February 12, 2020

On The CMA Online Platforms and Digital Advertising Interim Report: Developers Alliance Comment Invitation Response

This represents the second Developers Alliance\(^1\) submission to the UK CMA’s market study into online platforms and the digital advertising market. We welcome the opportunity to provide our comments on the initial findings and the potential interventions proposed in the interim report.

This contribution doesn’t contain confidential information and can be made publicly available.

General Remarks

The digital advertising market is complex. It involves a multitude of players, including software developers whose interests we represent. Online platforms play the pivotal role of providing the ecosystem that allows companies of all sizes to efficiently deliver relevant advertising to consumers and to earn important revenues. We must find the interim report’s focus overly narrow due to its focus on only the returns of two online platforms, Facebook and Google. The report ignores the critical role that online advertising revenues play for other market participants. As underlined in our first submission, mobile application developers are among the main beneficiaries of this sector’s growth.

The interim report mentions that “online platforms that are funded by digital advertising serve multiple user groups, including consumers and advertisers” and that “some of these platforms also serve other user groups, such as publishers, retailers and app developers”. All constituencies of these digital ecosystems are equally important when it comes to the impact of market dynamics on their viability. Assessing the market only from the perspective of the revenues of two

\(^1\) The Developers Alliance is the leading advocate for the global software developers workforce and the companies that depend on them, supporting the industry’s continued growth and promoting innovation. The Developers Alliance teams in Washington, DC, and Brussels work with members and policymakers to better understand industry and technological changes and to create an environment that promotes and rewards innovation.
online platforms and ignoring developers’ reliance on digital advertising to support low-cost and free consumer services is a flawed approach. Such an approach could lead to interventions with unintended consequences.

The revenue of the mobile app economy in the United Kingdom (UK) is growing steadily. Forecasts predict that it will exceed 30 billion British pounds by 2025, approximately ten times what it was in 2013. A large part of this revenue is from monetization by means of advertising. Any assessment and eventual intervention in the digital advertising market will have a profound and direct effect on the profitability of the mobile app sector, inhibiting its growth and restricting the benefit of low-cost applications for consumers.

Not only do developers derive revenues from advertising, they are consumers of advertising services as well. From the developer community’s perspective, particular attention should be paid to targeted advertising, which represents the most efficient way to provide relevant adverts to consumers. It is also the most affordable marketing tool for small-to-medium-sized businesses, such as those of app developers. Targeted advertising helps developers reach specific customer groups, limiting the display of ads to those who are most likely to respond positively. This allows for more efficient audience cultivation, creating a positive feedback loop. Targeted advertising also provides a better measure of the efficiency of the money spent on advertising, providing valuable insights for future marketing efforts. This type of advertising is preferred because it provides more robust tracking options than other traditional forms of advertising. The share of revenues generated by targeted advertising should not be neglected either. Developers in our community indicate that relying on other formats for mobile advertising (excluding mobile ads targeting), can reduce revenues by up to one-third.

We note that the interim report also mentions “more relevant and better-targeted adverts can be expected to result in more purchases, increasing consumer and producer welfare as a result.” We appreciate that the interim report recognises the benefits of targeted ads and data. We respectfully disagree, however, that intervention would result in the most desirable outcome.

The frictions between data protection/privacy regulations and competition remedies or other ex-ante regulatory measures strongly encourage a cautious approach. The conflict between data privacy and the mandated sharing of data needs to be resolved. With GDPR in its infancy and stakeholders on all sides trying to understand its ramifications, the developer community would not welcome additional uncertainty and complexity at this time. Any interventions related to data sharing and interoperability should take into consideration the above-mentioned risks and ensure they are balanced against privacy concerns.

We welcome CMA’s proposal not to pursue a market investigation reference and instead to address specific issues through a code of conduct. Developers would support such a participative process involving all industry stakeholders that implemented practices in response to specific market issues. Even well-intentioned market investigations and regulations often come with irreversible effects on the market and a high risk of unintended consequences for participants, including app developers, if they are rushed. We see a code of conduct as a valuable and capable regulatory tool in helping to address the concerns outlined in the interim report.

On the understanding of the markets within the scope...

The interim report considers three main areas: overall revenues in digital advertising; the fees charged by intermediaries in the open display market; and the profitability of two online platforms (Google and Facebook). As highlighted previously, a proper assessment of the market should consider the importance of digital advertising revenues for all market participants. The developer community is conspicuously excluded. This is an unacceptable and fatal oversight, calling many of the report’s conclusions into question.

Digital advertising is the leading method for app monetization, which is a primary issue for every developer in the process of app development. Mobile advertising networks are essential in advertising and monetizing these apps or mobile website traffic. In turn, this monetization method is what underpins the rapid innovation in low-cost and free consumer digital services. The assessment of the market should consider the perspective of app developers when making choices that will impact mobile ad networks for UK-based users. Such an approach will provide a more accurate picture of the entire market, and thus will better identify the potential benefit, or consequences, of different interventions.

On the proposed code of conduct...

While the developer community would support a code of conduct over ex-ante regulation, developers would counsel that the overall process be driven by industry stakeholders versus government or outside experts. In our experience, self-regulation is better able to balance the objectives of the parties without distorting the market or opening the door to political influence. Developers fear that market distortions introduced by well-meaning outsiders could destabilize an ecosystem they, and virtually all mobile internet users, rely on. A broad and inclusive process that includes a wide range of players would be ideally suited to building the compromises needed to both preserve the ecosystem’s value while eliminating potential harms.

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3See, for ex.: https://www.businessofapps.com/ads/uk/
For a code of conduct to be beneficial for the ecosystem, it is key that it be well-tailored and focused on specific behaviors or ecosystem relationships, and not applied with reference to named companies. Economic models based the various roles in the ecosystem avoid the danger of creating a “ceiling”, where up and coming companies are incentivized to avoid growth beyond the point where additional burdens are applied.

Likewise, the developer community does not support the arbitrary classification of companies as part of a code of conduct in any way. A rigid categorization of companies leaves all stakeholders open to inclusion in a suspect category at some future date. Furthermore there is not enough evidence to support the added value of a separate framework that is tailored to certain business models. Instead, rules should be applied based on behaviors and unique traits of the various ecosystem roles. This should reinforce that they are neutral, universal, and free from political bias. Thus, there would be built-in incentives for parties to create a framework that was inherently fair, knowing they themselves would be subject to the same rules as others. While goals such as fairness, openness, and transparency are clearly appropriate, price controls and the other more specific elements mentioned are contentious both inside and outside the community. Ecosystem stakeholders should be left to determine and justify the specifics of these rules.

In general, the lack of clarity or definition of what a “Strategic Market Status” (SMS) is, is troublesome. This includes the allusion that there SMS-like companies in other industry sectors. Additionally, the interim report seems to imply that the regulator should be able to direct these vaguely defined SMS firms to implement, or unwind, measures for the purpose of fulfilling the objectives of the code. In regards to this proposed special framework for SMS platforms, we believe this will lead to a high level of uncertainty amongst the market players. The imposing of mandated behavioural rules by a regulator to targeted companies would preclude any incentives for further investment in affected and unintended areas.

On the potential content and design of the code, we agree with the initial proposal that it “should take the form of high-level principles rather than detailed and prescriptive rules.” We believe Table 1.1’s proposed concerns for investigation under each of the three key principles includes significant presumptions and should be an outcome, rather than an input, into the development of an industry code of conduct. Beyond high-level principles, making an early determination of what industry participants would view as beneficial would not be welcome. As previously mentioned, we suggest that industry stakeholders instead be allowed to define and support the initial set of rules. We recommend that the process and procedures for determining rules, adjudicating and verifying compliance, and resolving disputes, be left to stakeholders to determine upfront.

We also do not see a need for an expansion of authorised remedies and regulatory scope beyond what is already in place. However, after the establishment of a principle-based code of conduct, regulators could reassess the appropriateness of the tools at hand and suggest where they might be improved. Generally however, we believe that the regulators’ role should be restricted to determining the
adequacy of the proposed procedures and the representative stakeholder group overseeing the process. These steps will guarantee that the code of conduct rules and potential regulations are both flexible and adaptable to new developments.

Moving forward, reporting should be commensurate with objectively demonstrating compliance with those industry-defined and regulator approved rules. In the event of market failures, we would then support mechanisms that removed the code of conduct safe harbor protections from those companies that do not comply with the stakeholder-defined rules. This could also include future regulatory sanctions as appropriate.

On potential interventions to address market power in general search...

While Developers have no unique position on the questions from Appendix J, we would like to underline the subjects of data use, data access, and rights in data, which are of significant importance to our community. We would oppose any regulatory intervention in search that would establish industry-wide precedent over data regulation in other contexts. In general, we oppose the mandatory sharing of data in which the company in question holds shared rights with the data subject (e.g., a consumer) due to the company’s work-product in collecting, observing, analyzing, organizing, cleaning or otherwise modifying or enhancing raw data. We recognise that this is an area of significant social and political debate given that it represents an extraordinary exercise of government power to unilaterally divest private entities of their assets.

We are particularly concerned that, where competitive incentives are removed, the overall incentive to invest in data-driven innovation will be seriously compromised. We believe it is universally agreed that the societal benefits of data-driven research and innovation are undeniably beneficial and should be promoted.

Further, while the report focuses on two companies, it should be considered that “search” is a widely used function inherent in many software products and services beyond “general internet search”. Any potential intervention should be weighed against the impact and precedent that would be created for the thousands of other search providers active today and in the future.

On the effectiveness of the proposed remedy to support rivals’ ability to deliver improved search results with restricted to data from UK users, we would observe that regional variation in digital economy regulation will inevitably lead to internet fragmentation and will likely result in long term damage to protectionist economies.

As stated in the general remarks, the mandatory sharing of consumer data conflicts with the goals of consumer privacy regulation. In fact, many of the proposals in the interim report could drive irreconcilable conflict with existing consumer privacy goals. If consumers have data rights, they must include both restrictive and
permissive rights, in conflict with mandatory sharing obligations. This is obviously over and above corporate interests in their own data investments.

On potential interventions to address market power in social media...

There has been a shift in awareness regarding data privacy and data sharing practices within the digital community. The reporting of highly visible privacy violations by a small number of bad actors abusing public trust has had a profound impact on how companies operate. Inevitable reactionary responses have driven the rise of privacy regulations like GDPR. Additionally, good actors have made efforts to mitigate damage and restore consumer confidence.

Given the role that platforms play within the ecosystem, it is not surprising that they've taken a lead role in educating the developer community on good data stewardship and in disseminating tools to help our community adopt best practices. They have also taken the logical step of restricting access to those APIs which have the greatest potential for abuse by ill-intentioned third parties. On the specific questions concerning the impact of Facebook ‘Find Contacts’ and ‘Publish Actions’ APIs, we have no general response from across the developer community. Our members are acutely aware that there are many potential reasons for opening or restricting APIs.

Privacy regulation imposes pressure to restrict those APIs with the greatest potential for abuse. These APIs served to enable conscientious and valuable third party services; they were not designed to explicitly or intentionally break consumer trust. What developers agree on is, where API restrictions are introduced, there should be an obligation on the API publisher to deal in good faith with those that rely on the service. This includes a period of dialog and the opportunity to explore alternatives that are less destructive to third-party partners.

Regarding the question whether social media platforms are subject to an API access obligation and the scope of the interoperability requirements, developers have no unique position on this question. The community does agree with the general observation that API access should be voluntary and subject to compliance with overriding personal privacy objectives. It should be noted that under GDPR there is a general obligation for social media networks to provide user data in a portable format on request. In response, the industry has voluntarily agreed to standardize the format of this to improve consumer data portability (under consumer control).

On potential interventions to improve personal data mobility...

Developers have struggled to keep up with the rapid shifts in data privacy expectations for the last several years. They have yet to find stable ground following the imposition of GDPR. This is due to a lack of guidance, and more importantly experience, as the regulation has only been in place for a short amount
of time. As such, it is premature to talk about the potential effectiveness of the proposed remedies on data-sharing. The developer community believes that consumer-created data belongs to consumers and should be subject to their control. However, there are also many more classes of data where rights are shared between the various parties involved and should not be wholly under the control of any single party. In particular we observe that sharing large datasets amongst multiple unrelated players increases the risk of unauthorized access.

Beyond these concerns, we question the regulatory creation of an industry intermediary, especially where one has not naturally emerged. Today, the role described is performed by specific regulatory agencies under government control. In creating these structures, sector-specific regulators have determined that the societal benefit is preferable to granular personal data control. Thus, health records, tax records, census information, etc. are collected by the government and often provided as a service to industry participants. If the need for an intermediary proves to be a societal concern (without a natural economic incentive), then the government could play such a role here.

Alternatively, it is unclear whether adding yet another layer to an already complex industry landscape would not create yet another large platform in this market area. Such an addition would come with all new concerns, solving little and further complicating the issue. Personal Information Management Systems (PIMs) represent a new area of software development. These may lead to new business models. As we are in an incipient development stage it is too early to anticipate the feasibility of alternatives to well-established and economically efficient proven solutions.

While a single generalized social network is the target of this proposal, we would like to note that there are many smaller communities who thrive on smaller social platforms. These small or specialized platforms and the communities they host come with unique characteristics that have not been adequately studied and taken into account. To reiterate our point, we are concerned that a proposal which targets a single company, or an arbitrarily defined category of companies, would create a precedent with a much larger impact; an effect that would be likely detrimental to these small and specialized communities.

The interim report makes reference to privacy-enhancing technologies and questions their feasibility in practical and technical terms. The developer community has no unique position on these questions other than to observe in passing that the outcome would be similar to the models used by the radio, television, and magazine broadcast industry of decades past. The ability to offer applications, search, social media, and the full range of modern internet services without charge to consumers is enabled by the efficiencies gained through improved advertising targeting. Eliminating these efficiencies, without offering a viable alternative, would inevitably drive up the overall cost of the ecosystem, and likely result in reduced innovation, fewer service options, and increased costs for consumers and ecosystem participants.
On potential interventions in digital advertising markets...

We are not able to provide a convergence of opinion from the developer community in regards to possible interventions. We believe it will be difficult for any existing party to predict what will become necessary over and above the code of conduct, proposed in Appendix M, and especially to potential separation interventions. Nevertheless, we express our disapproval of remedies that are not founded on well-developed impact assessments. The assessments must provide compelling evidence that the interventions will not destabilize the ecosystem and/or significantly affect other market participants.

Developers do, however, see the value of the report’s proposed improvements regarding transparency interventions in digital advertising markets. We agree that some of the concerns, including those related to algorithm changes, bids in auctions, or fees, may be addressed by a code of conduct.

On the possibility of pursuing a market investigation and further work...

As previously mentioned in the introductory remarks, we agree with the proposal’s conclusion not to make a market investigation reference. Developers would support a participative process, involving all stakeholders, which could provide adequate measures to address specific issues which are already identified by the interim report. At present, it seems that there is not enough evidence of systemic problems that would support any of the broaded regulatory measures proposed. The regulatory approach should be cautiously appraised in the second half of the study, taking into consideration all the implications, including the global nature of advertising and marketing.

There are no special comments from us on the specific areas for further and more detailed analysis which are envisaged for the second half of the study.

In Conclusion

Digital advertising is the engine that powers the “free” internet economy. The efficiencies it has provided subsidize innovative and valuable consumer services. Eliminating or restricting digital advertising will drive up consumer costs, reduce innovation, and threaten the undeniable societal benefits coming from the data economy. Digital balkanization in this way would severely impact the digital economy, most notably for digital protectionists.

In conclusion, as stated throughout this contribution, we support the creation of an industry-led, regulator reviewed, and approved by all, code of conduct. Industry-led solutions have proved to be the best path forward in multiple industries for cross-jurisdictional change. This is especially true for those industries who are consistently subjected to rapid and dramatic changes. Digital advertising and the
software development that supports it should be seen as textbook examples of such areas. Such a code would not only be the best first step, but the best solution generally to affect real and lasting change without unintended or negative consequences.

The Developers Alliance remains at CMA’s disposal for further engagement in the second half of the market study.