

Regulatory Highlights from the CMA's Interim Report on Online Platforms

In December 2019, the Competition and Markets Authority (CMA) in the United Kingdom [released a report](#) as part of its ongoing examination of online platforms.¹ These findings are preliminary, and its final report will be published this year.

The report makes interim findings that in the UK, both Google and Facebook have dominant positions in some of the most critical elements of the digital advertising market, substantially undercutting opportunities for meaningful competition.

Facebook and Google Have Market Power

The report finds that:

- Google has “significant market power in search advertising” (5.286). Google is seen as a “must have,” and there are incentives for advertisers not to use any competitors. Because of Google’s broad data streams from across the internet, it is able to derive advertising analytics that are much better than any competitor. This increases the value of its advertising and makes it even harder for smaller companies to compete.
- Google has significant market power in “general search” (3.92). Google has a high market share and there are significant barriers to entry and expansion. This means Google faces very little competition or even potential competition. For example, search engines benefit immensely from scale for improving the quality of their product. Google has also paid to be the default search engine on so many devices, browsers, and other ways people access the web.
- Facebook has significant market power in social media (3.165). The UK identified no other social networks that have a strong competitive impact on Facebook. They also identified three key components of Facebook’s product that competitors cannot match: the range of services, the huge network of users, and the social graph. They found that network effects are a strong barrier to entry, and as a result, new startups also do not pose any potential competitive threat to Facebook.
- Facebook’s ownership of Instagram and Whatsapp also prevents competition (3.169). In order for a new social network to thrive, it needs access to Facebook’s social graph - who is friends with who - and it needs to be able to communicate from one platform onto the others - “cross-post.” The social networks that Facebook owns have access to these functions, but anyone else either does not have access, or is at risk for having access revoked. This means Facebook can control whether it faces competition or not.

Regulating Companies With Strategic Market Status

The report preliminarily concludes that the new regulatory authority under consideration in the UK should have a broad array of tools to promote market competition. While the UK report preserves the opportunity to initiate further antitrust investigations based on its findings, it immediately calls for regulatory intervention to limit Google’s and Facebook’s enormous power in the market.

The report proposes the creation of a new regulator in order to implement the interventions they recommend (6.16). The goals they specify for the agency are to promote competition by helping new entrants to the market overcome barriers to entry and expansion, protect consumers and competi-

¹ <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>

tion in areas where platforms have market power, and to prevent exploitation or exclusion (6.6). To do this, the UK proposes certain rules will apply to platforms with “strategic market status” (6.35).

While antitrust punishes anticompetitive behavior by firms with market power, the UK wants to implement a regulatory regime to address these potential problems in advance. Antitrust would still apply in the industry, so these rules would be concurrent (6.25).

These new rules are preferable to existing antitrust law because:

- they will change platforms’ behavior much more quickly, important in a fast moving market like this one;
- they will go farther than existing antitrust law to capture additional bad behavior that is still harmful to competition;
- they will provide increased business certainty;
- a dedicated regulator can do a better job in such a complex industry, increasing their expertise over time;
- the regulator can do audits and get greater transparency into how the platforms are functioning. (6.22)

The report suggests these new rules should apply to platforms that have enduring market power and “act as an important gateway for businesses to access a significant portion of consumers,” when those consumers are on the other “side” of a two-sided market (6.30). To determine if platforms meet these criteria, they suggest examining:

- consumer time spent on the platform as a share of a market;
- what percentage of consumers use the platform, also called “reach”;
- the share of digital ad revenue in a particular ad market;
- if the company controls the rules or standards of the market;
- “the ability to obtain and control unique data.” (6.31)

For digital platforms, these criteria are important for getting a realistic picture of the power that platforms have.

Using these criteria, the report suggests Google and Facebook would likely count as having “SMS.” It finds that Google has had around 90% or higher market share in search for over ten years, as well as over 90% share in the ad server market. These are both key markets that give them a lot of consumer time spent, very broad “reach,” and a high share of digital ad revenue. They also found that Google has “unrivalled” access to consumer data through the many different Google services they provide, as well as their tracking tags on other websites across the web and the data they collect from Android devices (6.32).

It finds that Facebook has a “reach” of 85% of UK internet users, and over 75% of time spent in social media, as well as 40% of digital ad revenue in display ads. Facebook also has control of unique data, the data that advertisers find most valuable for certain ad campaigns (6.33).

Potential Interventions

The new regulatory regime would have two aims: to create fairness in spaces dominated by market power and to promote competition to try to fight Google’s and Facebook’s market power (6.11-6.14). The regulatory suggestions include:

- A nondiscrimination principle

Companies with SMS would be required to not preference their own products or services above those of competitors, specifically identifying search and ranking algorithms as potential sources of self-preferencing (6.43). In fact, SMS should give customers a neutral choice between their own ser-

vices and those of competitors, and not impose any restrictions on customers' ability to use competitors' products (6.43). The nondiscrimination principle also applies to standards that an SMS platform may develop: Such standards should not favor the platforms' other businesses (6.44).

- A “fairness by design” requirement (6.41)

This could address some of the “dark patterns” concerns that advocates have. Platforms can use what they know about user behavior to encourage certain choices that users might not otherwise make, such as making the “Accept Tracking” button bright red and in the center, while making the “Refuse Tracking” button grey and inconveniently located. Similarly, they could push users towards accepting affiliated products instead of letting them choose freely among competitors.

- An interoperability requirement (6.44)

This could include requirements that “core services” of an SMS business be designed to be interoperable. SMS companies could charge a fee for interoperability, as long as the fee is “cost-based” and “objectively justifiable.” They could also be required to comply with common standards where such standards exist, presumably to address the concern that dominant platforms can impose their own standards through their market position even where independent standards are already in place.

Enforcement Procedures

The CMA discussed how the new regulations would be enforced by what they are calling the new Digital Unit of the CMA. The powers of the Unit for enforcement could include the power to:

- audit companies;
- open its own enforcement investigations;
- hear complaints from market participants;
- resolve disputes;
- impose interim measures, such as temporarily undoing a recent decision of an SMS platform while it investigates the change;
- impose injunctive relief at the end of an investigation, such as undoing a recent decision of an SMS platform;
- appoint a monitor to oversee ongoing compliance with the regulations or a particular Digital Unit decision. (6.49, 6.50)

The CMA is considering the possibility of major divestitures, such as separating Facebook and Instagram (6.79). It suggests that such a “significant step” may be warranted if other measures such as interoperability are not successfully implemented (6.79). Similarly, it discusses the possibility of separating parts of Google’s vertically integrated business (6.160 et seq.). Stating that “the threshold for such interventions is high,” they go on to say they are seeking views on a few particular separations they’re considering: Google separating its publisher ad server from the rest of the company; requiring that any company, including Google, cannot operate both a Demand-Side Platform (advertiser facing) and a Supply-Side Platform (publisher facing); and/or Google separating its advertising business from key parts of its data business (6.163). They plan to consider whether such separations are appropriate now, or if a trial period for the regulatory interventions is appropriate first to see if that may be sufficient on its own (6.174).