# ABUSE OF A DOMINANT POSITION – SOME THOUGHTS ON THE FIRST PANEL

BRUSSELS CONFERENCE NOVEMBER 7, 2018

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# A PROBLEM OF POWER

# TOP 5 CAPITALIZATION COMPANIES OVER TIME: IN 2016, ALL TECH

# "WINNER-TAKES-MOST" WORLD

- Network effects create high inequality among companies in sales and profits
- Larger scale increases profits exponentially
- Very concentrated markets
- Top company has much higher sales and profits than the second one; second one much larger than third, etc.
- Often the fourth or fifth largest company are too small to make any difference in the market structure
- 'Superstar firms' command growing market shares and become highly profitable, one may observe a larger decline in labour's share: D. Autor, D. Dorn, L. Lawrence, F. Katz, C. Patterson & J. Van Reenen, 'Concentrating on the Fall of the Labor Share', (2017) 107(5) American Economic Review 180

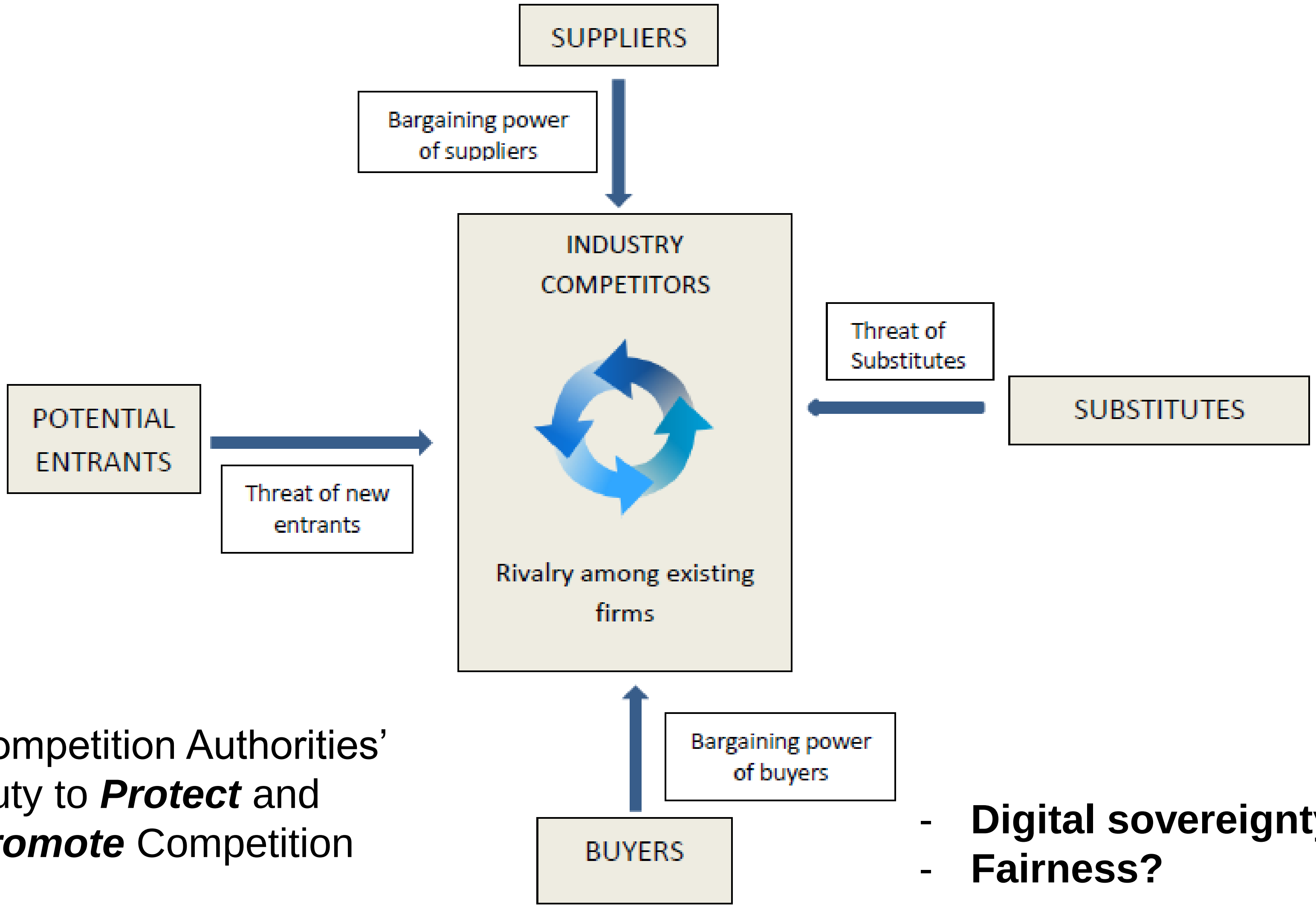
- Successes: Windows, Google, iPhone, Facebook, Adobe, LinkedIn, Visa, MasterCard, Amex, Alibaba, WeChat (Tencent). BUT ALSO Failures: Betamax, IBM OS/2, Blackberry, Discover Card

# DIFFERENT FORMS OF POWER

- Modernising the law on abuse of market power - Report for the Federal Ministry for Economic Affairs and Energy
  - ‘Digital markets - and markets characterized by digital platforms in particular - pose new challenges to competition law when it comes to market definition. Hence, there are good arguments for more flexibility in the assessment of dominance. Instead of requiring competition authorities and courts to always define markets first, as is currently the case, it can make sense, in some cases, to simply infer dominance if it can be established that some unilateral conduct is not sufficiently disciplined by competition and this practice has an exclusionary effect’.
  - Relative or superior market power under § 20 para. 1 or para. 3 GWB

- **Dimensions of power relevant for competition law analysis**
  - Seller power
  - Buyer power
  - ‘Intermediary power’
    - ‘a significant ability to steer "information consumers" to certain offers, and thereby to affect – and possibly restrain – competition’
    - Relevance of a platform in mediating access to sales or supply markets – in particular where the market power of platforms vis-à-vis retailers which are active on the platform is in question
    - A separate question whether "intermediation power" can also exist vis-à-vis firms that do not have a market relationship with the platform (e.g. firms listed on horizontal search platforms)

# A PROBLEM OF UNIT OF ANALYSIS FOR COMPETITION ASSESSMENT

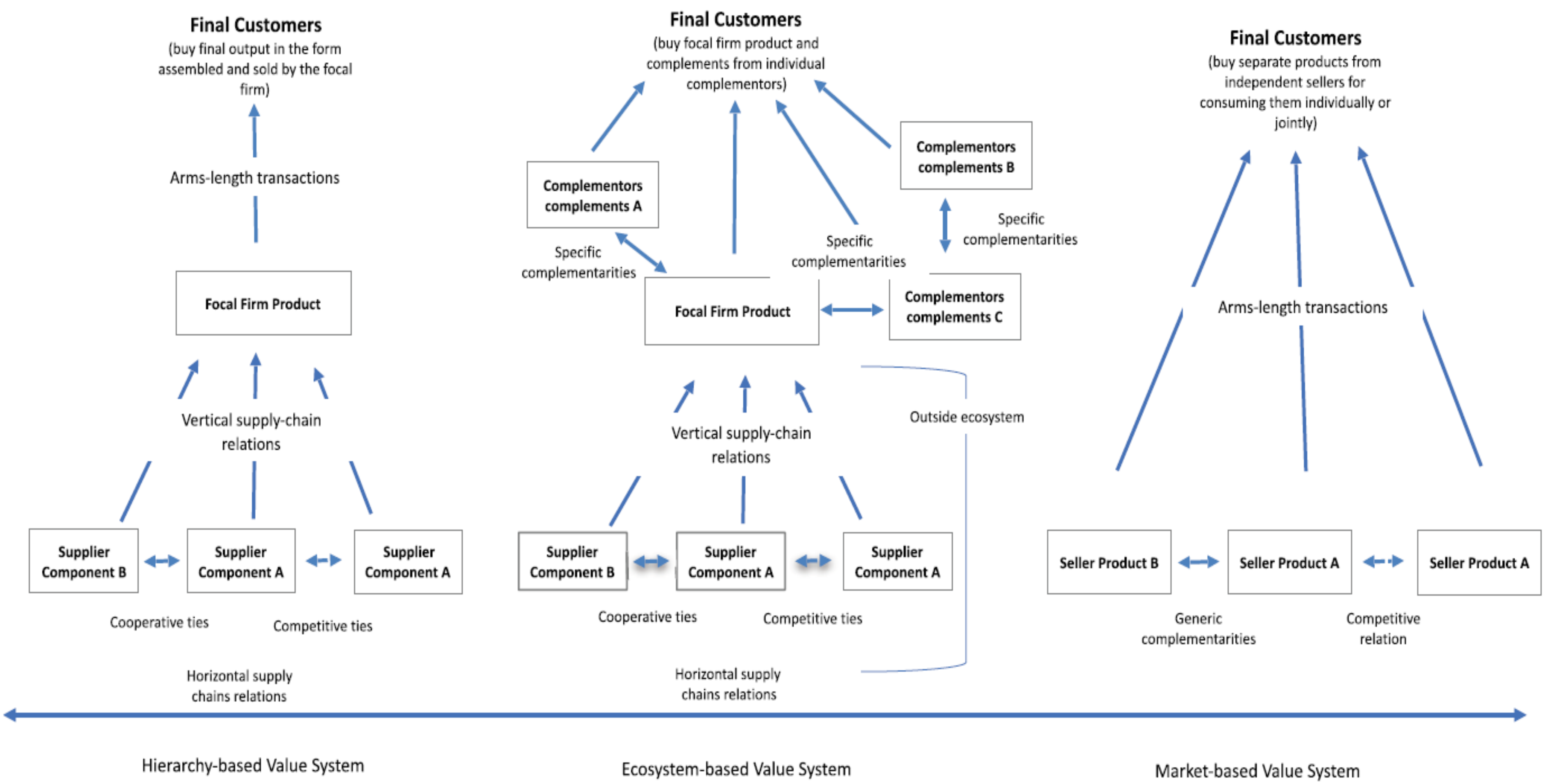



Competition Authorities' Duty to ***Protect*** and ***Promote*** Competition

- **Digital sovereignty?**
- **Fairness?**

*Porter's five forces*

# DIFFERENT TYPES OF VALUE SYSTEMS




*Source*: M. Jacobides (Strategic Management, 2018)

# POWER AND INDUSTRY ARCHITECTURE

'(t)he concept of industry architecture (IA) describes how labour is typically organized and structured within an industry ('who does what') and which firms capture value and profit as a result ('who takes what')'. Being in a position to influence the way the industry is organised/structured and the value allocation between the industry (or ecosystem) actors, provides 'architectural advantage'

- MG Jacobides, Industry Architecture, in M. Augier & D. J. Teece, *The Palgrave Encyclopedia of Strategic Management* (Palgrave Macmillan, London, 2016).

- Being in a position to influence the way the industry is organised/structured and the value allocation between the industry (or ecosystem) actors, provides '**architectural advantage**'.

- Power emerging out of central positioning in networks and informational asymmetries. Having ties that provide the only route through which information or resources can travel between network segments that are otherwise disconnected from each other, in particular if this is within various spheres of social activity, may provide invaluable strategic advantages over actors having few or no alternatives, and may easily convert to economic power.

- This may be a quite important source of sustainable abnormal profits. This is probably the reason why 'architectural fights' have characterised the evolution of all industries.

# LEVERAGING AND ECOSYSTEMS

- A monopolist may be able to gain additional profits through leveraging in certain circumstances (no single monopoly profit theorem)
- Raising Rivals' Costs
  - Aim is not always exclusion, but also
  - Relaxing competition in the marketplace
- The motivation behind monopoly leveraging activities may be a reduction in (vertical **and** horizontal) competition over time, rather than immediate profit: dynamic theory of market foreclosure
  - To protect a monopolistic position
  - To transfer monopoly power from a bottleneck to another market – this defeats the purpose of having markets, which is to ensure a proper reward on productivity
  - To reinforce vertical market power so as to gain a larger share of the surplus value brought by the ecosystem and capture the innovation rents – again affects productivity and investments
- Many large firms are more intent on maximizing their total output, sales, or growth rates/develop network effects or acquire architectural advantage rather than their profits short-term

# A PROBLEM OF MISGUIDED CONCEPTUAL FRAMEWORKS DRIVEN BY IDEOLOGY

# 1980s US law and economics at the ECJ

- ‘*given its economic character, competition law aims, in the final analysis, to enhance efficiency*. The importance placed on efficiency is also in my view clearly reflected in the case-law of the EU Courts’

  Opinion of AG N. Wahl, in Case C-413/14 P, paras 41-42

- The only focus of competition law is on consumer surplus (part of the deadweight loss)

- But what about wealth transfers from consumers to producers (distributive justice considerations)?

- An *abuse (of exploitative pricing) can be established where there is a ‘sufficiently complete and reliable set of elements which point **in one and the same direction**’, such that ‘**almost no doubt remains**’ as to the abusive nature of the conduct*

  Opinion of AG Wahl in Case C-177/16, Biedrība ‘Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība’ (AKKA v LAA), ECLI:EU:C:2017:286, para 112

# THE COMPETITION/REGULATION INTERACTION

- A. Komninos: Do not expand Article 102 TFEU to include fairness considerations (in terms of defining dominant position and abuse) – fairness should be a matter for regulation, not competition law
  - Beware of suggesting regulatory action as the appropriate tool. This is not US, but Europe and regulatory action may happen!
    - Inception Impact Assessment, Fairness in Platform to Business Relation, Ares(2017)5222469, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en
  - This position rests on the following assumptions
    - economic regulation is available in the specific economic sector
    - economic regulators offer a superior institutional mechanism than competition authorities to take into account fairness concerns
    - economic regulation can take sufficiently into account equity concerns so that there is no need for additional intervention by competition law
    - there is some form of allocation of tasks between economic regulators and competition authorities, the latter focusing on making markets work better for people, only from a (narrow) economic efficiency perspective, while the former is perceived as a tool whose purpose is to replace the price signalling role of the market, through price regulation
  - These assumptions and the position of these authors reflect a theoretical confusion and conceptual misunderstandings