

Digital Competition Expert Panel

Public responses to call for evidence from organisations

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ASA submission to Digital Competition Expert Panel: Call for Evidence

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2. The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 56 years and the broadcast Advertising Code (written and maintained by BCAP) for 14, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to take action against misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 389,000 pieces of advice and training in 2017.
- 1.5. The ASA is providing this written submission in response to the Digital Competition Expert Panel’s Call for Evidence.

2. Consultation Question: Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

- 2.1. It is vital that a level playing field is maintained to ensure that the potential for unfair advantage to is minimised. Doing so helps to stimulate competition and gives a consistency of protection to the general public. The ASA has regulated paid-for online ads since the emergence of the internet. In 2011, the ASA’s online remit was extended to include companies’ and other organisations’ own advertising claims on their own websites and social media spaces. We call this online ‘advertiser-owned’ advertising. That important subsection of online media has come to account for half of our regulation. 89% of those ads concerned potentially misleading claims, compared to 73% of cases resolved by the ASA in general.
- 2.2. 88% of the 7,099 ads amended or withdrawn by the ASA during 2017 were online ads (in whole or part). The vast majority of advertisers subject to an upheld complaint come into compliance with the strict advertising rules. For the small minority of noncompliant online advertisers, the ASA has a range of sanctions:
 - Listing on our Non-Compliant Online Advertiser register
 - Pay-per-click (PPC) ad campaigns suspended
 - ASA PPC campaign to further promote non-compliance
 - Referral to Trading Standards for legal action

- 2.3. The ASA is in the forefront worldwide of the challenge to regulate newer forms of online advertising like influencer, native and affiliate advertising, as well as how ads are targeted online and on social media platforms like Facebook, YouTube, Instagram, Snapchat and Twitter.
- 2.4. Ads for age-restricted products online – including on social media – need to follow the same strict content rules as those in traditional media such as TV. They must be prepared in a way that is socially responsible and which doesn't appeal inappropriately to children or other vulnerable people. Crucially, ads for age-restricted products mustn't be directed at children.
- 2.5. Advertisers need to be open and upfront with people about when they're being advertised to. Brand partnerships with influencers are on the rise, particularly on social networks like Instagram, YouTube, Snapchat and Twitter. Brands' engagement of influencers can be within the rules, so long as they're upfront with followers that content which is paid for and controlled by the brand is an ad rather than the influencer's independent opinion. The ASA has been working closely with brands, influencers and agencies to make sure ads are clearly labelled. We're also conducting research into consumers' recognition of online next year.
- 2.6. In November, we launched our new five year strategy, with a clear focus and commitment to strengthening further the regulation of online ads – including exploring the use of machine learning in regulation. The particular 'online' focus of the new strategy responds to the fact that businesses are increasingly advertising online, people are spending more time online, and the pace of change online is contributing to people's concerns.
- 2.7. We intend to listen in new ways, including research, data-driven intelligence gathering and machine learning – our own or that of others - to find out which other advertising-related issues are the most important to tackle. We will develop our thought-leadership in online ad regulation, including on advertising content and targeting issues relating to areas like voice, facial recognition, machine-generated personalised content and biometrics.
- 2.8. Our guiding principle is that people should benefit from the same level of protection against irresponsible online ads as they do offline. The ad rules apply just as strongly online as they do to ads in more traditional media. This new strategy – setting the ASA's direction to 2023 – will strengthen further the policing of online advertising to make sure people and responsible businesses are protected.

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Airbnb

Digital Competition Expert Panel

1. Introduction

- 1.1. Airbnb welcomes the opportunity to respond to the Digital Competition Expert Panel's call for evidence on competition in the digital economy.
- 1.2. Founded in 2008, Airbnb leverages technology to economically empower millions of people around the world to unlock and monetise their spaces, passions and talents to become hospitality entrepreneurs. Airbnb's accommodation marketplace provides access to 5+ million unique places to stay in more than 81,000 cities and 191 countries. Airbnb's experiences marketplace provides access to local communities and interests through 15,000 unique, handcrafted activities run by hosts in 1,000+ cities around the world.
- 1.3. As a platform, Airbnb has helped to create valuable new income streams for UK residents, to make travel more affordable, and to encourage travellers to spend their money in lesser-known destinations. Between July 2017 and July 2018, hosts and guests using Airbnb contributed an estimated £3.5 billion to the UK's economy, with approximately 8.4 million guests travelling to the UK during this period. There are 223,000 listings on Airbnb from every region in the UK.
- 1.4. The digital markets in which Airbnb operates are characterised by constant innovation and technological change that has created significant opportunities and benefits for consumers. Digital business models have emerged that have been attractive to consumers and challenged incumbent businesses.
- 1.5. From Airbnb's perspective it is important that - in developing recommendations for future competition in digital markets - the Panel appreciates that, as in other sectors of the economy, there is no "one size fits all" approach. Digital businesses comprise a range of business models and consumer propositions. The questions that the Panel is considering suggest that it is particularly interested in data-driven businesses that are funded by advertising and which may face few direct competitors. This is understandable given the wider public policy debate surrounding such businesses models.
- 1.6. However, it is important to recognise that there are other online businesses that operate very differently. Airbnb's business model does not rely on monetising user data. Rather, our business model allows people to monetise their own assets - their spaces, passions and talents. Airbnb does not rely on advertising revenues or unique datasets and faces significant competition from a wide range of competitors, many of which are long-established businesses with significant reputations. Unlike many other "two sided" markets, Airbnb's platform connects users who interact in real life.
- 1.7. A further key point that the Panel will no doubt want to balance carefully is the importance of fostering a climate that continues to encourage investment and innovation in digital businesses in the UK. Regulation and competition policy need to be effective in protecting consumers and promoting fair competition. However,

it is also important to continue to incentivise investment and innovation that can also disrupt the status quo for the benefits of consumers.

Responses to the key issues raised in the Panel's consultation questions (***Panel Questions***) are set out below.

1. *What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?*

2. *What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?*

2.1. Digital business models have undeniably brought about considerable innovation and consumer benefits. Many digital businesses have been successful as a result of their attractive consumer propositions, bringing about new markets and increased consumer choice. This has often challenged incumbent businesses, which have been slower to innovate and react to consumer expectations. These challenges have arisen from the increased competition that digital businesses have created.

2.2. Guests visiting the UK on Airbnb's platform are often looking for experiences beyond those that traditional hotels offer. Different types of travellers have different expectations, and the listings on Airbnb's platform provide guests with a wide diversity of choice: the experience can be tailored to their needs. Approximately 89 percent of guests choose to travel using Airbnb's platform because of the amenities that different listings offer (for example, a kitchen or garden). Such amenities broaden the accessibility of travel to consumers such as families, who would not normally be able to accommodate children in traditional accommodation. Almost a quarter (24 percent) of guests on Airbnb's platform in the UK now travel with children.

2.3. The variety of listings, at a range of price points and styles, helps people to travel in the UK with flexibility. 29 percent of guests say they would not have visited or have stayed as long in the UK without being able to use Airbnb and 96 percent of guests believe Airbnb offers a more affordable way to travel. In addition, almost half of guests spent the money they saved by using Airbnb to buy food or go shopping, all of which help support local businesses and attractions in the places that guests are visiting.

2.4. It is important to recognise many digital markets, including those in which Airbnb competes, are characterised by robust competition between a range of competitors and low barriers to entry. Ongoing innovation can be expected to continue to bring about continued consumer benefits. While Airbnb is one of the most high-profile brands in the accommodation space (alongside others, such as Booking.com, Expedia/HomeAway, and major hotel groups such as Accor, IHG and Premier Inn), there are countless sources of accommodation, and limitless ways for consumers to find them (websites, marketplaces, bulletin boards, and subscription services).

2.5. The Panel poses specific questions concerning social media, search and online advertising. Currently, those sectors are characterised by fewer firms with strong

market positions that operate across multiple, diverse markets. The search and online advertising services provided by those companies are an important route for consumers to explore and access available market offerings. It is therefore important that consumers are able to access accurate and impartial information on the range of offerings available to them through those services.

- 2.6. A strong position in search or online advertising can also create market power over other businesses that buy search or online advertising from those platforms and/or compete for customers in areas such as shopping, travel or accommodation. These issues and concerns around disintermediation are a legitimate area for consideration by antitrust authorities, which are already starting to explore these issues globally. We note that the European Commission has recently been active in that respect.

3. *What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?*

Data is a key component to targeting online advertising to the consumers who are most likely to be interested in the advertising. For this reason, companies with the richest datasets are able to offer the most attractive platforms for advertising. This is a related aspect of the potential market power issues referred to above.

4. *What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?*

- 4.1. An acquirer may be able to contribute know-how, technology and other resources to a target company or business, allowing the combined firm to grow and develop in ways that would not have been possible if the acquired company remained independent. Likewise, an acquired company or business may contribute know-how, skills or other resources. This leads to efficiencies that enable innovation, higher quality and lower prices bringing benefits to consumers.
- 4.2. For entrepreneurs and investors, the prospect of realising their investment by means of a future acquisition also acts as a strong spur to encourage innovation. By their nature, digital businesses and innovations involve considerable risk at the outset and many early stage companies do not succeed in the marketplace. For this reason, confidence among innovators that, if they are able to succeed in developing their ideas and can successfully make a return on their investments in time and resources by being acquired by a larger company, is critical to innovators' willingness to develop ideas in the first place.
- 4.3. Likewise, an early-stage company may be able to attract seed capital from private equity to enable them to develop interesting, but untested, innovations. These investors make such investments on the basis that, where the idea proves to be successful, there will be available routes to realise the investments they have made.

- 4.4. Merger control rules are designed to analyse acquisitions so that the vast majority of beneficial or benign mergers can be quickly approved and to screen out those mergers, far fewer in number, that may raise real issues for consumers. The UK merger regime is well-regarded internationally and bases its assessments on economic evidence and analysis in line with best practices internationally developed by bodies such as the OECD and International Competition Network. Such analysis is necessarily forward-looking requiring the authority to assess what will likely happen if a merger proceeds as compared to what will likely happen if it does not.
 - 4.5. Acquisition of small companies by larger companies rarely gives rise to real antitrust concerns. However, existing merger control rules and practice already contain a framework for identifying those, rare, transactions where a small company may be particularly important to the competitive environment (e.g. if it is acting as a “maverick” constraining the behaviour of other companies or if it is expected to develop into a more significant competitor in the near future). Therefore, the existing merger control framework already caters for these issues and Airbnb is not aware of any evidence that suggests that the law and practice in the UK is not able to deal with these situations where they arise.
 - 4.6. What is important to the credibility of the regime and continued investor confidence is that decisions by merger control authorities remain based on evidence and robust analysis and not mere speculation. This is no different in the digital sector than any other sector of the economy.
 - 4.7. An example of the issues that can be created where merger control is too quick to intervene in digital markets is the decision of the UK Competition Commission to prohibit “Project Kangaroo”, a proposed joint online video on-demand service to be offered by BBC Worldwide, ITV and Channel 4. Recently, the Chief Executive of Ofcom called on the same companies to collaborate, citing the strong market position that Netflix has been able to attain in the UK, which was not predicted by the Competition Commission. This example shows the dangers of competition authorities seeking to “second guess” market developments in fast-moving digital markets.
5. ***To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?***
 6. ***How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?***

Use of artificial intelligence can enhance customer experience but can be costly to set up and manage. The UK competition authorities should understand the way that AI influences and benefits customers and businesses alike. Algorithmic pricing can lead to consumer benefits but as it is predominantly driven by data it can also reinforce market strength of certain platforms (as to which, see comments above); this is an area that regulators need to be aware of.

- 7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?**
- 8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?**
- 9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?**

- 9.1 The Panel Questions 7, 8 and 9 consider whether potential changes are required to UK law and policy so that competition authorities are well placed to intervene in digital markets in a timely manner.
- 9.2 The starting point for this analysis must be to recognise that the UK competition authorities already possess very broad and extensive powers. Those powers include the ability to require the production of documents and evidence, to summons executives for interview, to enter premises, including domestic premises, to conduct searches and interrogate IT systems and to conduct covert surveillance of parties suspected of breaching the competition rules. In this respect, the powers of the UK authorities are some of the most extensive in the world and, in respect of witnesses and available sanctions for producing documents and other evidence, are more extensive than those of the European Commission.
- 9.3 Likewise, the UK reformed its law relatively recently to reduce the test applicable to the CMA for imposing interim measures on companies at the outset of any investigation, before the evidence has been gathered and properly considered. The powers of the UK CMA to impose interim measures are now among the most extensive in the world.
- 9.4 Against that background, it is not clear that there is any evidence that greater powers or other changes to the law are necessary or appropriate in the UK.
- 9.5 Notwithstanding its very broad powers, the CMA must decide whether it is appropriate to use those powers in any particular case. In that context the CMA will take into account that fast-moving developments in dynamic market places are particularly difficult to predict and that intrusive intervention in digital markets at a stage where the evidence has not yet been properly tested may do more harm than good.
- 9.6 A shift away from established economic principles and frameworks which are internationally recognised could create risks. It remains important to the credibility of the regime in the digital sector that before exercising its extensive powers the CMA has sufficient evidence of a real and serious issue. Parties subject to potentially intrusive measures and investigation must also continue to have meaningful access to appeal mechanisms and the evidence on which the authority has relied. The UK is rightly held in high regard internationally in relation to the protections provided by its judicial system in competition law matters and this important aspect of the regime should not be watered down without very strong justification.

10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

Because online platforms are inherently borderless, the UK ought to embrace rules after Brexit that are consistent with EU law to the greatest degree possible. In the absence of clear and binding frameworks at national level which are consistent with those of the EU, there is a risk of a patchwork of different regulatory requirements, which may inhibit innovation and competition. Regulatory divergence will likely create barriers to doing business in the UK, even if the motivating force behind such divergence is liberalisation.

END

Consultation response

Digital Competition Expert Panel: Call for Evidence



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

About AmCham EU

The American Chamber of Commerce to the European Union (AmCham EU) speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

AmCham EU's submission to the Treasury

AmCham EU has taken note of the open consultation on the Digital Competition Expert Panel issued by Her Majesty's Treasury on 16 October 2018¹. In the present document, AmCham EU wishes to submit observations to the Treasury on a selected number of questions that reflect positions advanced by AmCham EU in previous papers concerning the digital market, including most recently a submission to the European Commission in response to its call for stakeholder input on three broad topics relating to the future challenges of digitisation for competition policy². This short position paper aims at placing relevant context around some of the questions raised in the UK's open consultation regarding the state of competition in the digital economy, and address the opportunities and challenges for competition policy, both in the UK and internationally. As the Expert Panel progresses with its review AmCham EU stands ready to continue to engage in the evolving discussion.

AmCham EU's observations

AmCham EU has identified a number of questions on which it wishes to submit high-level comments:

Question 3.1: *"What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?"*

First of all, we respectfully note that the formulation of this question (and of some of the other questions in the consultation) seems to assume that there is a trend towards only one or a small number of big firms in digital markets. Digital markets are extremely diverse, and often closely integrated with traditional, brick-and-mortar markets.³ We would therefore caution HM Treasury not to assume that such a trend exists. Rather, whether such a trend exists and if so in which markets, might have been a good topic for the Treasury's consultation.

¹ <https://www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel>

² http://www.amchameu.eu/system/files/position_papers/shaping_competition_policy_in_the_era_of_digitisation_-_amcham_eu_response.pdf

³ See, e.g., http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf

As to the question itself, the potential benefits and harms of hypothetically having - in the long run - only one or few large players in digital markets, are similar to the potential harms or benefits of such trends in any markets. Choice is generally good for the consumer and contributes to driving the development of better and cheaper products or services. There are, however, no clear rules as to the number of firms that should be active in a particular market in order to maximise consumer welfare. Moreover, in rapidly evolving markets where firms compete “for the market”, the competitive benefits of particular market structures cannot be assessed solely at a given point in time. This is particularly true in the case of digital markets, which are peculiarly subject to rapid innovation.

As far as platform offerings are concerned, in the same way as a physical infrastructure can support the operation of competition service providers, a digital platform can host several competing offerings that provide the consumer with alternative choices, and competition generally leads to the development of better offerings that ultimately benefit the consumer. The presence of multiple sellers on the same e-commerce site enables customers to easily compare competing offers by brand, quality, price, speed of delivery or other attributes and select the offers that best meet their needs. By giving the customers a unique voice and providing them with a rating system to inform others, these digital platforms contribute to transparency and product quality.

Question 3.2: *"What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?"*

As in our response to Question 3.1 above, we do not perceive that there is a general trend towards a same small number of firms being active in digital markets. Nor do we see a trend towards the same small number of firms systematically expanding across product or service segments to develop a presence in neighboring, upstream or downstream markets. Whether or not a firm, small or big, decides to expand its offering into neighbouring digital markets depends on a wide range of factors that are particular to the respective firm. As we have seen with the emergence, and in some cases break-up, of conglomerates in the non-digital/brick-and-mortar economy, a wide range of manufacturers or service providers have sought to optimise their revenues and profits by expand their portfolio of products or services. We note that such strategies are generally not considered harmful to competition, except in rare cases where a firm has a dominant position in one market in which it is active and seeks to leverage that strength into another market in which its competitive position is less strong. The CJEU has developed a body of case law that deals with the leveraging of a dominant position into secondary markets. As in our response to Question 3.1 above, we consider that existing competition law tools are perfectly satisfactory to assess developments and potential problems with the the digital economy that may or may not occasionally occur.

Question 3.3: *"What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?"*

Again, this question assumes facts that are not actually demonstrated but that might have made a good subject for an inquiry. We further submit that the question is worded so broadly that the responses the Treasury receives risk being materially misleading. In a world where virtually all firms are constantly collecting data, a meaningful question would need to specify the types of data and relevant markets in question. Even assuming that the question relates to personal data of consumers collected by platforms engaged in business-to-consumer markets, we are not aware of any clear evidence for the assumption underlying the question. Indeed, the

European Commission has had occasion to examine the concentration of data in a number of merger cases in recent years and has consistently concluded that data concentration was not a concern.⁴

In any event, in our view, the accumulation and concentration of data, whether within a small number of big firms, or any other number of firms of any size, may confer market power if those data are tradeable commodities or otherwise give the holder of such data a significant competitive advantage. Again, there is no fundamental conceptual difference in this regard between the digital economy and the traditional economy.

In the case of data, moreover, it should be taken into account the same data can be held by an unlimited number of firms (i.e., they are “non-rivalrous”), that their value may decline rapidly over time, and that the incremental value of additional data may decline over a relatively small volume of data points. In today's economy, where consumers purchase products and services digitally, or use several social media platforms in parallel, a particular consumer's data will rapidly become available to a significant number of potential resellers, and the same data may be exchanged in a number of different and overlapping configurations, within the boundaries of the General Data Protection Regulation. There should therefore not be a generalised presumption that holding large amounts of data confers market power, even where those data are held by big firms.

Question 3.4: *"What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?"*

AmCham EU respectfully submits that this question is too broad to be meaningful. The impact of a large firm acquiring a smaller firm depends on the companies and markets in question. The European Commission, the UK Competition and Markets Authority (CMA) and other competition authorities consider such cases on a case-by-case basis. Although they have not, and could not, make generalised statements about the economic impact of such transactions, it is generally agreed that transactions involving no or small increments in market share raise fewer competition concerns.

More generally, mergers and acquisition activity are normally seen as an indicator of a healthy economy in which economic assets are reorganised between buyers and sellers for mutual benefit and the benefit of consumers. Moreover, the possibility of being acquired by a larger firm, or otherwise achieving a significant return, is an important incentive for entrepreneurs and venture capitalists to invest in small firms.

Indeed, the EU State aid rules on risk financing capital have been designed to encourage the creation of start-ups in view of these companies being sold on in the event that they are successful. This is based on the policy assumption that many innovative ideas originate in small companies that do not have themselves the potential

⁴ See, e.g., Case M.8788 – Apple/Shazam, available at http://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf; Case M.8124 – Microsoft/LinkedIn, available at http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf; Case N. COMP/M.7217 – Facebook/WhatsApp, available at, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

to grow and implement their own innovations due to lack of management or financial resource. Therefore, the acquisition of smaller firms by larger firms, if they happen, are in line with the usual business cycle of such small companies.

Separately, it would be incorrect to assume, especially in the digital space, that small companies necessarily hold smaller market shares than larger companies. Smaller companies not infrequently innovate by creating a successful new product or service that allows the company to achieve a significant market share. Thus, there is no intrinsic link between the size of a company and the size of the company's market share.

There is also no presumption that an acquisition of one firm by another firm harms competition simply because of their respective sizes.

Finally, we submit that there is no reason to believe that the impact of acquisitions by a larger company of a small company is of a greater magnitude in the digital space than in other sectors. To the contrary, in the digital space high market shares, if any, are particularly likely to be quickly eroded by rapidly emerging competing offers, as there are very few innovations that are so unique that they cannot be replicated by others.

Question 3.5: *"To what extent is it relevant for any identified benefits and harms that consumers receive 'free' services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?"*

The concept of "free" services "paid for" by data risks oversimplifying a phenomenon that is well known in both traditional and digital markets, the "two-sided" market (or "multi-sided" market), in which a particular product or service generates revenue from two or more distinct groups of customers, enabling a firm to prioritise different revenue streams in an effort to maximise profits. A classic example is the newspaper industry, in which publishers receive revenues from both newspaper buyers and advertisers. The fact that the publisher receives advertising revenue enables it to offer newspapers at a price that is lower than would otherwise be possible, or even for free. In a sense, newspaper readers "pay for" some or all of the cost of producing the paper by the attention they give (or are assumed to give) to advertisements, in return for the benefit of a lower (or zero) newspaper cost.

The same dynamic applies in the digital economy, where services offered to consumers for free are paid for in other ways. To say that consumers pay for these services with their data is simplistic. More specifically, providers of such services achieve revenues by selling other products or services in the two-sided market, such as online advertising. The provider of the consumer service may be able to increase the value of its advertising by using data collected on the consumer, in which case the consumer service provider benefits through higher advertising revenue and consumers benefit by seeing more relevant ads. In any case, the newspaper example demonstrates that such two-sided markets existed long before the development of digital markets and collection of personal data. The legal framework around the collection and use of personal data has in any case significantly changed as a result of the General Data Protection Regulation (GDPR). AmCham EU submits that a more meaningful question to examine would be the extent to which the value of services provided on one side of specific digital two-sided markets depends on the data that is collected from consumers in another side of such markets, and the extent to which the equation has changed as a result of the GDPR.

For the avoidance of doubt, AmCham EU acknowledges that how suppliers seek to optimise revenues from different sides of multi-sided markets can potentially "distort" competition from other suppliers following a different model. For example, in mainland Europe the distribution of "free" newspapers in subway stations has triggered complaints by paid-for newspapers, but such complaints are largely unsuccessful because such decisions are part of the normal evolution of competitive markets. In the UK, free evening newspapers are commonly accepted.

Further, regardless of whether there is a co-relation between "free" services and "free" data, data are not a scarce resource whose allocation is governed by price. Users commonly "multi-home," meaning that many companies gather data on the same users and end up with similar datasets. Data is also often a by-product of ordinary business activities - which means it is now available to most businesses. Even smaller companies engage in data sampling, because of the large volume of data available. Data and the value created through the use of data are not directly proportional.

In AmCham EU's view, drawing any inferences about regulatory intervention from such a simplistic question could be extremely dangerous. For example, requiring a company that collects data on its customers to make a monetary payment would risk creating a serious distortion of competition and would fundamentally misunderstand the functioning of multi-sided markets. It would also create enormous practical issues in valuing such data, among other things because a consumer making available his personal data does not limit in any way his capacity to make the same data available in an unlimited number of other cases. Therefore, the fact that one e-commerce platform obtains tradeable consumer data does not in itself limit the possibility of many other e-commerce providers obtaining the same data for similar purposes.

However, it is important to establish a consistent framework for all companies that collect and use personal information. In a connected world, where individuals use multiple devices and services from different providers, the most effective way to protect consumers is through one set of rules which apply to the collection and use of consumer data. Privacy regulations that apply to only one set of technologies, one data class or one segment of industry players will create customer confusion and distort competition. While context is a relevant factor in determining whether data collection, retention, use, and sharing is reasonable, this analysis should begin from a standpoint that is neutral in terms of both the technology and the industry involved.

Question 3.6: *"How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?"*

Artificial Intelligence, machine-learning software and algorithms are at a very early stage of development. Although these technologies have already generated significant competitive benefits, it is in our view far too early to offer a general assessment of how they affect competition, if indeed such a general assessment will ever be possible. The same may be said of these technologies' implications for competition policy. AmCham EU notes, however, that competition authorities that have looked at these issues so far have all come to the conclusion that existing concepts and tools of competition law are adequate to address competition concerns arising from behaviours in digital markets. Competition law is based on the fundamental dichotomy between bilateral and unilateral conduct. The latter can only infringe competition law where a company is dominant. Bilateral conduct may infringe competition law if it is based on collusion. Collusion requires a minimum contact between two independent companies. Merely parallel but unilateral conduct, as quickly as it may occur, is not collusion and remains lawful below the level of dominance. The acquisition or implementation of a self-learning price adaptation software is unilateral conduct, unless it has been agreed with a competitor or other third party for anti-competitive purposes.

There has been a lot of debate as to whether the fundamentals of antitrust law should be changed to accommodate the particularities of the digital economy, but in the view of AmCham EU, and every competition authority that has so far examined the question, the current system is perfectly able to protect against anti-competitive actions in the digital economy.

Question 3.7: *"What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?"*

Antitrust law and policy systems in the Western world are mostly built on the principle on *ex post* enforcement (with the notable exception of merger control), where regulators investigate allegedly unlawful conduct that is brought to their attention. The question whether a sector requires *ex ante* regulation has been frequently debated in the past. As far as competition law issues are concerned, the existing *ex post*-system is well placed to deal with any arising issues. The many facets of the digital economy actually facilitate - for regulators and third parties - the gathering of information and the bringing of a complaint, and regulators, to the extent that they are appropriately staffed, can turn around quickly and address any issue that is brought to their attention. To the extent that some of the larger firms in the digital space are particularly mediatized also contributes to a broad general debate that allows regulators to follow evolutions of relevance to these companies. Finally, the digital economy makes it also easier for the consumer to contour any hypothetical attempts by suppliers to restrain competition, as consumers can easily source products and services from a myriad of suppliers around the globe. The digital economy by its very nature tends to be more competitive than some segments of the traditional brick-and-mortar economy.

In order to deal with arising issues in a swift manner, regulators need to reflect thoroughly about potential theories of harm and, as they progress in experience, embody their learning in guidance and best practice documents that can be used by industry but also other regulators. For example, today it occasionally happens that even uncomplicated transactions trigger lengthy reviews, as the regulators are not always certain what to look for. We are confident that over time this concern will be addressed through experience.

Question 3.8: *"Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?"*

Outside of competition tools, new entry, competition and economic outcomes are influenced by a myriad of government policies. To that extent and for the digital transformation of the economy to continue taking hold there are a couple of essential elements that need to be in place at various levels: consistent, coordinated and forward-looking technology and data policies, trust, infrastructure, education and skills and an enabling environment.

It is crucial that before deciding on policies, legislation or regulation, policy-makers evaluate all existing tools and new market realities. Analysis should be made of how these could impact digital innovation and transformation. Any policy actions – if needed – should be targeted, flexible, and future-proof. Policy actions must be focused on synergies and measured against the impact on the digital transformation of the economy and its main industry sectors. Technology neutrality should be the cornerstone of policy-making.

Fragmenting the global market and the single market by introducing localisation requirements for data and /or infrastructure will damage the vast potential of the global digital economy as we know it today. The goal should be to remove obstacles while avoiding creating new ones. Any industrial strategy should aim at further aiding the digital transformation and avoid fragmentation.

In order to harness the changes and opportunities created by the digitisation of the economy, education and skills play a critical role, including integrating ICT skills into education and vocational training across sectors, and cooperation between industry and governments to help public authorities and small companies provide reskilling and lifelong learning initiatives.

Question 3.9: *"What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?"*

On 6 July 2018, European Commissioner for Competition, Margrethe Vestager issued a call for input from stakeholders on three broad topics relating to the future challenges of digitisation for competition policy. This is in anticipation of a conference to be held on 17 January 2019 and a report to be delivered by 31 March 2019 on three main topics: 1) competition, data, privacy and artificial intelligence (AI) 2) digital platforms' market power 3) and preserving digital innovation through competition policy.

The digitisation of the economy is contributing to increased competition and greater consumer welfare across a wide range of industries. AmCham EU members share the Commission's goal of ensuring that the European Union participates fully in these benefits and believes that rigorous enforcement of EU competition rules will play an essential role. At the same time, AmCham EU cautions against developing new, sector-specific rules for the emerging digital economy, as premature and overly-prescriptive intervention may chill, rather than encourage, innovation. As Commissioner Vestager noted in her address to the EDPS-BEUC Conference on Big Data on 29 September 2016 (the Big Data address), 'the competition rules weren't written with big data in mind. But the issues that concern us haven't changed'.⁵

In this context, AmCham EU has submitted comments to the European Commission on a number of issues, which is available here:

http://www.amchameu.eu/system/files/position_papers/shaping_competition_policy_in_the_era_of_digitisation_-_amcham_eu_response.pdf

Question 3.10: *"Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?"*

Please see our response to Question 3.9 above.

⁵ Available at, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en



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Digital Competition in the UK: Arete Research's View

6 December 2018

Arete Research is the leading independent technology investment research boutique, serving over 150 global TMT investors since its founding in 2000. We provide investment advice and services in the UK, US, and Hong Kong, regulated in each market by the FSA, FINRA and HK SFC. We have devoted considerable effort to looking at all aspects of large technology companies such as Google, Apple, Amazon, Netflix, and Facebook, which we actively research, despite their *de minimis* disclosure around financials and operating metrics. We regularly visit or speak with 100s of companies monthly and have seen or talked to over 100 digital ad firms just since 1 Sept. '18. We communicate our findings to the largest investors in these companies (among them large UK institutional investors and hedge funds), who are rightly sceptical about the pervasive conflicts of interest of research from investment banks and industry analysts, both of whom are paid directly by companies they follow. Our views are based upon decades of financial markets and commercial experience, and are wholly independent, as we never seek or receive any compensation from companies.

Scale Upon Scale: Relentless Consolidation

We have watched a relentless consolidation of digital advertising and content markets towards an ever-smaller number of ever larger firms. As an example, one can see in Table 1, the leading Internet platforms continue to capture vast sums in *incremental* digital advertising revenue (also taking some portion of "promotion" budgets alongside marketing spend). They take the vast majority of *growth* in Internet ad spend; no other platforms are comparable to the reach and scale that Facebook and Google enjoy, with Amazon and Apple as its only "rising" competitors. The ability of ad agencies to direct this spend is diminishing, as the Internet giants "go direct" to address advertisers large marketing budgets and use self-serve platforms to aggregate ad spend from SMEs. There is no UK-specific equivalent business, and Google no longer breaks out its UK-only revenues.

There are natural scale advantages that come with aggregating datasets of 1bn+ users, esp. when it comes to finding highly targeted audiences and matching them with advertiser demand. We believe that over half of the ad revenue for Google and Facebook comes from SMEs, which lack the sophisticated ad buying skills that larger brands may cultivate, while larger FMCG companies tend to skew their advertising towards less targeted "mass reach" channels like television. This makes trends driving Google and Facebook much harder to track. To an extent, these other channels (e.g. traditional TV, print, outdoor, etc.) have failed to make it simple for SMEs to compete for their advertising inventory). The "digital" portion of ad sales for TV vendors like ITV remain small, while any number of traditional print publishers have struggled to build profitable digital ad business, typically relying on Google and Facebook to "source" ads for their sites. Most rivals for UK ad spend lack the scale of audience or technical skills to establish the platforms that would allow them to compete effectively with Google and Facebook for ad spend. The figures above show they are failing to do so.

Table 1: Google, Facebook Capture Incremental Ad Spend

\$m	YoY Incremental ad spend					FY17 Ad Spend
	4Q17	1Q18	2Q18	3Q18	Total	
Google	4,828	5,231	5,415	4,889	20,363	95,375
Facebook	4,150	3,938	3,874	3,397	15,359	39,942
WPP	-93	-97	-32	-68	-290	7,180
Amazon	779	793	809	875	3,256	3,722
Twitter	6	101	112	147	366	2,110
Snap	120	81	81	90	372	809
Oath	5	51	-238	-200	-382	5,850
Yelp	32	37	40	33	142	772
Total	9,827	10,135	10,061	9,163	39,186	155,759
GOOG+FB as % of total	91.4%	90.5%	92.3%	90.4%	91.2%	86.9%

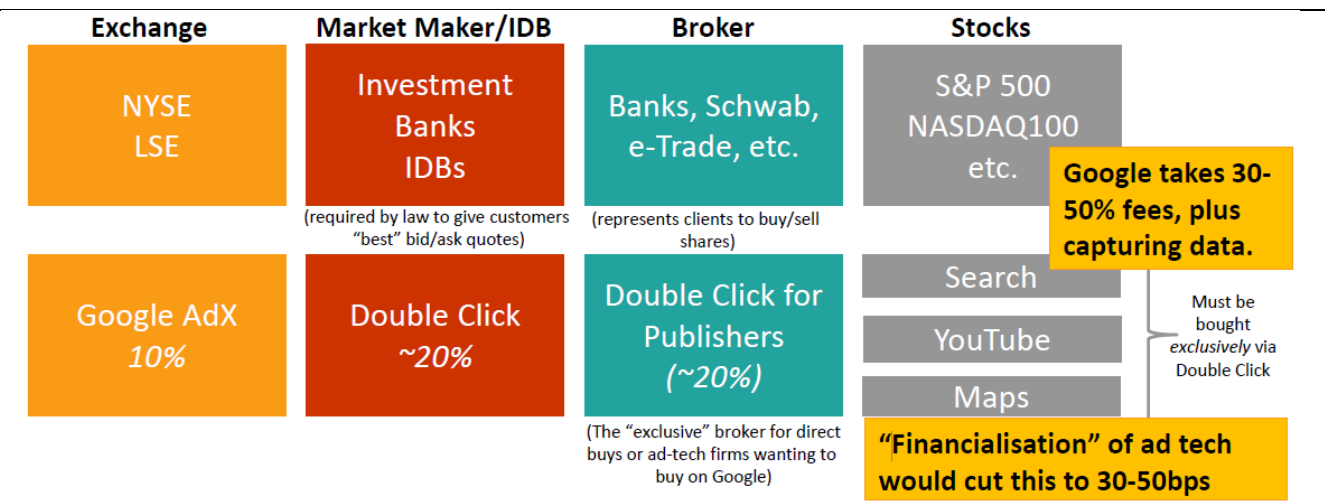
Source: Arete Research estimates, company filings

Digital Ads – A Rigged Market

Google owns every component of the “ad tech” stack. This creates a scenario that would be unimaginable in comparison with how financial markets operate, and leaves advertisers and publishers alike at a significant information asymmetry and commercial disadvantage relative to Google. Fig. 1 shows that Google’s take rate is between 30-50% (although we estimate it is closer to 30% in most cases) in comparison to similar processes in financial markets where typical rates are 5-200bps. Beyond Google owning every part of the value chain, it also has dominant market shares: AdX, its exchange, has ~\$7bn of spend flowing through it and 50%+ market share, whilst Double Click Bid Manager has 30%+ and Google’s Ad Server has an 70%+ share. These figures are hard to measure with precision due to the aforementioned wholly insufficient disclosure from Google (and the other leading Internet players are no better: Facebook does not disclose its Audience Network sales, nor does Amazon or Apple disclose their ad businesses).

The financial analogy would see a scenario where JP Morgan or Barclays *owned* the stock exchange (i.e. the NYSE or LSE), acted as the “market maker” – i.e. aggregating bid and offer quotes for stocks, while also acting as the *exclusive* broker for its *own* shares (i.e. advertising inventory on YouTube, Search, Maps, etc.). In this case, Google also acts as the “broker” for other shares (publisher inventory of display ads or video units on their pages, bought and placed via Google’s Network). Under this system, Google can see “both sides” of the trade – they know how deep “bid density” is for certain types of audiences or inventory, and how deep the pool of that inventory might be to satisfy market demand. This allows them to set price accordingly, to maximise profits. It also allows them to “toggle” or “steer” demand from advertisers towards the type of content which carries higher margins (i.e. YouTube creators that have a lower of revenue share than others). Since YouTube inventory can only be purchased through Google’s DoubleClick platforms, Google can effectively determine the clearing price of certain types of inventory. In this way, Google “runs” a rigged ad market. If such a market were established in the financial world, it would present clear conflicts of interest and ample opportunity for market manipulation (for example, acting as sole market maker in one’s own equity, while retaining the information advantage of knowledge about the underlying state of that equity). In the financial markets, there are floor limits on the cost of transactions, and many “indicative” bids from parties looking to determine the depth and liquidity of markets for any particular instrument. This cannot happen as easily from the outside of Google’s ecosystem (though we do see this behaviour in other parts of Ad tech, across Demand Side Platforms and Ad Networks). Generally, the costs for transacting in a stock that sells for £1 or £1,000 are broadly similar. Many brokers offer “per share” fees, not linked to the value of the share. In the case of Google or Facebook’s ad tech buying systems (embedded into the CPM) or the “take rate” of e-commerce vendors like Amazon, the costs for transacting in more highly valued shares are higher, even though the underlying transaction involves the same stages (of execution/fulfilment, reporting, and reconciliation).

Fig. 1: Comparing Google to the Financial Markets



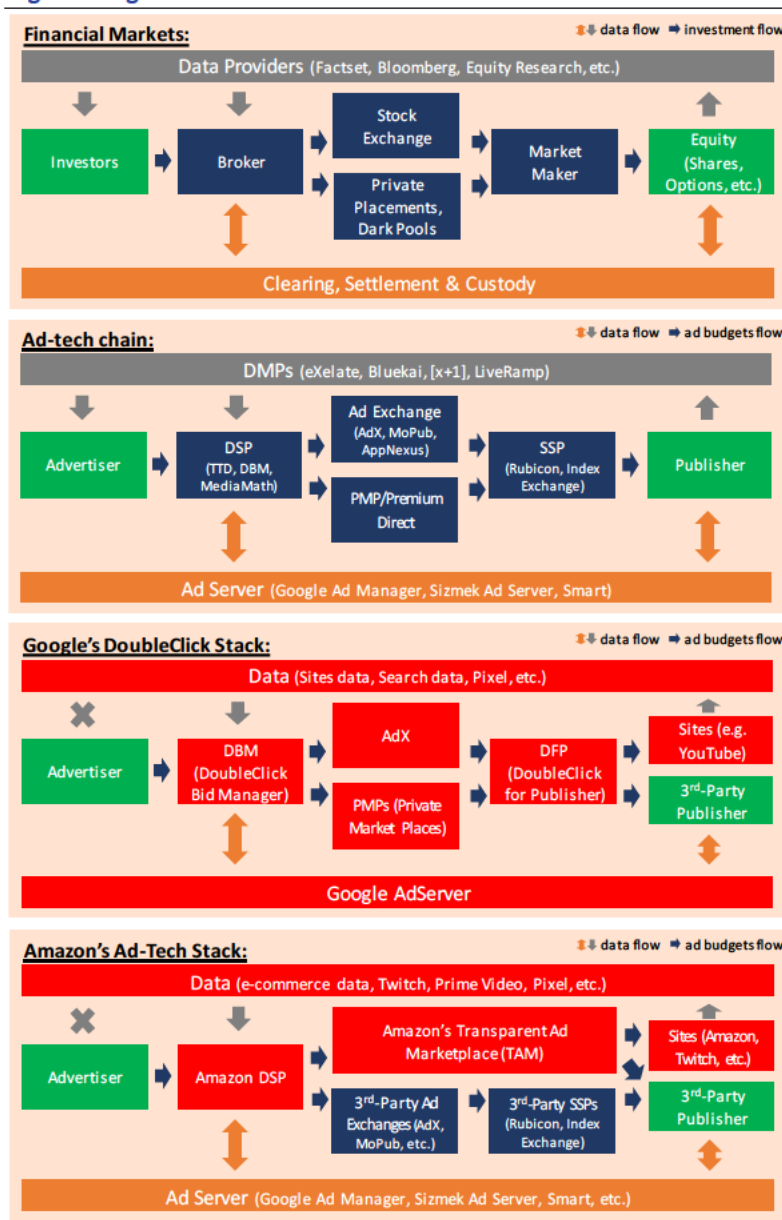
Source: Arete Research

Seeing this highly favourable set-up that Google operates, it is no surprise Amazon has sought to replicate it using data from its commerce business. We compare the Ad tech chain with Google and Amazon's equivalent "full stack" offerings for aggregating user data and selling ads in Fig. 2. Their advantage is compounded by both companies providing attribution services, i.e., confirming that ads were seen by target audiences or converted into increased sales, only with carefully chosen partners which rely on the companies for data with which to confirm the effectiveness of marketing spend.

The same trading room analogy applies to e-commerce firms. Why does Amazon take the same 12% of a sale of two identical items, if one finds a buyer willing to pay 10x more for the same item to be delivered to them. (There is another issue of differential pricing on Amazon's ecosystem based on attributions like location, device used to access the site or apps, past purchasing behaviour, etc which is well-documented, but discriminatory). Why does eBay take the same blended marketplace fee of 8% on items selling for £2, or over £2,000, even within the same category (in this instance, "Pens and Writing Instruments"). Is the value provided by aggregating demand in the form of giving sellers a platform for listings, and providing a place for buyers to go worth 16p, or £160? And in these cases,

we also observe similar information asymmetries –sellers have little way to gauge the depth of demand for products and are beholden to the "pricing guidance" which platforms provide. In the case of Amazon, it dictates strict terms to suppliers, esp. under its FBA (Fulfilled By Amazon) programmes, where sellers are charged to put items in Amazon's warehouse, but penalised if those items do not sell. As with Google and publishers, since Amazon is a critical conduit of sales for merchants of all types, they dare not "bite the hand that (partially) feeds them" with a company who considers "your margin as my opportunity." Platforms that aggregate that level of demand have tremendous leverage over the long tail of fragmented sellers, publishers and merchants, while there is little recourse under current competition law (and there have been few material changes in behaviour since the EU began its various investigations and subsequent rulings).

Fig. 2: Google's DoubleClick Stack is Amazon's Role Model



Source: Arete Research.

TAC Payments: Hush Money, or Efficient Channel?

Many publishers struggled with the shift to digital, with only a handful of “premium” publishers having scaled their digital ad businesses or made themselves profitable solely based on volatile digital ad revenues. Most have needed to develop direct subscription models to supplement digital ad sales, especially since a large portion of advertiser spend is taken by the “ad tech” provider – known as the “ad tech tax”. In 2017, Google paid out \$22bn in Traffic Acquisition Cost (TAC) to publishers, for advertising that was placed on publisher sites, either driven by Google Search traffic or by the publisher’s making their own site inventory available on Google’s Double Click. For many publishers, especially smaller ones which lack the resources to have their own dedicated ad sales teams, Google is their largest source of digital revenue. This creates a material conflict of interest, and effectively turns the digital publishers into “price takers.” Google also has by far the broadest reach of tags on publisher pages (as described by Princeton computing science researchers), meaning advertisers are more likely to find their audience with them. Facebook has a far smaller coverage of “pixels” or tags on publisher pages, instead focussing on its own inventory. We regard Google’s TAC payments to Network Members and to its Distribution Partners as “code of silence” money – publishers would take a risk with their primary source of revenue to speak out about the commercial terms they allow Google to set for selling ads on their sites.

GDPR – Power Play

In the run-up to the implementation of GDPR legislation in 2018, Google introduced its own consent framework at the 11th hour and insisted that agencies or advertisers that wanted to match their own 3P data with Google did so within Google’s Ads Data Hub, which gave Google visibility of the data. Google also hosted its Ads Data Hub internally on its own Google Cloud Platform (GCP), giving a latency advantage to anyone performing media buying with the data. Under the pretext of GDPR, they removed the practice of passing on log level IDs, further limiting advertiser’s visibility into what audience they were buying and brought together all of its attribution products (to determine whether the audience was reached as promised) into a single Unified Attribution offering. Marketers now receive an aggregate view rather than on an individual basis, making it more difficult to track who has been served ads and forcing marketers to commit more spend to a single platform (previously, marketers could see who they had targeted across platforms, whereas now they receive aggregate data and hence the same ad could have been served to the same person across many platforms). These changes require marketers to have “blind faith”, that Google can serve ads which drive the best ROI vs. which ones might be the most profitable (for Google). There is no independent auditing of Google data (it works with a number of partners, but they are limited by domain, e.g. viewability, mobile attribution, e-commerce, etc.), leaving Google in the enviable position of “grading its own homework.” Regulators have yet to show they understand the practice of programmatic i.e. algorithmic advertising technology, even when it has a dramatic impact on the political sphere, not to mention the wider commercial world.

Investment Considerations

The sheer scale of datasets and financial resources that leading tech giants have aggregated gives them a range of structural advantages.

First, they aggregate human resources at a scale that even the leading universities cannot come close to matching. The following tables as based on 2017 data aggregated from LinkedIn, showing the sheer scale of technical teams at leading Internet players, and their R&D budgets, relative to the leading engineering and computing science faculties in the US and UK. Leading Internet players have critical mass in multiple fields, and the wherewithal to take very long-term investment horizons on funding research.

Table 2: Tech Companies Capturing the Talent Pool

LinkedIn Search	Google	Facebook	Apple	Amazon	Microsoft
PhD/MSc Comp Sci./Eng.	3,668	672	1,228	1,742	3,137
Comp. Scientists	29,848	7,965	17,727	29,035	50,228
Total PhDs	939	181	357	281	391
Total Headcount	78,101	23,165	123,000	541,900	124,000
'17 R&D, ex SBC	\$13.9bn	\$5.2bn	\$9.3bn	\$22.1bn	\$13.8bn
yoy increase	\$3.2bn	\$1.7bn	\$1.1bn	\$7.7bn	\$1.0bn

Source: Arete Research, LinkedIn

Table 3: Top Research Universities Are Far Smaller

University	Comp. Sci. Faculty	Engineering Faculty
MIT	164	513
Carnegie Mellon	114	336
Stanford	122	259
Oxford	167	115
Cambridge	168	174

Source: Arete Research, LinkedIn

Second, these companies are cash-rich and have been deploying capital investment at a scale that dwarfs national infrastructure spenders. Google capex will top \$20bn in 2018, and Facebook has doubled spend from \$6.7bn in '17 to \$14bn in '18, with plans to spend \$17-20bn in '19E. The hyper-scale datacentre providers have the resources to pioneer a wide range of techniques (Hadoop, OpenFlow, Kubernetes, TensorFlow, etc.) hitherto only advanced by the largest IT of

defence vendors, which are now lagging the Internet players. Simply put, these large companies define the technical roadmap which all small companies must adhere to. As an example, many start-ups choose Python as a coding language because it is favoured by Google engineers and makes it easier to pitch a company to be acquired by Google when its code base is Python.

Third, to address the question of how these companies can address adjacent markets, when one has such extensive datacentre assets, the cost of incremental processing power can be driven far lower than rivals can match, while their cash balances (currently \$102bn in net cash at Google and \$40bn at Facebook, as examples) allow these companies to invest at near-zero internal costs of capital. The other key feature is the information advantage one services might derives from another: as an example, YouTube advertising rates can be set dynamically when Google knows the location of a user, whether they are in a more desirable postcode, or can scan Gmail content or search queries to see whether a user is "in market" for travel services or large scale purchases like home appliances or autos.

Table 4: Spending – No Object

\$bn	Capex				Net Cash
	FY15	FY16	FY17	FY18E	
Alphabet	9.9	10.2	13.1	21.1	102
Amazon	4.6	6.7	10.0	12.6	5
Apple	11.2	12.7	12.5	13.3	123
Facebook	2.5	4.5	6.7	13.8	41
Microsoft	5.9	8.3	8.1	11.6	60
Total	34.1	42.4	50.4	72.4	331
yoy growth		24.3%	18.9%	48.2%	

Source: Arete Research, Factset

There is little doubt that the scale of the datasets aggregated by multiple services offered by the Internet giants (spanning consumer and enterprise markets, and touching all strata of society, especially via services embedded within the operating systems or as default applications on smartphones) constitute a material barrier to entry to smaller firms.

Alongside that, the sheer scale of resources and competition for top talent leave smaller firms at a structural disadvantage. We have seen multiple sub-segments where a range of entrepreneurial efforts have been quashed by moves from the Internet giants, or just their perceived threat of entry into a segment (even when they withdraw, as Amazon has in UK food delivery).

We have had a view for the past few years that none of these firms would make large acquisitions for fear of the political consequences (sparking competition inquiries from bodies such as the US FTC or DoJ). This has proven correct, and we think explains their inefficient capital structures (earning nearly no return on capital sitting in cash on their balance sheets). As to whether there would be more or fewer acquisitions by these firms under a different regime, it is a failing of UK industrial policy that so many promising companies (and here we mention just two, ARM and DeepMind) were sold into foreign hands rather than being supported to remain (in ARM's case) or become (in DeepMind's) leading global tech names. There is no doubt that companies can be boosted with the near-limitless investment capital of Internet giants, but in a world awash with such pools of capital, the transfer of ownership is not necessary.

The tax regime for these companies is farcical. The notion that all of the ads sold by Google in the UK are actually sold by its Irish entity and based solely on intellectual property developed in the US but held in other low-tax jurisdictions, is simply indefensible by any common-sense test. Yet this raises a clear "outlier" problem, as long as there are adjacent low-tax regimes for leading players to "park" themselves in. Moving to a system whereby sales are taxed based on the location of customers (be they consumers or enterprises) would make far more sense, but would involve a far wider range of concerted efforts by stakeholders. If Google has 5% of its sales to UK firms, it should pay the UK rates of tax on a similar proportional allocation of overall profits, even though its costs may vary between countries.

Can Regulation Work?

In terms of regulation, there are many scholars and legal experts working on the problem of “re-setting” antitrust law away from the basis of “consumer harm” and instead considering monopoly or monopsony power. This is before considering the social implications of filtering news and broader consumer attention through a decreasing number of outlets, with the ability to practice predatory pricing (just ask the BBC, competing with Netflix for talent, but unable to run a deficit of \$16bn in unrecognised content liabilities or sustain losses of \$2bn of annualised free cash flow). There is also the problem of politicians and regulators lacking an understanding of a complicated ad tech market, which has evolved into a sprawling mess of 1P and 3P data applied to a vast array of content, and rife with issues of measurement and ad fraud.

As to specific policies we have a few suggestions:

1. **Keep GDPR.** It would be the height of folly for the UK to abandon the GDPR requirements it has recently imposed and try to create a different regime. This also applied to forthcoming ePrivacy rules. The more globally or regionally harmonised these are, the better for all concerned. These rules can also benefit from case law defining key terms such as “legitimate interest”.
2. **Give Everyone a Data Briefcase.** Consumers need to be made more aware of the value of their data, both individually and in aggregate, and allowed to “monetise” it in a market where they have the right to withhold it from the large players. Making data “portable” is one step but assigning a clear value would create interest to overcome “switching costs” of shifting that data around or denying access to it.
3. **Open Access to Platforms?** Aggregated pools of data from services like Search or social networks could be considered “public goods” whereby all firms would get equal access to the data at similar costs. There is no way for advertisers or sellers to effectively audit the activity on platforms. A structural separation of the “stock exchange functions” and the media assets of large Internet players would be a start, but this may be beyond the remit of any one country. At the very least, there should not be exclusive inventory (e.g. YouTube) which one is forced to buy through closed platforms. This is at the heart of the current case before the US Supreme Court about the 30% take rate on Apple’s AppStore.
4. **Require Improved Disclosure.** Given that the UK is unlikely to be able to force any structural separation of elements of large US Internet players (forcing a breakup of Google and YouTube, for example, runs counter to their ad buying systems that find audiences and places ads on Maps, Search, Gmail and YouTube, as well as on 3P sites), one could require greater disclosure of commercial terms, following similar rules as would govern capital markets. Likewise, the basis of transfer price arrangements and taxation should be broadly disclosed, not shrouded in secret. It is nearly impossible for financial analysts to calculate the likely tax rate of Google operations outside the US.
5. **Open Access to Selling Inventory?** The problem with getting publishers or other small ad tech firms to complain about leading players is that they rely on those same players as the primary conduit for revenue and allow them to act as “sales agent.” Breaking this link is critical – allowing anyone to access Google or Facebook inventory, the same way as anyone can use the LSE to buy any share.

We would be pleased to discuss our work in greater detail should it be required. We have no financial ties to any of the companies considered in this report, so our conclusions are wholly independent.

[Name redacted]

[Job title redacted]

DIGITAL COMPETITION EXPERT PANEL: RESPONSE TO CALL FOR EVIDENCE

Baker McKenzie welcomes the opportunity to respond to the call for evidence. Our comments are based on our experience of advising companies in a variety of sectors. We confirm that this response does not contain any confidential information.

4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Our anecdotal experience from advising clients is that knowledge of the possibility of being acquired can be an incentive to establish a start-up venture and innovate.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

We do not currently see any new concerns arising from AI/algorithms. For now and the foreseeable future, it seems that pricing policy is set by a business and the AI executes that policy. Conversely we do see positive benefits from these innovations – e.g. the ability to develop pricing policies in fast-moving markets.

3.2 Policy and implementation solutions

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

We believe that the competition law tools currently available to the CMA are adequate to address the complexities connected with digital products and services and digital ways of doing business. The CMA is also fortunate, of course, to have consumer protection tools at its disposal too.

Our reasons for believing that the current tools are sufficient are set out below. The thread running through these observations is that a thoughtful, evidence-based and holistic use of existing antitrust tools leads to predictable, timely and respected antitrust enforcement.

- **Empiricism/ evidenced-based approach:** we commend the CMA on its thoughtful and evidence-based approach to complex issues. An example of this is the time taken to select, study and understand markets and practices before taking any action. Looking back, the CMA has often been quite prescient in terms of the topics it has researched. Examples of topics which have grown in importance and attracted attention from other competition authorities and international antitrust fora are minority interests in competitors, personalised pricing, pricing algorithms and platforms. Our experience is that clients appreciate it when regulators take the time to talk to and listen to business, e.g. to understand the commercial drivers and technology being used. Good examples are the two studies into individualised pricing which look at the prevalence of this conduct as well as its effects. These papers are balanced and these papers are not afraid to reach difficult conclusions – e.g. identifying ambiguous effects as a result of the many factors at play. The Digital Comparison Tool study also led to many useful observations on the demand side, looking at the impact on consumer in a manner that not all competition authorities are able or inclined to do. The CMA paper into the economics of pricing algorithms also showed its preparedness to take on topical issues in a measured way. Its conclusions allowed stakeholders to understand what the CMA would prioritize and why, assuming it fell within the scope of competition rules at all. These challenging projects and their concise results ensure that the CMA continues to enjoy profile in the international competition law fora.

- **Cautious approach to presumptions:** these mechanisms can be very attractive to regulators but must be reserved for situations where there is empirical data and solid experience to know that one fact is likely to lead to another. That seems unlikely to be the case in relation to digital markets where even the process of defining antitrust relevant markets can be challenging given the pace of change. A case by case assessment, instead of presumptions, is prudent for now. Some antitrust commentators have expressed an argument that data asymmetry (e.g. as to why an incumbent acquired a start-up) may justify the use of presumptions. However, presumptions can become very strong - almost impossible to rebut in a way which might not be intended with market-chilling consequences. Agencies should be extremely careful about developing presumptions and that equal consideration and explanation would also need to be given as to how in practice companies can rebut presumptions.
- **Principled approach to geographic market definition:** The need to give full consideration to the facts and economic reality also arises of course in the merger control context. In relation to the geographic market, for example, competition authorities should take care not to allow the natural inclination to assess the impact of competition in the relevant local jurisdiction to divert their attention from the fact that the parties (especially in relation to digital activities) may face competition from much further afield, even worldwide. The use of merger retrospectives - analysis of whether predicted outcomes turned out to be accurate - are also a valuable data point.
- **The need to look beyond antitrust "labels":** In our view it is important to continue to look beyond labels such as "high concentration" and "big data" to assess the facts, and business objectives and economics at play. We think the EU Commission's developing approach to assessing the competitive significance of data in the merger control context reflects a careful empirical approach (moulded to formulated theories of harm). A number of recent cases have involved the acquisition and sometimes combination of major data sets, leading the Commission to investigate both horizontal and vertical issues. In these data-related cases, the Commission's methodical analysis has enabled it to remove its concerns, e.g. about the importance (uniqueness) of the data or whether it might be used to foreclose or harm rivals. The cases are generating useful guidance and potentially a workable methodology for assessing the competitive significance of data going beyond the merger control context. In relation to data, the establishment by the CMA of a Data Technology and Analysis team comprising data scientists and other technical experts also promised to enhance the CMA's ability to explore theories of harm and the most appropriate solution in this area - which may not always be on the supply side (see below).
- **Existing precedents can be applied flexibly in the digital context.** The EU Court has shown a flexibility in applying precedents in the digital context. In *Eturas*¹, the Court was faced with a situation where strategic pricing information was shared between competitors. The Court took into consideration the digital context in which information was easily shared between rivals and, in the circumstances, widened the available 'defence' for public distancing. Specifically, the court states that "in a case such as that at issue in the main proceedings, which does not concern an anticompetitive meeting, public distancing or reporting to the administrative authorities are not the only means of rebutting the presumption that a company has participated in an infringement; other evidence may also be adduced with a view to rebutting that presumption".² This is an example of existing case law being applied flexibly and yet sensibly to the digital context. It would not have been appropriate to have treated the digital information exchange in the same way as a physical exchange between a group of competitors (which is itself rightly a controversial area of EU competition law).
- **Holistic approach:** We commend the CMA for looking at competition issues in the round and for considering the various stakeholders affected. It is particularly important that the CMA can combine competition law powers with consumer protection law powers and can use these tools interchangeably or

¹ <http://curia.europa.eu/juris/liste.jsf?num=C-74/14>

² <http://curia.europa.eu/juris/document/document.jsf?jsessionid=4E34680D0972C6058E4084C0B38C6416?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=436032> - see para 46.

in conjunction in order to achieve the right outcome.³ For example, the DCT study focusses rightly on the role of consumer trust and how to build that. The OFT/CMA work on personalised pricing returns to that theme and emphasises the importance of consumer trust for online commerce more generally. The CMA is also aware that other areas of law for which it is not directly responsible have a role to play, e.g. equalities legislation, data protection and advertising rules. Looking at whether changes can intervene to tackle problems arising on the demand side is also a useful approach. See for example the joint CMA/FCA report (UKCN consumer remedies project). The CMA has also been prepared to assess the success of previous interventions. For example, in relation to price regulation, the CMA found that a decision by Ofgem in 2009 to ban regional price discrimination had not had the desired effect of promoting effective competition. It is important to be open-minded to the use of experience and findings like that in new settings. It is also important not to look at the various digital issues in isolation. For example both the CMA and the European Commission have noted that an economic effect of personalized pricing is that it may make tacit collusion (e.g. through pricing algorithms) less sustainable. That is because there is no longer a single observable price that pricing algorithms can match. So personalised pricing and tacit collusion are unlikely to function in the same market.

BAKER MCKENZIE

(GXM/December 2018)

³ See for example CMA *Annual Plan consultation 2019/20*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761071/annual_plan_consultation.pdf

Review of Competition in Digital Markets: Call for Evidence Barclays Response

Barclays is a transatlantic consumer and wholesale bank with global reach, offering products and services across personal, corporate and investment banking, credit cards and wealth management, with a strong presence in our two home markets of the UK and the US. With over 325 years of history and expertise in banking, Barclays operates in over 40 countries and employs approximately 85,000 people. Barclays moves, lends, invests and protects money for customers and clients worldwide.

Barclays welcomes the opportunity to engage with the Expert Panel's Review of Competition in Digital Markets. As a major financial institution competing in an increasingly digital market, we are well placed to provide unique insights and perspectives on this subject.

We provide thoughts on a number of themes we believe relevant to this review and hope these are valuable. We would of course be happy to discuss them further if helpful.

1. Driving Competition Through Data Sharing Frameworks

The digitalisation of markets and technological innovation has improved the ability of businesses to collect, store, manage and use consumer data, providing firms with huge potential to create competitive advantage. However, developments in technology and regulation also have the potential to drive greater competition across the economy by enabling consumers to control and share their data in ways never previously possible.

In financial services, the recently introduced Open Banking framework demonstrates how secure data sharing mechanisms can drive competition by allowing consumers to share their bank transaction data with competing third party providers (TPPs). Similarly, the new General Data Protection Regulation (GDPR) has enhanced consumers' control over their data, and introduced new data portability capabilities enabling consumers to transfer their data to competing providers. Access to consumers' data enables competing businesses to design tailored products and services most suited to the consumer's needs. However, for these benefits to be realized, a cultural shift towards data sharing is required, with consumers having confidence in these new frameworks, and trusting that their data will be used appropriately and for their benefit.

Open Banking and GDPR Data Portability create the foundations on which the UK can develop into a customer-centric, 'open data' economy, with greater competition as consumers leverage their data between providers for their own benefit. We explore each of these initiatives, and their impact on competition further below.

Open Banking

The Open Banking framework in the UK, introduced following the Retail Banking Market Investigation by the Competition and Markets Authority, is intended to boost competition in financial services by providing consumers with the ability to securely share their financial data with third party firms, whilst continuing to retain their underlying relationship with their bank.

The framework is driving competition in the market by enabling third party firms to provide the consumer with a variety of 'front line' services, from data aggregation to spending analysis, while the responsibility of securely holding the funds remains with the bank. Such services would not be possible without access to consumers' data.

If consumers choose to utilise this ability, they provide consent for each TPP to access their data, with the data then shared between their bank and the TPP safely and securely through industry developed and purpose built application programming interfaces (API) technology. This API technology underpinning the framework is crucial to ensuring consumer data is shared safely and securely with third parties, and helps build confidence and trust in the system. At no point are consumers required to share their login credentials with third parties.

While still in its infancy, Open Banking is a positive first step in harnessing the power of consumer data sharing to boost competition, and is proof that open data principles can be leveraged within the private sector to improve consumer markets.

Policymakers should consider how a similar framework to that used in Open Banking could be used to boost competition in other sectors.

Data Portability

Under the new GDPR rules, consumers can request that firms provide back to them all data they have provided to the firm in return for a service, for the purpose of 'porting' it to a competing provider. This allows a consumer to switch service providers without losing their data profile developed with their existing provider and the associated benefits that brings. A consumer may be discouraged from switching to a new service provider if, in so doing, they are unable to take their data history with them, and therefore have to begin creating a new data profile from scratch, which may disadvantage them – either in terms of product/service received or customer experience. Data portability has the potential to remove this barrier to changing service provider, therefore encouraging greater competition and enhancing economic outcomes for consumers. Alternatively, data portability could allow consumers to port their data profile to an intermediary to help them identify better services available at competing providers.

Data portability is well placed to drive competition in sectors where consumers provide data over time, whereby they develop an extensive data profile that other providers could use to anticipate their future behaviour, and tailor their service offerings. The insurance sector could provide a good example. Consumers provide a significant amount of data at the outset to receive a bespoke price quote. The need to 'recreate' their data profile with different providers could act as a disincentive to switch rather than renewing with their existing provider. Data portability in the insurance market

could potentially act to help remove this barrier, potentially making it easier and simpler for consumers to switch providers to achieve the best cover at the best price.

More generally, we believe there are criteria that can be used to identify consumer markets in which data portability could best drive competition:

- markets rich in personal data, either through initial on-boarding, or through consumer activity;
- markets where data can be used to provide a tailored, personalised or cheaper service;
- markets in which there are multiple service providers.

For data portability to have the most impact on competition there needs to be meaningful interoperability and agreement on common standards between market participants. The extent to which data is actually 'portable' to other providers - i.e. whether the data provided back to consumers is properly readable, understandable and useable by different providers - is key. Any requirement for the recipient firm to prepare or process the data in anyway upon receipt will create extra friction and will naturally limit the potential of data portability. While GDPR dictates that data should be shared in a commonly used format, if there are significant differences in the data that different firms provide, the benefits available will be limited. Ensuring data is shared in as uniform a way as possible would help ensure the benefits of data portability are fully realised and the positive impact on competition is delivered. It is therefore important that appropriate common standards are created around the relevant data sets, and adhered to by market participants. As the relevant useful data may differ between sectors, standardised data "templates" should be developed and agreed within sectors to ensure 'ported' data can be used without hesitation by different providers.

Furthermore, for data portability to best drive competition, the concept needs to become well established, be fully understood by consumers, and enjoy high levels of public awareness and trust. Any positive impact on competition will be limited if few consumers are aware of their right to data portability and the potential benefits it can deliver. Policymakers should therefore seek to maximise consumers' awareness of their data portability rights. Service providers should also be required to ensure consumers are aware of their rights and fully understand that they can request their personal data (in line with the established data templates) to share with other firms if they choose to.

2. Competition in Digital Financial Services

The digital revolution is impacting almost all sectors across the economy, and is changing the way we live our lives, from how we order a taxi and book a holiday, to the way we bank. Indeed, it has had a profound impact on the financial services sector: from online banking, to mobile apps, the digital revolution has transformed traditional models of banking and service delivery to fundamentally change how consumers manage their finances. Barclays has over 10m digitally active customers, with 6m customers regularly using the Barclays Mobile Banking app, and over the next few years, we expect almost all retail financial services to be conducted digitally, as consumers and clients increasingly choose online digital offerings over traditional channels such as branches.

While there have been a range of new entrants into financial services in the past, in recent years, the nature of competition within traditional financial services markets has been changing, as digitalisation has enabled new entrants to enter the market and challenge existing providers operating traditional banking models. For example:

- New financial services startups (fintechs) are emerging within the sector seeking to use technology, and often new data access frameworks, to innovate and transform certain services being provided to consumers.
- Larger firms, predominantly operating in sectors traditionally far removed from the regulated financial services sector (e.g. bigtech firms), are increasingly starting to engage in financial services activities while being outside of the regulatory perimeter.

While these new service providers have the potential to improve competition and drive innovation in traditional financial services markets, it is important to ensure the operating environment is fair and equal across market participants, regardless of the participant's home sector. However, currently, there are a number of instances where the regulatory operating environment for these new and emerging service providers is not equal to that of existing financial service providers. This creates a landscape with consumers potentially being exposed to greater risks, or existing providers facing competitive disadvantage. We explore these instances of an unequal operating environment below:

i. Consumer Protection

Many of the new service providers described above may not operate within the current regulatory perimeter for financial services and therefore will not be subject to important regulatory provisions intended to ensure sufficient levels of consumer protection. New digital financial products offered by these emerging financial service providers can carry many of the same risks as their traditional, non-digital equivalent products, but lack the protections provided by traditional service providers. There is a significant risk that consumers will find it increasingly difficult to understand the risk profiles of products offered by different providers and the associated protections they may or may not benefit from. For example, pre-paid card providers under the e-Money Regulations are one example where consumers may receive a service that looks and feels very similar to a current account, but consumers may not be aware that these providers offer significantly lower levels of consumer protection, including the fact that "deposits" of e-money are not covered by the deposit guarantee scheme. It is important to ensure that, as new differently regulated service providers enter the market, consumers continue to benefit from the strong consumer protection framework provided by the regulation of traditional existing providers.

ii. Access to Data

New requirements, introduced under the Second Payment Services Directive (PSD2), and the Open Banking framework in the UK, require the largest banks to share customer transaction data (at the customer's request) with TPPs, including potentially the large, data-rich technology (bigtech) firms. These requirements enable TPPs, and therefore bigtech service providers, to combine consumer transaction data with their vast non-transaction data to offer products and services to customers, often in direct competition with traditional, existing service providers.

While PSD2 provides third parties with real-time, secure access to bank transaction data, no similar framework or provisions exist requiring service providers in other sectors to share their consumer data (at the customer's request) with third parties and potentially banks. While consumers can seek to make use of data portability provisions under GDPR to share their non-transaction data with traditional, existing service providers, consumer data only has to be provided within 30 days, and on a one-off, rather than an ongoing, basis.

This asymmetry in data access is a clear example of an unequal operating environment between traditional and emerging service providers. Embracing a safe and secure 'open data' economy in which consumers can easily and securely share their data between sectors would enable more innovation, greater competition and ultimately benefit the end consumer.

iii. Regulatory Perimeter and Arbitrage

Traditional, existing financial services providers are subject to significant, direct and ongoing supervisory oversight by the relevant financial services regulators. While this can be a resource intensive undertaking, it ensures systemically important firms adhere to appropriate rules and frameworks to protect the financial system as a whole, and the individual consumer.

In contrast, non-financial services firms offering products that are close substitutes to traditional financial services for consumers but covered by different regulatory regimes, may not be subject to the same level of oversight, or indeed any oversight at all, if they operate outside the regulatory perimeter – for example, pre-paid card providers under the e-Money Regulations. There is a risk that regulators' rules will fail to apply equally and in a similar manner to both traditional financial service providers and emerging service providers operating outside their remit.

As a result, there is also a risk that the proportion of activity regulators can influence will shrink due to regulatory arbitrage, and the proportion of customers outside of their protection will grow.

To ensure a fair and equal operating environment, there is a need for effective and ongoing supervision of all providers of financial services, regardless of the providers traditional 'home' sector and even to look beyond permissioned, product based regulation toward an outcomes based/impact assessment regulation (looking at the end-to end process and risks for consumers). Ultimately, there is a need for cross-sectoral regulation, based on the principle of 'same activity, same risk, same regulation'.

iv. Prudential Requirements and Financial Stability

Major retail banks, as systemically important financial institutions, are subject to the regulator's framework of strict prudential requirements intended to ensure their resilience to financial shocks and protect the financial stability of the broader economy. These requirements are key to managing risk, protecting consumers and protecting the financial system as a whole. The rules were introduced or enhanced over the last decade, and are designed to cover traditional financial services providers. However, as discussed previously, the market for financial services has been changing with emerging service providers increasingly engaging in financial services activity outside of the regulatory

framework. These new service providers, both fintechs and bigtechs, are not subject to the framework of prudential regulation that traditional, existing service providers are. While these emerging firms may pose less stability risk to the financial system, there is a strong case from a consumer protection perspective, that they should be required to adhere to certain aspects of the framework, for example, deposit guarantee requirements, recovery and resolution/bail-in requirements, and operational resilience requirements.

v. Broader Societal Expectations

There is a significant difference in societal and policymaker social responsibility expectations placed upon traditional, existing service providers and emerging providers. Given their long history in the market, and their traditional role in society, established providers are subject to high expectations to support all areas of society, even where there may be limited benefit to the firm. For example, established retail banks are required to support financial inclusion across society in the provision of basic bank accounts. New emerging providers are currently insulated from such expectations to support financial exclusion, and instead are focussing their efforts on growth opportunities. As financial services are increasingly provided digitally, Government should consider how social responsibilities for the banking sector should be shared within the sector, regardless of business model or primary home sector. Ultimately, new emerging providers offering financial services should be required to serve the wider societal roles and expectations placed on established providers.

Policy Recommendations

- **Regulatory Perimeter and Arbitrage** – In considering competition in digital financial markets, it is important that policymakers assess and understand the changing market dynamics, the impact of emerging market participants and the provision of products that are close substitutes to traditional financial products.
- **Regulation must be technology and business model neutral** - new and emerging entrants offering financial services akin to traditional banks should be subject to the same regulatory rules and requirements as traditional banks, regardless of their primary business or home sector. Ultimately, policymakers should ensure equality of regulation, supervision, market access and obligations arising from participation in the financial services market, i.e. ‘same activity, same risk, same regulation’.
- **Introduction of data sharing frameworks in data-rich sectors** - policymakers should consider whether competition in digital markets can be improved for the benefit of consumers through the introduction of data sharing frameworks in data-rich sectors, for example the technology sector.

3. Powers and Tools Available to Competition Authorities

Competition authorities in the UK already have significant powers and tools at their disposal to deal with issues in the digital economy, particularly compared with other jurisdictions. For example:

- **Mergers** - the CMA has wide ranging discretion to scrutinise mergers and acquisitions in the digital markets. The presence of a share of supply test in the UK merger control jurisdictional thresholds means that the acquisition by large firms of small digital firms with low turnover and relatively small market shares may be subject to review by the CMA. For example, the CMA has recently been able to review Blackbaud's acquisition of JustGiving, and JustEat's acquisition of HungryHouse, by virtue of the share of supply test, despite the turnover of these targets being well below the UK CMA's turnover thresholds of £70m.¹ In addition, the CMA is currently reviewing the completed acquisition of iZettle by PayPal.²
- **Anti-trust enforcement** - the CMA and concurrent regulators have a broad range of powers to investigate and remediate suspected anti-competitive behaviour. The CMA has already used these powers to investigate companies in the digital sector. For example, the CMA is currently investigating the use of most favoured nation clauses in contracts relating to the online sale of home insurance products.³ The CMA also issued a decision in 2016 fining an online seller of posters and frames for agreeing with another online seller not to undercut each other's prices on the Amazon marketplace (implemented through automated repricing software).⁴
- **Market studies and investigations** - The CMA (and concurrent regulators, such as the FCA) can also conduct wide ranging market studies, and market investigations in the case of the CMA, if they consider that competition is not working well in a particular market. For example, the CMA investigated the supply of digital comparison tool services, publishing its final report in September 2017.
- **Advocacy** - In addition to these formal investigatory tools, the UK competition authorities regularly engage in advocacy work, including informally gathering information and steering the debate in important areas of interest which concern the digital economy. For example, the CMA has held stakeholder roundtables on consumer vulnerability in digital markets⁵ and has recently published a study into pricing algorithms and whether they could be used to support illegal practices.⁶ Online and digital markets have also been designated a theme of

¹ JustGiving had UK turnover of £25m and HungryHouse had UK turnover of £29m. See:

<https://www.gov.uk/cma-cases/blackbaud-giving-merger-inquiry>; <https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry>.

² <https://www.gov.uk/cma-cases/paypal-holdings-inc-izettle-ab-merger-inquiry>

³ <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>

⁴ <https://www.gov.uk/government/news/cma-issues-final-decision-in-online-cartel-case>

⁵ <https://www.gov.uk/government/publications/vulnerable-consumers/consumer-vulnerability-in-digital-markets-summary-of-stakeholder-roundtable>. Barclays attended a session on 26 June and has more recently engaged the CMA in relation to vulnerability work it has conducted.

⁶ The CMA's Economic working paper on the use of algorithms to facilitate collusion and personalised pricing as published on 8 October, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

particular strategic importance in the CMA 2018/2019 business plan.⁷ The CMA has also established a new Data, Technology and Analytics (DaTA) Unit, whose purpose is to enhance the CMA's understanding of the digital economy and make sure its practices, interventions and capabilities keep pace with the evolution of business models and practices.⁸

It is not clear that there is a competition law enforcement gap in the UK as far as digital markets are concerned. However, to the extent that the Government proposes to expand the tools and powers available to UK competition authorities to deal specifically with digital markets, Barclays would urge that careful consideration should be given to any additional rules, in order to ensure that they do not give rise to unintended consequences for digital or other sectors.

One relevant factor which requires special consideration in digital markets is the use and treatment of data, as data often becomes central to the services being offered in digital markets. There is therefore a need to ensure that competition authorities and regulators work together with consumers and industry in determining the correct treatment of data, whilst respecting that many firms have collected data by legitimate means as a result of investments made by them, with the data used by firms to improve their offers to customers. By getting the parameters for the use of such data right, Barclays considers that competition can flourish to benefit the consumer in a secure manner.

Having commented on the broad scope of existing competition law powers in the UK above, we note that where Government and policy makers have concerns about issues in the digital economy, they should also consider whether these could be more effectively addressed through regulation rather than through competition law enforcement, in order to speed up benefits to consumers. This is particularly in light of the typical timescales from initiation of competition cases to the implementation of remedies, and where complex issues are involved. For example, the benefits of measures as innovative and advantageous for customers as the UK's Open Banking regime could, in future, be realised in a more timely and efficient manner if implemented through regulation, rather than largely through a competition authority's findings and remedies (in that case, the CMA's Retail Banking Market Investigation Order 2017 led to the launch of Open Banking in 2018, following the CMA's 2014-2016 market investigation). Such regulation should still, of course, be subject to detailed comment and consultation with the relevant stakeholders, in order to enhance the effectiveness of any new regulation and to mitigate the risk of any unintended effects on, for example, innovation.

Care should also be taken to ensure that the application of both competition law and regulation is well considered and consistent. For example, authorities should be careful that their level of regulatory oversight does not give rise to an uneven playing field. Authorities should in particular be mindful of the effects on consumers of their actions, for example, when some players are subject to less regulatory oversight than others by virtue of having a different business model. As noted in

⁷ See 1.8 on page 4, and from 1.16 on page 6 of the business plan, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704594/Annual_Plan-201819.pdf.

⁸ See 1.21 on page 7 of the business plan.

section 1, when assessing the retail banking sector, it is important to consider not only fintechs alongside established and challenger banks, but also to consider other categories of new entrants.

Introduction

Bertelsmann SE & Co KG aA welcomes the opportunity to respond to this consultation on competition in the digital economy as we have with the book publisher Penguin Random House and our music branch BMG Rights major operations in the UK. Penguin Random House has its second biggest office on a global scale in London and employs around 2000 people in the UK alone. Moreover, Dorling and Kindersley' (part of PRH) global publishing is based in and operates from the UK.

Bertelsmann is a media, services and education company that operates in about 50 countries around the world. It includes the broadcaster RTL Group, the trade book publisher Penguin Random House, the magazine publisher Gruner + Jahr, the music company BMG, the service provider Arvato, the Bertelsmann Printing Group, the Bertelsmann Education Group and Bertelsmann Investments, an international network of funds. The company generated revenues of €17.2 billion in the 2017 financial year. Bertelsmann stands for entrepreneurship and creativity. This combination promotes first-class media content and innovative service solutions that inspire customers around the world.

As we represent a large variety of different businesses across many countries, we would like to address the question in a more general manner while trying to be concise.

The creative industry in Europe is at a crossroads. At this point, it is still one of the UK's and Europe's most important economic sectors. But the creative industry faces great challenges. U.S. tech platforms like Facebook, Amazon, Apple, Netflix and Google are increasingly turning into competitors. They shape – and often dominate – the digital economy. They also expand faster into the direction of media companies than vice versa. This results in an unprecedented concentration of market power in the hands of these digital platforms as de facto gatekeeper, which requires fair and proportionate regulation of all market players to achieve a level playing field. However, current legislation in key international markets is fragmented, outdated and does not reflect consumer interests and international market realities in the digital environment. It is time for digital platforms to take full responsibility, reflecting their market power, daily mass reach and influence on societies – and legislators must establish appropriate rules and standards with a holistic mindset.

The public value created by content companies must correlate to the economic value returned to them in order to ensure a healthy, pluralistic media ecosystem with diversity in voices, products, services and business models. For our high-quality content and services to thrive, we need to be able to capture a fair share of the data and advertising economy. To achieve this, we have six recommendations to regulators:

1. Appropriate accountability of all players reflecting consumer and business realities;
2. Fair access to data ;
3. Efficient and agile enforcement of modern competition and antitrust rules to reflect market realities;
4. Fair share of the advertising market to finance content investments;
5. Fair balance of rules for digital platforms and media companies ;
6. Fair taxation;

1. Appropriate accountability of all players reflecting consumer and business realities

Liability for online content is regulated by legislation pre-dating the existence of many US platforms and their businesses¹. Digital platforms have long ceased to be mere providers of technological infrastructure. Platforms do not just enable consumers and media companies to distribute and communicate their content – they also influence content in their news feeds via algorithms – all too often with the predisposition towards more radical, sensationalist content. Recent events have demonstrated that algorithm-driven platforms are highly vulnerable towards disinformation online, manipulated content and fraud. New business models of digital platforms expand into curating content – which is regulated at a much higher level for content/media companies – especially broadcasters. There is a significant mismatch between the value that digital platforms draw from (user generated) content and the revenue returned to the content providers.

We need a newly tiered liability regime, reflecting the massive impact of digital platforms on consumers, society and the whole value chain, and which ensures that the de facto curating activities of digital platforms entail the same kind of liability.

Some examples:

In Germany, media and press companies enjoy freedom of the press – in their reporting, media companies must respect the personal rights of people and companies, which, like freedom of the press, have constitutional status. The balancing of these interests is reflected in media regulation, which, for example, legally obliges press companies to maintain journalistic due diligence. This obligation stems from the State Press Act and – in the field of online media – from the Interstate Broadcasting Treaty.

Breaching these duties leads to extensive sanctions. If, for example, negligent research leads to an article containing false claims about a person, the person concerned can sue the publisher and editor for damages. Depending on the severity of the breach, they are entitled to injunctive relief, retraction, or even monetary compensation. Furthermore, all state press laws and the Interstate Broadcasting Treaty enshrine the claim to counterstatement. This claim gives the person concerned the right to have their account of an event disseminated, irrespective of the truthfulness of the account in the article they are disputing.

Finally, the majority of German publishing houses have made a voluntary commitment to respect the German Press Council Press Code when reporting in their media. The German Press Council Complaints Rules give every citizen the right to file complaints about violations of the Press Code. In the event of an infringement, the Press Council will issue a note, a censure, or a [public] reprimand. The latter are published by the Press Council at <http://www.presserat.de/pressekodex/uebersicht-der-ruegen/> and usually by the publisher concerned as well.

¹ e.g. Section 230 of the US-Communications Decency Act of 1996, EU E-Commerce Directive of 2000, US Digital Millennium Copyright Act of 1998, EU Directive on the harmonisation of certain aspects of copyright and related rights in the information society of 2001).

Beyond special media law regulations, journalists and publishers are also subject to sanctions under general criminal law. Here the focus is on libel (slander, defamation) and offences with regard to the publication of images, whereas in relation to research, the focus is on offences that violate the integrity of information or undermine official investigations or proceedings.

So although regulation is fragmentary overall and stems from numerous laws, it should be noted that media and press companies are subject to extensive regulation regarding compliance with journalistic standards.

2. Fair access to data

Asymmetrical access to data and a lack of transparency harms consumers, the diversity of the media landscape and the digital economy. Consumption of media content generates valuable data, which should be accessible to the media companies financing such content. The ever-increasing concentration of aggregated user data in the hands of a few digital platforms would be further reinforced by the ePrivacy Regulation as currently envisioned. Global digital platforms have built data ecosystems allowing them to easily obtain consent in exchange for access to their services. Similarly, media companies should remain free to make access to their editorial content conditional on the right to collect and process the data of their users. Furthermore, the concept of central privacy settings in browsers and devices would strengthen the gatekeeper role of digital platforms – but consumption of media needs to be independent of browsers and devices.

The global digital platforms are, by far, the biggest collectors and processors of data in the digital economy. We (urgently) need a more balanced framework that recognizes the contribution of media companies to the data ecosystem and ensures fair access to data and freedom of business model, while protecting consumer privacy and trust.

Some examples:

The mandatory opt-in stipulated in the draft ePrivacy Regulation would result in significantly fewer users of a website agreeing to targeting. This would reduce the use of targeted advertising so drastically that the offer can no longer be maintained with advertising revenues. Without advertising revenue, free, professional journalism in the digital world would be at risk.

The ePrivacy Regulation would require the default settings in browsers, apps and operating systems to exclude third-party cookies. This turns browser operators into powerful “gatekeepers”. The ePrivacy Regulation thus strengthens the influence of large American tech corporations at the expense of journalistic content providers.

The ePrivacy Regulation lacks a legal basis for a “fraud solution” based on the recognition of Internet access devices, i.e. a clause that would permit the collection of hardware and software data or the use of cookies for fraud prevention and combating abuse in eCommerce. Unless such a legal basis is provided, this effective form of fraud prevention would become impossible in the future. Opt-in is not a viable solution because potential fraudsters simply wouldn't give their consent.

This development is further exacerbated by the “coupling prohibition” in the GDPR. It says that a user may not be denied access to a site - independently of their opt-in. Since the user would have to be given full access to the site in any case, there would generally be negligible motivation to opt in and consent to the collection and processing of data.

The advertising industry's budgets are shifting to offers that can still use targeting. "Login giants" are the main beneficiaries. Thereby the ePrivacy Regulation would primarily serve to strengthen major U.S. players such as Google and Facebook.

3. Efficient and agile enforcement of modern competition and antitrust rules to reflect market realities

The current competition and antitrust law in Europe (and the US) does not reflect the realities of the digital ecosystem. The mechanics of the platform economy, notably the so-called network effect, fuel rapid growth of platform companies to unprecedented size, market power and influence on public opinion. Antitrust law and enforcement of it must take into account these effects even before the tipping point has been reached and – if too late – provide for effective means to prevent platforms from an abuse of such market power and from other anti-competitive behaviour.

It should be made easier for media companies to engage in mergers and new forms of cooperation in the media sector – otherwise, competition with US platforms remains impossible. The success of Video on Demand platforms depends on their ability to offer the widest possible selection of content, from various media companies.

We need dynamic enforcement of the current materiality rules, as well as procedural rules that can be adapted quickly, to reflect the rapidly changing market conditions and their effect on competition and on consumers.

Some examples:

For example, the project by big commercial TV players to form a neutral technology platform comprising all TV broadcasters of Germany for a onestop catch-up TV service was prohibited by the German Cartel Office a few years ago (2011/12) – de facto a free ride for Amazon and Netflix in the German market.

Another striking example of the outdated approach to market definitions stems from the analogue print market – the readers market of women's magazines is in itself divided into 5 separate markets – quickly leading to "assumed market dominance" – which does not reflect consumers approach to consuming media in the current environment. On the other hand we saw the unproblematic approval of Facebook's take-over of Whatsapp by the European Commission showing a very hands-off approach towards digital platforms.

A final example of the completely outdated view on markets is the German law on media concentration, which in fact is solely aimed at Bertelsmann – since it focuses on broadcasting only.

4. Fair share of the advertising market to finance content investments

Media companies produce and curate creative content and high-quality journalism responsibly and hence ensure creative diversity, brand safety and consumer trust. For many (or most) media companies, this is primarily financed by advertising revenues. Advertising bans or restrictions on media companies make competition with US digital platforms more difficult.

In order to achieve a level-playing field in accessing the digital advertising markets we need more flexibility in advertising regulation – and this needs to be applicable to all players equally, no matter how consumers receive the content, via TV or via digital platforms.

Some examples:

Viewers and politicians expect RTL to interrupt its regular programming for Breaking News in certain situations, and to report live on events of special news value. From a business perspective, this means lost advertising revenue, as the broadcasting of commercials booked for regular programs is neither permitted nor desirable during such special broadcasts. The AVMS Directive does not allow the broadcaster to make up for lost revenue from booked commercials at a later hour, so it penalizes the broadcaster with the hourly limit. By doing so, the directive practically provides an incentive for private broadcasters to keep broadcasting their entertainment programming during breaking news situations instead of acting as socio-politically desired.

If a broadcaster like RTL shows a full-length feature film for children (without advertising due to the interruption ban), it is denied the right to refinance the film in the hours before or after with additional advertising income. This hits the broadcaster even harder because such films are associated with high licensing costs. From a re-financing viewpoint, the lack of flexibility in broadcasting commercials makes it extremely difficult for a commercial TV channel to broadcast high-quality children's films.

Especially at the start of a new, self-produced series whose success is particularly important to both the producer and the broadcaster, and which they want to establish among viewers, it can make sense to show as little advertising as possible in the first few episodes in order to introduce the plot. This decision by the broadcaster is punished with an immediate loss of revenue during primetime, since he cannot "make up" the unused advertising air time at a later hour. This makes it much more difficult to refinance a series involving major investment.

5. Fair balance of rules for digital platforms and media companies

The asymmetry in regulation of digital platforms is most obvious in comparison with the highly regulated landscape for broadcasters (at EU and national level). Linear audiovisual media services (broadcasts) are still facing special regulation as far as advertising restrictions and programme-related obligations (regional windows, third party content) are concerned. As long as these obligations remain in place, a fair balance for more rights towards media platforms has to be re-established (access, findability, signal integrity). And as a baseline we always require strong and robust copyright and neighbouring rights protection. Furthermore, to achieve a level playing field with digital platforms in their broader role as intermediaries and bottleneck for all types of content, questions of transparency and non-discrimination need to be addressed. Digital platforms have become the touch point for billions of consumers to access and explore media content. Access to such content takes place via search or recommendation engines and social media platforms. The platforms actively influence what is presented to their users and how it is presented. Therefore, the digital platforms have become powerful intermediaries who stand between the content providers and their audiences. In addition, digital platforms are setting (and frequently changing) the technical standards in the digital marketplace other market players have to adhere to – this makes fair competition impossible.

The rights of media companies on audiovisual platforms should therefore be enhanced to redress the imbalance resulting from their (high) special regulatory obligations in order to achieve a level playing field towards platforms. Tech standards set by digital platforms alone

as a result of their market power should be subject to monitoring and regulation to ensure non-discriminatory access to such standards and transparency.

Some examples:

Although RTL's linear programs and the content offered by a digital platform such as Youtube can be viewed on the same screen, we are subject to completely different regulatory rules. Broadcasting is one of the most heavily regulated sectors in Europe. This is particularly evident in the fields of advertising and duties of care for the user (protection of minors, consumer protection).

According to the current legal situation, television broadcasters can only serve a stand-alone commercial before a program in exceptional cases. And yet this is common practice on all online platforms (such as Youtube). In the future we would like to see the exception lifted and be able to serve stand-alone commercials. Even more important is to make the permitted advertising volume more flexible. It should be possible to broadcast live news programming over a period of, say 1.5 or 2 hours, and then compensate, at least proportionately, for the lost advertising revenues in the hour following the live news broadcast. The windows envisaged by the EU, which would allow for a flexible shifting of the advertising volume to a respective share of 20%, can be described as a step in the right direction.

6. Fair taxation

The current de facto tax advantage of digital platforms, involving significantly different levels of taxation for them in key international markets, needs to be further addressed by policymakers. A level playing field needs to be achieved with a comprehensive tax policy response coordinated at international level.

We need a new tax framework that understands and reflects the nature of global digital business models and avoids unfair double-taxation to other players as collateral damage of tax initiatives. It is essential that governments and businesses work together to develop an efficient tax framework to harmonize international tax rules.

Some examples:

Bertelsmann CEO Thomas Rabe has criticized the EU's digital tax plan. He argued that a three percent levy on digital advertising revenues, as proposed by the European Commission, could result in a „double taxation“ of European corporations like Bertelsmann, which already pay a considerable amount of taxes on their European earnings.

Financial Times

New European tax plans targeting digital revenue could exacerbate the existing competition problems presented by American tech companies, Bertelsmann SE & Co. KGaA chief executive Thomas Rabe said Tuesday. If Bertelsmann, Europe's biggest media company by revenue, also had to pay the charges on digital revenue, „I would find this quite inappropriate,“ Mr. Rabe said. „We are paying direct taxes already...in all the countries where we operate,“ Mr. Rabe added. „We would be effectively taxed twice“ in Europe, he said.

Dow Jones

BBC Response to the Call for Evidence by the Digital Competition Expert Panel

1. Background

The UK has one of the most developed media industries in the world. The UK's film, TV, video, radio and music sub-sector of the digital economy has been one of the success stories over the last decade, contributing nearly £18bn to the UK economy in 2017. The contribution from this sub-sector has increased by 39% since 2010 (from £12.9bn in 2010)¹.

Advances in technology have transformed broadcasting. Audiences have benefitted from a proliferation of digital television channels and greater access to new Video-On-Demand (VOD) services. In a pre-digital world, audiences only had access to a handful of analogue channels, and on-demand services did not exist. Now audiences can choose from a multitude of linear channels available free to air and via pay TV services. They can also watch programmes on an array of on-demand services provided not only by the traditional broadcasters but also by new entrants like Netflix and Amazon Prime Video.

The impact on traditional broadcasters has been profound. Previously the BBC formed part of a relatively simple supply chain characterised by content producers, content aggregators, distribution platforms and audiences. However, as each level of the supply chain has greatly expanded, the BBC is now a much smaller part of a larger and more complex digital ecosystem. Consumers have access to a wider range of content types (e.g. short form video and podcasts), new ways that content is aggregated (e.g. through improved curation, personalisation and user interfaces) and distributed to them (e.g. via social media platforms and IPTV platforms). Digitisation has brought many more providers into the sector funded by different business models.

As a result the BBC now has a complex web of relationships with many of the big tech companies such as Amazon and Netflix. On the one hand these large digital companies are strategic partners – co-funders in TV production, network providers, distributors of BBC services via their platforms and devices and aggregators of BBC content within their services. On the other hand, the BBC competes with these global digital companies, for viewing time and in upstream markets for rights, ideas and talent. And as much as the entry of the global competitors has stimulated competition, the BBC is also an essential part of this competitive market, helping to stimulate creativity, efficiency and innovation in the UK broadcasting market.

The BBC recognises the important role that competition plays in digital markets in enabling innovation, lowering costs and improving outcomes for consumers in digital markets. We welcome the opportunity to respond to this call for evidence. In the remainder of this document we provide some evidence on the challenges the BBC has

¹ [DCMS Economic Estimates](#)

encountered primarily when distributing its content in line with the obligations set out in the BBC Agreement.

2. Understanding the effects of digital markets

2. What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

The BBC has an obligation to make its UK public services widely available². How the BBC distributes its services will be critical in determining how successfully the BBC can deliver its mission – to inform, educate and entertain. However the changing distribution landscape poses significant challenges for the BBC. When BBC iPlayer launched in 2007 it was delivered entirely over the open web. Now more than 80% of BBC iPlayer consumption takes place on platforms controlled by third parties such as TV platform operators and the manufacturers of televisions, radios and mobile device operating systems.

These content aggregators and distributors are increasingly international, consolidated and powerful. While platforms want to make their offers appealing to subscribers and users, their incentives are not always aligned with those of the BBC and this can lead to the following problems:

- Some vertically integrated digital platforms have a clear ability to leverage their position to favour their own products and services in ancillary markets.
- While bundling of products and services by large digital conglomerates can give rise to economies of scale and scope, it can lead to inertia in consumer switching and lack of transparency.
- Lack of prominence/brand attribution – this particularly applies to the distribution of UK news on third party platforms. We have noted the Panel's request that respondents do not provide evidence on the impacts of digital markets on the availability of a range of news media and, therefore, have presented evidence only on the consequences for competition of the lack of effective attribution.

Incentives of vertically integrated digital businesses

Over the past decade, many of the large digital businesses have expanded their businesses through vertical integration³. As a result, media conglomeration has become increasingly prevalent, with the entry of firms like Netflix, Amazon, Google and Facebook into the production of original content.

² Clause 61 of the BBC Agreement

³ Vertical integration occurs when one company operates in the same industry but at different levels of the supply chain. This can occur either organically by a company expanding its operations or through acquisition.

Firms often use vertical integration as a way of reducing cost and increasing efficiency. It can also be a way of overcoming difficulties in contracting with third parties. Under some circumstances, vertical integration can be pro-competitive.⁴

However, our experience suggests that vertically integrated platform providers sometimes seek to promote their own services disproportionately and to pick and choose the content and features the BBC and other contents providers supply which best support their own commercial goals. This reduces the degree to which the BBC can deliver its public service objectives on these platforms. Large platforms are able to leverage their power by acting as gatekeepers, blocking and filtering content in line with their own strategies and promoting their own services at the expense of others. For example:

- Facebook's control of its platform/algorithm allows it to curate the news. Its control of data allows them to control audience relationships via BBC content.
- Google's control of the Android operating system allows it to control prominence. Its assistant allows Google to select which stories users see. It also allows Google to monetise news funded by others. Such behaviours can limit consumer choice and influence public opinion.
- Apple's control of devices and operating system allows it to pre-load and favour its own services i.e. Apple Podcasts.

Risks associated with bundling

The growing presence of a small number of digital firms across a broad range of digital markets can lead to benefits and harms for consumers as well as business users.

Large global digital businesses have increasingly been bundling their products and services. Sometimes there are sound economic reasons for bundling related products – for example if consumers are members of Amazon Prime, they do not pay for delivery on products and they also get access to Amazon Prime Video – due to the exploitation of economies of scope and scale.

However, there can be downsides to bundling – for example, due to lack of transparency about how much consumers are paying for different services. Bundling can also lead to inertia in switching consumer behaviour.

Attribution

The use of online platforms as a way of accessing news has increased substantially over the last few years⁵. In line with its Distribution Policy the BBC distributes content via

⁴ In a vertically integrated company the upstream firm is incentivised to charge an internal transfer price equivalent to its cost (with no mark-up). As a result, overall costs of production will be lower than if the two companies had acted separately and demand for the product supplied downstream is higher than it would have otherwise been.

third party platforms as this increases its availability and its reach, particularly amongst those groups are who are less likely to consume BBC services. The policy requires that the placement of BBC content and services relative to those of other providers should be in line with audience needs and expectations. It also stipulates that users should be able to easily identify which content on a platform is provided by the BBC.

Securing effective attribution for its news content distributed via online aggregators is particularly important for the BBC for two reasons. Firstly, BBC branding conveys information to audiences about the quality and tone of programmes available on third party platforms. It therefore plays a critical role in helping users to make better informed consumption choices. Secondly, effective attribution helps audiences to better understand the value they receive from the licence fee.

However, the BBC has sometimes struggled to secure effective attribution for its content. This is because online platforms such as Facebook, Apple, Google and Snapchat have all developed their own formats into which they place branded news. Although Ofcom data suggests that even though the majority of social media news users say they know the source of their news stories ‘most’ or ‘some’ of the time, research from the Reuters News Institute found that less than half could remember the name of the news brand for a particular story when coming from search or social media⁶.

In many markets we would expect the supplier (in this case the platform) to adapt its offer in response to the demands of its customers (i.e. to improve their formats in a way that better serves content providers). However, as discussed above, large online digital platforms may not always be incentivised to accommodate requests from content providers for a variety of reasons. In particular, given the multi-sided nature of these markets, often neither the content provider nor the content consumer are necessarily the main customers of the platform. Rather the platforms’ customers are advertisers, for whom the attribution and value of news is secondary. Furthermore, it is unlikely that online platforms’ business decisions will factor in the public good aspects of journalism and the importance of high quality journalism in sustaining a well-functioning and democratic society. For these reasons, we anticipate that, if left unregulated, markets will not always deliver the optimal solution.

3. What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition? We are particularly interested in

⁵ According to [Ofcom](#)’s 2018 News Consumption in the UK report, more than two fifths (44% of adults claim to consumer news via social media.

⁶ Correct brand attribution was just 37% from search and 47% from social media. This compares with an attribution rate of 81% for users who arrived directly from another page on a destination website. By contrast, between half and two-thirds could remember the path through which they found the news story (social media 67%, search engines 57%). (Source: [I Saw the News on Facebook, Brand Attribution When Accessing News from Distributed Environments](#))

whether data may constitute a ‘barrier to entry or to expansion’ for companies seeking to compete in the digital economy. Please provide any evidence for your view.

The BBC’s broad distribution footprint means that its services are available across a large number of platforms and over a wide range of devices. The BBC regularly compiles viewing and engagement data across its services so that it can measure the reach of its content and services and make better commissioning, curatorial and strategic decisions.

We actively support industry-wide partnerships such as BARB and RAJAR that collect data about consumption of services on traditional broadcast TV and radio platforms. But the BBC is reliant on its distribution partners for data on consumption of BBC content that is delivered via third party digital TV platforms such as Sky and Virgin or social networking platforms such as Twitter.

However global policies adopted by the major digital intermediaries, when coupled with the inability of the BBC to withdraw its services from third party platforms because of its regulatory obligations, often make it difficult for the BBC to negotiate access to the data that it needs to fully understand the consumption of BBC public service content and services on third party platforms. We think it is likely that other content providers are affected by similar issues, even though they are not restricted by regulatory obligations. This is largely because of the digital intermediaries’ gatekeeper role and strong bargaining power.

In the absence of information about the consumption of BBC services on third party platforms that act as intermediaries between content providers and end users, the BBC’s ability to innovate and improve its services is constrained. Understanding what content audiences have watched or listened to in the past, and what similar users also watch, would allow the BBC to better predict which other programmes a viewer is most likely to enjoy, and therefore provide tailored, varied and more valuable content suggestions.

The BBC has invested in its own proprietary apps and is rolling out sign-in across its services where possible to benefit from user data to improve its services. But, as highlighted above, promoting take up of these apps can be difficult when devices come preloaded with existing apps.

Policy recommendations

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner?

The BBC believes that competition authorities need to take a different approach to competition policy to reflect the special features that characterise many digital platform markets. For example:

- Many digital platforms are multi-sided markets, connecting users or consumers of a product or service to its suppliers. Media platforms connect audiences to advertisers, often offering free content to consumers, funded via advertising. As there is often no explicit price charged for digital content (for example, programmes available on commercial free to air TV channels are funded by advertising), many of the traditional tools used in competition analysis (for example use of the ‘SSNIP test’⁷ to define markets) are less relevant without suitable adaptation. The consumer can either be thought of as paying for the “free” service with personal data, or as the “product” that is then sold to third parties.
- Network effects and economies of scale mean many digital platforms display tipping point dynamics. Such markets can often tip towards a single player. Competition is often ‘for the market’ rather than ‘in the market’. While the presence of a single firm in a market may dampen incentives to innovate, there can also be benefits to consumer welfare arising from their network effects.
- Digital platforms are usually technology-driven – so while they may be characterised by a single player, their dominance will be temporary if new technologies act as a disruptor. In other words, while digital platform markets are often ‘winner takes all’, the winner can change. However, competition authorities should be mindful of preventing winners from becoming entrenched. For example, there are some concerns that given their financial power, the largest online platforms may be able to acquire potential competitors before they become a threat.

Not taking into account these features can have enduring impacts, as illustrated by the Competition Commission’s decision in 2009 to block Project Kangaroo, the video on demand (VOD) service proposed by a joint venture between the BBC’s commercial arm (BBC Worldwide), ITV plc and Channel Four.

The Competition Commission blocked the proposal on the grounds that it would result in a substantial lessening of competition in the supply of UK TV VOD content at the wholesale and retail levels. The Competition Commission’s assessment hinged on the conclusions that:

- “Non-UK content was not a good substitute for UK content, particularly for certain genres of programmes and/or if it had not previously been broadcast on linear TV”

⁷ Small but Significant Non-transitory Increase in Prices (SSNIP) test defines the relevant market by determining whether a given increase in product prices would be profitable for a hypothetical monopolist.

- “There were no sources of sufficient scale to provide credible alternatives to the parties’ content, making it difficult for wholesale customers to switch, or threaten to switch.”

The Competition Commission’s decision to veto the joint venture has had long-lasting consequences on UK broadcasters and in retrospect it is clear that the decision was a misjudgement. For example, in 2010 the House of Lords Communications Committee report into the British Film and TV industries concluded that:

“In our view, the decision to block Kangaroo will inhibit the opportunity for UK content producers to create a stream of revenue, which might have been used for investment in UK content. The specific risk is that the market is now open to US video on demand ventures such as Hulu”.⁸

The Communications Committee’s prediction proved to be remarkably prescient. By the end of 2012, Netflix had already gained 1.4m users.

VOD is increasingly replacing linear TV as the place people go to watch TV programmes. Between 2010 and 2016 UK daily viewing minutes for linear TV declined from 215 to 173 minutes; while VOD (both broadcaster, or BVOD and subscription, or SVOD) grew from 8 to 25 minutes over the same period. Over 40% of UK households now use at least one SVOD service and the entry of global streaming services such as Netflix and Amazon has fundamentally changed the way in which audiences view TV programmes in the UK. The entry of these global giants has also fundamentally changed the competitive landscape in which the UK PSBs operate.

The BBC recognises the inherent difficulties of predicting how digital markets might evolve. However, it is clear that relying on historic static analysis of narrowly defined markets is unlikely to provide useful insights into the development of digital markets. Competition authorities must focus more on dynamic analysis of the entry, growth and failure of platforms. Although this may be more challenging and less superficially definitive, the example of Kangaroo illustrates its importance.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve economic outcomes?

Encouraging data portability

The BBC believes that encouraging data portability will be important in facilitating entry. The BBC provides trusted and popular online services which are core to the delivery of the BBC’s mission and public services. Having a presence on third party platforms is especially important in reaching those audiences who are less likely to access BBC content on BBC platforms. This is critical in ensuring that we are able to deliver our

⁸ House of Lords Communications Committee - First Report, [The British Film and Television Industries](#), 2010

public service remit and reach all audiences. For the reasons explained above, having access to data on use of its own product or service on a third party platform is also important as this helps companies to innovate and compete in digital platform markets.

Looking at comparators, we note that the European Commission has proposed a regulation on the fair treatment of business users of online platforms to address concerns about unfair practices carried out by certain platforms that are able to exploit their bargaining power in a way that can be unfair and harmful for traders and consumers. The draft regulation would mainly oblige platforms (including video-sharing platforms such as YouTube and TV platforms such as Apple TV) to provide information about what data they collect on use of our services.

However, the BBC believes that this requirement and the legislative negotiations do not go far enough. The BBC already has a good idea of the types of data held by third party platforms about its own products and services. The real problem lies with gaining access to that data. This goes to the heart of our – and all UK companies’ – ability to compete in a data economy and realise the goals in the government’s industrial strategy.

The BBC therefore recommends that the UK government, in its own policy development, considers how to ensure that business users can access data on use of their own products and services, in line with data protection and privacy.

This is not only essential for the BBC and other UK broadcasters, but it would also bring benefits to other sectors across the digital economy. It would be especially beneficial to small and medium-sized enterprises who are perhaps least able to leverage their position when negotiating with larger platforms.

Platforms benefit from network effects between consumers and business users and business users contribute significantly to platforms’ success. Platforms currently see how our services are used as well as everyone else’s, plus their own – sometimes competing – services on the platform, and can adapt their services/products accordingly. Our proposal will allow us to adapt and improve our offerings as well. Our request represents a minimum of good conduct to allow companies to innovate and compete.

Ensuring a level playing field

The evolution of digital broadcasting markets has resulted in significant changes in audience behaviours and led to the advent of new services and platforms. However regulation has not necessarily kept up with this pace of change and this has, in certain areas, led to inconsistencies in the regulation of different kinds of content and services. For instance:

- Licensed linear TV services are subject to statutory regulatory content related obligations whereas SVOD services are not.

- While regulation guarantees PSB (Public Service Broadcaster) prominence on the traditional linear channel programming guides, PSB prominence on connected devices, such as smart TVs and tablets is not protected.

While we recognise that many of the arguments in favour of regulation in media are primarily related to securing wider public policy objectives, policy interventions to address the two issues highlighted above could be beneficial for competition. For example, differences in requirements on linear TV services make it more difficult for linear and VOD services to compete on a level playing field. Similarly, there is a risk that in the absence of online PSB prominence, platforms may be incentivised to favour their own content in favour of PSB programmes.



Digital Competition Expert Panel

BT's Response to consultation published on 16 October 2018

14 December 2018

For any enquiries, please direct to [Name redacted] [Job title redacted]
BT Email: [Email address redacted]

Introduction

1. BT Group plc is pleased to respond to the Digital Competition Expert Panel's consultation into the state of competition in the digital economy. As a leading provider of fixed, mobile and TV services in the UK and in international markets, BT is an established player in digital markets, and also interacts with other digital players across a range of different services.
2. We have requested Professor Robert Hahn to provide an economic perspective to competition policy in digital markets.¹ His paper is provided alongside BT's response, and focuses on why the regulatory environment should promote dynamic efficiency, rather than static efficiency alone and why careful consideration should be given to the incentives that competition policy provides for investment and innovation.
3. Global technology firms have achieved faster growth than traditional telecommunications companies in the past decade. Large tech firms, such as Google, Facebook and Amazon have seen revenue growth of 94% in the past five years,² compared to a decline of 1% for UK telecoms companies over the same period.³ UK telecoms companies have faced increasing competitive pressure in various parts of the value chain, including from over-the-top (OTT) players, telecoms infrastructure investors and content providers.
4. Existing regulation in telecoms markets will need to adapt to these changes in digital competition. Ofcom continues to impose ex ante regulation in a number of the markets that BT serves, some of which are increasingly being disrupted by technology developments. We therefore welcome the Government's review into how competition regulation may need to adapt to take account of such changes in competition due to growth of digital markets.
5. Whilst the central focus of the panel's review is on how competition policy is suited to addressing competition issues in digital markets, we believe this review cannot simply review ex-post competition law application without also reviewing aspects of traditional ex-ante regulation. Given the interlinkages between digital markets and adjacent markets such as the telecoms sector and the degree of substitution between existing and new technologies, the panel should ensure there is a consistency in the principles applied to competition law with ex ante regulation. We understand this review is not intended to evaluate ex ante regulation in detail, but we believe the panel should

¹ Hahn, R (14 December 2018): "Competition policy for digital markets: An economic perspective", A response to the call for evidence on competition in the digital economy.

² Between 2012 and 2017, total revenues of Amazon, Facebook and Google grew by 94%. Source: Amazon, Facebook and Google 10-K filings for years ended 31 December 2012 to 13 December 2017.

³ Ofcom Communications Market Report 2018, Office for National Statistics. Note: Ofcom reported total revenues for telecoms sector is adjusted from real to nominal terms using CPI for consistency with nominal revenues for US technology firms.

undertake its review of competition policy in digital markets in the context that it is partly 'anchored' in ex ante regulated network markets.

Global technology firms place competitive constraints in adjacent markets

6. Global technology firms have achieved remarkable success in a relatively short period of time. As of March 2018, 10 of the top 20 largest publicly listed companies in the world were technology or digital services companies compared to only 2 out of 20 in March 2009.⁴ The global technology sector has seen growth in value of 322% in the last nine years, compared to 42% for the telecommunications sector.⁵
7. Part of the capital gain in the technology sector could be a justifiable reward for innovation. The technology sector typically engages in high amounts of R&D, and earns rewards by developing new products and services that consumers are quick to take up. The rewards for investors in these sectors may be seen as compensation for the high risk they often bear, because customer demand is typically highly uncertain (and innovative products can themselves be disrupted in fast moving segments).
8. The success of these firms has implications for competitive conditions in adjacent sectors. Companies earning high returns can use these funds (and customer relationships) to leverage into adjacent markets.
9. BT has already observed such disruption by global technology firms in the markets in which it currently operates:
 - **OTT players:** Over-the-top content providers are providing services that are substitutes for some of the services provided by BT. The growth of WhatsApp and VoIP services such as Skype have reduced demand for fixed and telecoms voice and messaging services. In the UK, mobile call volumes per subscription declined in 2017 for the first time in ten years and texts per subscription have declined since 2012,⁶ demonstrating the impact that OTT players have had on the market. At the same time, global technology companies are providing TV content services, including sports content in the UK, with new monetisation strategies.⁷
 - **Mobile services:** Traditional mobile companies face disintermediation and margin erosion by handset suppliers providing handsets and e-SIMs.⁸ For example, Amazon sells mobile handsets online at low prices, potentially funded through advertisements on the other side of the two-sided market that it operates in. Amazon preloads handsets sold on its website with its own apps, such as Prime

⁴ PwC (31 March 2018): "Global Top 100 companies by market capitalisation", 31 March 2018 update.

⁵ Ibid.

⁶ Ofcom Communications Market Report 2018, p54.

⁷ For example, Amazon has purchased UK football TV rights, entering a market previously only including Sky and BT. Amazon can bundle its sport content with its Prime TV offering, thereby expanding its 4.3m households in the UK. Source: The Guardian (3 May 2018): "Amazon Prime Video's growth outpaces Netflix in UK".

⁸ In its latest operating systems, Apple has introduced 'e-SIMs', which allow users to virtually move between different mobile network carriers. Source: <https://support.apple.com/en-gb/HT209044>

Video, channelling customers to its own services, creating a new competitive challenge for traditional mobile operators.

- **Fixed network infrastructure:** Fixed network infrastructure has historically been viewed as an input that affords operators with market power, and BT has been designated with significant market power (SMP) in a number of fixed markets. However, global technology companies have made forays into these markets. Google rolled out Fibre-to-the-Premise infrastructure in a number of US cities, including Atlanta, Nashville, Salt Lake City and Austin.⁹ The prospect of entry by digital disruptors prompted traditional telecoms operators to accelerate their own fibre investment, demonstrating the ability of global technology firms to influence the timing of telecoms operators' investment decisions.
- **IT services:** Amazon has opened data centres in a number of European countries, including the UK, principally to provide cloud computing services. Amazon Web Services' growth has been driven by virtualisation, enabling more flexible, scalable and cost effective services than traditional services. As a result, Amazon Web Services has become the market leader in cloud computing, with 33% revenue market share in 2018, overtaking historical market leaders such as IBM, which only has 8% market share.¹⁰ BT Global Services has decided to partner with Amazon Web Services to provide cloud computing. These partnership models may become more prevalent given the position that Amazon Web Services has achieved.

10. These examples of entry by digital disruptors are relatively new phenomena in telecoms markets. Prior to the emergence of global technology companies, BT principally faced competition in retail markets from other communications companies. In many wholesale markets, BT has been and continues to be regulated by Ofcom because it has been found to have SMP. However, whilst the rise of digital disruptors has often brought positive outcomes for consumers, they have created new competitive pressures and challenges for telecoms companies in both retail and potentially wholesale markets. In order to promote fair competition, this should be reflected in the market analysis undertaken by sectoral regulators and competition authorities.

Ex ante regulation in adjacent markets should be reassessed in light of competitive pressure from digital players

11. In order to impose ex ante regulation in the telecommunications sector, the European Commission recommends applying a three-criteria test which assess whether (1) there are high and non-transitory structural, legal or regulatory barriers to entry, (2) the market does not tend towards effective competition within the relevant time horizon, and (3) competition law is insufficient to adequately address the identified market failure(s).¹¹ The emergence of global technology companies and the competitive

⁹ Source: <https://fiber.google.com/about/>

¹⁰ Synergy Research Group (27 April 2018): "Cloud Growth Rate Increased Again in Q1; Amazon Maintains Market Share Dominance".

¹¹ European Commission (27 April 2018): "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services", Commission Staff Working Document, p6-7.

pressure this creates should be assessed as part of the three criteria test, particularly on a forward-looking basis.

12. The telecoms sector has historically tended to have higher barriers to entry at the fixed infrastructure level, due to high fixed and sunk costs associated with deploying infrastructure. However, these barriers to entry are being eroded by a range of factors including the emergence of global technology firms, whose access to capital allows them to invest in network infrastructure should they see value in doing so. Google's investment into FTTP networks in the US is an example of such entry.
13. With regards to the second criterion, telecoms companies are facing greater competition from digital players whose services increasingly act as substitutes to their products. The growth in data messaging services such as WhatsApp have come partly at the expense of traditional fixed and mobile voice and messaging services, which brings into question whether telecoms companies hold market power in these segments. So far Ofcom has disregarded data messaging and VoIP services as a competitive constraint on fixed and mobile services, relying principally on historical trends to come to its conclusion.¹²
14. Part of the challenge for regulators is to reframe their analysis to take account of the fast pace of change in digital markets. The European Commission's SMP guidelines state that "*market characteristics should be analysed not only in a static but also in a dynamic and forward-looking manner*".¹³ In order to do so, regulators should place greater emphasis on future trends in how the market could evolve, in particular, the capacity for disruption of traditional markets by global technology companies who are constantly innovating including by expanding into adjacent markets in order to build customer relationships.
15. The European Commission recommends that "*anticipated events must be expected within a precise timeframe and on the basis of concrete elements...rather than something which may be only theoretically possible*".¹⁴ In digital markets, regulators face a challenge in anticipating innovation because, by its nature, innovation involves creating products and services that are not easily conceivable today.
16. Innovation in digital markets (and its likely impacts) cannot easily be predicted over specific time horizons or based on concrete elements in the manner the Commission describes, and yet digital players still place competitive constraints on existing suppliers. Regulators should take a broader view of how a market may tend towards effective competition encompassing competitive constraints arising from digital competition. For example, regulators could consider how these constraints trigger responses from

¹² Ofcom (30 November 2017): "Narrowband Market Review: Statement - Markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets", paragraphs 4.58-4.59, p60-61; Ofcom (28 March 2018): "Mobile Call Termination Market Review 2018-2021 – Final Statement", paragraphs 3.45-3.49, p27-28.

¹³ European Commission (9 October 2014): "Commission Staff Working Document Explanatory Note accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, p9.

¹⁴ Ibid, p10.

existing firms with regards to changes in their business models and/or more investment in research and development, instead of just a focus on changes in price and quality of existing products and services.¹⁵

17. The final criterion states that ex ante regulation should only be imposed where competition law remedies are insufficient to address the competition problem identified. In Professor Robert Hahn's paper accompanying this response, he notes that in digital markets an ex post approach has some advantages over ex ante regulation because of the difficulties of identifying market failures on a forward-looking basis.

Competition law and regulation must place greater emphasis on quality rather than solely price

18. In general terms, we agree with the current principle-based analytical framework applied in competition law and used as a foundation for SMP regulation. That principle-based system has evolved transparently through EU and UK administrative and judicial proceedings to provide a flexible yet predictable analytical framework. We would caution against changes to those principles and are concerned that well-meaning changes might have unintended consequences beyond the scope of this review.¹⁶ Rather, we think it would be more appropriate to focus on the application of these principles to digital technology companies specifically, in particular to market analysis. In this regard, it is especially important for the application of the competition law principles to be forward-looking and take into account the dynamism in relevant digital markets.
19. In this regard, market definition is an important first step in any discussion of competition concerns (whether in a competition law or SMP regulation context), and can be particularly challenging in digital markets. The purpose of market definition is "identifying the competitive constraints acting upon a supplier of a given product or service".¹⁷ The ease with which consumers can switch to substitute products and the constraints placed by other competitors in the market define the relevant product market over which market power can be assessed.
20. Market definition is often assessed by reference to a conceptual framework which posits a Small but Significant Non-transitory Increase in Price test (SSNIP test). Under this test, a market is defined as a group of products or services across which a hypothetical monopolist could profitably impose a SSNIP (i.e. without this being undermined due to volume losses). The SSNIP test provides a useful tool for market definition where

¹⁵ Telecoms operators have accelerated investment in recent years in areas where the digital economy may make a difference, including BT's partnerships with university research facilities and Deutsche Telekom's investment in data analytics, cloud disruptions and network asset utilisation. Source: Copenhagen Economics (20 September 2017): "Review of SMP guidelines", A study prepared for ETNO, p21-22.

¹⁶ For completeness, we note that we would be particularly concerned about any change to the standard of review for appeals of competition law decisions. The current full merits review for Chapter 1/Article 101 and Chapter 2/Article 102 infringements is important to ensure robust decision making and protection of the rights of undertakings given the quasi-criminal nature of any breach finding.

¹⁷ Office of Fair Trading (2004), "Market Definition - Understanding competition law", OFT Competition Law Guidelines, paragraph 2.1.

changes in price are the key instrument by which a hypothetical monopolist could exercise market power.

21. However, in digital markets, the traditional SSNIP may not identify appropriate product markets for a number of reasons.
22. Firstly, digital markets are often two-sided, with suppliers interacting on both sides of the platforms with users and advertisers. A supplier's optimisation decision would take into account the profits from both sides of the market. Therefore, the SSNIP test may need to consider changes in price on both sides of the market and consider the demand-side and supply-side response on both sides simultaneously.
23. However, in digital markets, users on one side of the market often do not pay a monetary price. Users of Facebook, Google, Instagram, Youtube and other social media platforms and search engines do not typically pay for the service. With a zero price, conducting a SSNIP test is not viable for defining the relevant market. In such digital markets, users effectively pay for their use of the platform by providing their personal data, which can be monetised by the other side of the market, usually advertisers. For example, users of Google provide data about their preferences based on their search queries, which advertisers are then able to use to provide targeted goods and services.
24. In this setting, market definition may need to consider how a *change in the amount and/or quality of data* that is provided by users affects the demand-side and supply-side response on both sides of the market. This would provide a more complete view of the ability of the hypothetical monopolist to profit, taking into account all of the tools it has to exploit any market power.
25. Expanding the use of the traditional SSNIP test to changes in quality has been considered by China's Supreme Court in *Tencent vs Qihoo*, where the Supreme Court noted the inadequacy of traditional analysis based on changes in price. The Supreme Court discussed the use of changes in quality being used to define the product market, but found that the exercise could only be conducted in qualitative terms. The difficulty in quantifying changes in the quantity and/or quality of data supplied by users may mean that demand and supply side responses can only be assessed in qualitative terms.
26. A second challenge with market definition in digital markets is that consumers often regard services and products with differing capabilities as being viable substitutes. Users can migrate to different digital platforms, switching their attention, even though the platforms may provide different services under strict product market definitions. For example, the growing use of Snapchat has coincided with declining use of Facebook by younger users, as their attention has switched due to innovations by Snapchat. Although Facebook and Snapchat offer differentiated services across multiple dimensions including text updates, news content and advertising, the two platforms may constrain each other to some extent through the measures they use to seek users' attention.
27. We therefore believe competition and regulatory authorities should take a wider view of market definition in digital markets, recognising the practical constraints placed by users, who often view products with different capabilities as substitutes. Greater analysis of switching behaviour across adjacent product markets, customer surveys and

recognition of quality as well price factors will enable authorities to better define appropriate product markets.

Competition and regulatory authorities should ensure a level playing field in the ability to accumulate data across industries and the use of that data

28. The Digital Competition Expert Panel has requested responses on whether the concentration of data within a small number of firms has an impact on competition. Companies such as Google and Facebook collect data about their users, and in some cases, this data accumulation may constitute a barrier to entry for other firms. The accumulation of data has been likened to the high fixed costs associated with fixed infrastructure, which could result in findings of market power. We agree that the accumulation of such data and the subsequent use of that data (e.g. whether it is used to embed or leverage market power) is an important area of focus for competition and regulatory authorities.
29. The majority of the data that users of digital platforms provide tends to be highly personalised and have a limited shelf-life. Clicks on online shopping websites, likes on social media platforms and views on online video channels all represent the preferences and choices of the users at the point in time in which they are made. Digital players value this data highly at the point in time in which they gather it, because it is more likely to be monetised, for example through targeted advertising to induce further consumer spending. Over time, the value of such data declines because user preferences and choices change, and the data cannot be monetised so easily.
30. Because such data decays in value over time, digital players constantly adapt their operating models to engage their users such that they continue to supply their data. Facebook's move towards video content, Instagram's 'Stories' feature and Snapchat's filters feature are all innovations that consumers value enough to continue supplying their data to the platforms. Failure to keep users' attention may lead to users switching to alternative suppliers, providing strong incentives for the digital players to innovate and provide services that users continue to value. The rapid decline of MySpace provides an example of a digital platform failing to maintain user attention, and, as a result, losing market share.
31. As discussed earlier, users in such two-sided platforms in effect pay for their use of the platforms using their data. Constraining their ability to do so could prevent users from benefitting from services they currently value (often at zero price) and may undermine the incentive to create new services.
32. These principles apply more generally. For example, in telecoms markets, firms may also collect data about their customers, including the amount of data they consume, the type of content they prefer and time at which they consume services. In addition, telecoms markets are highly competitive at the retail level, which means firms are competing to

attract customers, and one such competitive dimension could be the amount of data that is supplied in return for valuable communications services.

33. We therefore believe a consistent approach should be applied when considering concentration of data in different sectors. Allowing firms in one sector to collect user data, but not firms in other sectors creates competitive distortions that harm overall consumer welfare.¹⁸ Similarly, any regulatory efforts to promote consumer switching should not be restricted to individual sectors, and should also consider switching behaviour in digital markets. BEREC is currently consulting on such issues, including on fostering interoperability obligations and data portability.¹⁹
34. We recognise consumer concerns about privacy and the way that their data is handled. Digital players and firms in all sectors have a responsibility to ensure that consumers' rights to data privacy are protected and consumers are provided information on how their data is used. We believe such data privacy issues are best addressed outside of the competition regime, and through consumer policy. Measures such as GDPR are an example of how regulators can protect consumers without resorting to competition regulation, which is not the appropriate tool for addressing consumer concerns about data privacy.

¹⁸ For example, telecoms operators can provide valuable digital security services by collecting data about their customers' mobile phone locations when they withdraw funds from a bank account. Restricting telecoms operators from collection and use of data limits such innovation in digital security, thereby harming consumer outcomes in the long-run.

¹⁹ BEREC Public Consultation on the data economy, 4 October 2018.

Conclusion

35. Growth in digital markets has undoubtedly created new challenges for firms in adjacent sectors, customers, and competition and regulatory authorities. BT is facing new forms of competitive threat across a range of its products and services, including OTT content, mobile handsets, fixed network infrastructure and IT services. In each of these areas, the pace and materiality of disruption has been far in excess of what has been observed historically. Regulatory authorities have so far been slow to adapt regulatory models in the face of this digital disruption, and have continued applying ex ante regulation in telecoms markets despite increasing competitive constraints from digital disruptors.
36. The services provided by digital firms include OTT voice calls, data messaging services and video sharing, which all act as substitutes to traditional fixed and mobile services offered by telecoms companies. This market convergence has so far been given little weight in telecoms regulation, partly because of a tendency to focus on historical trends rather than future competitive constraints. A greater emphasis on how markets are evolving (and the pace of change) will help to ensure that competitive constraints across adjacent markets are recognised.
37. This does not mean that the current principle-based analytical framework needs to be changed. Rather, we think it would be more appropriate to focus on the application of these principles to digital technology companies specifically, in particular to market definition assessments. In this regard, it is especially important for the application of the competition law principles to be forward-looking and take into account the dynamism in relevant digital markets.
38. With regards to market definition, traditional tools may need to be adapted, for example a hypothetical monopolist test for two-sided markets which captures the demand-side and supply-side response on both sides of the market. Incorporating a qualitative assessment of responses to changes in quality is important to achieve, a more appropriate assessment of substitutes. A broader approach to market definition also has implications in adjacent markets such as telecoms, where it will allow regulators to recognise how new digital services are widening product markets.
39. Finally, we do not see the accumulation of data by a few firms necessarily results in greater market power, as the value of data is time-limited such that firms are constantly innovating to encourage users to willingly supply data. This property of data means the accumulation of such an asset should not necessarily be seen as a barrier to entry. However, we note that this applies in a number of sectors, and not just in digital markets, so regulators should be conscious of applying regulations in one sector that prevent a level playing field in the use of data to provide valuable services to consumers. We believe concerns associated with data privacy are best addressed through consumer protection policy rather than competition policy.

Competition policy for digital markets: An economic perspective

14 December 2018

Robert Hahn*

A response to the call for evidence
on competition in the digital economy

* I have done work for several companies in the information technology space outside of the UK, and have also provided advice to governments. In the UK, I have worked for British Telecom, which is funding this effort. I would like to thank Jesper Akesson, Sam Ashworth-Hayes and Jay Chakravarti for helping with this submission. The views in this submission reflect my own, independent assessment, and do not necessarily reflect the views of the institutions with which I am affiliated.

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Competition policy for digital markets: An economic perspective

Robert Hahn

1. Introduction

I have been asked by British Telecom (BT) to provide input into the review of the state of competition in the digital economy. My submission primarily covers questions 7 and 10 in the call for evidence.¹

I am a visiting professor, and former director of economics, at Oxford University's Smith School of Enterprise and the Environment. I have also served on the faculty of Harvard University, and directed the AEI-Brookings Joint Center for Regulatory Studies. My research has covered a number of issues in competition policy. I include a bio in Appendix A and a Curriculum vitae in Appendix B.

I will argue for a regulatory environment that places greater weight on dynamic efficiency than on static efficiency. Static efficiency refers to the state of affairs that maximises current economic welfare; dynamic efficiency refers to the path of states over time that maximises long-run economic welfare. Dynamic efficiency is a particularly relevant welfare concept in digital markets, as they are subject to significant change over time.

In this spirit, I will argue that regulators should generally take an ex-post approach to regulation, acting once market failures are clearly identified and defined, rather than acting before the fact (ex-ante).

My submission is organised into four parts. Section 2 discusses the appropriate goal for competition policy and identifies some key constraints. Section 3 explores different frameworks for thinking about the digital economy. Section 4 outlines some initial lessons for competition policy in this space. Finally, Section 5 concludes.

2. Objectives and constraints

I am interested in providing some important lessons for competition policy in the digital economy. Before doing so in Section 3, it is useful to define the goal of competition policy, and identify key constraints faced by regulators.

The primary goal of competition policy should be to promote long-term economic efficiency (Heyer, 2006). That means maximising the sum of producer and consumer surplus over time, appropriately discounted (Carlton and Perloff, 2005). The key phrase here is 'long-term'. Practically speaking, it means giving careful consideration

¹ These questions are: "What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner?; To what extent are these in place in the UK?"; and "Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?".

to the incentives that competition policy provides for investment and innovation.

An important constraint upon the ability of regulators to achieve long-term efficiency in digital markets is that economists do not understand them very well. While we have stylised models of ‘equilibrium’ behaviour that provide some important insights for how certain kinds of digital markets may operate (see, e.g., Rochet and Tirole, 2003), we lack a solid theoretical understanding of the dynamics of digital competition (Smith, 2007). This is concerning, as it could be argued that at least some, and perhaps much, behaviour that we observe in digital markets does not take place at an economic equilibrium.

Because these markets are fast-moving and poorly understood, regulators should recognise the temporal limitations of competition policy (Hahn, 2001). Government does not run on internet time. By the time regulations are put in place, the original problem may well have been resolved within the market, or considerable progress in that direction may have been made.

A classic example concerns the AOL-Time Warner merger, where American authorities feared that AOL’s instant messaging service could become so dominant that no other party could compete with it (Crandall, 2018). In the end, no intervention was made, and other messaging services emerged.

Furthermore, the speed of movement within digital markets can leave both regulatory decisions and legislation looking out of date. Distinctions between long-distance and local calls, for instance, have been rendered largely meaningless by the development of Voice over IP. Regulatory action should be reserved for cases when a dynamic analysis illustrates that problems are likely to be both longstanding and unlikely to resolve themselves.

To summarise, digital markets are dynamic and move quickly. This means that regulation often lags changes in the market, and that static models of competition are insufficient. Attempting to achieve the best outcome in a static framework could impose significant costs in the long term, as these actions will not consider the incentives for investment and innovation that drive long-term growth.

These market characteristics suggest that a suitable philosophy of regulation might be “first, do no harm”. When a market is poorly understood, even the best-intentioned regulation can have negative effects. Until there is compelling evidence and understanding that suggests a course of action, regulators would be best advised to monitor the situation. When an intervention is made, it should be as narrowly defined as possible. Regulators should treat the diagnosed problem with the minimum intervention needed for success.

This does not mean that there is no role for intervening in, or regulating, the competitive aspects of the digital economy. Instead, it means acknowledging the limitations on our knowledge and ability. With this in mind, I would like to present some rules of thumb for thinking about competition policy in the digital economy.

3. How to think about the digital economy²

For the purposes of this paper, one can think of the digital economy as encompassing large technology firms, such as Google and Amazon, and smaller firms that are part of the Internet ecosystem. Before making recommendations on how to regulate these markets, I will briefly list some important considerations when analysing the behaviour of these firms.

While some digital markets resemble conventional ones, many others display a more complicated structure, such as firms providing platforms that bring together buyers and sellers. A number of features differentiate digital markets that are particularly relevant to our analysis.

- **Economies of scale in production:** Average costs often fall as output increases. In software, for example, it typically costs millions to produce the first unit of the finished product, but negligible amounts for additional units.
- **Complementarities across products:** The value of a product increases as other products related to its use are developed. For example, as software applications are written for a computer operating system, the operating system becomes more valuable to consumers.
- **Network effects:** Adding another person to a telephone, email or social media network makes the network more valuable to other users in the absence of significant congestion effects. Similarly, the value of many software products increases with the number of users who can open the files they produce.
- **The pace of change:** Software markets can change dramatically over short periods. A relatively short time ago, AOL Instant Messenger and MySpace were considered to be market leaders. New products emerge continually, adding competition to existing markets and creating new ones.

Because of the features of supply and demand in some digital markets, there is not always a clear competitive benchmark against which to judge the exercise of market power. Indeed, the way to price in these markets is not always clear. Companies often need to charge above marginal cost to recoup their investments, and the difference between price and marginal cost is often not a good measure of market power.

Rochet and Tirole (2003), in a seminal paper, present a useful way of thinking about some of these digital markets. They frame their analysis in terms of two-sided markets, which involve two sets of agents interacting on a platform. In this framework, decisions by one set of agents directly affect the welfare of the other set of agents, often as a result of an externality (Rysman, 2009).

In this setting, pricing is more complicated than in traditional 'one-sided' markets. To

² This section draws from Hahn (2001) and from ongoing work I am undertaking with Scott Wallsten.

quote Rysman (2009, p. 129):

In a one-sided market, we can characterise the price–cost mark-up in terms of elasticity of demand and the marginal cost. But in a two-sided market, pricing decisions will also include the elasticity of the response on the other side and the mark-up charged to the other side.

For an intuitive example from the non-digital world, we can consider the behaviour of bars. It is not uncommon for bars to run promotions offering discounts to female patrons. This pricing structure is the result of a two-sided market where two sets of agents (men and women) can be viewed as benefitting from each other's presence to different degrees. To attract an appropriate mixture of both, pricing may need to be different for the two sexes.

In the digital world, there are many examples. Facebook, for example, does not charge everyday users, but does charge advertisers. Google does the same for search. Amazon and eBay do not charge buyers explicitly for the right to use basic features of their platforms, but sellers are charged.

This two-sided structure makes decisions on competition policy more complicated when we consider attaining static efficiency. The structure of these markets also makes decisions more difficult for matters of dynamic efficiency.

The changing nature of competition in the digital economy can also make it challenging to define the relevant market for competition policy. Firms can enter new markets at startling speed. Historical market shares can be misleading, while changes in technology are constantly redefining which products can be substituted for which others. When considering the need for ex ante or ex post interventions in a market, regulators should take into account real-world patterns of substitution, and the distortions that can occur by differential regulatory treatment of closely-related products.

Another way in which many companies in the digital market differ from more 'traditional' firms is their heavy reliance on "big data". The use of this data is often opaque to the end user, and consumers may not understand the true 'cost' of using platforms, such as Facebook. Firms may be able to compete on this dimension, and increase the attractiveness of their services by being more transparent about how they process data. In addition, we may see the gradual introduction of markets that pay customers for having access to certain kinds of data.

One related issue is the extent to which firms should be required to share their data. In thinking about regulating this issue, regulators need to take into account a range of benefits and costs. If, for example, firms are required to share data sets that they have invested in developing, this could diminish their incentive to develop them in the first place. At the same time, it may be desirable for consumers to be allowed to exercise greater control over how and where their data are used.

It is in the nature of some of these markets that only a few players may be viable, or

in the extreme, only one. The rise of winner-take-most markets makes it harder to identify illegitimate monopoly power and predatory conduct. If competition in some parts of the digital economy yields one or two industry giants, it is hard to say whether the battle was fair and foul. The existence of large profits and market shares can also be viewed as an incentive for firms to provide better services. Firms might compete to ‘capture’ the market, and then continue to innovate to fend off potential competitors.

Regulators should be aware that by providing a fix to the static competitive effects of an undesirable activity, they are reducing the profits available to a firm willing to provide a market alternative by introducing a service or product that undercuts the incumbent firm. This is not to say that regulators should not take action; it is simply to note that there is a trade-off.

Regulators should also be aware that digital markets have the capacity to affect the level of competition within other markets in dramatic ways. Amazon, for example, continues to exert competitive pressure on “big-box” retailers; in addition, many bookstores have found they could not compete with Internet sales. These are just two examples of a broader trend in favour of ecommerce, which has changed the way consumers search for and buy goods and services.

Note that entry and competition in these markets does not always require that the digital firm provide a product of the same sort. It can instead offer a close substitute. For example, WhatsApp, Facebook Messenger, and iMessage substitute for texts; Skype for phone calls; and Netflix for video stores (Wadhwa, 2017).

In the telecommunications industry, some of the digital leaders have helped transform this market. Amazon and eBay have, for example, made it easier to sell handsets independent of telecom companies. This makes it more difficult for operators to attract customers to long-term phone plans using deals on handsets. Moreover, Google is directly competing with incumbent telecom companies in the US by rolling out Fibre-to-the-Premise infrastructure in a number of cities.

The bottom line is that digital markets should not exclusively be analysed with the tools that we use for static analysis. One example of a problematic tool is the ‘small but significant and non-transitory increase in price’ (SSNIP) test. The SSNIP test is particularly inadequate in two-sided markets, as it fails to take into account how changing the price on one side of the market affects revenues gained from the other side. As Coyle (2018) points out, “the prices set by the platform on each of its ‘sides’ cannot be considered in isolation”. Moreover, the multidimensional nature of products means that the monetary cost may not be the correct concept. The regulator may want to consider the trade-offs between quality, privacy, and price when evaluating market power.

Digital markets display different combinations of features, and should be analysed on a case-by-case basis. The challenge for policymakers is understanding both which framework is appropriate for each market, and the links between them – for instance,

between Google's web browser business, its search engine offering, and its email service. The central challenge, however, is the simple lack of operational models that capture the dynamics of competition.

4. Lessons from competition policy

Progress in digital markets takes place through innovation – the improvement of existing technologies, the development of new products, and the creation of new markets. The rate of innovation should in turn be viewed as the primary driver of long-run consumer welfare.

While tools and techniques aimed at static analysis may suffice in traditional markets – where the model of competition and the product provided are well-defined – they are likely to fall short in more dynamic contexts, such as digital markets. The faster-moving the market, the greater the need to focus on problems related to encouraging innovation.

In my view, regulators should pay attention to the following set of principles when regulating digital markets:

4.1 Focus on dynamic efficiency

Regulators should use a framework that focuses on dynamic efficiency. Static measures of competition and consumer welfare are generally uninformative in markets where progress largely takes place through innovation.

The real issue is what kinds of dynamic measures to use. Some scholars have called for a new economics to deal with these dynamic issues. While this would be useful, regulators do not have the luxury of waiting. The only realistic alternative, in my view, is to apply the tools and techniques we already possess in a dynamic context. One plausible measure, related to the idea of fragility, is the extent to which output and pricing decisions of the company are constrained by potential or actual competition.

4.2 Think outside the box on mergers and acquisitions in the digital economy

One concern voiced by some commentators and scholars is that some tech firms in the digital economy may have gotten too big (e.g., Wu, 2018). There are even acronyms that label these mega-firms at the top, such as GAFAM (Google, Apple, Facebook, Amazon and Microsoft).

I believe that regulators should be willing to think outside the box in terms of promoting greater competition in this sector. Policy could restrict the large tech firms in a few ways, ranging from breaking them up to setting behavioural rules. One of the most common proposals is that GAFAM should face stricter conditions on their ability to acquire other firms. Shapiro (2017), for example, when arguing for such an approach, noted “As a general principle, the greater and more durable is the market power of an incumbent firm, the larger is the payoff from preventing that firm from acquiring the smaller firms that, if left to grow on their own, would become its strongest challengers.”

This approach has two potential problems. First, it is difficult to know which small firms might become strong challengers. For example, how might YouTube have changed the Internet ecosystem if it had not been purchased by Google?

Second, the possibility of being acquired is in itself a reason entrepreneurs start companies in the first place. Allowing such a purchase could reduce the static level of competition within a market; however, it provides a considerable incentive for entrepreneurs to take risk, and thus could increase dynamic efficiency. The ‘prize’ for successful innovation is often being bought out by a major tech company. Thus, allowing a dominant firm in a market to buy out smaller firms could counterintuitively increase the dynamic efficiency of the market.

Still, economists may want to explore ways of carefully balancing the trade-offs between restricting large tech firm purchases and potentially unintended consequences. An alternative to restricting large tech firm purchases is to use merger policy as a mechanism for promoting more competition in this space. Policymakers may wish to take a more relaxed attitude towards proposed mergers between firms that have the capability to become competitors to incumbent firms within the digital ecosystem.

A good example is the recent AT&T–Time Warner merger, which is still being challenged by the U.S. Department of Justice. A key claim that AT&T made was that the merger would make it easier to compete with some of the larger tech firms in areas such as advertising and the distribution of programming – for example, to compete with Netflix (Financial Times, 2018). To the extent such claims are credible, they should be considered in a positive light in merger proceedings if the aim is to inject more competition into areas where the large tech firms currently dominate.

4.3 Reconsider the ex-ante and ex-post approaches to mergers and regulation more generally

In a working paper with Lewis Evans (Evans and Hahn, 2010), I discuss optimal regulation in fast moving markets. While my specific concern was telecoms, many of the arguments we use apply to digital markets.

Regulatory policy can be viewed as falling into two categories: ex-ante, and ex-post. Ex-post regulation seeks to deal with problems as they emerge and places a great deal of emphasis on maintaining a competitive market. Competition law is generally ex-post. Ex-ante regulation, on the other hand, seeks to replicate the circumstances such a market would achieve using regulation. A simple example would be price reviews, which set prices within a market.

The problem for ex-ante regulation in digital markets is that the market is not only often out of equilibrium, but that the equilibrium it tends towards is also shifting. This means that seemingly sensible ex-ante regulation can often find itself out of date and holding back investment. In such cases, the dynamic costs of regulations have the potential to be much larger than the initial static gains from making firms adopt a particular price.

Moreover, ex-ante regulation is not only likely to be left out of date by the progress of the market. It may also be rendered unnecessary by the development of substitutes or rival products. This may be true in fast-changing markets, such as telecom and video services, where customers have more and choices as technology evolves. Regulating, for instance, the price of text messaging in a telecoms market could be an example of unnecessary ex-ante regulation. Furthermore, regulating traditional landline telephone service, with the possible exception of providing “lifeline” service for low-income customers, may no longer be necessary.

In contrast, a significant benefit of ex-post regulation is that it provides a greater degree of flexibility for firms to innovate than they would have under ex-ante regulations. Rather than simply fixing an outcome that firms must adhere to, regulators can examine issues on a case-by-case basis. This is likely to mean greater dynamic efficiency, and consequently also greater long run economic welfare. These arguments do not just apply to the obvious digital markets – online shopping, search, advertising, and so on – but also to other firms that compete in the digital space.

This is not to say that ex-ante regulation does not have a role to play. As Coyle (2018) notes, it can assist in helping to set a competitive playing field. To the greatest extent possible, innovators should be able to build on existing frameworks. Further, regulators could also examine the possibility of setting open technical standards, which encourage firms to produce hardware and software that are compatible with offerings from rival firms. Similarly, allowing customers to take their data with them when they leave a service – data portability – could well be something regulators wish to encourage.

What is less appropriate is trying to prescribe particular competitive outcomes. When regulators believe an intervention of this sort is warranted, they should be sensitive to the point that market structures are not fixed. Furthermore, regulators should consider including mechanisms by which regulations could be reviewed at regular intervals and removed if no longer necessary. It is important to provide firms with stability for investment decisions, so such reviews and mechanisms should be clearly set out.

5. Conclusion

Digital markets are both dynamic and poorly understood. While regulators should not shy away from appropriate interventions, they need to be clear on what shape such interventions should take.

To incentivise investment and innovation, it would be better for regulators to focus on ex-post regulation rather than ex-ante in most situations. Further, regulators should focus on the attainment of dynamic efficiency rather than short-term static gains, and should be willing to bend their usual approach to mergers and other issues of competition policy in promoting dynamic efficiency.

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Appendix A – Short biography

Robert Hahn is a visiting professor and former director of economics at the Smith School of Enterprise and the Environment, Oxford University, and a senior policy scholar at the Georgetown University Center for Business and Public Policy. He has served on the faculties of Harvard and Carnegie Mellon, and has also had senior appointments at AEI and Brookings. Bob co-founded and directed the AEI-Brookings Joint Center for Regulatory Studies, a leader in policy research in law and economics, regulation, and antitrust. Previously, he worked for the U.S. President's Council of Economic Advisers and was the chief economist on the White House drafting team for the 1990 Clean Air Act Amendments. His responsibilities included helping to design the innovative cap-and-trade system for limiting smokestack sulfur emissions.

Bob is currently conducting several economics experiments aimed at improving productivity, and promoting growth and sustainability. He also continues to do research on competition policy, government regulation, Internet policy, and understanding the benefits of breakthrough innovations. He served as a commissioner on the U.S. Commission on Evidence-Based Policymaking and is currently working with key decision makers on ways to promote evidence-based policy. Furthermore, Bob is the co-founder of two London-based companies, The Behaviouralist and Signal.

Appendix B – Curriculum vitae

Robert W. Hahn

Smith School of Enterprise and the Environment
University of Oxford
OUCE South Parks Road
Oxford OX1 3QY

EDUCATION

- 1977-81 California Institute of Technology, Pasadena, California
M.S., 1979, Ph.D., Social Science, 1981
- 1976-77 Stanford Graduate School of Business, Stanford, California
- 1971-75 Brown University, Providence, Rhode Island
B.A., Mathematical Economics, 1975
M.A., Economics, 1975
Languages: Spanish
Honors: Phi Beta Kappa

EMPLOYMENT

- 2018- Visiting Professor, Smith School, University of Oxford
- 2013- Senior Research Fellow, Institute for New Economic Thinking, Oxford Martin School
- 2009- Senior Fellow, Center for Business and Public Policy, Georgetown University, Washington, D.C.
- 2012-17 Professor and Director of Economics, Smith School, University of Oxford
- 2016-17 Commissioner, U.S. Commission on Evidence-Based Policymaking
- 2011-18 Associate Member, Nuffield College, University of Oxford
- 2014-18 Non-resident Senior Fellow, Brookings Institution, Washington, D.C.
- 2013-15 Robert Schuman Fellow, Global Governance Programme, EUI
- 2015 Simon Fellow, Property and Environment Research Center
- 2011-12 Director of Economics, Smith School, Oxford
- 2008-10 Senior Visiting Fellow, Smith School, University of Oxford
- 2008-10 Visiting Fellow, Nuffield College, University of Oxford

2003-08 Executive Director, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C.

1998-02 Co-founder and Director, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C.

1999-08 Non-resident Senior Fellow, Brookings Institution, Washington, D.C.

1989-07 Resident Scholar, American Enterprise Institute, Washington, D.C.

1997-02 Research Associate, Harvard University, Cambridge, Massachusetts

1990-01 Adjunct Professor of Economics, Carnegie Mellon, Pittsburgh, Pennsylvania

1991-94 Adjunct Research Faculty, Harvard University, Cambridge, Massachusetts

1987-89 Senior Staff Economist, Council of Economic Advisers, Washington, D.C.

1985-90 Associate Professor of Economics, Carnegie Mellon, Pittsburgh, Pennsylvania

1982-85 Assistant Professor of Economics, Carnegie Mellon, Pittsburgh, Pennsylvania

1981-82 Research Fellow, California Institute of Technology, Pasadena, California

1981 Instructor, Pitzer College, Claremont, California

1978 Economist, Council on Environmental Quality, Washington, D.C. (summer)

1976 Economist, World Bank, Washington, D.C. (summer)

1975-76 Division Staff, MITRE Corporation, McLean, Virginia

1973-75 Math Teacher, Transitional High School, Providence, Rhode Island

PUBLIC SERVICE AND ACADEMIC ACTIVITIES

1983- Co-founder of the Community Preparatory School, Providence, Rhode Island

2011- Editorial Board – *Oxford Review of Economic Policy*

2016- Board of Scholars, American Council for Capital Formation

2016- Academic Advisory Board, Technology Policy Institute

2016- Board of Directors, Long-term Education Investment Fund

2010-15 Defra/GES Environmental Economics Academic Panel

2010-11 World Economic Forum, Consumer Industry Agenda Council

- 2009- Editorial Board - *Journal of Benefit-Cost Analysis*
- 2009- Editorial Board - *Journal of Prediction Markets*
- 2008- Editorial Board - *Policy and Internet*
- 2006- Editorial Board - *Review of Environmental Economics and Policy*
- 2005-11 Columnist - *Economists' Voice*
- 2000- Editorial Board - *Milken Review*
- 2000- Research Advisory Board - Committee for Economic Development
- 2001- Editorial Advisory Board - *Regulation*
- 1994-99 Board of Directors, Annapolis Center
- 1989-93 Editorial Council - *Journal of Environmental Economics and Management*
- 1990-92 Cochairman of the U.S. Alternative Fuels Council

PROFESSIONAL AFFILIATIONS

American Economic Association

Association for Public Policy Analysis and Management

Association of Environmental and Resource Economists

AWARDS

American Association for the Advancement of Science Fellowship

Barr Award for Outstanding Research in Applied Public Economics

Brookings Fellowship

Caltech McDonnell Award for best graduating student in Social Science

Premier's Fellowship, New South Wales, Australia

SELECTED RESEARCH PROJECTS AND FOUNDATION SUPPORT

Agency for International Development, "Government Regulation of the Marketing and Processing of Crops in Uganda"

Electric Power Research Institute, "Organizational Aspects of Power Pooling"

Electric Power Research Institute, "Markets in Transferable Property Rights"

Environmental Protection Agency, "An Examination of EPA's Controlled Trading Options"

Environmental Protection Agency, “An Evaluation of Mechanisms for Complying with the Ozone Standard”

Environmental Protection Agency, “Designing Markets in Tradable Allowances for Reducing Acid Deposition”

Environmental Protection Agency, “Promoting Conservation Through Price Rationalization”

Environmental Protection Agency, “Evaluation of Economic Incentives for Hazardous Waste Management”

Environmental Protection Agency, “Economic and Environmental Analysis of Alternative Fuels”

Matsushita Foundation, “Educational Development”

Mott Foundation, “AEI-Brookings Joint Center for Regulatory Studies”

National Science Foundation, Decision, Risk and Management Science, “The Emergence of Markets for Controlling Risks”

National Science Foundation, Regulation and Policy Analysis, “Spot Markets for Electricity”

National Science Foundation, Decision, Risk and Management Science, “Markets for Controlling Environmental Risks”

New South Wales Government, Australia, “Economic Approaches for Protecting Environmental and Natural Resources: From Theory to Practice”

Office of Technology Assessment, “Designing Economic Incentives for the Clean Air Act”

Rhode Island Foundation, “Options for Alternative Education”

Smith Richardson Foundation, “AEI-Brookings Joint Center for Regulatory Studies”

World Bank, “The Benefits and Costs of Regulation in Developing Countries”

World Bank, “Application of Economic Incentives to Environmental Problems in Developing Countries”

SELECTED PUBLICATIONS³

Working Papers and Work in Progress

“Using Big Data to Estimate Consumer Surplus: The Case of Uber,” with Peter Cohen, Jonathan Hall, Steven Levitt, and Robert Metcalfe, NBER working paper, September 2016, under revision.

“The Ridesharing Revolution: Economic Survey and Synthesis,” with Robert Metcalfe, forthcoming in Oxford University Press book.

³ Many of my scholarly publications can be found at www.ssrn.com.

“The Economics of Water Security,” with Dustin Garrick, proposal accepted by *Review of Environmental Economics and Policy*, under revision.

“Estimating the Trade-off between Efficiency and Equity from Energy Subsidies,” with Robert Metcalfe, under revision, *AER*.

Friend of the Court Brief on Climate Change for the U.S. Supreme Court, with Tom Schelling and Vernon Smith, May 2013.

“Refer-a-friend Economics: A Theoretical and Experimental Analysis,” with, Jonathan Davis, John List, Robert Metcalfe and Michael Price, draft.

“Regulating the Tech Titans” with Scott Wallsten outline submitted to JEP.

“The Behavioralist as Policy Designer: The Need to Test Multiple Treatments to Meet Multiple Targets,” with Robert Metcalfe, David Novgorodsky and Michael Price, NBER working paper, under review *JAERE*.

“Overconfidence in Future Behaviors: Getting Customers to Use an Online Platform for Water and Energy Management” with Robert Metcalfe and Dmitry Taubinsky, in preparation.

“Getting Students to the College Entrance Test on Time: Can Incentives Help?,” with Ty Cruce, Amos Dupuich, and Robert Metcalfe, in preparation.

“Understanding the Effectiveness of Bill Tracker Alerts on Energy Consumption,” with Robert Metcalfe and Florian Rundhammer, in preparation.

“How Urban Mass Transit can Reduce Congestion: A Natural Field Experiment with BART,” with Robert Metcalfe and Eddy Tam, in preparation.

Journals

“Promoting Customer Engagement: A New Trend in Utility Regulation,” with Robert Metcalfe and Florian Rundhammer, *Regulation and Governance*, 2018, forthcoming.

“The Impact of Behavioral Science Experiments on Energy Policy”, with Robert Metcalfe, *Economics of Energy and Environmental Policy*, 2016, 5(2), 27-44.

“Does the Social Cost of Carbon Matter: Evidence from U.S. Policy,” with Robert Ritz, *Journal of Legal Studies*, 2015, 44, 229-248.

“Understanding the Effectiveness of Environmental Offset Policies,” with Kenneth Richards, *Journal of Regulatory Economics*, 2013, 44(1), 103-119.

“Clash of the Titans: How the Largest Commercial Web Sites Got That Way,” with Hal Singer, *Milken Institute Review*, 2013, 38-46.

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- "The Grand Experiment in Regulatory Reporting," with Mary Beth Muething, *Administrative Law Review* 55, no. 3 (Summer 2003): 607-642.
- "Cybersecurity: Who's Watching the Store?," with Bruce Berkowitz, *Issues in Science and Technology* XIX (Spring 2003): 55-62.
- "Federalism in Antitrust," with Anne Layne-Farrar, *Harvard Journal of Law and Public Policy* 26, no.3 (Summer 2003): 878-921.
- "The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones," with Patrick M. Dudley, *Administrative Law Review* 55 no. 1 (Winter 2003): 127-185.
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HM Treasury: Digital Competition Expert Panel - Open consultation

Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

The Centre for Competition Policy (CCP)

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Overview

The members of CCP welcome the opportunity to contribute to this consultation. We limit our responses to some of the questions and issues raised by the consultation and which we have addressed in our research. Our responses focus in particular on the following issues and support the following recommendations:

- Impact of personal data collected through the 'free' online services on competition in associated markets with a specific regard to merger control (Question 5 and 7 A: Elias Deutscher)

Recommendation: *Competition analysis should focus in particular on the (i) variety, (ii) volume, (iii) velocity of collection and (iv) value of the merging parties' user databases to assess whether their combination confers the merged entity a 'data advantage' in associated markets.*

- Relevance of personal user data as economic counterpart of 'free' online services with a specific regard to merger control (Question 5 and 7: Elias Deutscher)

Recommendation: *Competition analysis should ascertain how mergers affect the non-monetary economic transactions in markets where consumers receive free services in exchange for disclosing their personal information. The tool of willingness-to-pay studies in the form of conjoint analysis would allow competition authorities to assess and quantify consumer harm resulting from such non-price effects (e.g. decrease in the level of privacy protection) of mergers in 'free' online services markets.*

- Tools of competition policy (Question 7 A and B: Bruce Lyons)

Recommendation: *In the context of digital markets, it would be wise to amend the standard 'more likely than not' merger test to allow greater harms, which are at least 'realistic prospects', to weigh more heavily in the merger decision.*

Recommendation: *The 'tool' necessary for antitrust action relating the abuse of dominance by digital giants is very strong international cooperation.*

- Policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes (Question 8: Wynne Lam)

Recommendation: *Regulators should be mindful of changes in both the extensive (how many consumers) and intensive margins (how much data consumers have provided and analysed by firms) induced by policies that aim at reducing switching costs, especially in the digital economy.*

- How does data protection legislation affect innovation by digital firms? (Question 10: Bruce Lyons, Wynne Lam)

Recommendation: *It is good policy not to rely solely on fines for incentivising data protection because the GDPR opt-in requirement helps to achieve the same aim with less adverse impact on service quality.*

- What is the appropriate relationship between data protection legislation and competition law in digital markets? (Question 10: Elias Deutscher)

Recommendation: *Competition authorities should account for the fact that privacy protection may constitute an important parameter of competition in digital markets which can be negatively affected by a merger or other anticompetitive conduct, even though this conduct does not amount to a breach of data protection legislation.*

I. Impact of personal data collected through the ‘free’ online services on competition in associated markets with a specific regard to merger control (Q.5 & Q.7A: Elias Deutscher)

A recent paper by Elias Deutscher¹ on merger analysis in the digital economy assesses how competition authorities examine the role of personal data as source of market power and as economic counterpart for ‘free’ online services. In several mergers between firms collecting user data, the European Commission has ascertained the extent to which the combination of their previously distinct datasets will bestow a ‘data advantage’ on the merged entity allowing it to marginalise or even foreclose competitors in associated (online advertising) markets. The paper, however, critically points out that the European Commission’s past assessment of such conglomerate effects resulting from the combination of the merging parties’ datasets lacked analytical depth. In *Google/DoubleClick*, *Facebook/WhatsApp* and *Microsoft/LinkedIn*, the Commission broadly assumed that such a combination of the parties’ databases would not have any anticompetitive effect on the online advertising market. It however omitted to analyse the specific characteristics of the combined databases and the suitability of alternative sources to replicate the information or other advantages the merging parties derived from the combination of their datasets. Against this backdrop, the recent decision in *Apple/Shazam* reflects a major step towards a more granular analysis of such a ‘data advantage’. To determine whether this combination of user datasets would have a negative impact on competition in the market for digital music streaming apps, the Commission focused in particular on the (i) variety, (ii) volume, (iii) velocity of collection and (iv) value of Shazam’s user dataset, as compared to the data accessible to competitors.²

Focusing on these four dimensions, or so-called ‘Four Vs’ of Big Data, constitutes a promising analytical tool to assess how the access to or combination of user datasets as a consequence of a merger might confer market power and cement entry barriers in associated markets.

II. Relevance of personal user data as economic counterpart of ‘free’ online services with a specific regard to merger control (Q.5 & Q.7A: Elias Deutscher)

The fact that consumers receive ‘free’ services has for quite some time shifted the focus of competition analysis away from the user-side to the advertising-side of online platforms. While the European Commission assessed in *Google/DoubleClick*, *Microsoft/Yahoo!*, and *Facebook/WhatsApp* the transactions’ effect on the market for online advertising, it omitted to examine how these mergers may affect consumers on the ‘free’, user-side of the multi-sided platforms. *This approach, however, unduly overlooks that consumers, albeit receiving services for ‘free’, are engaged in a genuine economic transaction with online platforms, as they barter their personal information in exchange for free online services.* Although consumers are not charged a monetary price, they nonetheless pay a non-monetary price by disclosing their personal information which, in turn, is monetised by the platforms on their online advertising side.

¹ Elias Deutscher, ‘How to measure privacy-related consumer harm in merger analysis? : a critical reassessment of the EU Commission’s merger control in data-driven markets’ (2018). EUI Law Working Paper 2018/13. <http://cadmus.eui.eu/handle/1814/58064>

² Case COMP/M. 8788 *Apple/Shazam* [315]–[330].

The analysis of non-price effects of mergers on the ‘free’, user-side of online platforms constitutes an essential element of a more holistic approach and major challenge for merger control in digital markets. ***Competition analysis should ascertain how mergers affect the non-monetary economic transactions in markets where consumers receive free services in exchange for disclosing their personal information.*** As the terms and bargains of these non-monetary transactions are determined by the amount and type of information consumers have to reveal in exchange of free services, competition authorities should evaluate how mergers affect consumers’ level of privacy or data protection on the ‘free’ user side of multi-sided platforms. In this respect, competition analysis could approach a decrease in the level of data protection resulting from a merger as being tantamount to a (non-monetary) ‘privacy price’ increase.

The paper advocates the use of willingness-to-pay studies in the form of conjoint analysis as a methodological tool for competition authorities to ascertain these non-price effects. By identifying consumers’ willingness to pay for a certain level of privacy, competition authorities would be able to quantify the consumer harm likely to arise from the potential change in the merging parties’ privacy policy as a consequence of the merger and to translate it into monetary terms for the purpose of balancing it with potential welfare-enhancing efficiencies. Conjoint analysis is increasingly used by competition authorities³ to measure consumers’ willingness to pay for non-price characteristics of differentiated products. This suggests that conjoint analysis is a workable and administrable tool which can be used for merger analysis without creating the need of any change in the substantive merger tests and notwithstanding the tight timelines of merger control. As it does not rely on stated but revealed preferences to measure how much consumers value a certain level of data protection, conjoint analysis is less vulnerable to the ‘privacy paradox’ and other cognitive biases than ordinary surveys. The conjoint analysis methodology would also enable competition authorities to account for the multi-faceted nature of privacy. It would not only allow them to measure how users value privacy in relation to the amount of personal information they have to disclose in exchange of a specific service, but also to gauge consumers’ preferences with regard to other dimensions of privacy, such as the interdependent privacy (disclosure of data of friends or contacts), the type of data disclosed (sensitive or non-sensitive data), the purpose of the data collection, the use of the data (platform or third parties), the control over data and data security.

III. Tools of competition policy (Q.7A & Q.7B: Bruce Lyons)

Digital markets have many characteristics that are also found in more traditional market settings (e.g. network effects, cross-network externalities, continuous marginal innovation, drastic Schumpeterian innovation, high fixed/low marginal costs, global reach, big data accumulation, targeted advertising, potential for individualised pricing). The instruments of competition policy are sufficiently flexible to address each of these when they raise problems for competition, with the back-up of regulation for natural monopolies. However, there is a major qualitative difference in that so many of these characteristics are combined in digital settings. In particular, digital technology can be used globally without transport costs, marginal costs are often close to zero, and a very small number of platforms become both first-choice access points for time-constrained consumers and the core route-to-market for many suppliers. Consequently, network and other effects become hugely exaggerated, resulting in dominant

³ Marinus Imthorn, Ron Kemp and Ivo Nobel, ‘Using Conjoint Analysis in Merger Control: A competition practitioner’s perspective’ (ACM Working Paper 2/2016 2016).

firms, even at a global level. In this context, I highlight two suggestions in relation to the tools of competition policy.

7 A. Merger tools:

A standard piece of merger analysis is to develop a counterfactual of what would happen in the absence of a merger. This need not be the status quo; for example, failing firms can provide the counterfactual against which to appraise the merger. The difficulty in forming a counterfactual in digital markets is that they are so fast-moving and innovation is unpredictable. This raises the prospect of more extreme outcomes than are usually considered in traditional markets. Suppose that the CMA is able to identify two possible scenarios, A and B. A is a slightly more likely outcome and would not create any competitive problems or harm consumers. B is slightly less likely but would result in foreclosing the market, unbalancing future innovation and be highly detrimental to consumers. Outcome A is ‘more likely than not’ and so such a merger might be allowed on the standard legal test. Inasmuch as this is the case, then *it would be wise to amend the standard test to allow greater harms, which are at least ‘realistic prospects’, to weigh more heavily in the merger decision*. There could be symmetry in this proposed approach if outcome A would result in minor harm and the slightly less likely outcome B would result in huge gains (e.g. creating a powerful challenger to a dominant firm).⁴

7 B. Antitrust tools:

For reasons given above, a few digital firms have become global giants. Post-Brexit, if DG Competition is no longer acting on behalf of the UK, the CMA would not be in a good position to tackle global digital giants. While the CMA has a very good track record on mergers and is improving on Ch.1, it has a poor record on Ch.2/Art.102 enforcement of competition law (i.e. dominant firms). In any case, UK law would have only a limited impact on the global giants. For example, geographically local remedies might be attempted but there could be no feasible measures to influence technology or structure. *The ‘tool’ that would then be needed is strong international cooperation*. Realistically, this would have to be with the EU, not least because US interests may not be so well aligned with UK interests when so many digital giants are located in the US.

IV. Policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes (Q.8: Wynne Lam)

In the “old” economy, one of the main sources of switching costs came from acquiring information about alternatives (e.g. searching for the cheapest provider). It is well-known in the economic literature that switching costs have two contrasting effects on competition. *Ex post*, once a consumer has bought from a firm, he/she is willing to pay more to continue buying from this firm (up to the switching costs). Demand is less elastic for “locked-in” consumers. Firms have market power over these consumers, which leads to higher prices. *Ex ante*, firms compete fiercely to get consumers locked-in in the first place, which leads to lower prices. Thus, one way to encourage entry is to reduce ex post switching costs.

⁴ This sort of flexibility appears possible in judicial review, which sets a higher standard when more is at stake.

In the digital economy, switching costs of acquiring information are much reduced, as price quotes and product specs are only one click away. However, now switching online services is more about the treatment of consumer data. In our recent research (Lam and Liu, 2018),⁵ we show that in a digital environment where big data analytics are prevalent, traditional policies (e.g. data portability) that intend to *reduce* ex post switching costs may have an unintended consequence of *increasing* ex post switching costs. Why? Because in a non-digital environment without any big data analytics, data portability rules can indeed facilitate switching (the extensive margin) and entry, holding the level of consumer data provision fixed. However, with big data analytics, the prospect of easier switching may actually entice consumers to provide even more data to the incumbent (the intensive margin), which creates entry barriers. We also demonstrate that where big data is very valuable, data portability rules may reduce consumer welfare by deterring entry of a more efficient firm.

Therefore, the regulators should be mindful of changes in both the extensive (how many consumers) and intensive margins (how much data consumers have provided and analysed by firms) induced by policies that aim at reducing switching costs, especially in the digital economy.

V. How does data protection legislation affect innovation by digital firms? (Q.10 – other issues: Wynne Lam, Bruce Lyons)

Rapid technological change and digital markets have created new opportunities for the use of personal data to develop services offered to consumers. Part of the benefit is generic in attracting consumers to a platform to use a core service. Additionally, consumers typically enjoy a benefit from providing their personal data in the form of individualised value added services (e.g. individualised search results, information on products of personal interest, access to relevant social networks). These add value to the core activity of a website (e.g. general internet search, convenient shopping, communication with friends). High profile examples include Google, Amazon and Facebook, but there are numerous other lower profile examples (e.g. games, travel websites, weather apps). At the same time, many consumers are concerned about the security of their personal data and its potential misuse (ranging from identity theft, hacking of credit card details, misuse of personal data for political purposes, misuse for commercial ends that do not benefit consumer, to spam). Consequently, internet firms invest both in the quality of value added services to attract consumers and in data security to create the confidence for them to provide their data.

The revenue model for such firms has evolved away from classic payment for services to a price subsidised by other revenue streams. The logic is now familiar from the theory of two-sided markets. Advertising revenues and product sales are highly valuable to internet firms, particularly if suppliers can target individuals, so a prime objective is to maximise the number of users on their site and to use the personal data they collect to target adverts and product offers. Internet firms attract consumers in three ways. First, they provide a core activity to consumers, often supplemented by individualised services, at a highly subsidised price and very often free of direct charge. Second, they invest in improving the quality of their core

⁵ Lam, W. M. W. and Liu, X. (2018) 'How does Data Portability affect Entry?', Working Paper. Available at: https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=EARIE45&paper_id=253. A non-technical summary of the paper can be found at: <https://bit.ly/2zzLiZ8> (CCP Research Bulletin, Spring 2018, pp. 8-9).

product and value added services (i.e. innovation). Third, they invest in internal and external data security in order to give consumers confidence to share personal data.

In contrast to other jurisdictions, the European GDPR uses publicity, fines and a new consumer opt-in requirement to incentivise firms to protect personal data. Lam and Lyons (2018)⁶ consider the distinctive GDPR role of opt-in by drawing on empirical and experimental evidence which suggests the status quo shifting significance of the opt-in requirement may be best understood by consumer loss aversion. They develop a simple theoretical model to show that, while fines incentivise investments in data security, higher fines also reduce the incentive of firms to innovate (i.e. there is an investment substitution effect). However, the opt-in requirement of the GDPR increases investment in data security, without necessarily reducing the incentive for service quality/innovation. In fact, this incentive may be improved because, unlike with fines, the opt-in hurdle can be directly addressed by improving service quality (i.e. there can be complementarity between data security and product quality investments).

Thus, we find that it is better policy not to rely solely on fines for incentivising data protection because the opt-in requirement helps to achieve the same aim with less adverse impact on service quality.

VI. What is the appropriate relationship between data protection legislation and competition law in digital markets? (Q.10 – other issues: Elias Deutscher)

One fundamental issue the review should consider is the appropriate relationship between and respective scope of competition law and privacy/data-protection regulation. The predominant view shared by competition authorities and academics on both sides of the Atlantic claims that privacy/data protection does not constitute an antitrust concern, but should be properly addressed by consumer protection or privacy legislation.⁷ Accounting for privacy under competition analysis, the argument goes, would unduly ‘instrumentalise’ competition law in order to fix regulatory failures resulting from insufficient or dysfunctional data protection legislation.

This argument, however, misconceives the respective roles of competition law and data protection regulation, which are complementary, but remain distinct, even if competition law was to address privacy-related consumer harm caused by mergers or anticompetitive conduct. Leaving aside the fact that data protection is considered a fundamental right, the way how data protection legislation operates does not differ much from other consumer protection regulation. In simple terms, data protection regulation establishes a minimum level of protection that has to be guaranteed in order for economic transactions whereby users disclose information in exchange for free services to lawfully take place.

⁶ Wynne Lam and Bruce Lyons (2018) ‘Data Protection Legislation and Investment Incentives when Consumers are Loss Averse’

⁷ Case C-238/05 *Asnef-Equifax* ECLI:EU:C:2006:734 [63]. Case COMP/M.4731 Google/DoubleClick [368]. Statement of Federal Trade Commission Concerning Google/DoubleClick 2007, Statement of Federal Trade Commission Concerning Google/DoubleClick. FTC File No. 071-0170 2. Case COMP/M.7217 Facebook/Whatsapp [164].

This insight has two important implications for the relationship between competition law and data protection regulation. ***First, although data protection legislation establishes a minimum level of protection, this does not prevent the level of privacy protection from being a competitive parameter.*** Indeed, online providers are free to offer users a level of privacy protection going beyond the minimum level of protection set out by the data protection legislation. ***Second, firms can lower the level of privacy protection, and, thus, raise the non-monetary ‘privacy price’ consumers have to pay for their services without necessarily violating data protection legislation. If such lowering of the level of privacy protection is the consequence of anticompetitive conduct or a merger, there is no (legal) reason why competition law should not intervene, unless one assumes that data protection regulation pre-empts the application of competition law.*** This pre-emption argument is not supported by the case law of the Court of Justice of the EU which has repeatedly held that – at least in the analogue world – EU competition law applies, even if an industry is subject to specific consumer or sector-specific regulation.⁸ This has been more recently recognised by the EU Commission in the *Microsoft/LinkedIn* merger. In this decision, the EU Commission stressed that even though the EU data protection legislation restricts the merged entity’s capacity to access and process data, competition law nonetheless applies to any anticompetitive effect that might arise from the merging firms’ lawful attempts to access or combine their datasets in compliance with data protection rules. The Commission here acknowledged for the first time that privacy protection constitutes an important parameter of competition in digital markets and can be negatively affected by a merger, even though the parties’ conduct does not amount to a breach of data protection legislation.

⁸ Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 [80] - [96]. Case T-398/07 *Spain v Commission* ECLI:EU:T:2012:173 [55]. Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 [46] - [47]. Case C-457/10P *AstraZeneca AB and AstraZeneca plc v European Commission* ECLI:EU:C:2012:770 [74] - [75], [93]. Case C-179/16 F. *Hoffmann-La Roche and Others* ECLI:EU:C:2018:25 [92] - [93].



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12 December 2018

Dear [Name redacted] ,

Please find in the accompanying email our research into personalised pricing which we would like to submit to the call for evidence on competition in the digital economy.

Citizens Advice represents consumers across essential regulated markets. In 2018, we partnered with Frontier Economics to explore the likelihood of new pricing strategies emerging in essential services markets due to developments in the digital economy.

Our research found that personalised pricing isn't currently widespread within essential markets. In spite of this, we think it's possible personalised pricing could become widespread in future. The increasing availability of consumer data, improved storage and opportunities for identifying correlations in this data, as well as the linking of 'smart' household products, means that essential service providers are likely to learn more about their clients, their habits and financial capabilities than ever before at lower cost.

The emergence of personalised pricing has two important implications for competition.

- **Personalised pricing might limit new entrants into markets.** At present, competitive essential markets rely on the risk that new entrants might 'disrupt' existing market practices to control prices. But personalised pricing is likely to rely on extensive use of consumer data sets. Without access to the enormous data sets

Patron HRH The Princess Royal

Chief Executive Gillian Guy

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which existing providers hold, new, more efficient providers could struggle to beat the personalised offers provided by existing providers, and be barred from entering the market as a result

Repricing software - and the algorithms on which they rely - could be particularly damaging for competition where providers practice 'instant price matching'. These algorithms could reduce the incentive for other firms to undercut prices, since it could initiate a 'race to the bottom' as well as limit the ability of new firms to enter the market. Such strategies, especially if used by a firm with strong position in the market, could have negative consequences for competition.

- **The concentration of data in a small number of digital platforms could allow 'partner providers' to consolidate large market shares.** The risk to competition posed by personalised pricing could be exacerbated by concentration of large amounts of consumer data within a relatively small number of digital platforms. Platforms such as Facebook, Google, and Amazon hold far more data on consumers than the standard energy provider and are able to provide a very rich account of who their users are. And the use of smart connected devices tends to rely on one of these three providers to link different consumer products. This concentration of data within a series of 'tech' firms could, if paired with a major energy provider, lead to a massive expansion in the providers' access to consumers, and subsequently push other providers out of the market.

Finally, there is the possibility of a negative feedback loop here. Personalised pricing could be bad for competition. And our research found that if competition is reduced, the risks posed by personalised pricing become much greater. Without



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downward pressure on prices in markets where consumers don't regularly switch providers, customers might find themselves losing out.

For more explanation of the benefits and risks of personalised pricing, as well as what it might mean for consumer trust and behaviour. Please see our attached research 'A price of one's own'.

Yours sincerely

[Name redacted]

Patron HRH The Princess Royal

Chief Executive Gillian Guy

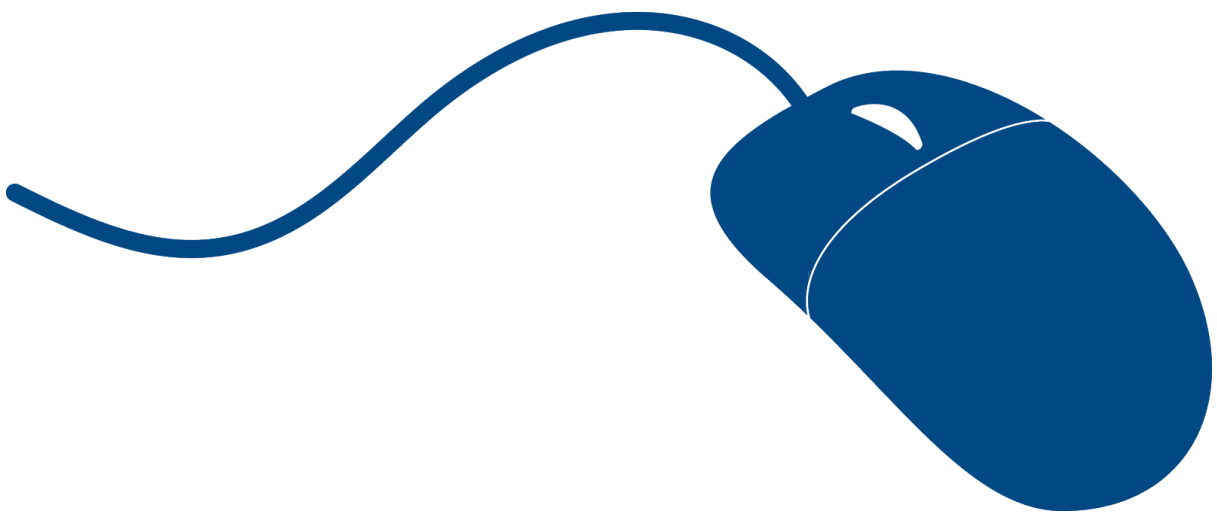
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A price of one's own

An investigation into personalised pricing in essential markets



Morgan Wild and Marini Thorne

Executive Summary

One of the most important things markets do is set prices for goods and services. But, prices tend not to be uniform: they are set in part by what companies know about what we are willing to pay. This is price discrimination and it's all around us. The incremental difference in firms' costs to make a small or large coffee, for example, or provide first and standard class rail travel, or produce 'value' and branded supermarket produce is relatively trivial. The different prices are largely driven by what we will pay.

Price discrimination is as old as the marketplace and *can* make markets work better by lowering prices for many consumers. But technological change is making it more prevalent, more intense — and more personalised. More personal data about us is being produced than ever before — for example, by 2020, 53 million smart meters in UK homes will be generating unparalleled levels of data about our energy use. Alongside this, internet shopping makes previously public marketplaces more private - there's a limit on how much price personalisation supermarkets can do, because everyone can see the price other people are paying. As markets go digital, this check on pricing strategies is diminished.

These are all potentially far-reaching changes to our economy. But we wanted to answer a specific question: **if firms use this explosion of personal data to personalise prices, what will this mean for the prices people pay for essential services?**

By their very nature, essential services are more important to consumers than other markets. Everyone needs household access to energy and water, and the lowest income households find themselves spending nearly 10% of their total expenditure on energy alone.¹ Increasingly, our economy and our lives are driven by reliable access to inexpensive broadband and mobile services. And postal services remain highly important for older and more rural consumers. When these markets fail, the consequences can be significant and costly. We need to be more alert to the potential downsides of major market shifts.

People tend to dislike personalised pricing. 84% of people said they felt uncomfortable with personalised pricing in essential service markets and 3 in 4 people say that if they encountered personalised pricing they wouldn't trust their provider.²

People do know that personalised pricing could happen and how to protect themselves. More than 85% of people know that adverts can be targeted using their browsing history, and 61% of people know that this can affect the types of offers that they might see. More than half of people know how to manage their data online - by clearing cookies, or changing privacy settings on emails and social media.

But most consumers don't maintain these practices on a regular basis - 1 in 3 people 'often' clear their browsing history and cookies. And only 1 in 5 people would definitely switch providers if they thought they were subject to personalised pricing.³

¹The lowest income decile spends 9.7% of its total expenditure on energy, as opposed to just 2.9% amongst the highest income decile. Office for National Statistics Data, [Family spending in the UK: financial year ending March 2016](#).

² Citizens Advice and ComRes nationally representative polling, July 2018, 2,848 responses.

³ Citizens Advice and ComRes polling, July 2018.

Personalised pricing might pose a risk to consumers by increasing disengagement - particularly in essential markets that are already falling short. Consumer disengagement means customers in the energy market overpay for standard variable tariffs by a staggering £1.4 billion a year.⁴ We've found that this loyalty penalty costs consumers up to £987 a year across six essential markets.⁵ It is often paid by those who can least afford it - people on the worst value energy tariffs, for example, are more likely to be on lower incomes or pensioners.⁶

Personalised pricing could make things worse for vulnerable consumers. Prices that were based on people's likelihood to switch could see prices for low income consumers rise higher. More concerning still, low income consumers appear worst placed to manage their online presence - only 25% of low income consumers know that prices might fluctuate after repeated searches.⁷

Consumers as a whole would be profoundly unhappy about this. 85% of people felt uncomfortable that personalised pricing could impact worse on vulnerable consumers.⁸

But it's not happening yet. Our research found that personalised pricing isn't currently widespread within essential markets. This is because:

- **Firms need data they don't have.** Many essential service providers do not yet have the ability to collect, store and analyse big data on the scale necessary for personalised pricing.
- **The return on investment is too low.** Personalised pricing requires investment in new IT systems & algorithms. Since consumers tend not to like the idea of personalised pricing, firms aren't yet taking the risk on investing.

Our research found that the potential for personalised pricing varies between markets:

- **In the postal and water sectors, it's unlikely that personalised pricing would emerge under current price protections.** Price caps mean that it's relatively hard for providers to price above cost, or to segment between users. This might change in coming years. The water sector might see the introduction of competition and an associated loosening of prices, and the online accounts for parcel delivery will make it easier to segment postal users.
- **In the energy and telecoms markets, personalised pricing looks more likely.** The pricing of energy and telecoms is fairly flexible, with an enormous range of tariffs on offer in both markets. These markets also have better access to consumer data, including personal data and usage data, providing firms with a fuller picture of their behaviour.

Consumers know that personalised pricing is more likely in some markets than others too. 55% of consumers anticipate the possibility of personalised pricing in mobile and broadband services. Whereas only 32% of consumers think it would be possible for personalised pricing to emerge in the water and postal sectors.

⁴ Competition and Markets Authority, [Energy Market Investigation](#), January 2016.

⁵ Citizens Advice, [The Cost of Loyalty](#), February 2018.

⁶ Ofgem, [Energy spend as a percentage of total household expenditure](#), October 2017.

⁷ A low income is categorised as less than £14,000 per annum.

⁸ Citizens Advice and ComRes polling, July 2018.

There are some constraints on personalised pricing. Existing legislation and regulations place limits on the forms that undisclosed personalised pricing might take. These operate in three main ways:

1. By preventing price discrimination based on identity,
2. By limiting access to consumer data, and
3. By providing transparency about pricing practices.

The efficacy of these constraints however, is only as good as the power to enforce them. If it's not clear that personalised pricing is happening, it's very hard to hold providers to account for a practice which is likely to be illegal. In this instance, it's vital that regulators - and particularly essential service regulators, continue to monitor the emergence of personalised pricing.

For the most part, truly personalised pricing lies in the future. But the challenges it presents should be tackled now. Current protections for consumers could also serve as important safeguards in the future:

- **Current price protections are vital** - but these must be kept up to date, to ensure those who are least able to manage don't get left behind.
- **Regulators need to keep up with technological changes** - by maintaining oversight about how data is used to inform pricing strategies and monitoring the cost of essential services for different consumer groups.
- **More needs to be done to ensure that technological developments - such as automated switching services - are used to benefit *all* consumers**, not only those who already shop around.

Introduction

By the year 2020, 1.7 megabytes of new information will be created every second for every human being on the planet.⁹ The exponential growth of so-called ‘big data’ is already having huge effects for consumers - and the markets they interact with. Our experience online is tailored to our interests, where we shop, our social media profile and it is looking increasingly likely that the prices we pay will be tailored to us too.

What is personalised pricing?

This transformation in how prices are set has come to be known as ‘personalised pricing’. Personalised pricing is a sophisticated form of price discrimination - the practice of charging different consumers different prices for the same goods or services based on what they are willing to pay. Personalised pricing differs from traditional price discrimination due to its granularity: rather than try and segment consumers into different groups, the idea behind personalised pricing is to try and set a price for each individual according to what they are willing to pay. A huge range of data about us could, in principle, be used to set this price, from demographics (e.g. gender or race) or behaviour (e.g. web-browsing history).

We’ve already seen a number of different instances of personalised pricing for shoes, holiday bookings or newspaper subscriptions. But the presence of this pricing practice in essential markets remains largely unexplored.

The scope of our research

We wanted to learn more about personalised pricing - but in particular we wanted to focus on certain essential markets: energy, water, telecoms and post. We chose these markets because they are important for a range of consumers. Postal services remain highly important for older and more rural consumers.¹⁰ Energy, telecoms and water are so essential to modern life that, when prices rise or problems emerge, consumers are often unable to reduce or change their usage. This is a particular challenge for low-income households - the poorest households spend 9.7% of their annual expenditure on energy alone.¹¹

To answer our questions, we commissioned Frontier Economics to look at each of these four markets to review:

1. The conditions necessary for personalised pricing
2. The potential for its emergence in certain essential markets
3. The likely impact on consumers in each market

This report

This report sets out our reflections on the research conducted by Frontier Economics and discusses wider questions surrounding personalised pricing. Here, we aim to set out what personalised pricing might mean for consumers in practical terms.

⁹ AnalyticsWeek.com, [Big Data Facts](#), March 2017.

¹⁰ The scope of our research on the postal sector was limited to the notion of consumers as ‘senders of mail’, rather than considering the cost of delivery to consumers. For an account of this, see Geradin, Damien, [Price Discrimination in the Postal Sector and Competition Law](#) July 2010.

¹¹ Office for National Statistics Data, [Family spending in the UK: financial year ending March 2016](#).

We have broken this issue down into seven parts, which consider:

1. Personalised pricing: our key findings

This section sets out the key findings from Frontier Economics' review of personalised pricing. Subsequent sections build on these findings by introducing our own reflections.

2. How consumer data will drive personalised pricing

This section sets out how firms use data to build a more sophisticated picture of consumer behaviour and could use it to set more personalised prices.

3. The potential benefits of personalised pricing

Economic theory doesn't predict whether personalised pricing is good or bad for consumers: it is highly dependent on market specifics. This section sets out the way that personalised pricing could lower prices for some consumers and enable firms in industries with slim margins to stay in business.

4. The downsides of personalised pricing

Personalised pricing can lead to higher prices and excessive profits for companies, particularly in situations where there are few competitors or high barriers to entry. This section argues that essential markets already fail consumers on multiple fronts, in ways that could be exacerbated by personalised pricing.

5. The wider impacts of personalised pricing

Personalised pricing could affect the structure of essential markets. This section considers the potential impacts on innovation & competition.

Essential markets face big challenges, such as extending reliable broadband nationwide, developing more energy efficient services and addressing unfairness in pricing structures. There's a risk that if market failures aren't addressed, personalised pricing could compound these problems - allowing firms to target consumer behaviour in ways that might be detrimental for consumers in the longer term.

6. What might personalised pricing mean for vulnerable consumers?

Personalised pricing in essential markets has both risks and opportunities for consumers. Importantly, however, consumers likely to benefit from this pricing strategy would be those who already tend to be engaged with these markets. By contrast, consumers who have typically shown low levels of engagement, often the elderly or those on low income, might be treated as increasingly price insensitive - and encounter higher prices.

7. The constraints on personalised pricing

There are existing pieces of legislation and regulation which might limit the detrimental effects of personalised pricing, in particular by reducing its capacity to 'discriminate' against particular groups. It's unclear however *how* this regulation should be implemented, when the evidence of personalised pricing remains murky at best.

Recommendations: how to shape personalised pricing in essential markets

While personalised pricing has not emerged in essential markets yet, there's reason to think it's round the corner. This section considers what protections consumers need and how regulators can enable all consumers to benefit from technological developments.

1. Personalised pricing: our key findings

Our research found that personalised pricing is not currently widespread in essential markets but this could quickly change. This is because:

- **Firms need data they don't have.** Many essential service providers do not yet have the ability to collect, store and effectively analyse big data on the scale necessary for personalised pricing.
- **The return on investment is too low.** Personalised pricing requires investment in new IT systems & algorithms. Because personalised pricing is not trusted by consumers, firms aren't yet taking the risk on investing.

These factors look set to change. The increasing availability of consumer data, improved storage and opportunities for identifying correlations in this data, as well as the linking of 'smart' household products, means that essential service providers are likely to learn more about their clients, their habits and their financial capabilities than ever before at lower cost.

Some of the tools to address the worst effects of personalised pricing are already in place. In essential markets some prices have caps - such as the cost of landlines, postage or the upcoming energy price cap for standard variable tariffs - whereas others are free to fluctuate according to the market. It is these existing price protections in essential markets which are likely to act as the most effective constraint on personalised pricing.

In what market conditions can personalised pricing emerge?

Personalised pricing looks increasingly likely, but it only happens if certain conditions are met. For this pricing strategy to become widespread, two main things are important:

- **Providers must be able to charge more to consumers for the products they sell than the cost of making those products** (often this means they are in a strong or dominant position within a market). After all, if there are lots of providers selling a product cheaper than the price a provider predicts they're willing to pay, many customers will just switch away.
- **Providers must be able to use data to segment consumers into smaller groups** associated with common behaviours or characteristics. This information can then be used to work out who is willing to pay more and who will only buy at bargain prices.¹²

These conditions mean it's unlikely that personalised pricing would emerge in the post and water sectors, because:

- **These markets are at least partially price controlled.** In post, there is a universal service obligation - which means that a single price will send a letter anywhere in the UK. More specifically, the price of second class and large parcels

¹² The third factor necessary for personalised pricing to emerge is the 'inability of consumers to instantly resell the product'. This condition is highly unlikely to emerge in the essential market we are discussing here so we have largely excluded it from this account. To read more about this, see our accompanying research.

are controlled. Water companies have all their domestic prices set by their regulator Ofwat. The inflexibility of these prices means it would be hard for firms to introduce a sophisticated and variable approach to pricing its products.

- **There is limited access to consumer data.** Unlike energy and telecoms providers, only 50% of homes have a water meter.¹³ This shortage of information on usage patterns and the inability to switch provider means that the capacity for water companies to introduce a greater degree of price discrimination is limited. The postal sector usually lacks access to consumer data. At present the very act of purchasing a stamp and posting a letter is blind to which consumer does it, as the price of stamps remains regulated.

Personalised pricing could still emerge if market rules change. Specifically:

- In the postal sector, Royal Mail is allowing consumers to set up accounts online. This could open the door to using consumer data to personalise pricing - but controls on prices would still set a limit on this.
- The water sector might see the introduction of residential competition. Policy discussions about the introduction of competition in residential water provision have not developed significantly since 2016, but may still be pursued in future. The introduction of competition would be likely to be associated with the dismantling of current pricing controls - and would therefore open the door for more sophisticated price discrimination based on data analysis.

Personalised pricing is significantly more likely in the energy and telecoms markets

There are two key factors which create these conditions:

1. The increasing quantity of and capacity for data analysis

There are large and growing amounts of data on consumer usage habits. The rollout of smart meters will significantly change the amount of information held by providers in the energy sector. Our research found that the extent to which this will create the conditions for personalised pricing is dependent on how regularly consumers choose to share their data. Smart meters will give consumers the option to share data monthly, daily or at thirty minute intervals, as service providers increasingly offer apps or other services that access smart meter data through a Consumer Access Device (CAD) the granularity of data available to them will increase to near real-time data

Telecoms companies hold huge amounts of usage data which can be compared against consumers' actual contracts - this enables them to have a much richer account than energy companies have traditionally had access to. Even the basic functions of a phone can provide a rich picture of people's regular habits and consumption activities. These firms are able to ask crucial questions about their customers - to what extent do customers use their current packages? Are customers regularly underusing their data allowance or overusing it? What products do customers use in combination?¹⁴

2. Firms in these industries can set prices above the cost of production

Both telecoms and energy companies have a large range of tariffs available, with different charging structures built into them. In the energy industry, there are usually 200 different

¹³ <https://www.water.org.uk/consumers/metering>

¹⁴ Subramanya, S., [Analysis of mobile phone call data to determine user characteristics and to enhance user experience](#). International Journal of Computer Applications, April 2012.

tariffs available to choose between at any given time - both standalone, for electricity and gas separately, and bundled, bringing the two sources together.¹⁵ This tariff diversity suggests that there is room for manoeuvre in setting prices above the cost of production. This is of course, likely to be reduced somewhat by the newly introduced price cap on standard variable tariffs, which could protect some disengaged consumers who might be more vulnerable from experiencing such costs.¹⁶

The telecoms industry is also characterised by huge diversity in its pricing strategies. The only sector specific limitation on telecoms pricing strategies is Ofcom's monitoring of standalone fixed line services which led to the introduction of BT's voluntary commitment in October 2017.¹⁷

Ultimately, in both these markets, it is the relative flexibility that providers have to set prices that creates the conditions in which personalised pricing could emerge.

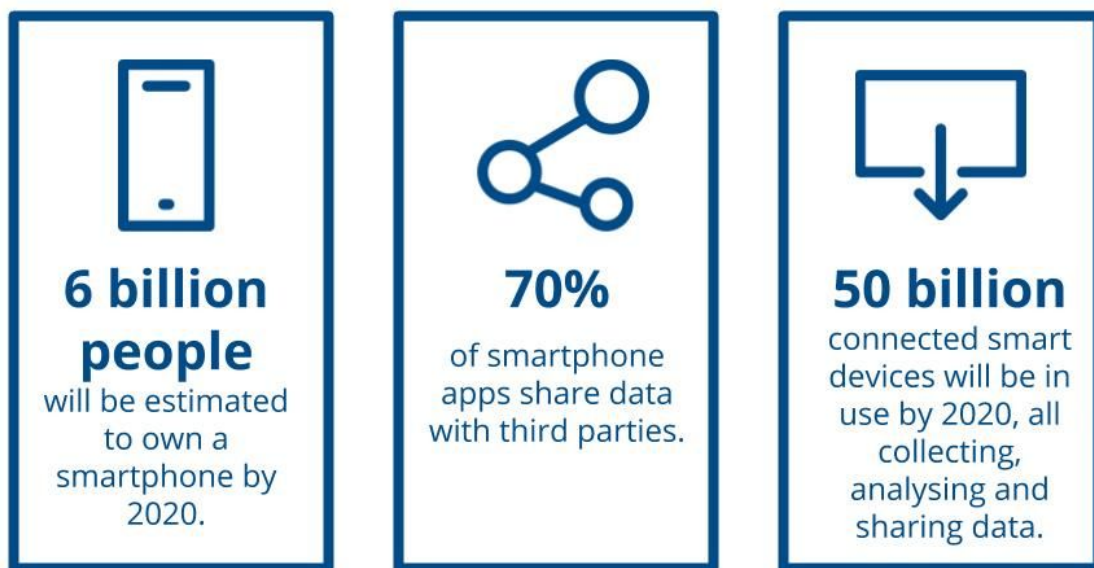
¹⁵ Citizens Advice energylinx data (unpublished), April 2018.

¹⁶ This is likely to be reduced somewhat by the newly introduced price cap on standard variable tariffs. For more information on our perspectives of the likely effect of the energy price cap, see Citizens Advice's [Energy Consultation Responses](#).

¹⁷ Ofcom, [Review of the market for standalone landline services](#), October 2017.

2. How consumer data will drive personalised pricing

Personalised pricing looks increasingly possible because of the growth in the availability of consumer data. This section elaborates on some of the changes in data availability across essential markets, and seeks to explain some of the technical developments through which personalised pricing can emerge. This transformation in the availability of data is a global phenomenon occurring across a huge range of markets.



Essential service providers in the UK are in the midst of massive changes in the accessibility of consumer data. This will enable them to know more about the consumers using their products than ever before. This growth in data availability is driven by three key factors:

- **Changes in purchasing habits.** More people than ever purchase their essential goods and services online. In 2018, **77%** of people in Great Britain used the internet to find information about goods and services in the last three months, up from 59% in 2008. More than three quarters of people made at least one online purchase in the last 12 months.¹⁸
- **Increasing information available through browsing history.** The Information Commissioner's Office found that UK websites placed an average of **44 cookies** on a first visit, the highest of any country surveyed.¹⁹ **86%** were persistent cookies

¹⁸ ONS, [Shopping online 2008 to 2016](#). Base: Adults (aged 16+) in Great Britain

¹⁹ A cookie is a small text file created by a website stored in the user's computer either temporarily for that session only or permanently. Cookies enable websites to recognize and keep track of your preferences. Definition from [PC Mag](#) Encyclopaedia.

which remain on a person's device after use, whilst 14% were removed after a person's browsing session had ended.²⁰

- **The development of connected smart devices.** By 2020, there will be **53 million energy smart meters** rolled out in homes across the country. These have the capacity to generate as much as **400 megabytes** of data a year, which means UK energy providers could collect as much as **21.2 billion megabytes of additional data each year**.²¹

More sophisticated mechanisms for storing and analysing data mean that a range of data points can then be joined up. By linking unique identifiers, such as date of birth, IP addresses or full names, providers can develop sophisticated consumer profiles. These profiles would include basic personal information such as gender, date of birth, address, but could extend much wider - to consumers' shopping preferences, social networks, digital devices, and preferred holiday destination.

When integrated, this data can provide a sophisticated understanding of consumers' habits and usual behaviours. We know that consumer behaviour tends to fall into patterns associated with objective indicators. For example, an Ipsos Mori poll on basic digital skills found that while 85% of consumers had sufficient digital skills to purchase goods or services online, this fell to 76% amongst the lowest income bands and to 57% amongst older people.²² Both age and socio-economic status are also associated with consumers tending to pay over the odds for their energy, mobile phone and other essential services. It's perfectly plausible to imagine this additional data being used by providers to even more specifically identify which consumers were unlikely to scrutinise their energy bills.

Complex algorithms are an essential part of this process. Algorithms speed up the process of linking consumer data, but also ensure that the prices advertised online are able to fluctuate, depending on a range of different factors.

The most common use of algorithm-based pricing at the moment is **dynamic pricing**. This is a form of price discrimination in which algorithms automatically adjust prices or discount offers, typically to respond to changes in competitors' prices, but also on the basis of the relative levels of supply and demand (e.g. surge pricing). It is most commonly associated with the airline industry, and with firms such as Uber which operate 'surge' pricing, dependent on the availability of taxis in relation to customers.²³

We haven't found indications of widespread dynamic pricing in essential markets, but the risk that algorithms could be used to 'fix' prices are suggested in the case study below.

Case study

Two companies that sold frames and posters online put in place an agreement not to undercut each other's prices in certain circumstances, and on certain products on Amazon's UK site. In order to ensure this was the case, both sellers used automated repricing software to monitor and adjust their prices. The two companies kept in contact

²⁰ Information Commissioner's Office, [Article 29 Cookie Sweep Results](#), 2015.

²¹ SmartGridAwareness.com, ['Smart meters generate a 'gold mine of data' for Utilities'](#), December 2015.

²² Ipsos Mori, [Basic Digital Skills](#), 2015.

²³ OECD, [Algorithms and Collusion](#), June 2017.

to make sure the pricing arrangement was working and to deal with issues regarding the operation of the repricing software.

The CMA found this to be a breach of competition law. It fined the firms and disqualified the managing directors from taking up director positions for the next five years. This form of price fixing only departs in a fairly limited way from older forms of price fixing. But, as the CMA acknowledged; *'A further challenge remains for regulators to better understand whether, and if so in which circumstances, algorithms (in particular through so-called 'self-learning') could result in potential harm to competition or consumers where there is no such discrete, explicit agreement or where potential harms are more difficult to detect.'*²⁴

²⁴ OECD, [Algorithms and Collusion](#), June 2017.

3. The potential benefits of personalised pricing in essential markets

Increasing data sharing and personalised pricing can be good for consumers. As personalised pricing is not easily identifiable in essential services markets, we've used a range of examples here to think about its possible benefits:

- **It might lead to lower prices for some consumers.** Where suppliers know the prices their competitors charge and there is a high likelihood that their customers shop around, an increase in data allows them to undercut their competitors and offer the lowest feasible price to particular consumers.

In the energy market for example, smart meters offer consumers the choice of how regularly to share their usage data. If consumers give suppliers permission, suppliers and third parties could use the data to provide personalised offers - according to the consumers usual usage patterns. These offers are likely to be more targeted, potentially enabling consumers to receive better, lower cost deals.

- **Consumers may get offers which better suit their needs.** Increased understanding of the combination of products, especially telecommunications services, which are used by consumers can enable providers to target the most appropriate deal to consumers.

More sophisticated use of 'bundles' might be one example of this. Bundling, the practice of providing combined offers to consumers for several different products at a lower overall cost, has been widespread in the telecoms market for some time. In 2016, 75% of UK households bought a bundled communication service. Ofcom found these services 27% cheaper than the average price for the same services on their own.²⁵ With greater access to consumer data, communications providers might be able to develop more appropriate bundled products which specifically meet the usage needs of different consumers.

- **It enables expensive products and services to be made available at a lower cost** to those who plan ahead. Some consumer services are immensely costly to provide, and if all consumers paid an equal price, the service would remain out of reach for those on low incomes. Developments in the use of dynamic pricing can help to address this problem.

Pricing according to willingness to pay often operates in such a way for airlines. The pricing structure for budget airlines means that consumers who plan ahead can secure very low cost airline tickets. This means that those consumers who might ordinarily be excluded from the market at a higher price are able to fly. By contrast, those who purchase tickets later tend to pay much higher prices, as a consequence of reduced price sensitivity. This variable pricing strategy makes flying available to a

²⁵ Ofcom, [Pricing trends for communications services in the UK](#) March 2017.

much larger range of consumers than a mid-level standardised price across all tickets.

- **It could give consumers access to greater choice.** Personalised pricing can support consumers to have a greater choice and variety. This is because it can allow even loss making companies to turn a small profit by effectively assessing willingness to pay.

The Wall Street Journal, for example, does not have a total paywall. Instead, it offers different subscription fees depending on a user's web history. For those it considers unlikely to pay a regular fee, it offers an 'introductory offer' of just £3 a month. This use of price discrimination allows the newspaper to continue to meet its costs while distributing the price consumers pay according to their predicted interest in its content.

- **It might enable suppliers to better manage demand.** So that some very popular services do not become overburdened, personalised pricing can be used to manage demand.

Energy networks currently struggle to meet the demand of 'peak' hours of energy usage. Time of use tariffs seek to reflect the time-varying nature of electricity costs more accurately than current tariffs. These tariffs would charge higher prices at times of high levels of demand, whilst offering lower tariffs to those who used their energy at off peak hours. The tariffs seek to encourage consumers to shift their energy usage to lower-priced hours. This might lower energy bills overall, whilst also providing a potential reduction in power system costs.²⁶ This is more cost reflective pricing, but it also marks a way forward for price discrimination which seeks to manage demand. Time of use tariffs do not reflect direct personalisation of prices to each individual, but instead break consumers down into groups of thousands of customers. We can see how this works, if we look at a less essential market - a 'peer-to-peer' taxi company such as Uber. We can see that surge prices are not totally personalised, but effect those consumers who use its service at a given time. Uber argues that without surge prices, customers wait longer and the rate of fulfilled rider requests plummets - suggesting that surge pricing actually intervenes in the level of demand for a service.²⁷

²⁶ Whilst theoretically interesting, time of use tariffs do carry certain risks, especially for those consumers who would struggle to shift their demand, due to working hours or dependent family members. Citizens Advice has conducted significant research into this issue. For more information, see The Brattle Group for Citizens Advice, [The Value of Time of Use Tariffs in Great Britain](#) July 2017.

²⁷ Although as we'll go on to show - it's important not to overstress equivalents such as Uber. Demand for essential services - such as heating and water - are not similar to a taxi ride, for most consumers there is no immediate alternative on offer. For more information, see The Economist, ['Price discrimination land'](#), February 2016.

4. The downsides of personalised pricing in essential markets

The effective use of consumer data to set prices can have real benefits, enabling lower costs for some consumers and smoothing demand across services. But it's one thing to have personalised pricing through 'disruptive' apps which lower the cost of taxi journeys or a pair of shoes. The effects of personalised pricing look quite different when it comes to essential service markets, where patterns of consumer behaviour are very different.

Consumers tend to be less price sensitive when it comes to these services. Behavioural insights attributes this to a number of reasons:

- Consumers tend to stick to their existing provider, and find it a hassle to switch
- People tend to find these markets complex - with too much choice
- Consumers tend to be overconfident about their ability to pay.²⁸

We know that, at present, markets take advantage of these patterns of consumer behaviour, leaving people paying over the odds for the goods that they receive. Personalised pricing risks exacerbating these problems as it might have further negative effects on people's behavioural biases.

Personalised pricing might increase the loyalty penalty

As the chart below shows, consumers in essential markets often find themselves experiencing a penalty for failing to switch between providers. This reluctance to switch tends to be referred to as 'consumer inertia', also known as the status quo bias.

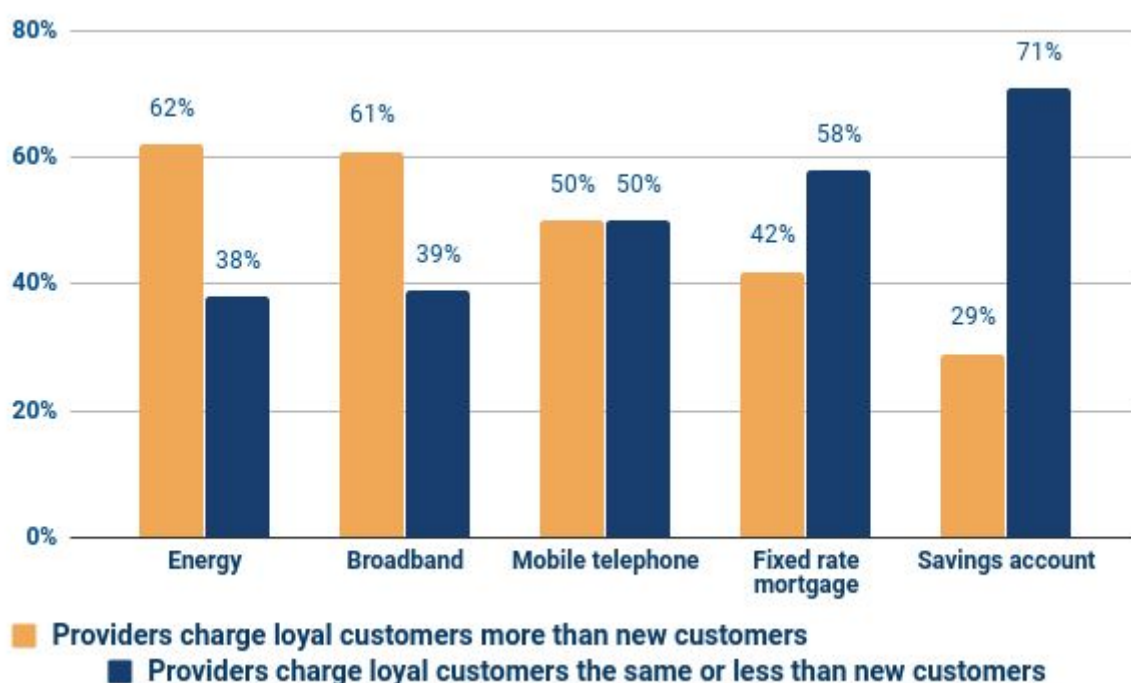
Status quo bias amongst essential services providers is particularly notable since, unlike other commodities, these services tend to 'roll over'. When it comes to energy, most people 'inherit' an energy provider when they move into a home. This is different from other markets where - if you don't seek out the product - you might be forced to go without. Energy customers are therefore particularly likely to remain with their current provider, since this is unlikely to lead to the service ending or running out.

It's by identifying - and taking advantage of - consumer inertia that firms can charge a 'loyalty penalty'. This is the increased cost consumers pay for not shopping around, for the same good or service. Our research earlier this year found that, cumulatively, **people could be overpaying by as much as £987 - more than 4 months' worth of food for the average household.** And it's often vulnerable consumers who pay the most.²⁹

²⁸ See Behavioural Insights Team for Citizens Advice, [Applying Behavioural Insights to Regulated Markets](#), May 2016.

²⁹ Citizens Advice, [The Cost of Loyalty](#), February 2018.

Figure 1: Awareness of the loyalty penalty across essential services



Source: Citizens Advice analysis of Populus data³⁰

Personalised pricing could make it easier to target loyal consumers. Large-scale data analysis would allow providers to identify the consumers who are most likely to switch between providers and those who are not. Currently, mobile phone and broadband providers commonly offer bundled ‘retention offers’ to those clients who are likely to switch provider. For example, if you call your mobile phone provider to let them know you are cancelling your contract, it’s likely they will give you a better deal than you might be able to find advertised elsewhere.³¹

If mobile phone or broadband companies could access their customers’ web browsing data - which might indicate the likelihood of switching - this pricing strategy would become increasingly possible. Offers might reach consumers through email and advertising, as well as the over the phone methods traditionally used to haggle with providers. The increasing use of retention offers, however, would benefit only a section of the market - those who regularly switch their phone or broadband providers. It would penalise loyal or disengaged consumers over the long term.

Personalised pricing could increase inertia. As data is used to identify consumer preferences, in addition to increasing personalised offers, it is likely that more products will be ‘bundled’ - particularly in the telecoms sector. This process is expected to increase the complexity of the telecoms sector - which is already a problem for consumers. Over a third (35%) of consumers making a purchase say it’s too hard to shop around in all

³⁰ Question: ‘For the following services, do you think long-standing customers are likely to pay more or less than newer customers?’ Bases vary by market and exclude those who answered ‘Don’t know’. Populus Survey Data, January and June 2017.

³¹ Moneysavingexpert.com, ‘[Mobile Phone Hagglng](#)’, March 2018.

essential markets.³² This complexity dissuades consumers from finding the best value product - and often leaves them sticking with their current provider.

Personalised pricing looks set to exacerbate this problem. The bundling of offers for consumers - while often providing a combined discount - makes it harder for people to compare prices across goods and services to ascertain whether they are getting a good deal. Bundled products can cause issues for the term-lengths of contracts. A mobile phone contract, for example, which ends six month earlier than the broadband contract - leaving consumers paying rolling over some contracts even after they are complete.³³ And, where consumers prefer a single service, breaking up 'bundled' products can be a hassle.³⁴ This increasing complexity might cause consumers to feel both disengaged and disempowered. As it is, we often speak with people who would prefer to choose between simple product offerings:

*"I found the task tedious because there are so many options to choose from, not just broadband but everything else is bundled in, calls etc."*³⁵

Consumer making a decision about home broadband

Personalised pricing makes it easier for essential service providers to target overconfident consumers.

The insight into consumer behaviour provided by large datasets doesn't only enable providers to identify consumer inertia, it could allow providers to target other behavioural biases too.

This knowledge of consumer behaviour could see firms targeting those with a tendency towards financial overconfidence with offers which they might, in the longer term, struggle to maintain. We already see nearly 40,000 consumers coming to Citizens Advice with problems with their mobile phone contracts. In many instances, these people take out the contracts with high confidence that they will be able to meet the cost of ongoing monthly payments. Unfortunately, however, overconfidence can leave consumers unlikely to account for changes in their income or unexpected financial shocks, and they may then find it difficult to meet the cost of such arrangements.

Overconfidence is more common amongst some consumers than others. Previous research has shown that consumer overconfidence is most common amongst those with the least knowledge.³⁶ Researchers have found that roughly 30% of consumers overestimate their credit score, with only 4% underestimating.³⁷ Personalised pricing

³² Citizens Advice, [The Cost of Loyalty](#) February 2018.

³³ This was a particular issue highlighted by OfCom, [Helping consumers to engage in communications markets](#) September 2017.

³⁴ Research suggests that the elderly and those on lower incomes are more likely to be using a standalone landline offer. Ofcom, [Consultation Review of the market for standalone landline telephone services](#) 2017.

³⁵ Citizens Advice, [Against the Clock](#) November 2016.

³⁶ Lichtenstein, S., & Fischhoff, B. (1977). 'Do those who know more also know more about how much they know? Organizational Behavior and Human Performance', 20(2), 159-183.

³⁷ Perry, V. G. (2008). [Is Ignorance Bliss? Consumer Accuracy in Judgments about Credit Ratings](#), The Journal of Consumer Affairs, 42(2), 189-205.

strategies could take advantage of this - using access to web history to give providers an indication of the characteristics which might be associated with overconfidence.

Subscription traps are a common way in which consumer overconfidence about their ability to pay is exploited - and then exacerbated through a reliance on consumer inertia.

Subscription traps - targeting consumer overconfidence and inertia simultaneously

In previous research, Citizens Advice has explored the issues surrounding subscription traps. These are situations where a consumer unintentionally enters into a subscription through the advertising of a “free trial” or reduced price offer. But if the consumer doesn’t cancel the trial within a set amount of time they automatically get transferred onto a costly subscription payment plan.

Subscription traps exploit consumer inertia by making it very difficult to withdraw from their terms. This is particularly damaging, since subscription traps often rely on Continuous Payment Authorities - which are harder to cancel than usual direct debits. But they might also target consumer overconfidence about their ability to pay. Using additional data on consumers could enable unscrupulous firms to target those who are most likely to feel confident about the costs.

Subscription traps pose a greater threat than ever with the increasing availability of consumer data. This data could indicate which consumers are likely to be both overconfident and inactive when it comes to their subscriptions.

Personalised pricing could further weaken consumer trust.

Trust plays a complex role in regulated markets - the generalised level of trust in regulated markets is often low, but consumers do tend to trust their current suppliers more than others (see figure 3).³⁸ Some groups of consumers are more concerned with trusting their provider than others - ironically, it is often those who trust their supplier most who are likely to be paying the loyalty penalty.³⁹

Figure 3. Trust is the most popular reason people give for staying in an essential service contract



Source: Citizens Advice analysis of Populus data.⁴⁰

Personalised pricing is not widely understood, and few consumers have an indication of the extent of information that is collected online.⁴¹ Prior research into consumer trust has found that consumers tend to be less trustful of online retailing where prices fluctuate,⁴² and that even when price fluctuation saves them money they still tend to be distrustful of the retailer.⁴³ As consumers become aware of personalised pricing in essential markets, the risk is that the general level of trust in markets will collapse. This lack of trust, rather than encouraging switching to an alternate provider, may leave consumers reluctant to take risks with alternate providers, and less likely to receive the best offers.

The Office of Fair Trading's 2013 report into personalised pricing suggested that concern over the loss of consumer trust was one of the key barriers providers face to introducing

³⁸ Only one in three consumers in the mobile phone market believe they are on the best deal available, suggesting a low level of trust in the market overall.

³⁹ Citizens Advice, *The Cost of Loyalty*, February 2018.

⁴⁰ Question: 'You said you have been in your contract for a year or more. Why have you stayed with each of the following essential service contracts?' Respondents could select more than one option. Base sizes vary by market.

⁴¹ Ipsos Mori, *Basic Digital Skills*, 2015.

⁴² Pavlou, Paul A., Huigang Liang, and Yajiong Xue (2007). 'Understanding and mitigating uncertainty in online exchange relationships: A principal-agent perspective.' *Mis Quarterly* 31.1: 105-136.

⁴³ Garbarino, Ellen, and Olivia F. Lee (2003). 'Dynamic pricing in internet retail: effects on consumer trust.' *Psychology & Marketing* 20.6: 495-513.

this pricing strategy.⁴⁴ But - while regulators might be deeply concerned about consumer trust - there are limited incentives for individual providers to be bothered about the total level of trust in online markets. In this instance, the profitability of sophisticated pricing strategies may outweigh concerns about the generalised level of trust.

Indeed, the experience of recent data breaches suggests that some of the most data rich websites in the world, such as Facebook, can - and have - been taking risky decisions when it comes to consumer data. These risks are taken in spite of the potential threats to consumer trust in the longer term. Our research suggests that a concern about consumer trust alone therefore, is not sufficient to prevent the emergence of personalised pricing, especially where the operation of personalised pricing might not be transparent to the consumer or regulators.

⁴⁴ Office of Fair Trading, [The Economics of Personalised Pricing](#) 2013.

5. The wider impacts of personalised pricing

Ultimately, personalised pricing could bring both positive and negative effects for consumers - and it's difficult to assess which will outweigh the other before it happens (though, as we argue below, it is possible to mitigate against the downsides). However, it's also possible that it will have deeper effects on market structure, which in turn will affect consumer outcomes.

It could impact innovation. Investment in increasingly sophisticated pricing strategies might maximise revenue, but it won't necessarily maximise what consumers actually want - better quality, low cost services.

In addition to the extensive consumer problems we identified earlier, there are major challenges facing essential markets. Energy providers need to adapt to the challenges of climate change. The telecommunications industry needs to ensure that they are able to meet the demand for 5G services and superfast broadband - including in 'internet black spots' that are currently underserved. We need providers in essential markets to address these challenges while developing more efficient ways for services to reach consumers at the lowest cost. Rather than investing in segmenting consumers into ever smaller groups based on willingness to pay.

It could impact competition. At present, competitive essential markets rely on the risk that new entrants might 'disrupt' existing market practices to control prices. But personalised pricing is likely to rely on extensive use of consumer data sets. Without access to the enormous data sets which existing providers hold, new, more efficient providers could struggle to beat the personalised offers provided by existing providers, and be barred from entering the market as a result

Repricing software⁴⁵ - and the algorithms on which they rely - could be particularly damaging for competition where providers practice 'instant price matching'. These algorithms could reduce the incentive for other firms to undercut prices, since it could initiate a 'race to the bottom' as well as limit the ability of new firms to enter the market. Such strategies, especially if used by a firm with strong position in the market, could have negative consequences for competition.⁴⁶

The risk to competition posed by personalised pricing could be exacerbated by concentration of large amounts of consumer data within a relatively small number of digital platforms. Platforms such as Facebook, Google, and Amazon hold far more data on consumers than the standard energy provider and are able to provide a very rich account of who their users are. And the use of smart connected devices tends to rely on one of these three providers to link different consumer products. This concentration of data within a series of 'tech' firms could, if paired with a major energy provider, lead to a

⁴⁵ Repricing software uses algorithms to automatically adjust the prices of all items depending on a range of the market conditions, such as fluctuations in demand or competitors' prices.

⁴⁶ OECD, *Algorithms and Collusion*, June 2017.

massive expansion in the providers' access to consumers, and subsequently push other providers out of the market.

There have been big improvements in levels of competition in the energy market since 2010, but if access to smart meter data is limited by the interaction of suppliers and smart home devices we might find that such improvements are reversed. The large stores of consumer data which are generated both by tech firms and by smart devices also raise the issue of data portability. How do we ensure consumers can continue to switch providers if their data is largely stored in a mode which is incompatible with other providers?⁴⁷

Finally, we must be wary of a negative feedback loop here. Personalised pricing could be bad for competition. And our research found that if competition is reduced, the risks posed by personalised pricing become much greater. Without downward pressure on prices in markets where consumers don't regularly switch providers, customers might find themselves losing out.

6. What might personalised pricing mean for vulnerable consumers?

This paper has sought to present a balanced view on the opportunities and risks of personalised pricing in essential markets. We remain cautious, however, about one aspect of personalised pricing - its effects for vulnerable consumers.

Crucially, the most hazardous effects of personalised pricing - arising from reduced competition and diminished consumer trust - could compound the difficulties vulnerable people face in engaging with consumer markets:

- **Diminished competition would push prices up.** Whilst increased prices across a market are bad for all consumers, those who have higher incomes are less likely to feel the effect of such costs on their living standards. By contrast, those with the least flexible budgets, generally people on low incomes, are forced to pay a larger proportion towards energy or basic communication services.
- **Decreased trust in markets would increase consumer disengagement.** Vulnerable consumers tend to have lower levels of trust in consumer markets, compared to wealthier people.⁴⁸ This attitude - which recognises that the odds are stacked against low income consumers - means that people have no incentive to engage, even where it might secure them a better deal.⁴⁹ Unfortunately, the

⁴⁷ The General Data Protection Regulation (GDPR) which comes into force in May 2018 introduces a right to data portability. Whether firms will remain bound by data portability rights, and whether consumers manage to push for these rights remains to be seen, especially due to the relatively small number of smart product providers currently in operation. Ofgem, [End-to-end switching arrangements: data protection impact assessment](#), September 2017.

⁴⁸ Those on the very lowest incomes tend to have the least trust in their energy suppliers on a range of issues, including value for money, bill accuracy, and openness and transparency. [Ipsos Mori research for Energy UK](#), 2014.

⁴⁹ Citizens Advice, [The domino effect: exposing the knock-on effects of consumer problems](#), March 2018

cumulative effect of such market disengagement doubly penalises low income consumers - creating a vicious circle.

7. The constraints on personalised pricing

Existing legislation and regulations place legal constraints on the forms that personalised pricing might take. These limits operate in three main ways:

1. By preventing price discrimination based on identity,
2. By limiting access to consumer data, and
3. By providing transparency about pricing practices.

The efficacy of these constraints however, is only as good as the power to enforce them. In this instance, it's vital that regulators - and particularly essential service regulators, continue to monitor the emergence of personalised pricing, and hold companies to account where it might negatively impact on consumers.

1. Protection from discrimination on the grounds of identity

Existing legislation should protect consumers from personalised pricing which can be directly linked to identity. This is enshrined in two places:

- **The Equality Act 2010** states that people are not allowed to discriminate against another person on the grounds of 'protected characteristics', such as: age, disability, race, religion, sex, or sexual orientation. The Equalities and Human Rights Commission, the regulatory body which oversees this act, states businesses must not directly or indirectly treat people worse because of protected characteristics, unless this can be objectively proven on grounds of cost.⁵⁰

The challenge posed by the the Equality Act is the need for legal challenge and strong evidence for the presence of personalised pricing. Thus far, it has been very difficult to prove that personalised pricing is taking place with suppliers insisting that what people consider to be personalised pricing tends to be sophisticated dynamic pricing. Another shortcoming of the Equality Act is it's failure to provide protections for those on low incomes - who might be left most exposed if the worst effects of personalised pricing were to emerge.

- **The Provision of Services Regulations 2009**⁵¹ restrict discrimination between customers in the EU based on their place of residence, unless this can be justified by additional costs incurred (e.g. due to distance travelled).

The status of the Provision of Service Regulations after Brexit is unclear. In addition, it's unlikely that these regulations protect the group of people who are at risk of experiencing the worst excesses of personalised pricing - those who are vulnerable, on a low income, or struggle to choose between essential service providers - factors which cannot be neatly reduced to geographical location.

⁵⁰ The UK Equality and Human Rights Commission, [Services Public functions and Associations: Statutory Code of Practice](#) p.52-82.

⁵¹ [The Provision of Service Regulation 2009](#)

2. Control over the use of consumer data

Legislation also appears likely to provide a legal protection from the undisclosed personalised pricing.

- **The Consumer Rights Act 2015** regulates the terms of use of a website, and any privacy policy applying to users of a website. In the event of personalised pricing, data collection might be limited by rules which require “important contract terms, particularly those which may disadvantage consumers”, to be “clear, prominent and actively brought to consumers’ attention. It may not be sufficient only to include terms in a privacy policy.”⁵²
- **The Privacy and Electronic Communications Regulations 2003** give people the right to opt out of cookies. They require parties which set cookies on a user’s device to obtain informed consent to their use unless the cookies are essential for the supply of a service requested by the user, for example to add goods to a shopping basket.

The shortcoming of these regulations is that almost all websites use cookies - making it very difficult for consumers to avoid consenting to cookie use.⁵³

- **The General Data Protection Regulation 2018⁵⁴ and Data Protection Act 2018⁵⁵** gives consumers greater control over how their personal data is used. This includes requiring that consumer consent to using their data is freely given, specific, informed and unambiguous.

Article 22 of GDPR gives people the ‘the right not to be subject to a decision based solely on automated processing, including profiling’.⁵⁶ This Article might give people the right either to opt out of the types of automated processing and data profiling associated with personalised pricing if they can prove that it ‘significantly affects’ them. This could mark a major development in the legal limits on personalised pricing.

At the moment - however - it’s unclear how such an opt out might work. In current browsing systems, the process of profiling consumers data does not necessarily occur after an opt in process, with cookies and personal data profiled before consumers have a chance to provide ‘informed consent’.

3. Transparency about pricing

- **The Consumer Protection from Unfair Trading Regulations 2008⁵⁷** prohibit unfair commercial practices which distort consumers’ transactional decisions, as well as a number of practices that are prohibited outright. A business may breach the CPRs by, for example, failing to tell consumers that information is being collected about them, and used commercially, where a privacy policy does not

⁵² Part 2: Unfair Contract Terms, [Consumer Rights Act](#), 2015’.

⁵³ [The Privacy and Electronic Communications Regulations 2003](#).

⁵⁴ Information Commissioner’s office (2017) “[Guide to the General Data Protection Regulation \(GDPR\)](#)” and <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679>

⁵⁵ <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

⁵⁶ [Article 22](#). General Data Protection Regulation

⁵⁷ [Consumer Protection from Unfair Trading Regulations 2008](#)

accurately represent the information actually being collected, or where information is being used *covertly to personalise a price*.

- The **Advertising Standards Authority (ASA)** is the UK's regulator of advertising. It makes sure that ads across UK media adhere to the Advertising Codes, which include rules around the prevention of misleading advertising. This might reduce the capacity of providers to misrepresent personalised 'discounts' or 'best price' deals which might actually be more expensive, than offers to other consumers.

Underlying all of these regulations is the **Competition Act 1998** which gives wide powers of enforcement to the CMA and to the sector regulators. It is imperative that the CMA uses these powers to monitor the risks associated with personalised pricing, and challenge firms where consumers - especially those on the lowest incomes - might be at risk of losing out.⁵⁸

⁵⁸ Bourreau, B., de Streel, A., and Graef, I. (2017), "*Big Data and Competition Policy: Market power, personalised pricing and advertising*"

Recommendations: how to shape personalised pricing in essential markets

This paper has sought to identify how - if existing market failures are not addressed - personalised pricing could affect essential markets.

The problems we have articulated in this paper - whilst drawing from existing evidence within consumer markets - are still speculative. At the moment, personalised pricing is not widespread in essential markets, and in some contexts, such as the water and postal sectors, current regulations and market structures mean that it would be nearly impossible for it to emerge.

But this doesn't mean personalised pricing couldn't emerge in the future. If it does, it's vital that regulators, consumer groups and providers are fully aware of the implications for consumers. Crucially, we mustn't rely on the actions of 'engaged consumers' or 'responsible providers' to limit the detrimental effects. We need to maintain certain limits on price fluctuation, and take other proactive steps to ensure that consumers - particularly those on low incomes - are protected.

Consequently, we recommend that:

A. Regulators should use existing tools to manage the risks of personalised pricing

- 1. Current price protections are vitally important to protect low income consumers.** The controls on the cost of fixed line telephone contracts and second class stamps, and the upcoming cap on standard variable tariffs, are all measures which would protect those on low incomes from suffering at the sharp end of personalised pricing. Crucially, these controlled tariffs not only reduce cost, but also simplify the market.

These tariff controls must be kept under review. Firstly, to ensure that they continue to be set at the appropriate level for consumers. And secondly, to ensure that shifting conceptions of what is 'essential' is taken into account.

- 2. Regular monitoring to ensure vulnerable people are not overpaying for essential services.** Increased complexity in algorithmic price determination may make it difficult to understand the mechanisms by which prices are calculated. To mitigate against this, regulators should be consistent in assessing the cost of essential services to different groups of consumers to ensure that some groups are not paying over the odds for similar goods and services.

One means to strengthen and enforce such monitoring would be to integrate it into the scorecards proposed in the recent Consumer Green Paper published by the Department for Business, Energy and Industrial Strategy.⁵⁹

- 3. Increase transparency of pricing practices between firms and regulators.** The use of consumer data is already extensive. If and how this data is fed into pricing

⁵⁹ BEIS, Modernising consumer markets: Consumer Green Paper, April 2018

strategies remains largely opaque - we need regulators to be conscious of the risks that access to consumer data might pose to prices.

There should be a duty on the part of regulated firms to inform regulators where personalised pricing is in operation, as well as an obligation to be transparent with regulators about how personalised prices are calculated.

B. Technology is leveraged to protect the interests of consumers

4. Regulators should support new tools to make consumer engagement easier.

Third party switching devices can take much of the hassle out of finding and switching to a better deal. As well as price comparison websites, these include sites such as Cheap Energy Club which notifies consumers if there is a better deal available, or Flipper which is a paid-for automatic switching service. These tools reduce the effect of the so-called 'loyalty penalty' and would be a means for consumers to use technology to challenge the detrimental effects that the technology of personalised pricing might have.

If these tools are limited to those who are actively engaged in essential markets, it's likely that they would only entrench existing market problems. Instead, regulators should explore how this model could be applied across essential markets to support *all* consumers.

C. Consumer control over data is increased

5. Give consumers greater control over the collection, storage and use of their data. Giving consumer 'control' over data does not necessarily resolve problems - since it is often unclear how consumer data is used by providers, or buried deep in to terms and conditions. The GDPR does mark a substantial improvement in consumer protections over data regulation - particularly by allowing consumers to 'opt-out' of automated profiling. However, the process by which this can be implemented is not yet clear.

Despite this lack of transparency, we think consumers should be given legal control over their data. As this provision allows people to challenge instances where data is used against the customer's interests. This legal control should be accompanied by extra clarity. Regulators should consider how to give customers clear oversight about how their data is stored and used in setting prices, allowing consumers to withdraw consent to providers as and when they choose.⁶⁰

⁶⁰ See Citizens Advice, Fairness and Flexibility: Making Personal Data work for Everyone, July 2016.

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**RESPONSE OF THE
CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE
TO THE INITIAL CALL FOR EVIDENCE OF THE HM TREASURY DIGITAL COMPETITION
EXPERT PANEL**

This response is submitted by the Competition Law Committee of the City of London Law Society (CLLS) in response to the Call for Evidence of 16 October issued by the Digital Competition Expert Panel.

The CLLS represents approximately 17,000 City solicitors through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specializing in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

The Competition Law Committee members responsible for the preparation of this response are:

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This response reflects the individual experience of Committee members, as experienced competition lawyers, and is provided in the interest of informing the Panel's deliberations. The views expressed are not made on behalf of any law firm or any client of any Committee member.

In light of this context, our response does not address questions regarding general aspects of digital markets and the wider economic context. Rather, we have focused on questions addressing specific implications for the UK competition law regime.

Question 6 - How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition? We are interested in any evidence on the implications of AI, machine learning and algorithms for competition. In particular we would welcome any evidence on whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers.

CLLS Response: The use by business of rules based decision-making is not new. In competitive markets, businesses constantly seek out new ways of increasing their efficiency to enable them to win an advantage over their rivals. These may include the use of emerging technologies, such as AI, machine learning and other algorithmic tools.

Recent enforcement cases¹ suggest that the use of algorithmic pricing tools, combined with the inherent transparency of online retail, increases the speed of competitive pricing responses and hence the intensity of competition. Depending on the context, such tools may also be used by parties to anticompetitive agreements, such as price-fixing or resale price maintenance, for monitoring adherence to the illegal agreement, as well as aiding implementation and enforcement. Experience from these cases, which resulted in the imposition of substantial fines and director disqualification in one case, indicates that existing competition law tools are adequate to tackle the underlying anticompetitive conduct, which typically follow traditional forms (for example, direct telephone discussions or email exchanges between participants).

While academics have raised theoretical concerns over the extent to which the use of AI may lead to tacitly collusive arrangements that fall outside the remit of current competition law, there is not yet sufficient evidence that this is actually happening in practice. We support the current approach of the CMA in this area, in terms of increasing their internal skills base and keeping developments under review, without the need for additional powers.²

Question 7 - What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

Specifically:

A. What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?

B. What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed? We would welcome specific proposals for changes to institutions, policy or its implementation under any of these headings. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

CLLS response: The question appears to presuppose that changes to the UK regime are needed to deal with “issues in the digital economy”. We would query that assumption. Rather, we would suggest that the competition tools that are needed for the digital economy are fundamentally the same as those that have been developed for the rest of the economy. This is demonstrated by reference to experience in merger control and antitrust enforcement.

¹ In particular, the CMA’s *Online sales of posters and frames* investigation, the recent European Commission RPM infringement decisions and the *Eturas* judgment of the CJEU (Case 74/14 Judgment of 21 January 2016, *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*).

² See, in particular, the CMA’s recent economic working paper on the use of pricing algorithms to facilitate collusion and personalised pricing.

A – Merger control

Although mergers in new markets raise challenges, particularly concerning the need to define markets without precedents, the existing legal framework has generally been flexible enough to date to accommodate consideration of competition in digital markets. The UK has a strong record in applying a dynamic approach to the analysis of transactions in rapidly developing markets, rather than being overly concerned with market definition as an exercise in itself. For example, we would suggest that the OFT was correct to conclude that it should have no concerns over LoveFilm's acquisition of Amazon's DVD rental by post business,³ due to wider market developments. We would also note that the CMA adopted a sophisticated analytical approach to satisfy itself, following an in-depth review, that Just Eat's acquisition of Hungryhouse raised no concerns.⁴ The fact that the 'Project Kangaroo' joint venture was blocked by the Competition Commission demonstrates that the inherent uncertainties of nascent markets have not consistently resulted in a reluctance to intervene.

The CMA has also indicated that, in common with the European Commission, it is prepared to consider the impact of a transaction on innovation competition, as well as on current market competition. As with the position of the Commission, we would emphasize the need for a predictable legal and economic framework within which innovation theories of harm are considered to arise (and evidenced). We would also emphasize the need to take into account the potential for future efficiencies alongside potential future harm in any such forward-looking analysis. To date, competition authorities have tended to be highly sceptical of efficiency claims but these are all the more significant in mergers in digital and dynamically evolving markets.

Distorting the CMA's approach, for example by defining markets too narrowly or too broadly or shifting the burden of proof, would undermine the integrity of the regime, as well as potentially chilling legitimate business activity.

The jurisdictional parameters of the UK's merger control regime are well-established. While this means that they are familiar to practitioners and businesses, and experience has shown they are broadly fit for purposes, they may need to be reassessed over time. Such a reassessment could be extended to include consideration of whether any jurisdictional changes are needed to take account of specific aspects of technology transactions, for example the fact that target businesses may attract a high valuation but be generating little or no revenues on a definable market. In the event that any changes were made to jurisdictional thresholds or the review procedure more generally, this should not distort the CMA's underlying substantive assessment.

³ OFT clearance decision, dated 15 April 2008.

⁴ Final report, 16 November 2017

B – Antitrust enforcement

The post-2000 UK competition regime is a marked improvement on its predecessor. Specifically, the broad *ex post* prohibitions contained in the Competition Act 1998 (**CA98**) of: (i) anticompetitive agreements and concerted practices; and (ii) the abuse of a dominant market position ensure predictable and effective deterrence, without threatening legitimate market conduct. These prohibitions are appropriate to catch the vast majority of conduct that is capable of appreciably reducing competition to the detriment of UK consumers. In contrast, the previous regime subjected broad swathes of legitimate business conduct to burdensome registration requirements, while missing many forms of harmful behaviour. Although the monopolies regime allowed individual sectors to be examined where specific concerns arose, over time this led to asymmetric micro-regulation that has taken time to unpick. Given this experience, the Government's intention to retain a degree of post-Brexit alignment with the EU competition law regime, from which the CA98 was derived, is welcome.

While emerging business practices and technologies may test the limits of the concept of agreement or concerted practice, we would caution against rushing to adopt a materially different approach to that contained in the CA98 Chapter I prohibition. It is important that competition law can tackle collusive arrangements between two or more undertakings that knowingly choose to coordinate their market activities rather than competing. This requires a degree of communication and a common understanding and acceptance of the terms of the coordination. Businesses should not be prevented from intelligently adapting their own unilateral business conduct in response to the actions of their competitors, including through the use of technological tools that speed decision making and by making use of all available information. That, after all, is the essence of competition.

Furthermore, businesses should not be punished for having market power, especially where this has been acquired through successful innovation.

It is a well-established principle, as reflected in the CA98 Chapter II prohibition as well as Article 102 TFEU, that competition law should prevent the *abuse* of dominance, especially through conduct that has the potential to lead to anticompetitive foreclosure, rather than its *possession*. Arbitrarily intervening to punish 'bigness' in itself is not an appropriate aim of antitrust enforcement and would, we suggest, discourage the very innovation that the UK should be encouraging. To the extent that wider public policy concerns relating to the use or abuse of technology are identified, they should be tackled by targeted regulatory and policy interventions outside the field of antitrust.

The CA98 prohibitions draw on long-standing EU law and precedent that has enabled the European Commission to take action against a wide range of business practices, including in new markets such as workgroup server operating systems, search advertising and smartphone operating systems.

European cases concerning abuses arising from ownership of data go back to *Magill*⁵ and *IMS Health*.⁶ There is no sign that this regime is in need of fundamental change to address issues in technology markets.

Indeed, it is questionable whether technology markets should be singled out for special treatment. Technology markets can be defined and assessed using established competition tools. While some technology markets may display certain specific characteristics, for example a tendency towards network effects or the presence of double-sided business models, these may also be present in more traditional markets, such as payment cards or newspapers.

In addition, it is notable that the UK competition regime has the unique (and long-standing) feature whereby the CMA is empowered to undertake market investigations to identify gap cases where there is an adverse effect on competition, and take remedial action, in the absence of an identifiable infringement of the CA98. This is an important tool and a source of additional flexibility for the regime.

It is crucial for the success of a competition regime that businesses are able to differentiate unlawful from lawful conduct with a degree of certainty, and to determine their business practices accordingly. Since no competition authority can find and punish every infringement, an effective regime relies upon deterrence. A competition law regime cannot effectively deter unlawful anticompetitive conduct unless businesses can identify that conduct with a reasonable degree of confidence and take steps to avoid it, within the context of a general compliance programme.⁷ The ‘halo of compliance’ that is supported by a high level of legal certainty and predictable enforcement is at least as important for the economy as the direct impact of taking action against infringers.⁸ This would be endangered by the adoption of a potentially arbitrary sector-specific approach that diverged from well-established antitrust principles founded on identifying and tackling conduct that harms consumer welfare.

In conclusion, it should be recalled that, while an effective competition regime is very important for a modern market economy, it is not a panacea. This is particularly pertinent as far as regulation of the technology sector is concerned.

The current shape of UK competition law, and the principles that underlie it, are perfectly capable of safeguarding competition in this sector. To the extent that Government identifies wider social or

⁵ Joined Cases C-241/91 and C-242/91, *RTE v Commission and ITP v Commission*, judgment of 6 April 1995.

⁶ Case C-418/01, *IMS Health*, judgment of 28 April 2004.

⁷ Sir Peter Roth in his recent Blackstone Lecture entitled *The Continual Evolution of Competition Law* (available at <https://www.catribunal.org.uk/sites/default/files/2018-12/The%20Continual%20Evolution%20of%20Competition%20Law.pdf>), observed that “*more fundamentally, the interpretation given to the antitrust provisions set a standard for commercial behaviour*” that should be “form-based” to aid businesses in their application of the rules.

⁸ See the analysis of DotEcon on the impact and deterrent effect of CA98 cases, which estimated that the indirect deterrence effect is plausibly a multiple of the direct effect (cited in the CMA’s impact assessment 2017/18).

economic concerns relating to the sector, we would suggest that they would be more properly addressed through discrete regulatory interventions outside the field of competition law, rather than by distorting the competition regime.

City of London Law Society Competition Law Committee

7th December 2018



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

06 December 2018

CCIA¹ Input for the Digital Competition Expert Panel in the UK

Introduction

CCIA welcomes this opportunity to contribute to the public consultation opened by the UK's Digital Competition Expert Panel. Competition policy has stood at the centre of our trade association's work for more than 45 years and we look forward to sharing our industry's experience and perspective in this contribution. While our membership includes many of the world's most popular and successful companies in what is commonly referred to as the 'digital economy', regulators should refrain from artificially drawing borders between the digital and the traditional economies. Neither companies nor consumers operate in a 'digital economy' - we live in a dynamic economy that is digital. 'Traditional industries' are rapidly becoming more digital and transforming into data-driven markets. This has important implications for competition enforcers especially.

The following provides our perspective on some of the topics raised in the Expert Panel's public consultation on "understanding the effects of digital markets".

1. Understanding Multi-sided Business Models or 'Platforms'

The term 'platform' is frequently used in reference to certain Internet-based business models, but usually without any definitional rigor. In lieu of these terms, the concept of 'two-sided' or 'multi-sided' markets is better substituted for 'platforms' when considering competition policy matters.² From an economic perspective, these business models, including certain online marketplaces, stock exchanges, dating websites, messaging platforms, and payment networks, enable two or more distinct sets of users to interact with

¹ The Computer & Communications Industry Association (CCIA) is a non-profit membership organisation that represents the interests of a wide range of companies in the Internet, technology and telecoms industries. We advocate for open markets, open networks and full, fair, and open competition. Our full membership can be viewed here: <http://www.ccianet.org/about/members/>

² Daniel O'Connor & Matthew Schruers, *Against Platform Regulation*, Presentation Draft, Oxford Internet Institute Conference on Internet, Policy, and Politics (Oct. 2016) at 3-8, available at <http://blogs.oii.ox.ac.uk/ipp-conference/sites/ipp/files/documents/OConnor-Schruers%2520-%2520Against%2520Platform%2520Regulation.pdf>.

each other, realizing gains from such interactions.³ What characterizes these business models is that there is interdependency of demand between them. In other words, the demand for the platform's services by each set of users depends on the demand for the platform's services by at least one other set of users.⁴ Whenever competition enforcers or regulators deal with companies based on these business models, this interdependency of demand needs to be taken into account. In practical terms, it is insufficient to look at effects of a given practice or conduct on only one side of the market. A competitive assessment should always include all affected sides. The need for such a holistic approach was confirmed by the Court of Justice of the EU (CJEU) in *Cartes Bancaires*⁵.

2. Digital Markets and the Competitive Environment

CCIA believes that EU and national competition authorities can apply the existing antitrust framework to a large and diverse set of businesses, including both single-sided and multi-sided business models. In doing so, competition authorities should take into account real-world business realities and apply sound economic analysis to its enforcement actions. It is fundamentally important to have a clear understanding of the underlying business models of these complex services. Competition law *itself* does certainly not have to be adjusted for online players. It has deliberately been constructed in a flexible manner to be able to deal with a broad range of companies and their business practices.

The current antitrust framework requires the definition of markets to assess competitive effects and determine whether an antitrust violation has taken place or not. Given the particularities that characterize multi-sided business models, including the extent of inter- and intra-platform competition, it is important that economic analysis informs antitrust authorities' enforcement decisions. In particular, it is necessary that agencies account for the interrelationship of demand. In addition, competition authorities should be careful with defining markets too narrowly. Online advertising is a good example where online players, at *the very least*, stand in fierce competition to each other. While they compete to attract 'eyeballs' and consequently advertisers, many think of these companies as operating in their own silos, unconstrained by their competitors who target the very same advertising income.

There is currently an ongoing discussion of potentially anticompetitive 'leveraging' in digital markets. It is important to make sure leveraging does not become a catch-all theory of harm that would prevent companies that are allegedly dominant in one market from effectively expanding and improving their products to provide a better user experience. There is a fine line between accusations of abusive leveraging and genuine product improvement. If

³ See, e.g., David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, Oxford Handbook of International Antitrust Economics 404, 404-405 (Roger D. Blair & D. Daniel Sokol, eds., 2015).

⁴ See, e.g., Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296-97 (2014). For example, an assessment of the competitive realities facing a website serving advertisements must take into account the interests of both advertisers and site visitors who experience the advertising.

⁵ Case C-67/13 P *Cartes Bancaires v European Commission*. Judgement from 11 September 2014. Available at: <http://curia.europa.eu/juris/liste.jsf?num=C-67/13&language=EN>

competition authorities developed a too wide view of ‘leveraging’, they would effectively lock companies into one tightly defined market. The competitive process and ultimately consumers are not served with preventing companies from improving their products. Product development, expansion, and improvement are key characteristics of companies competing on the merits.

On a more general level, digital players have always operated and will continue to operate in a highly dynamic and competitive environment. This is because the online market environment is characterized by very low barriers to entry. Very often the capital costs of starting and scaling a business will be much lower than in the offline world. Decreasing prices for cloud storage, worldwide reach, and widely accessible data analytics tools make it relatively easy to start a business online. In addition to this, consumers are in no way prevented from trying and flocking to other online services. In fact, industry-led initiatives like the Data Transfer Project (DTP) make it even easier for consumers to switch to another online provider.⁶ The amount of app downloads per year has constantly been on a rise.⁷ The Commission’s enforcement practice rightly highlighted the importance of user ‘multi-homing’ and the ease of switching in digital markets.⁸ While it’s true that these market dynamics allow companies to grow very quickly, it’s the very same dynamics that continue to place competitive pressure on them. The dynamics that helped companies grow fast could just as fast turn against them if they stopped innovating.

3. Network Effects

The role of network effects in competition analyses is subject to broad discussion in the antitrust community. As with all other economic concepts, it is difficult to describe the role of network effects in the competitive analysis in a general manner. As *ex post* competition enforcement is based on a case-by-case approach, the role of network effects must be assessed in each individual case.⁹

Network effects, or demand side economies of scale, are present when the value of adopting a service to an incremental user is larger when more users have already adopted.¹⁰ Importantly, this dynamic is likely to produce consumer benefits as the value and usefulness of the network increases in parallel with the number of network participants. Network growth creates, therefore, pro-competitive benefits that are reaped by consumers.

⁶ Data Transfer Project - Overview and Fundamentals, July 20, 2018. Available online at:

<https://datatransferproject.dev/dtp-overview.pdf>

⁷ For a good summary of many relevant statistics on Europe’s app economy see: European Parliamentary Research Service (EPRS), *European app economy* (2018). Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621894/EPRS_BRI\(2018\)621894_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621894/EPRS_BRI(2018)621894_EN.pdf)

⁸ See e.g. Commission Decision in Case No COMP/M.6281 *Microsoft/Skype* (2011). Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m6281_924_2.pdf

⁹ See e.g. the CMA’s in-depth discussion of network effects in the recent *Just Eat/Hungryhouse* merger inquiry, available at:

<https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry#final-report>

¹⁰ See, e.g. Hal R. Varian, *Use and Abuse of Network Effects* (Sept. 17, 2017), available at <https://ssrn.com/abstract=3215488>.

Bearing the above in mind, the evaluation of network effects in competition analyses should also be accompanied by an analysis concerning the extent to which ‘single-homing’ and ‘multi-homing’ are present in a given market.¹¹ For example, Professors Haucap and Heimeshoff acknowledge that:

“In two-sided markets increasing concentration will be driven by indirect network effects, but capacity limits, product differentiation and the potential for multi-homing (i.e., the parallel usage of different platforms) will decrease concentration levels. How easy it is for consumers to multi-home depends, among other things, on (a) switching costs (if they exist) between platforms and (b) whether usage-based tariffs or positive flat rates are charged on the platform.”¹²

Multi-homing refers to those instances where customers use more than one platform or service, whereas single-homing refers to those instances where customers only use one platform or service in a particular industry. Compared to previous physical networks, many of today’s online platforms may be more susceptible to disruption from new entrants thanks to lower barriers to entry, low switching costs, the prevalence of free-to-the-user business models, and multi-homing. Economist David Evans rightly states that:

“Online platforms are more susceptible to attack by entrants than network industries of a century ago. Network effects and sunk costs made the natural monopolies around the turn of 20th century difficult to challenge. Rivals had to sink massive amounts of capital into duplicating physical networks such as railroad tracks and telephone lines. Using multiple networks, or switching between them, was expensive for customers, even if a second network was available. However, online platforms can leverage the Internet to provide wired and wireless connections globally. People find it generally easy, and often costless, to use multiple online platforms, and many often do. The ease and prevalence of multihoming have enabled new firms, as well as cross-platform entrants, to attract significant numbers of users and secure critical mass necessary for growth. Incumbent platforms then face serious competitive pressure from new entrants—startups or other online platforms—because their network effects are reversible.”¹³

In sum, the presence of network effects merits closer analysis, but so do factors that countervail the potentially anti-competitive impact of them such as users’ ability to multi-home. In addition, network effects cannot be seen as a long-lasting moat. They are reversible, i.e. just like they have worked in favor of a company, they can start working

¹¹ See Jean-Charles Rochet & Jean Tirole, *Two Sided Markets: A Progress Report*, 37 RAND J. ECON 646 (2006); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990 (2003).

¹² Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, EBay: Is The Internet Driving Competition Or Market Monopolization?*, Düsseldorf Institute for Competition Economics (Jan. 2013).

¹³ David Evans, *Why The Dynamics Of Competition For Online Platforms Leads To Sleepless Nights, But Not Sleepy Monopolies* (2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

against it as competitors benefit from the same effects. A case-by-case analysis that takes into account evidence, economic analysis, and that is specific to the facts remains key to safeguarding consumer welfare.

4. Data and the Competition Assessment

In recent years some have made the argument that the mere accumulation of data by consumer-facing technology companies raises antitrust concerns. Based on the notion of an endless, positive feedback loop, the argument states that the more data is collected, the better companies' products become which in turn attracts more users who allow for even greater data collection. The end result of this process is a supposedly insurmountable data advantage keeping companies immune from competition. It is true that data may well enable a company to improve its products *if* it knows how to derive meaningful insights from it. That, however, can hardly be a competition concern. After all, more competitive companies finding new ways to better meet the demand of their customers is precisely what competition policy aims to encourage.

In fast-moving technology markets data as such has never given and will never give an online company an *insurmountable* competitive advantage. Apart from data often being available in the marketplace, that is primarily because of its key economic characteristics: it is non-rivalrous, subject to diminishing returns¹⁴, and its value depreciates over time considerably. As renowned economists Catherine Tucker and Anja Lambrecht note:

“Our analysis suggests that big data is not inimitable or rare, that substitutes exist, and that by itself big data is unlikely to be valuable. There are many alternative sources of data available to firms, reflecting the extent to which customers leave multiple digital footprints on the internet. In order to extract value from big data, firms need to have the right managerial toolkit. The history of the digital economy offers many examples, like Airbnb, Uber and Tinder, where a simple insight into customer needs allowed entry into markets where incumbents already had access to big data. Therefore, to build sustainable competitive advantage in the new data-rich environment, rather than simply amassing big data, firms need to focus on developing both the tools and organizational competence to allow them to use big data to provide value to consumers in previously impossible ways.”¹⁵

It is worth to highlight two aspects raised by the economists. First, rather than facing a ‘data bottleneck’, companies are faced with a ‘talent bottleneck’. The key to gaining a competitive edge is not data as such but the capacity to analyze and monetize data. In other words, human talent is the main ingredient to successfully compete in technology markets. Second, the company examples show that data cannot be considered as a barrier to entry. In

¹⁴ For an interesting study showing how growing datasets are subject to diminishing returns see: Stanford Dogs Dataset, *available at* <http://vision.stanford.edu/aditya86/ImageNetDogs/>.

¹⁵ Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition* (Dec. 18, 2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530.

general, the relatively short history of the Internet does not show any evidence of large amounts of data being an effective wall for fending off competition.¹⁶ The most obvious answer to the question how small competitors can compete with bigger, more data-heavy companies is to come up with a better, more innovative, or just different ‘mousetrap’ that would attract users.¹⁷ Dating app Tinder is a very good example for how a company could successfully break into a market that until then used to be extremely data-heavy. For Tinder, just like for many other innovators, data collection was ultimately the result of success rather than the cause for it.

Until now the existing EU competition law framework seems to have largely accommodated the points raised above. Commissioner Vestager has stated that the accumulation of data does not automatically equal market power.¹⁸ This approach is also reflected in the Commission’s merger decisions. During the *Microsoft/LinkedIn*¹⁹ merger some argued that LinkedIn might have unique data that companies were not able to replicate. The Commission rightly dismissed this argument and pointed to other data sources readily available to competing companies.

We welcome this approach and call for continued, evidence-based enforcement that takes into account the fiercely competitive online environment. Data should continue to be assessed like any other non-rivalrous asset that companies use to compete in the market. Misguided policy could chill companies’ incentives to invest and innovate.

As mentioned in paragraph 2, there are also industry-led initiatives like the Data Transfer Project (DTP) designed to ensure data portability across various online services.²⁰ The aim of the DTP goes much beyond users’ ability to simply download a copy of their data. The project makes sure users can directly transfer their data into and out of any participating provider. In the words of participating companies, this “concept of allowing users to choose products and services based on choice, rather than being locked in, helps drive innovation and facilitates competition”.²¹

5. Privacy as an Element in the Competition Assessment

¹⁶ See also David S. Evans & Richard Schmalensee, *Network Effects: March to the Evidence, Not to the Slogans*, Antitrust Chronicle (Aug. 2017) at 9, available at <http://mitsloan.mit.edu/shared/ods/documents/?DocumentID=4243>.

¹⁷ See also: D. Daniel Sokol & Jingyuan (Mary) Ma, *Understanding Online Markets and Antitrust Analysis*, 15 Nw. J. TECH. & INTELL. PROP. 43 (2017), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1267&context=njtip>.

¹⁸ Commissioner Vestager, *Competition in a big data world* (18 January 2016), available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en

¹⁹ Case M.8124 *Microsoft/LinkedIn*. Commission decision (6. December 2016) available at: http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf

²⁰ Data Transfer Project - Overview and Fundamentals, July 20, 2018. Available online at: <https://datatransferproject.dev/dtp-overview.pdf>

²¹ Ibid., p. 3.

In the EU there are strong legal frameworks for both, the protection of competition and the protection of personal data and privacy. While both frameworks are very important, they pursue different goals and should not be confused. Competition law and enforcement serve to protect the competitive process. Privacy laws protect individual privacy rights. Usually, there are different authorities, or departments within one authority, tasked with the protection of competition and the protection of privacy rights. When enforcing competition rules in both, an *ex ante* merger context or an *ex post* anti-competitive conduct context, authorities should continue to be guided by the question whether a given transaction or conduct reduces the degree of competition in the market. Non-competition considerations like the protection of privacy should not guide antitrust enforcement. The European Commission upheld this approach in the *Facebook/WhatsApp* merger decision by stating that “[a]ny privacy-related concerns flowing from the increased concentration of data [...] do not fall within the scope of the EU competition law rules but within the scope of EU data protection rules”.²² More recently, Commissioner Vestager confirmed this approach in a speech.²³ Back in 2003 the OECD cautioned against using competition enforcement for objectives other than economic efficiency and consumer welfare by stating that the “inclusion of multiple objectives [...] increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency”.²⁴ The UNCTAD secretariat made similar observations in a study dating back to 1995.²⁵

CCIA fully supports this approach. Just like competition authorities do not use competition rules to enforce e.g. environmental laws, they should equally not use them to enforce privacy law. Adding consumer protection-related privacy concerns into the competition assessment will lead to a much more subjective competition enforcement that would be much less grounded in economic efficiency considerations. For example, it is not clear how a competition authority would balance economic efficiency considerations ‘against’ privacy rights. Even if we discount the practical difficulties, such a balancing exercise should probably not be made in the first place. In addition, every company operating in the EU is already required to abide by very strict privacy and data protection standards. These obligations will always bind companies, irrespective of their market position.

Lastly, the degree of privacy can be a parameter of competition if companies in the marketplace compete by offering e.g. different privacy settings. In this situation, competition authorities should continue to treat privacy *as such* as a relevant dimension of competition in their assessment and in addition to many other potential factors of competition (such as price, quality, etc.). However, just because privacy protection can be a parameter of

²² Commission decision in Case M.7217 *Facebook/WhatsApp* (2014), para. 164. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

²³ “So I don’t think we need to look to competition enforcement to fix privacy problems.” Commissioner Vestager, *Competition in a big data world* (18 January 2016), see fn. 6.

²⁴ OECD Global Forum on Competition. (2003). *The Objectives of Competition Law and Policy*, pp. 2-3. Available at: <http://www.oecd.org/daf/competition/2486329.pdf>

²⁵ UNCTAD Secretariat. (1995). *The basic objectives and main provisions of competition laws and policies*. Available at: https://unctad.org/en/Docs/poitd_15.en.pdf

competition does not mean that it should be *the aim* of competition enforcement. A clear separation between competition and privacy regulations should be maintained.

6. Competitiveness and AI Technology

Whenever the broader competition and policy community discusses AI and competitiveness, there are two distinct perspectives. First, one could look at the competitiveness of AI technology *itself*. Second, one could also look at how to ensure that AI technology ultimately *functions* in a competitive, as opposed to an anti-competitive, manner.

With respect to the former, AI and algorithm-enabled analytics allow businesses to make more intuitive, data-driven decisions, from better matching products and services to consumers, to creating opportunities in education, finance, healthcare, and employment²⁶. In particular, these technologies can improve outcomes in the consumer advertising and marketing space, providing consumers with information more relevant to their interests and needs, and increasing the likelihood of a completed transaction. AI is already enabling businesses to place more relevant ads, reduce fraud, and optimize real-time bidding processes.²⁷ The potential applications of AI extend beyond consumer advertising and marketing, including: improved image recognition; automatic video captioning; expedited content moderation; enhanced medical diagnosis; spam and malware detection and filtering; and better detection of patterns in satellite imagery to improve agriculture and transit. In all of these areas of applicability we currently witness fierce competition as companies race to master, develop and put into practical use AI technology. This is a fundamentally pro-competitive development that public authorities should support. Measures could include opening up publicly held data as well as investing into technical skills and education as AI technology requires highly skilled workers.

With respect to the latter, some have voiced concerns with algorithms being potentially applied in an anti-competitive manner. These concerns primarily relate to the use of algorithms in pricing. In general, firms' use of algorithms to set prices should be seen as an efficient way to increase market competition to the benefit of consumers. It is regular practice for firms to monitor competitors' prices and adapt accordingly in order to compete. Therefore, the use of price algorithms injects dynamism in the markets as it allows firms to adapt to price changes more rapidly like undercutting their competitors. There is no special characteristic of firms' usage of price algorithms to compete that elicits changes to the current competition framework. At the same time, the use of algorithms does of course not confer immunity from antitrust law. If companies form and enforce a cartel with the help of algorithms, they continue to be subject to antitrust liability. A world in which 'intelligent'

²⁶ See e.g., Rebecca Greenfield & Riley Griffin, *Artificial Intelligence Is Coming for Hiring, and It Might Not Be That Bad*, BLOOMBERG (Aug. 8, 2018), <https://www.bloomberg.com/news/articles/2018-08-08/artificial-intelligence-is-coming-for-hiring-and-it-might-not-be-that-bad>; Elizabeth Woyke, *AI Can Now Tell Your Boss What Skills You Lack—And How You Can Get Them*, MIT TECHNOLOGY REVIEW (Aug. 7, 2018), <https://www.technologyreview.com/s/611790/coursera-ai-skills/>.

²⁷ *How Digital Advertising Can Benefit From the Growth of AI*, IAS INSIDER, <https://insider.integralads.com/digital-advertising-can-benefit-growth-ai/> (last visited July 20, 2018).

algorithms would decide to collude *by themselves* is science fiction, as also stated by Commissioner Vestager.²⁸

There are also discussions concerning how algorithms can facilitate tacit collusion, *i.e.*, ‘conscious parallelism’, that may result in a lessening of price competition. The legal assessment of such conduct has occupied enforcers, courts and academia for decades. Independently of this debate, it is important to remember that just like in the ‘offline world’, tacit collusion *facilitated* by algorithms would still require certain market and economic conditions to exist. These will usually be a high market transparency, the absence of competitors’ or customers’ reactions, a low degree of product differentiation, and a rather small number market participants. In other words, an oligopolistic market structure would still be the most fertile ground for tacit collusion independently of whether companies use algorithm-based technologies or not. Because of this and given that the alternative would be to regulate prices, the expansion of firms’ pricing algorithms should not automatically raise antitrust concerns.

Dynamic pricing enabled by algorithms allows companies to adapt prices in tune with evolving estimates for the supply and demand for a particular product. This makes markets more efficient and competitive. In addition, the use of algorithms helps firms to allocate resources more efficiently. Ultimately, consumers benefit through increased cost savings.

7. Mergers in Digital Markets and their Impact on Innovation

Merger control, as part of the antitrust toolkit, remains a key element in ensuring that the economy remains dynamic. EU competition authorities as well as competition authorities abroad have applied merger control rules vigorously in recent years. This includes transactions where the merger effects on innovation and competition have been analyzed, particularly in the case of R&D intensive industries. CCIA believes that antitrust authorities should continue to enforce merger control rules and evaluate transactions based on sound economic analysis that focuses on real and potential harm to consumer welfare.

Evaluating the impact of a transaction on innovation, along with price and product quality, is not new. When applying merger control rules, competition authorities have long analyzed the impact that transactions could have on innovation, particularly when there are overlapping markets. While some competition experts have suggested that it is a difficult exercise to predict how innovation will be impacted by a particular transaction, antitrust authorities have managed to analyze harm to innovation in a number of cases. Authorities analyze harm to innovation on a case-by-case basis and, among other factors, industry-specific elements such as market concentration, R&D output, and innovation efforts from merging parties and competitors. At the very least, an assessment of potential competition needs clear evidence that the party is a potential competitor that had plans to enter a market in a significant way before drawing conclusions.

²⁸ Commissioner Vestager, *Algorithms and competition* (16 March 2017), available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartella_mt-18th-conference-competition-berlin-16-march-2017_en

In conclusion, the current competition framework is well-equipped to tackle competition challenges that may arise in the context of innovation-centered transactions and does not require an update of analytical tools to specifically account for mergers in the ‘digital economy’. This is in tune with the majority of stakeholder views, including the majority of NCAs, expressed in submissions to DG Competition’s consultation on procedural and jurisdictional aspects of EU merger control.²⁹ While that consultation focused on potential complementary jurisdictional thresholds in EU merger control, also in that area the majority of respondents were not convinced that changes are needed to account for the specificities of digital economy mergers.

8. Competition Policy vs. Regulation

As discussed extensively above, many companies operating in the digital economy are based on complex multi-sided business models. Each ‘side’ consists of a different constituency that will have individual needs and interests. ‘Platforms’ provide the place for interaction between these sides and are hence at the centre of *moderating and balancing* these various interests. Needless to say, they do so while also trying to safeguard their own interests, e.g. protecting their brand value. Just because a given user group is not happy with certain policies or decisions does not mean that the interests of platforms and this user group are misaligned. A multi-sided business model will only be successful if it is able to generate a win-win situation between its various constituencies. If the various sides win, the platform wins. Hence, from an economic perspective, there are very strong incentives for the various interests to be aligned as much as possible.

With respect to the interplay between competition and regulatory policies, the European Commission has recently published a draft proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services and search engines.³⁰ While the proposal imposes new transparency obligations and establishes new redress mechanisms, it does *not* attempt to regulate business practices. CCIA welcomes this approach which should be instructive for other regulatory authorities. The risk with an interventionist, one-size-fits-all regulatory approach is not only its inability to differentiate between the various sectors within the digital economy, but also its likelihood to encroach on the competence of competition enforcers. That would be particularly relevant with respect to business practices that are both controversially discussed in the antitrust community and that are subject to pending court cases. For the sake of a clear division of competences and legal certainty, a clear separation between competition enforcement and regulation should be maintained.

²⁹ Stakeholders’ submissions and the Commission’s summary of the consultation (from 2017) are available at: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html

³⁰ Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services COM(2018) 238 final. Available at: <https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>

Final Comments on the Future of Competition Enforcement in Digital Markets

The current antitrust framework has proven to have the necessary tools and to be flexible enough to ensure effective competition in the market. While the emergence of new business models may present new challenges for antitrust enforcers, there is no need to change competition rules for what many call the 'digital economy'. Competition authorities' enforcement practice should be guided by economic analysis on a case-by-case basis and with a clear identification of consumer harm.

The accumulation of data as such should not raise antitrust concerns. Companies are not successful because they hold a lot of data. They are successful because they found an innovative business model in a highly dynamic market environment characterized by low barriers to entry. They are also successful because they know what to do with their data and how to derive and turn insights into consumer benefits.

Privacy can be a parameter of competition but it should never be a goal of competition enforcement. Maintaining a clear dividing line between privacy and competition rules ensures legal clarity and shields competition authorities from getting involved in highly subjective analyses. Network effects certainly help in growing a company quickly. They can, however, just as fast work against companies, particularly as consumers increasingly multi-home.

The multi-sidedness of business models requires a balancing of interests. The notion of platforms' interests not being aligned with their users is too simplistic. Multi-sided platforms have all the economic incentives to create win-win situations for their various users while trying to legitimately protect their own interests. These interplays must be considered in any competitive analysis.

Finally, a clear division between regulatory and competition policy should be maintained. The more legislators decide to regulate business practices, the more will they encroach on the competence of competition authorities. Because of this, the voice of competition authorities in these regulatory debates is fundamentally important.

Respectfully submitted,

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EU Transparency register ID number: 15987896534-82

Digital Competition Expert Panel

Response to Call for Evidence

A Brief Word About Us

The Digital Policy Alliance (DPA), originally founded in 1993 as EURIM, alerts EU and UK Parliamentarians and policy makers to the potential impacts, implications, and unintended consequences of policies which interact with and leverage online and digital technologies. We collaboratively cut across organisational and cross-sector boundaries to produce informed, representative and authoritative publications based on practical experience and insight, and suggest and review proposals for government policy, legislation and regulation as it applies to the UK.

For more information including lists of directors, members and observers see: www.dpalliance.org.uk. Email us at: admin@dpalliance.org.uk.

The DPA Competition Policy Working Group

Established in January 2018, this Group is examining the new forms of competition in the digital economy, and making recommendations on changes that may be needed to policy, legislation and enforcement. Active engagement of Parliamentarians, providing leadership, and of participants, making contributions in clearly defined issues, is the basis for our work.

The DPA warmly welcomes the initiative by the Chancellor of the Exchequer, on behalf of the UK Government to establish this Expert Panel. The DPA has already been active in this policy arena, and submitted evidence to the initiative by European Commissioner Vestager “Shaping competition policy in the era of digitisation”.

Our evidence to this Panel is set out below following the sequence of the key questions contained in the call for evidence. We have not provided a detailed response to each question, but we have covered the key points within a broader narrative on the context of emerging competition concerns in digital markets.

Understanding the effects of digital markets

The interests of digital platforms are not always aligned with the interests of their users.

In competitive markets the supplier’s interests and the user’s interests are typically closely aligned. The process of competition in terms of the dynamic rivalry between firms seeking out users’ needs is such that firms’ success is dependent on meeting the revealed preferences and demands of users. This should be the case whether the suppliers are meeting those needs over technology that is described as a “platform” or not.

Competition distortion in advertising funded markets

Advertising is the source of finance for many online markets today. Advertising can be pro-competitive and beneficial where it promotes product differences and increases transparency, allowing comparisons to be made by consumers and enhancing consumer choice. However, advertising may also give rise to imperfect competition through ‘perceived’ differentiation in product characteristics. Some downsides include consumers being sold a set of attributes that, for example, encourage them to become emotionally attached to brands, or misled or encouraged into not making rational decisions.¹

Evidence has emerged from online gambling investigations by the UK Consumer and Markets Authority that companies are using advanced knowledge of human psychology to create attention and this may be creating unhealthy dependency². In many ways suppliers can obtain price premium and increased profit – in economic terms – but a loss of consumer welfare, from successful advertising. It can, however, be difficult to distinguish between beneficial product differentiation and consumer-harming exploitation.³

Where companies achieve enhanced economies of scale (high fixed costs and low variable costs), network externalities, and global access to people (as happens with many internet businesses), together with high first mover advantages and barriers to entry, then a position of enduring market power can arise.

Once market power happens in ad-funded markets, the consumer, who only exerts weak demand over the supplier’s incentives as it does not pay the supplier directly, has an even weaker position in the system. Ad-funded markets are not driven by consumer demand, and welfare can be reduced. If the market power of an ad-funded supplier is big enough, the user can become an asset of the firm with market power, which can also be expected to exploit its this power.

Exploiting user data to leverage competitive advantage

With many digital platforms being funded by advertising, consumers can become assets to be exploited rather than sources of revenue and income whose interests must be respected. A clear example of this can be found in some platforms user terms, which appear to be mostly set with reference to their commercial interests, and include the consumer agreeing to the platform having a considerable amount of power over their data and any content they upload.

In current competition policy, there is often an assumption that consumer choices drive suppliers to differentiate their offerings in various markets. As described here, this assumption does not work in the same way for digital platforms. Consumer choices would only be likely to change supplier behaviour if enough consumers stopped using a platform, thereby endangering the platform’s continued advertising income. However, if the users remain loyal to the services provided, no economic incentive will operate to change its behaviour.

Weakening of consumer power in platform dominated markets

Overall it is clear that the interests of platforms may not be to operate in the interest of users - indeed one of the characteristics of two-sided platforms, where one side is an advertising interest, will, in circumstances of market power, probably give rise to exploitation. At a basic level, this could be a direct result of market failure where users have no choice of alternative platforms and are open to

¹ See for example the work of EH Chamberlain.

² Mattha Busby, ‘Social media copies gambling methods to create psychological cravings’, *The Guardian*, <https://www.theguardian.com/technology/2018/may/08/social-media-copies-gambling-methods-to-create-psychological-cravings>.

³ Tim Wu, 2016, *The Attention Merchants: The Epic Scramble to Get Inside Our Head*, (Atlantic Books: London).

exploitation. Consumer power in such circumstances is too weak to create incentives to alter the behaviour of such digital platforms.

Policy and implementation solutions

Early application of anti-trust measures

The above questions relating to leveraging or lock-in are examples of different forms of abuse. For example, abuse may occur by acquisition, thereby increasing the existing dominance of the acquiring party. A vertical acquisition of a player in a market adjacent to the platform market may also create inevitable foreclosure and exclusion from the market for competing rivals - where, for example, the acquiring firm is a platform that acquires an upstream or downstream competitor, thereby vertically integrating its platform with a player in a separate but related market. Such activity is, just like bundling or leveraging, a mechanism through which foreclosure and restriction or reduction in competition can then take place. Many examples of such acquisitions can be provided by the major platforms to date.

Anti-trust measures should immediately be applied to prevent such behaviour from occurring. As a matter of practicality, good policy toward competition and market structure should err on the side of intervening at the optimal time - preventing situations of market power from arising or preventing acquisition from operating as an abuse. Addressing the problem after it has arisen is often too late to save the market from permanent harm.

Redefine notification thresholds

The current focus on turnover as the threshold for notification of mergers and acquisitions to competition authorities is peculiarly inappropriate for platform markets where the players are funded by advertising. In such markets the number of users is more important as an indication of market power than the absolute amount of revenue involved. For example, platforms operating as digital billboards seek to demonstrate their value through recording the number of unique users who see the adverts. Another way they measure their success is on the number of page impressions generated (where a page impression is generated when a user views an advert online), or the number of people clicking on the advert (known as the click through rate or CTR). All these measures are measures of users seeing adverts - and can stand as a proxy for users' purchasing or products or services in more traditional goods or services markets - since the advert is the product and it is consumed when seen.

Merger vetting to become fully reflective of market power

Prevention of abuse and rapid action to ensure that damaging foreclosure does not take place requires vetting mergers before they occur. This would require changing turnover thresholds from the current revenue base to another basis that is more reflective of market power in a digital environment. The turnover thresholds were developed when the majority of company revenue resulted from contracts with consumers, whereas digital platforms rely on a secondary market or affiliate network advertising and are often offered to consumers for no monetary cost, in return for consumers data being harvested and monetised. As currently used in competition policy and law enforcement, the turnover thresholds are therefore inappropriate for digital markets, and should be reformed.

This reform needs to consider future market potential and the market power of the proposed acquirer. It should reflect the concern that acquisitions of nascent technologies by larger established players may hold back the development of more competitive markets.

With data-driven platforms, high fixed costs and low variable costs, barriers to entry can quickly become prohibitive, rendering it highly unlikely a potential competitor would ever be able to develop equivalent scale or reach equivalent numbers at similarly low costs. Where markets have already

become dominated, regulation cannot hope to address the position after the event and should therefore operate pre-emptively.

Swift intervention to combat leveraging and lock-in issues

In order to prevent such domination of digital markets, competition policy must turn its focus to reacting with speed to developments. Swift intervention may prevent the accumulation of market power outlined above. Moreover, where such power is accumulated, swifter enforcement of competition law is necessary: the leading competition cases brought against Google, Intel, and Microsoft all relate to technology platforms and all took many years.

Increased incentives toward compliance

The most urgent change to incentives would be to limit the profits that digital platforms can make from non-compliance. Laws often incentivise desirable behaviour by reinforcing preferred outcomes with financial incentives. Company behaviour is thus conditioned and driven by operating within the law to meet profitable goals. Oddly, competition law allows for damages actions to be brought against abusive dominant companies, and fines to be levied on them, but then as a matter of principle, because damages are quantified against the claimant's losses and not the defendant's gains, also allows market abusers to keep the gains and profits from their wrongdoing. The law needs to be respected to be worthy of its name, and in social terms, the signal sent by enforcement activity needs to be that breaking the law is unprofitable as well as unacceptable.

Building capacity within competition authorities

In addition to changes to enforcement and incentives toward compliance the following changes could be made to the practical operation of competition authorities:

1. **Management experience.** Where heads of authorities have limited litigation experience, is it appropriate to give them a mandate to take and manage litigation? They have to litigate against the world's best and it is a wonder that they win at all, given the scale of the firms, information disadvantages, expertise and the budgets and talent that they face. Outsourcing the management of litigation to experts is rarely if ever done by competition authorities and should be the default position.
2. **Processes and procedures adopted** also typically mean that competition authority people are assembled to deal with specific transactions, investigations and issues rather than being organised into industry specific groups. The complexity of the modern economy demands greater specialisation, focus on market areas and monitoring of transactions and measurement and monitoring of outcomes which would facilitate speed of understanding and more rapid decision making.
3. **Timescales** are measured in the time taken to achieve perfect administrative outcomes, rather than providing the response needed by markets in defined timescales.
4. **Our authorities need to move at internet speed.**

Freedom of Information Act - please be advised that the DPA does not consider anything in this document to be confidential and we are content for it to be published by HM Treasury or made available in any response to a Freedom of Information request. We would ask that if referring to any part of it at any time to kindly attribute it to the DPA. A copy of this document will be published on our website at www.dpalliance.org.uk.

Competition in the digital sector: DMG Media response to the Furman Review Call for Evidence

Executive Summary

1. This response to the Call for Evidence is submitted on behalf of DMG Media, publishers of the Daily Mail, Mail on Sunday, MailOnline, Metro and Metro.co.uk. Its purpose is to argue that Google and Facebook must be broken up, vertically and horizontally, to provide greater choice for the public, advertisers and news publishers alike. Achieving this will also foster greater innovation in the start-up sector which is currently almost entirely geared towards developing businesses with a view to sale to one of the existing big players.
2. Google should be forced to sell YouTube, which has no real competitor and therefore pays unsustainably low prices for content. Facebook should be forced to lose Instagram and WhatsApp. Both these companies could have presented real competition to Facebook, instead they were bought out and their development has been restricted only to what complements the main product. Further acquisitions by tech platforms should be subject to regulatory approval.
3. Both Google and Facebook should be removed from the ad-tech, browser (Chrome) and mobile operating system (Android) sectors where their size and data reach gives them an unfair advantage over any competitor.
4. One of the factors which has allowed the tech platforms to achieve market dominance has been the failure of Governments around the world to make them pay proper taxes. The UK should take a lead in forcing Google, Facebook, and Amazon to pay corporation tax at the same level as real-world competitors. Brexit will make this possible, a fact recognized by the tech giants themselves with the appointment of a British former deputy prime minister, Nick Clegg, as lobbying and communications chief at Facebook,

and the opening of a London office of the tech platforms' lobbying organization, the Internet Association.¹

5. Measures also need to be taken to ensure transparency of ranking algorithms. Changes to Google and Facebook's algorithms can make dramatic differences to search and social media referrals overnight, and in doing so cause enormous damage to the businesses of news publishers. Astonishingly, given their dominant player status, the tech platforms' algorithms are secret, making it impossible for publishers to prepare for changes or rectify the damage afterwards. The fact that search and social media referrals are subject to frequent sharp changes in volume makes business planning of digital news publishers extremely difficult.
6. It also means the public do not know what governs the selection and ranking of news items when they use Google and Facebook. They have no idea whether the content is failing to be surfaced for technical or business reasons – or because of the political positions of the tech giants, which have repeatedly exhibited evidence of institutional left-liberal prejudices².
7. Without these measures, from which appropriate rewards for legitimate news publishers should flow, it may prove impossible to sustain a viable news media industry in the UK, beyond the state-funded and ultimately state-controlled BBC. Not only will this put 17,000 jobs at risk³, it also poses a serious threat to democracy.
8. We appreciate that maintaining plurality of news media is beyond the scope of this review. However Britain currently has around 1100 print and 1500 digital news titles, which have traditionally performed the task - vital to a functioning democracy - of reporting the activities of the courts, local authorities, and Parliament itself. Increasingly they are struggling to earn enough revenue to maintain reporting staff, and in considerable parts of the country local newspapers and news websites no longer cover courts or local authority meetings, meaning no one is holding power to account. There is a very real danger that this void will be filled by rumours and conspiracy theories – distributed by the very tech platforms whose anti-competitive practices are damaging the commercial viability of responsible news media publishers.

¹ <https://www.theguardian.com/politics/2018/oct/21/nick-clegg-urged-paddy-ashdown-to-stand-up-for-liberalism-and-democracy-at-facebook>

² <https://www.telegraph.co.uk/technology/2018/09/13/google-denies-left-wing-bias-leaked-clip-co-founder-discussing/>

<https://www.nytimes.com/2018/08/28/technology/inside-facebook-employees-political-bias.html>

<https://www.telegraph.co.uk/technology/2018/09/14/twitter-staff-feel-silenced-left-wing-workforce/>

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720400/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf.

9. This is not a problem unique to Britain – it is a global challenge - but it is national governments which will have to meet it. The case was put with great eloquence by Mark Thompson, CEO of the New York Times and former Director-General of the BBC, in a speech to the Open Markets Institute in Washington in June this year⁴:

'The most serious threat facing journalism – the disruption of the traditional business model for journalism, and the failure of all but a handful of titles across the western world to find credible digital alternatives – is much more intractable [than fake news].

It presents as an economic problem but its consequences, which are already playing out and, unless something changes, are likely to grow far worse over the coming years, are civic and political.

Democracies cannot remain healthy if citizens do not know what is happening in their communities. If public and private institutions are not held to account. If elections come and go without issues being aired and candidates being scrutinized.

Unfortunately, at present the local, regional and national professional journalism, which historically played such an important role in meeting these civic needs, is ailing – in some cities and regions dying – in much of America and the West.

How can a pluralistic news industry trade on fair terms with a monopolistic tech industry?

10. DMG Media is one of Britain's most successful new publishers. The Daily Mail and Mail on Sunday each hold about 25 percent of their respective national newspaper markets and Metro has the largest distribution of any free newspaper. Our main news website, MailOnline, is the largest English language newspaper website in the world, with 218 million monthly unique browsers. This position has been achieved by establishing full-scale editorial and commercial operations in both the USA and Australia, in addition to the UK. MailOnline is now the eighth largest news website in the USA (and largest foreign-owned)⁵ and the fourth largest in Australia⁶.
11. The purpose of this investment has been to enable DMG Media to make the transition from a profitable print media business, into a profitable digital media business

⁴ <https://www.nytco.com/wp-content/uploads/sites/3/MARK-THOMPSON-OPEN-MARKETS-INSTITUTE-.pdf>

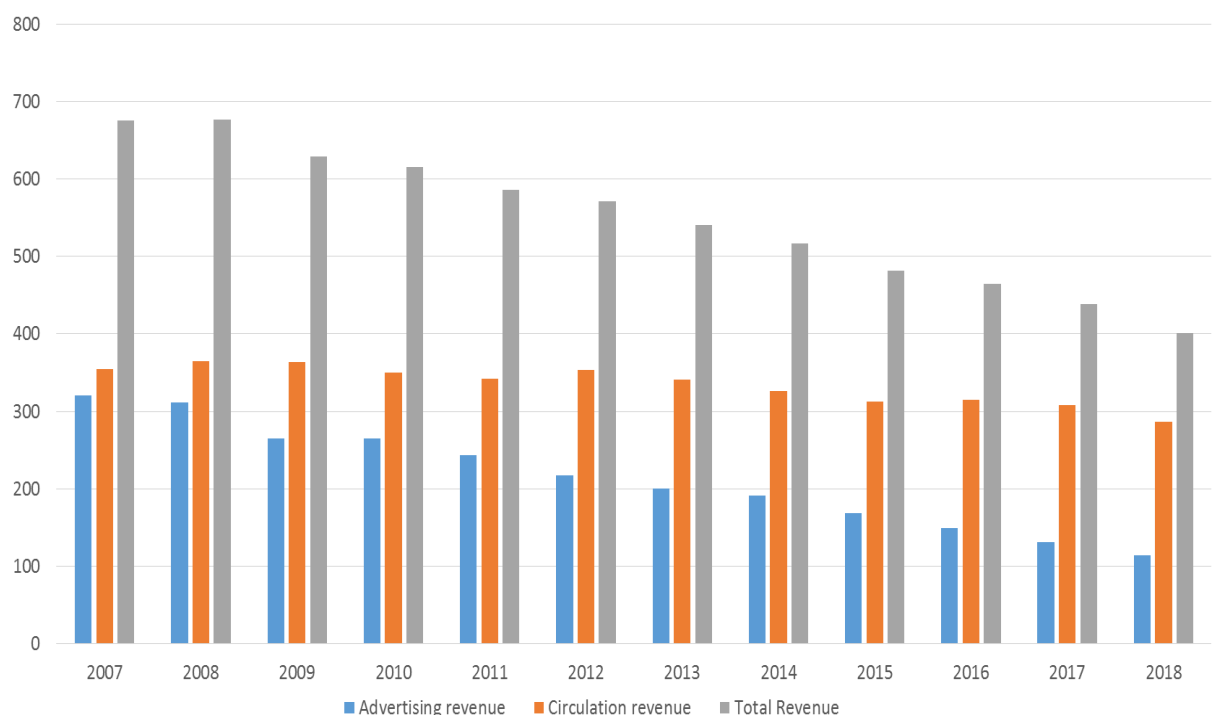
⁵ <http://www.ebizmba.com/articles/news-websites>

⁶ <http://www.roymorgan.com/findings/7595-top-20-news-websites-march-2018-201805240521>

employing nearly 1,000 journalists in the UK, a third of whom work exclusively online, operating internationally from a UK base. However MailOnline's remarkable success in building an audience has not been matched by similarly exponential growth in advertising revenue, and DMG Media remains reliant for profit on print revenues, in particular cover prices.

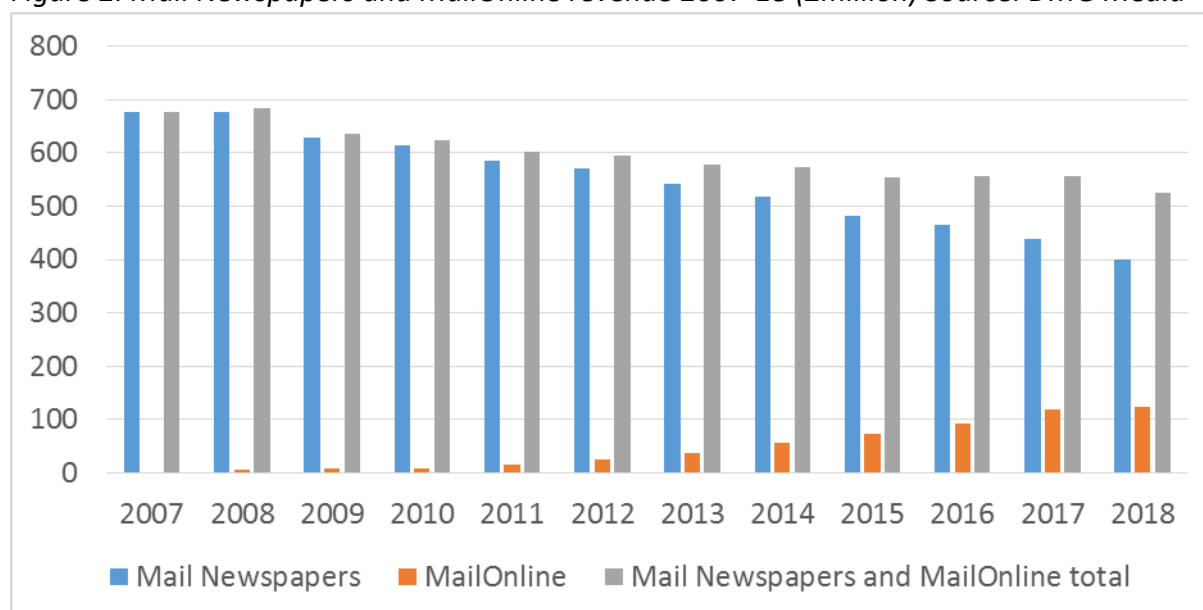
12. In 2007, the year that DMG Media entered the digital market as news publisher with the launch of MailOnline, the total annual revenues of the Daily Mail and Mail on Sunday were £676m. Of that, nearly half - £321m – was advertising revenue, and the rest circulation revenue. It was a healthy business model, with a wide range of advertisers, and circulation revenue collected through around 50,000 retail news outlets across Britain.
13. But the very rapid spread of smartphones inevitably meant more and more members of the public preferred to consume their news digitally and the print business model could not be sustained in the long term. By 2018, the total revenue of the Daily Mail and Mail on Sunday had shrunk to £401m – a fall of £275m. The most dramatic fall came not, as one might expect, in circulation revenue. That was sustained by increasing cover prices, shrinking only from £355m in 2007 to £287m in 2018. The dramatic drop came in advertising revenue, which in 2007 accounted for £321m, 47 per cent of the total, and by 2018 had fallen to £114m, just 28 per cent of the reduced total. (Fig 1)

Figure 1. Daily Mail and Mail on Sunday revenues 2007-2018 (£ million)



14. When criticised for market dominance Google frequently responds by blaming news publishers for being slow to adapt to the digital challenge⁷. DMG Media poured resource into MailOnline and developed it into a first rank global digital news publisher. But while the number of users grew very rapidly, growing revenue was a harder task. MailOnline revenues, which are dependent almost entirely on advertising, did grow – from £5.5m in 2008 to £122m in 2018, when for the first time it surpassed print advertising revenue. However that £122m does not compensate for the shortfall of £275m in print revenues. (Fig 2)

Figure 2. Mail Newspapers and MailOnline revenue 2007-18 (£million) Source: DMG Media



15. The difficulties DMG Media faces are far from unique. The Mediatique report published by the Department of Digital, Culture, Media and Sport's Cairncross Review shows that across the newspaper industry as a whole advertising revenue fell 70 per cent between 2007 and 2017, from £4,625m to £1,432m.⁸ Of the latter figure, only £487m was digital revenue.
16. As the news publishing industry's advertising revenue has contracted, the tech platforms' has expanded. Google's UK ad revenues more than doubled between 2011 and 2017, from £1.9 billion to £4.4 billion⁹ - Google alone took almost as much revenue as the entire newspaper industry had in 2007. Facebook's revenue increased even more

⁷ <https://mumbrella.com.au/the-future-of-news-cannot-be-built-on-a-broken-view-of-the-past-537577>

⁸

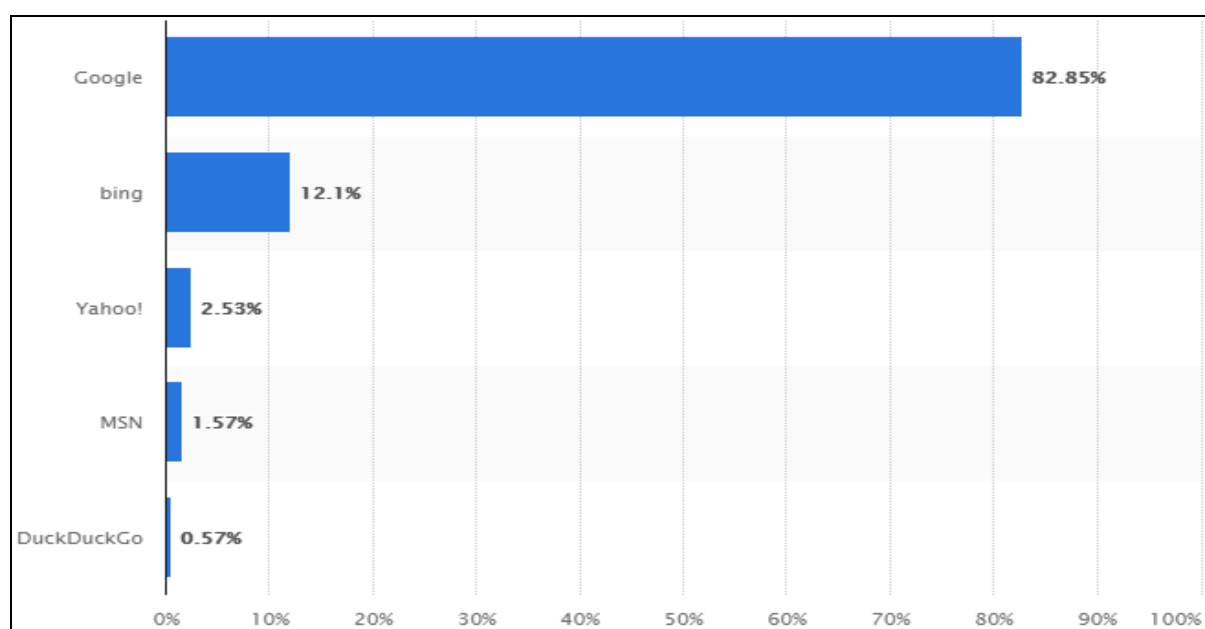
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720400/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf

⁹ <https://www.statista.com/statistics/268737/googles-digital-advertising-revenue-in-the-uk/>

dramatically, rising tenfold, from £181 million to £1.9 billion¹⁰. Between them the two companies account for more than half (54 per cent) of total UK digital ad revenue¹¹.

17. This rapid rise to market dominance has been helped by a hidden subsidy in the form of an extraordinarily favourable tax regime. In 2017 Google paid just £50m tax on total UK revenues of £5.7 billion¹². Facebook paid £15.8m tax on British sales of £1.3bn - while its revenues increased 50 per cent year-on-year its pre-tax profits rose by only 6 per cent, thanks to a £444m charge for “administrative expenses”¹³.
18. The speed with which Google and Facebook achieved market dominance in the UK has been mirrored in virtually every market in the world, with the exception of China, where political considerations have made it difficult for them to operate and allowed the growth of domestic tech platforms.
19. As of July 2018 Google (which also supplies search for Apple and monetises search for Yahoo) held 82.85 per cent of the market for search in the UK – its nearest competitor, Bing, had just 12.1 per cent. In social media Facebook commanded 63.76 per cent of the market - more than four times the share of nearest rivals Twitter (14.89 per cent) and Pinterest ((10.38 per cent) (Figs 3 and 4).

Figure 3. Search engines UK market share July 2018 (hits per month). Source: StatCounter



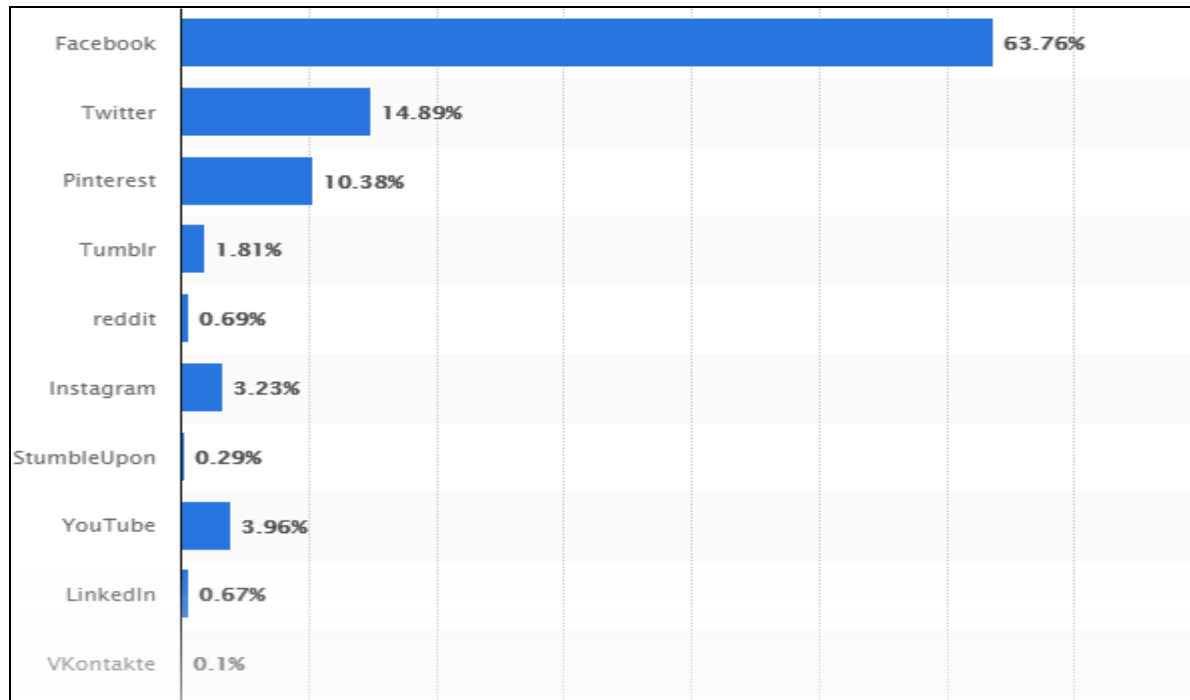
¹⁰ <https://www.statista.com/statistics/268738/facebooks-digital-advertising-revenue-in-the-uk/>

¹¹ <https://www.emarketer.com/Article/Digital-Duopoly-Remain-Dominant-UK-Ad-Race/1016481>

¹² <https://www.bbc.co.uk/news/business-43566751>

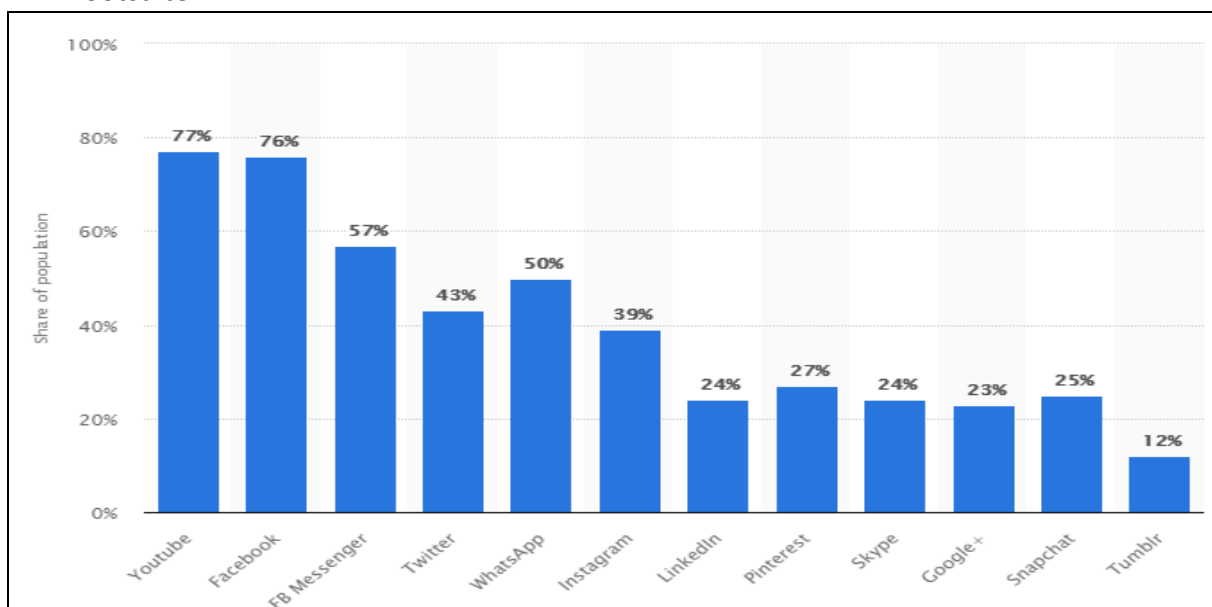
¹³ <https://www.theguardian.com/technology/2018/oct/08/facebook-uk-tax-bill-sales-margaret-hodge>

Figure 4. Social media UK market share July 2018 (hits per month). Source: StatCounter



20. Figure 4 does not include WhatsApp - also owned by Facebook - which is sometimes classed as an instant messaging service rather than a social media channel. Statistics for social media market penetration (Fig 5 below) – i.e the number of UK individuals with social media accounts, which do include WhatsApp, show that out of the six most popular social media networks in the UK, four are owned by Facebook (Facebook, FB Messenger, WhatsApp, Instagram). The most popular – Youtube - is owned by Google.

Figure 5. Penetration of social media in the UK, Q3 and Q4 2017. Source: We Are Social; Hootsuite



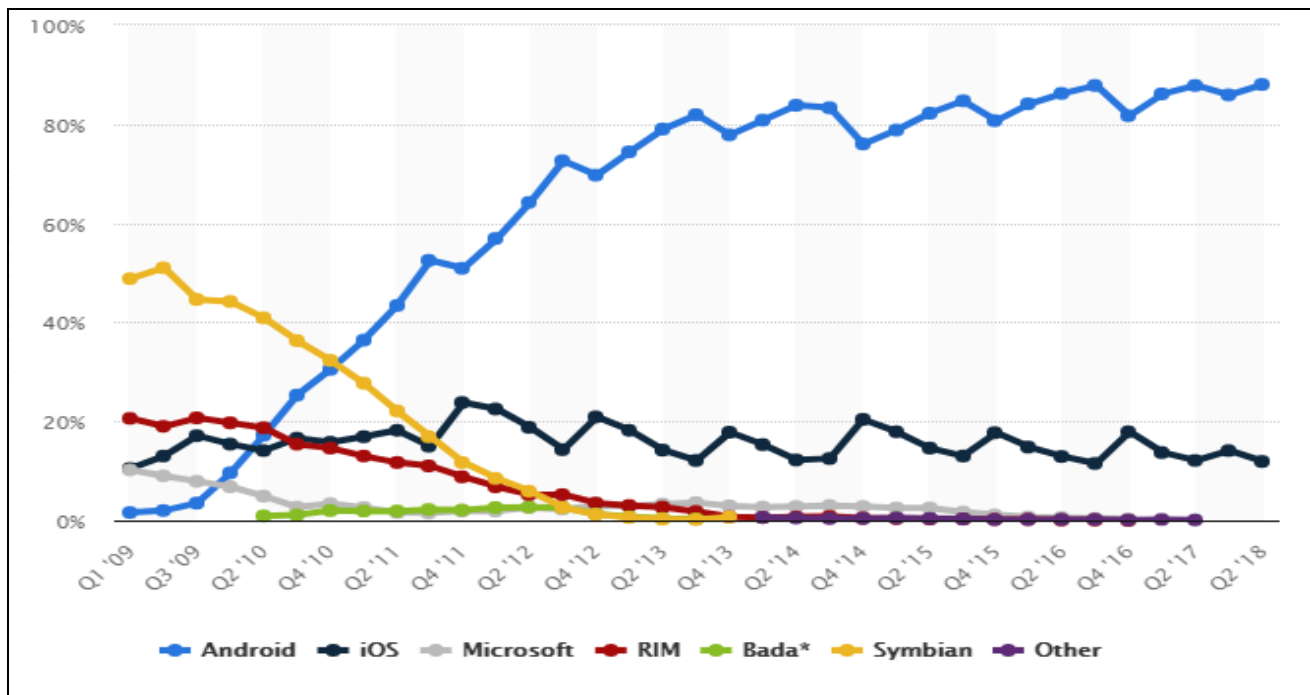
21. There can be no doubt that Google and Facebook are dominant players in search and social media, with both vertical and horizontal control of markets. But dominant positions have been established in many other fields. These are just some of the areas in which Google is active:

- **Operating systems:** Android, Android Mobile, Android Auto
- **Publisher/Apps/tools:** Google, Youtube, News, Maps, Waze, Translate, Photo, many other Comms apps (email, video, text/chat)
- **Browser:** Chrome
- **Ad Exchange/Auction/Ad analytics:** Google Marketing Platform (formerly DoubleClick, Ad Exchange and other adtech acquisitions like Invite Media)
- **Music and Movies:** Google Play
- **Hardware and Home Appliances:** Home, Wifi, Chromebook, wearables, Google TV, Nest
- **Business software:** Contacts, Calendar, Docs, Drive
- **Other initiatives:** autonomous cars, VR, voice recognition
- **Investments:** Google Ventures

22. Mobile operating systems, which are now dominated by Google and Apple, offer a case study in how tech giants achieve commercial hegemony. Little more than a decade ago Google did not own a mobile operating system. But in 2005 Google bought Android Inc, a tech start-up which was developing a mobile operating system.¹⁴ When Google launched Android in 2008 it was one of five major mobile operating systems; now, as Figure 6 shows, there are only two, and Google's Android has more than 80 per cent of the global market. As Android is pre-installed on smartphones – creating a so-called walled garden - this gives Google a vast captive market for five other products: search, maps, Gmail, YouTube, the Google Chrome browser, and its app store Google Play, which features more than 3.3 million apps.

¹⁴ <https://www.androidauthority.com/history-android-os-name-789433/>

Figure 6. Global mobile OS market share in sales 2009-2018. Source: Gartner



23. The anti-competitive effect of Google's control of Android software was demonstrated in July this year when the European Commission fined it \$5.1billion for forcing manufacturers of Android-based handsets to make Google Search and the Google Chrome browser default services in order to get access to other Google apps.¹⁵ An even more telling example of Google's abuse of market dominance was European Commission's decision in 2017 to fine Google \$2.7 billion for consistently giving prominent placings in search results to its own comparison shopping service, and demoting rivals.¹⁶

24. Facebook has been equally ruthless in buying up and exploiting potential competition. When in 2014 it paid £13.8bn for WhatsApp, it was a condition of the purchase that WhatsApp would continue not to carry any advertising, and that WhatsApp users' data would be kept independent of Facebook. But in April this year WhatsApp founder Jan Koum resigned from Facebook's board, following disputes over Facebook's attempts to access and exploit WhatsApp users' data.¹⁷

¹⁵ <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html>

¹⁶ <https://www.reuters.com/article/us-eu-google-antitrust/eu-fines-google-record-2-7-billion-in-first-antitrust-case-idUSKBN19I108>

¹⁷ https://www.washingtonpost.com/business/economy/whatsapp-founder-plans-to-leave-after-broad-clashes-with-parent-facebook/2018/04/30/49448dd2-4ca9-11e8-84a0-458a1aa9ac0a_story.html?noredirect=on&utm_term=.aacea45c107f

25. Less than six months later, Koum's departure was followed by those of Kevin Systrom and Mike Krieger, the founders of Instagram. Facebook had bought the photo-sharing site for £760m in 2012, when it had only 13 employees and 30 million registered users. Now it has a billion monthly users and provides Facebook with £20bn revenue a year, about a quarter of its total. Like Koum, Systrom and Krieger were reportedly unhappy with pressure to integrate Instagram into Facebook.¹⁸
26. It is often remarked that the internet – which was expected to liberate the individual from the power of big corporations – has actually proved to be a ruthless winner-takes-all environment for businesses. This is partly because digital services have very high fixed costs and low-to-zero marginal costs, creating enormous economies of scale, and partly because networks grow exponentially as they attract both consumers and producers.¹⁹
27. The news media industry, in contrast, is highly fragmented, both in the UK and elsewhere. All national newspaper groups in the UK have news websites (DMG Media and News UK each have two, while Reach has two national news websites and numerous regional ones). All the main broadcasters have news websites, as do regional newspaper publishers, radio broadcasters and magazine publishers. There are also many digital only news publishers, some of them very substantial (Huffington Post, BuzzFeed).
28. Ofcom's annual report *News Consumption in the UK: 2018* records that there are 23 online news providers in the UK with a reach of more than 5 per cent of the population. No online news publisher apart from the BBC has a reach of more than 20 per cent (Google search is not a news publisher)(Fig 7).²⁰

¹⁸ <https://www.bloomberg.com/news/articles/2018-09-25/instagram-founders-depart-facebook-after-clashes-with-zuckerberg>

¹⁹ <http://blogs.lse.ac.uk/mediapolicyproject/2018/06/14/why-tech-markets-are-winner-take-all/>

²⁰ https://www.ofcom.org.uk/__data/assets/pdf_file/0024/116529/news-consumption-2018.pdf

Figure 7. Websites/apps used for news 2018. Source: Ofcom.

	Total
BBC website/app	63%
Google (search engine)	46%
Guardian/Observer website/app	17%
Sky News website/app	17%
The Daily Mail website/app	17%
YouTube website/app	13%
Huffington Post website/app	12%
Google News	11%
MSN News website/app	11%
Yahoo News website/app	11%
Any local newspaper website/app	11%
ITV/ITN** website/app	10%
The Telegraph website/app	9%
The Independent website/app	8%
BuzzFeed website/app	8%
CNN website/app	7%
The Sun website/app	6%
Pre-loaded Apple news app	6%
Times/Sunday Times website/app	5%
The Daily Mirror website/app	5%
The Metro website/app	5%
LADBible website/app	5%
Channel 4 website/app	5%

29. The position of the BBC is particularly significant. The BBC was established as a broadcaster at a time when it was believed that limited broadcast spectrum and the cost of establishing a new medium justified state funding. It was not permitted to engage in print journalism, which was adequately served by commercial news publishers. However the internet has allowed it to move from TV and radio into text journalism, where it now has the largest market share. The fact that it is state-funded, and therefore free to the consumer at the point of delivery, means that it presents a major barrier to monetisation of digital news publishing, by making it extremely difficult to operate pay walls in the UK.
30. This plurality is enshrined in law. Statutory media ownership rules make media mergers subject to a Media Public Interest Test, which allows the Secretary of State for Digital, Culture, Media and Sport to intervene in proposed mergers to determine whether they might result in harm to the public interest. In addition no group with more than 20 percent of the newspaper market is permitted to own a Channel 3 TV licence.²¹ These powers are used: Rupert Murdoch's 21st Century Fox could not proceed with its bid for

²¹ https://www.ofcom.org.uk/__data/assets/pdf_file/0027/51867/morr_2015.pdf

the 61 per cent of Sky it did not already own without investigations by Ofcom and the Competition and Markets Authority, and clearance from the Secretary of State.²²

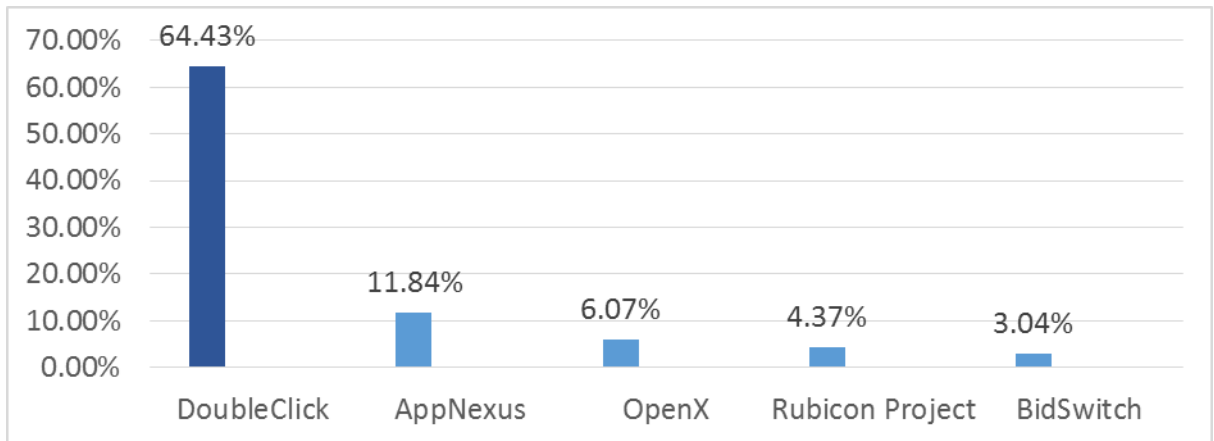
31. There is therefore a complete imbalance of power between the news publishing industry, required by law to be both plural and diverse, and offering a vast range of content and political viewpoints, aimed at every segment of the audience – and the tech giants, not only dominant in their native markets of search and social media, but seeking to extend that dominance across parallel tech markets as they emerge.

How the market dominance of the tech giants prevents publishers from making an adequate return on digital news services

32. One of the major obstacles to news publishers being able to make a satisfactory return is the digital advertising supply chain. Not only is it notoriously opaque and very poor value for advertisers and publishers alike, it is increasingly dominated by Google.
33. Digital advertising is placed in two ways: either through a direct commercial relationship between the advertiser and the publisher, or through the programmatic process where, every time a page is viewed by a member of the public, ads are served through an electronic auction by which, in theory at any rate, the marketing requirements of the advertiser are matched to data stored about the consumer.
34. We know, because the markets concerned are reasonably transparent, that for every pound spent by a print advertiser, or a digital advertiser which books space directly with DMG Media, we receive 83p. But the opacity of the programmatic advertising market means that neither we nor the advertiser know for certain what proportion of the programmatic advertiser's pound reaches the publisher. We estimate in our case that it is only around 30p. This is because of the large number of intermediaries in the ad-tech supply chain, and the dominant position of Google DoubleClick Ad Exchange against other ad exchanges (Fig. 8).

²² <https://www.theguardian.com/media/2018/jul/12/rupert-murdoch-fox-wins-government-clearance-sky-takeover>

Figure 8. Market share of five leading UK ad exchanges. Source: Datanyze



35. The graphic below, updated from an earlier version produced by the digital advertising consultant Matthew Scott Goldstein (Fig. 9) shows just how many intermediaries can be involved moving a digital ad from the advertiser to the page of a digital publisher – nine different agencies, each taking a cut.

Figure 9. The adtech supply chain



36. Within this adtech chain Google have dominant positions in ad serving (for both advertisers and publishers), auction dynamics, and demand- and supply-side platforms, meaning they compete in an auction which they also run. They exercise great leverage because they funnel a large percentage of advertiser demand through their pipes, so publishers have to integrate with Google's supply-side tools to access that demand and

it functions most efficiently when publishers also use Google's DoubleClick ad serving service.

37. An example of how this works in an anti-competitive way was Google's decision last October to change the way Ad Exchange recognises viewability on apps. Google's viewability test means ads are only be paid if they are served so at least one pixel is visible on the opening screen of the user. Google already operate a last look bidding process on Ad Exchange which means that if another bidder, say Appnexus, bids £1 for inventory, Google have the right to top that bid and buy it for £1.01p. In theory the publisher would receive £1.01 from Google, but once Google's viewability test is applied that figure is reduced dramatically – in MailOnline's case to 43p on average. Appnexus, which does not apply a viewability test, would have paid the full £1, so the publisher has lost 57p. The advertiser, though, has bought £1's worth of inventory for 43p, so advertisers move their spend away from competitors to Google.
38. The ad-tech industry is consolidating rapidly - the number of independent ad-tech companies has fallen 21 per cent since 2013 - and investment capital for start-ups is drying up²³. Google makes no secret of its intention to be at the centre of that consolidation²⁴, with Facebook and possibly Amazon the other big players.
39. Globally MailOnline currently earns £74 million a year (£31 million in the UK) from programmatic advertising (2018 forecast). We estimate, using 30p as the proportion of advertisers' pound we actually receive, that this represents a global advertisers' spend of £247 million. If the share taken by intermediaries was reduced and the market operated in a similar way to the print ad market, with prices paid by advertisers remaining stable, our programmatic revenues would nearly treble – from £74 million to £204 million, and we could begin to recoup some of the investment we have made in MailOnline over the last decade.

At the mercy of algorithms – how the tech giants can stifle news publishers on a whim

40. MailOnline is fortunate in that an unusually high proportion of its traffic – 46 per cent in the UK - comes to it directly, via the MailOnline mobile app or bookmarking. This partly because the quality of MailOnline's content has generated strong brand loyalty, and many users browse it on a daily basis, in a way similar to newspaper readers. However the unusually small proportion who arrive at the site through search –37 per cent in the UK, against an industry norm of 50-70 per cent – is also a result of changes to Google's

²³ <https://www.nytimes.com/2018/08/12/technology/google-facebook-dominance-hurts-ad-tech-firms-speeding-consolidation.html>

²⁴ <https://www.thinkwithgoogle.com/intl/en-apac/tools-research/programmatic/about-time-consolidate-ad-buys-get-more-from-teams-media/>

algorithms which have discriminated against MailOnline. The charts below demonstrate how secret and unexplained changes to Google’s algorithms have affected MailOnline and other publishers over the last two years.

41. Figure 10 shows how MailOnline’s share of Google search for top US news publishers dropped from 9.02 p.c. to 6.43 p.c. (a fall of 2.59 percentage points) between 2017 and 2018, while CNN.com and Fox News rose by 2.27 and 1.54 percentage points respectively. In the UK (Fig. 11) the drop was even more pronounced: MailOnline’s share of search fell by more than four percentage points, from 20.16p.c. to 16.14 p.c. (4.02 percentage points). The Telegraph saw a similar fall, from 10.07 p.c. to 7.84 p.c., while the Express gained 3.41 percentage points to 11.32 p.c.

Figure 10. Change in share of search for top US publishers (source: US Hitwise)

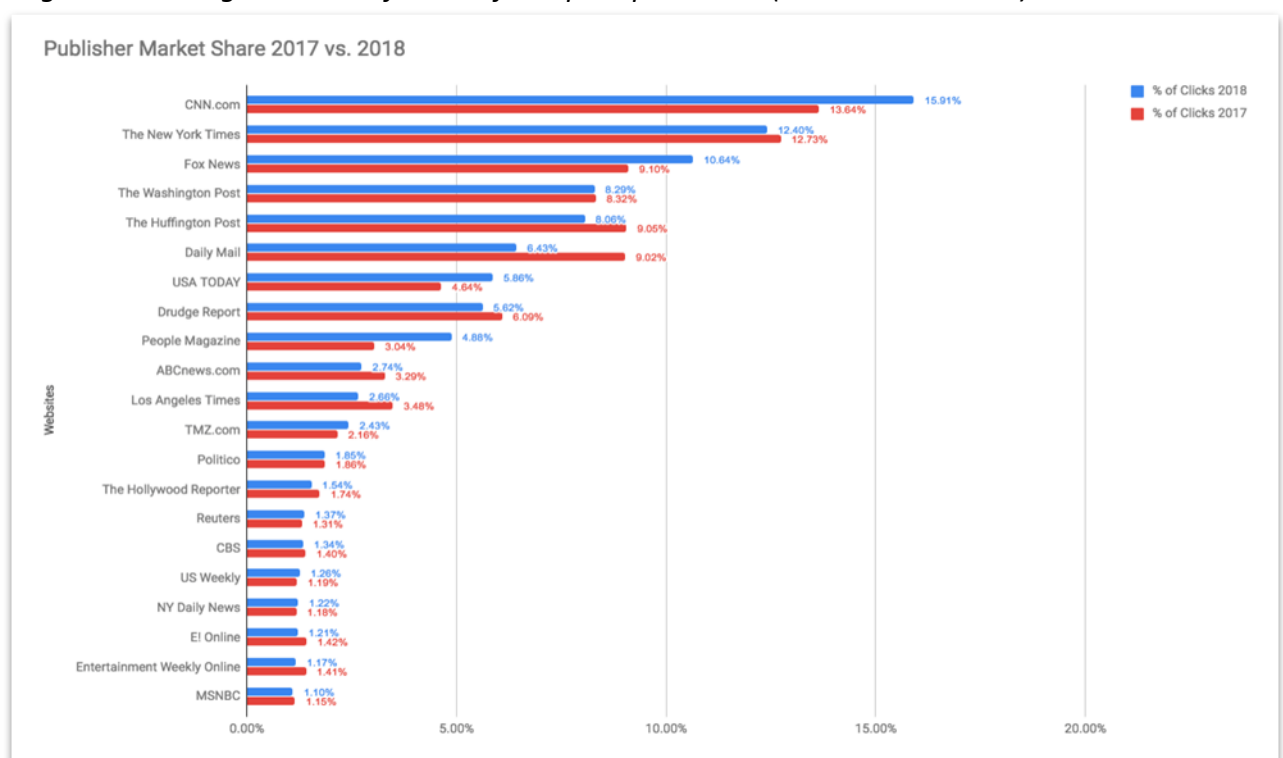
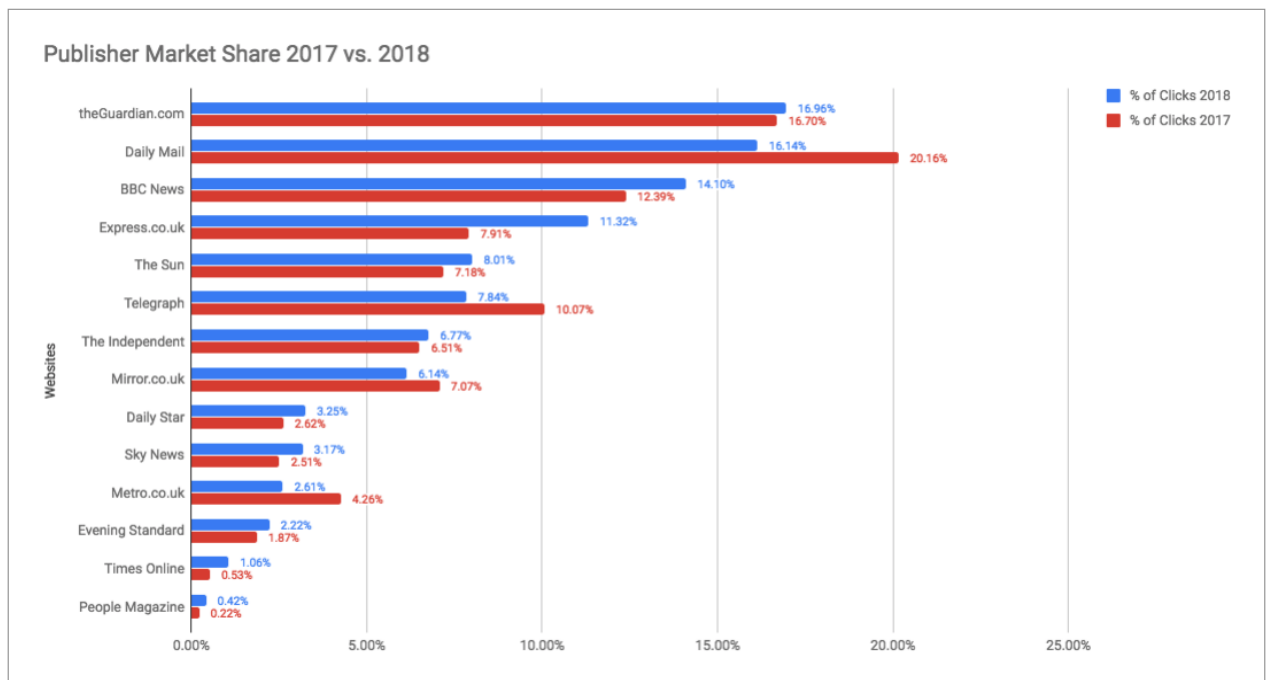


Figure 11. Change in share of search for top UK publishers (source: UK Hitwise)



42. Of course website traffic fluctuates from time to time, but there have been no changes in MailOnline's content or search engine optimisation that would account for such stark changes in two different markets.
43. Figure 12 suggests the true reason: a series of algorithm changes made by Google in October and November 2017 and again in March 2018. Figure 13, which gives search visibility data from a different source demonstrates even more dramatically how the March 2018 algorithm changes hit all UK popular news websites, with MailOnline particularly affected.

Figure 12: MailOnline search traffic impact from algorithm updates (sources: Omniture and Google Search Console)

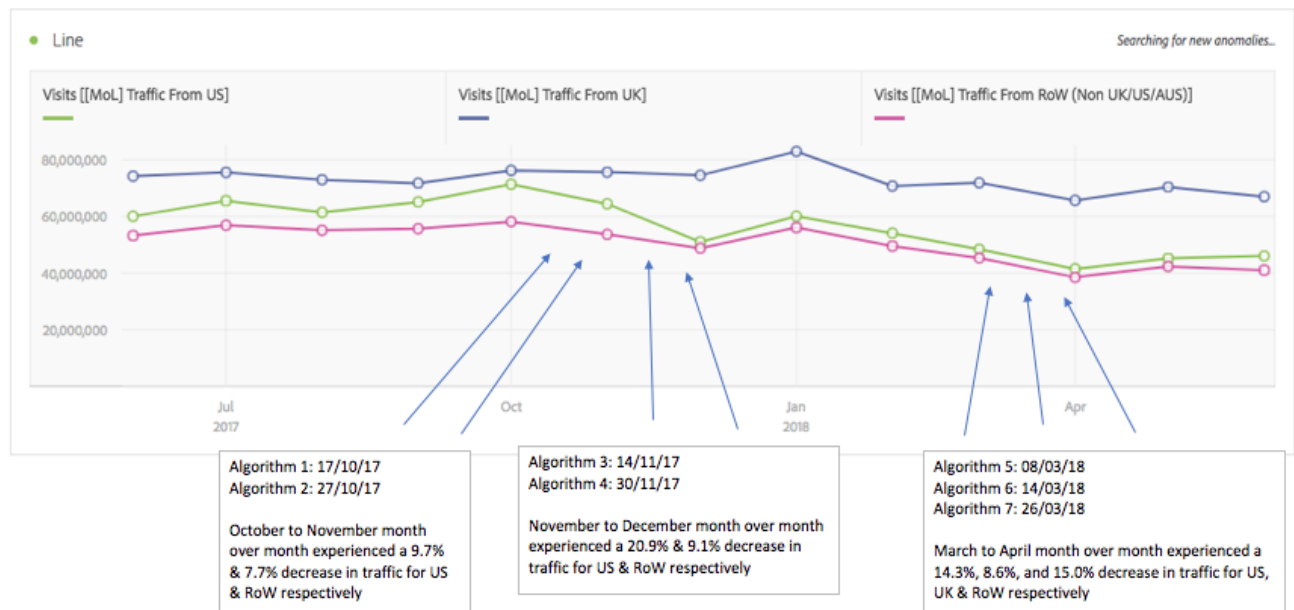
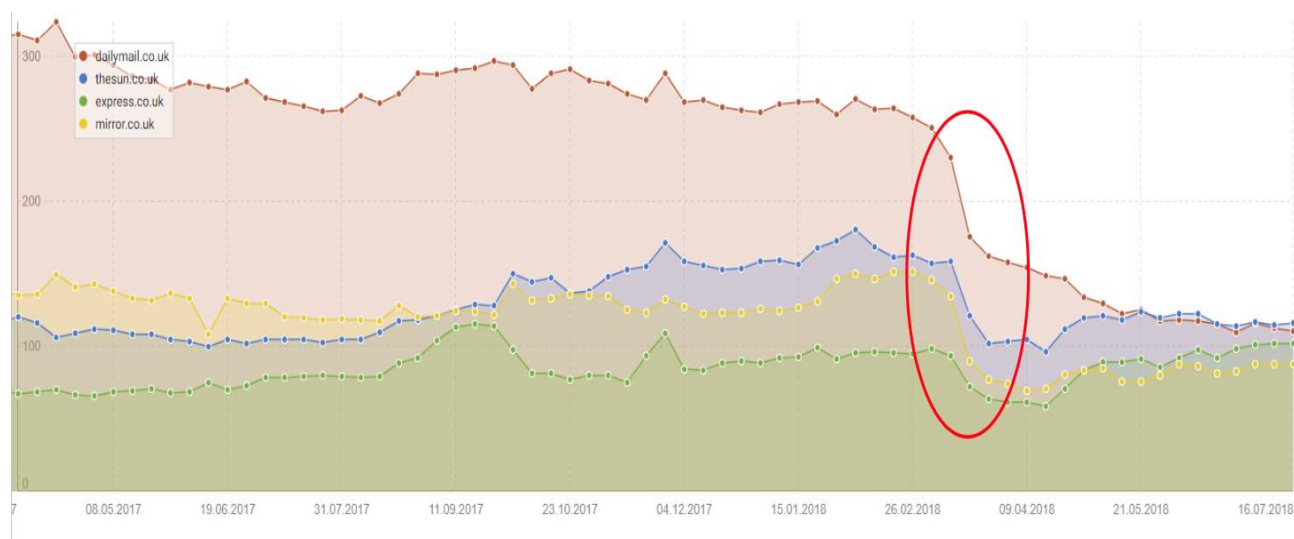


Figure 13: 12-month search visibility trend on Google UK (source: Systrix)

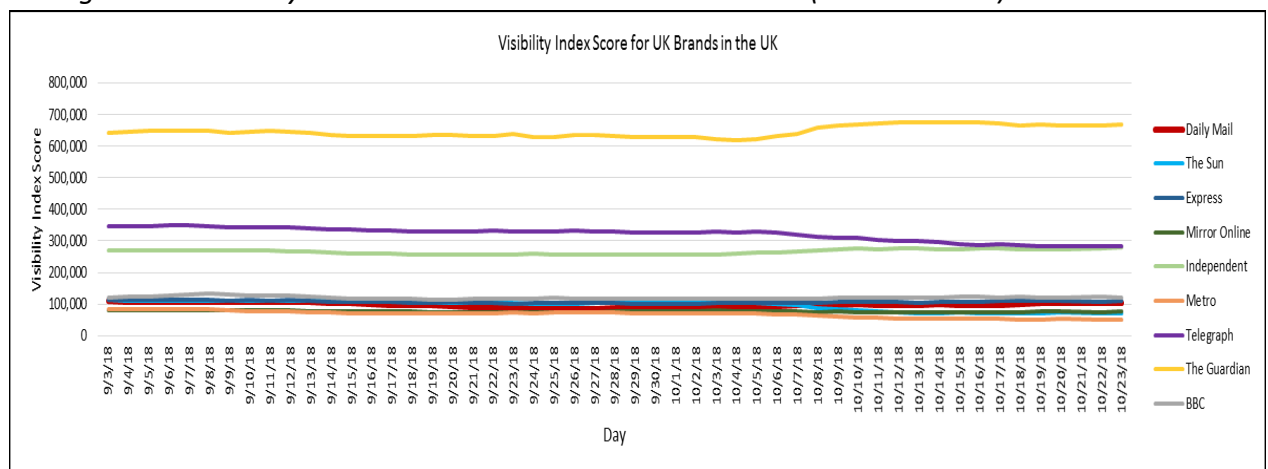


44. Unexplained changes in algorithms are not the only problem. Research undertaken by MailOnline shows that Google uses its control of algorithms to promote certain news brands at the expense of others.
45. Figures 14, 15 and 16 contain paired charts comparing Visibility Index scores against Share of Search over a three-week period in September 2018. Visibility Index scores show how frequently Google surfaces any chosen brand in the top 100 search results in any given territory against a basket of 1m keywords or search terms. Share of Search shows what percentage of the public's search requests in a given territory feature a chosen brand, as a percentage of all search requests for all brands, whether or not they

offer news. Deciding which news brands to surface against a given search term is a decision made by Google via its algorithms. Deciding what news to search for, and which search terms to use, are decisions made by members of the public without intervention by Google.

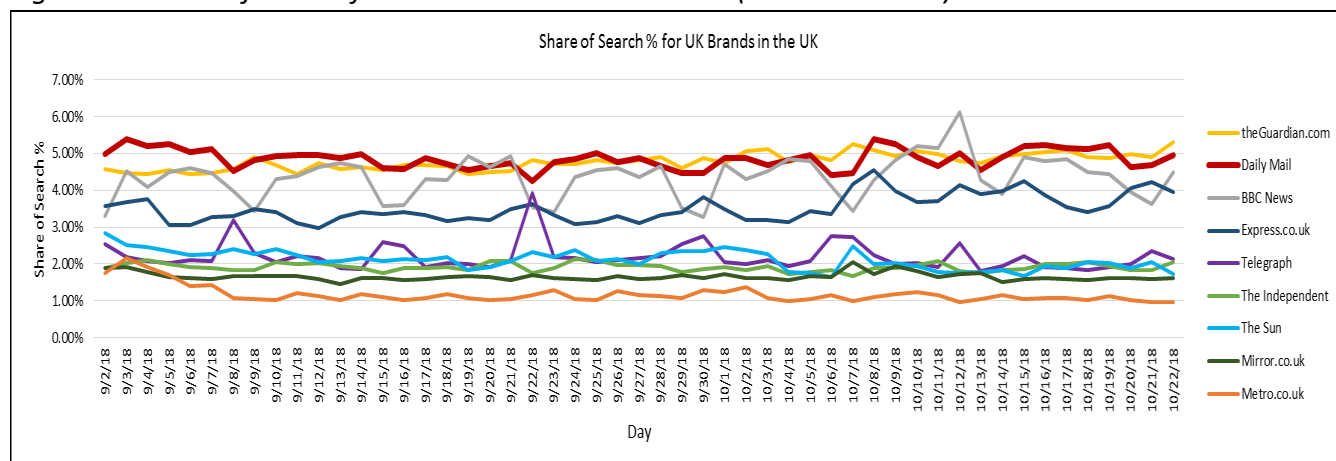
46. Figure 14 demonstrates that the Guardian is by a long distance the news brand most frequently surfaced by Google in response to search requests in the UK. The Telegraph and Independent are in second position, with around half the Guardian's score. The rest of the UK's news titles – including, interestingly, the BBC – are all surfaced approximately one-sixth as frequently as the Guardian.

Figure 14. Visibility Index Score UK News Brands in the UK (source: Sistrix)



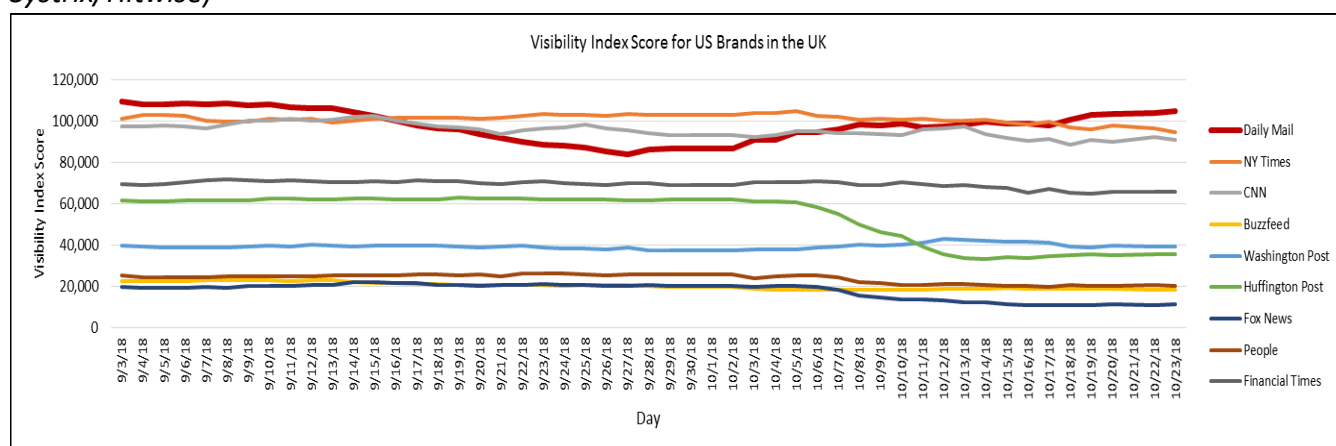
47. Google are notoriously secretive about how they choose which brands to surface, beyond insisting the process is data driven, and a key element is the extent to which an article is clicked on by users. If this were so, one might expect an approximate correlation between the Visibility Index and Share of Search. Google must have data on how often individual news brands are searched by the public and it would seem logical that this would influence which brands to surface.
48. But Figure 15 shows this is not the case. The three brands most frequently searched by the public are MailOnline and The Guardian, closely followed by the BBC. Why is there such a vast disparity in the positions of the Guardian, MailOnline and the BBC in the Visibility Index, determined by Google, and Share of Search, determined by the public?

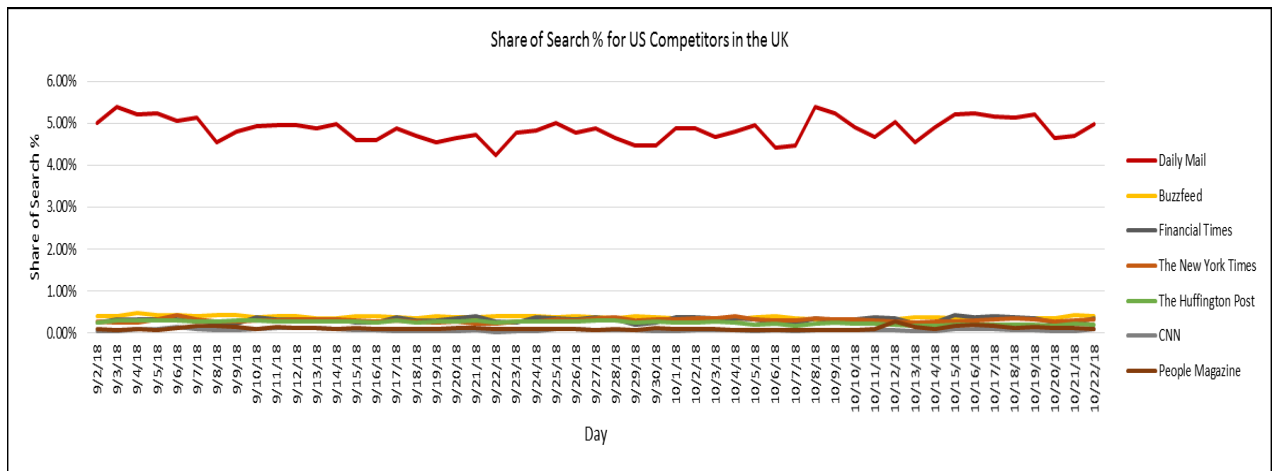
Figure 15. Share of search for UK news brands in the UK (source: Hitwise)



49. Surprisingly, Visibility Index scores for US news websites in the UK show that Google are just as likely to surface US news websites as they are MailOnline in response to UK search requests, despite the latter's vastly greater UK presence. Figure 16 shows the New York Times and CNN both have similar Visibility Index scores to MailOnline in the UK. However statistics for Share of Search (second chart) show that MailOnline has a consistent 5 per cent share of all searches made by the public, whereas no US website achieves more than 0.5 per cent. This means that although the British public are ten times as likely to search for MailOnline news stories, compared to the New York Times and CNN, Google's algorithms treat all three as though they are equally relevant to the UK audience.

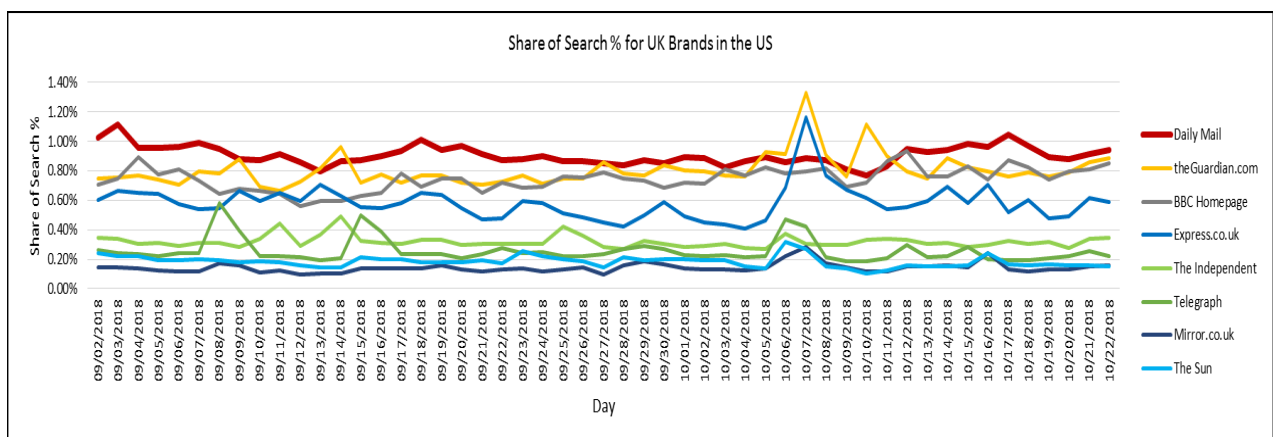
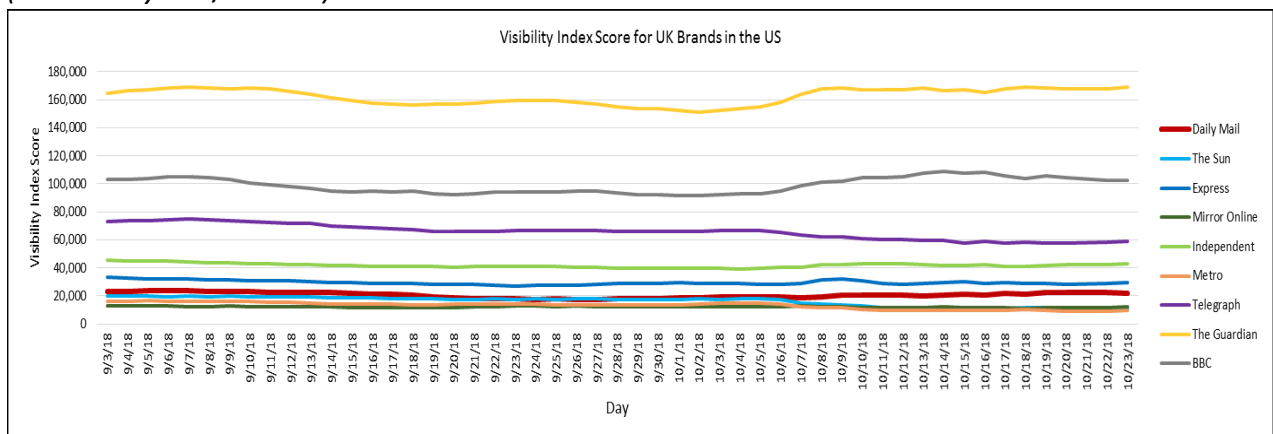
Figure 16: Visibility Index Score and Share of Search for US News Brands in the UK (source: Systrix/Hitwise)





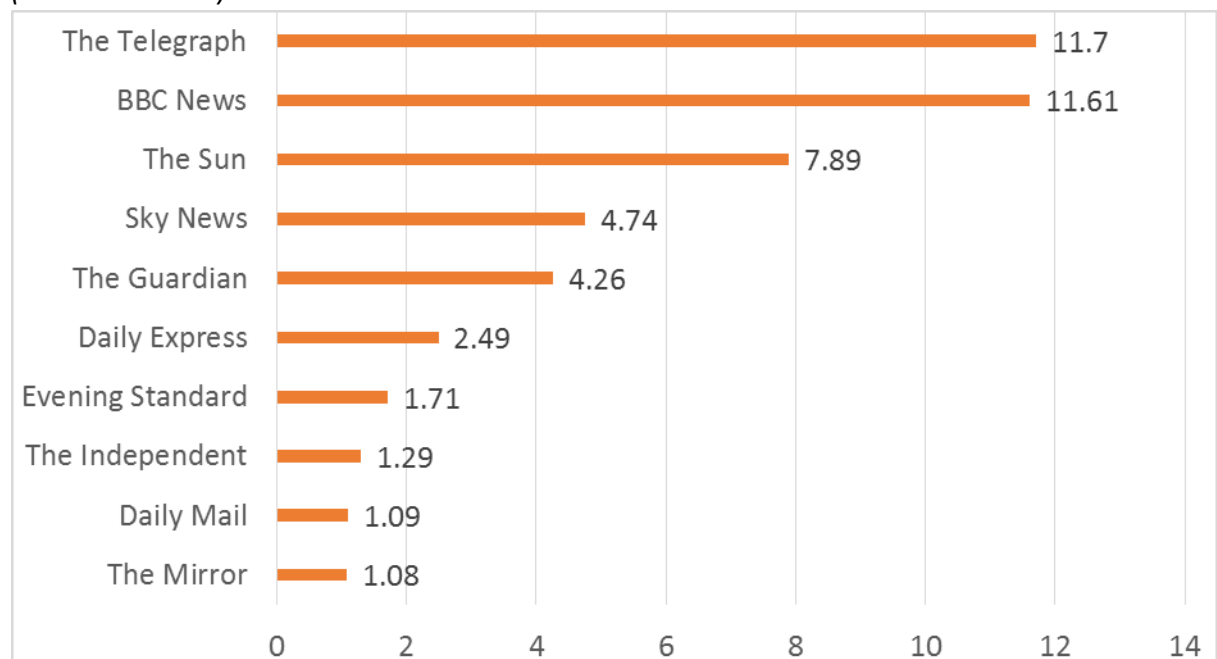
50. By the same token, it will not come as any surprise that the UK website which is most frequently surfaced by Google in the US is the Guardian, despite the fact that the UK website with greatest share of search in the US is MailOnline (Figure 17). What is surprising is that British news website with the second highest Visibility Index score in the US is the BBC, despite scoring so poorly in its home market in the UK.

Figure 17. Visibility Index Score and Share of Search for UK News Brands in the US (sources: Systrix/Hitwise)



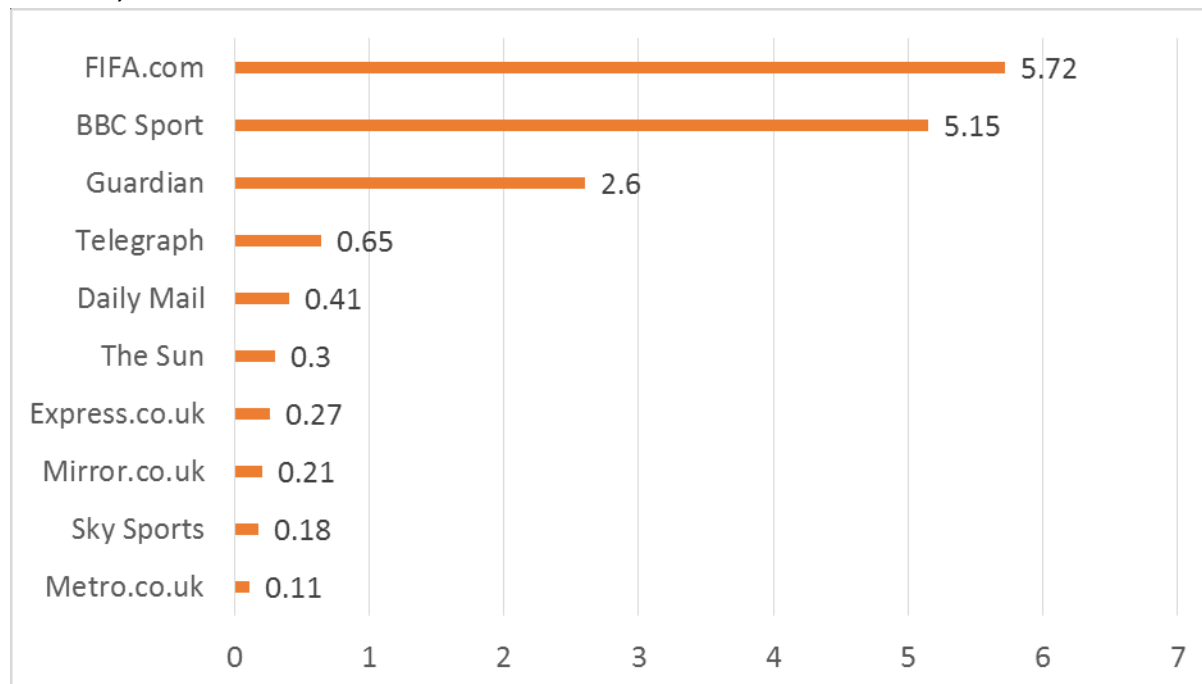
51. Why is this? Of course, Google's algorithms are secret, so no one can know for sure, but it may be no coincidence that in the UK the BBC carries no advertising, so has no commercial value to Google, whereas in the US the BBC does carry advertising, and Google earns revenue by facilitating the serving of ads for the BBC in the USA.
52. It is also noticeable that where there are no commercial reasons to do otherwise, Google's algorithms favour left/liberal leaning news websites – the New York Times and CNN have much higher visibility index scores in the UK than conservative Fox News, and the Guardian and the BBC have higher visibility index scores than MailOnline in the US. A lone exception to that rule in both markets is the Telegraph.
53. Data for two most popular news events of the year – the wedding of Prince Harry and Meghan Markle, and the World Cup – also show MailOnline performing inexplicably poorly in Google search. These were both events where MailOnline, as a hugely popular mass-market website, would normally expect to perform well compared to the BBC or broadsheet newspaper websites. The opposite was the case. The battle for the search term 'Royal Wedding' was won by the Telegraph (11.70 p.c.) and the BBC (11.61). MailOnline scored only 1.09 p.c., a quarter of the percentage for the Guardian (4.26 p.c.). The BBC's position on a state occasion might be understandable, but would four times as many people really chose the Guardian over MailOnline for royal coverage (Fig 18)?

Figure 18: Percentage share of 'Royal Wedding' searches to top news publishers (source: Hitwise)



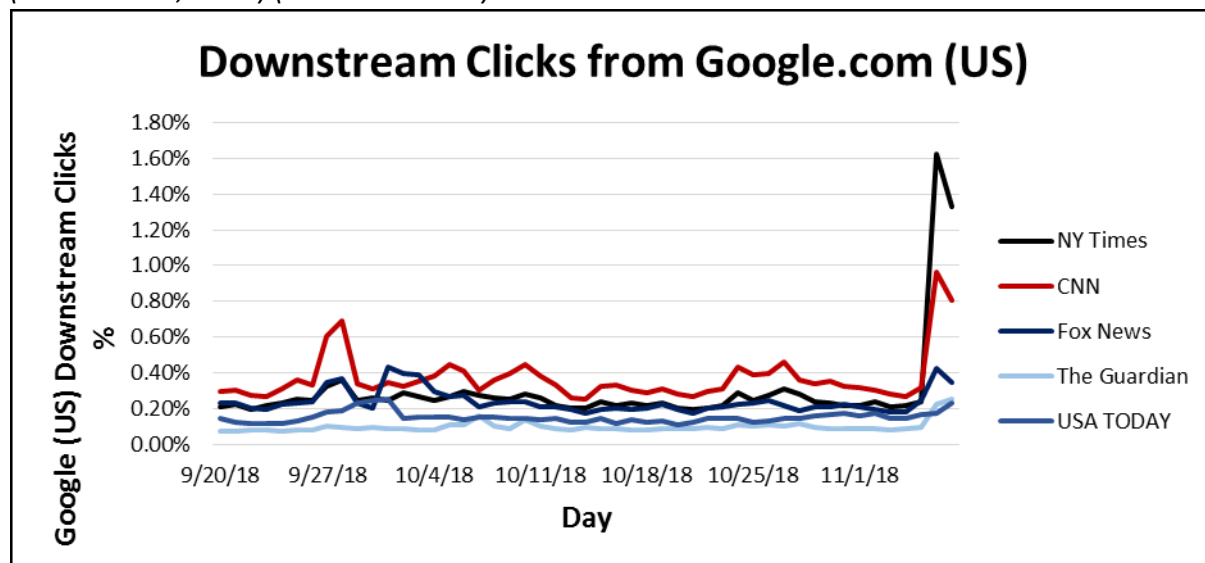
54. Football World Cup search results were even more heavily skewed. No newspaper website scored over 1 p.c. of search for the term ‘World Cup’ apart from the Guardian. The Sun and the Mirror, both of which would expect to score well on football, had even worse search results than MailOnline. This was because on this occasion Google chose to put their own content immediately below the search bar, linking it to FIFA, which consequently dominated search rankings, followed by the BBC and Guardian. Again, would anyone seriously expect the Guardian to achieve nearly ten times as many World Cup searches as the Sun, unless discrimination in Google’s algorithms were the cause? (Fig. 19)

Figure 19: Percentage share of ‘World Cup’ searches to top sports news publishers (source: Hitwise)



55. The same happens in the USA. Hitwise analysis of clicks from Google.com (Fig. 20) shows that this year’s mid-term elections generated enormous leaps for liberal news sources: 500 per cent for the New York Times and more than 300 per cent for CNN, whereas conservative Fox News barely shifted – strongly suggesting that Google’s algorithms were pushing readers in their direction.

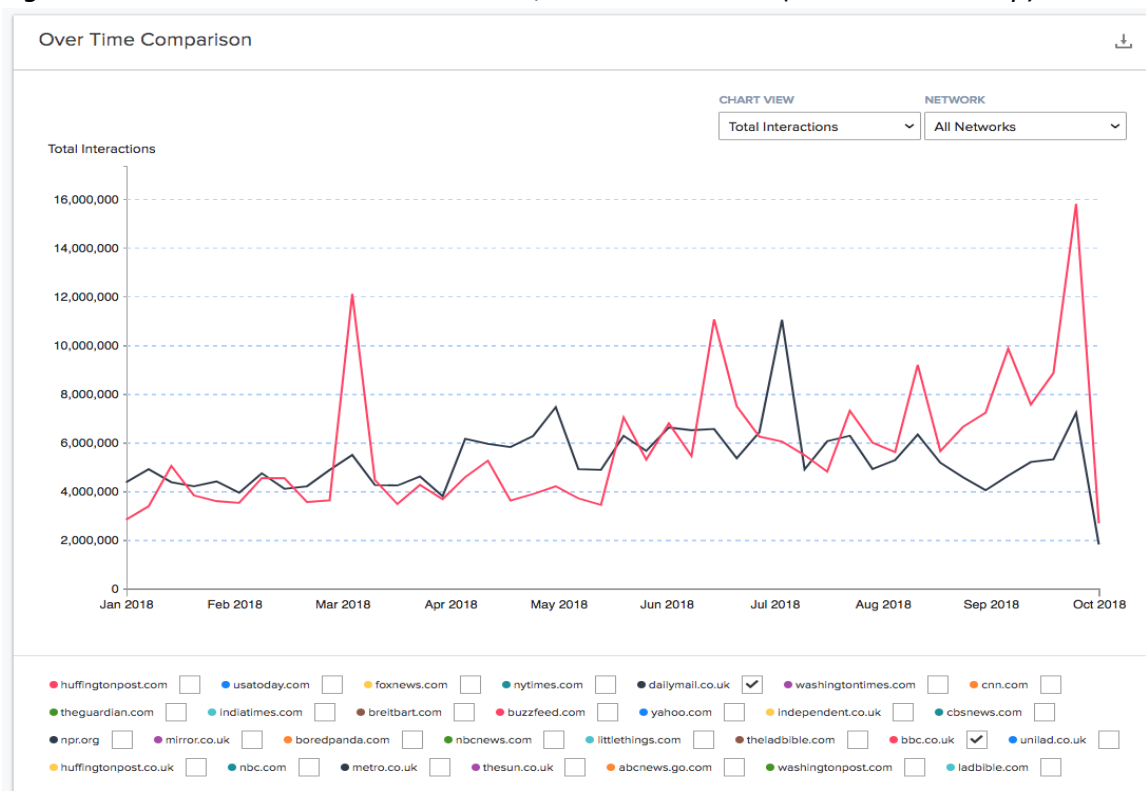
Figure 20: Downstream clicks from Google.com leading up to mid-term elections (November 6, 2018) (source: Hitwise)



56. Of course no news publisher can point to the specific changes in the algorithms which have caused these dramatic changes and anomalies in search results – because the algorithms are secret. But in newsprint terms it is the equivalent of WHSmith deciding that on Royal Wedding Day readers of the Daily Mail are given the Telegraph, and during the World Cup Sun readers get the Guardian.
57. Facebook also make regular changes to their algorithms, and again they can discriminate in an apparently arbitrary way against one news publisher in favour of another. A change made in July this year, to introduce so-called ‘trust ratings’ in the UK, India, France, Germany, Italy and Spain, caused a 13p.c. drop in engagements for MailOnline, and a 16p.c. increase for the BBC, according to website tracker Ezyinsights,²⁵. Figure 21 shows the same effect as recorded by another website tracker, Newswhip. BBC and MailOnline had been recording similar numbers of interactions throughout 2018 until July, when the BBC’s engagements began increasingly steeply. (Note: The dip for both publishers in October is a function of the way the chart is produced and will correct itself when further figures are available.)

²⁵ <https://ezyinsights.com/the-winners-and-losers-of-facebooks-trust-index/>

Figure 21: Total interactions on Facebook, BBC v MailOnline (Source: Newswhip)



58. The trust ratings were a response to the heavy criticism Facebook had received for distributing extreme content, invented news and conspiracy theories through its users' news feeds. The 'atomised' nature of items in Facebook's news feed, where news articles are viewed individually, without the context provided by the website on which they originally appeared, means users are often unable to judge how much credence they deserve.
59. However the trust ratings themselves were subject criticism when it emerged that the user survey on which they were based asked only two questions: 'Do you recognize the following websites'? And 'How much do you trust each of these domains'?²⁶
60. As detailed above, Facebook controls 64 percent of the market for social media in the UK. According to Ofcom's report *News Consumption in the UK 2018* it is the third most widely used news source in the UK, after the BBC and ITV, and globally, despite recent falls in traffic, it supplies 25 per cent of all referrals to news websites.²⁷ It is deeply concerning that one company, in such a dominant position, should be attempting, on the basis of a crude opinion poll, to determine which news sources users should trust, and restricting access to those it deems less trustworthy.

²⁶ <https://www.buzzfeednews.com/article/alexkantowitz/this-is-facebooks-news-survey#.fyRaVDEWV>

²⁷ <https://www.recode.net/2017/12/11/16748026/google-facebook-publisher-traffic-2017-increase>

61. Mark Thompson of the New York Times described the threat trust ratings pose in his Open Markets Institute speech²⁸:

We [the New York Times] regard the concept of “broadly trusted” as a sinister one, which misunderstands the role journalism plays in an open society and is likely to lead to damage and distort, not just the news business, but democratic debate.

Democracy depends in part on unbounded competition between different journalistic perspectives and the clash of different judgements and opinions. History suggests that mainstream news organizations frequently get it right, but also that, not infrequently, it is the outliers who should be listened to. At any given moment – think of mainstream media today in Russia, or in continental Europe in the 20s and 30s – a majority of the public may judge trustworthiness incorrectly.

To feed transient majority sentiment about trust back into the editorial decision-making process – and to do it essentially behind closed doors – is profoundly dangerous. The process of citizens making up their own mind which news source to believe is messy, and can indeed lead to “fake news”, but to rob them of that ability, and to replace the straightforward accountability of editors and publishers for the news they produce with a centralised trust algorithm will not make democracy healthier but damage it further.

62. However this is not only a threat to the plurality of news, and thus to democracy. It also prevents the proper functioning of the market for news. In its print form, newspapers are distributed through around 50,000 outlets in the UK – newsagents, convenience stores, supermarkets, garages etc. Some are large chains, but none of them are in a dominant position because the market is so diverse. If one newspaper retailer decides to restrict display of a particular title there are plenty of other retailers to fill the void. Moreover newspaper publishers have means they control by which they can push their product: promotions, TV and radio advertising, point of sale display.
63. None of this is available to digital publishers. They rely on one search engine, Google, and one social media platform, Facebook. Through their algorithms Google and Facebook control and manipulate the market in digital news, favouring some publishers and penalising others.
64. The extent to which Google manipulates search has already been the subject of regulatory action by the EU – most notably when the European Commission fined

²⁸ <https://www.nytco.com/wp-content/uploads/sites/3/MARK-THOMPSON-OPEN-MARKETS-INSTITUTE-.pdf>

Google \$2.7 billion for its own comparison shopping service over others in search results.

65. The only solution is full transparency of algorithms. This is necessary to demonstrate that all news providers are treated in the same way, without discrimination for commercial, political or any other reasons. Transparency will also allow news publishers to adapt their search engine optimisation when algorithms are changed, guaranteeing fair competition and secure business planning, rather than subjecting publishers to arbitrary swings in search and social media performance.
66. This transparency will have to be enforced: there will need to be a regulator to rule on complaints from news publishers about discrimination in algorithms, or means by which publishers can challenge discrimination in the courts.

How control of data reinforces market dominance

67. Google and Facebook also operate virtual monopolies on data. Advertisers no longer buy broad demographic groups, as they used to when choosing to place ads in, say, the Guardian or the Sun. Through programmatic advertising they can buy precise groups of individuals with known interests identified through their browsing habits.
68. Both Google and Facebook have made it a corporate priority to match data on the same customers from all their different properties so, for instance, any advertising platform which tries to compete with Facebook is in reality also competing with their ability to collect data from the same user when they are on WhatsApp and Instagram. News publishers can't begin compete, even if they were to force all their users to register so they had full access to their data. One of the biggest problems which faced Snapchat, one of the few challengers to Facebook, when it started selling ads two years ago was in matching Facebook and Google's ability to target users via data.²⁹
69. The platforms have also demonstrated that they are not always honest about what data they are collecting and how that accumulated data is used. This was why the European Commission fined Facebook £94m last year for misleading the Commission about sharing data with WhatsApp. When Facebook bought WhatsApp in 2014 it told the Commission it would not be able to match user accounts on both platforms, but went on to do exactly that – the issue which this year was to cause WhatsApp founder Jan Koum to resign from Facebook's board.³⁰
70. The problem is not only the actual collection of data but the way it is used by the platforms to convince marketers that only they can accurately identify potential

²⁹ <https://www.socialmediaexaminer.com/snapchat-advertising-is-it-working-new-research/>

³⁰ <https://www.theguardian.com/business/2017/may/18/facebook-fined-eu-whatsapp-european-commission>

customers³¹. Just as, in the early days of computers, IBM's market dominance was underpinned by the catchphrase 'nobody ever got fired for buying IBM', so advertisers prioritize their spending commitments to Google and Facebook because they rely on the platforms' ad spend performance data and cannot compare performance accurately against other channels in a campaign.

71. Google and Facebook exploit the vast amount of data they harvest about their users, across multiple platforms, to convince advertisers they are able accurately to identify the interests and intents of all potential customers. This is reinforced the platforms' control of analytics. Every digital ad contains a pixel, inserted by Google or Facebook, which reports every time the ad is viewed. The results are presented in such a way that even if user actually clicks on the ad, and makes a purchase, when he views it on MailOnline or another news brand, if he has also viewed it via Google or Facebook, the engagement is attributed to Google or Facebook, rendering the news brand invisible to the advertiser. The result is that 90 per cent of all new advertising spend goes to Google and Facebook.³²
72. Clearly user data from Google and Facebook may NOT always be the most accurate or the strongest available but the platforms have convinced the advertising industry they are synonymous with effectiveness of return on ad spend - in other words they are making up the rules of the game, which makes it easier for them to win the game.³³ In short, Google and Facebook's ability to harvest data on almost everybody via their different platforms makes them invulnerable to competition.
73. The consequence of this dominance is that there is virtually no investment in serious start-up competitors to Google and Facebook. The entire strategy for start-ups is to achieve a scale that prompts one of the existing big players to buy them up and absorb them, not to become the next web giant themselves.
74. From the user's perspective a duopoly on data means that they have no choice but to accept it. Technically there are steps users can now take to limit the data collected on them, but in reality it is complicated and almost nobody bothers to opt-out. Furthermore the platforms are very adept at exploiting attempts to limit their control of data and instead extend it. European publishers were horrified when Google's response to the EU's General Data Protection Regulation (GDPR) was to impose a regime that would effectively make them data controllers – giving them the freedom to do what they want with data collected through publishers, while threatening not to serve ads to any publishers which do not satisfactorily obtain users' consent on their behalf.³⁴
75. There is a distinct lack of viable competitive services which could make their point of difference either a less intrusive data regime *by default* or a business model that shares

³¹ <https://www.techtarget.com/before-you-leap-understand-the-4-pillars-of-intent-based-marketing/>

³² <https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth/>

³³ <https://www.marketing-interactive.com/ad-spend-on-facebook-increases-as-advertisers-remain-unfazed-amidst-data-scandal/>

³⁴ <https://techcrunch.com/2018/05/01/google-accused-of-using-gdpr-to-impose-unfair-terms-on-publishers/>

the value of users' data with the users themselves. Regulation could go some way to improving the situation but a market solution - breaking up the platforms and allowing competition - would be much more effective.

Conclusions and Recommendations

In this section we address the questions raised by the Call for Evidence.

1.What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

76. The digital revolution has presented the British news publishing industry with an historic opportunity. For the first time British publishers have been able to compete with their American counterparts on equal terms on a global basis.
77. A number of British publishers, including MailOnline, the Guardian and the BBC have met this challenge with remarkable success, building global audiences which easily match those of their American rivals.
78. However the nature of the internet, reinforced by the dominant position of a very small number of very large tech businesses, has meant that despite their success in building audiences major British news publishers have been unable to secure enough revenue to replace shrinking returns on print titles.
79. Although Google recognises the importance of news in driving the growth of its business³⁵ the fact that an overwhelming share of advertising revenue has been captured by the tech platforms means virtually no British news publisher has been able to turn a profit. For the BBC this is not a problem, as it is state-funded (although it sells advertising in the US and Australia). The Guardian has been reduced to asking users for donations and, although MailOnline is tantalisingly close to break even, it has not yet reached that point.
80. Traditionally advertisers have relied on news to create audiences for their message, and have paid news publishers to supply that news. However Google and Facebook extract audience data from news publishers' users, then sell that data to advertisers without paying for the news which created it.

³⁵ 'The underpinning of our business is search, and search needs a rich ecosystem of knowledge to work' – Richard Gingras, Google Vice-President, News. Briefing to UK news industry executives, October 9 2018

81. Without revenue to pay for reporters and editors, news publishers have had to narrow their coverage, avoid costly news projects, cut staffing and close publications. Local and regional publishers, traditionally dependent on classified advertising, have been hardest hit and in many parts of Britain important functions of civil society, such as courts and council meetings, are no longer covered. However all news publishers are struggling to generate significant revenue, and having to cut back on more expensive forms of journalism
82. This is a significant social harm. Unless means are discovered to reestablish the link between news generation and advertising revenue – and subscriptions are not viable for the 99 per cent of publications which do not serve a high value niche market - commercial news publishing will eventually not be viable. This would mean the only publisher with sufficient resource to hold power to account in the UK would be the state-funded BBC. To rely on one branch of the state to report on the activities of other branches of the state, without being balanced by a media which is independent because it **doesn't** rely on state funding, would be a very dangerous risk to a free society.

2. What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

83. Both Google and Facebook have ruthlessly used the revenue generated in one market to buy up competitors and expand into other markets. Google have also used their dominance in search to promote their own products and suppress the offerings of rivals.
84. This inhibits innovation and denies choice to consumers. In order to enjoy the benefits of search and social media consumers have no option but to surrender vast amounts of personal data to Google and Facebook, which is then used to fund dominance in yet more markets.

3. What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

85. Facebook have bought competitors – WhatsApp and Instagram – which offered the public a route to social media which did not involve the wholesale surrender of personal data. They have then forced those former rivals to market their users' personal data on the same exploitative terms as Facebook.
86. This has included selling to it organisations, such as Cambridge Analytica, which pose a serious threat to the democratic process.

4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

87. The digital world is notoriously a winner-takes-all environment. Digital businesses have very high fixed costs and extremely low marginal costs, meaning that once market dominance is established it is virtually impossible for challengers to find enough consumers and producers to provide competing networks. Market dominance also produces such prodigious revenues that it is then very easy for tech platforms to establish dominance in new markets as they emerge. Thus Google leapfrogged from search to online operating systems, to email, to browsers, to video, to apps, to maps. They are now targeting ad-tech.

5. To what extent is it relevant for any identified benefits and harms that consumers receive 'free' services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

88. Mark Thompson said in his Open Markets Institute lecture:

It is sometimes argued that, because the major platforms do not charge consumers money for their services, the public cannot suffer exploitative pricing. But barter implies an exchange of goods or services of real and quantifiable value in which a party can get a better or worse deal. If scale and network effects allow a search or social platform to achieve market dominance, a consumer who feels that they must use the platform may find themselves exchanging their attention and data for less in return by way of services than they would if there were effective competition. The same goes for a publisher who may conclude that they have no choice but to offer their content to a platform despite the poor economics

89. One of the major 'free' services offered by the platforms is news, however the data surrendered in return by the public is not returned to the news publisher, but sold to advertisers on terms that may be advantageous to the platforms, but do not cover the cost of generating news in the first place.
90. The public do not realise that the nature of this transaction means the quality of news product they get 'for free' will inevitably deteriorate - and over time in many cases disappear altogether.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

91. Our concern relates to the surfacing of content. Both Google and Facebook do this through algorithms which are both secret, and changed frequently. Our research shows that these changes are not neutral, as they should be if the platforms were truly just conduits for information.
92. On the contrary they regularly favour some publishers and disadvantage others. Whether this is because of the acknowledged left-liberal sympathies of the Google and Facebook employees who write the algorithms, or a corporate response to perceived political pressures, we have no way of knowing.
93. But the fact remains that the algorithms are a device by which Google and Facebook could put a news publisher out of business, or at the very least force a publisher to accede to any demands they choose to make. This is seriously anti-competitive.

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

94. The global nature of the tech platforms has meant that until now competition issues affecting the UK have largely been dealt with by the EU. Clearly with Brexit that will change.
95. But it would be wrong to assume that as a nation state the UK carries little weight. Britain's digital advertising market is the third largest in the world; larger than Japan's, twice the size of Germany's and nearly four times the size of France.³⁶ We understand that when the EU fined Google for market abuse by promoting its online shopping service 40 per cent of the detriment discovered across Europe was in the UK.
96. The EU has been more effective than the US in attempting to tackle abuse of market dominance by the platforms – though even in the US there is a growing belief that this is a problem which must be confronted and the Federal Trade Commission is facing increasing criticism over its failure to take action.³⁷
97. There is no reason why, as an independent nation state with a large and very advanced digital sector, the UK should not be a leading player in this process. Market dominance is

³⁶ https://www.appnexus.com/sites/default/files/whitepapers/guide-2018stats_2.pdf

³⁷ https://www.scribd.com/document/395074926/12-6-2018-FTC-Follow-Up-Letter-Android-Final?campaign=VigLink&ad_group=xxc1xx&source=hp_affiliate&medium=affiliate
<https://www.thetimes.co.uk/article/trump-looks-at-curbing-influence-of-tech-giants-hmqdlk6dg>

achieved so quickly and comprehensively in the digital world that steps need to be taken to counteract it as a matter of urgency.

Recommendations:

- **Google and Facebook must be broken up, horizontally and vertically.**
- **Google should be forced to sell or divest its interests in video (YouTube), browsers (Chrome) and mobile OS (Android).**
- **Facebook should forced to sell or divest Instagram and WhatsApp.**
- **The government should remove its hidden subsidy to Google and Facebook (and Amazon) by forcing them to pay proper corporation tax.**
- **There should be a Competition and Markets Authority investigation into the workings of the adtech industry, with a view to inceasing transparency and ensuring it delivers proper value to both advertisers and publishers.**
- **Measures need to be taken to ensure tranparency of search and social media algorithms, to prevent Google and Facebook distorting the market by discriminating against news publishers, whether for commercial or political reasons.**

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

98. One of the consequences of the digital revolution is that the tech platforms are able to accumulate data provided by users accessing news content and sell that data to advertisers without having properly to reward news publishers.
99. News publishers, as part of an industry which is naturally and rightly fragmented, have been unable to challenge the monopoly power of Google and Facebook and demand payment for the news content they supply to the platforms.
100. We have not examined it in great detail in this submission, because it is properly a matter for the Cairncross Review, but the European Commission has taken vigorous steps to redress this imbalance – against ferocious lobbying by Google - and in September the European Parliament passed the European Copyright Directive.³⁸

³⁸ <https://www.theguardian.com/law/2018/sep/12/eu-copyright-law-may-force-tech-giants-to-pay-billions-to-publishers-facebook-google>

Recommendation:

- **The Copyright Directive still has to be ratified, and will need to be incorporated into British law post-Brexit. The Government should be devoting resources to ensure legislation is drafted in such a way that it restores the economic balance between the Google/Facebook duopoly and the pluralistic news publishing industry.**

101. There have also been suggestions that the platforms should be subject to content regulation, possibly similar to that which covers broadcasters and the majority of news publishers in the UK with a newspaper background (but not the Guardian, Independent or FT).
102. We are strongly opposed to this. If the platforms fall under government regulation they will do whatever they have to do to make it work for them commercially.
103. To comply with regulation, the platforms would have to moderate all content. Even they would not have the resources to do this manually, so they would have to rely on algorithms, which are not nearly sophisticated enough to do such a complex job competently.
104. Inevitably they would adopt a safety-first policy. Editorial integrity, freedom of speech, and publisher revenues will not be priorities – and the public will be the losers.
105. A further massive risk is that, as the appointers of regulators, governments will have ultimate control over what is on the internet and who become its biggest winners.
106. There would also be a negative effect on competition – the cost of complying with regulation will make it even harder for new entrants to challenge Google and Facebook, just as the EU's recent GDPR regulation has only consolidated Google and Facebook's power in the programmatic advertising market.

Recommendation:

- **Regulation will only exacerbate the problems created by market dominance in the digital industry, and should not be considered as an option.**

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

107. We note that the British Government's announcement of a digital sales tax has prompted fresh efforts by the European Union to make progress on their 'painfully slow' efforts to introduce a Europe wide tax on the tech giants.³⁹
108. Of course this tax does not address the competition problems in tech industry. However if a digital leader such as the UK, shortly to be free of EU constraints, can take unilateral action to trigger international action over tax policy, there is no reason why it could not do the same in matters of competition policy.

[Name redacted]
[Job title redacted]
DMG Media
November 2018

³⁹ <https://www.thetimes.co.uk/article/eu-divided-over-digital-sales-tax-k0crzwrn8>

Doteveryone is a think tank that champions responsible technology for the good of everyone in society. Our work explores how technology is changing society, shows what technology that considers its social impact can look like, and builds communities and networks to improve the way technology shapes our world.

Our *Regulating for Responsible Technology: Making the case for an Independent Internet Regulator*¹ programme outlines the current landscape for digital regulation in the UK and outlines our proposals for a regulatory system that ensures digital innovation protects consumers and society. Our *People, Power and Technology*² survey research explores the public's understanding of and attitudes towards digital technologies. This consultation response draws on the findings from these works, which are informed by discussions with regulators, policymakers, technology companies, civil society and the public.

1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

1. Multinational digital monopolies increasingly challenge national sovereignty and attempts to regulate by national regulatory bodies. A July 2018 paper by UCLA School of Law's Professor Kristen Eichensehr outlines the changing social contract between multinational technology companies and nation states³, where such companies disregarding the authority of the state - As in the case of the dispute between the US government and Apple over the right to access San Bernardino shooter's iPhone⁴.
2. Where companies stand between government and users to protect latter's interests, they act as "user-sovereignities" operating outside of national legal frameworks. Whilst not inherently harmful - such action may be taken to protect user privacy, for example - acting unilaterally in the absence of the transparency, accountability, due process and democratic mandate that define public law is problematic.
3. Where enforcement agreements between states are not present and multinational companies have no significant presence in a nation, encouraging compliance with regulatory action can also be difficult.
4. Comparisons of large technology companies to utilities and infrastructure⁵ reflect the reality that many offline and digital services in the economy are reliant upon them to function. For example, applications not hosted on the app stores of digital devices with high-market share have little chance of building a user base at scale, whilst the use of large digital services as identity providers for other digital services further increases reliance upon them. This is a significant form of power which can be used to influence other organisations and markets. A recent example of this is Facebook's blocking of Vine's video app's friend-finding feature, shutting down their access to Facebook's API⁶.
5. To address digital monopolies competition regulators should broaden definitions of market power to encompass more than turnover, market share and traditional economic metrics. Assessments

¹<https://doteveryone.org.uk/regulating-for-responsible-technology/>

² <https://doteveryone.org.uk/project/peoplepowertech/>

³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205368

⁴ <https://www.apple.com/customer-letter/>

⁵ <https://5clpp.com/2018/04/23/regulating-social-media-as-a-public-utility/>

⁶<https://www.businessinsider.com/facebook-documents-mark-zuckerberg-restricted-vine-data-access-2018-12?r=UK&IR=T>

of power should incorporate factors such as data volume and value, web traffic, users numbers, user “stickiness” (how well they are retained and engaged), degree of interoperability and connectivity to other digital services, R&D spending and the strength of platforms’ network effects and software assets (such as algorithms and AI).

6. A definition of consumer welfare that goes beyond consumer price is also needed to consider factors such as information plurality, behavioural control and privacy.

5. To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

7. Transparency and accountability around the usages of data will be fundamental in driving innovation whilst protecting the public interest. To earn trust from consumers and earn consent data controllers must be open about the wider context of the data’s use. This includes factors such as the degree of de-identification, motives for data use (commercial vs non-commercial), whether data will be used in aggregate or individually, whether it is encrypted and how data is shared internally and externally by a company.
8. Our *People, Power and Technology* research⁷ into the public’s attitudes and understanding of digital technologies shows that significant blind-spots in understanding of use of personal data: Only 21% are aware that data can be gathered in order to determine the price of goods they pay online, 45% are unaware information they share on social media can be used to target ads and 24% don’t know how technology companies make money.⁸
9. Use of data in consumer markets should therefore be made more understandable to the public to encourage meaningful transparency and strengthen accountability of users and stewards of such data. Without this consumers will face considerable difficulty in identifying, and calling out, benefits and harms associated with ‘free’ data-driven services.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

10. An important consideration for policies relating to data-driven ‘free’ services is multi-sided platforms, where sellers and platform intermediaries all receive a proportion of the value created and buyers and sellers pay and receive different prices for a service or product. More work is needed to develop a framework for ensuring value flows, which are often decided in real-time by algorithms, are distributed fairly between all three parties.
11. Public understanding of algorithm-driven personalised pricing is also low. A lack of consumer awareness of such practices may reduce the likelihood of consumers switching between services and notify regulators and seek redress where they are the victim of discriminatory pricing, hampering competition and resulting in consumer detriment.
12. 47% of respondents to our *People, Power and Technology* research have not noticed that prices change when they search repeatedly for them online, and only 21% are aware that data can be gathered in order to determine the price they pay for goods online.

⁷ <http://understanding.doteveryone.org.uk/>

⁸ https://doteveryone.org.uk/wp-content/uploads/2018/04/Doteveryone_PeoplePowerTechDigitalUnderstanding2018.pdf

13. Men were significantly more likely to report being aware of companies collecting data for personalised pricing than women (27% vs 16%) and those in social grade AB were more likely to be aware than grade DE (24% vs 18%). There are also significant regional differences in awareness: Only 13% of respondents from the East Midlands are aware of personalised pricing, compared to 25% in London and Wales.
14. These discrepancies show that personalised pricing has the potential to be discriminatory when applied across society as a whole – people of a lower social grade and women are on average less likely to be aware of personalised pricing, and thus less likely to take steps to avoid it in instances where they may be being charged more.
15. Evidence suggests women pay more than men for a range of products⁹, meaning this awareness gap has the potential to lead to significant economic disparities and harm.
16. Online service providers should be obligated to notify users and seek consent when personalised pricing is being used and display what information has been used to determine what price a consumer sees.
17. More broadly personalised pricing set by algorithms and artificial intelligence, as with all algorithms, are able to absorb biases in the data sets used to train them. The use of personalised pricing algorithms by large organisations should be subject to auditing by an appropriate regulator to check they are not discriminatory.
18. Traditional cartel laws make it illegal for companies to agree to limit competition or fix prices. The effects, and underlying intent of, pricing algorithms is currently difficult to determine, making it hard to assess if companies have knowingly colluded.
19. Techniques to encourage interpretation and auditing of algorithms are therefore a fundamental priority for competition regulators, and a framework for assessing algorithmic fairness should be a cornerstone of future digital competition policy. A number of techniques for gauging bias algorithmic discrimination already exist or are in development¹⁰, with the Information Commissioner's Office will also be looking closely at this area up to 2020.¹¹ Competition regulators must stay up-to-date with progress of these approaches to develop their own tailored algorithmic auditing policies and approaches.

7.What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

20. Effective competition policy is reliant not only on the Competition and Markets Authority being able to regulate effectively. In an economy where digital technologies, e-commerce and data-driven business models are ubiquitous across all sectors, all regulators must have the powers and capacity to address the challenges and opportunities inherent in these technologies.
21. In the short term, the Competition and Market Authority's newly established Data, Technology and Analytics unit must be proactive in sharing their expertise and evolving thinking around digital competition policy across the regulatory system. This collaboration and knowledge sharing can

⁹ <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CDP-2016-0027#fullreport>

¹⁰<https://www.economist.com/science-and-technology/2018/02/15/for-artificial-intelligence-to-thrive-it-must-explain-itself>

¹¹<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/information-commissioner-s-office-appoints-in-house-expert-to-research-and-investigate-the-impact-of-artificial-intelligence-on-data-privacy/>

be strengthened through existing initiatives such as the UK Regulators Network and the Better Regulation Executive.

22. In the long-term, ensuring all regulators build their own capacity to positively shape the digital economy should be a central priority for both government and the Competition and Markets Authority.
23. Our *Regulating for Responsible Technology* research outlines our proposals for empowering regulators to better deal with issues in the digital economy. We propose establishing a centralised Office for Responsible Technology to deliver these functions, but they could conceivably also be delivered by Government and regulators. These functions are:
 - a. Addressing the gaps in digital regulation by conducting reviews of regulators' powers, remits and resources to ensure they remain up-to-date with the needs of the digital economy
 - b. Anticipating future digital challenges and opportunities by strengthening all regulators foresight and horizon scanning capabilities and establishing a Foresight Network across government and regulators to share learnings.
 - c. Fostering communities of practice around emerging forward-looking regulatory approaches including the Financial Conduct Authority's Sandboxes and emerging delivery models such as the Tripartite agreement between Citizens Advice, Ofgem and Ombudsman Services.
 - d. Ensuring leaders in the regulatory sector have the understanding and tools needed to lead their organisations through digital change. Doteveryone is currently developing a Digital Leadership programme for regulators, emulating similar successful programmes we have delivered for Acas and the Greater London Authority¹².
24. A strengthened redress system for the UK is also vital to promoting competition and protecting the interests of consumers. We propose an Office for Responsible Technology to:
 - a. Audit measures taken by digital services to protect users' interests to ensure their effectiveness.
 - b. Provide backstop mediation and dispute resolution where digital services own measures are unsatisfactory.
 - c. Provide redress where digital services have not dealt with harms appropriately. Collective redress should be possible where the same harms have affected groups, such as cases of large-scale data breaches or algorithmic discrimination against particular demographics.
 - d. Share learnings and case studies with the wider sector and government to raise standards and influence policy.

¹² <https://doteveryone.org.uk/project/digital-leadership-2/>

Digital Competition Expert Panel Secretariat
HM Treasury
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dcep@hmtreasury.gov.uk

07 December 2018

Dear Sir/Madam,

RE: Call for evidence on competition in the digital economy

FSB welcomes the opportunity to provide a response to the above call for evidence.

The Federation of Small Businesses (FSB) is the UK's leading business organisation. Established over 40 years ago to help our members succeed in business, we are a non-profit making and non-party political organisation that's led by our members, for our members. Our mission is to help smaller businesses achieve their ambitions. FSB is also the UK's leading business campaigner, focused on delivering change which supports smaller businesses to grow and succeed.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

Digital markets, such as social media, e-commerce, search and online advertising, provide substantial opportunities for small businesses:

- Barriers to entry and growth have been reduced by the effects of digital technology on consumer markets.
 - For example having physical premises is now less of a requirement, and in some cases not a requirement at all, for running a small business.
 - Websites enable e-commerce, which greatly expands the market reach possibilities of even the smallest business.
 - Social media can be used to advertise products and services more widely than ever before, and combined with targeted search can be a powerful driver of business.
 - Online advertising in general can be useful to small businesses, but there are limitations on how much they can benefit from search engine optimisation.
- Equally importantly digital technology has also offered opportunities to increase operational efficiency within businesses, which feeds through either directly or indirectly into better value for money products and services for consumers.
- New technologies have widened the scope for the development of new products of services or the novel evolution of existing goods and services.

Despite these benefits, there are a number of substantial downside risks to how competition operates in digital consumer markets, in large part due to the nature of the technology and the consequent way they impact market behaviour and structures. These

risks include network effects in digital markets, which can lead to dominance issues. This is of particular concern in the context of e-platforms which act as 'gatekeepers' for many smaller businesses to new market opportunities. These platforms place a lot of market power in the hands of the intermediaries that operate the platforms. Consumer choice can be shaped by what and how these platforms present information, while smaller businesses are largely recipients of the terms, conditions and practices of such platforms.

Technology allows a supplier to make highly bespoke offers to consumers, based upon a granular analysis of the preferences and behaviour of consumers. In other words, technology enables a highly developed form of market segmentation to occur. This can be a good thing. Allowing businesses to engage with consumers at a highly bespoke and frequently preferential level, which can lead to more efficient outcomes for both parties.

Nevertheless, there are risks. Consumers might find they are locked out in some way, from being able to see alternative i.e. the full range of possible, offers being made and thus unable to make reasonable comparisons. This is a reduction in consumer choice, and usually at the expense of being able to see smaller businesses, for example due to a lack of power in search engine optimisation. Smaller businesses may find it harder in terms of resources to optimise the ability of customers to find the business through search engines, and so are at risk of being shut out of online markets for certain products and services. This is also a risk where smaller businesses are acting as consumers, and utilising digital markets to buy ancillary goods and services.

Regulation to make data more open, portable or interoperable between different platforms, or standardised in format, could help to enable more effective competition in digital markets. For small businesses, data is an important asset to help enhance their competitiveness, which can mean better products and services, at lower cost, for consumers. To enable a competitive market it is therefore imperative that data can be accessed as easily by smaller businesses as large businesses.

However, there has to be a more appropriate data protection framework than currently exists in order to aid competitiveness, rather than raising costs, and stifling investment and innovation. This can be achieved by striking the right balance between minimising the risk of misusing the personal data of consumers, and the needs of businesses to harness data to develop and provide new products and services, or enhance existing ones. There are strong risks in creating an even greater regulatory burden on small businesses, with the result that consumers lose choice in digital markets.

For example, data protection is a very costly part of the regulatory environment for small businesses. The addition of GDPR (General Data Protection Regulation) this year has resulted in ongoing compliance costs of more than £7 billion annually for small businesses.¹ This figure includes related opportunity costs, for example the time it takes to ensure compliance. The aggregate time, financial costs and opportunity costs associated with data regulation combine to create indirect or dynamic costs. These reduce the resources available to businesses and alter their incentives.² Therefore data regulation can hamper the ability of small businesses to compete in the provision of digital services, resulting in less efficiency and innovation from the incumbent large businesses.

¹ FSB. Modernising Consumer Markets: Consumer Green Paper (FSB response). July 2018

² FSB. Data Ready report. February 2018

If you would like any further information or input from FSB, please contact our Policy Advisor (Infrastructure), [Name redacted], at [Email redacted]

Yours faithfully,

[Signature redacted]

[Name redacted]

Chairman of FSB Digital Policy

Federation of Small Businesses

The Foundation for Information Policy Research

Response to

Digital Competition Expert Panel

The Foundation for Information Policy Research (FIPR) is an independent body that studies the interaction between information technology and society. Its goal is to identify technical developments with significant social impact, commission and undertake research into public policy alternatives, and promote public understanding and dialogue between technologists and policy-makers in the UK and Europe.

FIPR has the following comments to make in response to the panel's consultation.

1. Market competition has brought huge benefits over the past 250 years, but it has not been the most common form of human organisation. Historically, states preferred to foster monopolies; 'crony capitalism' is more comfortable for both rulers and business elites. In this respect, Tudor England was much like Russia, China or most of the less developed countries today. It has been the most common condition of humanity.
2. To put things in context, the worst monopoly ever was not Facebook but the East India Company, which not only took over India from the seventeenth century to the nineteenth, but managed trade to many other colonies too, and after slavery was abolished promoted the opium trade to China. It not only killed, enslaved or impoverished millions of people, but captured much of the British political establishment and subverted the Royal Navy into fighting wars on its behalf.
3. That Britain, and then America, broke out of the crony capitalist system starting in the eighteenth century was transformational. Market competition led to achievement being more correlated with skill and effort than with birth or luck, greatly increasing productivity, changing expectations and driving social change too. For example, the advance of women and minorities has been faster in competitive industries than in cartelised ones; managers have an incentive to hire competent employees rather than loyal members of the tribe.
4. For a discussion, see for example Zingales¹, whose history of competition also highlights the fact that, since the 1980s, competition has been declining once more in Europe and North America.
5. Technology is one of the factors, especially in the last fifteen years, as the move of business online enables platform companies to profit from two-sided markets and the resulting network effects to establish market dominance. (The classic discussion of this is probably still Shapiro and Varian²; see also Tirole³.) However, it is by no means the only factor. Traditional rent-seeking is reasserting itself and is becoming more important in many business models, even for firms that do not benefit from significant network

¹ Luigi Zingales, "A Capitalism for the People", Basic Books 2012

² Carol Shapiro and Hal Varian, "Information Rules: A Strategic Guide to the Network

² Carol Shapiro and Hal Varian, "Information Rules: A Strategic Guide to the Network Economy", Harvard, 1998

³ Jean Tirole, Nobel Prize Lecture, 2014

effects. Globalisation plays a large role, as does the consolidation of traditional industries through mergers and acquisitions.

6. The decline of competition has been associated with an increasing income gap, declining social and intergenerational mobility, and an erosion of trust in capitalism. These factors vary between countries and, broadly speaking, less competitive economies have less trust. The Brexit and Trump votes might be seen as symptomatic of a broader loss of faith in “the system”, along with the recent riots in Paris, the Occupy movement and much else.
7. Our first point is that we must therefore draw a very clear distinction between arguments in favour of competitive markets, and arguments in favour of business. The conflation of these can easily lead to counterproductive political action, as rhetoric in favour of competition and innovation very often masks rent-seeking by incumbent firms.
8. A good example is the Copyright Directive⁴, which passed the European Parliament in September, is currently in Trilogue, and is likely to be approved in the next month or two. This has been sold as reining in the power of Google and Facebook, but is likely to entrench it instead. It will require large online firms to maintain a licensing regime for copyright material, with a view to providing press publishers with more control over how their material is used. Google maintains such a system with YouTube, so should be able to cope, despite the protests of its lobbyists; but anyone wishing to challenge it will have to climb an even steeper mountain⁵.
9. The Copyright Directive may have been well intentioned, but one should note that traditional print media also enjoyed market power. Local newspapers were usually monopolies who extracted rent from classified ads. Once this went to Craigslist and Google instead, many folded or retrenched.
10. Book publishers similarly enjoyed market power and operated almost as a cartel, failing to compete to offer better terms to most authors. Much the same can be said of the music industry. That the market power in these industries has shifted to other players is not of itself a catastrophe, though of course there are winners and losers, and the losers ask governments for relief. However the proposed remedy is likely to be counterproductive as it will entrench the new monopolies and diminish competition.
11. In addition, the text of the Copyright Directive has had pro-repair language removed; provisions for a better design that facilitates repair through the non-destructive disassembly of key components have been replaced with provisions targeting recycling through the ease of dismantling at end of life only, and the provisions granting access to repair and maintenance information to independent repairers have now been restricted to professional repairers only. EU firms and citizens will worse off than our American counterparts in our dealings with tech monopolies.
12. This highlights a common pattern with technological disruption. We start off with a traditional cartel, which has been entrenched politically for years, enriching producers at the expense of consumers (e.g. a taxi owners’ association, in cahoots with local government); along comes a disrupter (e.g. Uber); competition ensues, prices fall, complaints are made (are Uber drivers vetted and do they earn minimum wage?); litigation follows (the Mayor of London says that Uber is indeed a taxi company not a “platform” and pulls their licence); there is then a settlement, and things stabilise with a new pattern of market power.
13. Often the new dispensation is significantly more concentrated than the old one. For example, the music industry lobbied hard for DRM, in the belief that this would enable them to fend off the tech barbarians at the gate. Google’s chief economist, Hal Varian, warned in early 2008 that this was not in their interest, as creating a technical link between two industries generally causes the profits to flow to the more concentrated

⁴ 2016/0620(COD)

⁵ Ben Thompson, “The European Union Versus the Internet”, Stratechery, Sep 18, 2018

- industry. Music executives reacted with scorn but by the end of that year it had started to become clear that power was moving from the music majors to the tech firms, initially Sony and Nokia. By now, of course, the music industry choke point consists of Amazon, Apple, Google and Spotify; the traditional music firms have been marginalised.
14. In short, the tech revolution of the last twenty years has brought a tide of competition and innovation that has disrupted many industries. However that tide is now starting to go out, and the new landscape is less competitive than what went before.
 15. The Cybersecurity Act, now also in Trilogue, foresees that private firms will be able to propose voluntary security certification schemes, some of which may later be made mandatory; the rules for this are under negotiation. This creates the risk that the new incumbents can use security certification to deepen the moats that protect them from becoming the victims of new disrupters in turn.
 16. In order to understand this emerging landscape, we need tech-savvy economic analysis, and one aspect in which we have particular expertise is the economics of security and dependability. This is critical to understanding many problems from crime and conflict in the new world order, to the maintainability of complex socio-technical systems and thus their safety, sustainability and regulation.
 17. Starting in 2001, a number of us started to realise that security failures were often due not just to poor engineering but also to poor incentives. To put it simply, if Alice guards a system while Bob pays the cost of failure, then failure is to be expected. As an example, card payment fraud is most easily prevented by merchants and by the banks that acquire transactions from them, while the costs fall on the cardholders and the banks that issue their cards. The two are not in general the same.
 18. This realisation has led to the growth of a research community of over 150 people working on cybercrime, on optimal security investment, on patching and maintenance, on the economics of intellectual property enforcement and much else.
 19. An early insight was that network economics can lead to insecure platform software. A firm racing to get network effects going and dominate a new market (such as IBM in the early 1960s, Microsoft in the early 1980s, or Facebook a decade ago) has to appeal not just to users but to app developers, as whichever platform has the most apps can appeal to the most users. Security can get in the way, and is typically underprovided. Later, when the battle is won, the new incumbent may add security but typically optimised to lock customers in as much as to protect them from external threats.
 20. Another early insight was that network effects apply to bads as well as goods. Malware writers target Windows rather than Mac or Linux, not because Unix-based systems are intrinsically more secure, but because they are more rare.
 21. Thus people who use Windows enjoy lower-quality security and also attract more attacks – an example, perhaps, of what the brief asks for in section 1 – namely the harms resulting from market concentration.
 22. The brief asks ‘whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers’. The algorithm used, first by Google and now also by Bing, to set ad prices is to conduct a second-price auction and then multiply the bids by ad quality. That way, if I bid 10p for a slot and you bid 30, but the search engine reckons that people are four times more likely to click on my ad than on yours, then the moderated value of my bid is 40p and I win with a moderated price of 30p (I actually pay 7.5p since this is divided by my ad quality). This can be shown to maximise the search engine’s revenue and it is Pareto optimal in the sense that a second-price auction is strategy-proof.
 23. However, once the same algorithm is applied to social media, such as Facebook or YouTube, ad quality segues into virality. More provocative posts give rise to more secondary traffic (likes, shares, retweets...) and if the quality metric takes account of these, then the more inflammatory voices get cheaper ads. It is reported by a former

Facebook insider, for example, that Trump paid significantly less per ad than Clinton did⁶.

24. Finally, the brief asks about ‘policy changes beyond traditional competition tools’. One of the notable differences between the USA and Europe is that the courts have a greater role in America. This has two main causes. First, the USA does not in general mandate costs shifting, unlike the UK where the loser of a civil claim has to pay the winner’s costs. Second, class actions are much easier and more common.
25. FIPR argued for abolishing costs shifting in response to Lord Jackson’s review of the legal costs regime⁷ because of the other benefits of the U.S. regime, ranging from consumer protection to more rapid adaptation of the law to new technology. America benefits from the ability of private parties to bring anti-trust cases, and we should too, especially if a hard Brexit leaves us outside the ambit of DG Comp.
26. Although Margaret Thatcher opened up some monopolies that had previously been state-owned to competition, and Gordon Brown increased the number of mobile carriers, many of the deepest reflexes of the British state favour monopoly. The most effective protections that UK consumers and firms have enjoyed against tech monopolies have come from governments and courts in the USA and Europe; there are depressingly few cases where UK government action or civil litigation got a result. (Local loop unbundling is one that comes to mind, and perhaps electricity market deregulation if power companies are seen as tech companies.) We are sceptical that a UK outside the EU would have abolished or even capped roaming charges, however. Would ministers have found the backbone to stand up to the carriers?
27. In a world of increasing monopoly, competition cannot simply be left to ministers. And a UK that is no longer in the EU may see little benefit in picking fights with US or Chinese tech majors just to prevent price-gouging or protect consumer privacy. Is it possible that the courts could provide a backstop? Or will we just have to accept that the UK is no longer a player, and free-ride off the efforts of regulators elsewhere?

[Name redacted]
Chair, Foundation for Information Policy Research
December 7th 2018

⁶ Antonio Garcia Martinez, “How Trump conquered Facebook – without Russian ads”, Wired, Feb 23 2018

⁷ Foundation for Information Policy Research, “Consultation response on Civil Litigation Costs Review”, 2009, at <https://www.fipr.org>

This Submission is made by Google LLC and Alphabet Inc. (together “Google”) in respect of questions included in the Digital Competition Expert Panel’s Terms of Reference of September 19, 2018. Google welcomes the opportunity to contribute to the present Inquiry. Part I of this Submission provides an overview and Part II sets out Google’s responses to the Expert Panel’s questions.

I. OVERVIEW

The UK has a thriving digital sector that makes an enormous contribution to the national economy. The group of 12 industries that produce or intensively use digital goods, services, and labour in production accounts for 16% of domestic output, 10% of employment (nearly 3 million people), and 24% of exports.¹ The turnover of digital tech businesses in the UK reached £170 billion in 2016 – an increase of £30 billion in just five years.² And in Europe as a whole, capital invested in the technology ecosystem has increased to US\$ 23 billion, up from just US\$ 5 billion in 2013³ with London attracting £2.2bn of investment in digital tech in 2016, more than Paris, Berlin and Amsterdam combined.⁴ The government’s digital strategy showed that by 2020 the volume of global internet traffic is expected to be 95 times that of 2005 and in the UK, fixed internet traffic is set to double every two years, while mobile data traffic is set to increase at a rate of 25% to 42% per year.⁵

The present Inquiry is an opportunity to review the functioning of the UK’s flourishing digital sector and identify measures to enhance it still further. It is a chance to consider the possibilities for the digital sector to act as a driver of the post-Brexit economy, as an important plank of the

¹ Tech UK, The UK Digital Sectors After Brexit, January 24, 2017, available at: <https://www.techuk.org/insights/news/item/10086-the-uk-digital-sectors-after-brexit>.

² *Supra* note 1.

³ Atomico, The State of European Tech, 2018, available at https://2018.stateofeuropeantech.com/?utm_source=SOET+2018&utm_campaign=a04f865708-EMAIL_CAMPAIGN_2018_09_20_10_26_COPY_01&utm_medium=email&utm_term=0_ad455b4ff5-a04f865708-113077877.

⁴ IPPR, Charting a course for the future: How London’s start-up scene can survive and thrive in an age of Brexit, June 2018, available at: <https://www.ippr.org/files/2018-05/charting-a-course-for-the-future.pdf>.

⁵ See Department for Digital, Culture, Media & Sport, UK Digital Strategy 2017 Policy Paper, available at: <https://www.gov.uk/government/publications/uk-digital-strategy/uk-digital-strategy>.

Government's productivity agenda, and as a way of building future global tech companies; all the more so in the relatively nascent fields of data science, machine learning and artificial intelligence. The UK now has 1.64 million digital tech jobs and the growth rate was more than double that of non-digital jobs between 2011 and 2015. These jobs are highly skilled and highly paid: the gross value add of a digital tech worker is now double that of a non-digital worker (£103,000 compared to £50,000). This productivity gap has grown from £48,000 to £53,000 over the last five years.⁶ Supporting highly productive sectors – and their spread across the UK – is essential for economic growth at both local and national level.

Many factors have contributed to the growth of the UK's world-leading digital economy, such as access to funding, skilled personnel, low barriers to entry, and infrastructure. Google has set out below a range of policies and proposals for consideration that may help secure and advance the UK's strong position. It is particularly important that the UK maintains its robust, evidence-based competition regime that ensures that competition enforcement and advocacy continue to be focused on enhancing consumer welfare.

The Chancellor of the Exchequer has explained that the present Inquiry responds to concerns that *"the big players could be accumulating too much power in our new digital world"* and that the Expert Panel's work *"will help ensure we have the right regulations so that our digital markets are competitive and consumers are protected."*⁷ In carrying out this Inquiry, therefore, it is important to assess evidence of (i) the scale and extent of the concerns to which the Chancellor referred, and (ii) the capability of the UK's competition (and consumer protection) rules to address such concerns, as well as any changes that may be useful.

We believe that the starting point of this Inquiry should be to recognise that competition in digital markets in the UK is thriving. Barriers to entry are falling, innovation is rapid and investment levels are high. The following features of digital markets should be taken into account:

⁶ Tech City, Tech Nation, 2017, available at: <https://technation.techcityuk.com/digital-skills-jobs/jobs-salaries-data/>.

⁷ HM Treasury Press Release, Work kicks-off to examine digital competition in UK, September 19, 2018, available at: <https://www.gov.uk/government/news/work-kicks-off-to-examine-digital-competition-in-uk#history>.

Digital markets are contestable and contested. Digital services can typically be provided by a range of actual and potential competitors, and competition between existing online platforms is intensifying. For example, the development of advertising services by Amazon and Microsoft, in competition with Facebook and Google, has expanded customer choice. Even where digital sectors appear concentrated, economic indicators tend to confirm that performance has improved and firms remain subject to competitive pressure.

Digital markets feature free services that enhance consumer welfare. Many digital markets are characterized by the provision of high quality, free services on a sustainable, long-term basis. This means that any user with access to an Internet connection can enjoy these services, which is particularly important for users who might be unable or unwilling to pay up-front fees. Data privacy rules like the GDPR provide robust safeguards for personal data that are collected and processed.

Data are generally replicable and freely available. In a long series of merger cases, the European Commission and CMA have examined the effects of combining the merging parties' datasets. They found no grounds for intervention in these cases. Applying sound economic principles, these reviews found that data were replicable and non-exclusive, since users could make the same data available to multiple online service providers, allowing new entrants to grow quickly.

The possibility of buyouts provides an increased incentive to innovate. The possible reward from a future buyout may incentivize innovators and entrepreneurs to invest in providing new digital services, given the possibility of a lucrative exit option. Following acquisition, the acquired business may be brought within a larger firm with complementary expertise and infrastructure that can help increase its output, improve its products, and provide long-term financial security.

We recommend that the Inquiry also take into account the tools, organizational structure, and working practices of the UK competition regime that renders it well-equipped to address any competition concerns in digital markets and to identify effective solutions. As discussed below, the CMA has used a wide range of tools to assess competition issues in digital markets, including through merger reviews, antitrust cases, and market investigations. Where necessary,

it has imposed remedies, drawing on the expertise of its dedicated Remedies, Business and Financial Analysis team (as well as conducting reviews of past remedies to identify points of learning). It is recruiting staff with particular experience in data and technology. And it is well placed to ensure that its interventions are evidence-based, focused on consumer welfare, and independent.

We welcome this Inquiry's goals of strengthening the UK's thriving digital sector, boosting UK productivity and protecting consumer welfare. We believe that the UK's evidence-based approach to competition policy has worked – and continues to work – effectively in the interests of consumers and the productivity of the broader economy. However, this does not mean that competition, consumer, and other policy areas should stand still in the face of technological change. Rather, these policies should continue to promote the significant innovation potential that exists in the UK. Beyond traditional competition tools, we recommend proposals to further boost the dynamism of the UK digital economy through investment in digital skills, cloud infrastructure and government data sharing initiatives, which we outline in detail below.

II. RESPONSES TO QUESTIONS FROM THE EXPERT PANEL

1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms? We would particularly welcome evidence on:

- **the extent to which some digital markets appear to tend towards only one or a small number of firms;**
- **the key drivers of this trend (if present), and whether they relate to inherent features of these markets;**
- **the benefits or harms which are associated with concentration in digital markets;**
- **the degree to which large market players enable or inhibit wider innovation and investment.**

We would welcome evidence on the positive or negative economic impacts of all of the above, for example on prices, quality, choice, innovation or privacy.

The Expert Panel was asked to focus on the impacts on competition: please do not provide evidence relating to impacts on (for example) harmful content available online,

or the impacts of digital markets on the availability of a range of news media which are beyond the scope of our review or being considered elsewhere. Please be explicit about the sources of evidence for your view, where possible.

Digital services are contested and contestable

Digital sectors are typically characterized by the presence of multiple actual or potential rivals. For example, users can pick from multiple different cloud storage services (e.g., Microsoft OneDrive, Google Drive, Dropbox), music services (e.g., Spotify, YouTube Music, Apple Music, Deezer), email providers (e.g., Hotmail, Gmail, Yahoo mail) and video-streaming services (e.g., Netflix, Amazon Prime, Sky Now TV). In e-commerce, users can choose from Amazon, eBay, and other shopping services, including buying products directly from merchant websites.

Competition in advertising is particularly important as one of the main avenues through which many digital services are monetized. Most publishers concentrate their advertising efforts in display advertising, where adverts will appear on publishers' websites, such as newspapers and magazines. Some publishers offer search services that may also contain ads. Google offers a suite of tools, including AdSense, which provides access for those who lack relationships and the technical expertise to facilitate advertising relationships with millions of marketers on the web. Google shares approximately 70% of the ad revenues with these publishers.⁸ Larger publishers who can generate their own demand and, in many cases, operate their own trading desks, use Google Ad Manager, a deals platform where more than 70% of revenues are shared with publishers. In addition to Google, there are numerous other providers of online advertising services:

- Facebook is a major competitor in online advertising. Its Facebook Audience Network is popular, despite the fact that it launched just four years ago.⁹

⁸ This figure includes AdSense for Search and display advertising revenue shares. See Alphabet 2017 Form 10-K, page 35, available at: https://abc.xyz/investor/static/pdf/20171231_alphabet_10K.pdf?cache=7ac82f7.

⁹ See e.g., MarketingLand, Why you should be looking at Facebook's Audience Network, March 25, 2016, available at: <https://marketingland.com/looking-facebooks-audience-network-177797>; and BusinessInsider, How an 'oddball' team created one of Facebook's biggest potential threats to Google, February 29, 2016, available at: <http://uk.businessinsider.com/what-is-facebook-audience-network-and-why-does-it-matter-2016-2>.

- Microsoft has significantly increased its investment in advertising technology with the launch of its artificial intelligence-powered ad network, the Microsoft Audience Network.¹⁰
- Amazon only recently entered the advertising sector, but its advertiser and publisher ad tech solutions (Amazon Advertising Platform, Amazon Transparent Marketplace, Amazon Shopping Insights, Amazon Unified Marketplace) have grown rapidly.¹¹
- Specialized services that focus on the most readily monetizable aspects of online search provide further competition for advertisers (e.g., Travelocity, TripAdvisor, Hotels.com, Trivago, Idealo, eBay, Criteo, Shopify, MoneySupermarket, Pinterest and a host of other services that help users find products and services).¹²
- Telecommunications and cable industries are increasing their presence in advertising. This is borne out by Verizon's acquisitions of AOL and Yahoo! and subsequent formation of the Oath Ad platform; AT&T's recent acquisition of AppNexus; and the recent joint venture among Seven, Nine and MCN to launch an addressable TV advertising solution with granular targeting capabilities.

Innovation is a driver of competition in digital services

Digital services are often provided to consumers free of charge and competition for user attention takes place along parameters other than price – in particular, quality and innovation. The level and frequency of product innovations are an appropriate way of understanding how competitive these sectors are. Continued investment by Google and others confirms the competitive pressures to which these companies are subject – as do the rapid and continuous innovations they bring to market. It also explains the success of Google in search services, Amazon in online commerce, and Facebook in social media, compared with previous

¹⁰ SearchEngineLand, Microsoft launches new audience network, 'Audience Ads' at Bing Partner Summit, May 3, 2018, available at: <https://searchengineland.com/microsoft-launches-new-audience-network-audience-ads-at-bing-partner-summit-297336>.

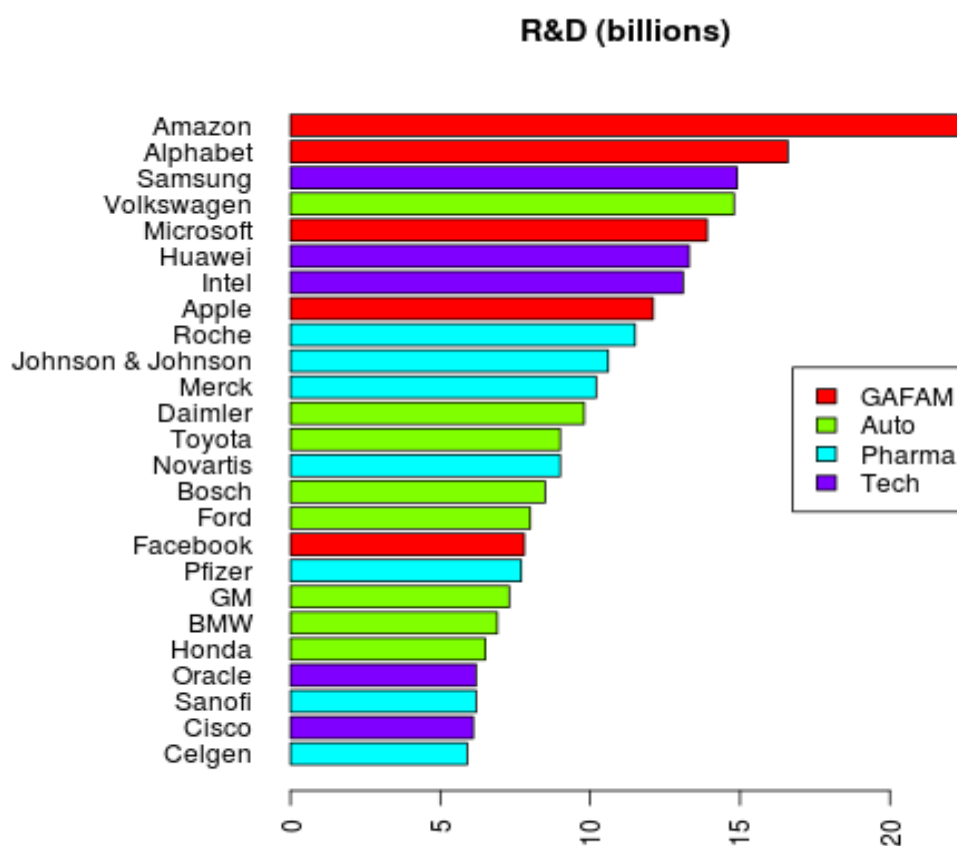
¹¹ See e.g., The Drum, The evolution of Amazon as an ad platform, August 13, 2018, available at: <https://www.thedrum.com/opinion/2018/08/13/the-evolution-amazon-ad-platform>.

¹² For a search engine like Google that answers all types of queries, only 6% of clicks are actually monetized, whereas its non-monetizing "organic" clicks account for the remaining 94%.

incumbents. These providers have delivered improvements in quality and productivity over their rivals, which have benefited consumers.

Competition policy should incentivize companies that achieve success through innovation and investment. And large technology companies continue to spend more on R&D than companies in any other sector. Four out of the top eight spenders globally on R&D are large online companies. A McKinsey study finds that “Superstar” firms spend two to three times more on R&D than their peers.¹³ It is the highly competitive environment in technology industries that drives the high R&D expenditure of firms in digital markets.

Global R&D spending by company. Source: Bloomberg (2018)



This innovation-based competition is beneficial for customers and consumers. Innovations in advertising, for example, have helped publishers to monetise their content and minimise the risk

¹³ McKinsey Global Institute, Superstars - the dynamics of firms, sectors and cities leading the global economy, October 2018, available at: <https://www.mckinsey.com/featured-insights/innovation-and-growth/superstars-the-dynamics-of-firms-sectors-and-cities-leading-the-global-economy>.

of advertising space online remaining unsold or sold below market value, thanks to the emergence of programmatic (*i.e.*, automated) advertising. Benefits to publishers include:

- **Cost efficiencies.** Using technology allows the sale of advertising space at scale and reduces the dependency on in-house sales teams.
- **A larger advertiser base.** Sections of websites that previously attracted low interest from advertisers can now be sold in real-time to advertisers looking for specific or niche audiences.
- **Accountability.** Programmatic advertising allows publishers to provide advertisers with granular reports on the effectiveness and reach of their advertising campaigns.
- **Control.** Programmatic advertising gives publishers control over who should be able to buy advertising space on their sites. For example, private marketplaces offer publishers the opportunity to make only certain (premium) content available to a select group of advertisers through automated means and at scale.

Switching is commonplace and barriers to entry are low

Competition in these sectors is enhanced in part by how easily users can generally switch between services and by decreasing barriers to entry. The cost of switching between digital and online services is generally very low:

- Switching involves merely typing a new web address, opening a new app, or clicking on a browser bookmark. What's more, users are willing to switch between services to find those that best meet their needs, and to multi-home. A survey by the European Commission found that "*Nearly eight in ten Internet users would probably change search engine if the search results provided were not useful (78%, vs. 17% who disagree). Four*

in ten totally agree that they would do so (40%), while almost as many tend to agree (38%).”¹⁴

- By way of illustration, in 2014 the Firefox web browser made Yahoo! its default search engine and Yahoo! usage initially increased. But as users became aware of this change, they switched back to Google, their preferred search engine, and Yahoo! search’s usage on Firefox declined. In 2017 Mozilla terminated its agreement with Yahoo! two years ahead of time, saying in a lawsuit that “*Yahoo! Search consistently failed to retain users and search volume over time, reducing the potential revenue [for Mozilla] under the Strategic Agreement.*”¹⁵

Likewise, due to cloud computing, entry costs for new players in online sectors are decreasing for the following reasons:

- Entrants can easily contract for cloud systems that, for example, will allow them to analyse, process, and store large datasets to produce useful information, without having to invest time and money in building large-scale, in-house computing facilities. What had been relatively high fixed costs for technology companies a decade ago have now become lower, variable costs, with small companies increasingly able to employ the same, powerful and efficient tools as the largest technology companies.
- In this area, intense competition is pushing prices down, so that these services cost far less via the cloud than they would cost if they were managed internally. Companies like Netflix, Apple, Snap, SAP and others are now taking advantage of these lower prices by using the cloud to host their services. Users of cloud services can easily multi-home and container technologies such as Docker and Kubernetes provide software and data portability among cloud providers, facilitating choice and spurring greater competition.

¹⁴ European Commission, Special Eurobarometer 447 Report – Online Platforms (June 2016), page 16, available at: http://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf.

¹⁵ See Search Engine Land, Yahoo! parent sues Mozilla for replacing it with Google as Firefox default search, December 6, 2017, available at: <https://searchengineland.com/yahoo-parent-sues-mozilla-replacing-google-firefox-default-search-287872>.

- The knowledge of how to develop and operate Internet software has diffused through other information industries, thereby further reducing barriers to entry. Indeed, several large Internet firms rent out their data centres to other companies. Amazon founded its cloud-computing business in 2002, and its success prompted Google and Microsoft to offer their own cloud services. The resulting competition has pushed down prices¹⁶ and granted small start-ups access to technology that they could not have afforded to build and maintain on their own.

Success in digital services reflects competition on the merits

In order to assess whether intervention is warranted it is important to understand the existing competitive dynamics and, in particular, the extent to which market positions or conduct result from or are contributing to a competition deficit. There is otherwise a risk of intervening in a way that punishes competition on the merits and overlooks the degree of competition that exists. This exercise is not necessarily straightforward. However, in many areas of the digital economy, economic indicators tend to confirm that any concentration is likely to have resulted from improved performance by the leading companies, which remain subject to competitive pressure. The recent McKinsey Global Institute study finds that “superstar” firms are 20-25% more productive with their labour and capital inputs versus median firms.¹⁷

Moreover, economic indices suggest that competition remains intense in purportedly concentrated markets: over the course of 2007-2017, “*prices in the tech/telecom/ecommerce sector fell by 15 percent, compared to a 21 percent increase in the rest of the non-health private sector*” including a fall in online advertising prices of more than 40% since 2010, while margins in electronic shopping that have fallen by 13% since 2007.¹⁸ Worker pay “*rose by 15.4 percent in the digital sector between 2007 and 2017, compared to a 7.0 percent gain in the rest of the*

¹⁶ See e.g., Fortune.com, Google to Amazon: Our Cloud’s Still Cheaper, January 8, 2016, available at: www.fortune.com/2016/01/08/google-amazon-cloud-price-war.

¹⁷ McKinsey Global Institute, *supra*, note 11.

¹⁸ Progressive Policy Institute, Competition and concentration: how the tech/telecom/ecommerce sector is outperforming the rest of the private sector, November 2018, available at: https://www.progressivepolicy.org/wp-content/uploads/2018/11/PPI_Competition-Concentration-2018.pdf.

non-health private sector” and employment expanded faster in the digital sector.¹⁹ In other words, the benefits of growth in the digital sector are being shared with consumers and workers.

Productivity growth, falling prices, high levels of investment in R&D, and an increased distribution of earnings to workers are signs that competition in digital markets is functioning well. Any concentration in these sectors is therefore likely to be the result of increased productivity, efficiency, and innovation, which is how competition should work.

Moreover, concentration in digital sectors has in the past proved ephemeral and, without continuous innovation, there is no guarantee that the same companies will lead their respective domains in the medium or long term. No tech company – no matter how large or popular – is unassailable. Even Amazon’s CEO, Jeff Bezos, has recently commented that “*Amazon is not too big to fail ... In fact, I predict one day Amazon will fail.*”²⁰ Numerous data-rich tech companies that were at one time successful have since become obsolete – examples include MySpace, Friendster, MSN Messenger, Bebo, AOL, Alta Vista, Lycos, and Inktomi. The 2007 Forbes magazine cover below is a reminder that success can be fleeting and the tech industry landscape is subject to sudden change.

¹⁹ Ibid.

²⁰ The Guardian, Jeff Bezos tells employees 'one day Amazon will fail', November 16, 2018, available at: <https://www.theguardian.com/technology/2018/nov/16/jeff-bezos-amazon-will-fail-recording-report>.



2. What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

Large technology firms are moving into one another's areas of "core" expertise. Historically, Amazon's core expertise was in shopping, Apple's in mobile devices, Facebook's in social networks, Google's in search, Microsoft's in operating systems and office applications. Each of these companies is competing intensely with the others outside of their core areas of business. For example, Apple, Amazon, Google, and Microsoft all provide operating systems. Apple, Google, and Microsoft provide competing office applications. There are many product areas where these companies compete. The below table shows how pervasively the "GAFAM" companies compete with each other across (sometimes fluid) product boundaries.

Competition among large tech firms in sectors where Google is present

Product	AMZN	AAPL	GOOG	FB	MSFT
advertising platforms	✓		✓	✓	✓
artificial intelligence	✓	✓	✓	✓	✓
browsers	✓	✓	✓		✓
cloud services	✓		✓		✓
digital assistants	✓	✓	✓	✓	✓
ebooks	✓	✓	✓		
email and messaging		✓	✓	✓	✓
games	✓	✓	✓	✓	✓
general purpose search engines			✓		✓
home delivery services	✓		✓		
maps		✓	✓		✓
office tools		✓	✓		✓
operating systems	✓	✓	✓		✓
smartphones	✓	✓	✓		✓
special purpose search engines	✓	✓	✓	✓	✓
streaming video	✓		✓	✓	
video and music distribution	✓	✓	✓		
video conferencing		✓	✓	✓	✓

As a recent example of the intense competition among Internet companies, consider the history of digital assistants. Apple was the first to market with Siri in 2011, which was followed rapidly by Google Assistant, Microsoft's Cortana, Facebook's M, and Amazon's Alexa. The first smart speaker, Amazon's Echo, was released to the public in June 2015. Less than a year later Google announced its competitive product, Google Home, which began shipping in November 2016. A smart speaker seems far outside these firms' core businesses of search engines and retailing, respectively, yet the two firms compete in this domain to the benefit of consumers. It is *because* of competition among the large Internet firms across multiple product areas that consumers face such low prices and high rates of innovation in online industries.

What unifies the disparate areas where large technology companies compete is that they rely on software and data centres. These are general purpose technologies²¹ that exhibit strong

²¹ Bresnahan and Trajtenberg, General Purpose Technologies: 'Engines of growth'?, 65 J. Econometrics 83 (1995).

economies of scope. For example, the software, hardware, and skills built up in hosting web pages also turn out to be useful for providing email services and streaming video. Indeed, experience gained in other markets helps firms offer attractive or differentiated products in new markets. Google's experience in designing search interfaces helped it to develop attractive interfaces in its other products and services.

That said, there is no guarantee that large technology firms will succeed when attempting to move into new sectors. They have to create an attractive product that users want. Google attempted to move into social media with Google+ in 2011, though it ultimately failed to gain traction and in 2018 Google announced that it would be shutting the service down.²² Other examples of failed attempts at entry by large technology firms include Microsoft's music player, Zune, and Apple's HomePod.

Nor is there any guarantee that the providers of even the most attractive services will obtain users' full attention: in multiple online sectors like search, consumer communications, music, email and elsewhere, users can and do multi-home. This further enhances users' ability to switch between services or mix and match providers.

3. What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition? We are particularly interested in whether data may constitute a 'barrier to entry or expansion' for companies seeking to compete in the digital economy. Please provide any evidence for your view

Analysing data gives firms new insights and encourages innovation. There are many examples of firms offering new or better services to consumers in ways that would not have been possible without the ability to analyse data. However, access to data alone will not determine a company's success – this will depend on the way data are used and requires continued investment and innovation.

²² Cnet, Google+ and life after social media death, October 13, 2018, available at: <https://www.cnet.com/news/google-plus-and-life-after-social-media-death/>.

The European Commission has reviewed the possibility of data acting as a barrier to entry in a long series of cases,²³ focusing specifically on the replicability of data. It did not find in any of these cases that aggregation of user data would operate as a barrier to entry. Commissioner Vestager has cautioned against assuming that data are a barrier to entry, noting that “[w]e also need to ask why competitors couldn't get hold of equally good information. What's to stop them from collecting the same data from their customers, or buying it from a data analytics company?”²⁴

Data constitute just one of many important factors in developing a smart and useful model. Many data-driven businesses started out with access to a limited amount of user data, but have nevertheless successfully entered and expanded in digital markets. The following examples demonstrate that pre-existing datasets are not necessarily a panacea:

- **Communications services.** In *Microsoft/Skype*, the European Commission found that barriers to new communications services were low, citing the “*immediate success*” of entrants like Viber, Fring and Tango. Within three days of launch, Viber had been downloaded more than one million times; it was downloaded by 10 million users within two months and 15 million users in less than six months.²⁵
- **The sharing economy.** Start-ups such as Airbnb and Zipcar had no customer database when they started, while incumbents had significant datasets. This did not prevent these new sharing services from flourishing and even overtaking incumbent businesses.
- **Social media.** Facebook employs complex machine learning algorithms to optimize social sharing, but Snapchat was able to build a successful competing service in less than three years – not because it had more data, but because of its insight that people

²³ See e.g., the European Commission’s reviews of the Google/DoubleClick, Microsoft/Yahoo, Microsoft/LinkedIn, and Facebook/WhatsApp mergers.

²⁴ M. Vestager, speech on Big Data and Competition, September 29, 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en.

²⁵ Case COMP/M.6281, Microsoft/Skype, Commission decision of October 7, 2011, paragraphs 90 to 93.

wanted to share information ephemerally (as well as a good quality design and ability to rely on cloud services).

- **Dating apps.** Incumbent dating platforms had large volumes of user data to match potential candidates. Yet Tinder was able to enter with great success by developing new features (e.g., speed, proximity, and swiping) that together attracted users.
- **Search services.** As with other digital services, the key differentiating factor between search providers is not access to data, but having the skills and ingenuity to analyse the data that are available. Google was able to enter the market as a newcomer at a time when incumbent search providers had significantly more user data and computing power, and yet succeeded in establishing a thriving online business.

With the digital economy, it can be tempting to make generalisations about all data and to exaggerate its inherent importance. Access to data should not be equated with market power, nor can data generally be considered a barrier to entry or expansion for the following reasons:

- **Data are non-rival and sometimes non-excludable.** Sharing data with one party will not use it up – nothing prevents the data source from sharing the same information with someone else. The European Commission in *Facebook/WhatsApp* found that the ability of a social network to collect data does not prevent a competitor, a search engine or a data broker from collecting that same information. Consumers often ‘multi-home’ and the same data are “*potentially available*” to all rivals.²⁶
- **Data are ubiquitous and inexpensive to collect.** Far from being a scarce resource, there are more data available today than ever before – all the more so, given the right of users to obtain and re-use (or “port” their data to rival services) under Article 20 of the GDPR. Data portability makes it easier for individuals to move their data and choose among services – this welcome development is central to innovation and is enhanced by

²⁶ Case COMP/M.7217 – *Facebook/WhatsApp*, Commission decision of October 3, 2014, paragraph 121.

the Data Portability Project that Google, Facebook, Twitter and others have put in place (as discussed below).²⁷

- **Firms share datasets usefully.** In practice, firms share various datasets that may be useful to other service providers. For example, Google has open-sourced almost 60 datasets relevant to training AI models similar to those created for its own services (including large labelled datasets featuring images, video, sounds, movements and more²⁸) and other datasets.²⁹ Google's Kaggle platform hosts more than 10,000 datasets provided by companies around the world as the basis for data science contests. These span a wide range of topics – everything from credit card fraud detection, European football statistics, to wine reviews.
- **Unlike currency, data have little inherent value.** The value comes from the ability to analyse and act on insights. As the European Commission recognized in a 2014 working paper: *“The existence of data alone is not sufficient to generate value; the value comes from maximising the efficacy of use from the data.”*³⁰ Put another way: the recipe matters more than the ingredients. And the value that data have may be subject to diminishing marginal returns. At a certain point adding more data does not render better

²⁷ See Data Transfer Project, available at: <https://datatransferproject.dev/>.

²⁸ These include: YouTube 8M (to aid in making advances in automating the analysis of video content); audioset (to aid in developing systems able to recognize sounds familiar to human listeners); speech commands (to support developers seeking to build voice interfaces for applications); atomic visual actions (to support the teaching of machines to understand human actions in videos – essential to building AI applications such as personal video search, sports analysis and gesture interfaces).

²⁹ For example, Google's Cloud platform hosts a range of public datasets containing copies of structured and unstructured data. These include datasets relating to topics such as crime, health and weather. Google's Dataset Search (available at: toolbox.google.com/datasetsearch) is a specialist search facility to help anyone find publicly available datasets hosted on the web. To appear in the index, publishers simply need to include information about their dataset in line with open standards, such as who created the dataset, when it was published, how the data were collected, and terms for using the data.

³⁰ EU Commission, Digital Economy - Facts & Figures, March 4, 2014, page 9, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/2014-03-13_fact_figures.pdf.

results. The first million observations are likely far more valuable in improving predictions than the last million.³¹

- **The amount of data needed is diminishing.** Companies are developing new tools that drive down the amount of data needed. Google is involved in developing technology that *“improves the rate at which computers correctly identify images and with reliance on less data,”*³² as are start-ups such as Geometric Intelligence.³³
- **Data can quickly become stale and worthless.** Because the usefulness of data diminishes over time, the accumulation of datasets in itself cannot be indicative of market power. Historical databanks may not be particularly impactful in terms of improving a firm’s product.³⁴ As Commissioner Vestager noted, *“[i]t might not be easy to build a strong market position using data that quickly goes out of date.”*³⁵

For all of these reasons, the accumulation of data is unlikely to create a barrier to entry, particularly in circumstances where data are replicable and readily available to all.

³¹ In fact, according to a 2018 study by Hestness et al, accuracy as a function of sample size fits a “power law” very closely for machine translation, language modelling, image processing, and speech recognition. Other studies using the ImageNet data and the Stanford Dogs Project have exhibited similar diminishing marginal returns.

³² Reuters, Google’s Hinton outlines new AI advance that requires less data, November 2, 2017, available at: <https://www.reuters.com/article/us-alphabet-artificialintelligence/googles-hinton-outlines-new-ai-advance-that-requires-less-data-idUSKBN1D231G>.

³³ Technology Review, Algorithms That Learn with Less Data Could Expand AI’s Power, May 24, 2016, available at: <https://www.technologyreview.com/s/601551/algorithms-that-learn-with-less-data-could-expand-ai-power/>.

³⁴ See Chou & Tucker, Search Engines and Data Retention: Implications for Privacy and Antitrust, May 25, 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441333.

³⁵ M. Vestager, speech on Big Data and Competition, September 29, 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en.

4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

- **Does the potential for acquisition of smaller firms provide an efficient source of capital and exit or does it affect innovation?**
- **Does acquisition of smaller firms raise the value of their innovations as they get incorporated into larger platforms or does it forestall potential future competition?**
- **Does the tax system or other policy features create biases that lead to more or less acquisitions than would be the case with a neutral policy regime?**

The prospects of a buyout by existing technology companies can provide technology entrepreneurs and start-ups with an exit option. Knowing that they stand a reasonable chance of a takeover offer will likely increase entrepreneurs' incentives to invest and take a risk in setting up a new digital service, such that the possibility of a buyout may intensify – rather than forestall – innovation.

Buyouts provide an important alternative to public share offerings, which firms may be reluctant to undertake due to regulatory burdens, the difficulty of accounting for R&D spending, increasing institutional ownership, and improved financial intermediation.³⁶ Indeed, over the last 20 years there have been about four times as many acquisitions in the U.S. as IPOs.

Acquisitions in the technology sector are particularly important in enabling smaller companies to reach their full potential and to assure them of a sustainable commercial footing. Specifically, the target of the acquisition may be “*more profitable as part of a larger organization that enables them to scale up quickly and efficiently.*”³⁷ From the perspective of the acquiring firm, the talent and the technology that comes with those acquisitions will allow them to compete more effectively with rivals or diversify into new business areas.

³⁶ Kahle & Stulz, Is the U.S. Public Corporation in Trouble? November 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2869301&download=yes, in particular at 84-85.

³⁷ Kahle & Stulz, *supra* note 35, at 85.

Consider Oculus VR, which Facebook acquired in March 2014 for \$2.3 billion.³⁸ At the time, Facebook had no presence in virtual reality or related fields such as online gaming. However, its competitors in the diverse Internet field – namely Apple, Google, and Microsoft – *did* have products or plans in this area. This acquisition enabled Facebook to compete in an area where existing competitors had a head start. Although virtual reality services appeared distinct from Facebook's core business, Facebook needed to stay competitive and anticipate ways to evolve its business as new technologies emerged.

Therefore, acquisition can be an important step in serving the original mission of the acquired firm. The acquisition gives it financial support to develop new, exciting products and services, as well as to gain much broader distribution.³⁹ When Google acquired Android, for example, there was not a single Android phone on the market. Today, hundreds of millions of Android devices ship every year. The growth of Android has enabled widespread innovation and choice, with millions of apps now available to Android users, creating an attractive and competitive alternative to the iPhone. As the frequency and attractiveness of IPOs vary over time, the prospect of a buyout provides an important incentive for more start-ups to form, as well as providing additional funding and investments in technological development post-acquisition.

It bears mention that competition authorities can and do consider the loss of actual or potential competition when reviewing technology and digital firm buyouts. This is evident from the European Commission and CMA reviews (among others) of Google's acquisitions of BeatThatQuote,⁴⁰ DoubleClick,⁴¹ and Waze,⁴² Facebook's acquisitions of WhatsApp⁴³ and

³⁸ Press Release, Facebook to Acquire Oculus, Facebook.com, March 25, 2014, newsroom.fb.com/news/2014/03/facebook-to-acquire-oculus.

³⁹ See Kahle & Stulz, *supra* note 35, at 85 (citing Xiaohui Gao, et al., *Where Have All the IPOs Gone?*, 48 J. Fin. & Quant. Analysis 1663 (2013) ("[S]mall firms are better off selling themselves to a large organization that can bring a product to market faster and realize economies of scope.").

⁴⁰ OFT, Completed acquisition by Google Inc of BeatThatQuote, decision of July 1, 2011, available at: <https://assets.publishing.service.gov.uk/media/555de311ed915d7ae200005f/Google-BeatThatQuote.pdf>.

⁴¹ M.4731 - Google/DoubleClick, Commission decision of March 11, 2008, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.

⁴² OFT, Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited, decision of November 11, 2013, available at: https://webarchive.nationalarchives.gov.uk/20140402225142/http://www.of.gov.uk/shared_of/mergers_ea02/2013/motorola.pdf.

Instagram;⁴⁴ and Apple's acquisition of Shazam.⁴⁵ Competition agencies consider the counterfactual scenario in carrying out these reviews, analysing how the acquired firms would have fared absent the merger.

The UK merger regime in particular is flexible enough to capture acquisitions of even very small or nascent enterprises in online markets, due to the share of supply jurisdictional test. For example, the UK authorities subjected Google's acquisition of Waze to a detailed review, even though Waze had no UK revenue at the time it was purchased.

5. To what extent is it relevant for any identified benefits and harms that consumers receive 'free' services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising? Please provide any evidence for your view.

It is beneficial for consumers that they receive services without having to pay an up-front financial cost. This renders the services available to everyone with an Internet connection, resulting in enormous consumer surplus. For example, Google UK's 2018 impact report calculated that Google services alone were responsible for over £37 billion of consumer surplus in the UK – indicating that these 'free' services generate considerable consumer value.⁴⁶

Users do not "pay" for services with data. Unlike currency, anyone can generate an endless supply of data. Rather, customers *pay attention* to obtain the product delivered along with the advertisements (similar to the typical model of free-to-air television). Data are merely the by-product of using a service. Paying with attention rather than fees, which not everyone can afford, makes the service more widely accessible. The absence of fees also means users face no financial barriers to switching or multi-homing, particularly in light of users' data portability

⁴³ M.8228 - Facebook/WhatsApp, Commission decision of May 17, 2017, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf.

⁴⁴ OFT, Anticipated acquisition by Facebook Inc of Instagram Inc, decision of August 14, 2012, available at: <https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf>.

⁴⁵ M.8788 - Apple/Shazam, Commission decision of September 6, 2018, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf.

⁴⁶ Public First, Google's Impact In The UK: At Home, At School, At Work, 2018, available at: <http://www.publicfirst.co.uk/wp-content/uploads/2018/10/GoogleImpact2018.pdf>.

rights under the GDPR. Therefore, the benefit of receiving services for free is not materially diminished by the contribution of data.

Consumers benefit from the free services and the product improvements the data enable. While the value of these free services is very substantial – as shown above – the value of data on a per user basis is tiny. Facebook had earnings in 2017 of around 16 billion dollars and claims to have 2 billion monthly active users. That amounts to around \$8 per user per year, or 2.2 cents per day.⁴⁷

Where services are provided free of charge, suppliers compete for users' attention based on the quality of the product, such as the reliability of the map or the functionality and connectivity of a social media service. Competition in the advertising market should be seen in light of this no-fee business model. Even if a company has a seemingly large share in the supply of advertising, it is constrained by competition for end users, without whom advertisers will not pay for ad space on the relevant platform (and vice versa). This constraint is borne out not just by having to provide a service for free, but also having to provide users with a sufficiently high-quality service.

As regards to data privacy, suppliers compete to offer greater levels of privacy in search and other services. Indeed, it is viewed as a means of competitive differentiation. Search services like DuckDuckGo and browsers like Brave market themselves as privacy-focused options.⁴⁸ Where privacy protections influence consumer choice, competition considerations may be relevant.

Other than as a parameter of competition, though, data privacy is not relevant to merger control or antitrust proceedings – rather, privacy is the concern of rules like the GDPR, which aims to provide safeguards against the improper collection and processing of personal data. In the UK,

⁴⁷ Facebook Investor Relations, Facebook Reports Fourth Quarter and Full Year 2017 Results, available at: <https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx>.

⁴⁸ See <https://duckduckgo.com/> (*"The search engine that doesn't track you"*); and <https://brave.com/about/> (*"Brave is open source, and built by a team of privacy focused, performance oriented pioneers of the web"*).

the Information Commissioner's Office is well-resourced and effective at enforcing data protection.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

We are interested in any evidence on the implications of AI, machine learning and algorithms for competition. In particular we would welcome any evidence on whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers.

As explained further in response to Question 7 below, we believe that the UK's competition agencies have a substantive toolkit which they deploy effectively. In principle, a conventional application of competition law should be able to deal with price-fixing and other collusive behaviour that is facilitated by algorithms or AI, depending on how the algorithms or AI at issue have been programmed to work. The CMA demonstrated this when it issued an infringement decision for price-fixing by competing online sellers of posters and frames on Amazon.⁴⁹ The CMA was able to investigate and assess its concerns within the existing competition framework and did not require specialist enforcement mechanisms.

The European Commission imposed significant fines on four consumer electronics manufacturers in July 2018 for imposing fixed or minimum resale prices on their online retailers. In doing so, the European Commission examined the impact of the use of algorithms by suppliers and retailers to monitor and respond to retail prices using the existing competition framework.⁵⁰

The reason competition law does not prohibit tacit collusion is the same regardless of the technologies involved. It may not be practical – or desirable – for a competition agency to try to enforce a rule that firms should not respond to the price changes of competitors, whether these decisions are made by humans or machines.

⁴⁹ Case page available at:
<https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>.

⁵⁰ See European Commission press release available at:
http://europa.eu/rapid/press-release_IP-18-4601_en.htm.

In its 2018 study into pricing algorithms, the CMA found that the existing technology for pricing algorithms may not be sufficiently advanced or widespread to make tacit collusion likely. The CMA also found that tacit collusion is more likely where rivals all use similar algorithms and in markets already susceptible to collusion, where an algorithm is the “*last piece of the puzzle*”.⁵¹

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK? Specifically:

- **What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?**
- **What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed?**
- **We would welcome specific proposals for changes to institutions, policy or its implementation under any of these headings. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.**

To deal with issues in both the digital and broader economy, competition policy interventions should be driven by objective, evidence-based analysis with a clear aim of promoting consumer welfare. The CMA has a dual competition and consumer protection mandate, a wide range of tools available to it as well as robust organizational and working practices. This combination makes the CMA especially well placed to ensure that competition enforcement in digital markets is nuanced and thorough and that theories of harm and potential remedies are consumer, rather than competitor focused. In particular, the following tools and practices are effective:

- **Wide range of tools to assess digital markets.** The CMA has shown that it is ready to examine issues in the digital sphere using the full range of tools at its disposal. The CMA has conducted market studies and published reports on topics like the commercial use of consumer data,⁵² digital comparison tools (mentioned above),⁵³ online reviews

⁵¹ Ibid., paragraph 8.6.

⁵² CMA publishes findings on the commercial use of consumer data, June 17, 2015, available at: <https://www.gov.uk/government/news/cma-publishes-findings-on-the-commercial-use-of-consumer-data>.

and endorsements,⁵⁴ and its joint study with the French Autorité de la Concurrence on competition issues into open and closed systems.⁵⁵ During these studies, the CMA consults closely with market participants, economists, members of the public, and other regulatory bodies to better understand the sector. The CMA also hosts roundtable discussions and symposia to maintain dialogue with market participants, and it is generally viewed as being open with parties during merger and antitrust reviews.

- **Detailed analysis of digital platforms.** The CMA's analysis in the Just Eat/HungryHouse merger involved a detailed assessment of the extent to which markets characterized by multi-sided digital platforms might or might not tend towards concentration. It took account of factors like the varying strength of network effects across industries, the incidence of multi-homing, and the possibility of competitive differentiation.⁵⁶ Its extensive surveys and econometric analysis provided a solid basis for assessing the merger's likely effects on competition.⁵⁷ The CMA's submission to the European Commission's consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy⁵⁸ provides a further example of the CMA's detailed assessment of the issues that affect digital markets.

⁵³ Digital comparison tools market study – Final Report, September 26, 2017, available at: <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-to-ols-market-study-final-report.pdf>.

⁵⁴ Online Reviews and Endorsements (June 2015), available at: <https://www.gov.uk/government/consultations/online-reviews-and-endorsements>.

⁵⁵ CMA and Autorité de la Concurrence, The Economics of Open and Closed Systems, December 16, 2014, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf.

⁵⁶ CMA Final Report, Just Eat and Hungryhouse, November 16, 2017, paras. 6.61, 6.63, and 6.80-6.84, available at: <https://assets.publishing.service.gov.uk/media/5a0d6521ed915d0ade60db7e/justeat-hungryhouse-final-report.pdf>.

⁵⁷ Ibid., Appendix F.

⁵⁸ CMA, UK Competition and Markets Authority response to the European Commission's consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502606/Response_to_EC_s_questionnaire_on_the_regulatory_environment_for_platforms.pdf.

- Dedicated remedies team.** The CMA has a dedicated remedies, business and financial analysis team that supports all of the CMA's casework, with a particular responsibility for advising on undertakings and orders in mergers and markets cases. Having a team with wide-ranging expertise⁵⁹ promotes orders and undertakings that are innovative, proportionate and effective in addressing competition concerns, including in the digital sector. For example, the CMA's Open Banking solution is viewed as having lowered barriers to entry for fin-tech companies and challenger banks, thereby facilitating the competitive process and improving consumer welfare.⁶⁰ Likewise, the CMA's practice of conducting expert reviews into remedies in past cases allows the CMA to verify that its practice works well and identify further improvements.⁶¹
- Recognition of market-based tools.** During a year-long market study, the CMA considered the benefits and possible concerns relating to digital comparison tools, and recommended remedies to ensure they provide the best and most accurate consumer experience.⁶² The UK's first comparison website for extended warranties was launched

⁵⁹ Adam Land, Introducing our Remedies, Business and Financial Analysis team, August 17, 2018, available at: <https://competitionandmarkets.blog.gov.uk/2018/08/17/introducing-our-remedies-business-and-financial-analysis-team/> (*"Within the team today, we have recruited colleagues from industry, accountancy firms, strategy consultancies, analytical and transactional roles in the City, as well as from the economic regulators and within other commercially and analytically minded parts of Government... It is unusual for a competition agency to have access to such an array of commercial and regulatory experience and it is a real asset for the CMA"*).

⁶⁰ See e.g., Which?, Open banking launches this weekend: what's it all about, January 11, 2018, available at: <https://www.which.co.uk/news/2018/01/open-banking-launches-this-weekend-whats-it-all-about/> (*"these reforms could pave the way for a single platform providing one point of access to all of your financial accounts, with any number of apps able to 'plug in' and offer you highly personalised services. For example, apps might be able to move money between your accounts to help you avoid charges, or spot trends in your spending to help you save money and find cheaper suppliers for all your household bills"*).

⁶¹ See e.g., CMA, Understanding past merger remedies – Report on case study research (CMA48), April 6, 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/606680/understanding_past_merger_remedies_April_2017.pdf.

⁶² CMA steps in to give people a better deal on comparison sites, September 26, 2017, available at: <https://www.gov.uk/government/news/cma-steps-in-to-give-people-a-better-deal-on-comparison-sites> (*"The year-long examination found that these sites offer a range of benefits, including helping people shop around by making it easier to compare prices and forcing businesses to up their game"*).

as a direct result of a remedy that the OFT required following a market study.⁶³ The CMA recognises and supports these market-based tools for enhancing consumer welfare and promoting competition.

- **Recruitment of tech and data experts.** The CMA has enhanced its expertise in digital markets by recruiting staff for its Digital Forensics and Intelligence Service (to assist in investigating, collating, processing, and analysing digital material). It is also building a digital, data and technology team comprising data scientists, computer experts and economists to enhance its understanding of the digital economy and “*ensure its practices, interventions and capabilities keep pace with the tech-enabled evolution of business models and practices.*”⁶⁴ These developments – combined with using the increased CMA budget to hire more staff across the board – contribute to the CMA’s ability to monitor digital and other markets, and to understand technological developments, business rationales, and market dynamics.
- **Independent decision-making.** In addressing competition issues – including competition in digital markets – the CMA has carried out its assessments independently, while maintaining an appropriate degree of open and transparent dialogue with government. As the CMA’s 2018/19 Annual Plan recognises, the government’s Strategic Steer can provide helpful direction, while any interventions are ultimately “based on an assessment of how [the CMA] can best work to the benefit of consumers”.⁶⁵ The CMA can thereby act as a partner of government but, as the Executive Director of Enforcement noted, pay close attention to ensuring “that the CMA retains its reputation for rigour, fairness, respect for the rule of law, and political impartiality and independence”.⁶⁶

⁶³ OFT, Extended Warranties on Domestic Electrical Goods, February 2012, available at: https://webarchive.nationalarchives.gov.uk/20140402172757/http://oft.gov.uk/shared_oft/markets-work/OFT1403.pdf.

⁶⁴ CMA launches consultation on 2018/19 annual plan, December 3, 2017, available at: <https://www.gov.uk/government/news/cma-launches-consultation-on-201819-annual-plan>.

⁶⁵ CMA Annual Plan 2018/19, paragraph 1.36, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704594/Annual_Plan-201819.pdf.

⁶⁶ Michael Grenfell, Speech, A view from the CMA: Brexit and beyond, available at: <https://www.gov.uk/government/speeches/a-view-from-the-cma-brexit-and-beyond>.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

For example, you may wish to consider options for sector-led initiatives or regulation to make data more open, portable or interoperable between different platforms, or standardised in format if these would enable more effective competition in digital markets?

Beyond traditional competition tools, one way to improve competition and economic outcomes is to support standards for the transfer of data between different digital service providers.

In this space, sector-led initiatives are already emerging. One example is the Data Transfer Project – an open-source initiative dedicated to developing tools that will enable consumers to transfer their data directly from one service to another, without needing to download and re-upload it. Google announced this alongside Microsoft, Twitter, and Facebook. This open-source project will make it easier for people to switch services, or try something new, by improving the ease and speed of data portability.⁶⁷

The goal of this project is to support direct, service-to-service portability. Users will be able to transfer data between two authenticated accounts behind the scenes, without having to download the data and relocate it themselves. Google believes this will have a positive impact on competition by making portability more efficient and more widely available. It will also improve user experiences in emerging economies where connection speeds are slower, data are more costly, and/or people lack devices with sufficient local storage to download their data. The Data Transfer Project's open source code is available online.

Data security and privacy are foundational to the design of the Data Transfer Project. Services must first agree to allow data transfer between them, and then they will require that individuals authenticate each account independently. All credentials and user data will be encrypted both in transit and at rest. The protocol uses a form of “perfect forward secrecy” whereby a new unique key is generated for each transfer. In addition, the framework allows partners to support any

⁶⁷ See <https://datatransferproject.dev/>; Google Open Source Blog, Introducing Data Transfer Project: an open source platform promoting universal data portability, July 20, 2018, available at: <https://opensource.googleblog.com/2018/07/introducing-data-transfer-project.html>; and Willard et al., Data Transfer Project: From Theory to Practice, available at: <https://services.google.com/fh/files/blogs/data-transfer-project-google-whitepaper-v4.pdf>.

authorization mechanism they choose. This enables partners to use their existing security infrastructure when authorizing accounts. The Data Transfer Project prioritizes privacy, while enhancing competition and choice. It might therefore function well as an industry standard for the transfer of data.

Alongside industry, government also has the potential to broaden data access and usage, and Google's Dataset Search tool enables users to search publicly available data. As one of the largest holders of data, government can play a major role in galvanising an economy and a public sector that is a global leader in data-driven-innovation to improve lives, deliver efficient public services and create economic growth. Governments at the national and local level are opening up data for re-use, with the UK government often taking the lead in this move towards 'open data', where government datasets are available to all. The open datasets made available by organisations like Transport for London ("TfL") contribute to the UK being one of the most advanced countries when it comes to open data. The National Health Service ("NHS") also makes freely available – through its "NHS Digital" programme – the datasets that it collects. We welcome these developments and would support further action to make government datasets publicly available.⁶⁸

That said, the provision of open data remains fragmented across the UK, and many local authorities do not match the levels of success seen by central Government, TfL, or the NHS. In local government, we would encourage the UK to do more to replicate the work of the most innovative authorities – including the setting up of the London Office of Data Analytics by Mayor of London, Sadiq Khan, which has enormous potential – by enabling every local authority to recruit a Chief Data Officer. In addition to boosting the provision of public services, Chief Data Officers could be given responsibility for building the local authority's digital skills capacity.

⁶⁸ NHS Digital, Data Sets, available at:
<https://digital.nhs.uk/data-and-information/data-collections-and-data-sets/data-sets>.

Again, in relation to policy changes beyond traditional competition tools, we would welcome specific proposals for changes to institutions, policy or its implementation. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

As noted above, the UK has a thriving digital sector and the UK's start-up ecosystem is mature and successful. For example, London is home to more developers than any other city in Europe (over 300,000 in 2017; the next highest population is 182,000 in Paris).⁶⁹ Google recommends examining a range of policy areas beyond traditional competition tools to ensure the UK remains a leading environment to start and grow a digital business – one of the stated aims of the Government's Digital Charter.

Coadec, the policy voice for start-ups, worked with start-ups across the UK to understand their concerns and asks of government for how to boost the digital economy. Their responses are captured in Coadec's 12 Principles for the Digital Charter.⁷⁰ These include a 'digital first' start-up business culture, evidence-based policy reflecting the global ambitions of start-ups, and a commitment to world class network infrastructure. In terms of specific policy proposals, the following ideas merit serious consideration:

- **Insure the first customers of tech start-ups against the risk that they fail.** This policy would make it less risky for potential customers to do business with new tech firms, thereby enabling new entrants to secure early contracts and get innovative ideas off the ground. In return, the government would receive an equity stake in the start-up, to be held in a Citizen's Wealth Fund, which would be used to support skills and training for workers who face losing their jobs through automation.⁷¹
- **Support the development of digital skills in the workforce.** The British Chambers of Commerce recently found that 76% of UK businesses have a shortage of digital skills in their workplace, despite clear evidence showing that digitally-enabled businesses grow

⁶⁹ IPPR, Charting a course for the future: How London's start-up scene can survive and thrive in an age of Brexit, June 2018, available at: <https://www.ippr.org/files/2018-05/charting-a-course-for-the-future.pdf>.

⁷⁰ Coadec, 12 Principles for the Digital Charter, available at: <http://coadec.com/wp-content/uploads/2018/07/12-Principles-for-the-Digital-Charter.pdf>.

⁷¹ *Supra* note 65.

faster and create more jobs than their non-digital counterparts.⁷² Three quarters of UK businesses say they cannot find highly skilled workers, and less than half of 18 to 25-year-olds believe their education gives them the skills they need.⁷³

- **Partner with industry to enhance digital skills.** In 2015 Google launched the Digital Garage – an initiative that involved Google’s experts training around 2,000 people and businesses every week through a variety of methods.⁷⁴ An analysis of the Digital Garage by IPPR North found that 88% of participants made changes to the way they run their businesses online; 27% have seen more sales or bookings; 32% have seen increased customer numbers; 49% have seen increased website visitors; and 9% have hired additional staff to manage their digital work.⁷⁵ A systematic roll-out of this type of programme could help to maximize benefits to consumers and businesses in the UK.
- **National development of cloud infrastructure.** Despite having significant potential, in 2015 the proportion of UK firms adopting cloud computing was nearly 30% below Europe's best performers, Sweden and Denmark.⁷⁶ This underperformance has persisted over time and represents a missed opportunity in efforts to boost the efficiency of UK firms. The government could help to encourage the uptake of cloud by leading the

⁷² British Chambers of Commerce Digital Economy Survey 2017, available at: <https://www.britishchambers.org.uk/media/get/BCC%20Digital%20Survey%202017%20Summary.pdf>.

⁷³ The Economist, Driving the skills agenda: Preparing students for the future, page 3, available at: <https://eiuperspectives.economist.com/sites/default/files/Drivingtheskillsagenda.pdf>.

⁷⁴ These included High Street Digital Garage training shops opened for up to one year in major city centres (Hubs opened include Birmingham, Manchester and Sheffield); a bus tour visiting towns and villages across the country, delivering day-long face-to-face training in each community; pop-ups and bespoke tours; and online training.

⁷⁵ Google, In the Digital Garage, small businesses learn to grow online, January 8, 2016, available at: <https://blog.google/around-the-globe/google-europe/smes-grow-with-digital-garage/>.

⁷⁶ CBI, From Ostrich to Magpie: Increasing business take-up of proven ideas and technologies, November 2017, page 15, available at: http://www.cbi.org.uk/index.cfm/_api/render/file/?method=inline&fileID=93B9C860-FB79-428A-AFA95ADB6F1C7EF7.

way. Public-sector adoption of cloud computing is currently still low and 80% of councils are still using on-premises infrastructure to access and manage citizen data.⁷⁷

- **Voucher schemes for small businesses.** The government has announced that it will offer full-fibre broadband connection vouchers for businesses (“gigabit vouchers”) in an attempt to encourage take-up of services where new networks are built.⁷⁸ The same principle could be applied to cloud computing services. Alternatively, vouchers could be provided to businesses for the purpose of training in cloud services.

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

We are interested in positive experiences of other jurisdictions in policy making in the digital economy and would welcome evidence on this. We are also interested in understanding what policy changes would be appropriate within the UK and what would need to be made at an international level. We are also interested in what policies would require or benefit from international coordination. Please provide any evidence for your view.

As explained above, we believe that supporting the digital sector is important to improve productivity across the UK economy. Approaches being developed in other countries that could be considered in the UK include:

- **Emphasising and investing in digital strategy.** Several countries have taken steps to recognize the importance of a robust digital strategy and to invest in its advancement.
 - Germany was the first country to emphasise 'Industry 4.0' – where machine learning is combined with data exchange and automation.⁷⁹ To maintain its competitive advantage, the government has created a comprehensive policy

⁷⁷ CloudPro, Local government slow to adopt cloud services, research shows, May 24, 2018, available at: <https://www.cloudpro.co.uk/leadership/7505/local-government-slow-to-adopt-cloud-services-research-shows>.

⁷⁸ Department for Digital, Culture, Media, and Sport: <https://gigabitvoucher.culture.gov.uk/>.

⁷⁹ See, Germany Trade & Invest, available at: <https://www.gtai.de/GTAI/Navigation/EN/Invest/Industries/Industrie-4-0/Industrie-4-0/industrie-4-0-was-ist-es.html>.

framework with business to support cyber-physical systems. It has also taken steps to ensure a thriving start-up scene. Major research institutes offer incentives for employees to create digital businesses, while the High Tech start-up Fund – partially government-financed – supports potential high-tech start-ups.⁸⁰ Partly as a result of the government's support, Berlin is increasingly a tech hub.

- The US continues to allocate a fixed percentage of federal research funding to small businesses through its Small Business Innovation Research ("SBIR") programme.⁸¹ Approximately \$2.5 billion is awarded to research-focused small companies every year – this has a catalytic effect on start-ups. The Obama administration demonstrated its commitment to driving the tech industry through government with the creation of a CTO, CIO, and CDO within federal government for the first time and with a push to make available public, open data.
- Israel, historically a leader in innovation, has consistently used the Office of the Chief Scientist to incubate and co-fund (with the private sector) technology in relatively high-risk areas. It recently introduced a new programme in partnership with Google – E-nnovate, which provides the government with a systematic model for the implementation of information and communication technologies.⁸² Such ambitious projects that use the government's procurement machinery – for example in justice, energy, and health – could also be implemented in the UK.
- New Zealand's Ultra-fast Broadband Initiative has seen the government invest \$1.345bn, matched by private sector funding from four partners, to ensure Fibre To The Premise coverage to 75% of New Zealanders by 2019. All schools and hospitals were connected by the end of 2015 as well as 90% of businesses. The

⁸⁰ See, High-Tech Gründerfonds, available at: <https://high-tech-gruenderfonds.de/en/#title>.

⁸¹ See, SBIR, available at: <https://www.sbir.gov/about/about-sbir>.

⁸² E-nnovate Israel, available at: <https://ennovate.withgoogle.com/project-e-nnovate?language=en>.

UFB Extension will increase the percentage of New Zealanders able to access Ultra-Fast Broadband from 75% to 85% by 2024.⁸³

- **Government services online.** In Estonia, almost all state services are now online and rapid: citizens can register a company and start trading within 18 minutes; their education, medical, and employment data are easily accessible; and the introduction of the e-Cabinet to replace traditional cabinet procedures has increased governmental productivity, reducing meeting times from five hours to 30 minutes.⁸⁴ Ukraine has moved all public procurement to the ProZorro e-procurement portal.⁸⁵

10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

Google does not have comments on this question.

⁸³ UFB NZ, available at: <https://ufb.org.nz/initial-ultra-fast-broadband-programme-75-complete/>.

⁸⁴ Government Digital Service , 'Government as a data model': what I learned in Estonia, October 31, 2013, available at: <https://gds.blog.gov.uk/2013/10/31/government-as-a-data-model-what-i-learned-in-estonia/>; and e-cabinet, available at: <https://e-estonia.com/solutions/e-governance/e-cabinet/>.

⁸⁵ ProZorro, The Official Resource on Public Purchasing in Ukraine, available at: <https://prozorro.gov.ua/en/about>.

Incorporated Society of Musicians response to the Digital Competition Expert Panel Call for Evidence

Submitted on: 7 December 2018

Submitted to dcep@hmtreasury.gov.uk



Introduction and executive summary

1. This is a response from the Incorporated Society of Musicians (ISM) to the call for evidence made by HM Treasury's Digital Competition Expert Panel on 12 October 2018.
2. The ISM is the professional body for performers, composers, songwriters and music educators. Founded in 1882, we are wholly independent and support our membership of more than 9,000 professional musicians with one-to-one legal advice, professional support, independent advocacy and policy development.
3. This response addresses only those questions specifically relevant to the ISM.

Question 1: What are the emerging benefits and harms from digital markets such social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

4. The concentration of online music into major providers, such as Google, Spotify and Apple, allows listeners to easily access an

immense catalogue of music in a way barely imaginable even 20 years ago. There is no doubt that this has benefitted millions of music fans. However, there are significant negative consequences for musicians.

5. Musicians could potentially suffer due to reductions in rates paid for their music. The concentration of major providers makes it easier for them to exercise oligopolistic behaviour over rates, with damaging consequences for performers and composers. However, the ISM takes the view while concerning, these problems are not an immediate threat, because at the present time rates are in fact rising. According to PRS for Music, the UK's leading collection society, royalty revenue for UK musicians from music played via online platforms increased 52.7% year on year in 2017 to £122.9m.¹
6. A greater short-term concern is around the diminishing influence of radio on the music industry. This is caused by a wide range of factors, including the easy availability and accessibility of online music. The declining influence of radio means that the BBC's public service broadcasting obligations have less sway. As a result, it may become harder for new artists or those working in less popular genres to break through or indeed to get work at all.
7. The Government should work to secure UK music against existing and potential threats. One way it can do this is by securing the talent pipeline into UK music by protecting and investing in music education in schools. At present, music education in England is threatened by the introduction of the English Baccalaureate (EBacc), which since 2010 has been a key factor in reducing the number of pupils in

¹ PRS for Music, [PRS: Record royalties paid to songwriters and composers](#), 23 April 2018.

England studying GCSE music by 23% and the number of pupils in England studying A level music by 38%. The ISM calls for the reform or abolition of the EBacc to incorporate creative subjects, and our recent report² on the future of music education includes recommendations for how the Government can ensure the next iteration of the National Plan for Music Education can be improved.

8. Additionally, the Government should ensure that the UK music industry is not unduly harmed by Brexit. The ISM's Save Music campaign calls on the Government to protect freedom of movement with EU27 countries for musicians and other creatives after Brexit. Short of this, it should establish a two-year multi-entry touring visa for British musicians working in the EU27, which will allow continued easy access to this vital source of work. The Government must also work to ensure the UK continues to be part of the Digital Single Market, which allows musicians to more easily collect royalties they earn in EU27 countries.

² Incorporated Society of Musicians, [Consultation on the Future of Music Education](#), Dec 2018.

The Information Commissioner's response to the Digital Competition Expert Panel's independent review consultation on 'The State of Competition in the Digital Economy'

1. The Information Commissioner has responsibility for promoting and enforcing the EU General Data Protection Regulation (GDPR), the Data Protection Act 2018 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations 2004 ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR"). She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.
2. The GDPR and the DPA are new laws which took effect from May 2018, replacing the Data Protection Act 1998. They build on existing data protection rights, such as the right to access, and introduce new ones, for example, the right to data portability.
3. The Commissioner's fundamental objective during her term is to build a culture of data confidence in the UK, helping our digital economy to grow in a strong and sustainable way. In order to achieve this objective it is essential that government builds privacy into the development of public policy, ensuring that individuals' fundamental privacy rights are central to legislative and regulatory decisions. The Commissioner believes that, where policy proposals include the processing of personal data, there should not be a choice between privacy *or* innovation, but a focus on privacy *and* innovation.
4. The Information Commissioner welcomes the opportunity to respond to the Digital Competition Expert Panel's independent review consultation on 'The State of Competition in the Digital Economy'.
5. This response focuses on digital market competition issues that raise data protection considerations. These include:
 - Innovation and privacy by design and default;
 - Data Portability and interoperability;

- Artificial Intelligence (AI), machine learning and algorithmic transparency;
- Data Trusts;
- Certification Schemes;
- Codes of Conduct.

Privacy and Competition

6. Of the G20 countries the digital economy in the UK is the highest proportion of GDP, and this could grow by another third in the medium term. This provides enormous opportunities for business seeking to expand in the data driven economy.
7. The introduction of the GDPR on 25th May this year, brought a series of new requirements and responsibilities upon businesses in how they approached data handling and data protection. Attention is being increasingly focussed upon the opportunities data protection presents. One of the overlooked aspects of this opportunity is the facilitation and promotion of competition and innovation through data protection. This response hopes to outline what the opportunities are and more importantly how they can have positive impacts upon businesses and market places.
8. One of the difficulties in the area where data meets business is that the greater the proportion of personal data a company possesses the more likely it is to accumulate more. Data has a natural propensity toward aggregation. This creates a challenge around the creation of monopolies, an issue that has become increasingly prominent in recent years with the emergence of extremely large internet based corporations. For policy makers the challenge is to facilitate competition, while convincing businesses already in a strong position that data protection is a catalyst to innovation, rather than an impediment.
9. This response will enumerate a series of concepts that spring from the GDPR and DPA 2018 and detail their immediate and potential impacts. But there a series of principles that underpin the legislation and how it interacts with competition policy. The concepts of transparency, accountability and trust are central to data protection in and of itself, but furthermore are the basis for how competition can flourish in the digital world. As more and more commerce and other business moves online, demand from users of these services for greater protections has grown.
10. In order for individuals, as consumers, to have confidence in digital businesses they must have trust that their personal data will be handled responsibly and in ways that they have agreed.

Transparency is the first cornerstone of this. The GDPR allows people to understand in much clearer terms what data companies possess and how it is being processed – through tools such as subject access requests, algorithmic transparency, consent and other lawful bases for processing. The second cornerstone is around accountability, and the faith that if data is misused there are remedies for individuals and consequences for those who breach the law.

11. The specific areas, outlined in this submission, which put these principles into practice are all in part aimed at fostering the trust and confidence that enables competition, which allows customers to move their data with confidence, to undertake transactions, and that encourages businesses to innovate in order to retain customers.

Innovation and Privacy by Design and Default

12. In many instances data concentration is seen as advantageous by large corporations that already possess large amounts of data. Intellectual Property laws often underpins this. In much the same way, Data Protection laws should also be ingrained across the spectrum of economic development to help encourage competition and innovation. Central to this is the principle of data protection by design and default.
13. Privacy by design has two major advantages in terms of bolstering competitiveness. Firstly, it mitigates what could be described as “regulatory burden” by building in protection of personal data from the very conception of businesses, projects or functions. Secondly, it guards against potential breaches by ‘hard-wiring’ systems for fair and secure processing into any handling of data, preventing loss of trust in a given business, and avoiding censure from regulators.
14. There are broad competitive advantages to good privacy practices, such as privacy by design and default, revolving around basic concepts like customer satisfaction. Equally, an enterprise which is built upon sound data protection principles will find itself unburdened by out-of-date customer information, duplicated data, wasted storage, and redundant man hours spend meeting data protection requirements retrospectively. The concepts of data minimisation and purpose limitation allow companies to become streamlined and nimble in their use of data, opening up avenues to competitive advantage.
15. Advances in technology should not mean organisations racing ahead of people’s rights. Innovation relies on consumer trust and therefore the digital economy depends on the trust of consumers to engage with it. Organisations need to understand that, unless they are

trusted to properly look after people's personal data, they will fail to realise its potential benefits to their business or the wider economy.

16. The GDPR requires that appropriate technical and organisational measures are put in place to implement the data protection principles and safeguard individual rights. This is 'data protection by design and by default'. This means that data protection must be 'baked' into processing activities and business practices, from the design stage right through the lifecycle of a project to its completion.

Data Portability and Interoperability

17. As GDPR beds in, business will increasingly turn its attention toward the opportunities it presents, in addition to simply complying with its requirements. Data portability and interoperability, as a potential competitive advantage, could be one of these opportunities.
18. The right to data portability allows individuals to obtain and reuse their personal data for their own purposes across different services. It allows them to move, copy or transfer personal data easily from one IT environment to another in a safe and secure way, without affecting its usability.
19. The role of data portability as a catalyst to greater competition is clear. By bolstering the right of individuals to move their data from one business or platform to another creates incentives in the marketplace for better services, better products, and greater innovation.
20. Data portability creates a more level playing field between large corporations who enjoy greater degrees of data concentration and smaller enterprises who will be able to attract customers unhindered by cumbersome processes for engaging their data. Individuals will feel less tethered to a company which hold their data.
21. Interoperability is a related advantage for competition. By requiring that data processed by a given company is held, developed and made transferable in a way that other businesses can use, it makes it simpler for individuals to move their personal data; once again bolstering the need for enterprise to develop good services and innovate to retain or attract customers.
22. Doing this will enable individuals to take advantage of applications and services that use this data to find them a better deal or help them understand their spending habits.

23. There are a number of different components that need to be in place for data portability to work. Organisations are going to need to consider what the building blocks are to achieve this. Big tech has already launched schemes looking into this and solutions are inevitable.
24. There are, of course, data protection risks related to this GDPR requirement, such as the risk of 'data leakage' occurring during a transfer of data. Organisations will need to consider this and take precautions to mitigate against the risks. Too many leaks are likely to lead to the eroding of consumer trust and engagement with the market.

Artificial Intelligence, Machine Learning and Algorithmic Transparency

25. The implications of the use of Artificial Intelligence (AI) and machine learning in competition could be extensive in terms of consumer rights. Competition policy should take into account how such technology can affect the equality and fairness with which consumers are treated in the digital markets.
26. AI is a type of automated processing that has its own unique risks. AI programs often include machine-learning and do not linearly analyse data in the way they were originally programmed. Instead they learn from the data they have already analysed in order to respond intelligently to new data and adapt their outputs accordingly.
27. This brings the possibility of AI-enabled technology making significant decisions about people, with little or no human oversight. There is also the very real risk that biases are introduced into AI either from the development of a product or through the way in which it develops as part of the machine learning process.
28. People have developed a mistrust in the use of AI technology. This is likely to affect competition in this area unless organisations can increase consumer trust.
29. Artificial Intelligence, machine learning and the use of algorithms present an enormous range of opportunities for businesses. The speed of processing, decision-making and exponential learning can improve services, allow many more transactions, and free up manpower. However, these opportunities can only be utilised and maximised if the risks around privacy and data processing are adequately addressed.

30. Take for example algorithms. Individuals using digital services or businesses are likely to appreciate greater speed of processing but only if there is a sufficient degree of transparency as to how the algorithms work and how decisions about them are made using their own personal data. An absence of this will create a reluctance to engage.
31. Algorithmic transparency can also encourage innovation and competition by allowing businesses to learn from each other, develop best practice, and prevent oversensitive protection of algorithms by large corporations seeking to retain monopolistic market share.
32. Bias in AI can encourage the perpetuation of poor service, or limited options for some consumers which is anathema to competition. By contrast fair and open AI practices will do the opposite and encourage opportunities for interaction between businesses and customers.
33. The GDPR has introduced a number of new requirements that could be used to mitigate against a lack of trust. Including a right for individuals to request human intervention or to challenge a decision.
34. Another key element that the GDPR introduces that could be used to resolve this issue is transparency. Providing individuals with information about how the AI works and the implications and likely outcomes from its use will increase understanding. That alongside regular reviews and data privacy impact assessments when making changes to systems or implementing new systems is likely to reduce breach risks and increase consumer trust.

Data Trusts

35. A "Data Trust" takes the concept of a legal trust and applies it to data. It provides a legal structure that allows for independent third-party stewardship of data. The idea behind data trusts is that they facilitate sharing between multiple organisations, but do so in a way that ensure that the proper privacy protections and other relevant protections are in place. There is a governance of the data, which ensures that the voices of interested parties are represented in that governance, and there is a fair sharing of the value that can be derived from those data. Data trusts have the potential to greatly increase the competitiveness of the digital markets.
36. Data trusts do not necessarily involve the processing of personal data. Those that don't would be unlikely therefore to engage the requirements of the GDPR. Some data trusts use 'anonymised'

personal data and where the data is truly anonymised the GDPR requirements would also not be engaged.

37. However, there are a number of considerations data trusts need to take into account. Those who use anonymised personal data need to ensure that they are not assuming the data they are using has anonymised where in reality it may be pseudonymised. The difference being that it is possible to re-identify pseudonymised data, resulting in the possible re-identification of the individual the data relates to. It should not be possible to re-identify truly anonymised data. The test in law is that if it is reasonably likely for re-identification to occur then the data is not truly anonymised.
38. Truly anonymised data is a more complex concept than might initially be thought. For example, data trusts will not only need to think about what is possible now in terms of re-identification but also what could be possible in the future. With open data sets a gamble is essentially being taken that future technology will not be developed that would enable the data to be re-identified. There are also risks around third-party access to that data and how they use it.
39. The issue is not soluble, having said that, organisations can address it by assessing the risks - including considering what third parties with access to the data might do with it – and taking reasonable precautions. The risks need not be a hindrance to the development of data trusts. They simply should be taken into account and the data trust developed with these considerations in mind – in other words privacy by design and default.
40. Data trusts encourage competition through innovation. They provide a mechanism for companies and businesses to try new things with data while taking steps to ensure that the privacy rights of individuals are protected. Likewise, 'regulatory sandboxes', like the one the ICO is establishing, encourage innovations by creating safe space for businesses to interact with real world customers helping them to develop approaches that utilise and are driven by sound data protection practices.

Certification Schemes

41. The concept of certification schemes in data protection was included in the GDPR. They are envisaged as a way to comply with the GDPR and enhance transparency. Certification is a way for organisations to demonstrate that their processing of personal data complies with the GDPR requirements in line with the accountability principle.

- 42. The ICO has no plans to accredit certification bodies or carry out certification at this time, although the GDPR does allow this.
- 43. The ICO will publish accreditation requirements for certification bodies to meet. The UK's national accreditation body (UKAS) will accredit certification bodies and maintain a public register of accredited certification bodies.
- 44. Signing up to a certification scheme is voluntary but could be considered a competitive advantage in the digital economy.
- 45. Certification is a mechanism for displaying trustworthiness to potential customers. Smaller businesses seeking to expand, or new companies with lesser brand recognition than established counterparts can demonstrate their willingness and ability to handle individuals' data in a way that is responsible and transparent, verified by a third party certification. This levels the playing field and fosters competition.

Codes of Conduct

- 46. Codes of Conduct were introduced by the GDPR as a way to help organisations to apply the GDPR effectively. They are expected to be sector specific and reflect the needs of different processing sectors and micro, small and medium sized enterprises. Trade associations or bodies representing a sector can create codes of conduct to help their sector comply with the GDPR in an efficient and cost effective way. They will have to submit them to the ICO for approval. Signing up to a code of conduct is also voluntary.
- 47. The ICO's role in codes of conduct will be to assess whether a monitoring body is independent and has expertise in the subject matter/sector. Approved bodies will monitor compliance with the code and help ensure that the code is appropriately robust and trustworthy.
- 48. Compliance with these Codes of Conduct with specific sectors will help not only help organisations to comply with the GDPR and demonstrate that compliance with the ICO but could also give them a competitive advantage over organisations who do not comply.
- 49. Codes of conduct can be a tool in fostering both competition and innovation. In the first instance, the sector specific guidance give confidence to businesses that they can/are handling data correctly. That confidence can be a springboard for innovation. Secondly, codes of practice are one strand of creating a level playing field for

businesses who process data, which is a prerequisite to encouraging competition.

Data Protection and Competition

50. It is too early to tell what the full extent of the impact of the GDPR on competition in the digital economy will be as organisations are currently mainly focused on basic compliance. However, as outlined above, it is likely to influence a number of areas in the markets development.
51. We note that the main considerations of this consultation are around concerns relating to the monopolization of the digital market, rather than data protection principles. However, the overlap between privacy and competition is much more real now than a few years ago. The competitive advantages organisations might gain through compliance with the GDPR should be considered when deciding competition policy.
52. As laid out here, organisations themselves can improve their competitive edge in the digital market by engaging and complying with data protection principles, seeing them as an opportunity rather than a burden. The key theme underpinning this opportunity is viewing it as privacy *and* innovation, rather than privacy *or* innovation.



Law Society
of Scotland

Consultation Response

Digital Competition Expert Panel: Call for Evidence

December 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee, together with the Consumer Law and Privacy Law Sub-committees, welcomes the opportunity to consider and respond to the Digital Competition Expert Panel's call for evidence.¹ The Sub-committee has the following comments to put forward for consideration.

General remarks

We welcome the Government's recognition of the importance of ensuring that the competition law framework is fit for purpose in the context of regulating digital markets. The development of digital markets raises a number of interesting legal and policy issues, which are attracting increasing interest from the legal profession, including in relation to competition law. We have identified a number of potential benefits and harms of the current trends in evolution of those markets and our thoughts are set out in response to the questions below.

An overarching consideration is how an individual market is defined or how the relevant market is determined in this context. If the market cannot itself be identified, this could lead to an inability to eg establish dominance, relevant to considerations of whether a particular transaction is anti-competitive.

¹ <https://www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel>

Response to questions

1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

We would particularly welcome evidence on:

- *the extent to which some digital markets appear to tend towards only one or a small number of firms;*
- *the key drivers of this trend (if present), and whether they relate to inherent features of these markets;*
- *the benefits or harms which are associated with concentration in digital markets; and*
- *the degree to which large market players enable or inhibit wider innovation and investment.*

We would welcome evidence on the positive or negative economic impacts of all of the above, for example on prices, quality, choice, innovation or privacy. The Expert Panel was asked to focus on the impacts on competition: please do not provide evidence relating to impacts on (for example) harmful content available online, or the impacts of digital markets on the availability of a range of news media which are beyond the scope of our review or being considered elsewhere. Please be explicit about the sources of evidence for your view, where possible.

The potential benefits and harms from digital markets tending towards only one or a small number of big firms are, in principle, the same as in any other market, namely loss of competition, barriers to entry, stifling of innovation, concentration of power.

However, specific aspects of those market may compound those effects – with potential larger benefits and harms. In particular, the reliance on data and the ability to collect and draw behavioural analysis and patterns from that data, can be used (and could be abused) in a variety of circumstances (see further response to question 2 below).

Healthy markets need level playing fields. Moreover, a benefit to one stakeholder may be a harm to another: the primary goal of regulation or legislation must therefore be to balance those competing interests to achieve a “fair” result.

Digital markets present a number of regulatory challenges: they are constantly evolving; the pace of that change is rapid; power dynamics may not follow conventional patterns; market data itself is a valuable commodity; and the algorithms which increasingly underpin digital markets can be incredibly complex. The full potential of data, groups of data, and the information that can be gleaned from aggregating different types of data is only just starting to be explored. It is therefore difficult to get a clear picture of benefits and harms which may be occurring right now, far less to assess the direction of travel and anticipate all the issues which will need to be addressed in the mid to longer term.

Social media and any other services which collect or may be used to collect personal data necessarily create potential privacy and personal security risks. That data is not, and should never be, an easily transferable commodity. This is certainly not to say that they are harmful *per se* but again, the risks may be difficult for users to appreciate, not least because, as referred to above, the full potential of data is not, and probably currently cannot be, fully understood.

We have no data on the extent to which some digital markets appear to tend towards a limited number of firms. However, as data is power, those already large, often global, businesses which are able to utilise existing data effectively, have advantages in terms of maintaining their existing position and further increasing their market share. This will inevitably pose a barrier to new entrants (without any such data) or even smaller competitors, where the data accumulated through service provision presents a competitive advantage in its own right. It is an advantage which they are able to maintain and grow.

There may be benefits for consumers if data collection and analysis facilitates more tailored offerings, or improves service levels generally but not at the expense of consumer control over data, or transparency over collection. Additionally, tailored offerings, which are often claimed by marketers to be in the interest of consumers, may not be perceived in the same way by the consumers themselves and can sometimes even be psychologically damaging.²

There could also be benefits in terms of market structure, for example facilitating market entry and enabling the unbundling of services. However, we note that there may be risks to consumers eg if data analysis suggests that a particular offering is less profitable, which results in this service being withdrawn or a premium being charged.

The impact of platforms may also merit consideration. A platform may be able to collect, analyse and use data to identify particular consumer behaviours or buying trends. This information could potentially be used to stifle competition in the longer term in markets where at present there are a larger number of suppliers. See in this regard, the European Commission's Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services.³

2.What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

We would particularly welcome evidence on:

- *the extent to which the same small number of digital firms are becoming present across a broad range of digital markets;*
- *the key drivers of this cross-market presence*
- *the benefits or harms associated with cross-market presence.*

We would welcome evidence on the economic impacts of the above, along the same lines set out under question one.

There is a potential harm if a small number of actors reduce competition by preventing new entrants to the market or putting existing smaller players out of business. The nature of data also raises particular issues.

² For example, people who have searched for weight loss advice being sent repeated weight-loss related advertising, which can be damaging to their self-image.

³ COM(2018) 238 final - see https://eur-lex.europa.eu/procedure/EN/2018_112

As referred to above, the principle findings from one market, may be relevant to other markets. In addition, the greater the aggregation of data, the more potential uses to which that data can be put. This could therefore mean that those larger firms which are present across a range of digital markets may be able to obtain further market intelligence, leading to growth of their customer basis and therefore in turn further market intelligence in an ever-increasing spiral. This could stifle competition and in particular make it increasingly difficult for new entrants to break into all these markets, as well as leading to concentration of the commodity in the hands of a few.

3.What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

We are particularly interested in whether data may constitute a ‘barrier to entry or expansion’ for companies seeking to compete in the digital economy. Please provide any evidence for your view.

Concentration of data in hands of a few players is likely to lead distortion of the market. There is a growing appreciation of the potential economic value of holding large amounts of data. The larger the volume of data, the greater the potential for firms to use data analytics to process and understand that data in order to develop new products, understand and anticipate consumer behaviour and therefore inform their strategy. This is likely to give an ever-increasing advantage to bigger businesses, which could have a negative effect on competition from the perspective of both smaller would-be competitors and consumers.

There is a further crossover here with privacy law and the extent to which data “owned” by one entity may be used (or abused) when aggregated by data held by other companies.⁴ This may create the potential for detailed profiles of individual users to be created, giving the companies a potential competitive advantage in economic terms but also allowing for certain predictions in relation to that individual, which might not be to their advantage.

A further observation relates to the potential importance of interoperability and the development of standards to enhance the competitive conditions in a market. Where open data is being used as a policy tool to enhance competition, a lack of interoperability and standards can act as a barrier to entry. An example of where this has been considered is in the development of Open Banking in the UK. This was implemented by the CMA and required the largest providers of bank current accounts in the UK to develop a standardised approach to enable customers to share their current account transaction data with third

⁴ One question that could be asked in this context is whether a data subject’s consent given to a collector of personal data is assignable by the collector or is personal to the collector of that data. This could raise questions in the context of acquisitions. For example: a consumer “C”, buys an item from a vendor “A”; is there a sufficient explicit informed consent by C to enable A, in the event of sale of the goodwill of its business to B, to disclose the personal data to B without obtaining C’s express consent. Similarly, is consent to disclosure to another member of A’s group of companies limited to disclosures to members of A’s group as at the time when the consent was given? The answers to these questions will largely depend on the clarity of the notice given to the data subject in recognition of the transparency obligations imposed under the GDPR/Data Protection Act.

parties – through the development of common, standard, open application programming interfaces (APIs). This approach ensures that third parties can deploy a single, common API to link with banks, reducing their market entry costs, providing greater choice and variety of innovation to customers. Such interoperability is consistent with and required by the GDPR to support the right to data portability.

4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Does the potential for acquisition of smaller firms provide an efficient source of capital and exit or does it affect innovation? Does acquisition of smaller firms raise the value of their innovations as they get incorporated into larger platforms or does it forestall potential future competition? Does the tax system or other policy features create biases that lead to more or less acquisitions than would be the case with a neutral policy regime?

A big firm would appear to be able to accumulate data from more and wider customer sources. This is likely to give an exponentially-growing resource advantage over smaller firms for data mining purposes. See further responses to questions 1 and 2.

5. To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

Please provide any evidence for your view.

The concepts of “free” services in exchange for payment in data raise a number of competition policy considerations.

The first of this arises in the context of mergers and acquisitions. Anecdotally we are aware that there is growing discussion around the extent to which competition regulators consider in detail the potential consequences from a competition perspective, which may result from the takeover of company A by company B in terms of data acquisition. Commentators have highlighted recent social network and digital entertainment services acquisitions, where approval was given but the full extent of the implications of data acquisition/amalgamation does not appear to have been explored.

The second strand ties in with the potential exploitation of consumers themselves, with perhaps particular danger of detriment for those of more limited economic means who may be more vulnerable to this type of abuse. This is encapsulated in the phrase “if you’re not paying for the product, you are the product”, which recognises the economic advantages which can be gained from data collection. This applies not only to “free” services per se but may also apply where the value of a good or service is outweighed by the value to the provider of the data obtained. This is a particularly relevant consideration in the context of the internet of things and smart products which gather larger volumes of user data. Where collection of that data is used to deliver value to the customer through a high-quality product or high quality of service, that data collection is merited; it is certainly not the case that collection of data will necessarily lead to an exploitative or anti-competitive result. However, if an inferior product or service is delivered in return for

harvesting large quantities of data which provides the company in question with a competitive advantage, or that data is used against the individual whose data was collected, there is the potential for competitive and consumer harm. There is a further question as to what happens when a “free” service (or app or piece of equipment), which is indispensable for the proper enjoyment of a paid-for service proves defective?

Access to high volumes of data can be aggregated and used in certain ways, including to dictate particularly targeted types of advertising. This is one of the ways in which “free” services can be used to deliver far higher value to those collecting data than is received by the data subject whose data is being used. We note that the GDPR does address some aspects of the issue of advertising but it is important to note that it does not attempt to deal with competition issues which may arise in this context.

Overall, associated markets are at risk of being dominated down-stream where the argument upstream is that the service is free and needs paid for. Regulatory scrutiny should continue to apply to any perceived linkage of data use in return for free service.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

We are interested in any evidence on the implications of AI, machine learning and algorithms for competition. In particular we would welcome any evidence on whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers.

As we have commented elsewhere, digital markets pose a number of potential competition issues including: the detail of comparing like with like; algorithmic decision-making; price fixing; the emergence of intermediaries for data and questions around where transaction power lies from a competition perspective; and behaviour in online market places. A further key issue arises in terms of the increasing overlap between providers or agents for providers, for example a platform which offers a marketplace for other sellers while also offering goods or services in its own right (see further at question 1). This leads to a lack of transparency, which can in turn translate into a loss of ability to apply regulatory scrutiny.

Additionally, we note that algorithms may be created for constant monitoring of competitors’ prices. These could be expected to facilitate a business maintaining its own prices at level no lower than the maximum consistent with undercutting, or matching, the competition.

A final issue which is raising concerns is how search results are displayed. This may have an impact on competition in two ways, in particular where the systems or algorithms used to determine the order of such results are not transparent. Firstly, search results may drive consumers towards particular choices, giving preferential treatment to particular businesses and thereby delivering an unfair competitive advantage and perhaps further reducing the ability of new entrants to break into the market. Secondly, collecting data on particular individuals may lead to tailored pricing options which are set at the highest level which it is assessed that individual can or will be willing to pay. This can lead to prejudicial and exploitative outcomes for individual consumers.

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

Specifically:

A. What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?

B. What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed? We would welcome specific proposals for changes to institutions, policy or its implementation under any of these headings. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

As we have said previously, generally speaking, we consider that competition law as such is fit for purpose to deal with new technologies – ie collusion by an algorithm is collusion just the same. One of the strengths of competition law is that the principles-based nature of the regime gives greater flexibility to deal with changing markets. However, there are still difficulties in terms of enforcement in evolving markets: an issue which could be dealt with by competition law may still be missed or the competition law relevance may be overlooked. The key question in fast moving markets is time taken to run complex cases – by the time decision is reached and litigated, the market has moved on. Fast-tracking or creation of nimbler enforcement tools could be helpful in this context.

There is also an inherent difficulty in less obvious cases as competition investigations and enforcement usually focus on past conduct. Often a particular action or behaviour will only be prohibited after an incidence of it has already occurred.

In both these scenarios the speed of decision-making in enforcement cases is a central consideration. While there may be advantages to fast-track decision-making in certain cases, there is a danger that pushing through cases too fast could erode the rights of the defence. On the other hand, significant delays can allow businesses to continue exploiting an advantage or gaining further market share. In this respect powers to take interim measures can have a positive effect. A possible solution would be to focus on changes the balance of risk, recognising the role of competition law in managing change while guarding against anti-competitive practices and ensuring protection of consumers.

We note that NRAs and competition authorities themselves have always used data to fulfil their duties. The emerging issue over the last few years has been the vast amounts of data that are now available. This data enables firms to compete in new ways, developing products, services and prices to better meet customer needs, but also to act in ways to undermine competition and produce detrimental consumer outcomes. Regulators therefore need to have an in-depth understanding of how those technologies might be used for anticompetitive purposes, and the tools to identify potential abuse, if they are to achieve effective enforcement.

In recent years NRAs and competition authorities have been developing their expertise in this area, to use data in their investigation and enforcement work. For example, in the UK the Competition and Markets Authority (CMA) has this year established its Data, Technology and Analytics unit, with a key part of its

remit being to consider how to develop its machine learning and artificial intelligence capabilities to be used across its case work. It is also developing capability within the CMA to better understand how firms are using data and whether there is a need for action. NRAs and competition authorities should explore opportunities to develop best practice in these important emerging areas to ensure there is sufficient capability across markets.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

For example, you may wish to consider options for sector-led initiatives or regulation to make data more open, portable or interoperable between different platforms, or standardised in format if these would enable more effective competition in digital markets?

Again, in relation to policy changes beyond traditional competition tools, we would welcome specific proposals for changes to institutions, policy or its implementation. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

It is important to note that incumbent suppliers can also be innovators: the important thing is to promote a competitive environment which does not unfairly advantage incumbent suppliers or discourage new entrants. While it is too early to assess the impact and success of the recently open banking initiative, the legislation seeks to establish a framework that allows both new entrant and incumbent suppliers to offer services which may allow consumers to make better use of their data. If successful, this could provide a blueprint which might be expanded to other sectors to facilitate development of innovative services. For example, this could include the provision of other retail financial services such as mortgages, the management of investment portfolios and pensions (such as enhancements to the Pensions Dashboard). It could also be helpful in promoting competition and removing inefficiencies in wholesale relationships, for example through enabling increased interoperability between providers. The approach could also be adopted in other sectors, such as is the case in Australia, with consumer data rights being introduced in telecommunications and energy sectors, in addition to the establishment of open banking.

Furthermore, we can see that potential benefits could be realised from establishing central databases of consumer information, of the kind established by the Database Order referred to above, and making these available to all suppliers and price comparison websites. To the extent mechanisms and infrastructures have been introduced in the establishment of open banking and there is scope for these to be expanded and/or leveraged in order to introduce open data in other financial services markets, or indeed other sectors, then opportunities to do so should be explored and exploited.

We also note that data portability can be used to enhance price transparency and allow consumers to compare products with reference to their personal circumstances. It can be particularly useful where complex pricing structures are involved. Data portability can also facilitate switching by reducing the administrative burden on consumers when the decision to move to a new provider has been taken. This could also assist new entrants seeking to establish themselves in the market. At the same time further support may be needed: for example, even if an individual consumer is given access to his or her Midata, it

can be very difficult for them to understand how to apply this to searching for a new tariff. Allowing a consumer to approve their data being made available to price comparison websites and competitors of their current supplier, without the need for the consumer herself to enter that data online, could allow an algorithm to calculate the best tariff for that consumer and allow the consumer to benefit from the widest possible range of tariffs, which the CMA's 2016 report on its energy market investigation endorsed.⁵

We would encourage regulators to consider microbusinesses, and possibly SMEs more broadly, when considering how the benefits of data portability can be realised in driving a more competitive business environment. Microbusinesses are widely recognised to behave like consumers and can often benefit from the same regulatory interventions.

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

We are interested in positive experiences of other jurisdictions in policy making in the digital economy and would welcome evidence on this. We are also interested in understanding what policy changes would be appropriate within the UK and what would need to be made at an international level. We are also interested in what policies would require or benefit from international coordination.

Please provide any evidence for your view.

As referred to above, we note the European Commission's Digital Market Strategy includes the development of a "fit for purpose regulatory environment for platforms and intermediaries" which resulted from concerns regarding the "growing market power of some platforms" and "their strong bargaining power compared to that of their clients ... may be reflected in their terms and conditions (particularly for SMEs), promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies, or restrictions on pricing and sale conditions".⁶

We have also referred above to open data initiatives in Australia. The government there is introducing consumer data rights in retail banking, telecommunications and energy sectors, starting with the introduction of open banking, following the lead of the UK. There could be lessons for the UK to learn from the Australian experience in other, non-financial services sectors.

⁵ For further discussion, including the impact of data portability on vulnerable and disengaged consumers, see our response to the consultation on *Modernising Consumer Markets: Consumer Green Paper* - https://www.lawscot.org.uk/media/360683/comp-con-priv-beis-modernising-consumer-markets_july-2018.pdf

⁶ See the report of the European Scrutiny Committee of the House of Commons of 18 July 2018 available at https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xxxv/30105.htm#_idTextAnchor017



10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

We have no comment on this question.

For further information, please

contact:

[Name redacted]

Policy Team

Law Society of Scotland

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medConfidential submission to the Digital Commission Expert Panel consultation

We have intentionally kept this document relatively short, with references to additional material in the solutions section. We are happy to go into further details on any parts where useful and not already provided.

medConfidential is an independent non-partisan organisation campaigning for confidentiality and consent in health and social care, which seeks to ensure that every flow of data into, across and out of the NHS and care system is *consensual, safe, and transparent*.

Founded in January 2013, medConfidential works with patients and medics, service users and care professionals; draws advice from a network of experts in the fields of health informatics, computer security, law/ethics and privacy; and believes there need be no conflict between good research, good ethics and good medical care. We also engage with data use across Government, as to the first approximation, the data that institutions of state most want to make copies of is your medical record.

Understanding the effects of digital markets

The best way to understand how your data will be used tomorrow, is to see how it was used yesterday. To borrow a phrase, “follow the data”.

Whether in the private sector or the public, there is no expectation that a data subject (whether acting as a citizen, a consumer, or an innocent bystander caught in digital surveillance) will understand what data is collected, nor how that data is used.

The commercial incentives to duplicity and secrecy are strong. What is [normal practice in business is unacceptable in the public sector](#).

What must change is the norm that an individual can not know how their data is used - most people will never look, but that there is secrecy breeds harmful practices because people can't see.

The public sector is in a strong place to lead on such issues, and indeed, the Cabinet Office's Technology Code of Practice (points 6 and 10) contain some indications in that direction - that there should be audit trails, and individuals should know how data about them is used.

After large missteps in 2014, the NHS is slowly moving towards telling patients how data about them is used, and what the effects of their dissent choices are. Where the NHS leads, the rest of the public sector will have to follow - either willingly or as a result of more (and inevitable) data catastrophes.

If all a data subject hears about data use is the ongoing steady flow of failures, there can not be institutional trust in the long term.

Policy and implementation solutions

AI and algorithms in the public sector: For all bodies subject to judicial review, any [AI or algorithm involved in input](#) to that decision must satisfy the explainability [requirements of judicial review](#). Should there be a clear public sector mandate that algorithms will only be used if they satisfy existing legal obligations, and that technology tools will need to be procured to satisfy those tools, that will create an international market in which the [UK is possibly uniquely placed to lead](#), if leadership is desired. The UK has the rare combination of an ecosystem of technology companies, a large community of lawyers/judges with a deep and practical understanding of the rule of law, and a public sector open to new tools where they satisfy well known existing legal requirements,

Procurement incentives for competitive markets: Where an NHS body wishes to procure an AI to assist in diagnosis, it should be [required to procure 3](#) - effectively requiring 3 diverse analyses rather than one, replicating the medical norm of a 'second opinion' from a human doctor. That may be extensible to other public bodies.

Data available to life sciences and research: For there to be public confidence in data use, every patient should be able to know how the NHS and others use data about them, and how their wishes are respected. The NHS has established clear processes for the use of data for legitimate research – these do not need to be changed. However, the implementation of the National Data Opt-out remains hamstrung by legacy data disseminations.

This, the first spending review since the 2018 Data Protection Act, allows for a clearer formulation when communicating with the public: "If you want your data to be used for research and for other purposes beyond your care, it will be; if you don't, it won't." (Any exceptions being solely decided by the explicit approval of the Confidentiality Advisory Group – which was placed on a statutory footing in 2014, yet still has no Regulations governing its work.) Past and current heavy reliance on (DPA98) 'anonymous' data as the basis for dissemination both undermines public confidence and limits the data available to research.

The spending review offers an opportunity to reconsider that failed approach, improving public confidence and making more high quality data available to researchers and the life sciences – both underpinned by a commitment that whatever a patient wishes, they will be able to see how their wishes were respected. Any suggestion of 'data trusts' for NHS patients' data requires as a prerequisite the admission that the NHS itself will never get data dissemination right in patient's interests. Public confidence in data for life sciences and research would be higher if the message was clear, simple, and accurate: *If you want us to use your data in legitimate projects, we will; if you don't, we won't.*

Technology in the NHS: Clinicians will use technology when it helps them with patients; when it doesn't, they don't – no matter how hard NHS England may push it. The FHIR (Fast

Healthcare Interoperability Resources) standard is now internationally recognised as the standard for interoperability between health systems – yet the first version was only published *after* the last spending round. Treasury / DH / NHSE should ensure that companies cannot use [contracts to limit or prohibit interoperability](#), or to require bulk data copying from core hospital systems into commercial companies. Where they are proposing new national programmes, chopped up into parts, what happens at the [boundaries between parts](#)?

medConfidential

[Email address redacted]

7 December 2018



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Thank you for this opportunity to provide input into your review of the state of competition in the digital economy.

The internet has had, and continues to have, a transformative impact on our society and our economy. In many ways the legal and regulatory frameworks built decades ago for communications and information systems still serve admirably; but in others, they have fallen short. We welcome this timely public discussion of the many complex elements of promoting competition and consumer protection online.

The Mozilla Corporation produces the Firefox web browser and the family of Firefox products, including Firefox for iOS, Firefox for Android, Firefox Focus, and Firefox Lite, used by hundreds of millions of individual internet users around the world. Mozilla is also a foundation that focuses on fueling the movement for a healthy internet. Finally, Mozilla is a global community of technologists, thinkers, and builders, including thousands of contributors and developers who work together to keep the internet alive and accessible.

When we built Firefox, we were working against a backdrop of a then-dominant pairing of Microsoft Windows and Internet Explorer. We sought to change the world of web browsing by showing that it could be different, and better. Competition issues at the heart of this review are thus of central importance to Mozilla.

Throughout the history of the internet, many have held as a fundamental assumption that today's big companies won't be the same as tomorrow's, because the internet is inherently disruptive. That assumption can no longer be taken for granted. Today five technology companies—Alphabet (parent company of Google), Amazon, Apple, Facebook, and Microsoft—have all achieved substantial market capitalisation, among the largest companies in the world in any industry by that measure.¹ Farhad Manjoo in the *New York Times* calls them "[a new superclass of American corporate might](#)."² It

¹ Quarterly rankings of top ten publicly traded companies by market capitalization worldwide, from Wikipedia: https://en.wikipedia.org/wiki/List_of_public_corporations_by_market_capitalization

² Farhad Manjoo, "Tech Giants Seem Invincible. That Worries Lawmakers." *New York Times* (Jan. 4, 2017), at: <https://www.nytimes.com/2017/01/04/technology/techs-next-battle-the-frightful-five-vs-lawmakers.html>

seems plausible that they will still have those industry leading positions a decade, even multiple decades, from now.

The need for government engagement to promote competition online is readily apparent today, and the economic consequences of inaction or inadvisable action have never been greater.

In the remainder of this submission, we offer responses for seven of the ten questions identified by the panel. We would welcome the opportunity to provide additional evidence and insight as the secretariat's work evolves.

1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

The technology sector is significant for many reasons, but the sheer size of the biggest businesses and the two-sided nature of many of the markets do not fundamentally distinguish the internet from other industries, many of which also have big businesses and two-sided markets. One unique feature of tech in the context of competition is the nature of the integration of distinct and interconnecting digital services, and the fine-grained ability to control that interconnectivity through product and business decisions around integrating code bases and offering APIs—and how the outcomes those decisions can produce run counter to long-standing assumptions of interoperability and openness on which the internet was built. Even before the term platform came into common parlance, that was how tech was designed—not in the two-sided market economic sense, but from the technical perspective that software and services are often built on top of other software and services built by others, relying on well-settled norms of openness and the mutual benefits of interoperability. Unfortunately, those norms are no longer settled, nor the mutual benefits guaranteed, in the digital economy prisoner's dilemma we have today.

Another unique feature of the internet economy is the role played by data, including data collected from users and data generated about them. Some European competition authorities have taken the position that data itself can indicate market power.³ Data can improve the quality of a service and the revenue that it can generate in ways that may be impossible to replicate without achieving a comparable data set. Compared to number of users as a measure of size, data is potentially far more robust. When users leave the network, their data and the power that comes with it may stay behind, particularly as a component of aggregated data powering improved machine learning.

³ Bruno Lasserre and Andreas Mundt, "Competition Law and Big Data: The Enforcers' View", Italian Antitrust Review (2017), available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Competition Law and Big Data The enforcers view.pdf? blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Competition%20Law%20and%20Big%20Data%20The%20enforcers%20view.pdf?__blob=publicationFile&v=2)

Together, data, technical integration, and network effects make the competitive advantages of size quite different than in non-digital markets. They also make market entry harder - a competitor can't reach scale without having scale, and bootstrapping to reach critical mass is an incredibly challenging proposition. A more conscious and proactive approach to promoting competition is therefore needed in digital markets.

2. What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

Big isn't inherently bad, either under competition law or general policy considerations. However, significant competitive problems can arise where software or services with substantial market presence are technically interconnected with other software or services operated by the same business. Several high-profile mergers over recent years have increased the number of vertically integrated businesses substantially.⁴

Vertical combinations that involve large user bases at one part of a stack of technologies pose a particular risk of competitive harm. In this context, the harm arises where future innovation in one layer or a subset of layers in the vertical stack becomes impeded by the practical necessity of functional integration with a key technology (often but not necessarily a "platform") anchoring that stack. To put it more bluntly, new and superior services could be squashed by inferior competitors who receive special technical treatment by one or more platforms (perhaps because they're operated by the same business), conferring advantages through their superior integration that can become quasi-permanent given the difficulty of reverse-engineering interoperability into established technology stacks. Investment pounds and market entry into that sector then decline and disappear, resulting in a permanent loss of user choice and competition.

The most plausible worst-case scenario for the future of the internet is a market in which users choose from among a few silos of technology stacks, fully vertically integrated with no interoperability across them. If the choice we face as consumers was solely among single-firm, homogenous internet companies rather than the heterogenous experiences we can choose today—the collapse of many distinct markets into one—the harm analysis under traditional antitrust law would not be clear. It might qualify as a competitive market under certain metrics, but it certainly wouldn't be the internet. It would be a different ecosystem, one less inviting of innovation and disruption, particularly from new entrants and entrepreneurs.

3. What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

⁴ Facebook's mergers with Instagram and WhatsApp, and Microsoft's with LinkedIn, are illustrative examples.

Significant concentrations of data collected by and generated about users offer tremendous value to a service, and along with network effects, create a gravity well within digital markets. A new service that can be integrated with a popular digital platform holds an immediate and perhaps insuperable advantage over a standalone competitor. Market entry can effectively become impossible in some markets without such technical integration and access.

The internet has historically avoided this constriction through the ready offering of Application Programming Interfaces, or APIs, providing third parties with access to the data and functionality needed for technical integration. APIs are the fundamental connective tissue of the internet.⁵ They're also a powerful tool for efficient, rapid scaling market entry, when a new app or service developer can reach users through existing APIs offered by platforms that have already achieved significant economies of scale.

Yet, platform operators that have already hit a critical mass of data and users (and are thus less dependent for network effects on interconnection with others) face natural incentives to restrict the use of APIs by third parties. Some of these incentives are anti-competitive in intent and effect, for example if a platform operator obstructs a downstream market of services to its own detriment in order to prevent the growth of an emergent competitor. Others are driven by privacy and security concerns, for example shutting down third-party access to user data via an API rather than investing resources to determine how best to design the API and its policies and access controls to facilitate effective interconnection while also protecting privacy and security (and undertaking some risk of getting that balance wrong).

Many companies are already scaling back their API offerings. Facebook, most notably, has made [major changes](#) in the wake of the Cambridge Analytica scandal.⁶ Some of these changes, such as Facebook's [deprecation of "publish actions"](#),⁷ have had significant and detrimental impact for [smaller, independent](#) technology projects.⁸ Similarly, Twitter deprecated its User Streams and Site Streams APIs in favor of a new Account Activity API, breaking third party downstream technologies, most notably Favstar, while itself introducing some of the same functionality.⁹

⁵ See Michael Bock, "WTF is an API? How the Internet Works Behind the Scenes", *Hacker Noon* (Jan. 20, 2015), at: <https://hackernoon.com/apis-how-the-internet-works-behind-the-scenes-690288634c32>

⁶ Josh Constine, "Facebook restricts APIs, axes old Instagram platform amidst scandals", *Tech Crunch* (Apr. 4, 2018), at: <https://techcrunch.com/2018/04/04/facebook-instagram-api-shut-down/>

⁷ Josh Constine, "Facebook shuts down custom feed-sharing prompts and 12 other APIs", *Tech Crunch* (Apr. 24, 2018), at: <https://techcrunch.com/2018/04/24/facebook-api-changes/>

⁸ See "What happened to Facebook", *Bridgy*, at: <https://bridgy/about#rip-facebook>; and "[Publish] Facebook Profiles can no longer be connected to Buffer Publish", *Buffer*, at: <https://faq.buffer.com/article/985-publish-facebook-api-changes>

⁹ Ingrid Lunden, "Favstar says it will shut down June 19 as a result of Twitter's API changes for data streams," *Tech Crunch* (May 14, 2018), at: <https://techcrunch.com/2018/05/14/favstar-twitter/>

Changes like these, evolving public third-party APIs to more limited, partner-restricted or private APIs or direct functionality, are the kinds of behaviours that should be subject to regulatory scrutiny and potential intervention. This trajectory carries the internet ecosystem in the opposite direction of a decentralised, competitive future.

Market definitions, user-facing prices, the role of data and APIs, and the benefits of innovation all contribute to challenges faced by competition regulators charged with evaluating corporate mergers and single-firm conduct in the tech sector through the lens of advancing consumer welfare. Against this backdrop, the toolkit of potential interventions must be broadened.

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

Traditional antitrust metrics will struggle to measure harm related to the unique elements of the digital economy. They depend on cognisable market definitions, a challenging task in the fluid world of modern technology. They often focus on user-facing prices, which makes little sense with so many services offered free to the user and supported by advertising. And they struggle to measure the [impact of innovation](#) and the lost economic benefits of foreclosed innovation.¹⁰

To counteract these challenges, interoperability belongs in the toolkit of every competition and antitrust regulator. Interoperability, and the role played by APIs in providing access to essential data and functionality, ought to factor into competition policy in three ways. The first is in the context of mergers, in consideration of whether the combined company will have incentive to resist interoperability and downstream innovation/competition, and whether interoperability as a merger condition would be a sufficient remedy. Second, single-firm conduct in the form of changes to APIs and the availability of core data and functionality must be carefully evaluated where the intent or effect of such changes are harmful to competition. Finally, the speed and efficacy of competition processes must be improved to something closer to the pace of digital markets. Multi-year enforcement where a company has cut off access to critical APIs means the effective death of most competitors.

Firstly, in the merger context, interoperability plays a factor in considering how the merging companies are likely to integrate their operations. Where both companies offer software or services that are capable of being technically integrated in the sense of sharing data or functionality, the manner of that integration may change following a

¹⁰ Kevin W. Caves and Hal J. Singer, "When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard", *George Mason Law Review*, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205518

merger. Perhaps before the merger there is no effective integration, or there may be transparent, third-party accessible public APIs offered by the respective parties to allow for the integration. The combined business units will certainly explore efficiency and value benefits that could be derived by increasing the degree of integration, whether through new APIs, new data or functionality for existing APIs, or through the more laborious task of integrating code bases.

In practice, greater technical integration post-merger is likely to occur via the creation of new, private APIs made available only to the other party. Private APIs have their place in the overall technical ecosystem, but they offer limited interoperability, by design. However, they create an opportunity for effective, targeted, pro-competitive merger intervention: require APIs developed for or made available to the other merging party to also be made available to third parties under fair, reasonable, and nondiscriminatory terms and conditions. Such a constraint ought to impose minimal or no limitations on the merging parties' abilities to realise the efficiency benefits of the merger; however, those benefits can imbue to third parties at the same time, resulting in a greater economic output.

Secondly, single-firm conduct practices regarding APIs represent a similar, though somewhat murkier, view into the relationship between competition and interoperability. Where a platform shuts down an existing API, limits the data and/or functionality made available through the API, or changes the terms or policies associated with use of the API, the outcome of the decision may be a substantial net reduction in consumer welfare. Again, many of these actions are motivated by legitimate interests including privacy and security considerations; but the potential and the incentives exist for anti-competitive practices as well.

A platform operator may have many different reasons for limiting or deprecating public APIs, including the legitimate protection of privacy as well as the natural evolution of technology such as replacing an older API with an improved approach. But privacy must not be a cover-up for closing out competitors. Competition authorities must stand at the ready to evaluate changes to APIs on their merits, and offer mechanisms and authority to review potentially harmful practices.

Finally, enforcement processes, particularly in the context of complaints regarding harmful changes to API practices, must move quickly and have teeth. Windows of opportunity for new ideas in the digital economy are smaller than in other markets, given the pace of innovation and high user expectations. If a new idea is predicated on access to a platform's API, and if complaints over harmful changes to that API cannot be effectively resolved in a matter of months, competitors and potential new market entrants will have lost their windows.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

The European Union's General Data Protection Regulation (GDPR) includes a notable obligation to provide users with data portability. In theory, data portability facilitates competition in digital markets by preventing lock-in—making sure a user who wishes to make a change in service provider has the capacity to do so with minimal sunk costs of their own data contributions to the service. In practice, data portability is more limited than interoperability because it struggles to overcome network effects and reach critical mass. However, industry efforts to implement data portability, such as the Data Transfer Project,¹¹ will offer some benefit and coupled with competition policy can pave the way for a future of greater interoperability.

But it's important to keep distinct the concepts of data portability and interoperability. While both promote user choice and competition, they do so in different ways and to different effect. Interoperability depends on real-time exchanges of data and functionality with digital platforms; in that sense, while a user may face broader choices of interfaces and applications to communicate, they would still be exchanging data with the original platform and thus be beholden to it. Data portability, in contrast, is designed to extract the key elements of a user's experience in a manner that can free the user entirely. Both have their appeal, but as a tool to promote competition, data portability is limited in a world of network effects. Other services must acquire a minimum viable threshold of users to scale network effects enough to be true competitors to existing platforms, and the advantage of existing services is tough to overcome when their user counts number in the billions. Interoperability mitigates this advantage by allowing users of one service to reach users of another, and thus benefit from the other platform's scale and network effects.

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

Government bodies in the United States, India, Israel, and the European Union are undertaking parallel competition reviews of their digital markets at this point in time. The ideal outcome of these processes would be a shared acceptance of the importance of preserving interoperability on an international level. But the reality is that competition enforcement happens nationally, including merger review and single-firm conduct enforcement. To preserve the competitive environment within the UK and within each other country with a vibrant technology sector, changes need to be made across the board in each individual country to speed up competition processes and infuse them with a better understanding of technology and data.

¹¹ <https://datatransferproject.dev/>

10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

Antitrust and competition have long prized the input of economic analysis, for good reason. However, in the digital economy, the input of technologists who understand the inner workings of these complex systems will prove equally important over time. Competition authorities will need to make determinations as to the harms and benefits of highly technical questions, such as whether the scope and access policies of a digital platform's APIs are sufficient to promote competition, or are punitive and intentionally restrictive to create the appearance of interoperability without the practical effect. Similarly, merger reviews must incorporate a more effective understanding of the nature of the combined entities, a consideration that goes far beyond the traditional domain of economic analysis given the unique interplay of data and network effects in market power. We encourage policymakers to recognise the importance of understanding how technology and the internet work, and putting adequate resources behind the use of technologists throughout competition policy processes.

Sincerely,

[Signature redacted]

[Name redacted]

[Job title redacted]

Mozilla Corporation

**Comments of News Corp
to the Digital Competition Expert Panel**

Re: Call for evidence on competition in the digital economy

I. Introduction

News Corp appreciates having the opportunity to submit these comments to the Digital Competition Expert Panel in response to its public consultation. News Corp would like to thank the HM Treasury for this opportunity and agrees with Professor Jason Furman that the “UK [needs to] remain at the forefront of the global digital economy, and that consumers continue to benefit as innovative technologies develop and evolve”.

As a global diversified media and information services company—comprised of businesses that include, among others, news and information services, book publishing, and digital real estate services—News Corp has a strong interest in the protection and preservation of competition in an age of digital media. The rise of modern technology platforms has brought with it enormous benefits to consumers—including unprecedented access to news and information from a vast array of publishers. Unfortunately, the same market dynamics have also created opportunities for exploitation and abuse by monopolistic intermediaries. In the balance of this submission, we focus on the need to preserve and protect robust, healthy competition to protect both consumers and content creators.

The publishing industry, which is under threat from the dominance of Amazon, Facebook and Google, is far from the only industry under threat as a result of anticompetitive conduct in the digital economy. It is, however, one of the most consequential. In other industries, abusive conduct by a platform might cause consumers to suffer from the loss or degradation of a useful service. But in the case of publishing markets, consumers are losing access to critically important information. As Chairman

Robert Pitofsky of the U.S. Federal Trade Commission observed in 2000: “if somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be.”¹

Discussions regarding the modern competitive dynamics between publishers and internet platforms often fail to progress beyond certain threshold issues. Whether the product of genuine confusion or intentional obfuscation, these issues unfortunately preclude meaningful engagement and progress. It is thus necessary and important to address some of these issues up front.

First, the view that a generational struggle is occurring between “old media” and “new media,” with the implication that the former are dinosaurs whose markets have been disrupted by innovative new entrants, is mistaken. On this view, traditional publishers may be well-intentioned and provide a public service, but from a competitive standpoint they are being displaced by a more efficient, consumer-centric set of rivals. This reflects a profound misunderstanding of the competitive dynamics. If News Corp was losing share to a competitor that had come up with better books or news products, it would be the result of healthy competition.² But content providers are losing shares to a set of participants who are using their monopoly power to stifle competition and innovation. The future is one in which publishing *distribution* channels may be world-class, the only problem being that there will be increasingly less quality *content* to be distributed through those channels. It is hard to envision a situation that would serve consumer interests more poorly.

¹ Alec Klein, *A Hard Look at Media Mergers*, THE WASHINGTON POST (29 November 2000), <https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055>

² For example, news products are, in effect, a mix of content and distribution. Internet platforms have disrupted news distribution but not news content.

Second, News Corp is conscious that the Digital Competition Expert Panel has issued a request for *evidence*; however, most of the relevant evidence is currently inaccessible, locked inside of and understood by only the dominant Internet platforms themselves. Whether considering the black-box algorithms that now order huge swaths of the information consumers and citizens rely upon daily or the byzantine structure of the programmatic advertising market, very little is known about the way these systems operate and the motivations behind their structure. As was observed by the House of Lords' Select Committee on Communications, in its report on "UK advertising in a digital age," even participants in the digital advertising market do not understand how it works. This leads to confusion that is exploited by the platforms in multiple ways, including how they defend themselves when inquiries such as this arise. For example, the House of Lords report provided detailed information regarding the allocation of digital advertising spend that concluded that publishers are currently only receiving approximately 30 percent of the proceeds; nevertheless, the digital platforms have regularly trotted out a claim that *they* only receive 30 percent. Similarly, whenever a challenge is raised regarding a change to an algorithm that has clear, anticompetitive effects, the platforms inevitably respond that their *intent* was to improve the user experience, a claim that cannot be reasonably judged when all the *evidence* of intent resides with the platforms. Accordingly, we encourage the Panel to see that the next, necessary step in the consideration of the complex issues presented is not to reach a final judgment (on an incomplete record) but to identify avenues of fact gathering that will help elucidate crucial facts.

Third, the discussion regarding the problems in digital publishing is often redirected away from competition law based on a claim that whatever problems or complaints may exist, they relate to intellectual property, privacy and/or other areas aside from antitrust. While it is true that *some* of the issues can (and should) be addressed as issues of copyright and privacy, which does not relieve competition authorities of the need to hone in on those matters that do raise antitrust concerns. The Digital Competition Expert Panel has requested evidence about, amongst others: (i) the benefits and harms

from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms (Question 1); (ii) the benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets (Question 2); and (iii) the benefits and harms from “free” services, paid through consumer data (Question 5). The comments below address these questions.

Section II explains the novel challenges presented by platforms against content creators. Section III shows that enhanced competition and consumer protection rules, such as algorithm transparency, are needed to supplement antitrust enforcement in the presence of these novel challenges.

II. Platforms present benefits and costs for consumers and content creators

It is now widely recognized that the rise of digital platforms can present special issues and challenges for antitrust and consumer protection enforcement.³ Platforms, however, are not monolithic. They come in many different forms, which can create different competitive dynamics. For example ad-funded platforms do not have the same incentives as transactional platforms (e.g., credit cards or digital marketplace) although their ability to constrain suppliers is similar. As a result, there is no one-size-fits-all approach for analyzing the conduct of platforms from an antitrust or consumer protection perspective. Nevertheless, dominant digital platforms do have at least one thing in common: they resist traditional forms of antitrust scrutiny despite causing substantial harm to consumers.

³ See generally, e.g., Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L.R. 1663 (2013); Athey, et al., *The Impact of Aggregators on Internet News Consumption* 3 (Working Paper, 2017), <https://pdfs.semanticscholar.org/27e4/6dfcfbcce75660b39462cccff62328d0ede5.pdf>.

A. First phase: matchmaking

“There is no consensus on exactly what constitutes a digital platform.”⁴ Most definitions of platforms, however, focus on what is essentially a “matchmaking” function. For example: “A platform is a business based on enabling value-creating interactions between external producers and consumers. . . . The platform’s overarching purpose: to consummate matches among users and facilitate the exchange of goods, services, or social currency, thereby enabling value creation for all participants.”⁵

Platforms can include a wide range of different types of products that intermediate between groups of consumers and producers. Examples of platforms that fit broadly within the definitions given above may include “devices (e.g., phones and tablets), software (e.g., operating systems and browsers), and services (e.g., search engines, social networks, and e-commerce sites).”⁶

Most successful platforms provide a matchmaking function, at least initially. When they do so, they can provide extraordinary benefits for consumers and competition. At the most basic level, a matchmaking platform is “mainly about selling one group of customers, like restaurants with spare tables, access to another group of customers, like people who want to go out to eat.”⁷

⁴ Shelanski, *supra* note 3, at 1665.

⁵ GEOFFREY G. PARKER, ET AL., PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY - AND HOW TO MAKE THEM WORK FOR YOU 5 (2016); *see also* Shelanski, *supra* note 3, at 1665 (“I will define digital platforms as products or services through which end users and a wide variety of complementary products, services, or information (‘applications’) can interact.”).

⁶ Shelanski, *supra* note 3, at 1666.

⁷ David Slocum, *5 Questions With David S. Evans and Richard Schmalensee On Matchmaking*, FORBES (May 25, 2016), <https://www.forbes.com/sites/berlinschoolofcreativeleadership/2016/05/25/5-questions-with-david-s-evans-and-richard-schmalensee-on-matchmaking/> (May 25, 2016).

Matchmaking platforms can reduce transaction costs by making it easier for users to find relevant goods, services, or information, and for producers to find new customers.⁸ Such platforms, moreover, can “serve as ‘enablers’ of innovation by providing common interfaces through which entrepreneurs can connect their complementary products to critical masses of consumers.”⁹

Becoming a matchmaker is costly because the platforms need to achieve a critical mass of consumers and suppliers and largely have done so by offering their services at no (or low) cost. Access to venture capital has been critical to the development of platforms because it has allowed platforms to run their operations for years without being profitable, on the assumption that returns will flow back to investors once the platform has reached a point where it can start monetizing efficiently.

B. Second phase: leveraging power

The antitrust and consumer protection risks associated with monopolistic platforms generally do not appear during the developmental phase but rather only later, when platforms acquire the ability and incentives to migrate away from a pure matchmaking function. Platforms usually gain the ability to migrate after they become an indispensable partner on the supply side of the platform. Platforms also have the incentives to migrate away from a pure matchmaking function when they choose a business model that has the effect of converting them into horizontal competitors of producers, to whom they initially held themselves out as a vertical distribution channel.

For example, as discussed further in the separate comment submitted by News UK, news aggregators such as Google, Facebook and Twitter do not produce their own

⁸ See, e.g., Athey et al., *supra* note 3, at 3 (observing that platform intermediaries can “make it easier for consumers to search and consumer products from small firms, increasing competition across publishers for consumer attention.”).

⁹ Shelanski, *supra* note 3, at 1666.

journalistic content, but instead collect and curate content produced by others. Initially such aggregators played a matchmaking role: they provided links to consumers and publishers, which let them exchange content for traffic. But when they pivoted to an advertising business model, these intermediaries made themselves horizontal competitors of the content producers since they now compete with news publishers for both user attention (and data) and advertising dollars. “[N]ews aggregators act in dual roles: their front pages look very similar to news outlets who produce original content, and thus may be a substitute for them; yet they also aggregate a wide range of sources, and may be an effective mechanism for search and discovery, which places it in the role of an upstream complement to the outlets who produce the news.”¹⁰ Issues arise when the aggregators obtain enough scale to impose conditions and choose to become “attention merchants”—meaning that they seek user attention (and data) for the purpose of selling it to advertisers¹¹, thus competing against publishers that seek user attention through content for the purpose of selling subscriptions and advertising. In this regard, the aggregator has an incentive to steer users to its own front page and away from that of the original publisher, which is seeking the same user attention.

C. Bottleneck monopolists and standard setting

A dominant platform can act as a “bottleneck monopolist” and thereby restrict competition in a wide range of different markets: “While a typical monopolist controls access to its own products and services, a typical bottleneck monopolist both controls access to its own service and can affect access to some number of other products and services.”¹² These dynamics can offset or even overwhelm the welfare benefits typically associated with platforms. For example, while a platform fulfilling its traditional matchmaking function can serve as an “enabler” of innovation as described above, a

¹⁰ Athey et al., *supra* note 3, at 2.

¹¹ Tim Wu, *The Attention Merchants: How Our Time and Attention Are Gathered and Sold* (2017).

¹² Shelanski, *supra* note 3, at 1676.

monopolistic platform can acquire both the incentive and the ability to squelch or usurp innovation—especially “over-the-top” innovation that threatens to circumvent the bottleneck—to preserve its own monopoly position.

The ability and incentives of bottleneck monopolists to extract supra-competitive profits often reside in the ability to exploit their position in adjacent markets. A bottleneck monopolist would not want to disrupt its unique access to consumers and will therefore want to leverage its position vertically. Dominant platforms have this ability because they often are standard setters in other vertical markets. For example, platforms that run a dominant auction for display ad inventory with high barriers to entry, low fixed costs and strong indirect network effects have the ability and incentives to set standards both for advertisers and publishers without consultation.

Similarly, platforms, once they achieve dominance, have an incentive to shape their surrounding ecosystem in a way that “fits” better within their business model even if doing so undermines incentives for quality content generation. For example, a bottleneck platform would rather have consumers consume news in “bite-sized” chunks that can be displayed on its platform and which minimizes the risk of consumers navigating outside of the platform’s ecosystem. When doing so, a platform is unlikely to internalize the cost that such fragmentation has on the broader ecosystem and its effects on the incentives for content generation and investment.

A key tool platforms can use to bring about these outcomes is the imposition of self-benefitting standards. Standards, protocols, and instructions are the way platforms organize supply and demand in their ecosystem. Most platforms do not create the information they serve; rather, they organize the information created by third parties, often doing so in such a way as to make that information consumable in the platform’s ecosystem.¹³ Platforms serve consumers when they create standards that organize

¹³ For example, Google publishes some guidelines used by its global team of 10,000

information to best serve consumer needs, which include the need for relevant, timely, reliable information. Consumers reasonably believe that information served to them by Internet platforms is organized with the overriding goal of meeting these standards. When a platform's organization of information diverges from these standards, consumers are poorly served. When the divergence is intentional, consumers are deceived.

Platforms that set standards usually affirm, at a general level, that they provide consumers what they want, but they do not communicate clearly on the standards and, more importantly, their order of priority. Platforms have large teams of engineers and use complex algorithms and artificial intelligence. Consumers end up having to trust the resulting rankings even if they do not understand the underlying process and cannot choose their standards. Subjectivity and judgment are therefore interposed. Consumers understand this, or should reasonably understand this; however, consumers also reasonably believe that platforms make a good faith effort to organize information for objectivity and relevance, and thus reasonably rely on the ordering of information they receive.

Within some industries, certain well-worn standards exist as proxies for relevance, and the platforms have found ways to distort those standards to meet their commercial goals, and in a way that does not serve consumers. In the book publishing industry for example, the bestseller list is built on the proposition that, with respect to items like books, popularity is a reasonable proxy for relevance: if many readers have already purchased a given book, it is likely because they believe it will be satisfying. By contrast, consumers are deceived where a bookseller unfairly promotes as bestsellers books that are delivered as part of a free bundle and not genuinely chosen or read by consumers.

raters to evaluate search results.

<http://static.googleusercontent.com/media/www.google.com/en//insidesearch/howsearchworks/assets/searchqualityevaluatorguidelines.pdf>

In the news industry, consumers want quality, originality and provenance, as well as ease of discovery. A curation tool that unduly prioritizes ease of discovery (in the form of free content and fast delivery) over all other vectors of consumer need, because such prioritization serves the platform's strategic business interests, underserves and deceives consumers, who reasonably expect a curation of information that duly prioritizes quality, originality and provenance.

D. Consumer harm

Platforms that charge suppliers high margins or unfair terms for use of the dominant tools do not only harm suppliers but also consumers. Increasingly, the harms are non-monetary: setting unfair standards affects quality and impedes innovation.

1. Harm to quality

In a platform economy, the traditional price and output-centric paradigm for evaluating competitive harm is unduly limiting. Modern tech platforms often involve businesses where end users do not pay directly for the platforms' services. As a result, instead of competing on price, platforms compete in terms of innovation and/or quality of the user experience they can deliver.¹⁴ On the flip side, when competition in a platform market dries up, consumer harm is much more likely to take the form of quality degradations and harm to the competitive process on other sides of the platform rather than price increases or output restrictions. Thus, "the usual price-oriented antitrust analysis may be irrelevant in markets where consumers pay nothing for the services they

¹⁴ Susan Athey, *Information, Privacy, and the Internet: An Economic Perspective* 7 (2014), <https://www.cpb.nl/sites/default/files/CPB-Lecture-2014-Information-Privacy-and-the-Internet-an-economic-perspective.pdf> ("Technology platforms, as complex entities, often have a wider array of strategic choices" than to increase quality or lower prices).

use and in which firms compete more through technological advancements than through lower prices.”¹⁵

A market that is producing high volumes of low-quality product (*e.g.*, free news articles produced by untrustworthy publishers), even if consumers are being charged a low (or no) price, cannot be deemed a healthy, functioning market.

2. Harm to innovation

Like reductions in quality, the stifling of innovation by firms with monopoly power has been recognized as a potential form of anticompetitive harm, but is rarely acted upon in the absence of measurable price or output effects. We encourage the Panel to examine specifically whether a more coherent and rigorous approach to measuring and acting on harm to innovation and threats to nascent competition would be sensible and, as importantly, whether it would be practical and justiciable.

In the news industry, innovation can take at least two forms. First, the production of original content, which is the way in which high-quality newspapers differentiate. Second, news publishers innovate by experimenting with new forms of delivering content and ways that enhance their readers’ experience. Traffic distortions, discrimination and free-riding undermine the ability of news publishers to innovate by interfering with their ability to monetize their content and thus generate the resources needed for innovation.

In effect, platforms can deter the development of new and innovative products and services.¹⁶ When competition against platforms is not possible for structural reasons, innovation on platforms is a potential source of competition. One of the ways nascent

¹⁵ Shelanski, *supra* note 3, at 1667.

¹⁶ Shelanski at 1676 (“monopolist both controls access to its own service and can affect access to some number of other products and services. . . . [As such,] it affects the decisions of a much broader universe of users”).

competition develops in the digital economy is by offering new ecosystems on existing platforms instead of competing head-to-head against them (see, e.g., the rise of Google Search, Facebook and Amazon marketplaces on existing platforms: browsers and then mobile operating systems). Protecting interoperability and the ability to develop freely on dominant platforms is therefore essential.

III. Enhanced competition and consumer protection enforcement

Given their ability and incentives to leverage their power in adjacent markets and capture most of the welfare of the ecosystem they created (or became an essential part of), dominant platforms' conducts need to be carefully monitored. The issue is not whether certain digital platforms are dominant -- they are, the question is whether new rivals can compete against the monopolistic platforms and therefore limit their ability to abuse their power. The answer appears to be negative. Traditional antitrust rules need to be reconsidered and consumer protection needs to be revitalized to adapt to the peculiar dynamics of the platforms. We analyze the structural forces that solidify the dominant positions of the platforms (even if the absence of any exclusionary conduct in their own market) and offer a few suggestions to enhance competition and consumer protection enforcement.

A. Platforms' power is entrenched by structural forces

While there is no reason to believe that the current UK competition law framework is insufficient or unsuited to address the issues created by digital platforms, its enforcement needs to be enhanced to address the structural features of platform markets that solidify barriers to entry and lead to more entrenched and durable market power regardless of (and in addition to) the platforms' exclusionary conduct.

First, network effects lock in dominance. A platform that captures the critical mass of buyers and sellers can only be challenged by a platform that also achieves a

critical mass of buyers and sellers, who may already be locked in by the incumbent. Network effects reinforce the “winner takes all” effect by making it exceedingly difficult to acquire buyers or sellers.

Second, behavioral lock-in is strong in digital businesses. Consumers who do not pay, or pay a price below marginal costs, have less incentive to change. Consumers also need to learn new standards when they switch platforms. Behavioral lock-in is often the main transaction costs for suppliers as they need to convince consumers to “match” on a new forum that will lead to less overall welfare.

Finally, barriers to entry are high. Barriers usually take two forms: costs and access to data. Most platforms acquired their dominant position following years of investments and negative margins. Replicating the same model is expensive and risky given network effects, the lack of portability, and the reluctance of venture investors to commit capital where success requires the unseating of a dominant incumbent. Access to consumer data is also a barrier to entry: the incumbent generally has huge amounts of user data that it uses to further solidify behavioral lock-in. For example, a nascent on-line retail competitor lacks the copious amounts of user data of Amazon that helps its power and perfects its recommendations. And a nascent ad tech competitor lacks the copious amounts of data that Google and Facebook have that helps them power and perfect their targeted, programmatic advertising products. Normal economic assumptions dictate that new entrants should arise to challenge these incumbents to grab some of those profits and huge margins; yet none have. There is a self-evident problem with the effects being generated in the current competitive environment. One deficiency of current antitrust/economic models is that they often that assume “rational” and “economically efficient” behavior without recognizing the highly personalized and idiosyncratic nature of consumer behavior in a modern world filled with data-based targeting and endless behavioral and targeted stimuli.

B. Novel tools for competition and consumer protection enforcements

The relations between digital platforms and publishers are complex and do not necessarily fall into the traditional consumer/competitor categories, nor fit within traditional theories of harm based on vertical leveraging. Enhanced competition and consumer protection enforcement is necessary to overcome the structural barriers in the digital economy. Assuming dominance is, even partially, a naturally-occurring phenomenon in these platform markets, regulators seeking to protect competition should make sure that the dominant players do not exploit their power to harm welfare and/or foreclose/prevent competition in adjacent markets or carry out their activities consistent with the objective standards that consumers expect. At a minimum, dominant platforms should not abuse their position of standard-setter to benefit their activities or discriminate between business models in vertical or adjacent segments. News Corp would like to offer two solutions: reverse presumptions in competition law and increase the role of consumer protection.

1. Reverse presumptions

We encourage the Panel to examine whether, when, and to what extent historical presumptions should be abandoned or reversed in evaluating potential anticompetitive conduct in platform markets, especially in platform markets that meet a range of structural factors like (i) strong network or scale effects, (ii) low marginal costs, (iii) high barriers to entry, and (iv) persistently high market shares consistent with market “tipping”. As examples, we discuss presumptions regarding vertical integration, presumptions regarding causation where nascent competition is foreclosed, broadening the notion of foreclosure in adjacent markets, and the need for prima facie evidence against anti-competitive conduct.

First, we encourage the Panel to examine whether the general presumption in favor of vertical integration (behavioral conducts and merger review) needs to be

abandoned—or even flipped—in platform markets, because of the inherent risk that the platform will use its dominance to preference its own inferior product. Often, vertical expansion by a tech platform involves becoming a late-joining competitor with an opportunity to steer traffic to its own vertical, despite a lack of any real innovation or quality advantage. As a result, the assumptions about cost efficiencies (such as double-marginalization) and consumer benefits that underlie the traditional presumption may have no application. Moreover, when a platform also operates in a competing vertical, it can have a conflicted motivation to facilitate connections organically *and* to favor its own vertical, as discussed above.¹⁷ Such favoritism can manifest itself directly, as when a platform favors its own vertical product, often in a manner designed to make users believe they are getting objective matchmaking based on the “best” product. As discussed above, a platform can also indirectly advantage itself by configuring its platform in a way that benefits its business model in the relevant vertical. The Panel should consider whether the traditional presumption should be abandoned, or whether it should be reversed so as to require upfront a compelling showing of consumer benefit to justify the vertical integration.

Second, we encourage the Panel to examine the role of presumptions in the analysis of causation where harm to nascent markets or competitors is alleged. In winner-take-all markets, courts and commentators have recognized that just because a but-for world may not be susceptible to proof, a monopolist should not necessarily be absolved of anticompetitive conduct. In general, conduct that is aimed at nascent competition, for example through a lack of operability, justifies an inference of anticompetitive effects. Dominant platforms should have also to explain the procompetitive benefits of their standards, in particular when they disproportionately benefit from the new standard de facto.

¹⁷ See Shelanski, *supra* note 3, at 1677 (citation omitted) (“a firm’s incentive to discriminate against unaffiliated providers of complementary products are complex – especially when that firm’s business model hinges largely on selling advertising to those complementary producers.”).

Third, we encourage the Panel to recommend novel competition approaches for instances where a dominant platform in one market damages competition in an adjacent market (e.g., news) for its own benefit but not necessarily out of a desire to monopolise this adjacent market itself. We believe the foreclosure paradigm limited to direct exclusion insufficiently addresses the situation of content providers. As discussed above, dominant platforms have the ability and incentives to impose unfair standards on adjacent markets to distort competition within the broader ecosystem and not necessarily within a relevant market in which they directly compete. For example, standards that fragment news consumption and undermine the incentive to invest in different distribution models benefit the platforms within the broader ecosystem and are anti-competitive.

Finally, we recommend the Panel to examine whether platform monopolists should be put to a more rigorous standard to justify anticompetitive conduct. As discussed, platform tech markets generally are characterized by network effects that can result in natural monopolies and a winner-take-all framework for competition. This dynamic can create significant procompetitive benefits for consumers. However, there is a need to consider whether procompetitive efficiencies could be reasonably achieved through less anticompetitive means. That need may be particularly acute in markets where there is a risk of nascent competitive technologies being eliminated in their infancy. Thus, the Panel should consider the role of the “less restrictive alternative” test in the context of evaluating anticompetitive conduct by platform monopolists, when and how the burden of proving a less restrictive alternative attaches. The Panel should also recommend a softening review of all mergers and conducts which, while they increase concentration in certain product markets, help build a more effective challenger to incumbent players (particularly relevant in industries where data is key).

2. Enhance consumer protection

We also encourage the Panel to consider whether the unusually covert nature of algorithmic abuses to the detriment of consumers justify a different investigatory or evidentiary framework—specifically one based on a principle of algorithm transparency.

Algorithm transparency is the idea that regulators and courts should have some way of evaluating whether a platform’s algorithms are biased in a way that harms consumers, including through deception. The concept does not require regulators to monitor platforms’ algorithms by continuously “looking under the hood,” which would be burdensome both for resource-constrained regulators and for platforms trying to protect their trade secrets. Rather, an effective algorithm transparency regime might consist of shifting the burden of proof in narrow, clearly defined situations.

Algorithm transparency is not “mandating disclosure of Google’s algorithms” which News Corp agrees could “conflict with long-standing legal protections for trade secrets and other intellectual property”.¹⁸ As the above explanation makes clear, algorithm transparency would not require a close review of the algorithm itself, because it would be focused on objective *effects*, not design and priorities. In instances in which a platform itself might deem it necessary and appropriate to voluntarily disclose details about its algorithm in order to prove its case, such disclosure could be made pursuant to confidentiality and non-disclosure orders that would address both of the platforms concerns.

For example, when a platform has market power—such that it is unconstrained by competitors and not open to consumer choice—and complainants or plaintiffs show that

¹⁸ See Google’s submission to the Australian Consumer and Competition Commission (ACCC) dated October 2018, available at: <https://www.accc.gov.au/system/files/Google%20Submission%202%20%28October%202018%29.pdf>

the output of its algorithms disproportionately demotes competitors or transfers welfare to the platform, then regulators may be justified in concluding that a prima facie case exists for believing that the platform's algorithms produces those effects. The burden could then shift to the platform to prove that its algorithms are neutral or that they serve some beneficial consumer interest that cannot be achieved through less discriminatory means. If this showing were made, the factfinder could then consider all the evidence to determine whether the procompetitive justifications outweigh the anticompetitive effects.

A burden-shifting algorithm transparency regime makes sense for several reasons.

First, it is more likely to result in correct outcomes because, where a prima facie case is found to exist, it places the burden of proof on the platforms, which have access to vastly more information than either regulators or users about how their algorithms function.

Second, from a normative standpoint, it is desirable to hold platforms responsible for the consequences of algorithms that they themselves have designed—tech companies should not be able to release an algorithm into the world and then plead innocence as to its effects.

Finally, the burden-shifting framework would benefit consumers by rooting out forms of algorithmic abuse that would otherwise go undetected.

* * *

We appreciate the opportunity to share this public comment, and we look forward to discussing these issues further in the work done by the Panel.

Submission from News Media Association

Note: The News Media Association submitted its previous response to The Cairncross Review as evidence to the Digital Competition Expert Panel. It also drew attention to NLA media access's submission to The Cairncross Review. Both are reproduced below for information.

Cairncross Review Secretariat
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Tackling the Threat to High-Quality Journalism in the UK NMA Response to Cairncross Review Call for Evidence

1. The [News Media Association](#) is the voice of UK national, regional and local newspapers in all their print and digital forms. Our members publish around 1,000 news media titles – from The Sun, The Guardian, the Daily Mail and the Daily Mirror to the Yorkshire Post, Kent Messenger, Monmouthshire Beacon and the Manchester Evening News. Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK¹.
2. This review is about sustaining high-quality journalism; it is not about sustaining traditional newspapers and their associated news sites. But financially strong news media companies, independent of the state and able to fund the expensive business of journalism, are recognised as the backbone of the UK news media sector and they remain best placed to serve the public interest by holding those in power to account.
3. The current UK media landscape has been shaped by government policy and intervention. Media ownership regulation and competition law have meant that, for many years, newspaper publishers were not permitted to own radio or TV stations. Regional publishers were prevented from buying neighbouring newspaper titles, creating an irrational pattern of local newspaper ownership in terms of geography, channels and platforms. Some weekly newspapers have had to be closed down because their publishers were blocked by the competition regulators from selling them to a willing buyer. Meanwhile, the BBC has been able to extend and cross-promote its content across all media platforms, funded by the licence fee payer, leading to an imbalance between tax-funded news provision and commercially-funded news provision.
4. The primary focus of concern today is the loss of advertising revenues which have previously sustained quality national and local journalism and are now flowing to the global search engines and social media companies who make no meaningful contribution to the cost of producing the original content from which they so richly benefit. UK law and public policy have made it difficult for news publishers even to discuss joining forces to compete effectively or to seek to rationalise their media businesses.

¹Estimate by Mediatique Ltd for the BBC

http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/mediatique_online_news_report_dec_2014.pdf ; Mediatique Ltd also referenced by O&O at [http://www.newsmediauk.org/write/MediaUploads/PDF%20Docs/OandO_NMA - UK news provision at the crossroads.pdf](http://www.newsmediauk.org/write/MediaUploads/PDF%20Docs/OandO_NMA_-_UK_news_provision_at_the_crossroads.pdf)

5. UK government support for commercial news provision has been uncoordinated. Media merger laws have focused on protecting local advertisers rather than serving citizen voters. VAT zero rating has been the most consistent form of support and this covers all books, newspapers and magazines along with other items of public benefit. Government fiscal intervention in other content creation areas – such as tax credits for the film and video industries, local orchestras and theatres - has not been extended to news provision.
6. The government's settlement with the BBC, including the BBC/NMA local democracy reporters scheme, was helpful but could have been more radical in redressing the balance. However, it is a model which could be developed for the local news media sector. The 'indie quota' system, requiring the BBC to outsource a percentage of film and TV production to independent production companies, is a model which could have been applied to the news creation scheme. Some of the largest regional publishers – Newsquest, Reach and Archant - are submitting a proposal to the Cairncross Review to build on the success of the local democracy reporters scheme. It identifies a need for third party investment, whether from the BBC or elsewhere, to fund an additional 1,750 local reporters to cover local public institutions across the UK.
7. The only recent small-scale experiment from the government was the business rates relief scheme for local newspapers. Another potential model which the DCMS has explored is the levy imposed on the horse racing betting industry to underpin the infrastructure of local race courses across the UK.
8. Other western democracies have fiscal support measures for news provision that range from direct state subsidy to facilitate the employment of journalists, to postal and distribution subsidies, to technological and innovation funds, to favourable tax and expense treatment of journalists. These interventions are in some cases fundamental to the viability and structure of news provision.
9. Meanwhile, despite the severe challenges they face, publishers everywhere have embraced digital opportunities and are exploring new and different ways to bring high quality editorial content to their audiences and to monetise that content in a digital age so they can ensure its continued provision. NMA members publish some digital-only titles, others print-only, but most publish across multiple platforms. A few have broadcast channels alongside their newspapers and others have diversified into other unrelated areas in order to provide the income to sustain their core news media business. Local publishers are evolving into trusted marketing and digital media advisers to small local business owners in their areas.
10. News media content fuels the social media machine. According to Ofcom research, social media is the most popular type of online news, used by 44 per cent of UK adults, with 76 per cent of those using Facebook, even though it employs no journalists and produces no news content. Indeed, Facebook is the third most popular source of news overall, used by 33 per cent of UK adults, with many regarding it as their single most important news source. However, many struggle to recall the original source of the news story.² Nearly half of all engagements with UK websites on social media source content from UK newspapers.³ Publishers are investing heavily in investigative and campaigning journalism which is

² Ofcom: News Consumption in the UK (2018) Report:

https://www.ofcom.org.uk/data/assets/pdf_file/0024/116529/news-consumption-2018.pdf

³ Forty-seven per cent of all engagements with UK websites on social media in 2017 sourced content from UK news brands. (NMA analysis of NewsWhip's 100 top-performing UK websites)

<http://www.newsmediauk.org/News/uk-news-media-journalism-powers-social-networks/181674>

followed up by other media channels, but the tech companies are extracting most of the value from that investment. This is not sustainable in the long term.

11. News media publishers have a history and a clear vision about the importance of holding those in authority to account and serving the interests of the public. They have invested in technological innovation, partnered with tech companies, nurtured dramatic audience growth, and continue to lead the way in terms of ground-breaking investigative journalism, campaigning on behalf of their communities and fighting on behalf of their readers. (A small selection of recent stories and campaigns originated by news media publishers and followed up by broadcast and other media channels is shown in Annex A.)
12. Journalism is a costly business and no publisher has been immune from the effects of a halving of the revenues that have sustained their editorial cost base. The local press, more dependent on advertising revenue than the nationals with their stronger cover price revenues, has been hardest hit. Although all publishers have sought to protect front-line journalist jobs wherever possible, there has been an inevitable and concerning reduction in editorial numbers. One national print title has switched to online-only. Some long-established local newspapers, such as the Oldham Chronicle, have closed down altogether, while other smaller, family-owned businesses like CN Group have sold to larger groups with the scale and resources to keep the titles in publication and even launch new titles.
13. We have set out in Annex B a list of 42 potential solutions which the review can draw on but the key areas to highlight are:
 - Launch a competition inquiry into the dominance of the tech companies and the role of intermediaries in the digital advertising supply chain and their impact on consumers, advertisers and other media players, leading to effective remedies;
 - Introduce a fair, open and equitable content licence fee agreement, supported by a UK Publishers Right, enabling the tech companies to demonstrate the value they extract and to pay for the content from which they benefit without discrimination between news publishers;
 - Give the tech companies the same legal responsibility as publishers for the content they carry, unless this is from a bona fide news source, and introduce independent regulatory oversight of their activities. This is intended to incentivise them to promote verified news content over fake news and other harmful content. It must not impose any new restrictions or additional regulation on news media publishers nor allow the tech companies to obstruct access to news media sites, discriminate against their content, or seek to shift liability, costs and regulatory burdens onto news media publishers.
 - Ensure greater openness and transparency from the tech companies over data processing and algorithmic decision-making affecting businesses which rely on them. Tech companies must be required to give reasonable notice of any changes to terms of business or to algorithms which impact news publishers to explain the purpose of the changes and to set out the assumptions and editorial judgments which lie behind the automation.

Cairncross Review - Questions under Consideration:

The review's objective is to establish how far and by what means we can secure a sustainable future for high-quality journalism, particularly for news. Looking ahead to 2028, how will we know if we have been successful, in relation to:

- a) publishers
- b) consumers

14. High-quality journalism is critical to the functioning of any healthy democracy but it requires the infrastructure, resources and skills to monitor and investigate those in authority and to sift, analyse and interpret a plethora of information. Consumers are best served by a diverse range of trusted, verified news sources to help them make sense of a chaotic world. That means a strong cross-section of news media brands covering national and international issues and professional, well-funded newsrooms covering every town and city in the UK.
15. Measures of success for the review in 10 years' time would see a vibrant and well-funded independent news media sector marked by an increase in number of news media journalists, regular launches of new local titles by dedicated commercial news media companies, and a rebalancing of the advertising market so that revenues follow audiences and advertisers can once again be confident that their brand messages are seen by real people viewing real content in a brand-safe environment.
16. Successful solutions would result in search engines and social media companies recognising that genuine news is the vital component of engagement with their platforms and that it is in their long-term interests actively to promote it over fake news and other harmful content.

Do you consider that the future of high-quality journalism in the UK is at risk - at national, regional and/or local levels?

- a) What are the main sources of evidence that support your view?
- b) What are the main sources of evidence which support an alternative perspective?

17. News media companies – newspapers in print and online - are by far the biggest investors in original news content, accounting for 58 per cent of the total spent on news provision in the UK⁴, with the rest spent largely by broadcast channels including the BBC.
18. They are the key providers of high-quality journalism in the UK but the advertising and cover price revenues which have traditionally funded that journalism have plummeted by half over the past decade, with the steeper 59 per cent decline in ad revenues⁵ hitting local newspapers the hardest.
19. The threat to local journalism is now acute. Many smaller titles are struggling to breakeven and are in danger of closure. Without significant market intervention, the outlook for Britain's regional and local press is bleak. National newspapers face similar difficulties over time.
20. Bloggers and hyper-local news sites are important outlets for self-expression but tend to be run on a voluntary, part-time basis with limited resources to support journalism in the longer term. They provide a valuable service to their communities but can be ephemeral and do not offer a realistic alternative to professional news media companies, nationally or locally.

⁴ Estimate by Mediatique Ltd

⁵ Overview of recent dynamics in the UK press market, Mediatique, p.4

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720400/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf

21. The challenges facing the news media sector are not unique to the UK and they are impacting on all independent news channels, including commercial broadcasters and newer digital entrants to the market such as BuzzFeed and Vice Media.
22. But there are some reasons for optimism. According to the 2018 Edelman Trust Barometer, public trust in traditional news media has rebounded sharply over the past year, reaching its highest level in six years, while trust in social media platforms and search engines has dropped.⁶ The global report found that trust in publishers and broadcasters in the UK had increased 13 points to 61 per cent while trust in social media dropped to just 24 per cent.⁷
23. While regulators may have been slow to act, the public may be starting to demand change. Some 70 per cent of people think social media companies do not do enough to prevent illegal or unethical behaviours on their platforms while 63 per cent think they lack transparency and 62 per cent think they're selling people's data without their knowledge.⁸
24. Nearly two-thirds, 64 per cent, of people in the UK back tougher regulation of social media companies⁹ while 53 per cent worry about being exposed to fake news on social media.¹⁰ Worryingly, 64 per cent can't distinguish between proper journalism and fake news.¹¹

What can the review learn from successful business models in other sectors or other countries, including those which work at scale? We are particularly interested in any organisational or business models which might promote or advance the future of high-quality journalism at the local and regional levels:

- a) **Where new and viable business models are emerging for high-quality journalism, what does this tell us about changing consumer behaviour and preferences?**
 - b) **Are different approaches needed for different parts of the market (e.g national and local; general and special interest news)?**
 - c) **To what extent do new and emerging business models such as online-only, hyperlocals and cooperative models work or mitigate issues felt by traditional players?**
 - d) **What alternative income streams (other than advertising) are most likely to sustain high-quality journalism in the digital age? Are there barriers to their effective exploitation and if so, how could these be addressed?**
25. A range of fiscal measures has been introduced by other countries to support news journalism. These include direct state subsidies to facilitate the employment of journalists, to postal and distribution subsidies, technological and innovation funds, to favourable tax and expense treatment of journalists. Some interventions, such as Denmark's editorial production subsidy and innovation pool, are fundamental to the viability and structure of news provision. The Dutch have a state fund for innovation in journalism. There is state aid in Portugal for regional and local newspapers. France has developed a complex system of press subsidies covering distribution, innovation, research and development and local media.

⁶ Edelman Trust Barometer 2018, Full Report, p.19

⁷ <https://www.edelman.co.uk/magazine/posts/edelman-trust-barometer-2018/>

⁸ Edelman Trust Barometer 2018, UK Findings slideshow, slide 6

⁹ https://www.slideshare.net/Edelman_UK/edelman-trust-barometer-2018-uk-results/1

¹⁰ Edelman Trust Barometer 2018, UK Findings, slide 9

¹¹ Edelman Trust Barometer 2018, UK Findings, slide 9

¹² Edelman Trust Barometer 2018, UK Findings, slide 11

¹³ Edelman Trust Barometer 2018, UK Findings, slide 11

Sweden's Press Subsidies Council has responsibility for awarding grants for paid-for daily or weekly publications and distributed SEK 487 million (£42 million) in 2015.

26. The Australian government has recently launched a \$48 million (£27 million) fund for regional publishers. The Regional and Small Publishers Innovation Fund will reportedly allow incorporated companies with an annual turnover of less than \$30 million to apply for grants of up to \$1 million. The total funds for the scheme will be made available over three years. The Canadian government has pledged to create a \$50 million (£30 million) fund to support local journalism.
27. See Appendix D (News Media Europe paper) and Appendix C (Suggested criteria for UK news media businesses to be eligible for a licensing scheme or other intervention.)

What has been the impact of the operation of the digital advertising market on the sustainability of high-quality journalism in the UK?

- a) Can digital advertising revenues support high-quality journalism in the future, as print advertising has done in the past?
 - b) How does the digital advertising market affect the ability of news publishers to monetise content?
 - c) Does the digital advertising market influence what news people see and if so, in what ways?
 - d) What changes might be made to the operation of the digital advertising market to help support and sustain high-quality journalism?
28. Sixty-nine per cent of the UK population accesses newspapers online every month.¹² According to an analysis of Newswhip data, nearly half (47 per cent) of all engagements with UK websites on social media source content from UK news brands and eight of the top 10 most shared UK websites on social media are UK news media sites.¹³ Publishers invest £97 million in digital services¹⁴ and drive 920 million social media interactions a year.¹⁵
29. The problems facing the newspaper industry are fundamentally about revenue decline rather than audience decline. There has been a gradual reduction in print circulation as reading habits shift online but this has been more than compensated by huge growth in digital audiences. The established national and local news brands report that they are reaching bigger audiences overall than they have for decades as people's appetite for news grows and they are able to consume it on the platform or device of their choice.
30. But people expect to get their news for free online – not least because of the BBC licence-fee funded website which competes head to head for audiences with commercial news sites - and as a result very few news brands have been able successfully to introduce paywalls or other subscription models.

¹² PAMCo newsbrand audience figures 2017 https://pamco.co.uk/wp-content/uploads/2018/06/pamco_tmr_newsbrands-apr-17-mar-18.pptx

¹³ NMA 2017 analysis of NewsWhip's 100 top-performing UK websites <http://www.newsmediauk.org/News/uk-news-media-journalism-powers-social-networks/181674>

¹⁴ UK News Media: an engine of original news content and democracy (Deloitte 2016) p.6 http://www.newsmediauk.org/write/MediaUploads/In%20the%20Spotlight/NMA%20Economic%20Report/Final_Report_News_Media_Economic_Impact_Study.pdf

¹⁵ NewsWhip May 2017 – April 2018, Newsworks https://www.newsworks.org.uk/write/MediaUploads/1%20Facts%20Figures/Market%20overview/2018/Jun/Social_Media_-_6.6.18.pptx

31. Total newspaper print and online revenues from advertising and circulation have halved over the past decade, from £6.8 billion in 2007 to £3.6 billion in 2017.¹⁶ But it is the loss of advertising revenue, previously contributing more than two-thirds of publishers' total revenues, which has hit newspapers - and particularly the local press - the hardest. Circulation revenues have declined by 23 per cent but ad revenues are down by 59 per cent over the 10-year period.¹⁷
32. The digital advertising supply chain does not recognise the growth in audiences for news media content. It supports the aggregators of that content rather than its creators. The dominance of the digital eco-system by the global tech giants means that Google and Facebook have been able to extract over 60 per cent of UK digital advertising expenditure¹⁸ and nearly 100 per cent of growth.¹⁹ Those two companies alone are estimated to take over £6 billion a year in digital ad revenues,²⁰ while the news media companies producing the content from which the duopoly benefits earn just £487 million in digital ad revenues.²¹
33. This matters because the advertising eco-system which has traditionally supported high-quality journalism is being destroyed, leading to reduced journalist numbers and increasing title closures, particularly among local weeklies. Unless the ad revenue declines are reversed, the damage will inevitably extend to larger regional and even some national titles.
34. Fake news sites and other harmful content online are fuelled by digital advertising, to the benefit of tech platforms, agencies and other intermediaries, but to the detriment of society, advertisers and the publishers of genuine news. It has been reported that even government advertising has unknowingly been served up on highly inappropriate content as a result of blind programmatic ad buying practices. A coherent and thorough review of the digital advertising supply chain is long overdue.

Many consumers access news through digital search engines, social media platforms and other digital content aggregation platforms. What changes might be made to the operation of the online platforms and/or the relationship between the platforms and news publishers, which would help to sustain high-quality journalism?

- a) **Do the news publishers receive a fair proportion of revenues for their content when it is accessed through digital platforms? If not, what would be a fair proportion or solution and how could it best be achieved?**
 - b) **When their content is reached through digital platforms, do the news publishers receive fair and proportionate relevant data from the platforms. If not, what changes should be made and how could they best be achieved?**
35. Major internet and social media companies such as Google and Facebook are now globally dominant businesses with unprecedented reach, resources and power, whose commercial agenda, business operations and the services and products offered can have a major effect on those around them.

¹⁶ Overview of recent dynamics in the UK press market, Mediatique, p.4

¹⁷ Overview of recent dynamics in the UK press market, Mediatique, p.4

¹⁸ eMarketer 2017, <http://digitalmarketingmagazine.co.uk/digital-marketing-advertising/google-and-facebook-dominate-uk-digital-ad-market/4630>

¹⁹ eMarketer 2017

²⁰ eMarketer 2017

²¹ AA Warc Expenditure Report Summary Q1 2018 <http://expenditurereport.warc.com/FreeContent/AA-WARC%20Q1%202018.pdf>

36. Small algorithmic changes can inflict enormous damage on publishers with sudden shifts in traffic and resulting revenues to news media sites. Far greater openness, transparency and accountability is required from the tech companies over the algorithmic decision-making which affects news publishers who are reliant on them for traffic to their own sites. Tech companies must be required to give reasonable notice of any changes to terms of business or to algorithms which impact on news publishers (eg by deprioritising 'news' or promoting some news sites and demoting others), to explain the changes and their purpose, and to set out the assumptions and editorial judgments which lie behind the automation.
37. The protections devised for "mere conduits" to allow the early exploration of the potential of the internet, new technology and development of digital networks and services are no longer appropriate for these powerful global gateways to the internet. Swift and robust measures must be taken by the government in order to safeguard consumers and the role of the independent media and its trusted journalism on which UK citizens depend. It is vital that these do not place new restrictions or liabilities on independent news media publishers.
38. News publishers clearly do not receive a fair proportion of revenues for their content when it is accessed through the digital platforms. A meaningful contribution, in the form of an annual content licence fee, potentially managed by [NLA Media Access](#) (formerly the Newspaper Licensing Agency), could be used specifically to support independent journalism. This should be supported by a UK Publishers Right.
39. A programmatic classification identifying bona fide news media websites as 'brand safe' environments for advertisers could be introduced. The classification would need to be developed and applied by the news media industry itself in conjunction with advertisers and agencies – and, importantly, not by the tech companies themselves - potentially building on initiatives from the DTSG, JICWEBS and TAG.
40. Such a system would automate digital ad serving to known sources of verified news content, driving up advertising yields for brand safe news domains. It would make a clear distinction between brand safety and brand sensitivity, to avoid the problem of editorial content on genuine, fact-checked, professional news sites being blocked by indiscriminate programmatic brand safety and content policing tools.
41. Measures should be brought in to ensure the tech companies adjust their algorithms actively to prioritise brand safe genuine news websites (as independently defined, see 39 above) and to demote programmatic serving of digital advertising to 'fake news' sites and other harmful content such as terrorist websites and child pornography.

High-quality journalism plays a critical role in our democratic system, in particular through holding power to account, and its independence must be safeguarded. In light of this, what do you consider to be the most effective and efficient policy levers to deliver a sustainable future for high quality journalism?

- a) **Where, if at all, should any intervention be targeted and why (for example, at the local level, or at specific types of journalism)?**
- b) **What do you think are or should be the respective responsibilities of industry, individuals and government, in addressing the issues we have identified?**
- c) **If there is a case for subsidising high-quality journalism, where should any funding support come from?**
 - i. **What form should it take?**
 - ii. **How or where should it be targeted?**

42. The following is a range of options which the NMA and a wide cross-section of news publishers are developing and exploring with the government and other agencies:

- An Ofcom and Competition and Markets Authority review and investigation into the opaque digital advertising supply chain to examine the dominance of Google, Facebook and other major tech companies, and the role of tech vendors and other intermediaries, and the impact of their activities on consumers, advertisers and other media players. Effective remedies to be introduced.
- A Government-commissioned independent study into the importance of news content to the tech companies and the monetary value it provides to them on an annual basis.
- Give the tech companies the same legal responsibility as publishers for the content they carry, unless this is from a bona fide news source, and introduce independent regulatory oversight of their activities. This is intended to incentivise them to promote verified news content over fake news and other harmful content. It must not impose any new restrictions or additional regulation on news media publishers nor allow the tech companies to obstruct access to news media sites, discriminate against their content, or seek to shift liability, costs and regulatory burdens onto news media publishers. The NMA supports recent calls from Ofcom and UK broadcasters for independent regulation of the tech companies.
- Government to take the lead, as one of the largest UK advertisers, to reject the risks associated with 'blind' programmatic ad buying via open exchanges and instruct their buying agencies instead only to use brand safe programmatic options such as private marketplace or programmatic guaranteed for government digital campaigns.

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Annex A: Selection of news media campaigns and investigations

An essential role of the local and national news media industry is its investment in agenda setting original news content ranging from investigations to campaigns and scoops.

The news media industry is the leading investor in producing original news content- 58 per cent of all news investments in the UK comes from newsbrands.

Local, regional and national newspapers act as the public's watchdog. By scrutinising and holding power to account on behalf of their readers through investigations and campaigns, newspapers help to underpin the democratic process. Furthermore, at a local level charities and community causes are championed with real change being achieved. Below are a selection of recent national and local newspaper campaigns and investigations.

Manchester Evening News - We Stand Together

The Manchester Arena attack rocked both the city and the country. The MEN promptly set up an appeal to help those affected and it quickly hit the £2.5m mark.

The Paper realised an additional issue that needed tackling - the bomber was a Mancunian.

#WeStandTogether had a double message – defiance and a call to do something to make the future better. The campaign had three main aims: make sure every pupil in Greater Manchester is taught about peace and how to solve problems without resorting to violence; encourage acts of kindness and acts of love – especially towards people we don't know; and fight each and every crime which is driven by hatred – while also opening up a dialogue across communities to defeat violent extremism.

Glasgow Evening Times- Opt for Life

In October 2011, the Glasgow Evening Times launched Opt for Life, a campaign to try to change Scotland's organ donation laws. Opt for Life's aim was to persuade the Scottish Government to switch to an opt-out system of organ donation, where the default position would be that everyone is considered a donor but the right to say no is respected.

Kidney Research UK was first to support the campaign, giving the Evening Times its full backing and helping to gather more than 20,000 petition signatures. Other charities followed, including the Cystic Fibrosis Trust, the Kidney Federation and the British Medical Association, which has itself led a long campaign for an opt-out system.

The Evening Times submitted a petition to the Scottish parliament calling for the change and were asked to give evidence at the public petitions committee. The petition was praised by the committee and led to a full debate in parliament. A Bill was created, but narrowly defeated. However, after 1706 days and almost 500 articles, a Holyrood petition, and a public petition the campaign achieved its goal.

Express and Star (Wolverhampton)- Investigation into Police Handling of Murder Case

The family of a young man who was killed in a shooting in South Staffordshire praised the Express & Star for its three-year investigation into the police handling of the case.

Kevin Nunes was shot five times in a gangland killing in 2002, the murder investigation led to five men being jailed and then acquitted on appeal.

Working with a police whistle-blower, the Express & Star's investigation included a year-long Freedom of Information drive to get a dossier of failings from the case made public for the first time. The Independent Police Complaints Commission released its investigator's full report into the case nearly three years after its inquiry was completed. The report found that senior Staffordshire police officers had a case to answer for misconduct or gross misconduct, but ultimately no disciplinary proceedings went ahead.

Leanne Williams, who was Kevin's girlfriend when he was killed, said: "The Express & Star has wanted to know how the family feels, how it has affected us. They have shown more interest than the police and IPCC together...We felt like our cause was disappearing, and that in the eyes of the police and the IPCC nobody cared. I definitely believe the Express & Star helped that massively. I totally believe the Express & Star's input put a fire under it and made the authorities stand up and listen and forced them into action."

In May 2018, a formal review into Kevin's murder was launched by Merseyside Police.

The Times-Big Brands Fund Terror

Some of the world's biggest brands were found to be unwittingly funding Islamic extremists, white supremacists and pornographers by advertising on their websites through blind programmatic advertising.

The Times investigation prompted market-leading global brands to pull millions of pounds in ad spend from digital channels as well as an outcry from politicians from all the main parties who called on the tech giants to do more to police inappropriate content being distributed on their platforms.

The Times investigation found that the practice was likely to generate tens of thousands of pounds a month for extremists, and analysis showed that the blacklists designed to prevent digital adverts from appearing next to offensive material were not fit for purpose.

After The Times informed Google, which owns the video streaming platform, it took down some of the videos.

MPs called on Google and other social media platforms to attend an oral evidence session at the Home Affairs Select Committee's inquiry into Hate Crime and its Violent Consequences. Google was criticised by the Select Committee for failing to search for hate videos, relying instead on its users to report suspect content, despite profits of more than \$30 billion last year.

Yellow Advertiser- Child abuse allegations

The Yellow Advertiser submitted a Freedom of Information request for details of compensation payments made by Essex Council in 2014. The request unearthed 10 payments for 'alleged abuse' in the 1970s and 1990s. Essex Council refused to answer questions about the payments, stating that to do so could identify alleged victims.

The Advertiser disagreed, as did the National Association for People Abused in Childhood and the Taxpayers' Alliance, who supported a campaign by the paper calling on Essex Council to be transparent over the allegations.

Inspired by the campaign, a whistleblower contacted the paper to say he had been involved with Essex Council's children's services in the late 1980s and early 1990s, and he and others had suspected that not enough was done by the council or Essex Police to combat child abuse. By working together for several months, reporter Charles Thomson and the whistleblower managed to get Essex Council to admit that it had knowledge of historic allegations of child abuse by its own staff. The paper ran a front-page story about the admission, which prompted two more whistleblowers to come forward.

A series of meetings were held between the whistleblowers and the Essex Police and Crime Commissioner. The Commissioner arranged for the Chief Constable and a senior sex crimes detective to attend one of the meetings, after which a full-scale police operation, with dedicated officers, was set-up to reinvestigate the Shoebury case.

The Guardian – Windrush Scandal

Over the course of six months the Guardian highlighted the Home Office's treatment towards the Windrush generation, describing how retirement-age citizens who had legally lived and paid taxes in the UK for decades had been detained, made homeless, sacked or denied benefits and NHS treatment because they struggled to prove they were British.

Articles documented the cases of people such as Paulette Wilson, 61 (former kitchen worker at the House of Commons, made homeless, detained and threatened with removal to Jamaica, after 50 years in the UK), Michael Braithwaite, 66 (sacked as a special needs teaching assistant after 56 years in the UK), and Hubert Howard, 61 (sacked and unable to visit his dying mother after 49 years in UK).

The only official record of the arrival of many "Windrush" immigrants were landing cards collected as they arrived in UK ports. In 2009, a decision was made to destroy the landing cards and implemented in 2010, months after Theresa May became Home Secretary. New immigration rules also came into force that required employers, landlords and the NHS to demand evidence of legal immigration status.

The Barbados high commissioner revealed that Downing Street had rejected a formal request from all 12 Caribbean high commissioners to meet with Theresa May at the Commonwealth heads of government meeting. Within 24 hours then Home Secretary Amber Rudd was apologising for the "appalling" behaviour of her own department and Theresa May apologised twice that week.

Since the scandal came to light the following actions have taken place:

- The Windrush taskforce was set up with more than 5,000 identified as potential Windrush cases.
- The government committed to launching a compensation scheme for the potentially thousands of people caught up in the scandal.
- Ministers suspended arrangements under which the NHS shared patients' details with the Home Office so it could trace people breaking immigration rules.
- The Home Office will suspend immigration checks on thousands of bank accounts which were another aspect of the government's hostile environment policy.

Amelia Gentleman won the 2018 Paul Foot award for investigative and campaigning journalism for her reporting on the Windrush scandal.

Liverpool Echo - Hillsborough

For 27 years the Liverpool Echo tirelessly campaigned for justice for the 96 Liverpool fans who travelled to Sheffield in April 1989 to watch a football match but never returned.

The Echo quashed the original inquest verdicts and successfully campaigned for the launch of new inquests. Following the publication of the Hillsborough Independent Panel's report in September 2012 and the new inquest verdicts in April 2016, the Echo was proved right.

On 26 April 2016 the jury determined that the 96 Liverpool fans were unlawfully killed and a catalogue of failings by police and the ambulance services had contributed to their deaths.

The Echo, was the only media organisation to attend every day of the hearings. Reporter Eleanor Barlow covered all 267 days of the two year-long inquest. She wrote a blog covering proceedings as well as news stories for the website and print edition which included a longer piece and a shorter snapshot each day.

Evening Standard – Grenfell Tower

The Evening Standard Dispossessed Fund appeal raised a total of £6.2 million from readers and

private donors for Grenfell Tower Residents. Within days of the fire, each family received emergency payments of £1,000 from the fund. In addition to this, £100,000 was been given to community groups working with victims.

By the middle of August 2017, each family had received a further £13,000 from the appeal. In total, the funds raised by the Fund amounted to £5.2 million which was allocated within two months of the tragedy taking place. Of this, £3.9 million has been committed directly to survivors and a further £1.2 million has been allocated to the London Emergencies Trust for payments to next of kin and injured.

The Standard continues to work in partnership with the Charity Commission, Grenfell United and survivors of Grenfell Tower to ensure that the remaining donations raised by the Fund are distributed to meet the needs of those affected.

Portsmouth News - Gosport War Memorial Hospital

The Gosport Independent Panel found that between 1988 and 2000, at least 450 patients at the Gosport War Memorial Hospital had their lives shortened as a result of being prescribed powerful opioids without medical justification.

Panel chair Bishop James Jones singled out and praised The News in Portsmouth which had represented and campaigned on behalf of the families affected since 2001.

He said: "Your advocacy of the families is a great example of what local media means, and I've been a great supporter of local media. Local newspapers and TV stations and radio are absolutely vital for precisely this reason because no-one in national media and national TV was (reporting on it). The paper acted as their channel and champion and that's very commendable."

Daily Mail - Turn The Tide On Plastic

The Daily Mail's Turn The Tide On Plastic campaign has called for measures to stop the vast amount of plastic waste found in the oceans.

The newspaper has previously campaigned for plastic bags to be banished, the introduction of a plastic bottle deposit scheme, and action to be taken on non-recyclable coffee cups.

Following the launch of the campaign in November 2017, Prime Minister Theresa May pledged to dramatically reduce plastic waste over the next 25 years. She also set out plans to extend the 5p levy on plastic carrier bags to smaller shops.

The Mail ran a series of articles written by environmental experts offering readers tips on how to minimise the amount of plastic they use. It also ran a promotion for free reusable cups for readers and pledged to stop the using poly wrapping for magazine supplements in their weekend editions.

At a United Nations summit, the head of the UN's environment programme praised the Mail for campaigning on the issue. Erik Solheim said: "If we continue to allow this to happen, by 2050 there is going to be more plastic in the ocean than fish. To tackle the problem of marine pollution we have to make this a kitchen table conversation.

"This is happening. For example, the Daily Mail, one of the most widely read newspapers in the world, is putting the message out and this is really positive, really fantastic."

Birmingham Mail – Pub Bombing

The Birmingham Mail has long reported on the appalling legacy of the pub bombings on 21 November 1974 which killed 21 people and injured 182.

While trawling legal documents and archive news reports, Birmingham Mail content editor Andy Richards realised that although the inquests were opened, they were never completed. This was because police immediately arrested the Birmingham Six, who were later cleared of the crime.

It was judged that there was then no need for the inquests to continue but, crucially, they were never closed.

Working with lawyers, and the Justice4The21 campaign group Mr Richards first brought the loophole to the attention of the authorities, and then campaigned relentlessly for the inquests to be resumed.

There was fierce opposition from West Midlands Police, whose mishandling of the investigation resulted in the wrong men being convicted. But as more information flowed in as a result of the Mail's campaigning, it emerged that the force appeared to have ignored at least two warnings of the attack. Thanks to the Mail's campaigning, in 2016 Coroner Louise Hunt took the historic decision to re-open inquests into the deaths.

The Observer - Cambridge Analytica Investigation

The Observer exposed how Cambridge Analytica, the data analytics firm that worked with Donald Trump's election team and the Leave Campaign during the EU referendum, harvested millions of Facebook profiles of US voters, and used them to build a software program to predict and influence choices at the ballot box.

A whistleblower revealed to the Observer how Cambridge Analytica used personal information taken without authorisation in early 2014 to build a system that could profile individual US voters, in order to target them with personalised political advertisements.

The data was collected through an app called thisisyourdigitallife and saw hundreds of thousands of users paid to take a personality test and agreed to have their data collected for academic use. However, the app also collected the information of the test-takers' Facebook friends, leading to the collection of a data pool tens of millions-strong.

The 18 month investigation caught international interest with Facebook's Mark Zuckerberg being summoned to testify before Congress and the European parliament, and a series of witnesses asked to appear before the DCMS Select Committee.

Sunday Post- Smyllum Children's Home

The Sunday Post broke the story that up to 400 children were buried in a mass grave near the former Smyllum Children's home in Lanarkshire.

This followed painstaking detective work over a number of months which involved employing a family history specialist to trawl through death certificates and burial records. Eventually, they were able to establish the identities of almost 400 children who had died at Smyllum over a number of decades. Many were killed by natural causes and diseases such as TB and flu.

When the paper cross-referenced the names of those young victims against the records for burials at nearby churchyards, there was no evidence any of those children were buried at those sites. Instead the children had been buried in a mass grave near the orphanage itself.

The Post campaigned for the forgotten children to finally be remembered. They called on the Catholic order that previously ran the now-closed orphanage to remember those lost. The Catholic order agreed and promised to erect a permanent memorial.

The Times- Rotherham Abuse Investigation

The Times chief investigative reporter, Andrew Norfolk's, four-year investigation into child abuse in Rotherham, South Yorkshire, resulted in an independent inquiry that found at least 1,400 girls were sexually exploited over 16 years.

The story led to the resignation of senior figures in public services in the area - Rotherham's council leader; the council chief executive; the director of children's services; the South Yorkshire police and crime commissioner. Additionally, four Rotherham councillors were suspended by the Labour party.

The investigation also triggered two major, ongoing criminal inquiries into allegations of sexual exploitation in Rotherham in the years covered by the articles, featuring a total of 283 victims and 18 suspects.

The report also prompted the formation of a Government task force on child sexual exploitation, new regulations in children's homes, improved training for police, new guidelines for judges and prosecutors plus a sharp rise in criminal investigations into child sexual exploitation across England.

Derby Telegraph – Aston Hall

During the 1960s and 70s vulnerable children, some of whom had been victims of abuse or were runaways, were sent to Aston Hall Hospital, to receive help and care.

Instead they were delivered into the hands of Kenneth Milner, head physician at the hospital. Under Mr Milner's care, children as young as 11 suffered sexual, physical and emotional abuse.

This harrowing evidence would never have emerged had it not been for a long-running and determined investigation by the Derby Telegraph. Now 55 former patients have come forward to share their stories through the newspaper– re-living their nightmares and urging other victims to come forward.

Police and health authorities in Derbyshire have launched a major inquiry into Aston Hall Hospital with the matter also been addressed by the Prime Minister in the House of Commons.

Eastern Daily Press- Kerri's Campaign

Norwich woman Kerri McAuley was murdered by her violent partner in January 2017. Kerri's murder prompted an outpouring of tributes and debate about whether legislation should be changed so that abusive partners are given tougher jail terms to prevent them from reoffending.

Leeway, a local domestic violence charity, needed to raise £10,000 for the kit out of a new women's refuge and the EDP felt this was an ideal way to honour Kerri's memory.

The paper launched the campaign which received fantastic backing from the public, with people organising events and collections to help meet the target. The target was met a day before Christmas Eve 2017 and was one of the quickest campaign successes in the newspaper's history.

Telegraph- Changing Minds

Changing Minds is a Telegraph campaign to raise awareness of mental health issues. It tackles the stigma attached to mental health, offers a platform for support and encourages a spirit of self-help between individuals and communities.

Changing Minds is a dedicated Telegraph microsite hosting advice, articles and a comprehensive list of crisis numbers. A regular contributor is journalist Bryony Gordon who discusses her own past battles with OCD and depression on her podcast. The podcast called Mad World covers interviews with high profile figures including Prince Harry, Frank Bruno, Stephen Fry, and Melanie C discussing issues ranging from depression, OCD, grief and anxiety. The aim of the podcast is to normalise and encourage people to talk about their mental health.

JP Investigation's Unit- Drive For Justice

Johnston Press' investigations Unit, discovered that dozens of people convicted of killing by driving dangerously have walked free.

Since 2010 over 800 lives have been claimed from dangerous driving and no-one has ever received the maximum 14-year sentence for causing death by dangerous driving.

Data released under the Freedom of Information Act showed that in the 12 years since Parliament increased the longest sentence from ten to 14 years in jail, not a single person has been handed the maximum penalty for causing death by dangerous driving in England, Wales or Northern Ireland. Of the 738 people convicted between 2010 and 2015 of the offence, the most serious driving crime on the statute book, just seven were jailed for more than ten years.

The average jail sentence for causing death by dangerous driving is four years and one month, with 46 per cent of all those convicted sentenced to less than four years in prison. A total of 111 people convicted of death by dangerous driving between 2006 and 2015 have walked free from court.

Ben Bradshaw, Labour MP for Exeter welcomed the investigation, he said : “The penalties and sentences passed on people who kill behind the wheel of a car are wholly inadequate and have been so for a number of years. It is time that our law reflected the fact that when you get behind the wheel of a vehicle you are in charge of a lethal weapon. If you kill somebody by misusing that weapon you should receive a punishment that is appropriate to the suffering that you inflict on your victims and their families.”

Annex B: NMA Options for Cairncross Press Sustainability Review

The NMA has drawn up a list of options and initiatives to support Britain's press for consideration by the Cairncross press sustainability review and by government. These proposals include industry/tech company solutions that the government could facilitate, as well as measures that only government action can achieve. They are subject to clearance that the NMA can collectively pursue them and avoid competition law problems.

External funding for journalism

Tech companies

1. **Government to facilitate agreement between publishers and major tech platforms such as Facebook and Google on measures to support a sustainable news media sector.** These would include an annual financial contribution by the tech companies towards the cost of independent high-quality journalism produced by established news media providers in the interests of supporting a diverse news ecosystem.

This could take the form of a licence fee agreement between publishers and the tech platforms, representing a fair commercial return for their users' access to and benefit from publishers' content, traffic and audience. The NMA/BBC Local Democracy Reporters Scheme (See BBC, par 7) is also an example of a successful third party local journalism funding model which could be adapted, developed and expanded.

2. Agreement to be reached with the tech platforms to maximise audiences to 'brand safe' NMA member news sites and demote audiences to 'fake news' sites and other harmful content, thereby reinforcing the importance of real, verifiable journalism and allowing publishers to monetise those audiences.
3. Tech companies such as Facebook to attribute to news publishers a share of their advertising revenues based on number of articles read in news feed, not just those clicked upon, while guaranteeing a minimum number of professional news articles will be maintained in the feed.
4. Facebook Instant articles should have realistic commission rates, no unreasonable increases and no disadvantage of any kind to publishers who are not parties or do not join.
5. Tech companies profit from the newspaper articles which appear in search results and on news feeds. They need to share with publishers meaningful data on the audiences for news media content and acknowledge the benefit they derive from this content rather than exacting technology fees for ad serving/downloading at rates which do not recognise this.
6. Equality of bargaining power requires redress to end tech companies' imposition of terms favouring themselves by virtue of their dominant position. Tech companies must give reasonable notice of any intention to vary their terms of business or activities including changes to algorithms which impact on publishers.

BBC

7. Guarantee funding for the expansion of the BBC **Local Democracy Reporter Scheme**. Increase number of reporters from 150 to 200 as agreed, and explore possible expansion of remit beyond councils, public health and other authorities to other areas, and alternative funding sources for schemes of this nature.

8. Enhanced restrictions on BBC as a multiplatform publisher, whether acting alone or in partnership with PSBs etc, to avoid adverse impact on commercial independent news media.

Regulatory Reviews and Reforms to Create Level Playing Field

9. **The CMA, supported by Ofcom and the ICO, to urgently investigate the digital advertising supply chain, the dominance of the tech platforms and their impact on consumers, advertisers, and other media players and put in place measures to address the problems.**
10. Review and reform of the regulatory regime to ensure fair and sustainable competition to address problems created by such dominant tech companies.
11. Review and reform of the competition and media ownership regime, and the CMA approach and cumbersome process, so as to reduce the costs, time and obstacles to transfer of titles and mergers by news media companies.
12. Give the tech companies the same legal responsibility as publishers for the content they carry, unless this is from a bona fide news source, and introduce independent regulatory oversight of their activities. This is intended to incentivise them to promote verified news content over fake news and other harmful content. It must not impose any new restrictions or additional regulation on news media publishers nor allow the tech companies to obstruct access to news media sites, discriminate against their content, or seek to shift liability, costs and regulatory burdens onto news media publishers. The NMA supports recent calls from Ofcom and UK broadcasters for independent regulation of the tech companies.
13. Investigation and enforcement of the existing criminal and civil law if applicable against tech companies within the jurisdiction.
14. Government must avert exploitation by tech companies or others of e-Privacy legislation in ways that would allow them: to acquire consent to enable control and commercial exploitation of publishers' products, content, audiences and data; to obstruct audience access to publishers' websites through browser controls; to obstruct or limit advertising on publishers' websites; or to prevent publishers from imposing their own terms for conditional access to their own websites.

Data

15. **Government, ICO and competition authorities to ensure EU legislation such as GDPR and e-Privacy is not subverted by tech companies to exploit their dominant position**
16. Stop tech companies from forcing unfair terms on publishers through the new consents regime. Google's consent tool would require publishers to give Google a direct relationship with their own users, allow Google to use all the data which their publishers pass through Google's products for whatever purposes Google wishes, and require publishers to collect the relevant user permissions for Google and bear the liabilities.²²

²² GDPR consent framework: Associations representing more than 4,000 publishers across the globe including the NMA have accused Google of "effectively putting a gun against publishers' heads" with its proposed framework for the new data protection regime. <http://www.newsmediauk.org/News/gdpr-google-accused-of-putting-a-gun-against-publishers-heads/201259>

17. The ePrivacy proposals for users consent to be set through browsers give Google even greater and directional power as gatekeeper to the internet to acquire user data and influence and control users' access to others' sites. Other adverse impact of the proposals upon publishers' audience, advertising access terms and revenues must be avoided. (See Regulatory Reforms, par 15, Press Freedom, par 40)

Intellectual Property Rights

18. Maintenance of a strong Intellectual Property regime. Maintain and enhance UK news publishers' IP rights and remuneration derived from them, without dilution, under UK and overseas IP regimes. This includes promotion of an improved Publisher's Right to benefit UK news publishers and the prevention of a detrimental version. (IP issues are also relevant to external funding and commercial relationships with the tech platforms and others.)
19. Maintenance of the current legal deposit regime that does not permit commercial exploitation of digital material by libraries or anyone other than the publisher.

Advertising Self-Regulation: Tech Platforms to Pay their Fair Share

20. Payment by the major tech companies, internet and social media companies of a proportionate and full contribution to the financing of the advertising self-regulatory system reflecting the size of their advertising revenue and growing share of the advertising market.

Government Advertising

21. Retention of public notices in newspapers: no repeal and continued specification in new legislation of mandatory newspaper publication of statutory public notices to preserve the public's right to know important information affecting them.
22. Government, as one of the biggest UK advertisers, has withdrawn adspend from news media brands in recent years, in favour of the tech platforms. There should be a centralised review of government and public-sector advertising and marketing spend and practices with a thorough re-evaluation of the value, reach and effectiveness of news media brands, and the public's growing trust in them versus social media platforms.²³
23. Scottish Government advertising and marketing spend has also seen a shift away from newsbrands, in particular towards radio, and a separate review should be conducted into Scottish Government and public sector advertising and marketing activity to ensure a fair spread of public spending which properly reflects reach, trust and effectiveness.
24. Government should reject the risks associated with blind programmatic ad buying (open exchanges) in favour of private market place or programmatic guaranteed for its digital advertising campaigns.

²³ Ofcom Report: Public Overwhelmingly Favour Traditional Media as News Source:
<http://www.newsmediauk.org/News/ofcom-report-public-overwhelmingly-favour-traditional-media-as-news-source/198886>

25. Curb council newspapers: Government should use its statutory powers and strictly enforce the curbs on council newspapers imposed by the Local Authority Publicity Code. Independent local newspapers are critical to upholding local democracy, scrutinising the activities and decisions of local authorities and holding them to account on behalf of local taxpayers.²⁴

Newspaper Distribution and Environmental Issues

26. Dominant distribution companies should not target price increases at small companies or exploit sector dependence upon its operation.
27. Government to maintain support for voluntary industry recycling initiatives.
28. Any distribution issues that may be raised with the Review by the NFRN or others must be addressed in ways that benefit news publishers and are not to their detriment.
29. The Review should include an examination of the level of subsidy news publishers are required to make to ensure distribution to geographically remote communities and make recommendations about whether such subsidies should be met by the UK and/or Scottish Governments.

Taxation and Tariffs

30. Digital taxation reforms in respect of tech companies, which do not threaten or impact upon news media publishers but would help to level the playing field.
31. Maintenance and extension of VAT zero rating for newspapers and digital products.
32. **Tax credit relief scheme for news creation:** Tax credits have been crucial in sustaining film, television, video games, theatres, regional orchestras, exhibitions of museums and galleries. For the tax year 2015-2016, film industry tax credits totalled £338.4 million, high-end TV £95.9 million, animation £50.9 million, and video games £45 million in the same period.

Creative industry tax reliefs are currently a group of eight corporation tax reliefs that allow qualifying companies to claim a larger deduction, or in some circumstances claim a payable tax credit when calculating their taxable profits. They could be adapted and extended to news media companies.

Subject to the news media company satisfying a qualifying culture test, a journalism tax credit scheme could increase the amount of allowable tax-free expenditure for its spending on core areas such as investigative journalism, editorial and publishing costs and it could claim a cash rebate on a proportion of those costs.²⁵

²⁴ Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance. US study finds that the cost of government rises when local newspapers close:
<https://www.theguardian.com/media/2018/jun/10/cost-of-government-rises-when-local-newspaper-closes-study-finds>

²⁵ **News media tax credit scheme:** For example, if a company has £500,000 expenditure and £500,000 profit, if the tax free allowable expenditure was increased by a rate of 25%, £625,000 would qualify as tax free expenditure, £375,000 as profit and corresponding reduction in corporate tax bill.

Alternatively, there could be a payable tax credit model where the news media company would benefit from such an increased tax-free allowable expenditure. If the company made a loss, instead of carrying this forward for up to four years to set against future taxable profits, it may be able to surrender the loss and convert some or all of it into a payable tax credit.

Theatres and orchestras benefit from HMRC pay-outs of 25 per cent of the loss surrendered (eg, a £20,000 loss can be traded in for £5,000 from HMRC, on condition that this loss is not used to reduce taxable profits made within the next four years).

- 33. Extension, improvement and retention of business rate relief for local newspaper companies.
- 34. Unimpeded supply of newsprint into the UK, free of tariffs or other duties.

Pensions

- 35. An open, pragmatic solution seeking industry dialogue with the Pensions Regulator and Pension Protection Fund that would assist the viability of news publishers.

Press Freedom

- 36. Repeal Section 40 of the Crime and Courts Act 2013 in its entirety without commencement as soon as possible.
- 37. Prevent and reject all Parliamentary attempts to instigate press controls and new statutory inquiries based on Leveson Part 2 terms of reference and/or intended to recommend new press controls.
- 38. Extend freedom of information legislation and reject any proposals for tougher laws against disclosure of official data, including official secrets legislative reforms in the terms of Cabinet Office/Law Commission proposals, which would put media organisations, journalists and their sources at greater risk of prosecution and create a chilling effect on the public right to know.
- 39. Introduce a Freedom of Expression audit. Ministers to certify that all proposed legislation is not only consistent with the European Convention on Human Rights but that it explicitly does not inhibit freedom of expression. Ensure prior consultation.
- 40. Promote open justice. Ensure full consultation and involvement of local and national publishers, editors and media organisations on the project to transform and modernise courts and tribunals, which currently threatens open justice. Consult the media on legal and practical changes required to maintain and extend open justice through media reporting of the courts. This includes consultation on and implementation of improved extended statutory rights of access to all court and tribunal proceedings, court documentation, court lists, registers of court judgements, updated defences, improved procedures, as well as maintenance of existing joint media protocols. Resume opening up the family courts. Roll out cameras in court and use the opportunities provided by the court reform project to open up beyond sentencing remarks in crown courts. Consult media organisations, and provide training and guidance to judiciary, court and tribunal staff, on open justice, including avoidance of unjustified reporting restrictions. Strengthen the Crown Prosecution Service code directing CPS to safeguard open justice and oppose reporting restrictions. Consult the media on any proposals that would impact upon open justice. Prevent unwarranted statutory restrictions

on reporting the courts and tribunals and those appearing before them, or on reporting investigations, arrests and charges prior to court proceedings and those involved in them.

41. Implement comprehensive and robust freedom of expression exemptions mandated by GDPR. Ensure that EU e-Privacy proposals do not make tech companies the gatekeepers for audience access to publishers' content nor allow its commercial exploitation by them.
42. Stop tech companies from obstructing audience access to content, creating barriers to publishing freedoms and content discovery: tech companies have vast powers over audience access to news publishers' content, controlled by opaque algorithms. They must be required to carefully consider the impact of algorithm changes on news and news publishers. This must include prior detailed consultations with news publishers on any proposed changes and avoidance of adverse impact upon news publishers. (See Data, par 16)

Annex C: Criteria for eligible news media businesses

Potential criteria for eligible news media businesses

These potential criteria are designed to set a fair and non-discriminatory approach and avoid conferring an unfair advantage on a particular publisher or class of news media publisher which could distort the market. To be eligible for a levy or licensor scheme, publishers must have legal responsibility for the content they publish. The following criteria could be applied:

1. Publish direct to the public or any section of the public (subject to payment or other access restriction imposed by the publisher) original journalism of demonstrable quality, which must be under the editorial control of the publisher and which is produced by journalists, including editors, trained to recognised standards with relevant experience who are employed by the publisher, or which has been commissioned and/or selected for publication by such journalists and editors.
2. Publication of such journalism may be in print or electronic transmission, via the internet or similar means. This may therefore include printed newspapers and their supplements, published daily, weekly or at other intervals of not more than 15 days, and other digital news media publications and news media digital services that are supplied electronically to the public such as online newspapers, newspaper websites and associated news services consisting of text, images and which may include some audio visual or audio material, which may be updated continuously or issued at not less than such intervals.
3. A consistent and substantial proportion of the original quality journalism published by any such means and at any such interval and, as appropriate, in each issue of any publication, must consist of news and information about current affairs and current events of local, regional, national or international importance. This may include contemporaneous coverage of all aspects of public institutions, organisations and civic life. It may also include comment or opinion relating to such news and information, range of other journalistic content such as features whether specialised or general, readers/audience contributions, cross words and competitions, weather and advertising content.
4. The publisher must be able to demonstrate the consistent quality of its journalism and that its journalism meets and maintains high journalistic standards. These can be evidenced by the content of its past publications over an appropriate period, detailed proposals for launch of any new publications and services, and by its oversight by an established industry regulator such as IPSO and/or adherence to the Editors' Code of Practice.

Annex D: Support for news media in European states (News Media Europe)

News Media Europe - state aid measures in EU Member States as of 25 July 2018

Member States	Direct	Indirect	VAT
Austria	In 2017 direct press subsidies amounted to EUR 8.5 million based on the Press Subsidies Act 2004. Subsidies are given on the basis of grant applications reviewed by the Austrian Communications Authority (KommAustria) is responsible for federal subsidies. Different subsidies exist for daily and weekly newspapers, for the preservation of diversity in regional daily newspapers, for training new journalists, for hiring foreign correspondants, for delivering publications to schools, and for carrying out research projects. The Austrian Communications Authority (KommAustria) is responsible for federal subsidies.	The Press Subsidies Act of 2004 also provides a number of further measures that aim to promote quality: publishers of daily and weekly newspapers can receive subsidies toward the cost of training new journalists. There are also subsidies for employing foreign correspondents. For the purpose of promoting the reading of daily and weekly newspapers, especially in schools, associations that define this as their sole objective can also receive subsidies.	Newspapers benefit from a lowered VAT rate of 10%. The standard VAT rate of 20% applies to digital publications.
Belgium	Press subsidies are a regional competence. No subsidies exist in Flanders (Dutch). In Wallonia (French), direct subsidies are available to all daily newspaper publishers that meet the requirements set out in the law (eg. number of employed journalists, circulation, circulation revenue, advertising revenue). The aid covers operational costs, development, media innovation, and a specific subsidy exists for training journalists. The launch of newspapers can also be subsidised.	Reduced rates for postal services are granted to all newspapers in Belgium. Finally, journalists benefit from special conditions when using the rail network.	Daily newspapers are exempted from VAT, and a 0% rate is applied to single-copy sales, subscription sales and newsprint, while the standard rate (21%) is applied to advertising. Digital publications are subject to the standard rate.
Bulgaria	None.	National experts note that the government uses state advertising to channel money to certain media outlets on an "arbitrary" basis.	Unlike in most of the EU, where the general trend is to apply a reduced or super-reduced VAT rate to newspapers, a standard VAT rate of 20% is applied.

Croatia	<p>The Fund for the promotion of pluralism and diversity of electronic media (radio-, TV and e-publications) was founded in 2004 for the following: right to public information, culture, education, science, arts, Croatian dialects and minorities, gender and sexual awareness, content for children, contributions of persons with disabilities, authentic representation of the Homeland War, media literacy, environmental protection and the promotion of health. The fund is managed by the Agency for Electronic Media, which operates on the basis of a rulebook, based on the Law on Electronic Media. Funds are awarded through public tenders, and financed through a 3% fee levied on the license fee income of public service broadcasters. The fund is opened to public, commercial and non-profit media. In 2015 there were two calls for funding. In the first call the funds allocated for radio broadcasters amounted to 14.066.001 KN (ca. 1.875.466 EUR), non-profit electronic publications 972.000 KN (ca. 130.000 EUR), and for non-profit radio 59.500 (ca. 7.900 EUR). In the second call the funds allocated for TV broadcasters amounted to 14.966.000 KN (ca. 199.546 EUR), and for radio 1.000.000 KN (ca. 133.333 EUR).</p>	<p>Allocation of state advertising. There is also a scheme of redistribution of revenues from the lottery games awarded by the Ministry of Culture through a Non-Profit Media Committee.</p>	<p>A reduced VAT rate of 5% applies (excluding newspapers with more than 50% advertising). The standard VAT rate of 13% applies to digital publications.</p>
Cyprus	<p>A press support scheme was introduced in 2017, entitling newspapers to grants between EUR 8,000 and EUR 67,000 over a three-year period. The scheme has been created to support print media and aims to support traditional news outlets, digital publications are excluded. Daily and weekly newspapers which “are distributed across the island; registered with the Press and Information Office; have at least five qualified journalists that are members of the Cyprus Journalists’ Union; feature original news reporting; and have</p>	<p>Free distribution of newspapers: distribution agencies, kiosks and other distribution locations must ensure that newspapers are available to the public freely, without restrictions or discriminations, regardless of the newspapers’ political inclinations or views.</p>	<p>Newspapers benefit from a lowered VAT rate of 5%. The standard VAT rate of 19% applies to digital publications.</p>

	invested in expanding their online presence” are eligible for the subsidy. The annual subsidy will be calculated according to the number of days the newspaper is published in a week and newspapers are entitled to “an annual €1,000 for each qualified journalist who is a member of the Cyprus Journalists’ Union, as a remuneration subsidy.		
Czech Republic	None. However, magazines published for national minorities in their own languages ("minority titles") can obtain grants from the Ministry of Culture. The total amount of this aid was about 20.5 million CZK (around EUR 770,000) for all titles of this category in 2016.	None.	The standard VAT rate is 21%, and a reduced 10% rate has applied to newspapers and magazines since March 2017. Between January 2013 and February 2017, the rate was 15%. Newspapers and magazines benefited from a 5% VAT rate until 2007.
Denmark	In Denmark and since the new media laws were passed in 2014, newspapers and digital publications that publish political and cultural content, employing at least three journalists, are entitled to an editorial production subsidy based on the amount they use for producing journalism. Both print and digital publications can qualify, and the total amount granted to newspapers is about EUR 60 million. State aid must not amount to more than 35% of a medium's editorial costs. An innovation pool is also set up for aid to the start-up of new, independent news media and the development of existing media. A transition scheme is foreseen to support a number of news media particularly affected by the wider shift from distribution aid to production aid over the past years. A fund set up in 2004 to support specific types of newspapers (such as humanitarian, cultural, educational, sports, environment, and religious issues) was also increased.	None.	A 0% VAT rate applies to newspapers, but the standard VAT rate (25%) is applied to digital publications.

Estonia	In Estonia, there are two forms of direct, yet limited, subsidies. First, a subsidy for home delivery in rural areas is granted, amounting to EUR 1.94 million. Second, EUR 1.28 million is given to cultural publications. Instead of investing in an independent regional press, most municipalities tend to issue their own gazettes, resembling journalistic newspapers, which often also sell advertising.	None. <i>News media can apply for grants from a 200,000 EUR per anum fund from the Nordic Council to support quality content production in minority languages (eg. Russian) of Baltic countries.</i>	Newspapers benefit from a lowered VAT rate of 9%. The standard VAT rate of 20% applies to digital publications.
Finland	A system of direct subsidy exists for minority press, addressed to newspapers in Swedish and other minority languages. In 2016 the amount was 500,000 EUR, and the same amount is expected in the future because it has been the same for the last 10 years. The subsidy is not automatically given, but is granted through application. Finland's Ministry of Transport and Communications also sees public subventions as a means of ensuring press diversity and, in particular, the survival of papers representing different political views. Political parties are therefore granted budget to support party press (2005 Decree on Press Subventions). Another subsidy addressed to reduction of transport and distribution costs exists, it is directed at what are considered to be second rank circulation periodicals which make little profit. Lastly, the Ministry of Education also issues grants for cultural content in periodicals.	There is a specific aid granted for media innovation, though it is not addressed only to news media. This funding was established by the Ministry of Transport and Communications, and is governed by Tekes – the Finnish Funding Agency for Innovation. During its 2015-2018 period program, the total sum granted will be EUR 20 million. Newspapers also benefit from distribution support through the postal service.	The VAT rate for newspaper subscriptions is 10% (it was raised from 0% to 9% in 2012, and to 10% in 2013). For single-copy sales and digital editions, the standard VAT rate (24%) applies.

France	<p>France has probably the most complex system of press subsidies in the EU. The purpose of subsidies is to increase access to information, support media pluralism, and the modernisation of news media. Funds for the written press are widely distributed through a committee (CPPAP) made up of press and government representatives. In direct subsidies, there is a system of subsidies granted to the press as a whole, though mainly assigned to general-information newspapers and publications. This includes press subsidies, a strategic modernisation fund, support for local media, distribution support (storage, transport, selling points), and aid for media pluralism. There is also an innovation fund set up in 2016, supporting new outlets, incubation, the development of new types of media, and research and development). Total subsidies exceed 1 billion EUR annually and are by far the most significant in the EU. For 2017, total direct press subsidies was EUR 262 million as follows: 1) press subsidies EUR 128 million (includes aid for distribution at EUR 53 million, pluralism at EUR 16 million, modernisation at EUR 59 million) 2) support to local media: EUR 1.6 million and 3) National Press Agency (AFP) EUR 133 million.</p>	<p>French law provides for a host of different indirect measures to support the press. Notably, news media can benefit from a range of fiscal benefits when filing tax returns, heavily subsidised postal rates, a supportive framework for taking in donations, significant tax deductions for journalists filing their tax returns, deductibility of certain types of investments in tax returns, and lower social security contributions for journalists employed.</p>	<p>The standard VAT is 20%, but newspapers and digital publications benefit from a lower VAT rate of 2.1%. For advertising, the standard rate applies.</p>
Germany	None.	<p>As for other indirect subsidies granted to newspapers in the form of a tax relief, there is a reduction on postal rates.</p>	<p>A reduced 7% rate is applied to both single-copy and subscription sales, and the 19% standard rate applies to advertising and digital publications.</p>
Greece	None.	<p>Greek media benefit from reduced postal distribution rates and reduced telecommunication rates. National experts note that the government uses state advertising to channel money to certain media outlets on an "arbitrary" basis.</p>	<p>Newspapers benefit from a lowered VAT rate of 56%. The standard VAT rate of 24% applies to digital publications.</p>

Hungary	None.	National experts note that the government uses state advertising to channel money to certain media outlets on an "arbitrary" basis.	A reduced VAT rate of 5% is applied on newspapers. However, the standard VAT rate of 27% is applied to advertising and newsprint.
Iceland (non-EU)	Not found.	Not found.	A reduced VAT rate of 11% applies to both newspapers and digital publications.
Ireland	None.	None.	A lower VAT rate of 9% is applied, instead of the standard rate of 23%. The lower rate was previously 13.5%: a temporary reduction was introduced in 2011, which is still in place but subject to annual budget review.
Italy	A fund for media pluralism and innovation was set up in 2016, rationalising the entire legal framework for direct media subsidy (the fund used to be focused on radio and broadcasting only). The fund for 2018 totals 182 million EUR, of which ca. 50 million EUR is destined to publishers. Subsidies are granted to three categories of newspapers: 1) newspapers representing political parties 2) cooperatives of journalists and 3) newspapers for a minority language or Italians abroad. The subsidy comes in the form of a reimbursement for the previous year accounting for sales, distribution and costs of production. Recently, a new aid, addressed to newspapers investing in e-publications, was introduced, to cover 70% of investment costs, with the possibility to add another 10% if digital copies are sold by subscription. The Italian government has been mandated consider maintaining direct subsidies just for newspapers of political parties, and consequently erase from the beneficiaries those newspapers issued by cooperatives of journalists, and newspapers representing and newspapers addressed to Italians abroad.	Until 2010, newspapers benefited from reduced postal rates for delivering subscriptions. This situation is reviewed annually. Reduced telecom rates are also granted to newspapers.	Newspapers benefit from a reduced VAT rate of 4% (the standard rate is 22%). In 2016, Italy started applying the same reduced VAT rate both to print and digital publications (contrary to the EU VAT Directive).

Latvia	None.	None. <i>News media can apply for grants from a 200,000 EUR per annum fund from the Nordic Council to support quality content production in minority languages (eg. Russian) of Baltic countries.</i>	Newspapers benefit from a lowered VAT rate of 12%. The standard VAT rate of 21% applies to digital publications.
Lithuania	The Press, Radio and Television Support Fund was established by the Law on Public Information, 1996. The major priorities of the Press, Radio and Television Support Fund are financial support for publishing, radio and TV projects, public websites, and dissemination of cultural and educational information. The fund's budget has been unchanged at 2.75 million euros in recent years.	None. <i>News media can apply for grants from a 200,000 EUR per annum fund from the Nordic Council to support quality content production in minority languages (eg. Russian) of Baltic countries.</i>	Newspapers benefit from a lowered VAT rate of 9%. The standard VAT rate of 21% applies to digital publications.
Luxembourg	Direct subsidies for the press are in place. To qualify for direct aid, newspapers must fulfil specific conditions: be a paid newspaper and employ at least five professional journalists, contain general information and be published in one of the three languages used in the country (German, French or Luxembourgish). The total amount of the aid given is EUR 7.4 million. For SMEs, for whom this aid can be quite vital, the direct aid represents about 10% of the general turnover. The aid is composed of two parts: a basic subsidy, which is the same for all newspapers, and a second part, calculated on the basis of published pages. In 2016, the government decided to give direct aid to electronic publications. For this, the maximum amount per publication is EUR 100,000, and there are two conditions: employ at least two journalists, publish "original content of quality," and have at least EUR 200,000 invested every year by the publisher.	Additionally, there is an indirect aid for distribution. Another indirect aid is the obligation for a commercial company to publish its legal announcements in the press. However, a new commercial law, voted in August 2016, reduces the former obligations by 50%.	Newspapers benefit from a lowered VAT rate of 3%. The standard VAT rate of 17% applies to digital publications.
Malta	None.	National experts note that the government uses state advertising to channel money to certain media outlets. There is no legal framework nor transparency	Newspapers benefit from a lowered VAT rate of 5%. The standard VAT rate of 18% applies to digital publications.

		in the allocation of state advertising.	
Netherlands	There is a state fund for innovation in journalism, with a modest annual budget (Journalism Promotion Fund) since 2010. The fund can support newspapers or news magazines whose existence is under threat by supporting research and other efforts which could lead to a more sustainable business model. It also supports journalistic websites and innovative projects relating to the press and journalism. To prevent journalistic media from becoming dependent on government aid, support from the fund is always temporary. An evaluation of the program in summer 2014 showed that approximately half of the projects are continued by the applicant after the subsidy is spent.	None.	Newspapers benefit from a lowered VAT rate of 6%. The standard VAT rate of 21% applies to digital publications.
Norway (non-EU)	There are direct subsidies granted to newspapers in Norway. The most important subsidy are the production grants, which are awarded in proportion to the newspapers' circulation and market position: every newspaper with a circulation of less than 6,000 receives aid from the government. For newspapers ranked second in their local market (based on circulation), additional aid is granted. Subsidies are also in place to support minority newspapers, and to support distribution as well as research and training activities. In 2018, the total value of subsidies is NOK 362 million (ca. EUR 38 million). Press subsidies in Norway are administered by the Norwegian Media Authority.	None.	Newspapers benefit of VAT exemptions both for printed and digital publications: while the standard VAT rate is 25%, a 0% rate applies to printed and digital publications.

Poland	None. However, a small, limited number of state subsidies exist for minorities, cultural, academic and environmental outlets, which are the result of scattered policy initiatives rather than a coherent framework. Much of these subsidies take place through grants rather than ongoing support. The State does not use a direct subsidy scheme for the media with a small exception of minority press and specialized periodicals.	Indirect subsidies in the form of tax reductions for newspapers exist. The state also injects significant money in newspapers through advertising, although state advertising to media outlets is not monitored and lacks transparency, especially vis-à-vis the general public.	8% rate applies to print (excluding where 76% or more of the surface is covered with advertisement) and 23% standard rate to digital.
Portugal	Aid to the press in Portugal is ensured by the Constitution, which stipulates that the state has an obligation to support the press. Concretely, there is direct and indirect state aid, giving support of EUR 1.5 million to local and regional newspapers, and to local radio stations. National newspapers are exempted from this state aid. To qualify for aid, publications need to employ a certain number of journalists and sell a certain number of copies. Between 120 and 150 newspapers benefit from the aid. Last year the government also gave the possibility to grant aid at a regional level, to increase the amount of aid available to newspapers.	As for indirect state aid, 40% of the costs of postal distribution of local and regional general information newspapers (in the country and for abroad) are paid by the government.	A reduced VAT rate of 6% is applied to print newspapers and magazines (except where newspaper contains mainly advertising), while VAT for digital editions is the standard 23%.
Romania	None.	National experts note that the government uses state advertising to channel money to certain media outlets on an "arbitrary" basis.	Newspapers benefit from a lowered VAT rate of 5%. The standard VAT rate of 24% applies to digital publications.
Slovakia	None. However, local media tend to be financially dependent on municipal governments.	None.	20% standard rate applies to newspapers - no reduced rate applicable.

Slovenia	The state should by law provide funding for media and direct subsidies are mostly given out in the form of public grants and calls. However, in practice, support schemes have failed to facilitate market entry or to enable media organisations to overcome financial difficulties, as the amount of funding has been very small. New media can apply for temporary grants and public calls, which usually receive many applications and where only few are contemplated.	None.	Newspapers benefit from a lowered VAT rate of 9.5%. The standard VAT rate of 22% applies to digital publications.
Spain	None.	None.	There is a reduced VAT rate of 4% for printed publications (if they obtain less than 75% revenue from advertising), while the standard VAT rate of 21% applies to digital publications.
Sweden	Direct subsidies have been in place since the introduction of the Statute of Annual Subventions to the Press of 31 May 1990. The body with responsibility for awarding the subventions is the Press Subsidies Council, part of the Swedish Press and Broadcasting Authority. To benefit from a press subsidy, a publication must 1) be a of daily press character with regular news services or political opinion 2) normally be published at least once a week 3) have a content mainly written in Swedish and be mainly distributed within Sweden 4) and its editorial content must constitute at least 55 percent of the total editorial content 5) the newspaper should have a minimum of 1,500 paying subscribers, unless the newspaper is aimed towards a minority language group. Three types of subsidies exist 1) operational subsidies granted to newspapers that are digitally published based on circulation 2) distribution subsidies for each issue that participates in joint distribution 3) development subsidies given to	None.	Newspapers benefit from a lowered VAT rate of 6%. The standard VAT rate of 25% applies to digital publications.

	printed newspapers for a long-term development of digital offering and services with a high-quality editorial content. In 2015, SEK 487 million (ca. EUR 47 million) were distributed.		
Switzerland (non-EU)	None.	As indirect subsidies, certain newspapers can qualify and benefit from a discount (per day and per copy) to their postal distribution fee. The Swiss Post is granted CHF 50 million (ca. EUR 46 million), which then grants appropriate discounts to qualifying newspapers and magazines. Article 16 of the Post Law (Loi sur la Poste) - the legal basis for this - breaks down the CHF 50 million (30 local and regional press and 20 for magazines and newspapers from associations).	Print newspapers, magazines and digital publications all benefit from a lower VAT rate of 2.5%. The standard rate is at 8%.
United Kingdom	None.	The government introduced in 2017 a temporary GBP 1,500 business-rates discount for office space occupied by local newspapers in England - the local authority is to be reimbursed by government.	The UK has maintained zero-rate VAT, which applies to the printed word, including newspapers and magazines. The standard VAT 20% standard rate applies to digital publications and to advertising.
European Union (EU)	Investigative journalism fund #IJ4EU, of up to €450,000 with a maximum of €50,000 per grant. Grants are application-based for cross-border investigative reporting projects in the EU.	N/A	VAT Directive.

Annex E: NMA Letters to Google and Facebook

Letter to Ronan Harris, Google

Dear Ronan,

You will recall the discussions between the NMA and Google back in June 2017 which led to our invitation for you to attend the NMA Board meeting in October last year and the subsequent establishment of three working groups. These were set up to address:

1. The economics of online advertising for publishers
2. The value of premium content and driving traffic to that content
3. GDPR: data protection and data sharing

The purpose of the workshops was primarily to identify what Google could do to help improve the economics for publishers in order to ensure the continuation of rich, verifiable news content online – which we had all agreed was in everyone’s interests. This was seen by our members to be the most important and pressing issue.

We put forward publisher representatives for each of the workstreams and one workshop session was subsequently held for each of these three areas during January 2018. However, the Google team involved said they were still in ‘listening mode’ at that point and there has been no real follow up since then; the workshops have never met again and have effectively fallen by the wayside. We suggested back in February that Google, having heard the views and practical suggestions from publisher CEOs and their representatives, might produce a paper setting out your proposals from each of the three workstreams. We would still welcome such a paper.

Similarly, the GDPR data workshop would have provided a prime opportunity for Google to alert UK publishers to the terms that you planned to impose on them in order for them to continue using Google’s advertising services when GDPR came into force a few months later. Instead, our members, along with other publishers across Europe and worldwide, were understandably alarmed by Google’s last-minute announcement of terms which would have had such a detrimental impact on their businesses. Their concerns were set out in the letter to [Google’s CEO from the four publisher associations including the NMA on 30 April](#)²⁶, to which we have yet to receive any response.

It is unfortunate that nothing has come of our meetings last year despite our agreement at the time on the need to make swift progress in order to help to safeguard the future of high quality news content.

Yours,
David

David Newell
CEO
News Media Association

6 September 2018

²⁶ Joint letter sent to Google in April 2018 from the News Media Association, News Media Alliance, European Publishers Council, and Digital Context Next
http://www.newsmediauk.org/write/MediaUploads/PDF%20Docs/DCN_Letter_to_Google_re_GDPR_Terms.pdf

Letter to Simon Milner, Facebook

Dear Simon,

As you are aware the NMA wrote to Nicola on 26 June 2017 asking for a meeting to discuss the inter-relationship between Facebook and news media companies and the advertising revenues gained by Facebook on the back of news content which is not shared with the content creators and owners. This led to a meeting with yourselves on 22 September 2017.

I just want to record formally that nothing concrete developed as a result of that meeting. We had at the very least hoped that it would have led to Facebook sharing the data which it alone has access to on the relationship between Facebook consumers, news content usage, and the advertising revenues derived from that relationship with specific reference to news content created by NMA members. This would then have led to a fact-based discussion on public policy and commercial options which would help underpin the continued creation of high quality news content.

Yours,

David

David Newell
CEO
News Media Association

6 September 2018

Joint letter sent to Google from the News Media Association, News Media Alliance, European Publishers Council, and Digital Context Next

April 30, 2018

Sundar Pichai
CEO
Google
1600 Amphitheatre Parkway
Mountain View, CA 94043

Dear Mr. Pichai,

We are trade associations whose members include European-based and international news publishers. Our publisher members through longstanding commitment and substantial financial and human investment in gathering and reporting on the news serve a vital role to both their readers and society as a whole. We have no doubt that Google would agree that a vibrant news market is fundamental to and is an underpinning tenet of a healthy democratic society. Our publisher members have always supported their endeavors, wholly or partially, through ¹advertising.

As our members work through their efforts to comply with the European General Data Protection Regulation (GDPR), we read with interest your recent announcement of terms for the continuing use of Google's advertising services in the European Union, Google's plans for complying with the GDPR, and what Google will be imposing on publishers and indeed on the Ad Tech vendors they work with.

We are writing to express concern about your approach and to outline questions for which publishers need answers. As the major provider of digital advertising services to publishers, we find it especially troubling that you would wait until the last-minute before the GDPR comes into force to announce these terms as publishers have now little time to assess the legality or fairness of your proposal and how best to consider its impact on their own GDPR compliance plans which have been underway for a long time. Nor do we believe that this meets the test of creating a fair, transparent and predictable business environment of the kind required by the draft Regulation COM (2018) 238 final published 26 April 2018².

The GDPR is intended to provide consumers with greater transparency and control over how their personal data is collected and used. As publishers with direct, trusted relationships with consumers, our members have a duty to make sure that obligation is met

¹ Even nonprofit members may serve sponsorship messages or underwriting acknowledgments that – although they are not advertisements – are provided through Google's services.

² <https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services>

by them and their partners, such as Google. We acknowledge that determining a path towards compliance with the new law is something all companies must work out for themselves, and because each company processes personal data in different ways and has different purposes and interests in doing so, there is no one-size-fits-all solution for GDPR compliance. Indeed, our members vis-à-vis Google and others in the ad tech ecosystem have different purposes and interests for participating in that ecosystem -- as publishers, digital advertising provides essential funding to support the gathering and reporting on the news, an activity that has longstanding, undisputed benefits to consumers and society as a whole.

Your proposal severely falls short on many levels and seems to lay out a framework more concerned with protecting your existing business model in a manner that would undermine the fundamental purposes of the GDPR and the efforts of publishers to comply with the letter and spirit of the law.

Under your proposal³, in providing certain digital advertising services to publishers, you assert that Google will be a controller of the personal data it receives from publishers and collects on publisher pages, and that Google will make unilateral decisions about how a publisher's data is used. As a controller, Google will need its own legal basis to process that personal data under the GDPR. Your proposal notes that Google intends to rely on consent for its legal basis and you will require publishers to obtain legally valid consent on behalf of Google for its processing of personal data as a separate and independent controller which you directly benefit from, yet you decide how and when that data may be made available to others and do not provide any details about how the data will be used by Google. By imposing your own standard for regulatory compliance Google effectively prevents publishers from being able to choose which partners to work with.

Further, your proposal notes that Google may stop serving ads on publisher sites if you deem their consent mechanism to be insufficient. If Google then dictates how that mechanism would look and prescribes the number of companies a publisher can work with, this would limit the choice of companies that any one publisher can gather consent for, or integrate with, to a very small number defined by Google. This gives rise to grave concerns in terms of anti-competitive behavior as Google is in effect dictating to the market which companies any publisher can do business with. Finally, your attempt to shift full liability onto publishers for obtaining consent on your behalf as a separate and independent controller is troubling to us. As trade associations representing publishers around the world, we have grave concerns about this approach as follows:

Controller. Your Controller Terms (§ 4.1(a)) spell out that Google will be an independent controller with respect to any personal data that is processed by either party under the Google Controller Terms in connection with its provision or use (as applicable) of the Controller Services ("Controller Personal Data"). The terms further specify that Google will individually determine the purposes and means of its processing of Controller

³ <https://adwords.googleblog.com/2018/03/changes-to-our-ad-policies-to-comply-with-the-GDPR.html>
<https://www.google.com/about/company/consentstaging.html>

Personal Data. While Google may be considered a controller in certain circumstances which have yet to be fully disclosed, it should not be considered a controller over all data that it receives from publishers or collects on publisher pages in connection with advertising services provided to publishers. Your proposal should include full disclosure of the use and purposes of the data received and collected by Google to preserve a true partnership with publishers. Claiming such broad rights over all data in the ecosystem, without full disclosure and without providing publishers the option for Google to act as a processor for certain types of data, appears to be an intentional abuse of your market power.

Consent. Your proposal notes that Google will need affirmative, express consent as its legal basis to process data of European citizens. However, your plan is to require that publishers obtain on Google's behalf broad and blanket consent for all "collection, sharing, and use of personal data for personalization of ads or other services from its users." At the same time, you refuse to provide publishers with any specific information about how you will collect, share and use the data. Placing the full burden of obtaining new consent on the publisher is untenable without providing the publisher with the specific information needed to provide sufficient transparency or to obtain the requisite specific, granular, and informed consent under the GDPR. If publishers agree to obtain consent on your behalf, then you must provide the publisher with detailed information for each use of the personal data for which you want publishers to ask for legally valid consent and model language to obtain consent for your activities.

At the same time, Google's determination that it will rely on consent as its legal basis for the processing of personal data it receives from publishers and collects on publisher pages as an independent controller of that data, should not presuppose any legal basis or interest that our publisher members may have in collecting and using that same data as a controller as well. Some publishers may want to rely upon legitimate interest as a legal basis and since the GDPR calls for balancing several factors, it may be appropriate for publishers to process data under this legal basis for some purposes. Our members, as providers of the news, have different purposes and interests for participating in the digital advertising ecosystem. Yet, Google's imposition of an essentially self-prescribed one-size-fits-all approach doesn't seem to take into account or allow for the different purposes and interests publishers have.

Liability. Also, of concern is your attempt to transfer liability for consent to the publisher. Your proposal includes a contractual structure that improperly reallocates responsibility and liability to require the publishers to take the full brunt of a regulatory or private action penalties – penalties that could implicate up to four percent of global turnover for the prior financial year – should the publishers fail to obtain consent on Google's behalf, despite the fact that the publishers must obtain such consent in the absence of sufficient information regarding Google's intended practices. Given that your now-changed terms are incorporated by reference into many contracts under which publishers indemnify Google, these terms could result in publishers indemnifying Google for potentially ruinous fines. We strongly encourage you to revise your proposal to include mutual indemnification provisions and limitations on liability. While the exact allocation of liability should be negotiated by individual publishers, your current proposal represents a "take it or leave it" disproportionate approach.

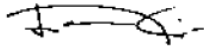
Questions:

In addition to the above concerns, we have identified a number of questions for which publishers require answers. While we expect there will be additional questions going forward and we have seen your most recent [blog post](#), we would appreciate your prompt reply to the following questions.

1. What specific activities does Google undertake that would make it a “controller” under the GDPR? Have you sought guidance from regulators to inform or confirm your decision? The more logical legal position would be as a processor of that data. Have you examined the tenability of this legal position? If so, why has this position been rejected in favour of being designated a controller of the data?
2. Given that you announced just recently a solution for serving “non-personalized” ads, we would appreciate clarification on the following questions:
 - Is this solution meant to serve only contextual ads?
 - Under this solution, will Google serve only in the role of processor?
 - To what extent, will Google rely on legal bases other than consent to collect and use personal data?
 - Is this solution intended for use when a consumer does not grant consent?
3. With regard to any of Google’s services used by publishers, will you be explicit about the purposes for which Google requires consent from end users? The specification of purposes will need to meet the condition specified in GDPR Art.6.1.a (to the level of detailed needed).
4. Your proposal notes that Google will not serve ads on sites with consent mechanisms that do not meet your criteria.
 - In Google’s opinion, what constitutes a valid user experience for gaining consent?
 - Do you envision a one-size-fits-all approach?
 - How will you determine which sites must comply with the GDPR?
 - Would you implement a warning system for publishers you deem out of compliance? Will any such system include human review prior to a decision?
5. Do you envisage making regular changes to the Google terms of use as you do with other services? If so, how will you seek publisher input and provide advance notice?
6. How would a publisher use your services to serve advertising without triggering the need for obtaining consumer consent?
7. If publishers decide to utilize an industry-wide consent management platform, how could Google’s services be integrated? Specifically, will you commit to being listed as a vendor in the IAB Europe’s consent mechanism?

Given the rapidly approaching enforcement date of May 25, we would appreciate your prompt attention to our concerns. If you need any clarification, please feel free to reach out to Chris Pedigo, SVP for Digital Content Next, who can help coordinate a response from all of us.

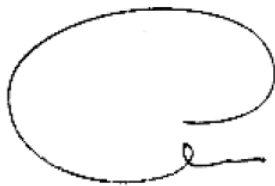
Sincerely,



Jason Kint
CEO
Digital Content Next



Angela Mills Wade
Executive Director
European Publishers Council



David Chavern
President and CEO
News Media Alliance



David Newell
CEO
News Media Association

Annexe F: NMA Submission to Internet Safety Strategy

News Media Association Response to the Internet Safety Strategy Green Paper [December 2017]

Summary

1. The News Media Association is the voice of national, regional and local news media organisations in the UK. Our members' 1000 titles, in print and online, are read by some 48 million adults every month.²⁷ News media companies are the biggest investors in original news content, accounting for 58 per cent of the total spent on news provisions in the UK.²⁸

2. The NMA and our members welcome the Government's initiation of an internet safety strategy that focuses on social media companies, their products and practices that require them to protect their users from abusive behaviour and content online.

3. The Government's commitment to review the existing regulatory framework in relation to social media companies is important. NMA members also support the Government's additional commitment to consider the further steps required to continue to develop and uphold a robust regulatory environment that delivers improved protection to all their users, including a sanctions regime.

4. Major internet and social media companies such as Google and Facebook are now globally dominant businesses with unprecedented reach, resources and power, whose commercial agenda, business operations and the services and products offered have enormous effect on those around them.

5. The protections devised for "mere conduits" to allow the early exploration of the potential of the internet, new technology and development of digital networks and services are no longer appropriate. Robust measures must be taken by government, now, in order to safeguard consumers and the role of the independent media and its trusted journalism on which UK citizens depend. However, these must not place new restrictions or liabilities on independent news media publishers.

6. The NMA has been asked by the DCMS to identify a series of measures which, with government backing, could help the news media sector to continue to perform its vital public service in the face of competition from social media companies and major internet platforms which draw in billions in advertising revenues against the news content which people upload without contributing to the cost of independent verified journalism.

7. It should be stressed that these are complex issues affecting a rapidly developing industry, and NMA members hold a spectrum of views. The following is a range of options which the NMA and a wide cross-section of news publishers are developing and exploring with the government and other agencies:

- An annual content licence fee or levy specifically aimed at supporting independent local journalism.
- A programmatic 'brand safe' classification for bona fide news media publishers.

²⁷ NRS PADD, 2017 <http://www.nrs.co.uk/latest-results/facts-and-figures/newspapers-factsandfigures/>

²⁸ Estimate by Mediatique Ltd

- Tech platforms to prioritise brand safe websites and demote ad serving to ‘fake news’ sites and other harmful content.
- Government to reject risks associated with ‘blind’ programmatic ad buying in favour of private marketplace or programmatic guaranteed for digital campaigns.
- Ofcom and CMA to investigate the digital advertising supply chain, dominance of tech platforms and their impact on consumers, advertisers and other media players.
- Regulatory review of the status of the tech platforms, as to whether they should be categorised and liable as “publisher” not “conduit”, and what additional responsibilities they should bear for the content they publish.

NMA Response

8. News media companies – newspapers in print and online - are by far the biggest investors in original news content, accounting for 58 per cent of the total spent²⁹ on news provisions in the UK, with the rest spent largely by broadcast channels including the BBC.

9. Publishers invest £97 million in digital services³⁰ and drive over 900 million social media interactions a year.³¹ Nearly half (47 per cent)³² of all engagements with UK websites on social media over the past year sourced content from UK news brands and eight of the top 10 most shared UK websites on social media were UK news media sites³³.

10. Fake news sites and other harmful content online are fuelled by digital advertising, to the benefit of tech platforms, agencies and other intermediaries, but to the detriment of society, advertisers and the publishers of genuine news. It has been reported that even government advertising has unknowingly been served up on highly inappropriate content as a result of blind programmatic ad buying practices. A coherent review of the digital advertising supply chain is long overdue.

11. The Government cannot ignore the depth and strength of industry concern about the impact of social media companies and content aggregators on the national and regional news media. The audience and appetite for news media’s independent journalism expands. But the advertising revenues which fund that journalism diminishes, swallowed up by the technology companies who control the means through which online content is accessed and against which advertising appears.

12. The Government has pledged to “ensure content creators are appropriately rewarded for the content that they make available online.” The Government must now take meaningful action that safeguards democratic debate and promotes independent trusted journalism upon which citizens rely.

²⁹ Estimate by Mediatique Ltd

³⁰ NMA Deloitte Report, ‘UK News Media: Engine of Original News Content and Democracy,’ 2016 [http://www.newsmediauk.org/write/MediaUploads/In%20the%20Spotlight/NMA%20Economic%20Report/Final Report News Media Economic Impact Study.pdf](http://www.newsmediauk.org/write/MediaUploads/In%20the%20Spotlight/NMA%20Economic%20Report/Final%20Report%20News%20Media%20Economic%20Impact%20Study.pdf)

³¹ Newswhip Analysis 2016 <http://www.newsworks.org.uk/Opinion/newswhip-data-newsbrands-rack-up-901-million-social-media-interactions-in-2016/161765>

³² NMA Newswhip Research, 2017 <http://www.newsmediauk.org/News/uk-news-media-journalism-powers-social-networks/181674>

³³ NMA Newswhip Research, 2017

13. We welcome the Government's commitment to introduce an industry-wide levy for social media companies to support preventative activity to counter internet harms. As the Government is using this consultation to ask questions about how it could best be implemented, we suggest that it should explore the wider application of such a levy, to address the wider social issues and harms occasioned by social media developments. This would work in conjunction with news media industry initiatives that mark out its independent trusted journalism.

14. The Government continues to point out the pressing need for a sustainable funding model for the news media sector which performs such a vital public service. In response to Government requests, the NMA and its members have identified a number of options which, with government backing, could start to address the economic imbalance between news content creators and those platforms which benefit handsomely from news content without contributing to the costly business of verified journalism.

15. It should be stressed that these are complex issues affecting a rapidly developing industry, and NMA members hold a spectrum of views. The following is a range of options which the NMA and a wide cross-section of news publishers are developing and exploring with the government and other agencies:

- A meaningful contribution, in the form of an annual content licence fee or levy on tech platform advertising revenues, aimed specifically at supporting independent local journalism.
- A programmatic classification identifying bona fide news media websites as 'brand safe' environments for advertisers. The classification would be developed and applied by the news media industry itself in conjunction with advertisers and agencies, potentially building on initiatives from the DTSG, JICWEBS and TAG.³⁴
- Such a system would automate digital ad serving to known sources of verified news content, driving up advertising yields for brand safe news domains. It would make a clear distinction between brand safety and brand sensitivity, to avoid the problem of editorial content on genuine, fact-checked, professional news sites being blocked by indiscriminate programmatic brand safety and content policing tools.
- Measures to ensure the tech platforms adjust their algorithms actively to prioritise brand safe genuine news websites and to demote programmatic serving of digital advertising to 'fake news' sites and other harmful content such as terrorist websites and child pornography.
- Government to take the lead, as one of the largest UK advertisers, to reject the risks associated with 'blind' programmatic ad buying via open exchanges and instruct their buying agencies instead only to use brand safe programmatic options such as private marketplace or programmatic guaranteed for government digital campaigns.
- An Ofcom and Competition and Markets Authority review and investigation into the opaque digital advertising supply chain to examine the dominance of Google, Facebook and other major tech platforms and the impact of their activities on consumers, advertisers and other media players.
- A regulatory review of the status of Google, Facebook and other major tech platforms, whether they should continue to be considered mere conduits or intermediaries, and what additional responsibilities they should bear for the content they publish.

³⁴ Digital Trading Standards Group (DTSG). Joint Industry Committee for Web Standards in the UK and Ireland (JICWEBS). Trustworthy Accountability Group in the US/Global (TAG).

16. Through this review and exploration of the levy, the NMA urges the Government to address directly the range of serious concerns and wider social harms arising from the rise, operation and impact of social media companies.

17. The government's commitment to develop and uphold a robust regulatory environment ought to entail government co-ordination of regulatory and enforcement authorities as to whether action is currently warranted and to ensure that it is undertaken, as well as whether there is any lacuna in the law, oversight and enforcement powers and how this can quickly be addressed, including timescale for review of EU derived legislation.

18. We stress that this should include the powers of the Competition and Markets Authority and the Information Commissioner. We also noted the industrial strategy white paper's proposals to require the CMA to review competition law and to give it additional funding for enforcement action to encourage enterprise. In view of the CMA acknowledged challenges to competition law posed both by the rapid growth of dominant social media companies and their ever-evolving products, the CMA could be asked to carry out a similarly specific review and make recommendations for swift implementation.

19. Ofcom and the Competition and Markets Authority should be asked to conduct a comprehensive review and investigation into the opaque digital advertising supply chain to examine the dominance of Google, Facebook and other major tech platforms and the impact of their activities on consumers, advertisers and other media players. The algorithms designed by social media sites and other major internet platforms prioritise virality over reality, making the platforms the primary beneficiaries of blind programmatic advertising. But fake news sites and other forms of harmful online content – from jihadist terror videos to child pornography - are also being rewarded, doubtless incentivised by reports of children as young as six generating vast sums in ad revenues from their home-grown YouTube sites. The consequential damage to consumers, particularly children, as well as to advertisers and other media players can no longer be ignored by the regulators.

20. Conversely, in seeking to better regulate the technology companies, it is vital that new restrictions and liabilities are not placed on news media publishers, through EU or UK legislative or co-regulatory or voluntary controls. NMA members are already subject to a myriad of legal controls over their editorial and advertising operations. They voluntarily fund and adhere to the independent editorial and advertising industry self-regulatory systems upheld by IPSO and the ASA.

21. It would be very helpful if the DCMS took active steps to ensure that the major internet and social media companies made a full and proportionate contribution, reflecting the size of their advertising revenues and share of the advertising market, to the financing of the advertising self-regulatory system, of which they are a part.

22. The DCMS will be aware of the investigations by *The Times* in respect of Google's YouTube, *The Guardian's* 'Facebook files' and by others such as the BBC over the past few months. These raised concerns about the content carried, the advertising appearing alongside unbeknown to the advertiser and the adequacy of policies and practices (some examples of recent press coverage are attached).

23. The NMA and members have called for government and regulatory action and we hope that the DCMS will address our recommendations.

24. We refer you to the evidence to the Inquiry into Fake News which is being conducted by the House of Commons Select Committee on Digital, Culture, Media and Sport. We attach a copy of the NMA's written evidence to the inquiry. We would like the DCMS to consider the NMA's full submission and its recommendations.

25. We refer you to the evidence submitted by the NMA to the Inquiry into the Advertising Industry which is being conducted by the House of Lords Select Committee on Communications. We attach a copy of the NMA's written evidence to the inquiry and also refer you to the oral evidence given by NMA members on 28 November, both of which we would like the DCMS to consider.

26. The NMA would welcome the opportunity to discuss the development of the DCMS's initiatives in more detail.

Annex G: NMA Submission to Fake News Inquiry

Culture, Media and Sport Select Committee 'Fake News' Inquiry: News Media Association Response 03.03.2017

Link to full NMA submission:

http://www.newsmediauk.org/write/MediaUploads/Fake%20News/NMA_Submission_to_the_CMS_Select_Committee_'Fake_News'_Inquiry.pdf

Annex H: House of Lords Communications Committee report:

NMA News Article:

NMA Welcomes Lords Committee Calls for CMA Investigation Into Digital Ad Market

<http://www.newsmediauk.org/News/lords-communications-committee-calls-for-cma-investigation-into-digital-advertising-market/198005>

Link to full House of Lords Communications Select Committee report: UK Advertising in a Digital Age:

<https://drive.google.com/file/d/0B59chPQfmlt1U0htaUFkWI2WGpqT2pucjNpMXVibDI1Y1VF/view>

Annex I: House of Commons CMS Committee interim report on fake news

NMA News Article:

Fake News Spread By Social Networks Has Created 'Crisis In Our Democracy,' MPs Warn

<http://www.newsmediauk.org/Latest/fake-news-spread-by-social-networks-has-created-crisis-in-our-democracy-committee-says->

Link to full Culture, Media and Sport Select Committee interim report: Disinformation and 'fake news'

<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/363/36302.htm>

Annex J: NMA Letter to CMA, August 2018

3 August 2018

Daniel Gordon
Senior Director Markets
Competition and Markets Authority
Victoria House Southampton Row
London WC1B 4AD

Dear Daniel,

The NMA notes that two Select Committees have now formally recommended that the Competitions and Markets Authority investigate the digital advertising market.

Last week, the House of Commons Digital Media and Sport Select Committee [5th Report - Disinformation and 'fake news': Interim Report](#) (29 July 2018) recommended:

24. If companies like Facebook and Twitter fail to act against fake accounts, and properly account for the estimated total of fake accounts on their sites at any one time, this could not only damage the user experience, but potentially defraud advertisers who could be buying target audiences on the basis that the user profiles are connected to real people. We ask the Competition and Markets Authority to consider conducting an audit of the operation of the advertising market on social media.
(Paragraph 73)

This reinforced the earlier recommendation of the House of Lords Communications Committee [1st Report - UK advertising in a digital age](#) (11 April 2018):

Recommendation 4: The lack of transparency in the digital media advertising market hinders the ability of advertisers to ascertain whether they receive value for money. This is in part caused by the superfluity of ad tech intermediaries, but Google alone has control at all levels of the market. We recommend that the Competition and Markets Authority (CMA) should conduct a market study of digital advertising to investigate whether the market is working fairly for businesses and consumers.
(Paragraph 76)

However, the Government's response to the House of Lords Communications Committee's Inquiry, Government Response: UK advertising in the digital age, published 16 July 2018, stressed that this was a matter for CMA decision alone, notwithstanding the Government's own keen interest in the digital advertising market and its central importance to the Cairncross review and the sustainability of the press CMA to respond to the Committee's recommendations on CMA market investigation and audit:

Response to Recommendation 4: 'The Government recognises the highly complex nature of the online advertising industry and as part of the Digital Charter's work programme we are keen to gather more evidence on the business models in the digital media advertising market. This is also of central importance to the Cairncross review into the sustainability of the press, which was launched in March 2018 and will report its findings and recommendations in early 2019. The CMA is the independent competition authority that investigates competition issues across the UK. Ministers do not have statutory powers to direct the CMA to undertake particular investigations, other than in exceptional circumstances.'

The NMA would therefore welcome a clear statement by the CMA as to whether and when it will conduct a market investigation, in response to the recommendations for CMA audit and investigation of the digital advertising market, as set out in the reports of the House of Lords Communications Committee and the House of Commons Digital Media and Sport Committee.

Such an investigation would help achieve the Government's 'key priority for the Digital Charter to ensure digital markets work well for everyone'. It would most certainly assist and complement the work of the Cairncross Review into press sustainability. It would be highly relevant to work of the new Treasury Expert Panel on Competition in Digital Markets, announced by the Chancellor of the Exchequer on 2 August and to the review of competition tools in the context of digital markets and the review of competition law as also recommended by the House of Lords Communications Committee (Paragraph 78) and set out in the BEIS Modernising Consumer Markets Green Paper.

The NMA considers that this review of competition law must address substantive reform of the newspaper merger and transfer of titles regime, including CMA approach and procedures, in order to facilitate such transactions. These are ever more vital to the sustainability of the independent local press.

We look forward to hearing from you.

Yours sincerely

Santha Rasaiah
Legal Policy and Regulatory Affairs Director
News Media Association



NLA evidence to Cairncross Review

September 2018

Introduction

NLA Media Access is delighted to have the opportunity to submit written evidence to the Cairncross review.

‘Supporting journalism’ – our strapline - is at the heart of NLA Media Access’s business. Nearly all of our revenues go back to publishers to re-invest in journalism, and our corporate responsibility activity supports new entrants to journalism from diverse backgrounds.

However, as a licensing body, our remit is relatively narrow. We have therefore not offered a response to all the questions posed by the review. Instead we have focused on the role that licensing currently plays in increasing publisher revenues; examined the impact which the introduction of the proposed publisher’s neighbouring right might have on licensing; and critically considered whether the NLA model might be adapted to increase the scope and scale of licensing and hence provide more money to invest in journalism.

Our response is therefore most relevant to the review’s question 5:

Many consumers access news through digital search engines, social media platforms and other digital content aggregation platforms. What changes might be made to the operation of the online platforms and/or the relationship between the platforms and news publishers, which would help to sustain high-quality journalism?

- (a) Do the news publishers receive a fair proportion of their revenues for their content when it is accessed through digital platforms? If not, what would a fair proportion or solution and how could it best be achieved?
- (b) When their content is reached through digital platforms, do the news publishers receive fair and proportionate relevant data from the platforms? If not, what changes should be made and how could they best be achieved?

We hope that the review finds our evidence helpful, and we would be happy to supply additional information if it were thought useful.

I About NLA Media Access

1. Principles

NLA Media Access (“NLA”), formerly the Newspaper Licensing Agency, has traded for more than 20 years. The company initially operated purely as a collective licensing organisation; more recently it has added database and publisher services businesses. Collecting societies have the authority to license copyrighted works and collect royalties on behalf of their members. They collect royalty payments and distribute the royalties to the copyright owners.

Originally cuttings agencies bought multiple copies of newspapers and distributed cuttings (in those days articles physically cut out from newspapers) to their clients which required no licence. When copying became feasible, NLA was created to ensure that organisations that wanted to distribute copies of newspaper cuttings did so with the permission of the copyright holder, and under terms that reflected the value of the content. Before the establishment of NLA, individual publishers had to negotiate copyright charges directly with users, which was time-consuming and expensive, if done at all.

There are three principles underpinning the work of NLA which the review might wish to bear in mind:

- News media and magazine content has **economic value**, both to organisations which ‘wholesale’ it to end-users (typically, companies) and those end-users themselves
- NLA works within a **legally regulated system** which ensures that the terms of its licences and their cost are ultimately subject to third-party approval from the Copyright Tribunal, a statutory body, if a reference is made
- The revenues generated by NLA are returned for **investment in journalism** by the news media and magazines which produce the content in the first place

The success of NLA in representing news media publishers, and in more recent times extending that to magazine publishers, reflects its record of continual innovation and ability to offer services that are better handled by a single body acting on behalf of the industry as a whole:

- Selling non-exclusive licences
- Collecting licensing (royalty) payments
- Distributing collected royalties at a low cost
- Managing reciprocal arrangements with other collecting societies in the UK and overseas
- Rights enforcement
- Additional services such as databases

2. Ownership

NLA is owned in equal shares by seven national news media publishing groups (Associated, Financial Times, Guardian News & Media, Independent Digital, Reach, News UK and Telegraph Media Group).

The NLA Board includes representatives from each of the shareholders; a representative for regional publishers; a representative for magazine publishers; and a representative for freelance contributors.

3. Services and licences

At present, NLA takes in both print and online content from all major UK publishers and delivers it on to the media monitoring organisations (MMOs), such as Cision/Gorkana and Kantar, which it also licenses to operate.

Our remit encompasses over 6000 national, regional and foreign newspapers, over 2700 magazines and more than 2600 news media websites, including digital only publishers such as Huffington Post and BuzzFeed.

Text aggregators, such as Factiva and Lexis Nexis, and other third parties such as MSN, Yahoo etc., (with whom publishers hold direct agreements) also are fed this content by NLA; but no licensing agreement exists between NLA and these secondary recipients. NLA does though offer a service to publishers in managing relations with text aggregators, helping to bring fairness and transparency to this sector.

This role might have parallels with the relationship between publishers and platforms, as discussed below.

Within the MMO sector, NLA runs a licensing scheme to earn revenue for publishers under the legal authority provided by the Copyright Designs and Patents Act 1988. Every publisher has the right to license its content directly: however, all aside from the FT have chosen to use NLA – on a non-exclusive licence basis - as a more efficient vehicle for both themselves and end users.

MMOs are commercial organisations which provide monitoring services to their clients (other corporate entities/charities and campaigning groups/PR companies etc.). This involves them seeking out articles published in newspapers and magazines both in print and online, corresponding to the instructions/keywords given to them by their clients.

NLA licenses MMOs to provide copies of these articles. It is important to note, however, that MMO licences do not include any rights for the use by their clients of these articles. These rights are obtained under a separate end-user licence purchased directly from NLA by the clients of the MMOs.

While the choice of content provided by an MMO to its clients is entirely at the MMO's discretion, each MMO is required to report to NLA the number of articles copied per client, and from which publications, to ensure the correct fee is charged for the use of publisher content.

MMOs may purchase a variety of licences and content bundles from NLA. The cost of their licence is determined both by how an MMO wishes to use publisher content, and (more importantly) how many clients are receiving the content.

The NLA also offers a Universal Licence, which allows large organisations to pay a fixed fee (usually over £100k) for unlimited copying of content: this covers a handful of clients whose scale of use makes it economic to have a licence for unlimited copying.

4. Web content licensing

The NLA Web Database Licence specifically gives MMOs the right to scrape, copy and supply (in the form of links) selected newspaper web content to clients. Clients of such an MMO service then purchase the NLA Web End User Licence, in order to receive this content for commercial purposes.

If they also receive print content, or put content from select publishers on their website, they need to buy separate licences from NLA for this and these fees are dictated by reported volumes and usage.

Fee levels for licensing are supervised by the Copyright Tribunal (see next section). Those for web are very low in comparison to print licensing: this discounting is due to current British and EU law attaching no copyright to hyperlinks.

As with the print licensing, this system gives NLA a picture of the overall use and distribution of news media web content.

5. Legal and regulatory structure

The NLA's licensing system is subject to the ultimate authority of the Copyright Tribunal, an independent tribunal established under the Copyright, Designs and Patents Act (CDPA) 1988.

The Tribunal consists of a chairman and two deputy chairmen who are appointed by the Lord Chancellor, sitting with eight ordinary lay members who are appointed by the Secretary of State for Business, Innovation and Skills. The Tribunal's secretary is a member of staff of the Intellectual Property Office based in London. The tribunal's jurisdiction covers the whole of the UK.

The Tribunal is responsible for resolving disputes between collecting societies - like NLA - and users of copyright material. The disputes the Tribunal resolves usually relate to the terms and conditions of licences (including in some circumstances their cost), or the refusal by a collecting society to provide a licence. Under normal circumstances, however, the Tribunal does not set tariffs.

The NLA tariffs reflect the value of the IP rights being licensed; and economic modelling (carried out by independent economic consultants), is used to derive the appropriate levels for each activity. The most common methods for valuing IP rights are on an Economic Benefits or Comparable Royalties basis. All tariffs are agreed with publishers and reviewed annually. In addition, and when relevant, the NLA consults industry bodies representing the MMOs or the PR industry.

In exceptional cases, where NLA is unable to agree terms with a licensee, the licence or tariff may then be set by the Copyright Tribunal. Unless a term has been ordered by the Copyright Tribunal, in which case it may only be varied by that body, NLA is able to review and make changes to its licensing terms and conditions, including licensing fees, under its own authority.

In addition to the formal oversight of the Copyright Tribunal, NLA has a code of practice which sets out what licensees can expect from NLA. The Code offers an independent ombudsman service to resolve disputes¹.

In summary, NLA is part of a clear, transparent and heavily-regulated system with a high degree of independent oversight. It is also the case that participation in NLA licensing is both voluntary and non-exclusive, giving a welcome degree of flexibility to publishers.

6. Benefits to journalism

NLA is a success story of the industry working collectively, and has delivered uninterrupted growth in licensing revenue for publishers over the last 10 years. Eighty per cent of NLA revenues are returned to the publishers to be invested back into the industry. Annual NLA revenues are the equivalent of over 1000 jobs in journalism.

¹ [http://www.nlamediaaccess.com/uploads/public/About Us/2015NLA Final COP End Users 270313.pdf](http://www.nlamediaaccess.com/uploads/public/About%20Us/2015NLA%20Final%20COP%20End%20Users%20270313.pdf)

Total revenue for these activities (plus some service fees) was more than £40m in 2017, bringing the total returned by NLA for investment in news and journalism to over £380m over the course of the last twenty years.

II The Publisher's Right

1. Definition

The current draft of the European Union's revised Copyright Directive (currently being considered by the European Parliament), proposes a new right - at Article 11 - for European publishers: a related right which neighbours those of the creators of a work.

This apparently technical change would have important effects in some EU member states, as it would clarify the right of publishers, give them legal standing, and enable them to receive revenues for the use, extraction, or distribution of the content concerned.

At present, the ability of authors, journalists and illustrators to assert their ownership of content has placed constraints on the ability of media companies in some EU countries to adapt their products to digital channels. This is not the case in the UK, where NLA operates a Special Contributors' Scheme for those publishers that cannot confirm that they have cleared all necessary rights beyond the rights for initial publication.

NLA operates a survey to calculate what portion of their NLA licensing revenue is due to freelance contributors or agencies and this enables publishers to make the appropriate payment to those contributors.

The proposed publisher's right is not without precedent. A similar right is enjoyed in the audio-visual and music industries.

Nor would the right be absolute. It is proposed that existing exceptions to copyright continue to apply in certain special cases (reviews and parodies being representative examples) where these do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the author.

2. The impact on the UK position

The interaction of the proposed publisher's right and the UK position requires some elucidation.

In the UK, section 11(2) of the Copyright, Designs, and Patents Act 1988 gives news media publishers ownership of the copyright of their employees' work: "Where a literary, dramatic, musical or artistic work or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."

This is not the case in all EU member states and hence the publisher's right would in those countries create a new right enabling publishers to exploit the content they have commissioned.

In addition, recent UK case law has clarified that publishers' copyright extends to headlines and small extracts ('snippets'). This clarification came about as the result of a series of court decisions in litigation between NLA and an MMO, Meltwater.

One advantage of the publisher's right if established in UK law would be to codify some of the elements of the NLA/Meltwater litigation, in particular the right of news media companies to license

the sharing of headlines and snippets. It would go further to make all snippets, even those which might fail the copyright test of originality and/or substantiality, subject to copyright.

This might seem a minor question. It is not. Nearly half of all internet users only browse through news snippets. Thus, for nearly half of the internet users, snippets, which they access via third party services, seem to suffice to satisfy their primary information demand. They do not access publishers' websites and therefore do not contribute to advertising revenues and publishers' potential to sell subscriptions or privileged access is diminished.

Search results with snippets can convey the essential meaning of the linked news text. The benefit for the consumer does not depend on a minimum length of the work. On the contrary, the typical consumer would like a quick overview of what is new. The services provided by online platforms on a commercial basis provide for exactly this demand.

The introduction of the publisher's right would clarify two other aspects of intellectual property: it would define more clearly the circumstances in which a licence was needed; and it would enable publishers to market their products without having to ascertain or be put to proof about the scope of freelance or other third-party rights first. This can be time-consuming. Instead, publishers would enjoy an independent and exclusive right.

As NLA understands the current position, the licensing of news media and magazine content is not legally inhibited in the UK (except in respect of the third-party rights noted above, and then not substantially). Indeed, the present legal position is clear: publishers own their copyrights and, subject to certain exceptions, the copying, use or dissemination of that content beyond a mere hyperlink requires a licence.

Rather than the catastrophic end to the open internet that has been suggested by some campaigners against the passage of Article 11², the incorporation of a publisher's right in UK law (at least in the current form it has reached at EU level) would simply clarify the existing complex legal and regulatory regime that applies to published content.

3. Recent experiences in Germany and Spain

Germany introduced a law intended to create a publishers' right (ancillary copyright, or 'Leistungsschutzrecht') in 2013.

As the German news media publishers argued, ancillary copyright merely filled a gap in German copyright law created by the internet, with very similar justifications to those in the UK: 'search engines and news aggregators compile and categorize publishers' content and use it to enhance their own offers. While they profit from value added to their own offerings by using press products and, thus, increase their ad revenue by doing so, publishers are not involved in this process. Yet it is them who shoulder the enormous investments necessary to create media content and innovations. It is the publishers who hire countless journalists, editors and freelancers'³.

The ancillary copyright grants press publishers the exclusive right to decide on the use of their products, or extracts thereof, by commercial providers such as search engine operators or news aggregators. The law is intended to enable publishers to request reasonable compensation for each use.

² <https://savethelink.org/>

³ <http://www.lsr-aktuell.de/ancillary-copyright/debate-ancillary-copyright-press-publishers-germany>

However, digital platforms have hitherto refused to accept the validity of both the licence and the proposed tariff for copying and as a consequence there is litigation between VG Media and Google which includes a technical issue (on whether the German Federal Government should have notified the European Commission of its proposed law before it came into force) which will be ruled on by the ECJ. The Berlin District Court, which referred this matter to the ECJ held that the ancillary right was justified at least in part.

VG Media is the collecting society for private media companies, working on the same model as NLA. It represents the copyright and ancillary copyright of nearly all German - and some international - private TV and radio broadcasters, as well as over 200 digital publications, including the websites of local and national news media companies.

In Spain, a January 2015 amendment to the fundamental Spanish IP legislation ('Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia') gave newspaper publishers an inalienable and irrevocable right to license text aggregators (such as Google News) which were using and distributing their content.

In response, before the law came into effect, Google closed its Google News service which has not subsequently been available in Spain. The law did not affect search engines.

The operation of the law requires aggregators to pay a levy fixed at Euros 0.05 per active user per month, although in practice it is intended that agreements would be negotiated by the Spanish collecting society (and NLA equivalent), CEDRO (Centro Español de Derechos Reprográficos).

Since the introduction of the law, one licensing agreement has been agreed between CEDRO and Upday (a joint venture news service between Samsung and Axel Springer). Upday is preinstalled on Samsung mobile phones and available as an app.

There are two important aspects of the Spanish experience to note:

- Initial fears that the impact of the law, and the removal of Google News, would lead to a drastic reduction in traffic to Spanish newspaper websites have been found to be erroneous. An insignificant initial decline has subsequently been reversed
- The legislation was deliberately framed to make the publisher's right irrevocable and inalienable (on the model of authors' rights) as it was otherwise feared that the market imbalance between digital platforms and publishers would make the law a dead letter.

III The future licensing of news media content

1. The Cairncross Review

The issue that the Cairncross Review has to resolve is simple to articulate, if complex to solve. The initial enthusiasm for sharing content on digital platforms was driven by a belief or hope that online advertising revenue would offset the loss of copy sales revenue in the offline world. This has proven not to be the case, and the two largest digital platform businesses, - Alphabet and Facebook, have captured almost all of the digital advertising market, estimated at £11.5bn in 2017 between them, on the basis of providing free services to their end-users. At the same time, the advertising market has migrated to digital, away from other media sources, particularly print, falling by over 20% in 2017 across both news media and magazines.

This trend of market migration and consolidation is unlikely to reverse. The result is a reduction in resources available to the publishing industry, leading to the closure of titles, loss of jobs, and a reduction in reporting. *Supporting journalism*

Securing a sustainable future for high-quality journalism could be realised, at least in part, by ensuring that the value of news media and magazine content to the products and services of digital platforms is recognised beyond the provision of internet traffic. The reality is that through the collection, aggregation and exploitation of vast amounts of personal data of EU citizens, Google and Facebook now have the market power to define and dominate the digital advertising market across large parts of the world.

Over the past twenty years NLA has developed great expertise in a variety of roles which are relevant to the practical questions emanating from the Cairncross Review, and in particular the collection and distribution of new revenues from digital platforms.

Given its 20-year history of generating revenues on behalf of the news media industry, the NLA understands the monetary value that the licensing of high quality journalism can provide for reinvestment in journalism at a local and national level. While the business and policy questions are ultimately for individual publishers to resolve, the NLA understands that there is no legal impediment to a licensing scheme being developed for the use of news media content in search and social environments. Rather, publishers have thus far been unwilling to take legal action against global platforms with substantial market power, due to concerns about the ability of those platforms to respond negatively through their near total dominance in search or social media. Such a response can be seen by Google's decision to close Google News in Spain⁴, and to force publishers to waive their legal right to payment in Germany⁵.

A combination of factors, prevent the emergence of an approach to the search and social licensing of news in the UK, including:

- Publishers receive traffic to their websites thanks to their content appearing in search results or on digital platforms (like Facebook) and do not wish to reduce that flow, even though there is no ability to negotiate terms
- Similarly, publishers receive advertising revenue (shared with platforms) from visitors to their sites, although the terms are not transparent
- Publishers secure data about visitors to their websites which it was thought would be monetisable (although in practice this has not been lucrative, as the platforms themselves collect the most valuable data across their sites)
- There are many publishers but very few platforms, creating a competitive imbalance between the two. Unlike publishing, digital platforms operate in a winner takes all environment, as can be seen in the respective market shares in their fields for (for instance) Facebook, Google, YouTube, and Instagram. The publishers' right is an attempt to remedy this imbalance
- In the UK there is a supply of 'free' news from the BBC (at least free at the point of delivery) which is very well-funded and has no incentive to restrict access to its content (indeed the reverse is true)
- There can be no first-mover advantage in taking the licensing route as there are a range of substitutable sources of news on which platforms and citizens could draw. No one publisher

could risk this approach, given the risk of consequent exclusion from platforms to the benefit of rival suppliers

⁴ <https://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links>

⁵ <https://www.zdnet.com/article/google-stops-displaying-news-snippets-from-german-publishers-that-sued-it/>

The advantage of licensing is not limited to financial reward. The principle of licensing is that permission is granted subject to conditions – among which may be (or may not) be - an agreement to pay fees. Allowing third parties to scrape news media content, and their algorithms to present individual articles in a list of search results, without any conditions being agreed, leads inevitably to the commoditisation of news media brands within environments over which they have little to no control.

Therefore, licensing systems could be based on the conditions of the usage of news media content, as well as negotiations around payment. The internet has the potential to automate some licences, making it possible for them to be cost-effective even if licensing fees are very low, proportional to use, or even sometimes zero. This offers the potential for significant innovation.

In terms of the commercial challenges facing news media businesses at a local and national level, the debate about Article 11 and the wider use of licensing have focused on the potential to raise revenues for reinvestment in high quality journalism. This is clearly the most substantive aspect of the current debate about licensing, especially when the use of news media content by the search and social platforms is significant in terms of scale and commercial value for the licensee.

2. The role of NLA

Over the 20 years it has been in existence, NLA has developed immense expertise in a number of areas relevant to this discussion:

- Collective licensing – its core and original business
- Compliance mechanisms
- Payment collection and distribution
- Database management

Naturally therefore when looking at the possibility of licensing the use of news media content by search and social platforms, the potential role of NLA in managing this system has been mentioned.

In addition, NLA already licenses web-based news media content. Thanks to the outcome of litigation between NLA and Meltwater (referred to above) NLA has an unambiguous legal right to license web-based news media content. Licences apply both to media monitoring organisations (MMOs) and to their clients, the end-users.

In principle that opens a possible route for licensing digital platforms as if they were another media monitoring service, wholesaling news media content to end-users.

There is of course one significant difference between licensing MMOs and commercial end-users. MMOs charge their clients for access to news media web content. Platforms do not: their business model is based on optimising scraped content to secure increased traffic driving higher advertising revenues.

Although this difference is clearly material in terms of business models, in practical terms, there is little difference in terms of the licencing of news media content. The fact that a business model is underpinned by advertising, rather than a direct user payment is **no impediment** to the development of a licensing regime. Many publisher members of the NLA already license to a wide variety of platforms, each of whom have different business that can deliver revenue on a revenue share model, based on minimum guarantees. Both MMOs and platforms make money from news media content,

whether directly or indirectly – in the case of platforms from advertising revenue. When negotiating such a licence the discussions would focus, just as they do in all other similar negotiations, on the scope of the rights being granted and the extent and terms under which fees or other considerations are provided in return.

The analogy does break down, however, when considering the end-users. Buyers of MMO services are themselves commercial organisations (whether companies or PR agencies) which can be licensed in their turn. This would not be the case with the consumer customer bases of the platforms. So while the existing model could be substantially re-used, it would inevitably need to be varied to reflect the different nature of the services.

Again, that need not be a barrier to a licensing system. Part of the consideration for a licence would need to be the provisions of the data were available to identify the volumes of links being shared with end-users, estimating the associated revenues accruing to the platform, and then the use of those numbers as a basis for some form of licence and hence royalty payment.

3. The treatment of scale

While the principle of treating digital platforms as if they were MMOs seems plausible, there is a difference in scale. MMOs serve thousands of businesses, but digital platforms provide their services to millions of end-users.

Scale is however already inherent in the current NLA Web Database Licence. An MMO which provides a service to between 101 and 150 clients pays a smaller licence fee (£12,504) than one with between 4251 and 4750 clients (£44,352). But the cost per client in the latter case is much lower at about £10 per head compared to £123 in the former.

Licensing digital platforms could work in the same way, with increasing discounts offered per client (readers in this case), while the cost of the licence could reflect the relationship between searches and ad revenue.

Ultimately, there would be no need for end users to ever be aware of the ostensibly free products or service they are using, to have ever purchased a licence to publish news media content. This would be a cost of business that would take place in the background between the search or social platform and the licensing agency, in much the same way as platforms such as Google licence their IP to other digital businesses.⁶

4. How a licensing system could work in practice

For this licensing system to work there would have to be agreement between publisher and platforms; transparency; and a system of independent regulation. Achieving any one of these three will be difficult: achieving all three would likely only be made possible through the intervention of government.

- Digital platforms would have to agree to supply NLA (or another licensing body created specifically for this sector) with a report on the publisher content which they do not own but have indexed and distributed to end-users who have accessed that content.
- NLA could help this process, if mandated by publishers, by making feeds of publisher content available to digital platforms as it currently does for text aggregators.
- NLA would collate the information by publisher and distribute the appropriate licence fees to publishers in proportion to use.
- Some form of independent legal regulation would be required to ensure that the system worked fairly. For example, platforms might decide to reduce their licensing fees by deliberately demoting qualifying content in search results.

⁶ <https://cloud.google.com/maps-platform/pricing/>

- This role could be carried out by the Copyright Tribunal, or by a new body with specific responsibility for resolving disputes in a swift and low-cost manner, to avoid expensive litigation in which the platforms would have a built-in advantage.

5. Licensing choices

There would be no compulsion for news media and magazines to licence their content via NLA. Indeed, the Financial Times (one of NLA's owners) has chosen not to do so. The same would apply to any licensing of platforms. News media and magazine businesses could choose to participate in an NLA licence or to negotiate their own licences.

In the latter case, there might still be a role for NLA in managing, monitoring, and ensuring the smooth running of a licence, as these are areas in which the organisation has great technical expertise and can act on a consultancy basis if so desired.

Conclusion

NLA believes that, with sufficient investment, a licensing system for publisher content which is indexed and shared by digital platforms is possible. Such a system would be assisted by clarifying the law via the introduction of a publisher's right; but that is not an absolute requirement.

NLA suggests that in this connection the Cairncross Review should propose that:

1. The publisher's right should be incorporated into English law to clarify any ambiguity over the legal rights of publishers over their content
2. The appropriate regulatory machinery should be put in place to ensure that a system in which publishers licensed digital platforms was fair, transparent, and not capable of being manipulated to the advantage of either side

NLA hopes that this analysis is helpful to Cairncross Review, and looks forward to the findings of the review in due course.

Digital Competition Expert Panel - Open consultation

Open Data Institute response

7 December 2018

Introduction

The Open Data Institute (ODI) is an independent, not-for-profit organisation founded by Sir Nigel Shadbolt and Sir Tim Berners-Lee in 2012. The ODI's vision is for people, organisations and communities to use data to make better decisions and be protected from any harmful impacts.

The ODI works with companies and governments around the world to build open, trustworthy data infrastructure. It does this through:

- sector programmes, which coordinate organisations to tackle a social or economic problem with data and an open approach;
- practical advocacy; working as a critical friend with organisations in the public, private and third sectors, and creating products they can use to support change;
- peer networks that bring together peers in similar situations to learn together.

We have received funding from multiple commercial organisations, philanthropic organisations and governments to carry out our work since 2012. Our work is always aligned with [our vision and mission](#).

The ODI's response to this call focuses on the non-rivalrous but excludable nature of data, and how this affects competition in digital markets.

Consultation questions

Understanding the effects of digital markets

Q1 What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

1. Digital markets pose a number of challenges to competition policy and its enforcement. The challenges include

- the international nature of digital markets and the organisations and consumers in them.
- the speed in which digital markets can evolve and the fact that existing laws and regulation may lag technological change.
- the difficulty in assessing the markets, sectors, and domains spanned by an organisation, product or service.
- the difficulty in understanding and assessing consumer harm from digital products and services.

2. Online marketplaces, social media, and digital services that provide recommendations and matching are better if they have lots of data to use. More data means that the companies offering the services are better able to understand the preferences of consumers, and which goods and connections they might value.¹ This has happened with online accommodation platforms such as AirBnB. Consumers may choose one service over another if it provides better matching, thereby favouring companies with more data.

3. Better matching between consumers and suppliers can generate social benefits. Considerable benefits to health provision in the UK have been identified using personal data on prescriptions, surgery, and other treatments.² But not all matching requires personal data and the Open Data Institute runs OpenActive, a community-led initiative using open data to help people get active, and the OpenActive Accelerator which supports startups creating new tech products that get people active.³ The products are designed to meet the needs of different market segments and use open data to help consumers find activities that meet their needs. In time, other datasets on how services are used can support better public spending decisions on how to fund sports facilities.

4. The owners of heavily used marketplaces and search engines can amplify ‘network effects’, sometimes favouring their own products. Data from different sources can be linked to create aggregated value, and large firms have access to more data sources and

¹ Which?, ‘[Consumer Data in Online Markets](#)’, accessed 3rd December 2018

² NHS England, ‘[Examples of open data and transparency in action](#)’, accessed 3rd December 2018

³ OpenActive, ‘[Helping physical activity reach everyone](#)’, accessed 3rd December 2018; OpenActive, ‘[For millions, staying active is hard](#)’, accessed 6th December 2018

oftentimes a greater ability to analyse them.⁴ The European Union recently found that Google had abused its dominant position - derived from network effects - in the internet search sector to favour its own comparison shopping service over rival offerings.⁵

5. Data hoarding by large digital firms affects the ability of public agents to conduct research and enforce the law. Holding large amounts of data on citizens in only a few places makes it easier for public officials to collect information for research or national security purposes, such as the Office for National Statistics requesting data from Amazon in order to understand the consumption patterns of consumers, and the UK Government Communications Headquarters accessing WhatsApp so as to detect potentially terrorist activity. On the other hand, data collection from a wide number of sources can help to reduce bias.

6. Trust in organisations that hold large amounts of data is low - particularly when there is a dominant firm in an industry - and treatment of that data may be creating opportunity costs. The Information Commissioner's Office has revealed how little British consumers trust organisations with their data, and trust is unlikely to be increased by data security breaches, improper data use by organisations such as Facebook and Cambridge Analytica, or instances of surveillance.⁶ This may mean that in health research and similar fields, citizens are unwilling to share data that may lead to valuable discoveries.

Q2 What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

7. A small number of digital firms operating across many markets can broaden consumers' knowledge of available services, and make personalisation easier. Having a Google account allows a user to quickly see the range of services available to them, some of which they may have been unaware of. Once they have begun using a new Google service, users are able to easily transfer their information and personal preferences, and without an easy way to transfer their personalisation to other providers may have to spend time repeating it across different services. But low interoperability between competing services can also mean that consumers are 'locked-in', inhibiting their ability to switch to new providers.

8. Investment in the collection of large amounts of data in one digital market can allow firms to enter other markets by producing services for users at low marginal cost. When a firm has collected large amounts of information, say, on the book consumption preferences of a service user, it may be able to easily enter markets for

⁴ Ormerod P (2012) *Positive Linking: How Networks Can Revolutionise the World*, Faber and Faber

⁵ European Commission, '[Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules](#)', accessed 3rd December 2018

⁶ Information Commissioner's Office, '[ICO survey shows most UK citizens don't trust organisations with their data](#)', accessed 3rd December 2018

products that satisfy similar tastes. Advantages from one industry are therefore being used in another, perhaps lowering costs below those of other providers.

Q3 What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

9. Large technology companies represent a challenge in terms of who benefits from the increased availability of data.⁷ Concentrating data in a small number of big firms will likely improve their services, helping them to take market share. The Open Data Institute explored this in a recent workshop.⁸ These firms will benefit disproportionately to smaller organisations from the availability of data due to their capability to derive value from it. They have the skills to analyse it and draw conclusions that help them grow and succeed, as well as the ability to test and scale products and services to large numbers of customers.

10. The returns to digital services encourage companies to control more data sets. As firms learn more about the ability of artificial intelligence and machine learning to identify consumer preferences and consumption patterns, they can improve services with more control over the data that informs them.⁹ This has been boosted by the new artificial intelligence techniques such as deep learning and neural networks, which seem to improve regardless of the amount of data added.¹⁰

11. Data gains in value through aggregation, increasing the incentives for holders of small amounts of data to join firms with access to large amounts. When there are a few companies that own large amounts of data, the value of information collected by new entrants is more likely to gain in value if it is combined with the datasets held elsewhere. This incentivises small firms to seek to realise the value of their assets through links with large firms, perhaps leading to sale.¹¹

12. Data networks and the ‘artificial intelligence lock-in loop’ suggest future competition questions. The loop occurs when artificial intelligence is used in a product, creating use that generates data that further improves the product, with repetitions of the loop creating ever more value.¹² This can be beneficial for consumers, but gives the holders of the artificial intelligence holders a strong incentive to defend their data, as doing so impedes market entry by new service providers.

⁷ Jeni's Musings, '[Doesn't open data make data monopolies more powerful?](#)', accessed 3rd December 2018

⁸ Open Data Institute, '[Data's value: how and why should we measure it](#),' accessed 3rd December 2018

⁹ Open Data Institute, '[Data's value: how and why should we measure it](#),' accessed 3rd December 2018

¹⁰ Open Data Institute, '[Data's value: how and why should we measure it](#),' accessed 3rd December 2018

¹¹ Jones CI and Tonetti C (2018) '[Nonrivalry and the economics of data](#)', christophertonetti.com, accessed 3rd December 2018

¹² GDPR Associates, '[The AI Lock In Loop](#)', accessed 3rd December 2018

Q4 What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

13. Big firms controlling large amounts of data that improves their services may be affecting the choices of startups and small companies. Knowing that there are big companies with large amounts of data may be causing small firms entering the market to position themselves for acquisition rather than expansion, and to harvest data as quickly as possible in order to be competitive. Venture capitalists often provide a pathway for such startups to be acquired.¹³

Q5 To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

14. Online advertising has been one of the most profitable ways of monetising data and associated services. Spending on digital advertising is expected to reach USD335 billion by 2020, much of it presaged on the ability of social media and other firms to direct advertising to users that are more likely than the general population to make a purchase.¹⁴

15. Reliance on online advertising creates an incentive for a firm to improve its targeting by collecting more data. Customer targeting has been claimed to improve sales by allowing advertising buyers to segment an audience by characteristics such as age, geography, cultural tastes, and many others.¹⁵ But there is debate over whether collecting large amounts of data for advertising creates significant value for consumers, and which metrics to use for valuing an advertisement.¹⁶ Targeted advertising companies are also under pressure from privacy campaigners.¹⁷

16. Targeting narrows the awareness of some consumers and workers to the range of choices available to them, and can be subject to bias. There have been claims that adverts on Facebook for job positions in the United States have been explicitly biased towards men.¹⁸ Research has revealed bias in the Google Ad Settings service, which was

¹³ Bresnick J (2018) ‘[Big Data Analytics Top List of Healthcare VC Investment Deals](#)’, *Health IT Analytics*, accessed 5th December 2018

¹⁴ Statista, ‘[Digital advertising spending worldwide from 2015 to 2020 \(in billion U.S. dollars\)](#)’, accessed 3rd December 2018

¹⁵ N, ‘[Does online advertising deliver the target audience](#)’, accessed 3rd December 2018

¹⁶ Marrotta V et al (2015) ‘[Who Benefits from Targeted Advertising?](#)’, draft; and House of Lords (2018) [UK advertising in a digital age](#), p15

¹⁷ Privacy International, ‘[Why we’ve filed complaints against companies that most people have never heard of – and what needs to happen next](#)’, accessed 3rd December 2018

¹⁸ Marsh S (2018) ‘[Campaigners begin action against male-targeted job ads on Facebook](#)’, *The Guardian*, accessed 3rd December 2018

found to show high-paying jobs to women less than it did to men.¹⁹

There is also evidence that advertisers can discriminate by race, religion, and language when posting housing advertisements on Facebook.²⁰

17. Consumers may be paying for ‘free’ services with their attention. It is possible to think of consumers as exchanging their attention and time for the use of a service, instead of paying for it with a monetary sum. In the United States alone, the consumer surplus from ‘attention services’ has been valued at around USD100 billion a year.²¹

18. Interpretation of data ownership and data rights have consequences for the control and exchange of data, and therefore competition. The Open Data Institute believes that an ecosystem around data needs to be created that asserts rights over data, and does not establish ownership to it.²² Data is often not about one person alone - a person’s DNA shows what they have inherited from their parents - which makes it difficult to establish ownership, while companies are limited in what they can predict about the use of data provided by users.²³ It is also difficult to predict the future value of data.²⁴ Consumers can therefore struggle to make informed decisions about the use of data, while wealthy ones may be able to buy stronger privacy safeguards.²⁵

19. There are data-driven business models that companies can adopt that do not rely on the collection of data and restricting access to it. The Open Data Institute published ‘Data Entrepreneurship: Exploring Successful Business Models with Open Data’, which showed that there are many ways in which companies can create value from open and shared data that do not involve hoarding it.²⁶ These include republishing open data in ways that are more usable for consumers, or creating value from the combination of a number of data sources.

Q6 How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

20. There are risks in the extension of algorithmic pricing into new sectors. Algorithmic pricing has long been used in the insurance industry and similar sectors, and their respective

¹⁹ Datta A et al (2015) ‘[Automated Experiments on Ad Privacy Settings](#)’ *Proceedings on Privacy Enhancing Technologies*, (1): 92-112

²⁰ Propublica, ‘[Facebook \(Still\) Letting Housing Advertisers Exclude Users by Race](#)’, accessed 3rd December 2018

²¹ See Brynjolfsson E and Hee Oh J (2012) ‘[The Attention Economy: Measuring the Value of Free Digital Services on the Internet](#)’, *Thirty Third International Conference on Information Systems*

²² Open Data Institute, ‘[No one owns data: we need to strengthen our rights](#)’, accessed 3rd December 2018

²³ Tufecki Z (2018) ‘[The Latest Data Privacy Debacle](#)’, *New York Times*, accessed 3rd December 2018

²⁴ Academia, ‘[Zeynep Tufecki](#)’, accessed 3rd December 2018

²⁵ Open Data Institute, ‘[Jeni Tennison: ‘Getting paid for personal data won’t make things better](#)’, accessed 3rd December 2018; and Spero J (2018) ‘[How the wealthy use privacy laws to keep out of the news](#)’, accessed 3rd December 2018

²⁶ Open Data Institute, ‘[Data entrepreneurship: exploring successful business models with open data](#)’, accessed 3rd December 2018

regulators have accumulated knowledge of how to analyse its effects. Extending the same techniques into new areas without similar understanding may have negative effects.

21. Regulators may not be able to easily observe collusion on algorithmic pricing between firms. Without understanding the algorithms used by companies, regulators may find it difficult to spot where companies are colluding on prices and being anti-competitive.

22. It is possible to increase the accountability of services and algorithms to their users and other parties. A recent report found that the 'socio-technical' nature of algorithms meant that the human judgement and values in the design of them and the services which they form part of were just as important as their mathematical techniques, and that non-specialists could judge some of the behaviour once they had understood their inputs and outputs.²⁷ There are also more sophisticated techniques in development by academics that include ways to judge bias and make prediction easier to understand, which could be used by individual consumers, civil society, and regulators to bring greater accountability to the organisations using the services and algorithms.

Policy and implementation solutions

Q7 What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

23. There are a number of things that UK Government can do to address challenges related to existing competition policy and methods of enforcement. These include:

- ensuring that regulators have the right skill sets in place to understand, interpret and respond to them.
- stimulating competitiveness in foundational data infrastructure - such as mapping and other geospatial data - that are widely used by many organisations and will have indirect effects on consumers.
- leading by example by adopting open-as-possible data provisions in public sector procurement and public sector service design manuals.
- considering and experimenting with anticipatory methods to regulation to tackle new technologies and industries.²⁸
- focusing on large data holders to ensure that data is available for new entrants and innovative new uses of data.

24. Using 'data observatories' can help to monitor industries that use large amounts of data. The Open Data Institute report 'Understanding the Impacts of Peer-to-Peer

²⁷ Upturn and Omidyar Network (2017) [Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods](#)

²⁸ Nesta, '[Anticipatory Regulation: 10 ways governments can better keep up with fast-changing industries](#)', accessed 3rd December 2018

Accommodation, the Role of Data and Data Observatories'

discovered that policy-makers across public organisations have been collecting data sets to enable them to better monitor similar sectors.²⁹ For example, the Local Government Inform tool allows councils to make data-informed decisions about the provision of services, while the European Data Portal and other similar websites allow multi-factor analysis of economic and social changes at city, regional, and national levels. Where digital businesses are affecting the use of physical infrastructure - through delivery drivers using a road network, for example - it might be possible to assess company behaviour and competition through similar data observatories.

Q8 Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

25. It has been argued that network effects make it difficult to shrink big technology firms. Once a company has established a dominant position in an industry by accumulating lots of users who, when joining, create a positive externality for further users, it may have created high barriers to entry for competitors.³⁰ But reducing the market share of the company may mean shrinking its position in the network, cutting the surplus that consumers receive from being connected to others.

26. Data infrastructure offers a way of thinking about data that may encourage competition in digital markets. Strong data infrastructure is as open as possible, but the data assets that contribute to our data infrastructure are not, and cannot, all be open. For example, data infrastructure includes personal data held by public and private sector organisations through our use of different products and services.

27. Encouraging data portability may improve entry into digital markets and improve competition. Data portability allows consumers to extract data from one holder and give it to another so that they can better direct how data is used, likely improving the goods and services provided to them by the company they are choosing.³¹ The European Union's General Data Protection Regulation provides a right to data portability that is stronger than the previous right to data access.³²

28. There have been attempts to increase consumer data portability in regulated markets before, such as the UK Government's midata initiative.³³ The midata initiative was a voluntary scheme launched in 2011, backed in some markets by the 2013 Enterprise and Regulatory Reform Act.³⁴ The Enterprise and Regulatory Reform Act 2013 provided UK Government with powers to act on data portability related to current accounts, mobile

²⁹ Open Data Institute, '[Understanding the impacts of peer-to-peer accommodation, the role of data and data observatories \(report\)](#)', accessed 3rd December 2018

³⁰ Evans DS and Schmalensee R (2017) '[Network Effects: March to the Evidence, Not to the Slogans](#)', *Competition Policy International*

³¹ Information Commissioner's Office, '[Right to data portability](#)', accessed 3rd December 2018

³² Open Data Institute, '[Will GDPR and data portability support innovation?](#)', accessed 3rd December 2018

³³ Gov.uk, '[The midata vision of consumer empowerment](#)', accessed 5th December 2018

³⁴ Legislation.gov.uk, '[Enterprise and Regulatory Reform Act 2013](#)', accessed 3rd December 2018

phones, gas, electricity and credit cards, all of which have digital elements and are where data portability has the potential to improve consumer outcomes.

29. More recent initiatives, such as the UK's open banking initiative, combine data infrastructure and data portability. In 2014 the Open Data Institute and Fingleton Associates published a report on data sharing and open data for banks and in 2015 the Open Data Institute worked with the banking sector to write and publish a report on how to develop an open standard for banking data.³⁵ Following these reports the Competition and Markets Authority mandated the development and implementation of an open banking standard by the 'big nine' banks which would combine open data infrastructure for items like bank products and branch locations, with portability for data that banks hold about consumers.³⁶ These types of data, along with activity to boost use of the standard, were to be used to encourage innovation and make banks work harder for customers.

30. Data portability has the potential to drive innovation, and UK Government can use it to boost the creation of new goods and services.³⁷ It can do so by running challenges and innovation funds such as Nesta's Open Up Challenge, which encouraged startups to use the emerging open banking APIs, or Nationwide's Open Banking for Good which encourages startups to use the more mature open banking APIs to build services to help the financially squeezed.³⁸ Other markets or areas where data portability has the most potential to improve outcomes include those in which competition is an issue; have active regulators; those that are well positioned to take advantage of data portability due to existing demand for data and innovation capability; and public services.

31. Consumers are often unaware of data portability and how to exercise it. UK Government could look to tackle this through public information campaigns and guidance that helps people understand data portability - including on how to avoid passing data about themselves, or people they are connected to, to untrustworthy organisations. The UK Government could also work with consumer rights organisations and those companies who people trust with data on these campaigns. For organisations, UK Government could also provide guidance to help them to design products and services that support data portability in ways that help people understand what is going on.

32. UK Government can increase the positive impact of data portability by making provisions for the vulnerable and disengaged. It can do this by

³⁵ Open Data Institute and Fingleton Associates (2014) '[Data Sharing and Open Data for Banks](#)'; Open Data Institute '[Open banking: setting a standard and enabling innovation](#)', accessed 6th December 2018

³⁶ Gov.uk, '[Retail banking market investigation](#)', accessed 6th December 2018

³⁷ Open Data Institute, '[Will GDPR and data portability support innovation?](#)', accessed 3rd December 2018

³⁸ Nesta, '[Introducing the Open Up Challenge](#)'; Nationwide '[Open Banking For Good](#)', accessed 3rd December 2018

- supporting digital inclusion, including by building on research, guidance and existing policy such as the UK Government Digital Skills and Inclusion Policy and organisations like the Good Things Foundation.³⁹
- supporting consumer data literacy initiatives and ensuring that data literacy forms part of digital skills frameworks.
- monitoring the effects of data portability to understand who's benefiting and where there might be harmful impacts.
- ensuring appropriate representation of different groups of consumers in standards and governance bodies.
- stimulating the public, private and third sectors to tackle specific problems encountered by vulnerable and disengaged communities, such as via challenges or innovation funds.

33. UK Government can strengthen data infrastructure and realise the benefits of data portability. This includes by:

- legislating in ways that tackle challenges that limit data portability in different markets and the effectiveness of existing data portability initiatives and rights.⁴⁰
- exercising regulatory powers so that data portability rights and obligations are upheld. This could include acting quickly and strongly against organisations that mislead users to get access to data about them or misuse data they get access to.
- ensuring the security and privacy of people porting data by developing and encouraging the adoption of common approaches around things like identity, authentication and permissions. They can direct innovation funds to prototype and work through the difficult problems such as when ported data holds information about multiple people.
- monitoring the effects of data portability. This monitoring will need to include ensuring organisations are open about how personal data is being used, how equitably the benefits are spread, and who is being harmfully impacted. The results of this monitoring should be published as openly as possible. This is necessary to help societies shape technological progress towards the outcomes they democratically decide on, and to help governments understand whether, where and how to intervene.
- supporting interoperability by working with the private and third sectors to develop and encourage the adoption of open standards for data.⁴¹ This could also include data that supports transparency around the use of data portability, such as lists of applications to which consumers have granted access and privacy policies.
- contributing to the data infrastructure themselves by providing access to the data they hold about people. They can do this in a way that demonstrates good

³⁹ Gov.uk, '[Digital Skills and Inclusion Policy](#)', accessed 3rd December 2018; Good Things Foundation, '[Our vision is a world where everyone benefits from digital](#)', accessed 3rd December 2018

⁴⁰ Jeni's Musings, '[Data portability](#)', accessed 3rd December 2018

⁴¹ Open Data Institute, '[Announcing the open standards for data guidebook](#)', accessed 3rd December 2018

practices, including in interface design and security measures, and make available open source libraries that help other organisations to follow suit.

- focusing on markets in which the data that would be made portable could provide real utility for consumers across a range of products and services - for example account data, location data, social graph data, clickstream data, spend data.
- focusing on markets in which the data that would be made portable could provide real utility for businesses, particularly smaller businesses as they scale - for example accounting data, customer relationship data, or employee data.

34. Increasing transparency and trust in the use of personal data by firms may have benefits for competition. In its report, 'The EU General Data Protection Regulation: Opportunities for Grocery Retail', the Open Data Institute found that firms in the grocery sector could increase their competitiveness and sales if their customers trusted them more with their data, and were willing to to share more of it in return for better services.⁴²

35. The development of open standards can boost competition. Decentralised models for data sharing are enabled by open standards and can encourage less concentrated markets, as they give appropriate weight to the interests of new entrants.⁴³

36. Increasing support to small and young firms could encourage new entrants to scale products and services. The Open Data Institute provides services to such companies through its innovation programmes, helping them to learn how to develop business models that are based on the use of data.⁴⁴ Where a market is dominated by some firms, providing such support could improve market contestability.⁴⁵

37. Companies can be encouraged to share data through private sector initiatives. An approach to levelling the playing field is to focus on increasing the access that others have to data held by large technology companies, while protecting people's privacy, commercial confidentiality and national security. UK Government can do this in several ways, including through encouraging efforts by firms to do this themselves, such as with Uber's sharing of data with city authorities via SharedStreets.⁴⁶

38. Procurement contracts with technology companies that deliver public services can be used to improve competition. The Open Data Institute has run innovation prizes

⁴² Open Data Institute, '[The EU General Data Protection Regulation: opportunities for grocery retail](#)', accessed 3rd December 2018

⁴³ Open Data Institute, '[Announcing the open standards for data guidebook](#)', accessed 3rd December 2018

⁴⁴ Open Data Institute, '[Startups & fostering innovation](#)', accessed 3rd December 2018

⁴⁵ See Accenture (2015) '[Competing in Digitally Contestable Markets: Unconventional growth opportunities in China](#)', accessed 3rd December 2018

⁴⁶ Endgadget, '[Uber is sharing curbside data with cities](#)', accessed 3rd December 2018

for startups to create better public procurement using data, and runs courses on how public officials can put open data requirements in procurement contracts.⁴⁷

39. Sharing data through data trusts could increase data sharing, perhaps allowing smaller companies to combine data and compete with bigger ones. A data trust applies the concept of a legal trust to data, and seeks to provide independent, third-party stewardship of data.⁴⁸ The trustors grant some of the rights they have to control the data to a set of trustees, who then make decisions about the data – such as who has access to it and for what purposes. The beneficiaries of the data trust include those who are provided with access to the data - such as researchers and developers - and the people who benefit from what they create from the data.

40. Improving the ability of regulators to assess digital markets could improve their application of traditional competition tools. The creation of a data unit at the Competition and Markets Authority is a good example of how public agencies can focus on the use of data by companies and how this affects markets, likely increasing institutional capacity as staff become more familiar with issues. This could also take place at agencies such as the Information Commissioner's Office and Ofcom.

41. Consumer protection in digital markets may offer a traditional means of achieving acceptable product standards. The Consumer Rights Act 2015 requires products to be of satisfactory quality, fit for purpose, and perform as described.⁴⁹ These are principles that could also be applied to digital services.

Q9 What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

42. France's Digital Republic Bill will compel companies to open their data for use by others. The bill is an attempt to lower barriers to entry for new market entrants, perhaps boosting the level of product and service innovation. Sector incumbents can be less nimble than new market entrants in making use of new data sources, and the bill could increase competitive pressure on them.

43. The European Union has revised its Public Sector Information Directive to encourage more open data infrastructure.⁵⁰ It proposes to do this by extending the directive to more activities in which the public sector is involved, such as the utilities and transport sectors, and public research. The directive is also intended to help young and

⁴⁷ Open Data Institute, '[Public procurement: startups improve process](#)', accessed 3rd December 2018; Open Data Institute, '[Guide - How to embed open data into the procurement of public services](#),' accessed 3rd December 2018

⁴⁸ Open Data Institute, '[Defining a 'data trust'](#)', accessed 3rd December 2018

⁴⁹ Which?, '[Consumer Rights Act 2015](#)', accessed 3rd December 2018

⁵⁰ European Commission, '[Proposal for a revision of the Public Sector Information \(PSI\) Directive](#)', accessed 3rd December 2018

small firms by reducing the scope that public bodies have for charging to access public data sets, while encouraging the use of dynamic data among all firms by developing application programming interfaces.

44. Australia's Consumer Data Right is a new approach to encouraging competition.⁵¹

The data right gives Australian consumers the power to direct whom data about them is shared with, and as with similar schemes could lead to companies that are more trusted being able to provide better services. The Australian government is applying the right first as part of its open banking initiative, and in the energy and telecommunications sectors. It could be spread to the rest of the economy in years to come.

45. Open Banking Mexico has focused on financial inclusion to improve the supply of banking services in Mexico. The Mexican government's FinTech Law - which includes data portability provisions - has provided for sharing of information through application programming interfaces, with the intention that this will help with the development of services for the unbanked.⁵² This is different to the UK's approach, which viewed data portability as a competition remedy for the UK retail banking market.

46. The Sunlight Foundation in the United States have developed methods for increasing transparency in political advertising that could be used elsewhere. The foundation has been concerned by issues such as the opacity of the algorithms that determine how political advertisements in the United States are shown on social media.⁵³ The Open Data Institute has also analysed the effects of targeted political advertisements on citizens' exposure to views in a plural political system.⁵⁴ Solutions suggested by the Sunlight Foundation include crowdsourcing information on where advertisements are shown, and requiring social media companies to openly publish the information, may be applicable in other sectors.

47. Pro-competition initiatives in the transport sector could be applied in other sectors. The Open Data Institute's recent report, 'The UK's Geospatial Data Infrastructure: Challenges and Opportunities' discusses the ways in which the Ordnance Survey and OpenStreetMap have supported the creation of transport and location services.⁵⁵ The report suggests that changes such as making data licensing in the sector less restrictive could allow further innovation in the sector.

48. Some cities are using operating licences and procurement to create open data infrastructure that encourages competition. The New York Taxi and Limousine

⁵¹ Treasury.gov.au, '[Consumer Data Right - Fact Sheet](#)', accessed 3rd December 2018

⁵² British Embassy Mexico City, '[What is the potential for open banking in Mexico?](#)', accessed 3rd December 2018

⁵³ Sunlight Foundation, '[Technology companies should publish political advertising files online](#)', accessed 3rd December 2018

⁵⁴ Open Data Institute, '[Facebook scandal: let's turn our attention from how data is collected to how it gets used](#)', accessed 3rd December 2018

⁵⁵ Open Data Institute (2018) [The UK's geospatial data infrastructure: challenges and opportunities](#), accessed 3rd December 2018

Commission, for example, is able to collect data on the trips made by 'yellow' and 'green' taxis in the city.⁵⁶

Q10 Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

49. The public sector is a holder of large amounts of data. The National Audit Office has encouraged the UK government to release more data, and its potential benefits were discussed by a study of the Commercial Use of Public Information.⁵⁷ The latter found that the handling of public sector information has an impact on competition and the market for that and related data.

⁵⁶ NYC Taxi and Limousine Commission, '[TLC Trip Record Data](#)', accessed 3rd December 2018

⁵⁷ National Audit Office (2012) *Implementing Transparency*, accessed 3rd December 2018; and Dotecon (2015) [Independent evaluation of the OFT's 2006 market study into the Commercial Use of Public Information \(CUPI\)](#), accessed 3rd December 2018

The Furman Review

Call for Evidence

Written Evidence Submitted by the Professional Publishers Association (PPA)

7th December 2018

About Us

The Professional Publishers Association (PPA) stands for professional publishers, representing magazine media and business information publishers in consumer, customer and business sectors in the UK. Our membership comprises over 260 companies, publishing around 2,500 consumer magazine titles and 4,500 business-to-business publications as well as data and information products. The PPA's membership incorporates the UK's largest publishing houses, including Ascential, Bauer Media Group, Centaur, Condé Nast, Dennis Publishing, Haymarket Media Group, Hearst UK, Immediate Media, TI Media, and William Reed Business Media as well as many smaller independent publishers. A full list of members can be found here: www.ppa.co.uk/Resources/Members

Executive Summary

The PPA welcomes this review and the opportunity to examine digital competition in UK, which has radically altered the market place as the digital economy grows. Our sector has been particularly impacted by the transition to the digital economy, with publishers embracing change to deliver content across multiple-platforms. The opportunity to monetise high quality content to deliver a return on the investment in that content has fundamentally changed in the digital landscape compared with traditional markets and monetisation through advertising and copy sales.

Magazine media is a diverse and vibrant industry and publishers continue to develop new ways of engaging with readers to reflect ongoing changes in technology and consumer behaviour. Our members publish curated, creative, controlled editorial content that seeks to educate, inform or entertain readers across different platforms including print, digital, mobile and social.

Platform-based business models and strategies are driving profound global macroeconomic change, unseen since the industrial revolution¹. Technology companies and digital-born organisations like Amazon and Google, understand and utilise the power of digital technologies, and generated platform ecosystems that have become the foundation for new value extraction and a new intermediary between publishers and readers.

¹ Accenture, 'The Platform Economy: innovation from the outside-in', <https://www.accenture.com/us-en/insight-digital-platform-economy>, (accessed 23rd November 2018).

Their success largely rests on two key elements: the technology platforms they've built to support their businesses, and the business models these platforms enable². Digital platforms create value externally with digital partners and communities of users, enabling unprecedented growth and domination of digital markets.

As a result, they have disrupted the traditional media landscape, bringing with them new ways for publishers to reach audiences. However, in doing so they have often introduced a lack of transparency for both advertisers and consumers. Our industry spends millions of pounds each year to provide robust, audited, and verified audience reach through PAMCo and ABC³ while these digital giants use market dominance with little or no verification.

At the same time, their ascendancy has been driven in part by sharing of publishers' content. This has allowed platforms to build a revenue model based on advertising placed around content, without having to invest in the creation of that content. Where revenue is shared with publishers, there is little or no transparency concerning the reasons for the success in delivery of one advertisement over another, leading to uneven power relations favouring platforms, and complex relationships as platforms vary on what they offer publishers in return for use, repackaging and linking to content owned by publishers. Accordingly, this review comes as a timely opportunity for government and industry to act to support publishers as they face a number of challenges, notably the financial impact of monopolistic competition from global digital giants.

The PPA believes there are two core areas this Review should consider in order to provide a level playing field that will underpin fair competition in the digital economy:

- i) The review of competition in the digital advertising market, with a specific focus on monopolistic digital platforms, such as Facebook and Google, and their impact on the value chain in relation to publishers/content creators.
- ii) The resetting of the regulations and practices governing the Competition and Markets Authority in order to allow consolidated media ownership, thus enabling publishers to achieve cost efficiencies and invest in journalism, supporting media plurality, and safeguarding brands that would otherwise be lost.

Monopolistic digital platforms

The relationship between publishers and global digital content platforms, which have become a significant player in the supply chain between publishers and readers, is fraught. Publishers invest heavily in providing content for consumers and businesses. That content is delivered, and monetised, across a variety of platforms, and yet the value chain often fails to provide a return which adequately supports continued investment by publishers.

² Accenture, 'The Platform Economy: innovation from the outside-in', <https://www.accenture.com/us-en/insight-digital-platform-economy>, (accessed 23rd November 2018).

³ PAMCo <https://pamco.co.uk/pamco-data/infographics/>

The PPA supports the call by the House of Lords Communications Committee for a CMA enquiry into the value chain in digital advertising.

Competition and Markets Authority

The position of the Competition and Markets Authority (CMA) regarding publisher business models and acquisitions is damaging consumer choice and efficiency in a changing marketplace. At the same time, it holds very different, often contradictory views on the acquisition of digital markets.

While mergers and acquisitions activity in publishing is too often viewed through the narrow prism of the print market, platform giants are able to acquire competitors at a rapid rate. Facebook's ownership of Instagram and Whatsapp gives them market domination without regulatory intervention. We have provided an additional confidential note on recent CMA activity.

For the press to continue to provide a variety of editorial voices and opinions to consumers it is imperative that operational efficiencies can be delivered through consolidation of ownership. Without such consolidation, we anticipate that a significant number of brands and titles would become economically unsustainable and would be forced to close, harming consumer choice as a result.

As such, the PPA calls for a review of the CMA's attitude towards mergers and acquisitions in the publishing sector in acknowledgement of the potential benefit to business and consumer choice.

These recommendations – alongside those offered throughout this submission - offer a package that we believe can help provide a level playing field and fair competition in the digital market, benefiting consumers and businesses alike.

Consultation questions

- 1) What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of firms?

Social Media and Search

Social media and search have changed the way readers access journalism. By incorporating news media and magazine articles on their sites, platforms enable individuals to access content without having to visit the publisher's website first. This increased exposure has contributed to higher levels of audience reach of individual magazine brands.

This year digital magazine purchases grew by 3%, and online readership for consumer magazines jumped by 37%⁴. Audience measurement data from PAMCo has found that the total market reach of magazines stands at 34.6 million adult readers a month, with magazine media brands reaching 47% of adults in print, 14% on desktop, 32% via smartphone and 9% on tablet⁵. With platforms operating across computers, phones and other electronics, magazine publishers can tailor content to various mediums and engage with new audiences and build deeper relationships with existing audiences.

And yet, publishers are heavily impacted by a few companies dominating the digital space. Our three core concerns are as follows: the unfair share of revenues received by publishers and challenges being posed to updating copyright laws to protect effective licensing options, a lack of transparency when dealing with digital markets and the lack of roadmap for algorithm and other platform developments that fundamentally change the competitive landscape.

Unfair Share of Profits

Whilst publishers invest heavily in providing content for consumers and businesses via platforms, the value chain fails to provide a return which adequately supports continued investment. Various social media and search platforms have different attitudes to publisher repatriation. Our analysis finds Facebook to be one of the most challenging digital markets to work with, as it fails to give publishers a fair share of revenue generated from their content. Meanwhile, Twitter, Snapchat and Apple News have traditionally been more helpful and constructive with publishers.

Publishers should receive an equitable share of the profits made from their content being on digital platforms. Their content should not be viewed and shared by platforms, at the

⁴ ABC, <https://www.abc.org.uk/report/consumer> (accessed 14th November 2018).

⁵ PAMCo <https://pamco.co.uk/pamco-data/infographics/>

expense of revenue. The variable relationships between different platforms and publishers opens up the potential for content creators to remain trapped in a value chain that fails to provide adequate returns.

Accordingly, the PPA recommends the founding of standard principles (potentially within codes of conduct) to be respected by all digital markets, to ensure all platforms benefitting from publisher content share revenue with publishers. It is also to be hoped that the new standards for recognition of copyright in the digital market place envisaged within the new EU Copyright Directive will be supported for the future.

Lack of Transparency

Sudden algorithm changes made by social media and search sites can severely impact on media organisations' revenues without notice.

The algorithm that runs the news feed or search pages on digital platforms, shows a computer-curated selection of content. Deviations to this algorithm are made with the intention of changing the source of information on an individual's news feed and search⁶. These changes often happened overnight, with little to no warning for publishers.

Algorithm changes have the potential to wipe a media brand from the traffic map, as their content moves down the search or social media site. This directly impacts a publisher's bottom line, through less click throughs and traffic onto a publisher's website.

Such behaviour has led to strained relationships between publishers and platforms. Google and Facebook, in particular, have opted for secrecy to the highest degree, despite such changes having the ability to decimate publishers' traffic overnight.

To varying degrees, media organisations are reliant on the platforms as a source of audience and means of delivering on campaigns. This reliance is leading publishers to invest heavily in optimisation of their presence on the platforms. At best, this helps in terms of traffic and click through, at worst, publishers are pumping additional money into search and social without guarantee of returns.

This unequal relationship is damaging competition between the publishers, who provide the content and platforms, who host it. PPA understands the secrecy related to algorithm changes. We however call for platforms to open a dialogue with publishers and notify them of when such changes are going to take place.

E-commerce

E-commerce offers publishers a new way of engaging with consumers and improving brand status. It is becoming an increasingly important income source for publishers, who act as

⁶ The Guardian, 'Why Facebook's news feed is changing- and how it will affect you', <https://www.theguardian.com/technology/2018/jan/12/why-facebooks-news-feed-changing-how-will-affect-you>, (accessed 24th November 2018).

gatekeepers to communities of interest. While 20-years ago a car manufacturer may have bought a display advert in an automotive magazine, today the publisher is just as likely to generate that revenue by presenting the reader with high-quality, well-researched analysis of the vehicle and earning a percentage of any resulting sale, tracked by click-through rates.

This is an example of how publishers are maximising distribution reach and monetising existing core brands, products, and intellectual property through new channels and platforms as a successful means of expanding revenue opportunities. E-commerce has had a positive affect on the publishing industry.

Online advertising

Digital markets have the potential to provide new revenue opportunities for magazine media publishing companies at a time when traditional advertising revenue models are collapsing. And yet each, to varying degrees, digital markets - especially online advertising- are a cause for concern and cannot support publisher revenue as print advertising has done in the past.

Tech oligopolies have consolidated their media advantage by dominating digital advertising revenues, particularly Facebook and Google. As it stands, this duopoly enjoys 84% share of global digital media advertising spend⁷. Advertisers are focusing on global digital markets, giving them a monopolistic advantage over publishers, who in turn find it harder to win campaigns and get the online advertising required to monetise content. This is an existential challenge for publishers, as advertising is following target audiences rather than content, providing a massive swing to platforms and making publishers an unattractive investment.

At the same time, platforms can monetise publishers' content on their sites through advertising without offering adequate returns for content creators. Publishers are at the will of platforms in an unequal power relationship.

Furthermore, publishers are faced with anti-competitive behaviour of platforms when managing ad servers. A particular cause for concern is the dominance of Google products for third party ad serving. By forcing other players out, Google has monopolised the ad server market. Publishers are unable to choose between a number of competitive companies to manage online advertising bids because there are no rivals to Google products. Worse still, rivals often get bought out or close as a result of Google's powerful position in the digital economy.

Better conditions need to be fostered to entice greater competition and new players to challenge Google's monopoly. There is a clear case for the Competition and Markets Authority to investigate the digital advertising market and the PPA supports the call by the House of Lords Communications Committee in its report on UK advertising in a digital age:

⁷ Marketing Week, 'Mark Ritson: Why you should fear the 'digital duopoly' in 2018', <https://www.marketingweek.com/2017/12/05/ritson-digital-duopoly-2018/>, (accessed 24th November 2018).

“The lack of transparency in the digital media advertising market hinders the ability of advertisers to ascertain whether they receive value for money. This is in part caused by the superfluity of ad tech intermediaries, but Google alone has control at all levels of the market. We recommend that the Competition and Markets Authority (CMA) should conduct a market study of digital advertising to investigate whether the market is working fairly for businesses and consumers.”⁸

2) What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

Our issue here is not with the consolidation of digital firms across a broad range of digital markets per se, but the Competition Market Authority’s (CMA) attitude to such transactions.

The position of the CMA regarding publisher business models and acquisitions is damaging consumer choice and efficiency in a changing marketplace. To date, the CMA has taken a narrow view of the market, ignoring the breadth of content sources and variety of ways in which consumers access information in today’s digital age. This has led to the rejection of magazine acquisitions that could have a positive impact on the sector, and industry, if considered in line with the overall market.

The rejections are largely a result of concerns regarding competition over market consolidation. However, for the press to continue to provide a variety of editorial voices and opinions to consumers it is imperative that operational efficiencies can be delivered through consolidation of ownership. Without such consolidation, we anticipate that a significant number of brands and titles would become economically unsustainable and would be forced to close, harming consumer choice as a result.

At the same time, Facebook has been allowed to purchase smaller firms including Instagram and WhatsApp, arguably both potential rivals. As such, the PPA calls for a review of the CMA’s attitude towards mergers in the media sector and publishing, in acknowledgement of the potential benefit to business and consumer choice.

3) What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

In a digital age where the internet has allowed a steady stream of information to flow between networks, data has become a currency, driving the economy and how publishers innovate. For publishers, data ensures that content is tailored to the preferences of readers, ensuring they get the very best product available.

⁸ House of Lords, ‘UK advertising in a digital age’, 1st Report of Session 2017-19.
www.publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/116/11608.htm#_idTextAnchor089

And yet, digital markets often fail to ensure publishers receive substantial data returns on viewer preferences despite being the content producers. Historically, customer data was collected through loyalty cards, enabling marketers to analyse basket contents. Now, through the use of cookies, tagging and social graph connections, the majority of a customer's online journey can be tracked.⁹ Accordingly, it is crucial for publishers to receive their fair share of data, as it drives content generation, and new methods of delivering content to consumers.

Further, business publications especially benefit from data, and are able to package this to provide intelligence and specific analytical data sets to subscribers. As the demand for business information rises, so do prices. It is therefore crucial that digital markets have mechanisms in place that ensure publishers get the data they need to monetise content.

4) What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Please refer to our response to Question 2.

5) To what extent is it relevant for any identified benefits and harms that consumers receive 'free' services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

Data is key to the UK digital economy, driving digital media and services that benefit both businesses and consumers. For publishers, data can be enhanced for marketing purposes and innovating new products.

For magazine publishers, data privacy means balancing individuals' right to privacy with their desire for high-quality news content, which are tailored to people's preferences and interests. Magazine publishers are held in high regard by readers when it comes to the handling of their data. Our publishers operate transparently and are compliant with the EU's General Data Protection Regulation (GDPR), which came into effect in May 2018.

Platforms such as Facebook, Twitter, and LinkedIn, offer a free, bespoke service to users. However, there is limited access to explanations of how user data is monetised by these platforms. To generate revenue, companies like Google harvests data to target users via advertising. This data is sold to third parties who purchase ad space off google to target specific audiences.

Their lack of transparency has had a negative impact on other industries operating in the digital economy. Cases of data misuse, for example, Facebook Cambridge Analytica scandal, reflects badly other digital businesses. Accordingly, the PPA calls for greater transparency on how platforms make their money and use data, so users can understand what happens to their data.

⁹ The Drum, 'The Future of Digital Acquisition', <https://www.thedrum.com/knowledge-bank/2012/09/16/future-digital-acquisition>, (accessed 25th November 2018).

6) What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

CMA attitude to the non-digital marketplace will hamper competition in the long run. Its narrow view of mergers and acquisitions in magazine media is affecting businesses and competition in the long run.

A reappraisal of the CMA's approach to analysing the market when considering mergers and acquisitions in the media sector is vital to the long-term health and sustainability of the press. The PPA calls for a review of the CMA's attitude towards mergers in the publishing sector.

7) Are there any other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

Support for the protection and enforcement of investment by new and SME entrants in intellectual property at both national and international level.

Conclusion

The government plays a crucial role in supporting magazine media brands and high-quality journalism by ensuring a legal and economic framework that allows independent journalism to thrive in the digital economy.

The PPA believes that two interventions – review of competition in the digital advertising market, and resetting of the regulations and practices governing the Competition and Markets Authority– will allow industry to act in a way that supports innovation in journalism and publishing for the digital age, and underpin economically sustainable, high-quality journalism that educates, entertains and informs readers.

Thank you for the opportunity to reply to this call for evidence. We are happy to answer any follow up consultation or supply further evidence as required, and look forward to the Review's report and conclusions in due course.

Digital Competition Expert Panel – Call for Evidence

Introduction and background

About the IAB

IAB UK is the trade association for digital advertising, representing over 1,200 of the UK's leading brands, agencies, media owners and technology providers. We have a Board comprised of 25 leading businesses in the sector, including news media brands. Our purpose is to build a sustainable future for digital advertising, a market that was worth £11.55bn in the UK in 2017.

The IAB is actively engaged in working towards the optimal policy and regulatory environment for the digital advertising market to continue to thrive. We also seek to promote good practice to ensure a responsible medium.

Types of digital advertising

Digital advertising is:

- Online advertising viewed on a desktop PC or laptop, accessed via an internet connection
- Advertising that has been specifically tailored and served on a tablet device, accessed via 3G, 4G or wifi
- Advertising that has been specifically tailored and served on a smartphone device, accessed via 3G, 4G or wifi

It comes in different categories and formats:

Formats	Categories
Display (these can appear in any online environment: websites, apps, social media)	<ol style="list-style-type: none"> 1. 'Banner' ads (e.g. at the top or side of a webpage) 2. Video 3. Content (paid-for sponsorship, advertisement features) 4. Native (in-feed & native distribution units, e.g. 'recommendation engines')
Search	Sponsored or promoted listings in search engine results
Classifieds	Listings for jobs, property, cars, tradespeople, etc.
Other	e.g. audio, lead generation

Size of the digital advertising market

The IAB has measured the size of the digital advertising market in the UK in conjunction with PricewaterhouseCoopers (PwC) since 1997, based on media

spend. The IAB's Adspend data feeds into the Advertising Association/WARC Expenditure Report that covers the whole UK advertising market.

In 2017, £11.55 billion was spent on UK digital advertising. The market grew by over 14% on a like-for-like basis (versus 2016) and now exceeds 50% of the total UK advertising market.¹ This figure breaks down as follows:

Figure 1: Digital Advertising expenditure 2017

Type	Spend in 2017	Share of the market
Display	£4.18bn	36%
Paid-for search	£5.82bn	50%
Classified	£1.47bn	13%
Other	£0.08bn	<1%
TOTAL	£11.55bn	100

Source: IAB/PwC Adspend 2017

Digital advertising's increased market share appears to be primarily accounted for by a shift in advertising spend from print, press classified and directory advertising to digital. This shift is driven by changes in consumer behaviour, particularly the trend in people accessing content and services on mobile devices (smartphones and tablets) and the emergence of a 'mobile first' generation of users.

Programmatic advertising

Programmatic advertising is the automated process of buying and selling digital ad inventory; connecting advertisers to publishers to deliver ads to the right person, at the right time, in the right place.

Before programmatic advertising, marketers turned to a handful of publishers with whom they would contract to run campaigns. Publishers had to individually traffic each ad and advertisers had little control over how often the same user would see the same ads.

Programmatic advertising has revolutionised this process by using automated software to handle previously manual transactions to deliver engagements on any device, through any channel (e.g. social media feeds or websites). This offers buyers and sellers the flexibility to adjust campaigns in real time, for optimal performance, making it much easier to dial up the things that are working and dial down the things that aren't.

¹ <https://www.iabuk.com/adspend/full-year-2017-digital-adspend-results> (please contact [Email redacted] for access to the full report)

Figure 2: Media owner (publisher) sales techniques

		TECHNIQUE	
		TRADITIONAL	PROGRAMMATIC
CHANNEL	DIRECT	Direct sales Inventory bought at fixed prices directly from media owners through in-house or external sales teams, using insertion orders and manual processes to book and turn the campaign 18% (-8pp)	Programmatic direct (e.g. direct deals, private marketplaces) Inventory bought from a particular media owner using automated processes, where a direct relationship exists between the buyer and media owner in the form of pre-existing deal terms (e.g. exclusive access and price floors) 63% (+10pp)
	INDIRECT	Networks Inventory bought at fixed prices from a third party offering packages which aggregate supply across multiple media owners 2% (=)	Programmatic indirect (e.g. open RTB exchanges) Inventory bought on an impression-by-impression basis in real-time through an open, unreserved auction. 17% (-2pp)

n.b. These figures represent the whole digital advertising market, i.e. all types of publishers. Figures and trends may differ between types of publisher/media owners.

The impact of programmatic advertising

It is important that the Review understands the positive impacts of programmatic advertising. It is often presented as a barrier to a competitive market, while overlooking how it more broadly addresses some of the challenges of the traditional media buying model.

There are several benefits to selling programmatically. One of the most significant benefits is that publishers are able to monetise inventory that they weren't able to before, or wouldn't otherwise be able to manage selling manually. Digital advertising inventory becomes 'available' whenever a person visits a web page, app, etc. Programmatic technology enables publishers to make all of this space available for sale in real time, according to supply levels, rather than having to forecast how much they may have available and sell it in advance, thereby helping them to monetise short-term spikes in traffic (that might arise from a big breaking news story, for example).

Selling programmatically also enables publishers to sell inventory that they may not have been able to previously because it wasn't considered to be valuable (e.g. because of its position on the page), whereas through the programmatic supply chain such ad space can be sold on the basis of how well the audience of that space meets buyers' criteria, rather than being left empty. Similarly, through RTB publishers can monetise the inventory they haven't otherwise been able to sell by making it available on the open market to buyers who are looking to target on the basis of the audience, rather than the publisher or the content, which again means that publishers can sell ad space on this basis that the buyer may not have otherwise bought on the basis of other factors.

A further innovation in the digital advertising market has helped to ensure that publishers are being paid the right price for their advertising inventory. Header Bidding is a process that allows marketers to bid for inventory that would have previously been reserved for direct bookings only, for example because it is considered to be premium and therefore of high value. If the publisher can make a better price selling an impression programmatically, then their ad server will make the decision automatically to do so, rather than using the space for the lower-value direct booking.

The digital advertising supply chain

The digital advertising supply chain has evolved over its twenty or so years of existence and now makes much greater use of technology. Our [short video²](#) explains this evolution. The volume of available advertising inventory online is constantly growing, and in order to effectively monetise this inventory, media owners (publishers) increasingly rely on technology, including programmatic advertising.

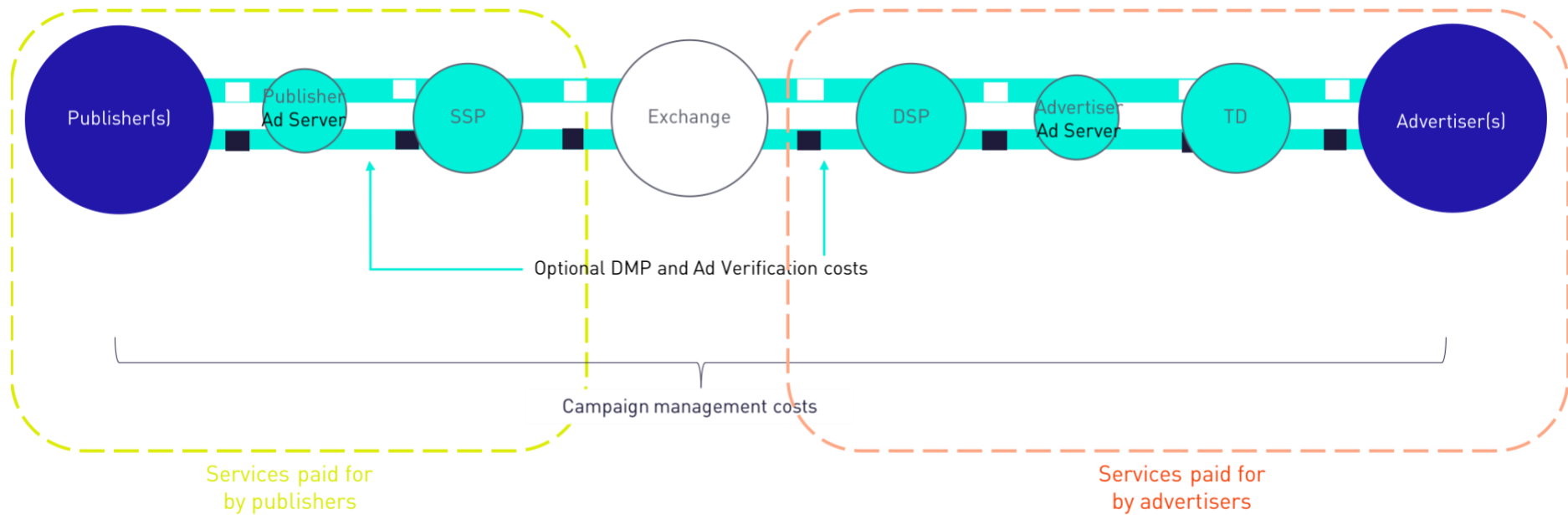
Money spent by advertisers (or agencies on their behalf) – collectively 'buyers' – on digital advertising is often distributed throughout the supply chain. This is because the overall 'cost' of buying advertising space (inventory) includes both the value of the inventory itself, which is variable, and the cost of any services provided by intermediary companies that sit between buyers and sellers and work to improve the overall efficiency of the buying and selling, for example by providing services to more accurately target ads at the intended audience.

There are some services that are essential to trading programmatically, and others that are optional. Advertisers (or agencies on their behalf) decide which of these intermediary services they wish to use. Similarly, publishers decide which intermediary services they work with to sell their ad inventory. The money 'spent' by buyers therefore includes intermediaries' fees as well as the cost of the inventory itself, which is paid to the publisher.

² <https://www.youtube.com/watch?v=efHVOWcNJZo>

The diagram and table below give an overview of the key services involved in buying and selling digital advertising that advertisers and publishers use (and therefore pay for, or develop in-house), and their functions.

Figure 3: Services in the programmatic trading supply chain



See table on following page for definitions and explanations.

Service type	What do they do?	Who pays for it?
Publishers (collectively 'sellers')	The owners of web properties (e.g. sites, apps) providing content for individuals. Publishers are the owners and sellers of the advertising space (inventory).	-
Publisher ad server	Ad servers are technology used by both advertisers and publishers. Publishers use ad servers to inform SSPs when an ad slot is available and to display ads (whether or not the inventory has been sold programmatically).	Publisher and advertiser ³
SSP: Supply side platform	An advertising technology platform that represents the suppliers of online ad space (publishers). SSPs give publishers the ability to increase their website advertising revenues by engaging with multiple demand-side channels (Ad Networks, Ad Exchanges and DSPs) through a single vendor. Used by publishers.	Publisher
Exchange	Virtual exchange where supply side and demand side platforms meet to trade and exchange inventory. ⁴	-
DSP: Demand side platform	An advertising technology platform that allows marketers to manage their online media campaigns by facilitating the buying of auction-based display media and audience data across multiple inventory and data suppliers in a centralised management platform.	Advertiser
Advertiser ad server	Ad servers are technology used by both advertisers and publishers. For advertisers, ad servers are used to store and deliver creative assets (i.e. the content of an ad) and keep track of delivery.	Advertiser
TD: Trading Desk	A trading entity known as the expert operators in their use of new technology. These entities can be independent or operate within an agency holding company. This group of people (known as traders) play the day-to-day campaign management role. Used by agency holding companies, operating agencies, advertisers.	Advertiser
Advertisers (collectively 'buyers')	Brands, or agencies acting on behalf of brands, looking to buy digital media inventory	-
Campaign management	The costs of setting up, managing, optimising and reporting on programmatic campaigns, as well as costs for building and maintaining technology, are incurred throughout the supply chain.	Advertiser and publisher
Optional services		
DMP: Data Management Platform	Platforms that allow advertisers, agencies, publishers and others to control their own first-party audience and campaign data, compare it to third-party audience data, and give the ability to make smarter media	Advertiser and/or publisher

³ Depending on how they manage their buying, this could be an advertiser directly or a media agency on an advertiser's behalf

⁴ As distinct from a type of company known as an 'ad exchange' that provides both SSP and DSP services in one place.

	<p>buying and campaign planning decisions via behavioural targeting or extending audiences via lookalike modelling.</p> <p>Advertisers and agencies generally use DMPs in order to buy more effectively while publishers typically use DMPs in order to segment their audiences and sell more effectively.</p>	
Ad verification	Typically used to measure viewability and used for blocking ad delivery, i.e. stopping an ad being displayed, for example where fraudulent traffic has been detected or for brand safety reasons.	Advertiser and/or publisher

Delivering a competitive digital advertising market in the UK

The UK digital advertising market is the largest in Europe, not only contributing significantly to the economy – every £1 spent on advertising contributes £6 to GDP⁵ – but also helping to fund digital content and services, such as news. The UK leads Europe: our digital advertising market is larger than the next three combined.⁶

The IAB's membership is wide-ranging and comprises companies of all sizes aggressively competing in a very challenging climate. These companies are investing in self-regulation and tools to ensure a responsible and world-leading ad market in the UK, as well as innovation that improves returns and choice for advertisers and helps support the UK's creative and other industries.

The questions in the Expert Panel's call for evidence are largely focused on the economic aspects of competition. In our view, consideration of the barriers to competition in the digital advertising market must also take into account other relevant factors, as set out here.

Consumer benefits of digital advertising

Advertising plays a significant role in the internet and the digital economy in the UK, EU and globally. It is one of the main commercial models for making (non-publicly funded) content online widely available to UK citizens for little or no cost.⁷ It helps fund a wide range of content and services that have become part of people's everyday lives – including search, webmail, social media, price comparison sites, online classified services (e.g. cars, jobs and homes), video- and photo-sharing tools and the majority of news, information and entertainment services.

⁵ 'Advertising Pays', Deloitte for the Advertising Association, 2013 http://www.adassoc.org.uk/wp-content/uploads/2014/09/Advertising_Pays_Report.pdf

⁶ IAB Europe adex benchmark 2017 <https://www.iabeurope.eu/research-thought-leadership/resources/iab-europe-report-adex-benchmark-2017-report/>

⁷ The call for evidence specifically excludes the question of the impacts of digital markets on the availability of a range of news media and we have not addressed that issue here.

The ad-funded business model enables companies to develop innovative products and services that benefit individuals and are either wholly or partly subsidised by advertising. For example, in June 2017 the fifth most popular digital property in the UK (i.e. a site or app) by time spent was Spotify, the music streaming service that has only been available in the UK since 2009, that generates revenue from both advertising and subscriptions. Eighth in the list was Snapchat, an app that launched in 2011 and also relies on advertising to generate revenue.⁸ Studies have consistently shown that people prefer this model to the option of paying the true cost to access such products and services. When asked, 84% of UK adults prefer to access content for free and have ads present than to pay for content with no ads.⁹

Business benefits of digital advertising

The ‘currencies’ of digital advertising are ‘traffic’ (i.e. people) and data - or a combination of both. Companies that can identify the right audience for advertisers and agencies and provide insights and targeting capabilities at a competitive price and at scale are likely to be successful in attracting advertising revenue. This has always been the case with advertising, and digital advertising is particularly effective at achieving those things at scale and at a relatively low cost, providing performance and return for advertisers.

Taxation

The Government has announced a new Digital Services Tax, due to be implemented in 2020. The IAB has not yet responded to the consultation, and we will do so in due course. However, our early analysis indicates that this tax – while intended to be narrowly-targeted – may in practice have a detrimental impact on the wider digital advertising market by increasing costs for those partnering with the services that are in the scope of the new tax to place or buy advertising – which includes other advertising companies as well as advertisers and media-buying agencies. Assumptions about profitability and margins should be tested to understand how the costs of a tax on revenue may be passed down to buyers in some form. Likewise there is a risk of double taxation by failing to account for any costs, which needs to be assessed.

Regulation and self-regulation

Existing regulation and self-regulation apply online. There are a number of key pieces of legislation that apply to digital advertising, including in relation to data and privacy, consumer protection, and ‘information society services’. Self-regulatory frameworks also cover a range of other areas including advertising standards (regulated by the Advertising Standards Authority (ASA) which enforces the UK Code UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)); good practice in the use of data for online behavioural advertising; good practice in addressing brand safety, ad fraud and viewability of online

⁸ <http://ukom.uk.net/digital-market-overview/97-q3-2018-uk-digital-market-overview-report.php>

⁹ <https://www.iabuk.com/research/iab-fit-purpose-research>

advertising and improving the consumer experience of advertising online. More details are included in Appendix 1 for reference.

Self-regulation and good practice complement legislation and achieve objectives that the law does not or cannot, often going beyond what the law requires. They offer an easily-accessible route for educating consumers, resolving disputes and providing the flexibility to respond to issues and adapt to new technologies and business models. This is particularly important in fast-moving markets like digital advertising where statutory legislation may not be able to, or be the right tool by which to achieve the desired policy goals. Self-regulation and good practice also provide an opportunity for responsible companies to differentiate themselves and therefore encourage competition.

The UK digital advertising industry is facing the most uncertain regulatory climate it has ever seen. For example, legislation such as the GDPR has impacted the market in unexpected ways and the proposed EU ePrivacy Regulation may have similar impacts, and this is creating new uncertainties about the future. The impact of the UK's departure from the EU on business and consumer confidence is also a concern for the stability of the ad market. Finally, the potential for regulatory intervention via the forthcoming Online Harms White Paper could serve as a precedent for regulation that disadvantages innovative players. It is important that this is taken into account in considering how best to achieve the desired policy aims. The Panel must take care to look beyond its focus on data controllership and also examine the potential of well-intended but poorly-thought-through policy and legislation to skew competitive incentives and impact the future shape and direction of the UK ad market.

Looking at each of these areas in more detail:

- The UK Government has recently implemented GDPR, which remains an uncertain piece of legislation due to its ambiguity, recency and associated lack of regulatory consistency or case-law to guide companies on its practical interpretation in a way that creates a level playing field and a stable basis for competition.
- The European Commission proposed a new ePrivacy Regulation before the full impact of the GDPR was understood. This proposal not only overlaps some of the scope of the GDPR but has also created even further uncertainty for the digital advertising industry. The proposed regulation threatens the future existence of ad-funded business models that rely on cookies and other similar technologies to generate income from selling advertising to their audiences to help fund the provision of their content/service, and the ability of companies to deliver digital advertising services based on data – regardless of compliance with the GDPR. This regulation, like the GDPR, has the potential to create a situation which advantages some but not others.
- Outside the area of privacy, the UK Government is undertaking various streams of work that affect digital advertising, under the auspices of its Digital Charter work programme, and has made several references to potentially introducing further regulation of digital advertising, including in its response to the Internet Safety Strategy Green Paper, its response to the House of Lords Select

Committee on Communications 'UK advertising in a digital age' report, and more specifically in its 'Childhood obesity: a plan for action, Chapter 2'. In this document, the Government announced it would consult on introducing new restrictions to advertising of products high in fat, salt or sugar (HFSS) – seemingly cutting across the existing and effective self-regulatory system that applies to the content and placement of advertising in the UK both online and offline, and already contains specific rules restricting HFSS advertising to children.

The Panel should therefore acknowledge that a competitive UK ad market needs a policy and legislative approach to digital advertising that is holistic and coordinated, and promotes scalable and competition-friendly policies, supporting existing self-regulation where it is working well. Any competition-specific issues should be dealt with by competition law.

Conclusion

The Government's Digital Charter aims to make the UK the best place to start and run a digital business. Its Industrial Strategy aims to – among other things – support and promote businesses in the UK to generate jobs and growth and ensure the future success of the country, which is particularly important in the context of the UK's exit from the EU. The Department for International Trade, together with the Advertising Association, is working with the advertising industry to support the UK industry internationally and showcase UK advertising services to the world. Its 'Promote UK' initiative wants to position Britain as 'the top global hub and centre of excellence for advertising'.

To achieve these various policy aims, and for the UK digital advertising market to be competitive and to continue to succeed, it needs a coherently designed and well-targeted regulatory, tax and competition framework that maximises competition, is fair, supports growth and innovation and encourages existing and new companies to participate in the UK market, so that the UK can continue to be a world-leader in digital advertising.

IAB UK

December 2018

Appendix 1: Self-regulation in digital advertising

The IAB's Gold Standard

IAB UK is committed to raising standards in digital advertising so that, collectively, we can build a sustainable future for the industry. As part of this we launched the IAB UK Gold Standard initiative last year, with a public commitment from all of our Board members – leading businesses in the digital advertising sector, including news media brands – aimed at driving up standards in the industry. The Standard aims to address three key industry challenges – ad blocking, ad fraud and brand safety – and commits signatories to adopt three existing industry initiatives.¹⁰ At the time of writing, 114 companies are participating in the Gold Standard, of which 68 have completed the certification process. This includes some of the largest companies in the UK digital advertising market.¹¹

The Gold Standard has already demonstrated its value as buyers of advertising services have begun to use Gold Standard certification as a selection criterion when considering which advertising service providers to partner with.

EDAA Framework for Online Behavioural Advertising

IAB UK acknowledges that the collection and use of consumer data (such as web browsing and other information) could potentially raise issues relating to consumer privacy. In 2011, building on an US initiative and the development of good practice in the UK, EU advertising and media trade bodies published good practice for all EU and EEA markets to enhance transparency and user control for online behavioural advertising (OBA), administered by the European Interactive Digital Advertising Alliance (EDAA). The EDAA initiative also provides a consumer-facing website to educate and provide people with choice and control. This initiative is widely supported, including by companies of all sizes operating in the UK market.¹²

A copy of the EU industry Framework can be found at: <http://edaa.eu/european-principles/>.

The ASA administers OBA consumer complaints in the UK and in 2013 new rules on OBA were introduced to the CAP Code to ensure businesses provide:

- notice to web users **in or around the advertisement**;
- choice via an **opt out mechanism** to prevent data from being collected and used for behavioural ad purposes.¹³

¹⁰ <https://www.iabuk.com/news-article/iab-uk-gold-standard>

¹¹ <https://www.iabuk.com/news-article/gold-standard-certified-and-registered>

¹² <https://www.edaa.eu/participating-companies/>

¹³ In response to changes introduced by the GDPR, the Committee of Advertising Practice (CAP) recently consulted on changes to the rules related to the collection and use of data for marketing. <https://www.asa.org.uk/news/gdpr-consultation-on-the-collection-and-use-of-data-for-marketing.html>

These rules are **complementary** to the EU Framework: those businesses complying with the EU Framework will be complying with the CAP Code.

Uber submission to Digital Competition Expert Panel

Uber is a smartphone app connecting people with licensed drivers at the touch of a button to get them from A to B. Our vision is to help cities by reducing congestion, pollution and the need for private car ownership with a range of safe, convenient and affordable transport options for every occasion.

In the UK Uber is available in more than 40 towns and cities with 5 million regular users. Drivers who use the app are all licensed for private hire and have partnered with Uber so they can choose when and where they work.

Q1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

Technological change has led to an unprecedented shift in the way markets work, and the way consumers engage with them. The benefits consumers derive from many digital markets depend on network effects – the greater the number of participants in the network, the more valuable they are to all participants. A natural consequence of this is that companies can benefit from efficiency advantages as they grow, as customer acquisition and retention costs fall. These efficiency gains in turn can give rise to significant benefits to consumers in the form of lower prices, better quality and greater innovation.

For example, Uber has brought significant benefits to consumers in the UK and across the world. In just six years of operation in the UK our presence and operation has led to lower prices, better service and safety standards/quality and greater competition. We have introduced innovative products and services of real value to consumers and will continue to do so. These benefits to consumers and society from Uber's products and services are a direct result of network effects. In our rides business we have 5 million active riders served by 60,000 partner drivers in the UK.

However, we recognise that in some markets efficiency gains and benefits from scale mean that there is a danger that markets tend towards natural monopolies. If entrenched firms exploit their dominance, and consumers are locked in to the network, consumer welfare may suffer. This means that there could be a short-term trade-off between the efficiency benefits of a single, or small number of providers, and the risk of dominant firm behaviour such as higher prices and limited levels of innovation.

This does not mean that high concentration levels and profit margins are an automatic signal for competition authorities that intervention is required. Even where the balance between dominant firm behaviour and efficiency may appear to hurt consumers in the short-term, authorities need to consider the ability of other firms to enter the market and the incentives to

innovate that may arise from (brief) periods of higher profits. (Patents are an explicit recognition of this innovation argument).

It is also clearly the case that competition authorities should be careful to define markets appropriately. In particular, although there may be differences between digital and non-digital products and services, they frequently constrain one another.

Our experience at Uber is that, for example, our private hire and ride-sharing service competes with other forms of transport, from taxis to public transport and beyond. Hence, despite our scale and growth, Uber's position is far from one of dominance.

Moreover, unlike some other digital markets, multi-homing is prevalent: participants can be active on multiple networks simultaneously without incurring any additional costs or losing any benefits from being part of the network. The markets in which we operate are very broad, with a wide range of competing providers. Uber's success is a result of delivering the right products and services for our customers at the right price, and is a legitimate return on the risks that we have taken.

But Uber cannot afford to be complacent and is continuously focused on innovation. Barriers to entry in the markets we operate in are not prohibitively high, as demonstrated by recent market entry by platform-based private hire operators such as Ola and Citymapper. Indeed, far from being constrained by unfair competition, market entry into private hire by app-based operators such as Taxify has been constrained by exacting regulatory standards which are regularly reviewed and increased by the regulator and licensing authority.[KW4]

Q2. What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

When the same firms operate across markets, it can be beneficial for both firms and consumers. This effect exists in non-digital markets as well. Firms are able to exploit economies of scale and scope to lower operating costs, and consumers benefit if these efficiencies are passed on to consumers. Furthermore, if established companies expand into different markets, it can result in reductions in search costs for consumers. If users trust the products and services of a particular company in one market, this 'halo' effect can carry over to adjacent markets.

The risk of firms operating in a variety of neighbouring markets is that they can leverage dominance in one market to gain a foothold in – and dominate – the other. This risk is acute if firms are able to use their ubiquitous presence across markets to tie customers into their network's ecosystem. This raises barriers to entry and prevents the threat (or reality) of competition from other firms.

Uber's experience has shown that operating in multiple markets can indeed lead to productive efficiencies. These have led to lower prices for consumers. It has also made our customers' lives easier – for example, customers can order food to be delivered at their destination address while they are on an Uber ride-sharing journey.

As mentioned in our answer to Question 1, customers and partners can use multiple competitive platforms and services simultaneously. The use of Uber's services does not lock users in to our networks. Despite our established presence across the UK, we are constantly anticipating and responding to competition and entry by innovating and keeping prices down.

Q3. What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

Data has been used by firms to serve customers' needs for decades, if not centuries. What has changed in the digital age is the scale on which it is collected and used, and its potential uses. The more data a firm has, the more potential it has to improve outcomes for consumers. For example, data can be used to:

- Deliver improvements to existing products and services (e.g. by monitoring take-up and usage, to know what features or products are most valuable)
- Help design new products and services in different markets
- Better target individual customers with the products and services they are likely to find most useful

The accumulation of data can lead to a healthy marketplace, with rivals competing to harness data to tailor goods and services to users' needs.

But we recognise that data could become a source of market power. While the risk is real, it should not be overstated nor assumed to apply in all digital markets. Competition authorities should assess the risks of data accumulation on a case by case basis. While data may be useful, it is not homogeneous. The use and exploitation is only likely to be a significant source of competitive advantage and potentially market power in some markets: it depends both on the nature of the data, and the use towards which it is put.

As with most digital business, Uber collects, uses and analyses a range of data to tailor products and services to our users' needs and preferences. Data allows us to operate our platform efficiently to better match overall supply and predicted demand – for example by ensuring there are enough cars in the right location at the right time. But we do not think that this data is a source of market power.

While the use of data is important to the tailoring of the service, it is not crucial to our business model. It does not limit the ability or incentive for users to multi-home, nor does it serve as a barrier to entry.

Q4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Larger companies could want to acquire smaller ones for a number of reasons, such as:

- Filling a gap in their geographic or product footprint

- Expanding into neighbouring/new markets
- Getting access to new and innovative technologies, products or processes

These kinds of acquisitions can have benefits, for example by making a wider range or better quality products and services available to a wider range of consumers. The superior resources and reach of the larger company can mean that it is more likely that these benefits materialise than if the smaller company remained a standalone entity. The innovative potential – and impact – of the smaller company may be more likely to be realised if it has access to the financial firepower, distribution channels and existing user base of the larger company.

However, it is possible that such acquisitions can prevent a scale competitor from emerging to the detriment of consumers. It is therefore right for competition authorities to be vigilant and, as with any acquisition, assess each on a case by case basis.

In carrying out these assessments, competition authorities should be mindful of the specific characteristics of digital markets and the way the start-up ecosystem works. The business models of digital start-ups typically involve attracting a user base to a new technology or product quickly, and only earning significant revenues once sufficient scale is achieved. Significant external investment is needed in the growth stages, often acquired from angel and venture capital investors. These investors expect returns commensurate with the high risks they take by investing at this stage.

The potential to be acquired by a larger incumbent is an important driver of the expected returns. Any steps taken by competition authorities that alter these expected returns may make it more difficult for start-ups to acquire early-stage investment in the future and may diminish the likelihood that they even get off the ground. In turn, this could diminish the incentives of potential founders to launch start-ups in the first place.

Q5. To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

Uber’s business model does not rely on free services paid for through customer data, so we do not have a view on this question.

Q6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

The benefits of large datasets (identified in our answer to Question 3) rely to a large extent on sophisticated technologies and techniques such as AI and machine learning.

From a competition policy perspective, these technologies might raise concerns in some circumstances, for example by facilitating tacit collusion through pricing algorithms which analyse and anticipate competitors’ actions in real time. They may also raise consumer policy concerns if they enable high degrees of price discrimination, but the concerns would need to be set alongside the efficiency benefits of price discrimination.

The challenge for competition policy is to distinguish between potentially harmful uses of AI and the many highly beneficial uses. This can be particularly difficult where there is little clarity on how underlying algorithms work. Once again, a case by case approach is needed.

For example, as identified in our answer to Question 3, Uber uses customer data to provide innovative products and services to our users. [RS13] Uber's pricing model works to adjust supply and demand in the market. We do not set personalised prices; nor do we adjust our prices with reference to competitor's prices using algorithms.

Q7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

- a) What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?
- b) What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed?

Uber's overall view is that the current competition regime is broadly fit for purpose and should only be changed with great care. Where there are concerns about its implementation, those should be addressed directly, but wholesale changes to the framework do not appear warranted.

In particular:

- **The merger regime should remain permissive**

Any change to the regime which makes it more difficult for growing companies to be acquired would make investment in early-stage companies less likely – and run the real risk of killing start-up businesses and innovation – although there may be room for evolution to reflect the characteristics of digital markets.

A further consideration is that a stricter domestic takeover regime has the potential to distort the decisions of where tech start-ups and venture capital choose to locate themselves or their investments.

- **It is not appropriate to separate digital and non-digital markets**

There is no hard separation between digital and non-digital markets. For example, Uber's competitors include not only other ride-sharing apps, traditional taxis and minicabs, but also public transport facilities. Any change to the regime which creates an artificial separation between digital and non-digital would not accurately reflect the way consumers behave.

- **Things move quickly in the digital sector**

While technological change has enabled companies like Uber to disrupt existing markets and deliver benefits for society, it has also fundamentally changed the competitive

landscape. Consumers and users are more engaged and new ideas spread fast. A firm with a market-leading position today faces the constant risk that it will be swept away tomorrow. An effective competition regime needs to recognise the dynamic nature of digital markets.

- **Innovation should be better integrated into the framework**

Under the current merger control framework, the main focus is on analysing the effects of the loss of competition on consumers in markets where companies offer similar products. There is arguably insufficient focus on the possibility of harm to innovation.

- **Flexibility is essential**

Each market is different, and while a uniform framework is helpful, authorities should look at each market and each case in a flexible manner. For example, while competition authorities may be concerned that data accumulation provides an avenue for companies to build and abuse a dominant position, this will only be the case in some circumstances (e.g. where the use of unique data is crucial to a firm's business model and competitive advantage). It should not be a concern a priori. Flexibility in competition assessments is also important because the scale of technological innovation means that digital markets will look very different - and give rise to very different concerns - in even a few years' time.

- **The burden of proof should not lie with firms**

Any changes to the competition and regulatory regime should not result in a reversal of the burden of proof. The legal framework is rightly clear that it is incumbent on authorities to prove anti-competitive effects. We disagree with the view of the European Commission's Chief Economist that this should be reversed in some cases. Such a move would set a dangerous precedent and create serious risks to investment and innovation.

Q8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

Competition policy provides a powerful set of ex post tools that (if properly applied) can lead to excellent outcomes for consumers. These tools can also be used – albeit with care – in particular cases to identify targeted ex ante interventions in markets that tend towards monopoly. The European telecoms framework is a good example of a regime that adopts exactly this approach – ensuring that ex ante regulatory interventions are taken only where absolutely necessary and where they have a sound economic basis. Uber supports this approach.

There is however a danger that ex ante regulation goes beyond well-designed, evidence-based, targeted regulatory interventions to address specific market failures. Where that happens, it can become a barrier to entry and restrict competition or give rise to other unintended consequences. For example, Uber has seen the impact of capacity restrictions – and even outright bans – in some geographies, and this has hurt users by artificially constraining choice and pushing up prices. We share the concerns of the Competition and Markets Authority about the notion of capping the number of private hire licences across 300+ UK licensing authority areas.

As explained in our answer to Question 3, data accumulation and use, while valuable, is not critical to Uber's success. While data-sharing initiatives in some markets are crucial in opening them up to competition, our view is that they will not be as useful in the markets in which Uber is active as data is not a barrier to entry. However, Uber is happy to share data in the right environments and with the right protections for the benefit of cities. For example, we launched Uber Movement in various UK cities this year. It is a free, public website that leverages aggregated, anonymised trip data to help urban planners identify congestion 'hotspots' and make informed decisions about the city.

Q9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

The UK has frequently been at the forefront of intellectual developments in this field, with the UK framework often becoming global best practice. As the UK moves to establish its own independent competition policy post-Brexit, it should take the opportunity to set the standard for a pro-competition regime fit for an open market economy in the digital age.

Businesses operate across international borders now more than ever. It is essential for regulatory and competition policy to move in a similar direction globally to avoid distorting investment and other business decisions. [RS20] Unhelpful precedents – such as artificial capacity restrictions in some countries – should be resisted. Uber has had to withdraw from some cities across the world in the face of deliberately targeted regulation to protect incumbents. Such unhelpful precedents should be resisted.

Q10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

N/A

Digital Competition Expert Panel: Call For Evidence

Compiled on behalf of the UK Computing Research Committee, UKCRC.

Coordinated by:

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UKCRC is an Expert Panel of the British Computer Society (BCS), the Institution of Engineering and Technology (IET), and the Council of Professors and Heads of Computing (CPHC). It was formed in November 2000 as a policy committee for computing research in the UK. Members of UKCRC are leading computing researchers who each have an established international reputation in computing. Our response thus covers UK research in computing, which is internationally strong and vigorous, and a major national asset. This response has been prepared after a widespread consultation amongst the membership of UKCRC and, as such, is an independent response on behalf of UKCRC and does not necessarily reflect the official opinion or position of the BCS or the IET.

1.What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

We would particularly welcome evidence on:

- the extent to which some digital markets appear to tend towards only one or a small number of firms;
- the key drivers of this trend (if present), and whether they relate to inherent features of these markets;
- the benefits or harms which are associated with concentration in digital markets; and
- the degree to which large market players enable or inhibit wider innovation and investment.

We would welcome evidence on the positive or negative economic impacts of all of the above, for example on prices, quality, choice, innovation or privacy. The Expert Panel was asked to focus on the impacts on competition: please do not provide evidence relating to impacts on (for example) harmful content available online, or the impacts of digital markets on the availability of a range of news media which are beyond the scope of our review or being considered elsewhere. Please be explicit about the sources of evidence for your view, where possible.

Response:

- ***The UK computing research community, typically, benefits from areas of the digital economy where there is a diverse ecosystem characterised by a strong degree of competition. In such situations, it is typically, possible to benefit from close support with a broad range of industrial partners. In markets characterised by oligopolies, especially where key players are based overseas it can be hard to sustain longer term research relationships. The UK has also suffered from a significant loss of talent to overseas research labs. Equally, there are counter examples where a small number of large market-leaders have set up centres in the UK. While these are beneficial, they often tend to have a narrow geographic focus and the IPR generated within these labs naturally tends to flow overseas.***

2.What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

We would particularly welcome evidence on:

- the extent to which the same small number of digital firms are becoming present across a broad range of digital markets;
- the key drivers of this cross-market presence
- the benefits or harms associated with cross-market presence.

We would welcome evidence on the economic impacts of the above, along the same lines set out under question one.

- ***In terms of the UK computing research community, the pervasive nature of a small number of players makes it hard for the UK to reap the benefits of public investment in research and development. Typically, researchers who develop spin-outs or who support UK SMEs develop their work up to the point where they are acquired by one of the market leaders – with the consequent loss of IPR and the further concentration of the digital market. This process has reached the situation where it is often the desired outcome of a UK start-up “to be bought up” by a dominant market player. This is undesirable.***
- ***There is a further concern that SMEs and research staff may be persuaded to act in an unethical manner in order to gain support from an oligopolistic company when they cannot get support from potential competitors. The UK has seen several recent examples of this.***

3.What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

We are particularly interested in whether data may constitute a ‘barrier to entry or expansion’ for companies seeking to compete in the digital economy. Please provide any evidence for your view.

- ***In terms of UK research, this forces our leading teams to sign over some of their rights to technical innovation simply in order to gain access to the large-scale data sets that they require in order to demonstrate that their methods can scale. When market dominant companies decide to change their policy towards UK research, for example by limiting the API access, this can kill off promising UK research partly supported by public funds.***

4.What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Does the potential for acquisition of smaller firms provide an efficient source of capital and exit or does it affect innovation? Does acquisition of smaller firms raise the value of their innovations as they get incorporated into larger platforms or does it forestall potential future competition? Does the tax system or other policy features create biases that lead to more or less acquisitions than would be the case with a neutral policy regime?

- ***See previous comments about the loss of IPR and the potential barriers to the sustained development of UK companies that might hope one day to create a thriving digital economy within key locations across the UK. We have an excellent record of developing SMEs with world leading capability that are then bought out by overseas companies – in some cases for integration into their products but also in a smaller number simply to end investment in that area.***

5.To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

Please provide any evidence for your view.

- ***In many cases, UK researchers engaging with large scale data sources are obliged to provide access to all their results to the companies that provide access. With the advent of GDPR this creates increasing concerns – there is a need for clear ethical and legal guidance to determine whether some of the agreements that have to be signed to obtain data access for research purposes do not stifle innovation or undermine the rightful protection of the public’s data.***

6.How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

We are interested in any evidence on the implications of AI, machine learning and algorithms for competition. In particular we would welcome any evidence on whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers.

- **There is a need to encourage public perceptions of trust and transparency in the application of AI/ML in general – for example, this is the focus of a recent initiative described here**

<https://www.gla.ac.uk/schools/computing/worldchangerswelcome/>

The oligopolistic practices of major tech companies means that a users on-line experience may be significantly influenced by algorithmic decisions that can be anti-competitive. Search engines selectively return those sites that are already selected to fill the advertising space on that users’ screen. Lack of transparency means that the user will be unaware of the factors that influence these selection mechanisms – be it financial relationships between the IT company/advertiser or critical factors in the users’ past interactions with on-line resources.

This part of a far wider debate.

3.2 Policy and implementation solutions

7.What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

Specifically:

A. What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?

B. What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed? We would welcome specific proposals for changes to institutions, policy or its implementation under any of these headings. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

- **To all of these questions it is important to understand the difficulty of enforcement in the digital realm. Many previous policies in this area have been far from successful and may even be counterproductive – for example, parallels might be drawn with the Chinese governments approach to Google.**

From a research perspective, every effort should be made to ensure that companies which dominate the UK digital market place should not simply benefit from public investment in our Schools, College and Universities but should also be expected to invest. There are some very good examples of best practice – where major companies have created an eco-culture of innovation with the mutual support of a host of SMEs; arguably the major US banks are better at this than some of the tech companies.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

For example, you may wish to consider options for sector-led initiatives or regulation to make data more open, portable or interoperable between different platforms, or standardised in format if these would enable more effective competition in digital markets?

Again, in relation to policy changes beyond traditional competition tools, we would welcome specific proposals for changes to institutions, policy or its implementation. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

- **See above, regional focal points for innovation where major tech companies are encourage to invest in a digital eco system so that SMEs and research organisations can benefit from access to market dominant companies.**

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

We are interested in positive experiences of other jurisdictions in policy making in the digital economy and would welcome evidence on this. We are also interested in understanding what policy changes would be appropriate within the UK and what would need to be made

at an international level. We are also interested in what policies would require or benefit from international coordination.

Please provide any evidence for your view.

- **Some aspects of the answers for 7, 8 and 9 were based on particular examples from the United States when a major bank created a Digital campus environment to encourage innovation in the local economy. This was seen as giving back to the local Universities from which they recruited many of their employees but also as a way of helping to make their IT staff less like “bank employees” through exposure to the SMEs in the ecosystem. As before, the role of regional government was on encouraging innovation and investment rather than trying to proscribe other forms of behaviour which may require legal or regulatory sanctions.**

10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?



Vodafone position paper: “Shaping competition policy in the era of digitisation” in response to UK Government’s consultation on Digital Competition Expert Panel

Summary

The UK has an opportunity to harmonise and strengthen the actions of the national competition authorities regarding the digital economy. The right competitive landscape will encourage and enable UK businesses to succeed in the era of digitisation.

In order to ensure that the UK competition law regime plays its part in achieving these goals, Vodafone’s recommendations would be as follows:

- Competition and Mergers Authority (CMA) should initiate a sector inquiry to assess platform-related competition concerns and should be as rigorous in its approach to digital markets as it is in all other areas.
- CMA should take a more proactive and dynamic approach to competition analysis. Competition authorities must analyse a wide range of evidence and factors into their analysis, including all aspects of platform business models and the impact of advertising, data and network effects.
- CMA should proactively collect data on an ongoing basis to enable it to identify and respond to potential competition concerns quickly. This data collection should be an ongoing requirement given the speed of change in digital markets to ensure that the digital sector becomes truly competitive and that Europe continues to benefit fully from further innovation and investment in this area.
- CMA should make greater use of interim measures to speed up ex post enforcement, thereby reducing the risk of irreversible harm/foreclosure.
- All remedies should be considered, including structural separation when less intrusive remedies are insufficient to ensure competitive markets. However, there also needs to be an acknowledgement that competition laws cannot provide all of the answers. Ex ante legislation has an important role to play in addressing unfair commercial practices and discrimination, particularly where there is a relationship of dependency between the business user and platform. Light touch, ex ante regulation is needed to address these imbalances and encourage fairness.
- The recently proposed EU Platform to Business regulation and New Deal for Consumers are a good starting point for such ex ante regulation, focusing on fairness and transparency towards businesses and consumers interacting with such platforms.

Introduction

As a leading British provider of communications, content and other digital services, with a large network of commercial and consumer relationships across Europe, Vodafone has a particularly good view of the competitive dynamics in UK and wider digital economy. Vodafone supports both consumer and enterprise customers, the latter who range from small businesses to large multinational companies, including across new areas such as Internet of Things and Cloud & Security services. Vodafone is both a business user of platforms and platform provider. Our connectivity and digital services are essential services for consumers and key enablers for British businesses to succeed in the digital economy.



We therefore consider ourselves to be particularly well-placed to contribute to the ongoing debate as to how EU competition law and regulatory policy could be applied to better support competition and innovation in the rapidly evolving digital economy.

Competition and the Digital Economy

UK businesses need the right regulatory framework to support competition and innovation. However, regulation, both ex ante and ex post, is struggling to keep up with changing business models and the evolution of digital services.

The digital economy in particular is both innovative and disruptive. Digital services such as cloud, AI and IoT are transforming industries across the UK economy. Online platforms can create more choice for consumers and allow businesses to reach a much wider set of customers without investing heavily in infrastructure.

As digital markets feature large economies of scale and many therefore have winner-takes-all dynamics, there are always likely to be a small number of very large digital platforms. Markets with these characteristics can tip, a process in which one firm conquers the entire market and drives developers and users away from the smaller rival platforms. Competition in the market becomes competition for the market.

The growth of platforms in particular has led to an increased dependency of businesses on those platforms, which have become gatekeepers to markets and consumers. The asymmetry between the relative market strength of a small number of large and powerful platforms and the myriad businesses (big and small) that now rely on those platforms to reach their customers has created new issues. In particular:

- As platforms benefit from both direct and indirect network effects, the bigger they are the more successful they become. Access to those platforms then becomes essential to participate in many digital markets.
- As platforms become the first point of entry to a market, businesses who are now reliant on those platforms start to lose their direct customer interface and ability to improve and personalise products to meet customers' needs. This is particularly an issue where the platform offers its own vertically integrated products or services in competition with the third party businesses using the platform.
- Digital incumbents create their own ecosystems with multiple services which interoperate and create barriers to switching. For example, once a customer has purchased a phone with a specific operating system, their choice in relation to a number of other services – maps, communications, storage, search – is immediately reduced on the basis of what apps are pre-installed, prioritised or work with that operating system or app store installed on the phone. A customer wanting to switch from an iOS phone to Android would need to move all these services across – and many of those services are not interoperable.
- Digital platforms have an ability to collect, use and analyse large amounts of data in order to optimise the service and experience of each customer. This data aggregation capacity can have beneficial effects as it may allow a platform to improve the services and customer experience which it offers to customers (e.g. by making them more tailored). However, it may also reinforce the position of dominant platforms (or even allow platforms to leverage dominance into new markets) if competitors are unable to offer similar services (or services which offer other benefits to customers) because they cannot access or generate data themselves.



- Digital incumbents leverage their market power into new areas and services, which reduces the ability for new entrants to innovate and disrupt existing businesses. Often these services are used to support the core business of the platform (e.g. advertising, device sales) and are offered below cost or are funded by data.

Incumbents such as Google, Apple, Facebook, Amazon and Microsoft are now the largest public companies by market cap and getting bigger every quarter. Facebook and Google now control over 80% of all global digital advertising (excluding China)¹ and still continue to gain share. Between them, Android and iOS accounted for 99 percent of all smartphone sales in 2016 and 2017 (see chart below). WhatsApp alone now generates nearly three times as much daily traffic as all SMS². In such markets the risk is that the platform operator chooses winners and losers and steers the supply and demand in accordance with its own parameters – often to its own services.

Ability of platforms to leverage market power and rapidly foreclose competition in new markets

Another challenge is the way in which platforms will leverage their data and user base to expand into new areas e.g. Uber's expansion into food delivery (Uber Eats). This both creates barriers to new entrants and enables platforms to use tying in order to overcome price constraints. More attention needs to be addressed generally towards leveraging given that it can mask anticompetitive entry³.

How to preserve innovation through competition policy

The application of competition policy has not yet adapted enough to the challenges posed by the behaviour of large digital platforms. It is well documented that multi-sided platforms present particular challenges to competition authorities because it is harder to apply the current tools and conventions of competition policy to them⁴. However, two-sided markets are not new (newspapers, commercial broadcasting, food retail etc.) and competition authorities have extensive experience in those markets.

In order to address these concerns, we would recommend the following:

More Proactive and Dynamic Competition Analysis:

Arguments over market definition can become a distraction in some competition cases. What is important is to assess the real and potential constraints faced by a platform both now and in the future. Competition authorities must analyse a wide range of evidence, to be able to assess multi-sided platforms, data and ad funded services and anti-competitive practices such as excluding or blocking competitors and the impact of big data and network effects. In looking at how to assess this wide range of evidence, authorities must recognise that these are moving targets as digital markets are evolving so quickly – just as new competitors and constraints can emerge, so existing competitors can disappear or be foreclosed and markets can tip to virtual monopoly if competition

¹ <https://www.ft.com/content/cf362186-d840-11e7-a039-c64b1c09b482>

² <https://inform.tmforum.org/news/2017/01/margins-pressure-whatsapp-generates-three-times-daily-traffic-sms/>

³ Choi and Jeon (2016) suggested is that anticompetitive tying and predation are interchangeable strategies.

⁴ See

https://www.bennettinstitute.cam.ac.uk/media/uploads/files/Practical_competition_policy_tools_for_digital_platforms.pdf



law enforcement is not agile enough. The challenge of using a rigid SSNIP test in multisided markets, where services are paid for via data is already well documented.

A similar approach has been taken in relation to other industries such as the food industry where there are parallels with the platforms economy. For example, across the EU there have been investigations and imposed sanctions for serious infringements of competition rules in food markets in more than 110 antitrust cases and reviewed close to 1300 merger cases. They are currently investigating about 60 further antitrust cases. In addition, the NCAs have also undertaken more than 100 monitoring actions to improve knowledge and to identify possible malfunctioning of food markets. As stated by the European Competition Network, *"these actions have shed light on structural and cyclical factors which constrain price formation and have revealed that certain food markets may face structural problems which can only be tackled by regulatory instruments other than the competition rules"*. Given the criticality of digital markets to the future of the UK economy, similar monitoring and research should be implemented in the platform economy, looking particularly at advertising, data and network effects and how these can be leveraged to foreclose competition.

We would therefore strongly recommend that a platform sector inquiry. The UK has an opportunity to take a world-leading role in its approach to regulation of digital platforms, establishing a fair balance of rights and obligations across the digital ecosystem and backed up by strong enforcement powers.

Faster action/enforcement: Despite the challenges of applying it in these new contexts, competition law is nevertheless still an essential tool both in terms of merger control and ex post antitrust enforcement. However, competition tools may be relatively slow to invoke and time consuming to implement. Here we support the approach recommended by the GSMA in their report, *Resetting Competition Policy Frameworks for the Digital Ecosystem* as set out below:

Recommendation 15: Adopt interim measures to speed up ex post enforcement and mitigate potential harm from anticompetitive conduct

Competitions authorities need to address the concern that ex post enforcement can take too long in highly dynamic industries. Taking interim measures can speed up the ex post process and prevent ongoing or future harm. Authorities should review timeframes to ensure there is an appropriate balance between the speed of the competition proceedings and the quality of the investigation. This involves (i) prioritising urgent cases, (ii) enhancing data gathering and processing capabilities, (iii) making use of outside industry experts early on, (iv) using early settlements and commitments where appropriate and (v) ensuring a purposeful, streamlined appeal process.⁵

Balance between ex ante and ex post: Competition rules protect firms and consumers against anti-competitive behaviours by undertakings having market power but cannot not address fairness as a principle (as recognised by the competition authorities themselves⁷). In addition, the difficulty of

⁵ http://ec.europa.eu/competition/ecn/food_report_en.pdf

⁶ https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf

⁷ Commission Green Paper on unfair trading practices in the B2B food and non-food supply chain, COM (2013) 37, p. 10 ; Commission Services Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD(2018) 138, p. 42 ; Report of the European Competition Network of May 2012 on



establishing a theory of harm combined with a fear of retaliation can strongly discourage business users from bringing any competition claims. Where there is an imbalance in bargaining power especially over smaller, local providers, this can result in the imposition of unfair commercial terms or practices on business users of platforms (who often compete with vertically integrated services), which they have no choice but to accept. Ex ante regulation therefore has a useful role here. By addressing unfair commercial practices, ex ante regulation can act as a deterrent to prevent platforms from imposing such unfair practices and also give business users new ways to challenge such practices, which are less extreme than launching a full competition case. The recently proposed EU Platform to Business regulation and New Deal for Consumers are a good starting point for such ex ante regulation, focusing on fairness and transparency towards businesses and consumers interacting with such platforms. Since both of these measures will not come into force until after Britain has left the EU (and after the Transition Period has expired) we urge the government to set up an immediate process to evaluate how these measures can be replicated in the UK, to ensure maximum alignment with EU law in this area. Given that the EU is likely to undertake further work on consumer protection and intermediary liability under the next Commission work plan, we urge the government to set up a mechanism to consult with businesses on the relative benefits and drawbacks of harmonising or diverging with new EU legislation in this area.

Monitoring and Enforcement: In order to properly assess the current landscape, the CMA should be able to request and analyse data on an ongoing basis. A sector inquiry or market review of the platform sector is one method as set out above; another may be to address the imbalance in bargaining power and resulting unfair trading practices via ex ante regulation, together with a requirement for platforms to provide information on request to competition authorities to enable them to better assess the market.

competition law enforcement and market monitoring activities by European competition authorities in the food sector; Valletti (2018).



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December 2018

Digital Competition Expert Panel: Which? Response to the Call for Evidence

Digitalisation is delivering a wide range of benefits for consumers. New platforms across many services (e.g. taxi hire, overnight accommodation, financial lending) have provided opportunities for consumer choice to lead markets to provide better quality and lower cost products and services. However, there is a risk of significant market dominance in many digital sectors that could harm consumers if left unchecked. Therefore, we welcome this independent review of the state of competition in the digital economy and the opportunity to share our views.

There are a broad range of issues raised in the review and the call for evidence. We have focused our response below on those issues where we have research and policy evidence to contribute. In particular, we have drawn on our work earlier this year on consumer data, [Control, Alt or Delete? The Future of Consumer Data](#)¹ (see annex A for a list of outputs and evidence gathered) and our experience in looking at consumer outcomes in Competition Law and Consumer Law enforcement.

The panel working with the Government, CMA and regulators needs to take a critical look at the impact of data concentration on consumer outcomes

Access to data combined with developments in technology to process it through computer algorithms and artificial intelligence is driving some digital markets towards a small number of big firms with considerable power and sectors with high data concentration. As pointed out in the economic paper that we commissioned from Oxera, a high concentration of data residing with a few firms could represent a barrier to entry, limiting competition and innovation.² This paper explained that whether high concentration of data is a barrier to entry is driven by the characteristics of the data itself (i.e. cost of data acquisition and rate of data depreciation) and the importance of the data for the business model in question. Low-cost, slow-depreciation data is likely to be easily acquired by many firms, while high-cost slow depreciation data may enable a longer-term advantage in a specific data segment.

¹ <https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>

² <https://www.oxera.com/wp-content/uploads/2018/07/Oxera-Consumer-data-in-online-markets.pdf.pdf>

The existence of barriers to entry results in a lack of competition which will ultimately harm consumers. Therefore, we believe that the panel should consider looking at the type and level of data concentration in key digital sectors and determine if those translate into entry barriers as a result of issues such as network and lock-in effects. The panel should also take a look at the number and type of innovations sectors with a high level of data concentration have delivered for consumers in recent years in terms of prices, choice, quality etc as well as the impact on privacy standards. This would provide useful evidence to inform specific consideration on whether some of those companies or sectors should be subject to additional ex-ante regulation and the potential impact of that regulation on (constraining or enhancing) innovation in those sectors.

“Free” services do not preclude the existence (and potential abuse) of market power

The fact that consumers do not pay an explicit price for some online services does not mean that consumers are not potentially experiencing detriment or that those companies do not have market power that could harm consumers. A good example of this is digital advertising. The invention and development of people-based marketing, driven by Facebook and Google, raises two key risks for consumer harm:

1. People-based marketing has become a feature of the digital advertising market, but its impact and consequences are poorly understood.
2. There is significant horizontal and vertical concentration of the digital advertising industry in Facebook and Google’s hands, which could lead to higher prices for consumers through supply chain impacts.

Current empirical evidence on harm for consumers through higher prices for advertised goods is limited, but we think the risk of harm is high. That is why we have called for the CMA to conduct a market study on digital advertising, in conjunction with the ICO. In our Control, Alt or Delete? report we have shown evidence that many people are unaware of the breadth and depth of the practices involved and have significant concerns when they find out about them. Worryingly, however, consumers do not feel they can realistically take action to avoid these practices. Together with the potential for structural detriment through the cost of digital advertising, this should be a priority area for the CMA.

The panel should identify best practice for assessing market power in digital markets where services are free to use. For example, it should look at the recent reforms in Germany regarding the relevant aspects to consider in assessing market power (e.g. network effects, the extent users are using several services (multi-homing), the company’s access to competitively relevant data, etc) and consider whether the UK should adopt similar criteria.

Finally, the panel should challenge the notion that some of those services are “free”. For instance, the panel could critically compare the data that some key digital companies “need” to gather to offer effective and efficient services to consumers vs. the data that they actually collect from consumers. Any data collected from consumers above and beyond what is needed to provide consumers with an efficient and effective service is the price that consumer are paying for that service.

Consumers are not always equipped to drive positive consumer outcomes in digital sectors

The research that we undertook as part [Control, Alt or Delete? The Future of Consumer Data](#) shows that:

- **Consumers are pushed into operating in a space of "rational disengagement":** Where the cost of trying to engage (e.g. understand what data is being collected and attempt to control this) is so much greater than any benefits they receive from doing so. It is often perceived that there is little benefit to engagement, because there appears to be a lack of alternatives to the product or service that is desired.
- **Consumers feel powerless to engage with organisations who collect and use their data:** There is a power imbalance between consumers and organisations which results from: 1) how dependent people have become on technology in their day-to-day lives; 2) consumers' lack of knowledge about the full extent of data collection and use by organisations; 3) a lack of alternatives if they want to stop using specific companies whose data collection practices they might be concerned about. This means that consumers are often left feeling powerless to try and shape their engagement with organisations that collect and use their data.
- **Vulnerable consumers are more likely to be concerned about data collection and use, because they perceive that tangible detriment could result from it:** This includes that "irrelevant" data could be used "against" them, for example stigmatising them based on health conditions and being charged a higher price for a product or service as a result.

This suggests that at the moment consumers have limited power to provide the necessary incentives for companies to deliver the right outcomes for them. In particular, people are not making choices in line with their own preferences, because of:

- A lack of knowledge about the extent of data use or its impact on their lives
- Complexity of making alternative choices, and
- Lack of perceived choice

Therefore, while additional transparency should be provided to consumers (e.g. on how their lives are influenced by the use of personal data), the provision of additional information to consumers is unlikely to be enough to address or prevent consumer detriment in those markets. In addition to considering ex-ante regulation, the panel should also consider how the same technological developments making the digitalisation of some services possible can also be used to develop tools to help consumers engage to make effective decisions and enable authorities to monitor those markets (e.g. to identify tacit collusion powered by algorithms) to ensure proactive and timely consumer and competition law enforcement.

Any new consumer-facing remedies should be properly tested. For example, data portability holds great promise to encourage competition in some sectors but its potential is heavily influenced by consumer behaviour and concerns. We undertook research with the general

public in the banking sector and found that over half of the respondents say they are fairly or very unlikely to share their financial data, even if it meant that the products and services offered were more suited to them.³ Consumer responses to potential new proposals could be tested using deliberative research approaches, including the use of prototypes such as developed in the Open Data Institute's work with IF on Open APIs in the telecoms industry.

Tackling and preventing consumer detriment in digital markets requires close cooperation between competition, consumer and data protection authorities

Competition policy, consumer policy and data protection regulation are closely related in the digital sector. For example, anti-competitive conduct may also breach data and consumer laws (e.g. current Facebook investigation in Germany).⁴ Therefore, it is very important that in looking at these sectors the different authorities responsible for the enforcement of competition and consumer laws and data protection regulations commit to work together in proactively monitoring the sector and in designing effective and coherent remedies as well as sharing intelligence and expertise.

The Panel should also consider if the current combination of competition and consumer laws as well as data protection regulations in the UK provides a coherent and effective framework for protecting consumers from harm including abuse of market power and the degradation of privacy standards in the digital sector or if additional reform is needed in any of these areas.

An approach to identify any gaps in the current framework is to hypothetically re-assess key recent competition cases in the digital sector considered in different jurisdictions to determine if, given the information that is available today (e.g. privacy decisions post-merger, the potential for some of the small firms acquired becoming competitors, etc), the current framework provides the CMA with the right tools to protect consumers from harm in making decisions in digital competition cases and in monitoring competition in markets. The recent revelations shedding new light on Facebook's market power including blocking twitter's short-video platform Vine should also be considered by the Panel in assessing the UK framework.

In this context, we note the point made by the IPPR in its final report of the Commission on Economic Justice *"Google's parent company Alphabet acquiring over 200 companies since 2001, and Facebook over 65 since 2005. These acquisitions serve both to expand the data extraction and analysis capabilities of large platforms, and potentially limit the ability of competitor firms to emerge."*⁵

³ Which? current account satisfaction survey 2018.

⁴ Another example of interaction can be found in the Microsoft/LinkedIn merger case where privacy was considered a quality parameter of competition. However, data protection rules and GDPR were considered as a safeguard, limiting what the parties can do post merger with the data.

⁵ https://www.ippr.org/files/2018-08/1535639099_prosperity-and-justice-ippr-2018.pdf.

About Which?

Which? is the largest consumer organisation in the UK with more than 1.3 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers. We are funded solely by our commercial ventures and receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

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Annex A: Which? Consumer Data Work

- [Control, Alt or Delete? The Future of Consumer Data](#):⁶ Our main policy report explaining the rationale for our three recommendations:
 - Consumers and their advocates need more transparency about the impact that personal data has on their lives.
 - It is time for a thorough review of governance of data in motion, with due attention given to creative ways to improve oversight and enforcement.
 - The Competition and Markets Authority should conduct a market study in to the digital advertising industry as a matter of urgency.
- [Control, Alt or Delete? Consumer research on attitudes to data collection and use](#):⁷ Our research findings from our extensive programme of consumer research to understand what people know of data collection and use, how they feel about it and how they behave.
- [Consumer Data in Online Markets](#):⁸ This economic paper by Oxera explores how the use of consumer data affects consumers across a broad range of markets through competition and privacy outcomes.
- [Platforms, brokers, and connected devices: what are the implications of the use of consumer data?](#):⁹ An economic literature review on the implications of the collection and use of consumer data undertaken by Frontier Economics

⁶ <https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>

⁷ <https://www.which.co.uk/policy/digitisation/2707/control-alt-or-delete-consumer-research-on-attitudes-to-data-collection-and-use>

⁸ <https://www.which.co.uk/policy/digitisation/2654/the-digital-revolution-consumers-and-their-data-research-review>

⁹ <https://www.which.co.uk/policy/digitisation/2646/platformsbrokers-and-connected-devices-an-economic-review-prepared-for-which>