities to competition involved “liberalisation” – also known as the regulation of previously monopolised markets.

That liberalisation led to new investment, new business and the 1980’s financial and 1990’s tech boom.



**THE FAILURE OF MARKETS  
TO DELIVER BROADLY  
SPREAD PROSPERITY IS A  
FAILURE OF REGULATION  
AND ENFORCEMENT**

Currently, as shown in the Technopoly report and elsewhere<sup>3</sup> markets are not expanding, productivity is low and investment is weak. Dividends and profits are up for some big players - and income inequality is increasing.

People are uncertain as never before.

3. See reports referenced in ‘Technopoly’ and what to do about it- Res Publica June 2018.

Policy makers are concerned about robots and artificial intelligence driving down wages.

Massive differences in wealth and opportunity can be blamed on failure of the market to deliver for enough people.

In contrast to 1990 or even 20 years ago, in 2019 it can now be said that the market mechanism delivers conspicuous consumption and a celebrity lifestyle for the few.

This may be less as a result of the failure of the market mechanism and more because of failure of regulation and limited enforcement.

People feel they have missed out, and the system is to blame. They may be right. The populism in the US, EU and UK all rest on people's "lack of control"; and lack of choice. We know also that:

*as a result, democracy as currently practiced is losing the trust and confidence of those it seeks to govern.*

The 'long twilight struggle' that took place in the cold war was between clearly defined ideologies. The market outcomes visible at the end of the 1980's were a product of decades of intervention by the competition authorities.

What is not widely known is that the philosophy of the authorities gradually changed, starting in the early 1980's. The Reagan administration in the US was about reducing state intervention in the economy, supposedly to give people liberty.

But the approach adopted meant that it gradually became easier for big companies to acquire small rivals. In simple terms the system gradually adopted a central idea that "consumer welfare" should be the starting point and goal of intervention.



THE CHANGES INITIATED  
UNDER REAGAN  
HAVE FAVOURED BIG  
COMPANIES WITH HUGE  
ECONOMIC ADVANTAGES

The consumer welfare standard does not focus directly on consumer choice or assess the dynamic of the market or the levels of innovation taking place. The danger is that it leads to an excessive focus on consumers and the prices charged to them. And it supports the argument that efficient delivery can be achieved by a smaller number of very big companies enjoying huge economic advantages.

3. See reports referenced in 'Technopoly' and what to do about it- Res Publica June 2018.

## *There has been a battle for the soul of the competition law system for about 15 years.*

Debate has taken place between the US vision of consumer welfare and a more European position centred on choice and economic rights.

Whatever, the outcome is increasingly concentrated markets and a crisis of confidence in the system.

The Federal Trade Commission is conducting hearings. The EU Commission has opened a consultation. The UK Treasury has launched a review. Former chief economists at the US Department of Justice such as Carl Shapiro and Fiona Scott Morton have recently accepted that many criticisms of consumer welfare policy with its over focus on only the consumer could be to blame.<sup>4</sup>

### **CURRENT CONTEXT**

Returning to the current context and discussion, we have seen European Commission investigations of Google that find it to be dominant and to have abused its dominance in many ways - from promotion of its own products into search rankings through tying and bundling products such as search and maps together with Android into a wide variety of smartphone and computer products.

Amazon is currently being investigated for its ability to gather data about what we might be thinking of buying and substituting its own products for those of smaller businesses available through its platform, limiting customers' freedom of choice.

Amazon is also seen as a major competitive threat to the high street and featured in the UK Chancellor's speech to the Conservative party conference - to much acclaim and banging of desks.

## *Some of us have been raising issues about the system failing for some years.*

Since 2016 the Economist magazine has shown that a small number of big companies populate a wide range of markets. Whether the consumer welfare standard has allowed monopolies to develop and whether it has allowed certain types of business to prosper at the expense of innovation and the competitive process was also raised in the dying days of the Obama presidency as an issue by his Council of Economic Advisors.

The UK Treasury review is led by Jason Furman - who led Obama's review - giving us hope that some in government are concerned and listening.

In preparation for the annual meeting at Jackson Hole of the worlds' central bankers in August 2018, the Bank of England investigated the implications and impacts of increasing concentration

4. See FTC hearings available online. Professor Tim Wu is pressing for a change that would mean the authorities should focus on the 'protection of competition'. However, this may involve less action than needed and compound the current culture within public institutions where failure of initiative is rewarded. It also overlooks innovation, and innovation intensity, that could be measured.

on macro-economic policy. It noted increasing mark ups and profits from what may be an increasing number of oligopolies. A small number of “superstar” companies attracting unequal levels of wealth and power was referenced in August 2018 by the Bank as a “concern”.

The CMA’s current consultation on its 2019 annual plan begins by stating:

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*“In uncertain times, and with increasing and accelerating changes in the world, our work to protect consumers and make markets work in their favour is particularly important. Unease about globalisation, low or negative growth in real incomes and concerns over business practices have fuelled widespread discontent. A sizeable part of the public has lost trust in public institutions to solve their everyday problems, and feel they have no one to turn to. And if a general feeling of unfairness erodes trust in competitive markets, then everyone will lose out.”*

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These are not a hysterical set of observers – and they have the power to do something about it.

But what?

That is the subject of the closing section.

## WHAT COULD BE DONE?

So much for skating through politics, philosophy and economics. The emerging outcomes in the current debate suggest that there are two main issues that need to be addressed:

First - the central policy question:

*Should we continue to focus on short term consumer welfare when examining cases or, more probably, focus on what affects freedom of choice, the competitive process and innovation, particularly in digital markets?*

Second:

*Is greater enforcement of the law needed?*

### THE NECESSARY LEGISLATIVE FRAMEWORK IS IN PLACE

UK and EU competition law is drafted in wide and general terms. It is based on ideas of a social market economy and does not require a focus only on short term consumer welfare.

Consumer choice and a focus on innovation could be taken as the touchstone of policy and there is a vehicle for doing so – the Ministerial Steer - currently under consideration by a combination of Treasury, the Department for Business, Energy and Industrial Strategy (BEIS), and DCMS.

I have suggested changes in my submission to the Treasury review.

Whether markets are competitive enough is the central issue.

Firms under the spotlight include Amazon, Google, Facebook and Apple. These firms have a lot in common with previous firms that became dominant, from Microsoft and Intel to telecommunications and public utilities. They are very high fixed cost businesses with low variable costs. Each additional unit of production is often achieved at very low cost.

MONOPOLY IS THE NATURAL OUTCOME OF THE NATURE OF THOSE FIRMS THAT BECOME DOMINANT

In these circumstances, markets become monopolized.<sup>5</sup>

When assessed against a consumer welfare standard such businesses will almost always be able to show that they can acquire, integrate, and offer services at prices that are lower than their competitors. Indeed, this is inevitable if they are efficiently running a communications platform.

THE ISSUES WE ARE FACING TODAY ARE LITTLE DIFFERENT FROM THOSE OF A CENTURY AGO - AND WE HAVE EFFECTIVE REMEDIES

5. As recently noted by Jean Tirole

We know this because the monopolisation of telecoms markets happened over a century ago for the same reason: competition cannot survive when faced with the scale, scope, and externality advantages established early on.

Faced with these advantages there are inevitable winners and losers; markets will always “tip” and competition will fail.

However, efficient platforms could be used by all, and a common remedy, known as **the access remedy**, can be used to allow tech platforms to support the wider economy and provide social benefit as well as private profit. More details of how the access remedy could work are provided below.

Most fundamentally:

*agencies need to focus on those businesses that are either already dominant or likely to become dominant.*

This means close scrutiny of a few - the few who are socially important.

*The authorities can enforce the law more effectively and at a faster pace.*

At present the rate of enforcement is appalling.


What do Intel, Microsoft and Google have in common? The cases against them each took 10 years to build. The CMA last year announced a welcome 30% increase in its enforcement actions – but its numbers of cases are only just out of single figures.

## CHANGE POLICY TO FOCUS ON PROMOTING FREEDOM TO CHOOSE

...and drive innovation and investment.

Where ‘consumer welfare’ could allow merger to monopoly or oligopoly, “promoting free choice” would instead promote competition and innovation and promote greater levels of investment in a range of businesses.

Authorities should actively intervene to promote competition, choice and innovation.



WE DID IT WITH TELECOMS.  
WHAT IS STOPPING US  
DOING IT AGAIN FOR THE  
TECH OLIGOPOLIES?

Because we knew this was important for a few types of business, we knew we could liberalise and open up telecommunications. In the 1990's each market in the EU was monopolised, but we legislated to open them up to competition, promoting entry and innovation in a system designed to liberalise markets to create and promote choice, and to create new players for customers to choose from.

The promotion of competition could be applied to all markets aligning our approach to liberalisation to ensure dynamic markets across the board.



## WHAT DOES IT MEAN?

Promoting freedom of choice means ensuring multiple sources of information. This involves plurality of data and of the media – not just traditional media and broadcasting but all media that informs and competes for user attention because it influences opinion and choice.

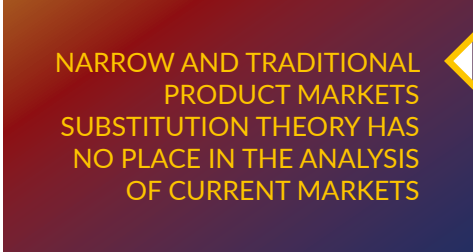
Narrow and traditional product markets substitution theory has no place in the analysis.

People's ability to make choices is influenced in ways that are increasingly insidious.

Facebook's former employees have blown the whistle on the use of behavioural psychology to train people to "Like" postings; and those that are followed endorse products that are then bought.

The CMA has, to its credit, investigated online gambling which uses variable rate reinforcement techniques to draw in gamblers, and train and alter their behaviour so they spend more and more time online, increasing the risk of addiction.

These practices abound among the attention merchants. They have created filter bubbles where people's views are reinforced not challenged and debated. This is a known issue and one that needs to be addressed urgently - promotion of impartiality of news and editorial independence is a well-known method for addressing plurality and diversity of news and views in broadcasting and probably needs to be extended to all media.



NARROW AND TRADITIONAL  
PRODUCT MARKETS  
SUBSTITUTION THEORY HAS  
NO PLACE IN THE ANALYSIS  
OF CURRENT MARKETS

## MORE AND FASTER ENFORCEMENT

*Simply enforcing the law more effectively and more quickly would make a massive difference in a very short time.*

On the tech cases, both EU and UK authorities can address issues such as bundling and vertical integration through non-discriminatory access conditions.

Access to Google, Facebook, Apple or Amazon's platforms could thus be assured for competing businesses and they should be able to trade on non-discriminatory terms through these platforms.

BT's monopoly over telecoms networks in the UK is similarly addressed through non-discriminatory access obligations designed to secure competition – it is for this reason that Sky and others can use BT's network to provide competitive broadband services to consumers. It works well. BT's income increases and, more importantly, it has had to innovate to compete – see for example BT Sport.

**OTHER BUSINESSES SHOULD  
BE GIVEN OPEN AND NON-  
DISCRIMINATORY ACCESS  
TO THE DOMINANT TECH  
PLATFORMS**

We can only imagine the opportunities for hundreds if not thousands of small businesses if they could more easily trade through the major platforms.

As with BT, the value of the underlying platform is likely to be higher if people can use it to find what they want and trade with who they want in a market place where people have freedom of choice – and that freedom is guaranteed under the oversight of the authorities.

We can also only imagine the investment opportunities and energy that would be unleashed if this were to be done in an effective way on an industrial scale. It is currently being considered, with relation to a series of individual cases – but which are simply taking too long to investigate.

This is a management issue. The authorities claim lack of resources. But they have considerable resources. They do not deploy them on abuse of dominance or merger by dominant companies – but instead are reviewing many hundreds of mergers of big companies above certain administrative turnover-based thresholds.

These are largely a waste of time – for both the companies and the authorities concerned. In the meantime cases that should be considered go un-reviewed. (Except in Germany and Austria which have changed their thresholds recently).

*The review of deals only “above the thresholds” is a classic piece of well-meaning administrative failure.*

Dominant tech companies regularly buy up companies to increase that dominance whether through buying up potential rivals (known as “kill in the crib mergers”) or by denying others strategic competences, or additional integration benefits – such as buying up a small player and promoting it over rivals – see Google’s acquisitions of maps and navigation from Keystone and Wayze; or its acquisition of insurance firm Beat that Quote; or YouTube; or Facebook’s acquisitions of WhatsApp and Instagram; etc. Only the occasional merger gets blocked – such as H3G’s proposal to buy O2.

As a result, one eminent leading practitioner said to me when I was a General Counsel at BT:

*“competition law is like lightning – it hurts when it hits but it strikes on a random basis”.*

## BENEFITS OF POLICY CHANGE

The potential benefits from coherent enforcement focused on preventing or controlling individual or collective dominance in markets and promoting freedom of choice and innovation would be considerable.

BY BEING CAPTURED BY 'THRESHOLDS', COMPETITION POLICY HAS ALLOWED BIG TECH TO KILL COMPETITION - AND CHOICE - AT BIRTH

How many markets are not dependent on technology in the 21st Century?

All consumer choices are information dependent and all sectors of the economy will be directly affected by lack of relevant information and decisions made for us by the digital platforms.

Much in our society depends on economic freedom. We live in what has been described as the Age of Uncertainty.<sup>6</sup> One key point is that a feeling of lack of control and lack of money are linked. These are real feelings that are driving people's decisions. In the past few years it has become clear that people's feelings of uncertainty run deep – and we know that it is based on economic uncertainty.

Between 30%-50% of British people have no savings and are in considerable debt – with average debt at about £30k per head – and 113% of average earnings – and increasing. Two hundred and seventy-three people a day were declared insolvent or bankrupt in July to September 2018. This was equivalent to one person every five minutes and sixteen seconds.<sup>7</sup>

If there is no extra money at the end of every month any change is suspect. The politics are well known. People's fear of change was used, and was a disaster, for the Remain campaign. It added to people's fears – and was always going to be less attractive than promising them a better life –and more control.

Is it such a big insight to say that economic instability is likely to feed political opportunism?

*How can we give people more control and more freedom?*

Perhaps we should start with what people do every day.

FAILURE OF COMPETITION POLICY TO TAME DOMINANT PLAYERS IS KILLING THE SPIRIT OF ENTREPRENEURSHIP - WITH HUGE CONSEQUENCES

6. See John Kenneth Galbraith: The Age of Uncertainty and possibly more importantly Milton Friedman's "Freedom to Choose"

7. According to themoneycharity.org.uk/November 2018. But an improvement on its report up to July which found 301 people a day were declared insolvent or bankrupt in April to June 2018. This was equivalent to one person every 4 minutes and 47 seconds.

More people in the UK are employed by small business than anything else. Small businesses involve a sense of ownership and changes the way people think about themselves.

Entrepreneurship reinforces certain values. Values like opportunity, self-sufficiency and responsibility, both for ourselves and for others, be they customers, employees or suppliers.

We understand that succeeding or failing on our own merits changes the way people look at themselves, and the world. Small businesses do things in different ways and create diversity.

However, opportunity must be truly open and the economy free for each and every one of us to pursue our own goals.

*People won't be willing to spend money, sweat, time and tears on their own venture if the market is rigged against them.*

People are willing to take risks, but not foolish risks. Innovation, like entrepreneurship, is risky. It costs money. It takes time. It often fails. Therefore, common sense tells us that there will be a lot less of it if markets are not driven by free choice and are not open to competition from businesses that have a better idea.

Currently, on the supply side, dominant players in the tech sector buy out better ideas and stifle competition and innovation; undermining confidence and opportunity. They touch every market.

It has also served to breed a corrosive culture in the world of early and mid-stage investment capital. In the UK, almost nobody in the venture capital and related worlds now aspires to build world beating companies. The focus is on early exit through a trade sale to a dominant player (usually American and increasingly Chinese) with lots of cash collected through rent-taking. Does this provide any hope of building a sustainable UK economy and leveraging the UK's well recognised strengths in innovation?

A belief that open and free markets serve consumers and allocate resources is a cornerstone of an open and free press and an open and free democracy. It is based on enlightenment thinking that the market provides the greatest happiness for the greatest number.

Alternatives include state controlled or state owned or other authoritarian systems of production and consumption which don't deliver because they can't. And monopolies are the commercial equivalent of authoritarianism.




**LIBERAL DEMOCRACY  
BASED ON OPEN, FAIR,  
COMPETITIVE MARKETS IS  
THE BEST WAY TO PROVIDE  
FOR THE COMMON GOOD**

Liberal democracy, based on free and open markets, is arguably the most successful mechanism that people have created – and one that provides opportunity for everyone to fulfil their needs wants and desires. But our experience shows that, left to their own devices, markets can become oligopolies and monopolies.

Most fundamentally, liberal democracy is about freedom from coercion. Coercion leaves people feeling caged, cribbed and confined – we do bow down to “what force must have us do” – but we feel that we don’t have control.

And we resent it.


Opportunity and hope are linked - and freedom of choice requires economic freedom – and as I said before - there is no such thing as ‘a free market’. All markets are regulated. They only work well for society if well regulated.



COMPETITION POLICY  
IS CURRENTLY FAILING  
THE PROMISE OF LIBERAL  
DEMOCRACY TO PROVIDE  
CHOICE NOT COERCION

Effective competition policy, rapidly and effectively enforced, is a central part of the promise of liberal democracy.

Currently it is failing us all.



'THE DOGMAS OF THE QUIET  
PAST ARE INADEQUATE TO  
THE STORMY PRESENT. THE  
OCCASION IS PILED HIGH  
WITH DIFFICULTY AND  
WE MUST RISE WITH THE  
OCCASION. AS OUR CASE IS  
NEW, WE MUST THINK ANEW  
AND ACT ANEW. WE MUST  
DISENTHRALL OURSELVES,  
AND THEN WE SHALL SAVE  
OUR COUNTRY!

Abraham Lincoln









# RADIX



THINK  
TANK  
FOR THE  
**RADICAL  
CENTRE**

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