

# Comments on the CMA Statement of Scope published 3 July 2019 (the “Scope”)

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## 1. Introduction

ResPublica is one of the country’s most successful public policy think tanks. We’ve achieved this by being radical in our thought, and persistent in our representations to policymakers, all based on rigorously evidenced proposals. Our work has been adopted by both Government and Opposition, and we frequently contribute evidence to Parliamentary Select Committees. Our ideas and recommendations have been endorsed by regulators, high-profile commissions, leading commentators, faith leaders, senior civil servants and entrepreneurs. Our work is consistently featured in local, national and international media outlets and we often provide viewpoints and commentary for current affairs discussions. We look ahead of the curve, and our publications and events remain independent from political agendas, Whitehall and private enterprise, and are guided by our political philosophy and our mission.

We authored *Technopoly: and what to do about it* (“**Technopoly**”), published in June 2018 with the Big Innovation Centre, which was heavily influential in persuading HM Treasury to conduct a review of competition in digital markets, headed by Professor Jason Furman (the “**Furman Review**”). We welcomed the Furman Review, published in March 2019, in addressing many of the issues identified in *Technopoly*. In particular, we note that the Furman Review identified the following key<sup>1</sup> issues in its Recommendations:

- To sustain and promote effective competition in digital markets, government should establish a pro-competition digital markets unit.
- Merger assessment in digital markets needs a reset.
- The CMA’s enforcement tools against anti-competitive conduct should be updated and effectively used.
- Machine learning algorithms and artificial intelligence need to be monitored to ensure it does not lead to anti-competitive activity to consumer detriment, with particular reference to vulnerable consumers.
- The CMA should conduct a market study into the digital advertising market encompassing the entire value chain.
- International coordination and engagement is necessary on government actions and recommendations to be taken following the review to ensure international best practice and a common approach.

Overall, we welcome the CMA’s announcement of a study into of these markets. In principle, the CMA’s study addresses, or could address, a number of the Furman Review’s recommendations. However, as presently defined, the Scope is unfortunately limited and seeks to address only part of the value chain, and fails to pick up the issue of merger assessment both needing a reset and being among the sources of market power of the current platform operators. While we appreciate that merger control can be assessed as a discreet administrative matter, nevertheless its absence has been a source of market

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<sup>1</sup> See Furman Review p. 138-140, Strategic Recommendations A-F.

power for many platform companies who have collectively acquired hundreds of companies over recent years.<sup>2</sup>

We are also concerned that the definition of market to be assessed is not apparently to be conducted against economic markets that are affected by the platforms. The Scope draws an arbitrary boundary between products that compete with each other and are funded by advertising, and those which are funded by other means. We consider this to be a significant deficiency.

Our concerns about the Scope are summarised below.

## **2. Product Market Definition with relation to Funding Mechanisms<sup>3</sup>**

The CMA states that platforms not funded by advertising are outside the scope of the study. This appears to indicate that funding mechanisms are relevant to product market definition. It may confuse the product offering to the end consumer which may be free with a variety of funding mechanisms.

Three points arise:

- A product which is free at the consumer level may nevertheless compete with products funded by other means. Businesses may offer products for free or as experience goods for a trial period or as free versions for limited functionality with full functionality behind a paywall (many online media companies adopt the model of a limited number of articles being available free of charge, while heavier use incur a subscription based-charge). Games companies may offer limited use versions free of charge in a similar basis. Further examples can be seen whereby acquisition of volumes of users may have value for monetization at a later point irrespective of the mechanism used for that monetization. Platforms often raise money for access to end users – and over time both sides of the platform are interrelated and interdependent such that payment is made – whether for advertising or for data or for access in many ways – and to rule out or into the set of things that need to be investigated and make the boundary of the study dependent of a business model being funded by advertising is to draw an arbitrary boundary around part of a market and a product offering. The study should investigate how ad-funded products compete with products funded from other sources.
- As a matter of competition law, the proper assessment of substitution between products when looked at from the perspective of an end user, as required by CMA Guidelines,<sup>4</sup> is a different issue to the form of funding models used to finance a business.<sup>5</sup> The platforms in question offer multiple products some of which may benefit from the power of the platform and be offered free of payment in cash but may be paid for in kind or with data, and some of which may simply compete head on with other products with different funding mechanisms as well as different payment mechanisms.
- We have an in depth understanding of the nature of two-sided markets and appreciate that the CMA is looking to investigate the impact on the advertising supply chains of platform market power, in line with the recommendations of the Furman Review. However, at a threshold stage funding models appear to be being used to exclude certain alternatives from the scope of the study. We believe that at the very least the CMA should retain the option for further investigation. Many notorious abuses whereby dominant platforms abused that dominance by acquiring rivals

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<sup>2</sup> See *Technopoly* page 22 – Google has acquired at least 215 businesses since 2001, and Facebook at least 69 since 2007.

<sup>3</sup> CMA Statement of Scope paragraph 10. “*We do not propose to focus in our study on platforms that are not funded by digital advertising.*”

<sup>4</sup> And the guidelines of sophisticated competition authorities such as the EU Commission and the US authorities.

<sup>5</sup> And in some cases, the provision of the service to the consumer is highly inter-related with the provision of the service to the advertiser- in other cases the side of the platform and the two products markets are less closely coupled. See Just Eat/Hungry House and Jean Tirole *Economics for the Common Good*.

involved cases of ad-funded and otherwise funded players: see WhatsApp, SnapChat, and Instagram which were not originally funded by advertising but were always competing with the platforms that may have since acquired them. The CMA risks repeating the now notorious mistakes that were made in cases<sup>6</sup> such as the Facebook/WhatsApp EU Merger Decision<sup>7</sup> where the failure by the EU Commission to appreciate that a messaging service from Facebook and a messaging service from WhatsApp could be regarded as substitutes by end users irrespective of the funding mechanism and how they were paid for. Here, for the purpose of defining the scope of the enquiry, an arbitrary decision that certain markets or sub-markets are not to be investigated because of differences in their funding models is an entirely inappropriate starting point

### 3. Sources of Market Power

The CMA states that it *“is launching a market study, which will consider the sources of the online platforms’ market power,”*<sup>8</sup> and that *“Digital advertising markets have been subject to rapid technological development and successful entry, particularly in the early stages of their development. We will consider the extent to which dynamic competition may constrain market power in the future, taking account of the competitive advantages enjoyed by the current incumbents and the role of the data they possess.”*<sup>9</sup>

Assessing market power is a natural starting point for understanding the issues that should be the focus of the study, however we are concerned that the scope for the study as currently contemplated risks excluding as a source of market power the acquisition of new entrants and competitors. No mention is made of mergers and the effect of mergers in reinforcing the position of the platforms over their rivals in downstream markets and the consequences for the enhancement of market power in the platform markets.

The platforms have acquired huge numbers of companies and those acquisitions and the inclusion of products that were either horizontal competitors or complimentary businesses that were then integrated into the platforms, preferred and presented over third party rivals is likely to have been a source of considerable market power. See, for example, Google’s acquisition of Keystone and other mapping companies and the later integration and promotion of Google Maps to the top of Google’s search engine results pages and Google’s acquisition of shopping companies and their later inclusion in Google Shopping over rivals (which was the subject of the EU Commission’s Search case and fine).

Many companies that were started up and competed with the main platforms were funded and paid for in many different ways. The fact that when they were started they were not funded by advertising is not a reason to ignore those acquisitions as a source of market power; Instagram, WhatsApp and SnapChat were not originally funded by advertising.

Taking the approach that part of the study could investigate and evaluate acquisitions of entrants as a source of market power, this could be done quickly given the data is available from the platforms and the CMA has the powers to demand it; it would be a relatively discrete exercise. We believe that it is also important in any evaluation of entry, any remedy and barriers to entry, and the extent to which the dynamic of the market can be expected to operate as a constraint on the market power of the platforms.

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

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<sup>6</sup> See also the CMA commissioned Lear Report 2019.

<sup>7</sup> ResPublica 2018

<sup>8</sup> CMA Statement of Scope paragraph 49.

<sup>9</sup> CMA Statement of Scope paragraph 57.

## **4. Reference Market**

The CMA is consulting on the scope of its study. It has referred to various items of market research, studies, and assessments. It has referenced well-known sources for market information. The IAB represents certain businesses and assesses the market according to its own criteria. It has made findings such as that the total digital advertising market in the UK continues to experience strong growth.<sup>10</sup> In its statement of scope the CMA has referred to its sources but also appears to have endorsed those sources. The CMA may have gone further than necessary and made findings about the market that may be better left to findings arising as a result of its investigations. It may be better to reference the studies and points of view of others that have informed the CMA to date and expressly leave the findings and conclusions to be determined by the decision and conclusions arising from the study in due course.

## **5. Regulatory Arbitrage; Stacks and Ecosystems**

The CMA is considering data mobility, open standards and open data. In the course of the study we see it as inevitable that the CMA should investigate the entire technology stack and its regulation and appreciate the extent to which the platform players benefit from rules that are less strict, impose lower costs and create regulatory arbitrage. The telecoms regulatory policy initially saw internet companies in terms of small internet services providers that competed with major dominant telecoms platforms and regulation was originally designed to facilitate new entry. Those rules have succeeded and have been a factor in the sources of market power of the current platforms. This needed to be further investigated in the CMA's study.

There is also a clear interrelationship between the platforms that operate at the top of the technology stack and other layers on which it depends. Non-reciprocal access has further enabled the newer players to compete on an unlevel playing field.

Technological innovation operates as a dynamic ecosystem rather than a series of discreet supply chains. The CMA needs to be cognisant of the fact that regulation has operated on certain components in a stack or ecosystem and consider the implications on the ecosystem and dynamic competition over time.

## **6. Overlapping Jurisdictions and Timeframes**

Given the multi-country provision of services and international offerings of the platforms, it is inevitable that the CMA study will overlap and have implications for competition investigations currently running before other authorities worldwide, with implications for ongoing litigation and cases that are currently under consideration before the EU and UK courts involving a number of platform operators and those affected by their anticompetitive practices. We call to the CMA's attention that its study needs to be impartial, independent and involve a dispassionate assessment of the facts and matters under consideration; with sensitivity to matters that are sub-judice. We recognize that the CMA has powers to obtain evidence within its own statutory remit but ought to take into account and treat with care and sensitivity the potential consequences for other investigations and cases. In the light of this issue, some guidance at an early stage on how the CMA intends to approach evidence gathering with respect to overlapping cases and investigations would be welcome for all concerned.

## **7. Share of Voice**

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<sup>10</sup> See IAB 2018 and Fig 2 Statement of Scope.

Many of those affected by the major global platforms have no mechanism through which to share their views and no opportunity to present evidence and perspectives to the CMA. The enquiry risks being dominated by the platforms and their major users on the business side with insufficient evidence or weight being placed on the views of many adversely affected. Whether those affected are consumers, or smaller businesses or simply those that do not have the financial wherewithal or time to be involved should not be confused with the importance of those voices to the CMA's consideration.

## **8. Institutional Reform**

We note that the CMA is considering the Furman Review's recommendations on institutional reform. We note the Furman Review's proposal for a Digital Markets Unit. While we see the interest that the CMA has in the recommendation, we also note that the CMA's position is one of an institution with an interest in the outcome and that this is not an issue in which it is can exercise a position that is entirely impartial.