

## Comments on CMA Statement of Scope: Online Platforms and Digital Advertising Market Study

### 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 details about our working groups see: [www.dpalliance.org.uk](http://www.dpalliance.org.uk). Email us at: [admin@dpalliance.org.uk](mailto:admin@dpalliance.org.uk).

We welcome, in general, the CMA's announcement of a study into of these markets. The recognition that many other authorities have been investigating these markets for many years is welcome. They are of critical importance to productivity, growth and jobs for the UK looking forward.

Our concerns about the Statement of Scope are summarised as follows:

- **Product market definition with relation to funding mechanisms<sup>1</sup>**: the CMA states that platforms not funded by advertising are outside the scope of the study. This both appears to accept that funding mechanisms are relevant to product market definition; and to have made a decision about that issue without conducting a study into how ad-funded products compete with funding from other sources. We understand the nature of two-sided markets, and appreciate the issue that CMA is looking to investigate concerning the impact on the advertising supply chains of platform market power. However, at a threshold stage, funding models appear to be used to exclude certain alternatives from the scope of the study; we believe that at the very least the option of further investigation should be retained. As a matter of competition law and the proper assessment of substitution between products when looked at from the perspective of an end user, as required in the CMA's guidelines,<sup>2</sup> competitive substitution is a different issue from the funding models used to finance a business<sup>3</sup>. The platforms in question offer multiple products, some of which may benefit from the power of the platform and be offered free of payment in cash, but may be paid for

---

<sup>1</sup> CMA Statement of Scope paragraph 10. "We do not propose to focus in our study on platforms that are not funded by digital advertising."

<sup>2</sup> And the guidelines of sophisticated competition authorities such as the EU Commission and the US authorities.

<sup>3</sup> And in some cases, the provision of the service to the consumer is highly inter-related with the provision of the service to the advertiser- in other cases the side of the platform and the two products markets are less closely coupled. See Just Eat/Hungry House and Jean Tirole *Economics for the Common Good*.

in kind or with data. Again, some may simply compete head on with other products with different funding mechanisms, as well as different payment mechanisms.

- **Sources of market power.** The CMA states in paragraph 49 that it: *“is launching a market study, which will consider the sources of the online platforms’ market power,”* and at para 57: *“Digital advertising markets have been subject to rapid technological development and successful entry, particularly in the early stages of their development. We will consider the extent to which dynamic competition may constrain market power in the future, taking account of the competitive advantages enjoyed by the current incumbents and the role of the data they possess.”*

Assessing market power is a natural starting point for understanding the issues that should be the focus of the study. However, we are concerned that the scope for the study as currently contemplated risks excluding as a source of market power the acquisition of new entrants and competitors that may have had different funding models. Many companies that were started up and competed with the main platforms were funded and paid for in many different ways. Many cases, whereby dominant platforms may have abused their dominance by acquiring rivals, involved cases of ad-funded and otherwise funded players: e.g. WhatsApp, Snapchat and Instagram were apparently not originally funded by advertising, but competed with the platforms that acquired them. The CMA risks repeating the mistakes that were made in cases<sup>4</sup> such as the **Facebook/WhatsApp** EU Merger Decision, where the EU Commission may have failed to appreciate that a messaging service from Facebook and a messaging service from WhatsApp could be regarded as substitutes by end users irrespective of the funding mechanism, and how they were paid for. Here, for the purpose of defining the scope of the inquiry, **an apparently arbitrary decision that certain markets or sub-markets are not to be investigated because of differences in their funding models would appear to be an entirely inappropriate starting point.**

Given that part of the study could quickly investigate and evaluate acquisitions of entrants as a source of market power, and given that data is available from the platforms and can be demanded by the CMA, it would be a relatively discrete exercise to conduct.

We are particularly concerned that acquisitions of entrants and rivals under merger control, which was a key issue identified in *Technopoly and what to do about it*,<sup>5</sup> and was supported and accepted by the Furman review, appears to be out of scope. The issue is acute with relation to potential Remedy area 3, which would involve a consideration of vertical harms while leaving open the possibility that such harm could be affected via mergers that would be unaffected and outside the scope of the study.

- **Reference Market.** The CMA is consulting on the scope of its study. It has referred to various market researches, studies, and assessments, referenced well-known sources for market information and may also have endorsed those sources. It may be better for the CMA to make its own findings about the market during its investigations, including the studies and points of view of others that have informed the CMA to date, and expressly leave the

---

<sup>4</sup> See also the CMA commissioned Lear Report 2019.

<sup>5</sup> ResPublica 2018.

findings and conclusions to be determined by the decision and conclusions arising from the study in due course.

- **Regulatory arbitrage; stacks and ecosystems.** The CMA is considering data mobility, open standards and open data. In the course of the study, we see it as inevitable that the CMA should investigate the entire technology stack and its regulation, and appreciate the extent to which the platform players benefit from regulatory arbitrage (and what was originally intended only as lack of regulation designed to enable entry). There is also a clear interrelationship between the platforms that are at the top of the technology stack and at other layers where it operates as a dynamic ecosystem rather than a series of discreet supply chains. The CMA will need to recognise that regulation has operated on certain components in a stack, and consider the implications on the ecosystem and dynamic competition over time.
- **Overlapping jurisdictions and timeframes.** Given the multi-country provision of services and international offerings of the platforms, it is inevitable that the CMA study will overlap and have implications for competition investigations currently running before other authorities worldwide. This will have implications for on-going litigation and cases that are currently under consideration before the EU and UK courts, involving a number of platform operators and those affected by their anticompetitive practices. We call to the CMA's attention that its study needs to be impartial, independent and involve a dispassionate assessment of the facts and matters under consideration; with sensitivity to matters that are sub judice. We recognise that the CMA has powers to obtain evidence within its own statutory remit, but ought to take into account and treat with care and sensitivity the potential consequences for other investigations and cases. In the light of this issue, some guidance at an early stage on how the CMA intends to approach evidence gathering with respect to overlapping cases and investigations would be welcome.
- **Share of voice.** Many of those affected by the major global platforms have no mechanism to share their views and no opportunity to present evidence and perspectives to the CMA. The inquiry risks being dominated by the platforms and their major users on the business side, with insufficient evidence or weight being placed on the views of many adversely affected. Whether those affected are consumers, or smaller businesses or simply those that do not have the financial wherewithal or time to be involved should not be confused with the importance of those voices for the CMA's consideration.
- **Institutional reform.** We note that the CMA is considering the Furman Review's recommendations on institutional reform. We note also the Furman Review's proposal for a Digital Markets Unit. While we see the interest that the CMA has in the recommendation, it is important that the CMA's position is seen to be entirely impartial.

*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 CMA 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](http://www.dpalliance.org.uk).*