

Response to the CMA's Market Study Interim Report on Online Platforms and Digital Advertising

Submitted by Prof. Derek McAuley and Dr. Jiahong Chen of
Horizon Digital Economy Research Institute, University of Nottingham

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1. Horizon¹ is a Research Institute centred at The University of Nottingham and a Research Hub within the UKRI Digital Economy programme². Horizon brings together researchers from a broad range of disciplines to investigate the opportunities and challenges arising from the increased use of digital technology in our everyday lives. Prof. McAuley is Director of Horizon, and was a member of the Furman Digital Competition Expert Panel for HM Treasury that published the "Unlocking Digital Competition" report³, and Principal Investigator of the ESRC-funded CaSMa⁴ (Citizen-centric approaches to Social Media analysis) project to promote ways for individuals to control their data and online privacy, and the EPSRC-funded UnBias⁵ (Emancipating Users Against Algorithmic Biases for a Trusted Digital Economy) project for raising user awareness and agency when using algorithmic services. Dr Jiahong Chen is a Researcher Fellow of Horizon, formerly working on his doctoral project on data protection and online behavioural advertising. We are happy for this response to be published in full.

Consultation questions

1) Do you agree with our descriptions of general search services and social media service, as set out in Chapters 2 and 3?

2. Yes.

2) Do you agree with our explanation of the different forms of digital advertising, as set out in Chapter 5?

3. Yes.

3) Do you agree with our explanation of how the intermediated open display market operates, as set out in appendix H?

4. Yes.

¹ <http://www.horizon.ac.uk>

² <https://epsrc.ukri.org/research/ourportfolio/themes/digitaleconomy/>

³ <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>

⁴ <http://casma.wp.horizon.ac.uk>

⁵ <http://unbias.wp.horizon.ac.uk>

4) Do you agree with our understanding of the role of data, as set out in Appendix E?

5. We agree with the factual description of how data is generated and consumed in the online advertising ecosystem, but do not fully agree with the implications suggested in Appendix E. Specifically, we believe it has been significantly understated how the unique role of data in this sector will challenge the conventional ways to assess competition and market power in this sector.
6. It has been rightly pointed out that “[i]n order to compete, these platforms as well as intermediaries in the open display market can supplement their own data with data from other market participants, [... but] this requires rival platforms and intermediaries to extensively share data between one another [...].” This means, new entrants to the market, while technically competing with the dominant players, will have to somehow connect to the complex advertising data networks (directly or indirectly), which will eventually further empower those who control the operation of the networks. In other words, unlike other traditional markets, the digital advertising sector exhibits certain characteristics with which consumer welfare is not necessarily improved simply by an increased number of competitors in the market. The report should make it clearer that market share is not the most decisive factor and emphasise the importance of looking into the market structure underlain by the infrastructural architecture and data flows.

5) Do you agree with our analysis and findings in relation to competition in search and social media, as set out in Chapter 3?

7. No.
8. The analysis in Chapter 3 relies heavily on submissions from Google and Microsoft, whose evidential rigour and neutrality are highly challengeable. The claim that click-and-query data plays an important role in the improvement of search quality lacks independent, verifiable empirical support. While there were blind tests taking place back in 2009⁶ and 2012⁷ between major search engines, the impartiality of these tests is questionable given the potential conflict of interest as well as the limited number of providers covered. Moreover, what might have potentially changed the landscape is the launching of privacy-friendly search engines, such as DuckDuckGo and Startpage. The dominance of Google in the general search engine market is not necessarily an indication of its overall better performance, but possibly just a result of user inertia or Google’s arguably anti-competitive behaviour, such as the forced integration of accounts across Google services in 2012.⁸ We call on the CMA to conduct or commission an independent, comprehensive, up-to-date study on search engine performance in relation to the use of click-and-query data.

6) Do you agree with our analysis and findings in relation to consumer control over data, as set out in Chapter 4?

9. No.
10. Similarly to our response to Question 5, we have doubts about the robustness of the evidence submitted by participants in the market, especially Google. Our literature review reveals that findings of the efficacy of targeted advertising in enhancing click-through rates and conversion rates

⁶ <https://www.istartedsomething.com/20090607/bing-vs-google-vs-yahoo-blind-search-engine-test/>

⁷ <https://blogs.bing.com/search/2012/09/06/take-the-bing-it-on-challenge/>

⁸ <https://www.theguardian.com/technology/2012/jan/25/google-merge-user-data-privacy>

vary remarkably across studies and depend heavily on the chosen methodology and datasets.⁹ The fact that the datasets used in those studies are available only to research teams affiliated with the market participants makes those results entirely unverifiable.

11. We would also like to point out certain issues with the “consumer attitudes to data processing” section. While we see the importance to objectively measure consumer attitudes, existing studies tend to be subject to criticisms in terms of methodological rigour and policymaking relevance. On the one hand, empirical studies on user attitudes to online advertising are known to have produced starkly contradictory results due to the different research set-up and question framing.¹⁰ On the other hand, it is unclear to what extent these findings can inform policymaking and law enforcement. Our research has shown that, when it comes to the trade-offs between the benefits of online services and the risks of use of their data, internet users tend to overestimate the value of these services. For example, in a 2014 Advertising Association report, it was quoted that on average internet users would value social media at £28 per year,¹¹ whereas Facebook’s annual average revenue per user (ARPU) in the same year was much lower, standing at a mere \$11.60 (approximately £8.90).¹² In other words, market failure is evident in this sector because of the distorted consumer behaviour and attitudes caused by information asymmetries.

7) Do you agree with our analysis and findings in relation to competition in digital advertising, as set out in Chapter 5?

12. No. We must challenge a few assumptions that seem to have been taken as a matter of fact in this Chapter.
13. First, we share the view of the ICO’s Adtech Report¹³ that data processing for real-time bidding (RTB) “is taking place unlawfully” due to the lack of valid consent, and “[e]ven if an argument could be made for reliance on legitimate interests, participants within the ecosystem are unable to demonstrate that they have properly carried out the legitimate interests tests and implemented

⁹ For example, see Jun Yan and others, “How Much Can Behavioral Targeting Help Online Advertising?” (Proceedings of the 18th International Conference on World Wide Web, Madrid, 20-24 April 2009); Ayma Farahat and Michael Bailey, “How Effective is Targeted Advertising?” (Proceedings of the 21st International Conference on World Wide Web, Lyon, 16-20 April 2012); PubMatic, “Understanding Real-Time Bidding (RTB) From the Publisher Perspective” (2010), archived at https://web.archive.org/web/20150319040044/http://pubmaticblog.com/wp-content/uploads/2014/06/Understanding_RT_B_Q12010.pdf, P11; Craig Dempster and John Lee, “The Rise of the Platform Marketer: Performance Marketing with Google, Facebook, and Twitter, Plus the Latest High-Growth Digital Advertising Platforms” (John Wiley & Sons, Inc. 2015) P10.

¹⁰ See, for example, Zogby Analytics, “Interactive Survey of US Adults” (2013) http://www.aboutads.info/resource/image/Poll/Zogby_DAA_Poll.pdf; Network Advertising Initiative, “US Internet Users Understand and Value Interest-Based Advertising, According to DAA Survey” (2013) <http://www.networkadvertising.org/blog/us-internet-users-understand-and-value-interest-based-advertising-according-daa-survey>; TNS, “2009 Study: Consumer Attitudes About Behavioral Targeting” (2009) https://dsimg.ubm-us.net/envelope/104162/339732/1249993418527_TRUSTe_TNS_2009_BT_Study_Summary.pdf; Joseph Turow and others, “Contrary to What Marketers Say, Americans Reject Tailored Advertising and Three Activities That Enable It” (2009) <http://ssrn.com/abstract=1478214>; Mark Sableman, Heather Shoenberger and Esther Thorson, “Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates” [2013](1) Media Law Resource Center Bulletin.

¹¹ Advertising Association, “Advertising Pays 3: The Value of Advertising to the UK’s Culture, Media and Sport” (2015) <http://www.adassoc.org.uk/wp-content/uploads/2015/01/Advertising-Pays-3.pdf>

¹² Facebook Inc., “Form 10-K” (2016) https://s21.g4cdn.com/399680738/files/doc_financials/annual_reports/2015-Annual-Report.pdf

¹³ <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906.pdf>

appropriate safeguards”. This is further confirmed with the evidence provided by the present report, and the clear implication is, “[m]arket participants must therefore modify existing consent mechanisms to collect explicit consent, or they should not process this data at all”.¹⁴ However, Section 5 of the CMA’s report (especially para 5.231) seems to have misinterpreted the ICO’s view, or at least have downplayed the level of non-compliance in practice, by simply noting “it is not possible for consumers to provide valid consent to the processing of their personal data [...] due to PECR’s requirements and also because of the nature of the processing”. We urge the CMA to make it clear in the final report that current practices are unlikely to be in line with data protection law, and may thus cause serious consumer harms. Our research has shown that children and young people are even more susceptible to these harms, and in order to protect vulnerable groups – indeed as an age-appropriate design requirement – no tracking or collection of personal data for online advertising should take place by default.¹⁵

14. Second, the CMA should challenge the claims that “the GDPR might lead to continuing consolidation of the display advertising market” and that “GDPR and privacy concerns have been used to justify a reduction in sharing of data with other market participants”. In fact, vertical or horizontal integration does not necessarily lead to better compliance with data protection law, and there are certainly alternative mechanisms to ensure a high level of data protection while maintaining a desirable level of competition. Also, it should be noted that under the GDPR, data subjects have the right of access and the right to data portability, which may potentially promote competition in consumer services and digital advertising. Rather than accepting the industry’s view that data protection law would exacerbate market concentration, the CMA should investigate whether the market participants have failed to facilitate the exercise of such rights, which may lead to adverse competition effects.
15. Third, and as a related point, horizontal integration has also significant effects on competition. While the report has highlighted a few critical acquisitions made by Google, this is far from complete and it has not been explained how these key acquisitions have changed the market power dynamics in the digital advertising sector.

8) Do you agree with our assessment of the merits of a code of conduct for large online platforms funded by digital advertising?

16. Yes.

9) Do you agree with the range of possible practices we have identified that could be considered under such a code of conduct?

17. No. While it is important for the code of conduct to set out the high-level principles, equally important are certain mandatory technical or design requirements that are commonly accepted as desirable. Also, certain practices widely considered unlawful or anti-competitive should be explicitly prohibited by the code of conduct. These specific requirements would effectively address existing issues and would not prevent the generic principles from governing future practices as technologies evolve.

¹⁴ Ibid, P16.

¹⁵ <https://ico.org.uk/media/about-the-ico/consultation-responses/2018/age-appropriate-design-code-responses/2260169/horizon-digital-economy-research-insitute-university-of-nottingham.pdf>

10) *Have we identified the appropriate range of potential interventions to address the sources of market power for Google and Facebook?*

18. Yes.

11) *Have we identified the appropriate range of remedies to improve consumers' control over their data?*

19. Yes.

12) *Have we identified the appropriate range of remedies to address conflicts of interest and a lack of transparency in digital advertising markets?*

20. Yes.

13) *We have set out a number of specific questions relating to the potential interventions, which are discussed in the following appendices:*

I: Potential practices to be tackled through a code of conduct

J: Potential interventions to address market power in general search

K: Potential interventions to address market power in social media

L: Potential interventions to improve personal data mobility

M: Potential interventions in digital advertising markets

Do you have any views on the more specific questions in these documents?

K.5 How should the standards surrounding these features be developed and monitored?

21. As per the Furman report, what is needed is a co-regulation arrangement in which regulators, market participants (established and emerging), academic experts and relevant NGOs participate in an open standards process. IETF and WWW Consortium provide existing examples. However, this is a complex negotiation process and as such we have not responded to specific questions of detail.

L.1 Would the data-sharing remedies we have discussed be effective (including practicable and technically feasible) in addressing our competition concerns? Above all, would consumers adopt them in significant numbers?

22. Consumers are mostly disinterested in managing their data, and importantly many vulnerable people (children and the elderly specifically) simply find it impossible to get to grips with. So, no, consumers will not engage insignificant, they have lives to lead and jobs to do, and this is simply extra work; if we wish to protect the consumer, and importantly the most vulnerable, we need a shift to "Do Not Track" by default – some engaged consumers may well then wish to take advantage of data sharing arrangements, and that would be the true test of whether any consumers value it or not.

L.10 Would the privacy-enhancing technologies we have discussed be practicable and technically feasible?

23. In 2009, "Privad"¹⁶ was developed to provide the functionality of the then existing advertising market using browser tracking. However, as with all such solutions this foregoes the ability to track users across applications, platforms, services, and devices, and as such has had little enthusiasm

¹⁶ Saikat Guha and others, "Privad: Practical Privacy in Online Advertising" <http://adresearch.mpi-sws.org/privad-techreport.pdf>

from industry. However, if extensive “Do Not Track” regulation came into being, with this as the one solution for targeted advertising, then their enthusiasm might be stimulated.

14) Do you have any views about the appropriate sequencing of the remedies we have identified?

24. No response.

15) Do you agree with our assessment of the potential candidates for a market investigation, and what are your views on the merits of each?

25. No response.

16) Do you agree with our proposal not to make a market investigation reference at this stage?

26. We consider the CMA’s Market Study as an important step in addressing the complex issues relating to the digital advertising ecosystem and we understand the CMA’s considerations behind the proposed decision not to make a market investigation reference. However, we would equally like to point out that allowing an Expert Panel to conduct the investigation is unlikely to undermine the ongoing efforts in understanding and resolving these truly complicated and global challenges. Such an independent investigation, regardless of the outcome, will certainly inform decision-making and international cooperation by the future Digital Markets Unit as well as other regulators in a more objective, convincing and timely manner.

27. In any event, the CMA will be in a better position to make the final decision with additional inquiries covered in the final market study report. We therefore welcome the CMA’s pledge to gather further evidence in the second half of the study.

17) Do you support recommendations to government as an effective route to implementing interventions in these areas?

28. Yes, but with reservations about ruling out a market investigation reference as detailed above.

18) Do you agree we have identified the right areas for further work in the second half of the study (set out below), and are there any significant gaps?

29. Yes. For potential gaps for further work, see our responses above (especially the ones to Questions 4-7).