

# Response to the CMA's interim report on Online Platforms and Digital Advertising

## Summary

The clear dominance of Google and Facebook has a wider impact than their immediate markets and heavily impacts other sectors which rely on advertising revenues for funding. This includes commercially funded broadcasting.

The grip of these two companies on the UK online advertising market is even tighter. In 2018, online advertising generated revenues of £13.4bn in the UK<sup>1</sup>. Between them, it is estimated that Google and Facebook generated 61% of this total, approximately £8.2bn<sup>2</sup>. This eclipses the total revenues of the entire UK television advertising sector (£5.1bn in 2018)<sup>3</sup>.

The dominance of Google and Facebook has led to a distorted market and a number of issues, particularly in the following areas;

### **Measurement**

In stark contrast to TV, Google and Facebook both refuse to have the reach and impact of their advertising independently checked and verified. This enables these companies to “mark their own homework”, exaggerate and over-inflate their numbers to make their offering seem more attractive than alternatives. This distorts the marketplace and because of their scale and influence advertisers have little alternative, despite the lack of verifiable independent measurement.

### **Setting unreasonable terms**

The scale, market power and lack of viable alternatives mean that Google and Facebook can set the terms by which they do business. This means content creators are forced to accept unequitable terms or fail to reach the audiences on these platforms. This is particularly problematic for Broadcasters who need to reach younger audiences who increasingly use these platforms to access content.

### **Control of the advertising ecosystem**

Google's involvement at all levels of the advertising ecosystem creates conflicts of interest. Its position as both buyer and seller, as setter of the rules and beneficiary of those rules is unsustainable.

## Proposed solutions

There is a compelling case for a direct market intervention by the CMA to prevent further harm on the basis of protecting media plurality and continuing to ensure the provision of high-quality British Broadcasting, particularly for otherwise underserved audiences in the United Kingdom.

In particular the CMA should consider implementing;

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<sup>1</sup> Ofcom, [Online Nation](#), May 2019

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

## A) An enforceable code of conduct

Given the immediacy and impact on the market of these issues, it is appropriate and important that the CMA take direct action, using its own order making powers to introduce a code of conduct immediately.

It is vital that any code of conduct is clear and specific enough to address problems that arise. It must be meaningful and directly actionable by an independent empowered regulator and organisations covered by the code must have real incentives to comply.

In order for the code to be truly meaningful the regulator responsible must be able to draw on a full suite of powers in the event of a breach. The regulator's powers should include but not be limited to imposing the following;

- **Significant Fines** –The EU have fined Google more than €8bn over the last three years for a range of anti-competitive practices. Companies like Google and Facebook, with such high levels of profitability may treat financial penalties as a simple cost of doing business and a cost worth paying to establish their dominance. Fines must therefore be large enough to act as a real disincentive. The General Data Protection Regulation (GDPR) enables the Information Commissioners Office (ICO) to fine companies up to 4% of their annual revenue.
- **Personal responsibility/liability for Directors** –The ICO have recommended holding Directors personally responsible for data breaches in the past and that similar liabilities exist in the financial sector and are known as “senior management liability” where firms have to appoint a director to take personal responsibility for ensuring they meet their legal duties. They face fines and criminal prosecution for breaches. This direct liability should also apply to breaches of this code.
- **Roll back** –The regulator must have the ability to force companies to roll back features.

The code should be principles based but backed by significant penalties and should cover the following areas:

### i) Independent Measurement

There is a clear and urgent need for platforms like Google and Facebook to be forced to enable industry standard, independent, third party measurement and verification of their advertising. There have been a number of high profile cases<sup>4</sup> in which the metrics used to demonstrate the effectiveness of ads on Google and Facebook have been shown to be overinflated or misleading.

These examples of Google and Facebook “marking their own homework” have serious consequences for the rest of the industry. By overstating the reach and impact of their advertising they make it more attractive to potential buyers of that advertising, making it more likely that brands and agencies will choose to invest in online advertising than they might in television or print advertising. The continued lack of information and clear independent measurement combined with brand safety issues<sup>5</sup> and numerous examples of overstating the impact and reach of online advertising has resulted in a distortion of the advertising market and an uneven playing field.

The size of Google and Facebook's user base and their unparalleled access to the data of these users means advertisers are unable to stop advertising on these platforms despite the

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<sup>4</sup> [Guardian](#), [New York Times](#), [Telegraph](#)

<sup>5</sup> [The Times](#)

inability to measure the effectiveness of their campaigns. This demonstrates a clear market failure which has resulted directly because of the size and influence of Google and Facebook.

In sharp contrast to online advertising the measurement of TV advertising is trusted, standardised and independently verifiable. BARB (Broadcasters' Audience Research Board) was set up by broadcasters in partnership with the IPA (Institute of Practitioners of Advertising) in 1981 to provide an accurate picture of viewing for broadcasters and advertisers – it uses a panel of 5,300 homes containing over 12,000 people representative of the variety of household types, demographics, TV platforms and geographies of the UK.

As viewing habits have changed and Broadcasters have launched on demand services BARB also collects device-based data whenever anyone in the UK watches a BVOD (Broadcaster Video on Demand) service on a tablet, PC or smartphone. These data provide a census-level measure of what's been watched and for how long.

Together this provides a full and accurate picture of viewing across all services offered by broadcasters which enables advertisers to make informed decisions about their investments.

There is no reason why, especially given their vast resources, Google and Facebook cannot provide advertisers with a similar level of transparency but to date they have refused to do so thereby exacerbating the distortion of the market which works heavily in their favour.

It is vital that the code of conduct ensures that platforms which are judged to have strategic market status (SMS) are obliged to share independently verifiable metrics so that advertisers can fairly judge the effectiveness of their advertising in comparison to alternative methods.

## **ii) Setting reasonable terms**

The code of conduct should also set up a new “terms of trade” between content providers and platforms to ensure platforms can no longer leverage their market power to dictate terms. Similarly, the code of conduct should ensure Google and Facebook cannot leverage their market power to set unreasonable terms for advertisers using their services.

### **With Content Providers**

The size and scale of Google and Facebook combined with the lack of viable alternatives for reaching large and particularly young audiences means that they are able to set unreasonable terms for using their platforms to access these audiences.

In a more competitive market there would be a greater degree of downward pressure on the revenue split between platforms and content providers. It cannot be right that having taken all of the risk to invest in the creation and production of high quality content that platforms, who take none of the risk but gain significant benefit from having high quality content on their platform, can take such a significant share of the revenue.

The code of conduct proposed by the CMA should therefore also form the basis of a new standardised “terms of trade” between content providers and platforms.

This is not without precedent, in 2003 a terms of trade agreement was established under a statutory code of practice which set out a framework of principles which govern the way the PSBs do business with independent production companies. This agreement was introduced to address the imbalance of negotiating power that existed between a small number of powerful “buyers” (the broadcasters) and a larger number of less powerful “sellers” (the production companies).

This imbalance meant that there was a risk that broadcasters could set unreasonable terms because production companies had a limited number of alternative places to sell their programmes. This same imbalance – a limited number of dominant “buyers” and multiple, less powerful “sellers” - exists today between content providers and platforms like Google and Facebook. Consequently, the same risk of abuse exists, and we believe there is clear evidence that Google and Facebook are already abusing this position of dominance. The introduction of a terms of trade agreement is an established means of dealing with such an imbalance.

The CMA is best placed to introduce a new terms of trade on the basis that there is a clear power imbalance between platforms and content providers which does not allow for the parties involved to reach a mutually equitable agreement.

### **With Advertisers**

Google’s market power also enables it to impose arbitrary and unreasonable conditions on advertisers wishing to use their platform which serve to which further strengthen its market position.

The CMA recognise the potential for Google and Facebook to leverage their size and market power in the interim report, highlighting that *“Harm could also take the form of exclusionary behaviour. Google and Facebook appear to have the incentive and ability to leverage their market power in general search and social media into other related services – both user-facing services and wider digital advertising markets. This can have the effect of making it more difficult for competitors in these markets to compete and of protecting the platforms’ core market power. We have heard these types of concerns raised in relation to several user markets, and are considering how to take these complaints forward in the second half of the study”*.

Google is using its market power to impose conditions on third parties which are unreasonable and arbitrary in order to further strengthen its market position and we believe there is significant evidence to justify a Market Investigation Reference (MIR) and to consider measures to remedy this.

The CMA should also consider the mandating of access by independent DSPs to Google’s YouTube advertising inventory. It should be possible for Google to allow qualified DSPs to sell YouTube advertising in compliance with GDPR. This would allow businesses the freedom to choose competing DSPs to Google’s DV360.

In addition, many social platforms (including Facebook) - do not allow content providers to sell their own advertising around the content they post. This means we are not able to include it within our wider sales business; we have no control of the price at which this is sold and thus the revenue we may make; and we have much more limited control over which advertisers may appear around our content, with the associated brand safety risks.

While Google does allow some third parties to sell advertising on their platform, our experience has been that it is difficult to agree terms that are acceptable - for instance, because of effective floor CPMs being set by the platform which are unreasonable and would lead to an uneconomic model for us.

While the use of a code of practice will help to remedy some of these concerns and prevent conflicts of interest, we believe the most effective form of remedy would be the introduction of a code of practice in combination with the structural separation of parts of Google’s advertising tech stack and limits on the user data that can be shared across services owned

and operated by the same company. We go into further detail on this in the separation section below.

## **B) Structural separation**

The most effective means of remedy is a new code of conduct combined with the structural separation of parts of Google's advertising tech stack and limits on the user data that can be shared across services owned and operated by the same company.

We have serious concerns with the "black box" nature of Google's advertising sales and the conflicts of interest that exist at the heart of this process because of Google's involvement at all levels of the process its position as both buyer and seller, as setter of the rules and beneficiary of those rules. There is a clear case for the CMA to intervene to remedy these conflicts of interest as a matter of urgency.

In addition to the enforceable Code of Conduct, and limits on data sharing by platforms designated as having strategic market status, there is already strong evidence provided by the CMA's interim report to consider structural separation of certain parts of Google and Facebook's UK businesses in order to promote and ensure effective competition in the digital advertising market.

The CMA highlight in the interim report that *"there is significant concern from market players that Google is able to use its market power in inventory and data to advantage its DSP services; use its influence over advertiser demand (from Google Ads) to favour its ad server and SSP; and use its market power as an ad server to favour its SSP"*.

The implementation of an enforceable Code of Conduct would be an important first step in addressing this concern but we believe it may not be sufficient in tackling the perceived and significant real conflicts of interests for actors that operate at multiple levels of the intermediation value chain.

We believe it is therefore necessary to structurally separate the parts of Google's UK business involved in multiple stages of the advertising sales process to better ensure fairness in this process and that abuses of market power cannot take place.

While it is not practicable for the CMA, a national regulator, to impose ownership separation on International SMS platforms we do believe the CMA should consider imposing restrictions on the extent to which these vertically integrated organisations can share data across their various services. There should be restrictions placed on the ability of Facebook to share the data of UK users with Instagram and WhatsApp and similarly Google should be limited in sharing UK user data between YouTube and its search, Maps, Mail, Photos and other services. Such an intervention would reduce the ability of these platforms to leverage their scale and market power, fostering better competition in the market.

## **Market Investigation Reference**

The CMA should introduce a Market Investigation Reference and it should consider all options which would lead to effective competition in the digital advertising market including structural separation. If the CMA conclude that there is cause to separate parts of Google and Facebook's businesses, given the scale and immediacy of the concerns they have identified, the CMA should move forward with those proposals immediately rather than risk further harm to those trying to compete with Google and Facebook in an already distorted and unfair market.

Where there is a strong case for introducing remedies to ensure effective competition in a marketplace the CMA is the most appropriate body to decide what interventions are necessary and to implement them.

## **Conclusion**

We agree with the CMA that there is a strong argument for the development of a pro-competitive regulatory regime and believe there is an urgent need for the CMA to act to put one in place. Google and Facebook's size, scale and market dominance has resulted in a number of practices which have distorted the market to the detriment of those trying to compete, of consumers and of wider society. However, the CMA have identified a suite of measures that could, in combination, help to remedy these issues. There is a clear case for the introduction of an enforceable code of conduct to govern the behaviours of these platforms. We also believe these platforms should be required to have the reach and impact of their advertising independently verified and enter into a terms of trade agreement with content providers to ensure an equitable split of revenues. Finally, we believe Google and Facebook should be prevented from sharing data across their services and that the CMA should seek to structurally separate Google's Advertising tech stack. Taken together these measures stand a chance of remedying the distorted market that has been created by Google and Facebook's practices and the CMA should use its own order making powers to implement these proposals as a matter of urgency.