

Written submission from the Competition Law Forum (CLF) at the British Institute of International and Comparative Law: Online platforms and digital advertising market study by the UK Competition and Markets Authority (CMA)

1. Introduction

- 1.1 The CLF is grateful for the opportunity to submit a response to the CMA's interim report on *Online platforms and digital advertising* (the 'Report'). The CLF would also like to acknowledge the valuable work the CMA is conducting in the digital sector.
- 1.2 This submission is divided in five sections. Section one provides comments to the CMA's preliminary decision not to make a market investigation reference (MIR). Section two outlines general comments on consumer-facing markets, including both general search engines and social media. Section three reviews consumers' control over their data. Section four is focused on competition in digital advertisement. Section five includes an analysis of the interventions proposed by the CMA as well as our own proposal.
- 1.3 The CLF would be happy to engage with the CMA in any further discussions following our submission.

2. The CMA's rejection on making an MIR

- 2.1 There seems to be an inconsistency between the CMA's decision not to make a market investigation reference (MIR) and the serious competition problems in the digital advertising market outlined in the Report. The CLF would encourage the CMA to clarify if other considerations, such as budgetary constraints or otherwise, have influenced its decision not to make a reference. All relevant considerations must be outlined in the final report to increase transparency.
- 2.2 A review of the Report suggests that the CMA has sufficient evidence of serious competition problems in the digital advertising market to justify a MIR. Thus, a decision not to make a MIR seems to champion maintaining the status quo of regulatory stagnation. The numerous challenges brought by digital platforms should not discourage the CMA from taking a bolder approach in analysing the numerous problems in the market and proposing effective remedies.
- 2.3 The CMA outlines three reasons for not making a MIR: (i) the Government is currently engaged in the process of regulatory reform and therefore it would be better placed to provide suggestions; (ii) the issues detected are global and these issues cannot be unilaterally addressed by the United Kingdom; (iii) the CMA considers a lack of sufficient understanding of the issues in the market and the most appropriate remedies.

- 2.4 The first reason seems to suggest that the CMA faces a binary choice. Either making an MIR or collaborating with the government on recommendations. The CLF does not see these two options as mutually exclusive. Conducting a market investigation would even allow the CMA to gain a better understanding of the issues involved and possible remedies. For example, the results of the market investigation could allow the CMA to recommend a fully-fledged regulatory regime similar to the regulation of telecoms and energy instead of meta-regulation (i.e. enforceable code of conduct). Also, it could better advise on how to implement the Digital Markets Unit.
- 2.5 The CLF respectfully disagree with the CMA's second reason for not making an MIR. While the CMA is correct in acknowledging that the issues are global and any implementation of remedies would require international coordination and dialogue, it does not justify an interim decision not to make an MIR for the following reasons:
- 2.6 First, according to a report from the Interactive Advertisement Bureau Europe (IAB Europe) the UK is the largest advertisement market in Europe generating €18.4 billion¹ and the third largest in the world.² Due to the sheer size of the market in question, any findings from a market investigation would not only be relevant for the UK, but also be useful for other competition authorities in European and beyond. It was the UK's leading position and global character of the statutory audit market that justified a MIR in 2011:
- (...) Given the UK's leading position in the global audit sector, the OFT sees considerable merit in a UK-focused inquiry by the CC that runs alongside this EU process, given that: a thorough competition analysis by the CC could help inform the EU process; and that the CC would be able to consider UK-issues or supplementary measures that might not be addressed at the EU level.³
- 2.7 Secondly, almost all possible interventions would require communication and coordination with other competition authorities globally including the enforceable code of conduct suggested by the CMA. Following the same logic, very little progress would ever be achieved if any global issue required a sufficient level of understanding between competition enforcers globally.
- 2.8 The CLF acknowledges the complexity of the digital advertising market and thus understands the CMA's concern in relations to its insufficient understanding of the market and remedies. That said, the Report seems to suggest that the CMA has a fairly good knowledge on several of the issues detected in consumer-facing markets, data protection and digital advertisement. Some examples include the alleged market exploitation attributed to Google and Facebook, the use and abuse of defaults to extract

¹ <https://iab europe.eu/all-news/european-digital-advertising-market-exceeds-e55bn-in-2018/>

² [Oracle's submission commenting the statement of scope](#) (31 July 2019).

³ [Statutory Audit – Market investigation reference to the Competition Commission of the supply of statutory audit services to large companies in the UK](#) (October 2011).

disproportionate amounts of data from consumers and the indiscriminate acquisitions of intermediaries in the open display market.

3. General comments on consumer facing markets

- 3.1 The report explains that Google is potentially engaging in exploitation of market power in the search advertisement market.⁴ Google's prominent position in the market has – over the past years – also generated competition concerns in the United States of America (US). In 2013, the FTC extracted commitments from Google regarding search bias allegations. Google was allegedly involved in exclusionary practices by generating search results that favoured its own products to the detriment of products from its rivals. In a negotiated settlement with the FTC, Google agreed the implementation of a universal search engine that would not demote rivals in its generic search results.⁵ It has since been argued that Google received a lenient treatment from the FTC in 2013.⁶ Following the Commission's €2.4 billion fine for a similar allegation in the Google Shopping case, calls have been made to open a new investigation. The fact that a retrospective analysis is being discussed in the US shows that the alleged anticompetitive practices attributed to Google may not necessarily be addressed with less intrusive (soft) measures. The CMA ought to consider the American experience and design remedies that adequately tackle the competition issues detected. This includes considering remedies that are more effective for the protection of the competitive process.
- 3.2 The Report found that Google's share of supply in desktop search engines is 86% and 97% in mobile search engines.⁷ Google's prominent position in the market could be a consequence of competition on the merits. However, the evidence shows that, at least in the mobile industry, Google has been engaged in questionable practices to consolidate its position. This consists of making payments to phone manufacturers so they will pre-install Google as their default search engine. This is problematic for two reasons. First, this practice effectively eliminates consumer choice as the power of defaults may nudge consumers into the perception that Google is the only mobile search engine. Google has justified this practice arguing that the payment is secondary because what matters is the quality of the service itself.⁸ However, Google's defence can be questioned from different perspectives. If that were the case then it would not be necessary to make payments in the first place. Phone manufacturers will choose the search engine based on consumer's experience or consumer's requests. Apple has argued that it uses Google's search engine by default on its mobile products because that is what consumers

⁴ Report, paragraph 5.90.

⁵ See FTC press release, <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

⁶ See news reports on the Financial Times and MLex: <https://www.ft.com/content/92cd496e-8487-11e9-a028-86cea8523dc2https://mlexmarketinsight.com/contact-us/ftcwatch/selected-2017-articles/ftc-urged-to-reopen-google-probe-after-record-eu-fine>.

⁷ Report, paragraph 3.20.

⁸ Report, paragraph 3.87.

want. In the absence of evidence it is not clear that consumers would necessarily opt for Google's mobile search engine if they were not nudged to use them by default. Secondly, it shows Google's willingness to protect its market position by using questionable practices (i.e. financial incentives) that are not aligned with the protection of consumer welfare, but with securing the best possible outcome for Google. This is an important element that the CMA must take into account when reviewing the extent of the remedies for this market and their level of intrusion.

4. General comments on consumer's control over data collection practices

- 4.1 The Report shows a stark contrast between the conditions on the transfer of personal data imposed by search engines and also between search engines and social media.
- 4.2 The collection and storing of personal data from consumers is not a necessary feature of search engines. Despite this, both Google and Bing operate in such a way that consumers can only opt-out of personalised advertising by configuring this option manually. This applies both to consumers who are not logged in⁹ and those who are logged in.¹⁰ For example, DuckDuckGo, a search engine, does not store personal data. It provides contextual ads based on previous searches performed by consumers. There are two preliminary conclusions that can be drawn from the comparison between DuckDuckGo's and the platforms that collect data from consumers, namely Bing and Google. First, it shows that collecting and storing personal data is not a core element of a search engine. It is a deliberate choice embedded in the business model of Google and Bing to create a revenue stream. Of course, companies are free to decide their own business model and their terms and conditions provided that they do not breach competition law and data privacy rules. Nevertheless, this distinction is relevant for the next preliminary conclusion. The difference between the two search engines shows that consumers could be empowered to choose their preferred search engines based on its terms and conditions. Consumers could opt for a search engine that does not collect and store personal data such as DuckDuckGo. As the market currently stands, consumers seem to be nudged into transferring their personal data to search engines such as Google or Bing without having the option to receive a specific financial benefit in return. Giving more information to consumers and empowering them with choice will enable informed decision making and generate competition on the merits in search engines.
- 4.3 Social media requires consumers to sign up before they are able to use the full range of services provided by the platform.¹¹ Facebook and Twitter allow non logged-in consumers to use the platform in a limited way unless they provide their personal data through the registration process. This means that the most intrusive option for

⁹ Report, paragraph 4.57.

¹⁰ Report, paragraph 4.60.

¹¹ Report, paragraph 4.66.

consumers (i.e. providing personal data as a condition) has been chosen by Facebook and other platforms, even though it could have been designed without restricting access to non-logged in consumers. Furthermore, the Report clearly highlights the fact that consumers are not allowed to opt-out from personalised advertisement.¹² This same approach has been consistently adopted by all the leading market players: Facebook, Twitter and Snapchat. Thus, some platforms have been designed in a way that prevents consumers from choosing how their data will be processed. Regarding social media, consumers face a binary choice. Either accepting the terms and conditions created by Facebook on the processing of their personal data or they will be unable to have full access to the platform. This proves that Facebook is effectively forcing its choice upon consumers. Such choice is unsurprisingly tailored to meet Facebook's own requirements regarding the processing of personal data.

- 4.4 The Report also highlights the fact that the platforms provided insufficient data¹³ or no data at all regarding how consumers use of privacy settings.¹⁴ From our perspective as objective observers, it is hard to make sense of this situation. The digital platforms argue lack of information as a justification, but their entire business model is based on gathering data from consumers. This situation requires a profound reflection from the CMA as it should consider applying its statutory powers to request this information. Especially considering that this will have a meaningful impact on understanding how consumers behave regarding the use of their personal data. This is a core element to better understand how the market operates. For example, the refusal to provide (or generate) information at this stage is an aspect that the CMA must take into account when making a final decision as whether or not to make a MIR.
- 4.5 To illustrate the issue regarding the combination of data from different sources, Oracle's submission to the Statement of Scope has provided useful data on two relevant issues.¹⁵ First, the fact that Google has acquired companies to improve the extraction of data from consumers (i.e. combining data from different sources including third parties) and ultimately create an undue advantage over its competitors in the digital advertisement market. This was the case when it acquired Doubleclick in 2007 in the US. It should be remembered that at that time the FTC did not object the acquisition in spite of the complaints from consumers and competitors regarding the excessive power yielded by Google on the collection of data. This acquisition allowed Google to track consumers'

¹² Report, paragraph 4.64.

¹³ Report, paragraphs 4.77, 4.78, 4.79.

¹⁴ Out of twelve platforms, none of them provided information on the number of consumers that access their privacy policy during registration. Only two provided data on the access to privacy policy on an ongoing basis. And just four platforms on how consumers use settings and control.

¹⁵ "We also note that Google's abuses of its market power have restricted competition in the supply of digital advertising in the UK. Google's massive breadth of consumer targeting data creates a barrier to entry for any would-be ad tech participant, but this breadth of consumer targeting data has been captured largely in an anticompetitive fashion through (a) its coercion of consumers under its terms of service and privacy policies, (b) its overreaching collection of their data, and (c) its combination of consumer data into "super-profiles" that cannot be replicated by its competitors that compete for the provision of ad tech services." [Oracle's submission commenting the statement of scope](#) (31 July 2019).

activities through different websites by using cookies. The remedy designed by the FTC was a voluntary code of conduct. However, as explained below,¹⁶ the downside of applying a code of conduct (even if it is enforceable) is the incumbent's ability to decide how to comply with it, effectively being able to circumvent its goals. Second, following a policy change in 2016 Google is now able to create super-profiles from consumers by tracking them on websites that use Google analytics, displays YouTube videos or ads served by Doubleclick. The new policy basically consisted of amending the terms and conditions to combine consumers' data from different sources (i.e. including Doubleclick cookies). Consumers are nudged by this policy to opt for the combination of their data from different sources by default. We acknowledge the fact that Oracle is a competitor to Google, but the information provided by Oracle is not only consistent with the Report's findings,¹⁷ but also provides important data to back its claims.¹⁸ Another important element is that this same issue regarding the combination of data from third parties should be considered regarding Facebook.

- 4.6 It has been argued that the General Data Protection Regulation (GDPR) is used as a shield by digital platforms to reject rivals' request to access their databases. As we have previously argued, mandated data sharing is a powerful tool to allow competition to thrive by enabling competitors to innovate and improve their services.¹⁹ Nonetheless, mandated data sharing could be problematic in the extreme scenario that the data cannot be anonymised. The GDPR could be used as a good excuse to turn down third parties' requests to access to the platform's database. This position is profoundly dangerous because if taken to the extreme, digital platforms could always reject mandated data sharing based on a 'presumption' of illegality. This would amount to a clear misinterpretation of the GDPR. The allegation consisting of a potential violation of data protection rules is akin to that detected by the Commission in *Lundbeck*. A relevant aspect of the case was the alleged violation of an Intellectual Property (IP) right as a justification to refrain from entering the market. This case involved determining if a pay for delay agreement between the originator of a pharmaceutical product (holder of an IP right) and a generic manufacturer to settle a dispute arising from the validity of a patent amounted to a restriction of Article 101 TFEU. The pay for delay agreement effectively involved a payment from the originator in favour of the generic producer so the latter will refrain from entering the market until the patent of the originator expires (i.e. the validity of the patent was being questioned). This agreement could be analysed from two different perspectives. First, from the point of view of IP rights it could be argued that the settlement agreement is nothing strange because disputes occur time and again and the parties are free to settle the controversy outside court. Second, from the competition perspective it is an agreement where a potential competitor (i.e. the

¹⁶ CLF submission, paragraph 6.2.

¹⁷ In the Report, the CMA has extensively discussed the abuse of default privacy settings [Paragraphs 29-36] and it also mentions the acquisition of Doubleclick [Box 5.1, p. 200] but there is no detail on the specific relevant issue raised by Oracle.

¹⁸ For example, see [appendix 3 on 'super-profiles'](#).

¹⁹ CLF submission, page 19.

generic producer) receives a payment in exchange of a promise consisting of refraining from entering a market in which the patent holder (i.e. originator) has an exclusive right. The Commission argued that as an alternative to the settlement, the generic producer could have entered the market 'at risk' and compete with the originator. The risk in this case was the infringement of the IP right. The General Court endorsed the Commission's position.²⁰ A similar approach could be applied in the eventual conflict between data protection and competition law. Digital platforms are able to accept requests from third parties to share data with their rivals. It is only in exceptional circumstances (i.e. effective impossibility to anonymise the data) that they are lawfully able to refuse this request. By applying the same arguments developed by the Commission and the General Court in *Lundbeck*, it is realistic to argue that mandated data sharing could also be considered 'at risk'. This approach is necessary to prevent digital platforms from developing their own presumption of illegality. Otherwise, the GDPR risks becoming a tool used by dominant digital platforms to protect their own position in the market to the detriment of rivals and consumers.

- 4.7 To complement the previous point, it could be argued that data sharing could encourage free-riding because the owner of the database has invested resource on its development. Nevertheless, our position is that data sharing could be made available through Information Sharing Agreements (ISA). The database must be accessible to every competitor subject to a fee and provided that the data is anonymised. Furthermore, access to the database must be done on objective fair, reasonable and non-discriminatory (FRAND) terms. The implementation of ISA is a form of self-regulation and could be considered an efficient cross-industry venture. A possible counterargument against ISA is that it could be considered an agreement that restricts competition under the terms of Article 101(1) TFEU. However, considering the efficiencies generated by ISA it would most likely fall under the block exemption of Article 101(3) TFEU.²¹ A similar provision can be found in Competition Act 1998 section 9(1).

5. General comments on competition in the supply of digital advertising in the UK

- 5.1 The Report establishes that Google has no competitive constraints in the market for general search engines. The only exception is Amazon, albeit to a limited extent as it only covers the retail of certain goods.²² In this regard, Google's position should be carefully analysed in light of the special responsibility that arises when an undertaking achieves a particular position of influence in the market.²³ One important aspect – highlighted in

²⁰ Case T-472/13 - H. Lundbeck A/S and Lundbeck Ltd v European Commission, paragraphs 115-133.

²¹ R. Whish and D. Bailey 'Competition law' (OUP 2015) page 157.

²² Report, paragraph 5.62.

²³ 'A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'. Case 322/81 - NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities.

the Report – is Google’s ability to control prices charged to advertisers.²⁴ It is likely that those prices will ultimately be borne by consumers as advertisers will set the prices of goods and services accordingly. This situation should be carefully considered by the CMA when analysing Google’s behaviour.

- 5.2 Google’s ability to exercise control over prices is not the only issue in the advertisement market. The Report detects transparency problems related to the lack of information offered to advertisers in relation to the effectiveness of the advertisement²⁵ and how auctions are unilaterally designed by Google.²⁶ Advertisers have argued that they cannot know with sufficient precision the effectiveness of the ads because independent verification performed by third-parties is restricted by Google (including YouTube) and Facebook.²⁷ Google has argued that it has partially restricted the verification process performed by third parties since the enactment of the GDPR because of concerns related to data privacy. Advertisers are therefore placed in a difficult situation as not only are they subject to the terms and conditions (i.e. including prices) set by dominant platforms, but also unable to understand the precise impact of their advertisement in a transparent way (i.e. third-party verification). The GDPR is used by dominant platforms to justify a refusal to provide information. The CMA should consider this as a critical situation and evaluate a clear break with the presumption of illegality that seems to have been developed by dominant platforms to prevent the exchange of data. As explained above, this issue could be resolved by imposing a duty to share data at risk.
- 5.3 The Report considered the scenario where Google uses its prominent market position in the general search engine to disrupt neighbouring markets.²⁸ Despite that we agree with this finding, the ‘self-preferencing’ terminology used in the Report is imprecise. Google is leveraging its market power in the search market where it is dominant for the purpose of entering a neighbouring market. This distinction is essential because every single undertaking participating in the market will strive to achieve the most beneficial outcome. That is not anticompetitive, but is an expression of the competitive process itself.²⁹ The problem arises when the behaviour restricts competition in another market sector where the undertaking is not dominant.
- 5.4 The Report also found evidence that both Google³⁰ and Facebook³¹ are potentially engaged in exploitation of market power. The Report found that it is likely that their profitability is above 40% of its costs of capital. This is a strong indicator that something is not working well in the market and that further investigation is essential to determine

²⁴ Report, paragraph 5.97.

²⁵ Report, paragraph 5.124.

²⁶ Report, paragraph 5.87.

²⁷ Report, paragraph 5.97.

²⁸ Report, paragraphs 5.88, 5.89.

²⁹ Joseph Schumpeter called it the gale of creative destruction.

³⁰ Report, paragraph 5.90.

³¹ Report, paragraph 5.155.

the extent and the potential harm that is being caused by these platforms. This is an element that the CMA must consider when drafting its final report.

Open Display Markets

- 5.5 The Report also found competition problems in the Open Display Market (ODM). The ODM has intermediaries between advertisers and publishers (also known as ad tech stack) including, among others, Demand Side Platforms (DSPs) and Supply Side Platforms (SSPs).³² Our analysis will be focused on three main problems: (i) the conflict of interest of vertically integrated companies owned by Google; (ii) insufficient information to determine the fees charged by intermediaries; and (iii) killer acquisitions in the ODM.
- 5.6 Google is present alongside the entire chain of the ODM.³³ Although its value in display advertisement remains low as it is chiefly based on YouTube [15-20%], its value in video advertisement has reached 60-80%. Since the ODM operates through intermediaries in both the demand side and the supply side, the CMA has suggested that Google's owned entities are likely to favour each other when an advertiser places a bid. Google's owned DSP has incentives to hire Google's SSP which will ultimately select Google's inventory. Thus, increasing Google's control in display advertisement.³⁴ Such outcome is likely to create a condition where all roads in the ODM could eventually lead to Google. This situation is problematic for two reasons: Firstly, the CMA has detected that Google Ads (targeted advertising) and YouTube (owned by Google) are only available through Google-owned intermediaries. Advertisers seeking to publish their material on Google's websites will have no choice but to select Google's intermediaries. This is detrimental to other DSPs and SSPs that are not owned by Google and is likely to lead to a situation where Google exercises excessive influence and control over the ODM. This could also mean that Google's intermediaries could end up imposing its own terms and conditions, including fees. Secondly, Google is leveraging its position on consumer-facing markets to foreclose competitors in a neighbouring market, in this case the ODM.³⁵ Google is attempting to extend its market power in adjacent markets by forcing competitors (i.e. intermediaries) out of the market as 'independent' DSPs and SSPs do not have access to Google's advertisement inventory. This is not an expression of competition on the merits, but an attempt to displace competitors by using anticompetitive tactics.
- 5.7 The Report also outlines a startling practice from Google. Over the last decade, it has acquired at least nine intermediaries to consolidate its position in the ODM.³⁶ As the CMA acknowledges, vertical integration is a source of efficiencies as DSPs and SSPs benefit of the interconnection between them. This allows them to provide a more efficient service. However, there is also a negative side as vertical integration has generated problems of

³² The ad tech stack also includes Data Management Platforms (DMPs) and Publisher ad servers.

³³ Report, paragraph 5.199.

³⁴ Report, paragraph 5.211.

³⁵ Report, page 150.

³⁶ Report, page 200.

lack of transparency and conflicts of interest (i.e. transparency and accountability) as already explained. The acquisition of companies at different levels at the ODM has taken place over the last years seemingly without proper antitrust scrutiny. The same complaint has arisen in the US.³⁷ As will be explained below,³⁸ one option to deal with this problem is for the dominant platforms to inform the CMA of its M&A activity, as the FTC has requested in the US.³⁹ This is another element that the CMA must take into account when making a final MIR decision.

6. Potential interventions

(i) The enforceable code of conduct

a) Code of conduct not is necessarily the best option

6.1 The Report proposes an enforceable code of conduct to address the competition concerns in the market. This follows a similar recommendation from the Digital Competition Expert Panel's report 'Unlocking Digital Competition' (the 'Furman report').⁴⁰ A positive aspect of this proposal is that a principle-based code of conduct – as opposed to prescriptive rules – could be beneficial for the industry as a degree of flexibility is essential especially in a dynamic market where new technologies and innovations arise. However, there are several reasons to be pessimistic about this proposal.

6.2 First, the CMA has detected numerous problems in consumer-facing platforms, control over their data and competition in the online advertising market. The most effective solutions require highly intrusive measures that are unlikely to be achieved with a soft approach based on enforceable meta-regulation (i.e. enforceable self-regulation).⁴¹ For example, interoperability and data sharing will signify a major overhaul on how platforms operate. It is unlikely that the way platforms will need to be redesigned to interoperate will be successfully achieved by a decision coming from the platforms themselves. The downsides of meta-regulation and self-regulation is a well-studied subject as Baldwin, Cave and Lodge explain:

‘Firms might be expected to expend large sums on devising rules to suit their interests and to circumvent the spirit of government requirements. The state would have to spend similarly large sums to avoid such departures from public

³⁷ See report on MLex: <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/googles-dominance-in-online-advertising-and-previous-mergers-in-state-ags-crosshairs>

³⁸ Our proposal on merger control is detailed in paragraphs 6.13 and 6.14.

³⁹ https://www.theguardian.com/technology/2020/feb/11/google-facebook-amazon-us-antitrust-investigations?CMP=Share_iOSApp_Other.

⁴⁰ Report of the Digital Competition Expert Panel, 'Unlocking Digital Competition' (March, 2019), page 9.

⁴¹ 'Meta-regulation is the state's oversight of self-regulatory arrangements' B. Hutter 'Risk, Regulation, and Management', in P. Taylor-Gooby and J. Zinn (eds.), Risk in Social Science, (OUP, 2006).

interest objectives. (Whether this is the case or not may depend inter alia on the distribution of interests, resources, costs, and benefits in a sector.)’.

- 6.3 As suggested by the Furman report, the code of conduct will require close oversight from a Digital Markets Unit to make sure that the process takes place and that rivals can effectively access the database.⁴² The enforceable code of conduct is likely to favour the status quo of the market. It is very likely that dominant market players will keep using so-called privacy concerns to justify a refusal to share data.
- 6.4 Second, the enforceable code of conduct seems to be a half-baked approach between the current situation (i.e. absence of regulation in the digital market) and a fully-fledged regulatory regime. We strongly encourage the CMA to take decisive action in the digital market and to avoid measures that fall in the middle of the road. The issues detected in the Report already point out several critical problems related to how markets are (not) working. There is no reason to believe that an enforceable code of conduct will be more effective than a principle-based regulatory regime. The element of flexibility arising from the application of principle-based regulation could be kept and applied by the digital regulator in a dynamic way without the need of altering or updating regulation.⁴³
- 6.5 Third, based on past experience (i.e. the FTC settlements in 2008 and 2013) and the current situation of the market, it is unlikely that dominant platforms will voluntarily alter their behaviour to meet the goals and objectives set by the code of conduct. A useful guidance can be found on the theory of really responsive regulation developed by Baldwin and Black. The regular and most acceptable approach when trying to reach secure compliance is to punish infringements in an escalated way, starting with the least severe measures and moving to the most severe punishments. However, it has been argued that this approach could lead to an unnecessary waste of resources if applied in an indiscriminate way. For example, it could be mistaken to apply the escalated approach to companies that are ill-intentioned (i.e. likely to reap benefits from loopholes in the law) or well-informed (i.e. using their knowledge and highly skilled advisors). In these cases, the response from the regulator should be based on a target-analytical approach based on the culture of the sector or the competitive constraints. This means that the regulatory strategy should be applied and tailored by considering the behaviour and circumstances of the market and the regulated entities.⁴⁴ The same logic could be applied to remedies (i.e. technically they are not a punishment). This means that it is not

⁴² ‘Self-regulation succeeds when targets decide that it is in their best interest not to defect from the self-imposed (or sectoral-imposed) standards. Assuming that compliance is at least somewhat costly, external forces of some kind will be needed to provide an incentive for voluntary control’. C. Coglianese and E. Mendelson ‘Meta-Regulation and Self-Regulation’ in *The Oxford Handbook of Regulation* Edited by Robert Baldwin, Martin Cave, and Martin Lodge (OUP, 2010).

⁴³ For example, the Electronic Communications Code adopts a principle-based approach. See article 91.

⁴⁴ R. Baldwin and J. Black, ‘Really Responsive Regulation’, LSE Law, Society and Economy Working Papers 15/2017.

necessary to begin with the least restrictive option. More intrusive measures should be considered and applied from the outset.

b) Specificities of the code of conduct

6.6 For the reasons explained above, we consider that the most appropriate measure is a fully-fledged regulatory regime based on standards and principles, similar to the regime in place for utilities such as telecoms. The Report asks specific questions regarding the code of conduct. We will answer to these specific questions in spite of the fact that we do not believe that meta-regulation would be the most effective measure to improve competition in the market.

6.7 We agree with the principles that will be included in the code of conduct namely fair trading, open choices and trust and transparency. We have three comments regarding the effectiveness of the code of conduct. First, including a sunset clause (i.e. triggering review after 2 years of its implementation). Second, developing specific remedies that complement the imposition of financial penalties. Third, a request for clarification on the functioning and remit of the Digital Markets Unit.

6.8 Considering the downside of self-regulation, mainly related to the possibility that regulated firms have a certain degree of discretion to decide how their behaviour will achieve regulation goals. The code of conduct should include a time limit provision of 2 years (i.e. sunset clause) for the authority to review if there is an improvement on the market and decide if a reasonable level of compliance has been achieved. For example, do dominant platforms regularly accept third parties' requests to provide access to their databases? If so, what is the percentage of requests that are rejected and on what grounds? Based on this information, the authority will then be able to decide if applying more intrusive measures such as divestitures are required. The judgement of the authority should be based on evidence and the statistics explaining the performance (or underperformance) of competition in the market.

6.9 The CMA is not fully convinced if the digital regulator should be able to impose financial penalties to discourage violations for breach of its orders. Financial penalties do not seem to deter anticompetitive behaviour in the digital sector. In practice, it could be the case that it is more beneficial for platforms to pay the financial penalty than to comply with an order from the digital regulator that could be costlier in terms of losing market power. For example, complying with an order to redesign the platform in a way that allows interoperability with rivals. Compliance with the remedy could effectively mean a profound alteration of the way the platform operates and generates revenues as the providers of their data (i.e. consumers) may begin to realise the benefits of choosing a rival's platform. We believe that financial penalties are a positive response to the problems detected in the market but complementary measures are also essential such as a prohibition on the combination of data obtained from third parties' sources. For

example, Google combines consumer’s data from a wide range of sources including Google search and Android. Facebook incurs in the same behaviour through Instagram and WhatsApp and third parties. This prohibition applies to the extent that it is used as a default setting. Consumers may be able to opt-in only if they expressly and voluntarily choose to do so. This will require updating the privacy settings and the way all digital platforms operate. This measure will require constant monitoring from the digital regulator.

6.10 On the other hand, the imposition of financial penalties may have an impact on the speed of the regime as an appeal process will be required. Nonetheless, a fast track procedure can be implemented to allow parties to question the decisions of the digital regulator before a specialised tribunal similar to the Competition Appeal Tribunal. Another characteristic of the appeal procedure could be the implementation of an ouster clause to reduce judicial review only to specific due process violations. The validity of ouster clauses in UK primary legislation has been extensively discussed⁴⁵ and the UK Supreme Court has not ruled out their validity.⁴⁶

c) Insufficient information regarding the Digital Markets Unit (i.e. the Regulator)

6.11 Following the recommendations from the Furman report, the CMA has decided to propose the creation of Digital Markets Unit⁴⁷ that will oversee the enforcement of the code of conduct. However, a key aspect missing from the Report is detailed information or a proposal regarding the implementation of the Digital Markets Unit. It is unclear if it would be an independent entity or if it would operate under the supervision of Ofcom or another institution. The Report clearly mentions that it will be in charge of supervising the code of conduct, performing investigations with powers of audit, scrutiny and transparency. The broad remit included in the code provides a good but basic on the Digital Markers Unit’s remit. However, it is still superficial to fully understand its level of independence and its capacity to make decisions.

6.12 In our view, the Digital Markets Unit should be designed mirroring a utilities regulator (i.e. Ofgem, Ofwat) including competition powers. The data unit should be independent and its decisions should be reviewed by an independent tribunal specialised in the digital market. Its remit should be based on principles that allow flexible interpretation. For

⁴⁵ ‘Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any [such] inquiry [. . .] I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law’, Lord Reid in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

⁴⁶ ‘Anisminic had not argued that Parliament could never exclude judicial review; rather, it said—and Lord Reid agreed—that judicial review could be excluded only by clear words’, A. Le Sueur, M. Sunkin, and J. E. Khushal Murkens, ‘Public law’ (OUP, fourth edition, 2019).

⁴⁷ The CMA refers to it as the regulator.

example, in cases involving interoperability it must allow room for market player's discretion. The Digital Markets Unit must exchange information with the ICO to adopt equivalent standards on the enforcement of data protection regulation. We understand that the Digital Markets Unit is a proposal still under consideration but it is essential for the CMA to provide clarity on this.

(ii) Overhauling the merger control regime

6.13 The CMA should consider updating the merger control regime to specifically tackle acquisitions that fall below the merger control threshold to prevent situations such as those we have analysed in relation to vertical integration in the ODM. This anticompetitive strategy consists of the acquisition of smaller rivals by a dominant undertaking to consolidate its position of dominance or to effectively enter into neighbouring markets (i.e. killer acquisitions). It is not just limited to the ODM as the strategic acquisition of smaller rivals could have been replicated in different sectors of the digital market. In fact, it could also fall outside the scope of this market study. Therefore, the CMA must consider additional action to review the extent of the harm caused by killer acquisition in other sectors of the digital markets.

6.14 A possible expedite action could be requesting information (i.e. this could be considered an informal notification process) to digital platforms on all their acquisitions over the last ten years including those that fall under the threshold of the merger control regime. This will allow the CMA to secure two key objectives. First, to understand how frequent digital platforms are engaged in the acquisition of smaller rivals that could potentially lead to the elimination of competition. Second, the CMA's analysis could reveal if the markets are functioning properly and if there is evidence of harm to the competitive process. Then it will be for the authority to decide on specific measures to remedy potential harms to competition. For example, it could enter into a settlement agreement where digital platforms agree to divest whole or part of the businesses they have acquired over the last decade. This measure does not constitute an ex post control of the mergers but a review of how the markets are operating. Therefore, in principle it is not necessary to amend the merger control regime before addressing this issue.

(iii) Potential interventions to address themes 1 to 3

(a) Theme 1 - Part 1: Potential interventions to address market power in general search⁴⁸

(a.1) Access to click-and-query data

6.15 Google has argued that providing access to click-and-query data could have unintended consequences. It alleged that there are privacy concerns (i.e. disclosing personal data

⁴⁸ The Report subdivides the potential interventions in the theme 1 between those applicable to general search engines and social media. We have followed the same approach in this submission.

from consumers) and the reduction of Google's incentives to innovate as it will have to reveal its search engine's algorithm.

- 6.16 We believe that Google's rivals should have access to its click-and-query data to allow effective competition in the market. Access to the algorithm may not be indispensable to compete but it is convenient for the promotion of competition. Taking a different approach could further entrench Google's position in search engines.
- 6.17 The privacy concerns alleged by Google must be supported by solid evidence. As discussed before, Google is already rejecting third parties requests based on a potential breach of the GDPR. Our position is that the antitrust enforcer must take a clear stance in this regard and eliminate the 'presumption of illegality' created by dominant platforms on data sharing. Breaking this presumption could involve encouraging platforms to share data at risk. Unless in verified exceptional circumstances, the data cannot be anonymised.⁴⁹
- 6.18 Google has argued that allowing rival's access to its click-and-query data may destroy its incentives to innovate as it may involve disclosing its algorithm. As a matter of fact, due to the poor conditions of competition in search engines, the antitrust enforcer should be more concerned with the protection of the incentives to innovate of the entire industry and not with those of the dominant market player. This same position was reiterated by the General Court in the Microsoft Windows Media Player case.⁵⁰ To rebuff Google's claim it is essential to understand what is at stake if rivals are barred from having access to click-and-query data. If Google's arguments are accepted this would (again) maintain the status quo. Furthermore, even if the algorithm is disclosed Google will still be able to develop another algorithm.

(a.2) Mechanisms for determining the default search engine on devices and browsers

- 6.19 The CMA has proposed two alternative measures to control Google's ability to pay phone manufacturers to pre-install Google as their default search engine. The first proposal consists of creating a general rule restricting Google's ability to pay for the default position.⁵¹ We believe that this proposal is too intrusive as it will effectively limit the parties' right to enter into a binding contract (i.e. restricting contractual terms). It may not achieve its purpose as phone manufacturers may be able to receive a benefit other than payment to pre-install Google's search engine. This measure will require a vast amount of resources to supervise. This may also require investigations to determine an infringement that may limit the effectiveness of the measure. The second proposal consists of offering a choice screen to consumers. We believe this option is much more realistic and is also in line with the remedy introduced by Google on all new Android

⁴⁹ See our analysis on this subject above, paragraph 4.6

⁵⁰ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3607, paragraph 659.

⁵¹ Alternatively, it was discussed limiting phone manufacturers' ability to receive payments in exchange of the default position.

devices following the Google Android decision from the Commission.⁵² However, in that case Google has auctioned the slots available in the choice screen. To prevent this situation, the CMA should design a remedy that allows search engines to request a free of charge incorporation in the choice screen. A possible design could include the top five search engines based on the revenues generated. An additional link could be included to show the remaining search engines available on a website. The design of the choice screen should be supervised by the CMA or the Digital Markets Unit.

(a.3) Syndication agreements

6.20 The CMA has also considered the possibility of imposing an obligation to supply syndication agreements on FRAND terms. The syndication agreement will enable smaller rivals to use the search engine of bigger platforms (i.e. Google and Bing) on their own websites in exchange of a payment. There are two problems with this proposal. First, the notion of FRAND terms is vague. It would be hard for the parties to determine its content, especially the amount to be paid. This will necessarily require the approval on a case-by-case basis by the Digital Markets Unit. Second, if the Digital Markets Unit is involved in the approval and setting FRAND terms, this could amount to a disproportionate amount of resources that could be better used in broader issues such as addressing leveraging and analysing potential killer acquisition or the issues detected in the ODM. A strategic use of resources is therefore essential.

(b) Theme 1 - Part 2: Potential interventions to address market power in social media

6.21 The CMA is considering imposing an obligation on social media platforms to interoperate with rivals. One of the important elements of its assessment is to determine its extent. On the one hand, full interoperability is the most intrusive option as it includes all the features of the platform. This may discourage innovation as it will require platforms that are designed with the same features, thus making them fully interoperable. On the other hand, limited interoperability will cover only specific features of the social media. For example, the ability to share posts from Facebook in LinkedIn. This allows platforms to compete on quality but may have a limited impact for rivals. It could ultimately lead to favouring incumbents. Our preferred option would be to strike a fair balance between full and limited interoperability. Basically, focused on allowing interoperability in respect of the core aspects of the social media that allow it to succeed. This includes basic information and network (i.e. contacts) of every consumer. In line with our previous proposal, we believe that interoperability and portability are both essential elements to tackle social media's market power.⁵³ Consumers should be able to take their data with them and to use it in the social media they prefer. The rules of interoperability should apply in the short term to the dominant platform (i.e. Facebook). In the medium to large

⁵² Case AT. 40099 Google Android.

⁵³ CLF submission, paragraph 39.

term, after the remedy has been effectively implemented, a review should be carried out to determine if other platforms should be subject to the same obligation.

6.22 Furthermore, Facebook should not be allowed to impose restrictions on the interoperability of data. Practices such as the clause included in its Developer Policy (i.e. restricting developers from replicating core elements of Facebook)⁵⁴ should be banned. These clauses have the only purpose of discouraging innovation by emulating some of the features from Facebook. We also believe that API access should be restored so consumers are free to share a post on Facebook and another social media.

(c) Theme 2: Consumers control over their own data

6.23 The Report proposes different measures to address the problems related to empower consumers for them to decide how to use their personal data. We welcome these initiatives. However, their effective implementation will require a certain level of involvement of the ICO as they tackle issues related to core areas of data protection.

(c.1) Turning off personalised advertising and changing defaults

6.24 The CLF agrees with the CMA's proposal to restrict personal advertisement as a default option. Consumers must opt-in for personalised advertisement. This must always require their express consent. The current default position must be inverted. Consumers opt-out personalised advertisement unless they voluntarily decide to change this setting. This will require updating the privacy settings of search engines and social media. The involvement of the data unit becomes essential as it must review and approve the privacy settings and also the format used by digital platforms to communicate – in a user friendly way – how their data will be processed.

6.25 If the general rule is that consumers must opt-in for personalised advertisement this could also have a positive impact on how the market works. It could stimulate competition in the market as platforms could compete to offer the best possible conditions to consumers if they voluntarily and expressly decide to receive personalised advertisement. This could effectively include the possibility of offering a negative price (i.e. payment) in favour of consumers.

6.26 Facebook has argued in defence of its practices that personalised advertisement leads to better consumer experience. Facebook's view is based on the premise that consumers are willing to give up their data to benefit from targeted advertising. The CMA should reject this premise. Not only because Facebook cannot substantiate it is this premise with evidence, but also there is evidence to the contrary. A US survey found that most US consumer do not want marketers to tailor advertisements to their interests in return

⁵⁴ Report, paragraph 6.85.

for their data.⁵⁵ In the absence of evidence, Facebook should not decide what experience is the best for consumers. Instead, consumers should be empowered to decide that for themselves. The current situation allows Facebook to force its choice upon consumers.

6.27 The current way digital platforms operate gives platform an unfair advantage. As they have free range to process – and profit – with consumers personal data by exploiting the use of defaults. In other words, the regulatory regime should put an end to the ‘free lunch’ enjoyed by digital platforms. The new default regime should consist of a presumption that consumers opt-out of personalised advertisement unless they express otherwise.

(c.2) Imposing fairness by design

6.28 The CMA is considering imposing an obligation on platforms to design their data collection practices based on: (i) neutrality of choices; (ii) making privacy controls easy; and (iii) engagement with consumers. This will require *ex ante* supervision from the Digital Markets Unit. In addition, platforms with strategic market status will be required to trial and test the choice architecture they design for their terms of use. We agree with this proposal and we understand that running the trial and test could amount to an unduly financial burden for small companies. This test should only apply to the largest digital platforms. The results of the test and the terms of use applied by the digital platforms should be approved by the Digital Markets Unit. Smaller competitors could be exempted of this obligation in the short term provided that they comply with the data collection practices detailed above.

(c.3) Designing regulations that work for small as well as large companies

6.29 The CMA has detected a competitive advantage from vertically integrated firms as they are able to secure consent from consumers through a single process. This allow them to combine data and share data across their businesses. Smaller non-vertically integrated rivals cannot compete with largest market players as there are significant barriers to access such data. We have already proposed different measures to deal with these issues. There are three specific measures that we have developed across this submission that can help to closing the gap between small and large digital platforms. First, the combination of data from third parties’ sources should not be allowed as a default setting. This will undercut the excessive power wielded by vertically integrated undertakings over consumers’ data.⁵⁶ Second, developing a regulatory framework that creates interoperability and portability of data.⁵⁷ Third, developing the concept of

⁵⁵ This survey was presented by J. Turow, M. Hennessy and N. A. Draper, ‘The trade-off Fallacy – How Marketers are Misrepresenting American Consumers and Opening them up to Exploitation’ Working Paper, University of Pennsylvania (2015). Available at: <https://www.asc.upenn.edu/news-events/publications/tradeoff-fallacy-how-marketers-are-misrepresenting-american-consumers-and>

⁵⁶ See paragraph 6.9.

⁵⁷ See paragraphs 6.21-6.22.

sharing data at risk to prevent dominant players from using the GDPR as a shield to protect their position in the market.⁵⁸

- 6.30 The CMA has also proposed engaging with the ICO to develop a framework that work across the different fields of law relevant to digital markets, namely competition law, data protection and consumer law. We think this is the right approach, however this dialogue may take time before an agreement is reached. The Report already outlines several critical aspects in the digital sector that require urgent action. While this communication takes place and an agreement is reached, the CMA could still conduct a thorough investigation of the market by making a market investigation reference.

(c.4) Options for the future: data mobility and privacy enhancing technologies

(c.4.1) Data mobility

- 6.31 Regarding data mobility the CMA has included two projects that are relevant to data mobility. First, the Data Transfer Project. This project is led by leading market players and – in theory – it will allow consumers to move their data across different platforms. It is backed by Google, Facebook, Microsoft, Apple and Twitter. The initiative must be welcomed. However, it is unlikely that it will go far enough to address the severe data portability issues because it is unlikely that the largest digital platforms will take steps that undermine their own position in the market. It is not surprising that an article recently published at Harvard Business Review acknowledges the fact that its implementation has been slow.⁵⁹
- 6.32 Another option discussed by the CMA is implementing Personal Information Management Services (PIMs). The PIMs would be a database that allow consumers to have control over their data. Consumers may authorise or revoke the authorisation.⁶⁰ The upside of the PIMs is that it has the potential to become an effective tool to tackle dominant market players if properly implemented. It could also boost innovation as it will be easier and faster to access consumer data. However, the proposal has shortcomings. The first hurdle detected by the CMA is related to the portability of the data and if derived data is included in the right to data portability in Article 20 of the GDPR. This issue should be discussed with the ICO to decide on the most appropriate interpretation. Other problems that could arise from the implementation of PIMs are that the database could be costly to implement. The costs are relevant in terms of the use of resources and the time required to complete the database. Another problem is if, once the PIMs is created, it will have a meaningful impact considering that Facebook and Google have their own databases that could have a superior level of data.

⁵⁸ See paragraph 4.6.

⁵⁹ See Harvard Business Review, <https://hbr.org/2020/01/why-companies-make-it-so-hard-for-users-to-control-their-data>

⁶⁰ Report, paragraph 6.137.

(c.4.2) Privacy enhancing technologies

6.33 The CMA has also proposed Privacy-enhancing technologies (PETs) to mitigate privacy risks. Its analysis is focused on client-side PETs that allows consumers to control the amount of data they transfer to third parties. This proposal is a positive step to empower consumers on the use of their data. In fact, there are mobile applications that are already performing a similar function such as Ernie App.⁶¹

6.34 Using PETs could certainly improve the level of protection for consumers regarding how much personal data they transfer to digital platforms. However, this is a measure that requires additional knowledge from consumers. For example, informing them about the benefits of using PETs and engaging them in the process. This is a task that will require a proactive role from both the data protection authority (i.e. designing an information campaign) and the consumers (i.e. learning how to use the app and effectively using it). The issue is that it PETs provides a solution that could place a disproportionate burden on consumers as opposed to digital platforms. PETs could certainly be implemented as a complementary role without exonerating platforms from playing the most important role to empower consumers on the use of their data. For example, avoiding the use of defaults to extract personal data and providing clear terms and conditions.

(d) Theme 3: Interventions to address concerns around transparency, conflicts and market power in digital advertising markets

(d.1) Options for the separation of integrated platforms

6.35 The CMA has analysed three possible interventions in the ODM: (i) if Google's publisher ad server should be separated or operated independently; (ii) if Google's DSPs and SSPs should be separated or operated independently; (iii) if Google should separate its data business from its advertisement business.⁶² The CMA has considered that each intervention could be carried out through divestiture or ring-fencing.

6.36 The initial view of the CMA is that ring-fencing Google's publisher ad server and SSP business would be its preferred choice. In principle we would prefer to reserve our comments on the remedies proposed until the CMA has tested them. Nonetheless, until the CMA conducts the testing exercise, we would like to provide brief preliminary views on the CMA's proposals.

6.37 One of the main issues in the ODM is vertical integration. It should be acknowledged that the ODM is in a dire situation because of the failures of the merger control regime. This situation could have been prevented in the first place if the merger rules would have

⁶¹ See Ernie app's website: <https://ernieapp.com/faq/#general1> and Ernie App's submission https://assets.publishing.service.gov.uk/media/5d76294140f0b60929c04331/190730_ErnieApp_-_Response_to_SoS_-_nonconfidential.pdf

⁶² Report, paragraph 6.163

been updated and enforced to prevent Google from being present alongside the entire market. We have expressed our views in relation to the merger control regime and how to address potential killer acquisitions in the ODM.⁶³

- 6.38 We believe that the most intrusive measure (i.e. divestiture) would in principle deliver the most effective outcome. However, we agree with the Report that this remedy may not be possible to implement in the short term, because it will require coordination with other authorities.⁶⁴ In any case, the divestiture option should remain on the table and for this purpose the CMA must be engaged in active communication with other antitrust enforcers (especially the FTC and the Commission) to decide on the best possible option for its implementation.
- 6.39 Google should divest its publisher ad server because not only manages Google's inventory, but also selects which ad to serve based on the bids it receives. The conflict of interest become evident when the other intermediaries between the publisher (i.e. Google) and the advertiser are also entities owned by Google. It could also be argued that the publisher ad server is a key link that allows Google (i.e. search engine) to leverage into the advertisement market. For the same reason there should also be a structural separation between the other intermediaries, the DSP and SSP owned by Google.
- 6.40 Google has a competitive advantage because it operates a leading search engine platform and is able to exchange data with its entities in the digital advertisement market. It is unlikely that Google's rivals in digital advertisement will be able to compete in the same conditions as Google. Therefore, there must be a restriction on the transfer of data from one market to the other. The most effective option to achieve this is through divestitures.
- 6.41 The CMA's initial view is to opt for the separation of the operation only in respect of Google's ad server and SSP business. We have expressed our views above regarding the entities that require structural separation. It should go beyond the ad tech server and SSP business. Ring-fencing Google's businesses could be a positive first step. The CMA must consider the costs involved as this remedy will require constant monitoring. A full review of the market should be conducted after two years to determine if the ring-fencing has improved market conditions. In the event that there is no improvement or an insufficient level of improvement then the only remaining option will be to opt for divestitures. By the time the review is carried out we expect that the CMA will have coordinated with other antitrust enforcers around the world to implement the divestitures.

⁶³ See our comments above, paragraphs 6.13-6.14.

⁶⁴ Report, paragraph 6.170

6.42 It is acknowledged that Google's vertical integration in the ODM is a source of efficiencies as it may allow in theory a much more efficient and faster service for advertisers. Either the structural or operational separation of Google's vertically integrated businesses is likely to be less efficient in the future. However, Google's current position in the market could end up delivering a far worse outcome. This could be expressed through higher prices or unfair terms and conditions for advertisers. There is evidence to assume that this could already be the case as advertisers do not know the amount of the fees charged by intermediaries nor they have full access to understand if their ads are performing well.

(d.2) Access to inventory

6.43 In the ODM, advertisers are forced to choosing Google's intermediaries in case they want to hire Google's targeted ads or ads on YouTube. The best way to avoid this practice is to implement the remedies detailed above in relation to structural separation.⁶⁵ In the meantime the regulatory regime could to force Google into offering its services to all intermediaries that request them without discrimination. The Digital Markets Unit will be well suited to supervise compliance with this rule.

(d.3) Interventions addressing a lack of transparency in digital advertising

6.44 In this section the CMA is requesting for views on four information requests: (i) transparency over fees charged for intermediary services; (ii) apply consistent transaction ID for each digital advertising transaction; (iii) provide sufficient data to allow for effective ad verification and attribution analysis; and (iv) sharing of bid data with publishers.

6.45 We agree with the information requests as they will allow the ODM to function in a much more transparent way. However, we would suggest that it will be essential for the data unit to be involved in this process to avoid a one-off request. The ODM will continue evolving and the ODM must have exercise periodical supervision in this market.

6.46 The CMA has also proposed auditing the auction processes for advertisement. This review is meant to be performed by the Digital Markets Unit. In principle we welcome the idea of auditing the market, as it will allow the Digital Markets Unit to have detailed knowledge of the upsides and downsides of the auction process. On the other hand, the auditing process could be complemented by principles included in the regulatory regime that serve both as a guide and a rule for intermediaries and publishers. The remit of the Digital Markets Unit should also include supervising compliance with such principles.

⁶⁵ Operational separation will also work in this case.