

Spotlight on Online Platforms and Digital Advertising as CMA Calls For a New Pro-Competition Regulation Regime

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On 1 July 2020, the CMA published the Final Report of the *Online Platforms and Digital Advertising* market study, concluding that existing competition law tools are not sufficient to regulate the major online platforms, such as Google and Facebook. The CMA has called on the Government to establish a pro-competition regulatory regime for online platforms, by creating a Digital Markets Unit (DMU), which will have powers to deal with concerns swiftly and before irrevocable harm to competition can occur.

The market study was conducted following a recommendation in the Furman Report¹ in March 2019 for a formal CMA study into the digital advertising market “which is dominated by two players and suffers from a lack of transparency”. After the publication of the CMA’s Interim Report on the market study on 19 December 2019, the Government announced in its Budget on 11 March 2020 that it was formally accepting the recommendations made in the Furman Report and establishing a digital markets task force.

In the meantime, the European Commission also published a report on *Competition Policy for the Digital Era* in April 2019² and has since launched an open public consultation into a proposed “new competition tool” to address structural competition problems.³ This new European competition tool appears to have much in common with the UK’s market investigation regime, although interestingly the CMA is choosing to address the issues found in the Final Report by recommendations direct to Government rather than by making a market investigation reference.

Three key competition concerns identified in the digital advertising market

The CMA has acknowledged that Google and Facebook first grew by offering better products than their rivals and that both have offered consumers highly valuable services. However, the concern is that they are now protected by the nature of the digital market, which favours economies of scale, network effects and the unmatched access to data they both enjoy. This means that potential rivals can no longer compete on equal terms and this may inhibit innovation and the development of new, valuable services for consumers. The Final Report identified the following key concerns for the CMA about the digital advertising market.

Impact on prices

Although services such as Google and Facebook are free to users, they are paid for indirectly through advertising revenues generated through the use of personal data to personalise certain content and advertising. The Final Report found that Google has more than a 90% share of the £7.3 billion search advertising market in the UK and Facebook has over 50% of the £5.5 billion display advertising market. Together, they receive over 80% of the digital advertising expenditure in the UK. If the £14 billion spend on digital advertising in the UK (amounting to £500 per household) is higher than it would otherwise be in a competitive market, consumers may be paying higher prices for products in industries that rely heavily on online advertising, such as hotels, flights and insurance. The Final Report found that Google’s prices are around 30%–40% higher than Bing’s when comparing like-for-like search terms.

Market specific barriers to new competition and innovation

The Final Report found that the digital advertising market has a number of interrelated and self-reinforcing characteristics that inhibit entry and expansion by rivals. In particular, the CMA expressed the view that the large user base enjoyed by both companies is a source of market power through network effects and economies of scale. A third of UK internet user’s total time online is spent on sites owned by Google or Facebook. Facebook has become a “must have” to remain in contact with others while Google is able to teach its algorithms using “click-and-query-data” gathered from its wide user base. The CMA found that digital markets tend towards a “winner-takes-most” dynamic with limited competition.

Google and Facebook have access to large amounts of user data, which allow them to improve their services and target advertisements at individual users. The CMA voiced concerns that the companies may use the General Data Protection Regulation (GDPR) as justification for

¹ J. Furman, “Unlocking Digital Competition” UK Government Report (March 2019).

² J. Cremer, Y. de Montjoye and H. Schweitzer, “Competition policy for the Digital Era” (April 2019).

³ See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation> [Accessed 17 September 2020].

restricting access to valuable data for third parties whilst retaining it for use within their own ecosystems. The CMA identified that both companies are active across several markets and have acquired new companies in order to expand their reach. The Final Report noted, by way of example, that Google has a strong position in browsers (through Chrome), operating systems (through Android) and video streaming (through YouTube), while Facebook has expanded into messaging, devices, gaming and retail.

The CMA also found that both companies use default settings to encourage consumers to use their services and operate a take-it-or-leave-it model, where consumers are unable to control their data. For example, Google paid around £1.2 billion in 2019 to be the default search engine on mobile devices across the UK. Further, the CMA found that almost all social media platforms, including Facebook, make it a pre-condition of use that consumers must accept personalised advertising. The Final Report found that consumers are forced to give up more data than they normally would choose to do as a result of an effective lack of choice in the market.

The CMA concluded that these factors present potential barriers to new competition. Taken together, they reinforce each other, potentially making it difficult for rivals to grow.

Effect on the news industry

The Final Report found that the newspaper industry is particularly affected by Google and Facebook's market positions, as they rely on these two companies for almost 40% of all visits to their sites. In its Final Report, the CMA found that intermediaries capture at least 35% of the value of advertising bought from newspapers in the UK. This can lead to wider social, political and cultural harm through the decline of authoritative and reliable news media, the rise of "fake news" and the failure of local press.

The proposed new pro-competition regulatory regime

In order to address these concerns, the CMA has called for a new pro-competition regulatory regime for online platforms. The new DMU recommended by the CMA will have powers aimed at encouraging competition by overcoming barriers to entry and expansion and therefore tackling the source of market power and promoting innovation. The majority of the proposals made by the CMA were already suggested by the Furman Report, such as tailoring an enforceable code of conduct to platforms and the power to make data-related interventions. Other proposed powers, such as consumer control and separation measures were not directly considered in the Furman Report.

Enforceable code of conduct

In line with recommendations already made in the Furman Report, the CMA proposes that the DMU should be able to enforce a code of conduct to ensure that platforms do not engage in exploitative or exclusionary practices. Rather than detailed and prescriptive rules, the CMA has recommended that the code take the form of high-level principles based on fair trading, open choices, trust and transparency. The DMU will determine which platforms have "strategic market status" (SMS), as defined in the Furman Report. Each platform with SMS would have its own tailored code, along with guidance on its practical application. The DMU would be able to update this guidance as the market evolved. As the code would have a statutory basis, the DMU should have the power to suspend, block and reverse decisions made by the platforms and impose financial penalties for non-compliance.

The purpose of the code would be to protect competition rather than tackling the underlying causes of market power. The CMA believes that this approach will allow a wide range of concerns to be addressed rapidly and before they result in harm to competition, ensuring both a greater focus on remedies and more clarity for platforms.

Pro-competitive interventions

The Final Report also suggests a number of further interventions designed to boost competition, which should be a part of the DMU's toolkit. This includes consumer choice interventions, increasing consumer control over data, default interventions (e.g. restrictions on the ability to become the default option across multiple devices, browsers etc) and separation interventions, ranging from operational separation to full ownership separation.

In order to address concerns relating to the greater access to user data for the purposes of targeted advertising enjoyed by Google and Facebook, the CMA recommended that the DMU should have the power to introduce a number of data-related changes including: data separation interventions, prohibiting platforms from combining certain categories of data within their ecosystems; user ID interventions, which would provide for the creation of a secure common digital ID that market participants could use to assign their own data; data access interventions, which would require platforms to provide third parties access to certain categories of data; and data mobility interventions, which would allow customers to share data platforms hold on them with other parties.

To illustrate how these powers will address the concerns identified, the Final Report recommended specific measures the DMU should consider taking against Google and Facebook. Google could be ordered to open up its click-and-query data to rival search engines. Potential rivals will be able to use this data to improve

their own algorithms and compete, thus helping to overcome Google's scale advantages in data. Google could also be restricted in its ability to secure its place as default search engine to allow more choice for consumers. To avoid potential conflicts of interest, Google could be ordered to separate its ad serving function from the advertising advisory function and be prohibited from restricting access to its inventory, where that inventory is sufficiently important to generate market power for the advertising advisory function.

With the same aim in mind, Facebook could be ordered to increase its interoperability with competing social media platforms and to give consumers the choice whether to receive personalised advertising. In addition to this choice requirement remedy, a duty of "fairness by design" (akin to the concept of "privacy by design" under the GDPR) could be imposed on platforms to ensure they are maximising a user's ability to make informed choices about the use of their personal data.

A Digital Markets Taskforce to take on this challenge

The CMA has decided not to make a market investigation reference at this point (although it has not ruled out future action), as it considers that Government intervention, including new legislation to introduce a new regulatory regime, to be the appropriate next step.

A Digital Markets Taskforce, which the CMA formally launched on 1 July 2020 in collaboration with the ICO and Ofcom will build on the conclusions of the Final Report and gather further information on the functions, processes and powers which will be needed to promote competition in the digital advertising market. The Taskforce has invited stakeholders to submit their views on the proposed regime by 31 July 2020. The aim is to advise the government on how this new regulatory regime should be designed by the end of 2020.

Commentary: collaboration is key

In its Final Report, the CMA pointed out that Google and Facebook offer services that are highly valued by consumers. Search engines give instant access to information, news and a wide range of goods and services. Social media allows users to connect with friends around the world, keep up with current events and share content with each other. They therefore provide many benefits for consumers. The main concern

identified by the Final Report is not their free-to-use model funded by digital advertising itself. Rather the concerns relate to choice and giving consumers the information they need to make an informed choice between a paid-for subscription service and one that requires assigning personal data in lieu of payment (i.e. effectively agreeing to targeted advertising as a result).

The enforceable code of conduct proposed by the CMA might follow in the footsteps of the Grocery Supply Code of Practice (GSCOP), which has overall resulted in better behaviour by the designated retailers and fewer complaints from suppliers. The success of the GSCOP largely comes down to the oversight and enforcement powers given to an adjudicator. To be effective, the DMU, as proposed adjudicator of this new code of conduct, will need to have the teeth to police compliance effectively.

Whilst the UK is trying to take a leading role globally in tackling the concerns arising in the digital advertising market, it will not be able to achieve this change alone. For example, it might not be feasible for the DMU to order ownership separation unilaterally. The CMA will need to work collaboratively with regulators around the world as well as the platforms themselves. In the press release, the CMA notes that "whilst this recommendation is UK-focused, many of the problems that the CMA has identified are international in nature". In fact, the CMA acknowledges that the proposals in the Final Report can "be seen as part of a growing international consensus on the need to reform competition tools to address the issues raised by the role of online platforms in today's digital markets".

In addition to working closely with international regulators, the DMU will need to collaborate with the platforms themselves to encourage meaningful change. Ronan Harris, vice-president of Google UK and Ireland has expressed Google's willingness to

"support regulation that benefits people, businesses and society, and continue to work constructively with regulatory authorities and government on these important areas so that everyone can make the most of the web".

Any new regime will need to balance addressing potential competition harms identified without overpowering services that consumers typically regard as valuable and useful and stifling the disruptive innovation that made Google and Facebook the market leaders they now are.