

Global Digital Value Chains, Distributive Justice and Competition Law

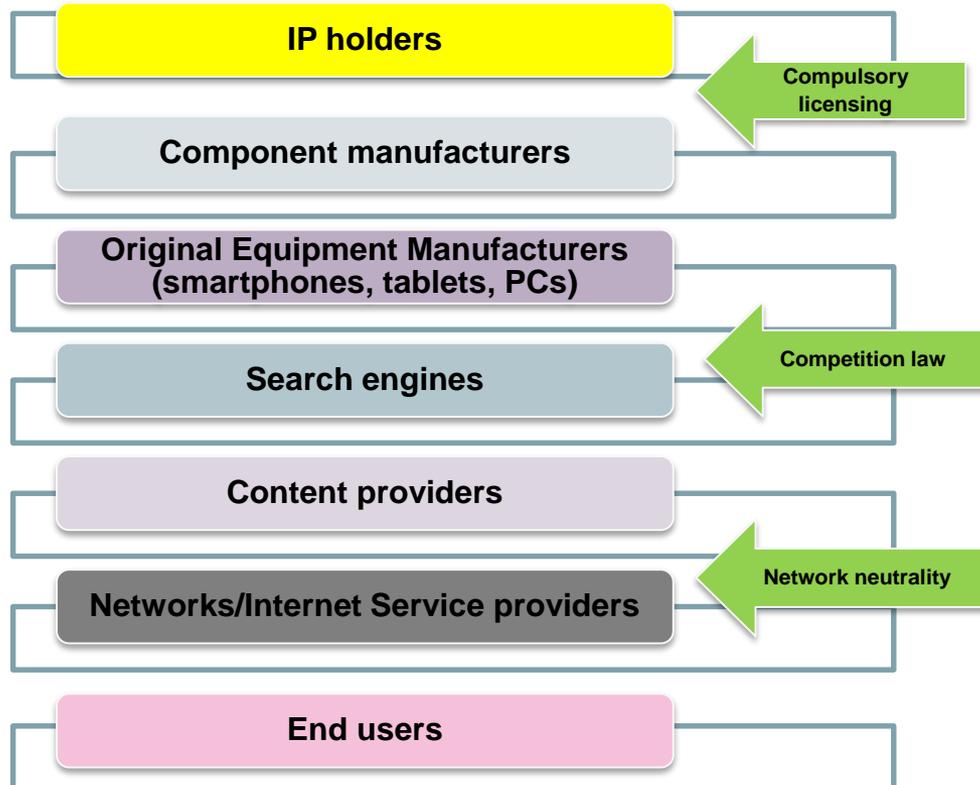
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Digital Value Chains

An illustration

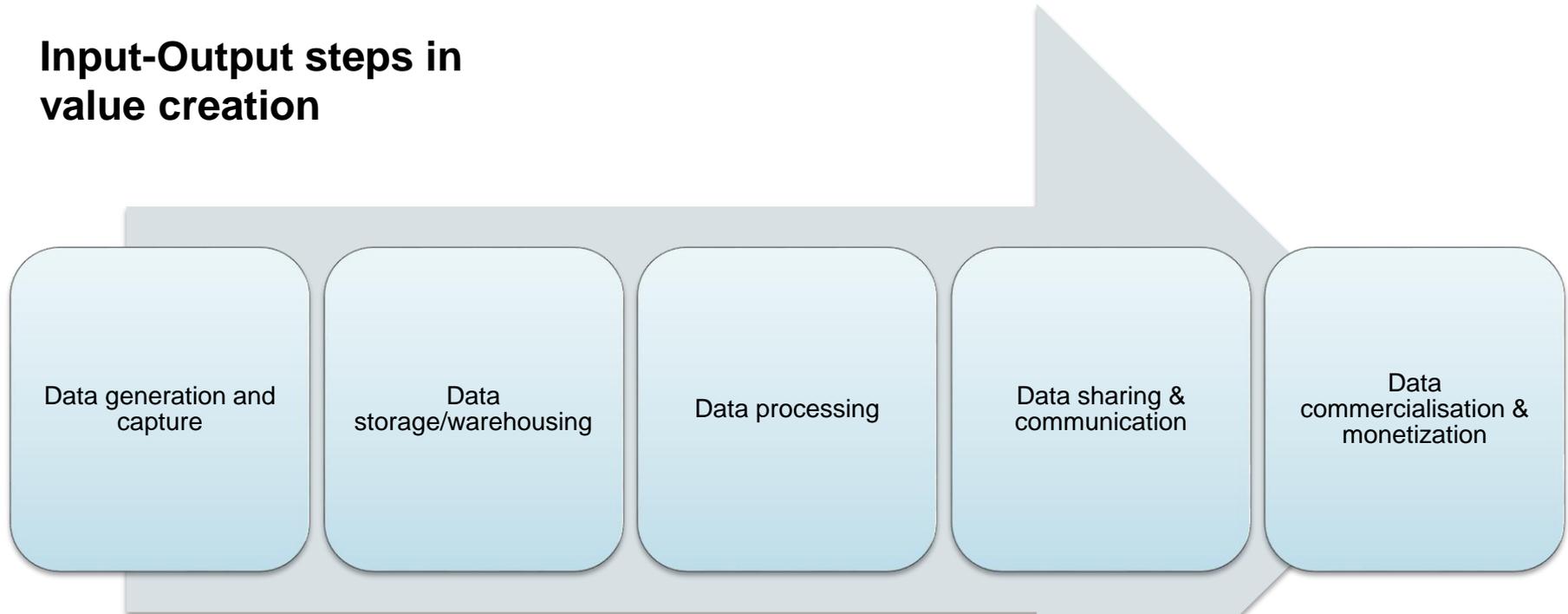
Eight of the world's most highly valued companies are technology businesses. The combined market capitalisation of these companies is US\$4.7 trillion. That is 30 per cent of the combined market capitalisation of the other 92 companies in the world's 100 most valuable firms.



- *Market power in multiple segments of the chain*
- *Co-opetition (frenemies)*
- *Allocation of the total **surplus value** of the value chain: vertical competition*
- *Extraction of revenue: limiting the market power of other segments of the value chain to increase your share*
- *Different ways of public action (competition law, net neutrality, compulsory licensing, regulation)*
- *Competition for financial capital as the main source of value in financial capitalism*

Is the consumer still at the end-point of the global data value chain?

Input-Output steps in value creation



As of September 30, the book value of Apple's equity was US\$134 billion, while its market valuation was close to US\$900 billion. The difference has to reflect the expectation of enduring "super-normal" profits.

Apple's total assets were US\$375 billion on September 30, but with fixed assets a mere US\$34 billion. The value of Apple's long-term investments was almost six times that of its fixed assets. Its net income in the year to September 30 was also more than 40 per cent higher than its total fixed assets.

This company evidently has no profitable way to invest its huge profits in its business. It is now an investment fund attached to an innovation machine and so a black hole for aggregate demand.

Follow the value

Financialisation & global markets

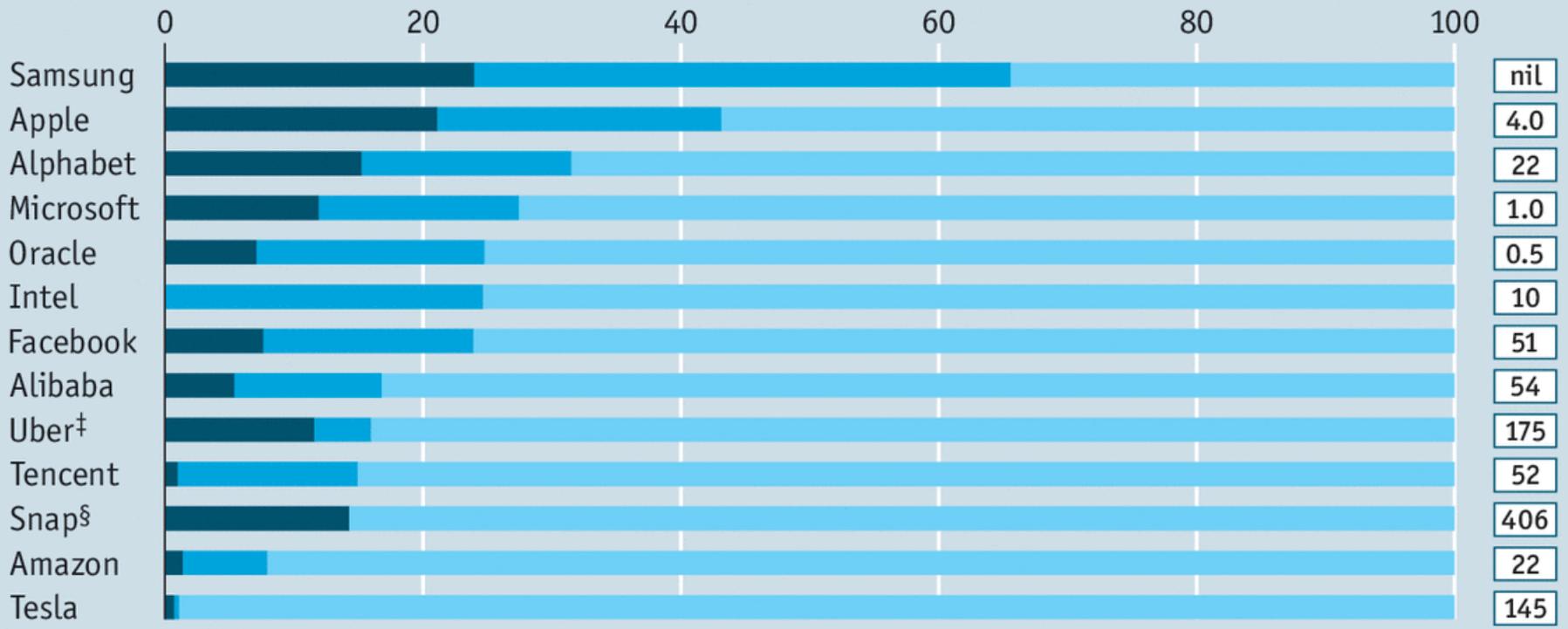
“Shares of technology firms trade on their highest ratio to sales since the turn of the century”

The good, the mad and the ugly

Market value of technology firms, %

Comprising: ■ net cash ■ profits*: ■ until 2020 ■ after 2020

Sales, % increase on a year earlier[†]



Sources: Bloomberg; company reports

*Present value †Latest ‡Implied by latest funding §Reported IPO value

The distributional effect of digital value chains and “disruptive innovation

- Should we *only* focus on consumers?
 - “Algorithmic” consumer as the “*ligne Maginot*” to the algorithmic seller
 - Relatively simple solutions?: Prohibition to vertical downstream integration in certain cases?
 - “Heteromation” and creation of value (Ekbia et al, 2017)
- Important trans-jurisdictional wealth transfers and drive towards global concentration
 - Will data and algorithmic capability win every “local” knowledge and “domain expertise”?
 - More concentration, less focus
 - “Gosplan 2.0”?: sensors, algorithms, databases, socio-metrics: beyond the price system
 - From local to global oligopolies/monopolies? Is this “disruptive” innovation?
 - E.g. From travel agents to OTA
 - E.g. From local stores to global marketplaces
- The bigger picture: digital platforms and industrial policy.⁶ Should competition law facilitate and promote “productivity enhancing asset redistribution”

Geography of platform businesses

Geography of platform businesses Key innovation hubs around the world



The most highly valued European tech company, SAP, is the world's 60th most valued company

Note: Clusters represent cities with 4 or more platform companies that have a market value of \$1 billion or more and includes publicly traded as well as private platform companies.

Source: Global Platform Database, Center for Global Enterprise, 2015

Country	HQ City	Company Market Cap	No. Platform Companies
US	San Francisco Bay Area	\$2,061B	43
	New York	\$25B	8
	Seattle	\$628B	4
China	Beijing	\$124B	11
	Shanghai	\$28B	6
	Hangzhou	\$182B	5
UK	London	\$26B	8
Germany	Berlin	\$17B	4
Japan	Tokyo	\$109B	5
Grand Total		\$3,191B	94

Employees v. Self-employed and hybrids

‘44. One of the **key features of any employment relationship is the *subordination of the worker to his employer***. The employer is not only empowered to give instructions and direct the activities of his employees, but he may also exercise certain powers of authority and control over them. A self-employed person follows the instructions of his customers but, generally speaking, they do not wield extensive powers of supervision over him. Because of the absence of a subordinate relationship, the self-employed person has more independence when choosing the type of work and tasks to be executed, the manner in which that work or those tasks are to be performed, his working hours and place of work, as well as the members of his staff.

45. Furthermore, a self-employed person **must assume the commercial and financial risks of the business**, whereas a worker normally does not bear any such risk, being entitled to remuneration for the work provided irrespective of the performance of the business. It is the employer who, in principle, is responsible towards the outer world for the activities carried out by his employees within the framework of their work relationship. The higher risks and responsibilities borne by the self-employed are, on the other hand, meant to be compensated by the possibility of retaining all profit generated by the business.

46. Lastly, it is barely necessary to point out that, while self-employed persons offer goods or services on the market, workers merely offer their labour to one (or, on rare occasions, more) particular employer(s).

47. Thus, it is inherent in the status of being self-employed that, at least if compared with workers, self-employed persons enjoy more independence and flexibility. In return, however, they inevitably have to bear more economic risks and will often find themselves in more unstable and uncertain working relationships. All these aspects seem to be closely interrelated.’

Uber “workers” I

- Employment Appeal Tribunal Uber case (November 10th, 2017)
 - Rejected the label of agency used in the written contractual documentation
 - Any Uber driver who had the Uber app switched on, was within the territory in which they were authorised to work (here, London) and was able and willing to accept assignments was working for Uber London Ltd (“ULL”) under a “worker” contract and was, further, then engaged on working time for the purposes of the Working time regulation
 - On “boarding” process for new drivers
 - There were obligations upon Uber drivers that they should accept trips offered by ULL and that they should not cancel trips once accepted
 - Driver remains entitled to its ‘Service Fee’ calculated on the basis of the recommended amount
 - Drivers should accept at least 80% of trip requests to retain their account status
 - Payment to drivers is made by UBV on a weekly basis; it is calculated on the basis of the fares charged for trips undertaken by the driver less a service fee, initially charged at 20% of the fare but increased to 25% later
 - The driver is responsible for all costs incidental to owning and running the vehicle
 - However, drivers can work for or through other organisations, including direct competitors operating through digital ‘platforms

Uber “workers” II

- “when the drivers are working, who are they working for?”
- Any supposed driver/passenger contract was a “pure fiction”, bearing no relation to the real dealings and relationships between the parties
- Noting the unequal bargaining positions of the parties (in particular, many Uber drivers - a substantial proportion of whom did not speak English as their first language - would be unused to reading and interpreting dense legal documents couched in impenetrable prose)
- Recognition of the imbalance of power between the parties in the employment context has informed the introduction of the statutory rights (such as minimum wage and working time protections)
- “*purposive*” interpretation, taking into account the relative bargaining power of the parties when deciding whether the terms of any written agreement represented their true intentions
- It will be relevant to consider the nature of the obligations between the parties
- Examine the degree of integration into the business undertaken by another
- “although an agent might well market services as agent of its principal, the ET was entitled to see Uber’s marketing as being for its collection of ‘products’; the drivers being integrated into the business as deliverers of those products.”¹⁰
Similarly, an agent may bind a disclosed but unidentified principal but where

Uber workers III

- Is it fatal to the drivers' working status, or to their being engaged on working time, that they might also hold themselves out as seeking work from other PHV operators in the same territory at the same time?
- Once Uber drivers are in the territory and have switched on the app, they will be offered a trip if they are the nearest driver and, as I understand the ET to have found, were told they “*should accept at least 80% of trip requests*” to retain their account status
- Even if the evidence allowed that drivers were not obliged to accept *all* trips, the very high percentage of acceptances required justified the ET's conclusion that, once in the territory with the app switched on, Uber drivers were available to ULL and at its disposal
- “If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact, they are working at ULL's disposal as part of the pool of drivers it requires to be available within the territory at any one time”
- “If, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply”