



Computer & Communications
Industry Association
Tech Advocacy Since 1972

CCIA's Submission to the UK Competition & Markets Authority

Digital Markets Taskforce - Call for Information

12 August 2020

Executive Summary

For nearly 50 years, CCIA has served as the leading association for the computer and communications industry advocating for open markets, open systems, and open networks. Markets work well under proactive competition enforcement that intervenes to address anticompetitive conduct while respecting safe harbours for competition on the merits. This traditional, internationally recognised framework for competition policy, focused on consumer welfare and economic efficiency, has served society well. It has incentivised the creation, proliferation, and evolution of the wide range of digital products and services that we enjoy today. If maintained, shared, and enforced, we can expect these benefits to continue.

The CMA's Call for Information on the Digital Market Taskforce notes, at para. 1.2, that "*Digital innovation plays an enormously valuable and positive role in our economy and our society. It is vital that any action does not have a negative impact on this, but rather drives competition and innovation, enabling disruptors to bring new services to market to the benefit of consumers, ensuring that [small and medium sized enterprises] have fair access to digital platforms to reach new markets and grow their businesses, as well as empowering consumers.*" This recognition is important and welcomed, given the Taskforce's role in providing the government practical advice on what intervention, if any, is necessary to promote competition and innovation in digital markets.

CCIA is concerned by portions of the Call for Information, and the CMA's online platforms and digital advertising market study final report. In this submission, CCIA questions whether the powers and interventions sought are consistent with the pro-competition policy objectives that have led to the innovation, investment, and tremendous consumer surplus that we see today. We caution against what appears to be a redistributive antitrust policy that punishes market leaders for their size, and signifies a return to a form-based approach to conduct that disregards economic evidence about how markets are operating in practice (paras. 11-22, below). We highlight the policy repercussions that such an approach would have (paras. 23-25), and suggest ways to calibrate future interventions to preserve market incentives to invest, innovate and compete vigorously on the merits, while addressing the anti-competitive effects that can arise from the exercise of market power in digitally enabled markets (paras. 26-37).

To assist the Taskforce's future work, CCIA also shares its perspective on how digitally enabled markets operate, and factors of significant relevance to the competitive assessment (paras. 38-51). Lastly, we explain how these factors were not sufficiently appreciated in the CMA's market study final report, and identify other shortcomings that should be avoided going forwards (paras. 52-58). CCIA submits that granting the wide-ranging powers of intervention proposed by the CMA, without a clear and objective assessment of the evidence, an understanding of the costs and trade-offs, or a transparent balancing of competing objectives, risks the very same negative impacts that the CMA seeks to avoid.

I. Introduction

1. The Computer and Communications Industry Association (CCIA) welcomes the opportunity to respond to the Call for Information on the CMA's Digital Markets Taskforce ("DMT").¹
2. CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. CCIA remains committed to protecting and advancing the interests of our members, the industry as a whole, as well as society's need to benefit from the positive contributions that digital technologies can make. CCIA promotes open markets, open systems, and open networks in the computer and telecommunications industry.²
3. CCIA's Members are leading innovators of what some refer to as the 'digital economy'. Many operate as digital intermediaries, efficiently connecting disparate sources of supply and demand and disintermediating traditional gatekeepers who have been slow to embrace digital distribution models. Due to the disruption that digital technologies have caused, some legacy incumbents have voiced concerns about increasing competitive pressure, and asked competition authorities to protect them against digital disruption by condemning conduct that is actually pro-competitive, innovative and beneficial to consumers.
4. CCIA understands that the purpose of the DMT is to advise the UK government on the potential design and implementation of pro-competitive measures for unlocking competition in digital platform markets. CCIA agrees that industry would benefit from more upfront clarity and legal certainty.³ CCIA submits that such measures should preserve incentives to innovate, invest, and vigorously compete on the merits. In this respect, CCIA has made several submissions to the CMA in recent years, and has raised concerns regarding the increasingly worrying trend towards a less economic and less consumer welfare based competitive analysis of digitally enabled markets.⁴ In particular, CCIA has raised concerns regarding the analysis contained in the CMA's market study into online platforms and digital advertising final report (the "Report"),⁵ cited as one of the foundational studies for the DMT.⁶ CCIA is disappointed that the majority of the points expressed in its

¹ CMA "Call for Information" (1 July 2020), available [here](#) ("Call for Information").

² Additional details on CCIA can be found here: <http://www.ccianet.org/>

³ Call for Information, para. 1.16.

⁴ CCIA pointed out many of these concerns in its response to the consultation following publication of the CMA's Interim Report. CMA "Online platforms and digital advertising Market study interim report" (18 December 2019), available [here](#) ("Interim Report"); CCIA "Submission to the UK Competition & Markets Authority Online Platforms and Digital Advertising Market Interim Report - Consultation" (17 February 2020), available [here](#) ("CCIA's Response to the Interim Report"). CCIA subsequently provided a supplemental submission on the benefits of digital advertising. CCIA "Supplemental Submission to the UK Competition & Markets Authority Online Platforms and Digital Advertising Market Interim Report - Consultation" (12 May 2020), available [here](#) ("CCIA's Supplemental Submission").

⁵ CMA "Market study final report: Online platforms and digital advertising" (1 July 2020), available [here](#) ("Report").

⁶ Call for Information, para. 2.19 ("A major component of the Taskforce's work will be considering how a procompetitive code of conduct for firms with SMS could work in practice. This would build on the case for

submissions were not adequately addressed in the final version of the Report, and hopes that the DMT will at least consider these points when providing advice to the government.⁷

5. Below, CCIA comments on the underlying objectives and appropriate scope of proposals to promote competition and innovation in the digital economy (Section II), offers insight on market dynamics that the DMT should consider in crafting its advice to the government (Section III), and identifies specific shortcomings of the Report that the DMT should be aware of when engaging in related work going forward (Section IV), before providing some final concluding remarks (Section V).

II. Underlying objectives and appropriate scope of a new approach to promote competition and innovation in the digital economy

6. The Call for Information asks for input on “[t]he scope of any new approach to promote competition and innovation”.⁸ To appropriately answer that question, the DMT must first decide upon its underlying competition policy objectives.
7. Advances in computer and communications technologies have dramatically lowered costs, increased output and improved the quality of products and services in a wide variety of industries. Those who have embraced these technologies have seen success, while those who have been slow to adapt have not. This technological disruption has practically eliminated some industries. Yellowpages still make billions of dollars globally, but that market share isn’t growing.
8. Digital technologies are lowering transaction costs and opening up markets to global competition. We no longer have to rely on a radio station to broadcast our music, a television station to watch videos, a publisher to distribute our writing, a distributor or retailer, to reach our customers, or even a hotel for accommodation abroad. Amazon, Facebook, Google, Netflix, and other digital intermediaries are predicated on the idea that shelf-space is unlimited and that consumers should have access to as much choice as possible. Through these intermediaries, consumers can more easily read reviews, compare offers, and choose what’s right for them. Consumers also benefit from increased competition on the supply side of these markets, lower prices, higher quality products, and increased innovation. And suppliers benefit from the unprecedented scale, availability and reach that these intermediaries provide. This helps level the playing field for SMEs, who have a dramatically expanded opportunity to reach customers and grow.
9. And yet, we live in challenging times. Each year technology becomes more complex, more powerful and harder to understand. We have to deal with austerity, shrinking tax bases, a

a pro-competitive code of conduct as proposed by the Furman Review and explored further by the market study”). See also *Ibid.*, paras. 1.3, 1.27, 2.7, 2.50 and fn. 41.

⁷ CCIA acknowledges that, per the Call for Information “[t]he Taskforce will not be re-examining proposals or analysis undertaken by the [online platforms and digital advertising] market study for those firms in its scope” (para. 2.20). Nevertheless, CCIA suggests the Taskforce consider critically the extent to which the flaws identified herein can inform guidance when setting out in more detail the potential application of the proposed code for specific platforms.

⁸ Call for Information, para. 1.5.

dynamically shifting labour market, and global competition. It feels like the world is rapidly changing from what it was just a few years ago.

10. But that doesn't mean we should give-up on full, fair, and open competition, or betray fundamental competition principles. One of those fundamental principles is that competition on the merits is welfare enhancing, and that less efficient firms should exit the market. Another is that customers benefit when firms mobilise their resources to enter new markets and stimulate competition. As the Report acknowledges, even where digital disruption is prevalent, "*big' is not necessarily 'bad' in these markets.*"⁹

A. The Purpose of Competition Policy

11. Over decades competition advocates have developed a body of law and practice that has limited the ability of government to play favourites, to pick and choose winners, and to protect its favoured industries from foreign competition.¹⁰ But this is not a concept limited to liberal free-market economies, it is a model that is followed in nearly every jurisdiction. Policy makers push for it in trade negotiations where we expect a level playing field for open and fair competition. At meetings of the ECN, ICN, and OECD, policy makers push for an international framework that keeps foreign markets open. This principled, evidence based approach drives British prosperity. Proponents of sound competition policy shouldn't throw all this work away.
12. Despite how popular services like Amazon and Google are, and the tremendous consumer surplus they have generated, some have been calling for new regulations that would prevent these companies and many others from innovating and offering new products and services.
13. 2019 saw a number of papers investigating the competitive dynamics in markets characterised by network effects, low marginal costs and the use of data. Some of these papers concluded that anti-competitive conduct was possible in these markets, and that the unquantifiable risk of harm justified ex-ante action. But they largely lack quantifiable evidence of harm.¹¹ They largely ask us to accept that digital intermediaries are raising entry barriers and acting as exclusionary gatekeepers, simply because they can, despite evidence that it would be against their interests to do so. But as Hitchens' razor states, "what can be asserted without evidence can also be dismissed without evidence" (*quod grātis asseritur, grātis negātur*).¹² Absent evidence of harm, restraining digital intermediaries, would more likely be counterproductive, raising entry barriers, shielding large incumbents from competition from the long-tail of supply, harming small and medium sized enterprise ("SME") suppliers, and ultimately, reducing consumer welfare.

⁹ Report, para. 20.

¹⁰ By contrast, Russia recently signed a law that will require manufacturers of smartphones, computers, and smart TVs to pre-install Russian-made software on their devices. J. Porter "Russia passes law forcing manufacturers to install Russian-made software" (Verge, 3 December 2019), available [here](#).

¹¹ White House Council of Economic Advisers "2020 Economic Report of the President" (February 2020), available [here](#), pg. 226 ("recent calls for changing the goals of the antitrust laws and expanding the scope of regulations are based on inconclusive evidence that competition is in decline.")

¹² Wikipedia "Hitchens's Razor", available [here](#).

B. Redistributive Antitrust and the Risk of Unintended Harm

14. The Call for Information raises concerns that in digitally enabled markets, “*once there is a winner, the incentives it faces to continue to invest and innovate are much lower.*”¹³ This is true for any company with market power. And yet, companies like Microsoft, Apple, Google, Amazon and Facebook are constantly challenging each other and offering competing services and ever broadening functionalities. These companies, like IBM and other large technology companies, invest billions into research and development.¹⁴ The evidence is one of constant innovation, investment and improvement, much more than is observed in other industries. Markets appear to be working.¹⁵
15. Digital innovation has facilitated the disruption of legacy business models that relied on leveraging capacity limited infrastructure bottlenecks like printing presses, broadcast spectrum, radio frequencies, compact disc fabrication plants, and even retail shelves and storefronts. Digital technologies have changed the value proposition of capital investments in the distribution technologies of the previous centuries. YouTube can now compete against the satellite and cable television industry, Amazon can compete with Tesco and Argos, and digital messaging competes with telecom companies’ SMS services. There is a tremendous increase in consumer surplus attributable to these cheap and efficient technologies bypassing existing gatekeepers.
16. These technologies haven’t replaced traditional gatekeepers with digital ones. Digital infrastructure remains open and competitive. It is based on open standards like HTML/XHTML, TCP/IP, CSS and HTTP. Thanks to new technologies pioneered by the computer and communications industry, the underlying internet infrastructure is largely commoditised, homogeneous, and sold as a service. Anyone can build a website and, with the right value proposition, attract users. When considering digital platforms for search, accommodation, car insurance, price comparison, and social media, a report from the UK Department for Business, Energy and Industrial Strategy (“DBEIS Report”) found that “[t]here is no tendency to monopoly resulting from network effects apparent and technical barriers to entry are modest.”¹⁶ TikTok, a new social media platform, reached over 2 billion downloads in a handful of years.¹⁷ In just a handful of months, during the COVID-19 pandemic, videoconferencing platform Zoom grew from around 10 million users to over 300 million.¹⁸ There are no insurmountable barriers to entry, rather, the accessibility of digital technologies, and the benefits of network effects mean services that

¹³ Call for Information, para. 1.12.

¹⁴ Amazon, Alphabet (Google’s parent company), Microsoft, Apple, and Facebook are ranked as the 1st, 2nd, 6th, 7th, and 14th highest spenders in R&D in the world. PwC “The Global Innovation 1000 study” (2018), available [here](#).

¹⁵ See e.g. UK Department for Business, Energy and Industrial Strategy Report “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 67 (“New entrants continue even in concentrated markets (e.g. music before the expansion of streaming services, or social networks) and tend to succeed through innovation, offering different services to existing platforms. There is no tendency to monopoly resulting from network effects apparent and technical barriers to entry are modest.”)

¹⁶ UK Department for Business, Energy and Industrial Strategy “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 67

¹⁷ M. Singh “TikTok tops 2 billion downloads” (TechCrunch, 29 April 2020), available [here](#).

¹⁸ R. Miller “In surprise choice, Zoom partners with Oracle for growing infrastructure needs” (TechCrunch, 28 April 2020), available [here](#).

users value are able to grow exponentially. If markets weren't working, this wouldn't be possible.

17. Instead of grappling with these market realities, the CMA reframes pro-competitive benefits as competition concerns. The Report suggests that network effects and economies of scale, and the value of ecosystems and vertical integration, “*provide an unassailable incumbency advantage*” that must be torn down.¹⁹ But these incumbency advantages derive from the tremendous investments made by digital technology companies, and the massive consumer welfare benefits they have generated. For example, the Report claims that Google possesses a data advantage, which it argues comes in part through its development of the Chrome browser and the Android operating system.²⁰ Both these products generate massive consumer welfare benefits, they are supplied to users for free, stimulate competition for advertising services, and have facilitated the creation of ecosystems through which numerous companies benefit (e.g. suppliers of apps, and browser extensions). Similarly, the Report accepts that Facebook is “*a valuable portal through which advertisers can access a large number of users, with [over one million] UK advertisers using the platform in 2019*”,²¹ but somehow fails to appreciate the tremendous investment, and continuous innovation, required to generate that value.
18. The traditional competition framework teaches that consumers benefit when firms use their existing expertise to offer new products and services.²² Vertical integration eliminates significant costs like double-marginalisation and vertical hold-up. It replaces them with efficiencies of scale and of scope, lower transaction costs and easier integration. Many proponents of increased intervention ignore these long observed, verifiable, and quantifiable benefits. Instead, they increasingly describe these efficiencies as entry barriers to be overcome by government intervention.
19. The Report appears to take a similar approach. Ignoring the competitive incentives that drove the tremendous consumer surplus generating investments of large digital platforms, the Report advocates for a “*‘pro-competition’ regulatory regime*” that would support competitors by “*tackling sources of market power*” and introducing new obligations on large companies for the purpose of “*overcoming barriers to entry*”.²³ These new obligations

¹⁹ Report, paras. 21-22.

²⁰ *Ibid.*, para. 7.61 (“Google has developed unrivalled access to data through its operation of the largest browser (Chrome) and the Android mobile operating system.”); *Ibid.*, para. 2.7. (“consumers place great financial value on a range of online services, with values of multiple thousands of dollars being assigned to search engines and digital maps.”)

²¹ *Ibid.*, para. 7.63.

²² See e.g. F. LaFontaine et al. “Vertical Integration and Firm Boundaries: The Evidence” (45 J. Econ. Lit. , 2007), available [here](#), pg. 629; J. Cooper et al. “Vertical Antitrust Policy as a Problem of Inference” (23 Int’l J. Indus. Org., 2005) available [here](#), pg. 639; O. Williamson “Transaction-Cost Economics: The Governance of Contractual Relations” (22 J. L. & Econ., 1979), available [here](#), pg. 233; B. Klein et al. “Vertical Integration, Appropriable Rents, and the Competitive Contracting Process” (21 J. L. & Econ., 1978), available [here](#), pg. 297; R. H. Coase “The Nature of the Firm” (4 Econometric, 1937), available [here](#), pg. 386.

²³ *Ibid.*, para. 70 (“This would be a ‘pro-competition’ regulatory regime, in that its objectives would be to encourage competition by overcoming barriers to entry and expansion, thus tackling sources of market power and promoting innovation.”) The Report expresses a concern for “competition” not the competitive process. *Ibid.*, para. 72 (“we have concluded that the CMA’s current tools, which allow us to enforce against individual practices and concerns, are not sufficient to protect competition.”)

include not only requirements to grant competitors access to existing company assets,²⁴ but also to develop new technologies and assets specifically for the benefit of competitors.²⁵ In its earlier submissions,²⁶ CCIA warned that such a redistributive antitrust policy risks significant costs to investment, innovation, and consumer welfare in the UK.

20. CCIA is concerned that the DMT may also be headed in the direction of a redistributive antitrust policy. In its attempt to “*build on the case for a pro-competitive code of conduct*”,²⁷ the Call for Information does not limit itself to asking about new approaches to the anticompetitive exercise of market power. It asks, “[w]hat remedies are required to address the sources of market power?”²⁸ Even worse, the Call for Information suggests imposing additional positive obligations on large companies to actively subsidise and support their competitors.²⁹
21. This fundamentally begs the question of what should be the objective of competition policy. According to the Courts, it has always been about protecting competition on the merits, not protecting competitors. As Philip Marsden, Member of the Furman Inquiry Panel, has recognised: “[a]ntitrust after all is law enforcement. It concerns conduct, not structure, and involves specific and serious allegations about likely or actual harm to competition. Alleging bigness doesn’t cut it nor should it. What matters is deeds not size”.³⁰ But the Call for Information suggests a redistributive antitrust policy that would make successful companies hand over to competitors the fruits of their investments, absent proof of anticompetitive conduct. CCIA cautions against such an approach. UK competition policy should continue to preserve market incentives to innovate, invest, and vigorously compete on the merits. It should continue to encourage firms to grow, and even very large companies should be allowed to compete on the merits so that consumers can benefit from that competition.
22. This traditional competition policy will make legacy incumbents nervous. But the existing competition framework is designed to make incumbents nervous when they fail to invest in new technologies. Instead of calling for regulatory intervention, they should shift away from obsolete distribution models and meet evolving consumer expectations. Enforcers who focus on protecting defunct business models and the market power of legacy incumbents risk distorting competition and causing unintended harm.

²⁴ *Ibid.* para. 90 (“the DMU [Digital Markets Unit] should have the power to require Google to provide click and query data to third-party search engines to allow them to improve their search algorithms”).

²⁵ The Report not only recommends imposing such obligations and associated costs on large platforms, it acknowledges that they are high enough to be prohibitive for smaller players. Report, para. 8.80 (“In relation to the Fairness by Design duty, the initial development and application of changes to platforms’ choice architecture will involve some costs. Imposing such developmental costs on new platforms could hinder the entry or expansion of much smaller platforms which may act as a competitive constraint on platforms with SMS. We consider the impact of the duty will be manageable for larger and well established platforms which already carry out some testing and trialling.”)

²⁶ See above, fn. 4.

²⁷ Call for Information, para. 2.19.

²⁸ Call for Information, pg. 26, question 9.

²⁹ Call for Information, para. 2.31 (“the Taskforce will consider whether there should be additional powers to ... help entrants seeking to develop new and innovative businesses to either compete with or complement the services provided by these firms.”)

³⁰ P. Marsden “Who should trust-bust? Hippocrates, Not Hipsters” (CPI, 18 April 2019), available [here](#).

C. Evidence Based Decision Making

23. As recognised by FTC Commissioner C. S. Wilson “[a]s antitrust regulators, when we encounter new products that are changing the landscape, we must resist the temptation to declare a state of crisis, to heed the populist clamoring to act first and ask questions later. In today’s dynamic markets, abandoning our antitrust principles can cause real harm”.³¹
24. Competition lawyers, economists, and judges have decades of experience determining whether conduct benefits consumers or users of one side or another of the multi-sided and interconnected ecosystem in which technology firms operate. It is understood that product design changes can promote inter-brand competition, or intra-brand competition, and thus constitute competition on the merits. Such design changes may also be necessary to address legitimate safety or privacy concerns. But design changes that anticompetitively foreclose competitors are illegal. Drawing the line and distinguishing between anticompetitive and permissible product design changes is a difficult process and should be done with care to avoid chilling ostensibly legitimate business decisions. Empowering a regulator to prohibit large swaths of potentially pro-competitive conduct, *ex-ante* on the basis of the size of the company or a “balance of harms” approach risks significant unintended consequences. Competition authorities and Courts have long recognised the heightened risk of such market distorting harms when competition authorities use their powers to act as market regulators.³² These concerns have traditionally arisen in cases of excessive pricing, where competition authorities have been “*rightly, wary of casting themselves in the role of price regulators*”.³³ Unfortunately, the Report recommendations abandon such a cautious approach, and go even further, envisaging a “Digital Markets Unit” taking on the role of product design decision maker.³⁴ This only increases the risks of unforeseen consequences.

³¹ FTC Commissioner C. S. Wilson “Remarks at UIC John Marshall Law School Center for Intellectual Property, Information and Privacy Law” (13 March 2020), available [here](#), pg. 15., C.S. Wilson, “Address at the British Institute of International and Comparative Law” (28 June 2019), available [here](#), pg. 4, G. Tullock “The Welfare Costs of Tariffs, Monopolies, and Theft” (5 W. Econ. J., 1967), available [here](#), pg. 224, W. Kip Viscusi et al. “Economics of Regulation and Antitrust” (4th ed., 2005), pg. 382.

³² Court of Appeal Case No: C3/2018/1847 & 1874 *CMA v. Flynn Pharma Ltd.* (10 March 2020), available [here](#), para. 104 (“In the absence of entry barriers regulatory intervention can risk prolonging a monopoly situation by blocking efficient signals which would otherwise promote market entry. A belief in market forces “...is often bolstered by the (perceived high) likelihood of regulatory failure, a risk which is compounded in the case of price regulation”. The investigation of *ex post* cases of alleged excessive pricing faces significant difficulties in terms of data availability and analysis, identifying appropriate assessment standards, and of designing and implementing suitable remedies: “This has led some to consider that the identification of excessive prices is a ‘daunting, if not, impossible task’... The issues are still more extreme when trying to set clear rules that allow for *ex ante* compliance with excessive pricing rules. The key problem here is that it is not clear what the appropriate benchmark should be.”), citing OECD “Excessive Prices in Pharmaceutical Markets” (3 October 2018), available [here](#).

³³ Competition Appeal Tribunal Case Nos: 1275-1276/1/12/17 *Flynn Pharma Ltd.* (7 June 2018), available [here](#), para. 3 (“Cases of pure unfair pricing are rare in competition law. Authorities find them difficult to bring and are, rightly, wary of casting themselves in the role of price regulators.”)

³⁴ See *e.g.* Report, para. 8.31 (“we are confident that there is a variety of incremental reforms that would produce better outcomes than the status quo without entailing major costs (eg a requirement for choice screens on mobile devices with a design driven by the DMU [Digital Markets Unit]).”); *Ibid.*, para. 8.122 (“In particular, the DMU would have discretion over how and when to use the choice requirement powers and how to design the requirement.”)

25. Policy makers may not be happy at the economies of scale that large US technology companies enjoy, they may wish to protect British companies from the aggressive competition of larger rivals. But that would take away the incentive for these smaller companies to compete.³⁵ Absent evidence of harmful conduct, intervention risks imposing on private companies the burden of protecting and subsidising less efficient rivals. Such burdens have costs, and encouraging such a system risks depriving us of product innovation, driving away investment, and making it harder for British companies to do business abroad. Ultimately it will be the UK citizen who suffers.

D. Transparent Approach to Non-Competition Concerns

26. A redistributive antitrust policy would be harmful, but at least it would be subject to challenge on its own terms. It would have to succeed on its own merits, and eventually, proof of its harmful consequences would lead to its reversal. However, the pursuit of non-competition concerns under the guise of competition could be even more harmful. CCIA is concerned that the CMA's Report resolves conflicts between competition policy objectives, and non-competition goals, by making certain assumptions about competitive dynamics without sufficient proof. In particular, it appears to do this in order to justify interventions that are primarily designed to advance consumer protection,³⁶ privacy,³⁷ and industrial policy objectives.³⁸ This approach to resolving policy conflict, ignores the tradeoffs inherent to the proposed interventions, and would be likely to have unintended repercussions if implemented.

27. For example, concerns arise with regard to the Report's assessment of search default payments.³⁹ The Report assumes that Google's increased access to search data gives it market power which results in increased advertising costs, which are then passed on and result in increased prices to consumers. The Report thereby justifies its recommendation to prohibit payments for default search status in browsers, and require search engine choice-screens for browsers. It claims that this would reduce Google's market power and thus indirectly lead to lower prices for consumers. However, the Report does not attempt to measure the direct costs of such prohibitions and obligations, in particular the lost savings that mobile device OEMs pass on to consumers as a result of not having to pay for Android OS, and the value of the direct payments that OEMs receive from search

³⁵ P. Marsden "Who should trust-bust? Hippocrates, Not Hipsters" (CPI, 18 April 2019), available [here](#) ("Isn't it dangerous to protect and thus foster inert, unengaged consumers? Isn't it preferable to find ways to motivate them to be more active and engaged, to lean in more, and contribute to the competitive dynamic?")

³⁶ See e.g. Report, para. 4.126 ("overall, we consider that platforms could do more to enable effective consumer engagement"); Report, para. 4.176 ("We consider that, overall, the choice architectures adopted by the platforms we have addressed in this market study can have the effect of restricting active, informed engagement to levels below what we would expect given the evidence that consumers value having control").

³⁷ See e.g. Report, para. 6.32 ("in a more competitive market, we would expect platforms to innovate and develop new ways to deliver advertising that meets the targeting needs of advertisers using less consumer data").

³⁸ See e.g. Report, para. 6.42 ("Greater competition to Google and Facebook can as a result be expected to improve the quality and accuracy of journalism."); *Ibid.*, para. 6.51 ("we expect that improving the bargaining power of online news publishers will improve the health and sustainability of journalism").

³⁹ Report, para. 3.128. See Report, Appendix V, available [here](#), paras. 6-86.

engines for default placement on their devices.⁴⁰ While the Report's intention appears to be to facilitate greater consumer engagement and empowerment (if not assist Google's search competitors), its proposals would likely lead to increased device costs, and a lower quality user experience.⁴¹ The Report does not explain how it balances these competing objectives, leaving it for the DMT.⁴²

28. Similar concerns arise with regard to proposals to increase consumer choice and control over the use of data for personalised advertising. The Report accepts that this is primarily a consumer harm issue, and that there are "*potential costs of such an intervention to consumers, advertisers and the platforms themselves.*"⁴³ It does not, however, attempt to account for these costs, or propose a way of balancing the trade-off between competition and consumer protection. This is particularly relevant where such interventions are likely to mean increased costs for advertisers, and disproportionately SME advertisers.⁴⁴ CCIA submits that the DMT should be transparent about how it intends to assess such trade-offs, in advance, so that they may be properly challenged and problematic assumptions rebutted. CCIA submits that, in line with OECD advice, priority should be given to traditional competition policy objectives.⁴⁵
29. As indicated above, not only would such interventions be actively detrimental to the pursuit of economic efficiency, but pursuing them under the guise of competition policy risks significant negative externalities. Other jurisdictions look to the CMA as an exemplar of

⁴⁰ See e.g. Report, para. 3.128 ("However, any consumer benefits that default payments create in browser and device markets are likely to be outweighed by the costs that default payments create for consumers due to weaker competition in search.")

⁴¹ There is evidence that users and OEMs choose Google search because it is better. Mozilla chose to end Yahoo!'s default placement and make Google the default in Firefox again in order to do "what's best for our brand, our effort to provide quality web search, and the broader content experience for our users". F. Lardinois "Mozilla terminates its deal with Yahoo and makes Google the default in Firefox again" (14 November 2017) available [here](#). The same views were expressed in the context of the CMA's market study. See Report, Appendix V, para. 15 ("Apple expressed strong opposition ... noting that its current choice of Google as the default search engine on Safari is, at least in part, based on creating a superior 'out of the box' experience for Apple users. [Android OEM] submitted that an intervention could limit its ability and discretion to design and make its own products to provide the best possible user experiences."); Report, para. 3.35 ("the evidence that we reviewed suggested that Google's search results are generally perceived to be of higher quality than those of Bing.")

⁴² Report, para. 8.30 ("Given the substantial benefits and costs involved in some of the interventions, including the restriction of monetisation, they would need to be carefully assessed and designed before implementation.")

⁴³ Report, para. 8.112.

⁴⁴ See below, para. 49.

⁴⁵ See e.g. OECD, "Competition and Efficiency as Organising Principles for All Economic and Regulatory Policymaking" (2003), available [here](#), para. 19 ("By giving predominance to competition and efficiency, the OECD and PECC approaches provide a framework for resolving policy conflict with non-efficiency goals in, or underlying, existing or proposed regulations. In the OECD approach, this predominance is achieved by reforming economic regulations in all sectors to stimulate competition and eliminate competition distorting impacts except where clear evidence demonstrates that they are the best way to serve broad public interests. In such cases, it is advocated that any required regulation be designed to promote efficiency. In the PECC and APEC approaches, this predominance is achieved by promoting competition and efficiency in cases of conflict with non-efficiency goals, except where application of this principle is simply not practicable or politically feasible, in which case the competition distorting impact of the regulations is minimised. Moreover in the latter circumstances, it is recommended that reasons for divergence from the principle of fully promoting competition and efficiency 'should be compelling and transparent'.")

objective, evidence-based, competition enforcement. Distorting competitive assessment to achieve alternate ends would open the door for other jurisdictions to follow suit, and to claim competition policy justification when their decisions to protect their consumers, privacy, or favoured industries, disproportionately impacts UK exporters of goods and services.

30. As a general rule, CCIA submits that non-competition policy objectives, particularly those that do not depend on market power, are best pursued by adopting horizontal, industry-wide regulations that are equally regardless of company size.⁴⁶ Such legislation should preserve a level playing field and existing incentives to innovate and invest.

E. A Pro-Competitive Regulatory Framework

31. In line with the above view of the appropriate scope of competition policy objectives and intervention for non-competition concerns, the first priority for any new regulation should be to do no harm. The CMA itself has said that the impact of regulation on competition needs further research,⁴⁷ and that there are “*potentially large risks to competition that poorly designed regulation can raise.*”⁴⁸ This is particularly important in the digital context because, as recognised by former Chief Executive of the CMA, Alex Chisholm, “[l]eaving aside costs of compliance, protecting consumers by virtue of *ex ante* regulation is inherently difficult in digital markets where consumer preferences evolve fast and in a less predictable manner. It is important not to be overconfident in identifying the preferences of consumers and therefore specifying what is in their interest.”⁴⁹ That being said, CCIA offers the following observations on a potential pro-competitive regulatory framework.
32. CCIA broadly agrees that any new competition rules should be limited to undertakings with strategic market status (“SMS”), meaning those with “*a position of enduring market power over a strategic bottleneck or gateway market, where a firm controls others’ market access and where there are many dependent users on either side.*”⁵⁰
33. With regards to strategic bottlenecks, gateways and enduring market power, the existing competition case-law on “essential facilities” is instructive, particularly where the DMT envisages the power to grant access remedies. Essential facilities case-law has developed a careful framework for assessment that balances the rights of property holders, incentives to innovate and invest, and broader interests in the competition process. It serves as an existing, internationally recognised framework with concepts familiar to competition enforcers. In this regard, with respect to “bottlenecks”, it requires

⁴⁶ Recent examples include Germany’s legislation mandating access to ‘technical infrastructure’ for mobile or internet-based payment service, without discriminating as between small and large infrastructure operators. See J. Franck and D. Linardatos, “Germany’s ‘Lex Apple Pay’: Payment Services Regulation Overtakes Competition Enforcement” (Journal of Competition Law & Practice forthcoming, 1 June 2020), available [here](#).

⁴⁷ CMA “Regulation and Competition. A Review of the Evidence” (January 2020), available [here](#), para. 7.27.

⁴⁸ *Ibid.*, para. 7.2.

⁴⁹ Speech by A. Chisholm, former Chief Executive at the CMA at the Bundesnetzagentur conference in Bonn (27 October 2015), available [here](#).

⁵⁰ Call for Information, para. 2.5, citing Digital Competition Expert Panel “Unlocking digital competition” (March 2019), available [here](#) (“Furman Report”), paras. paragraphs 2.10, 2.25-2.27 and 3.69. See also Furman Report, para. 2.116 (“This needs to be carefully designed to identify where companies operating platforms are in a position to exercise potentially enduring market power, **without granting an excessively broad scope and bringing within the bounds of regulation those companies who are effectively constrained by the competitive market.**”) (emphasis added).

not only evidencing market power, but also a demonstration of indispensability. According to the existing antitrust framework, indispensability means “*there is no actual or potential substitute on which competitors in the downstream market could rely.*”⁵¹ This finding is typically time-limited and can be revised, also at the request of the encumbered undertakings, as market circumstances develop.⁵² This ensures that undertakings remain incentivised to develop, and invest in, their own products and services without fear that competitors will appropriate the value of these investments. Failure to meet these criteria would undermine the notion that “*the right to choose one’s trading partners and freely to dispose of one’s property are generally recognised principles ... in some cases with constitutional status. Incursions on those rights require careful justification.*”⁵³ When mandating access to private resources, such an approach would protect against the DMT’s interventions being used to (a) subsidise or protect incumbent industries suffering from their own unwillingness to adapt to technological disruption, or (b) give competitors a free ride on the pro-competitive investments of private companies.

34. CCIA also agrees with the CMA’s acknowledgement that SMS designation “*would only have implications for the subset of a firm’s activities directly linked to the source of the SMS.*”⁵⁴ Undertakings, even allegedly dominant ones, may engage in a wide range of conduct in markets where they do not have market power and where there is no likelihood of anticompetitive effect. In addition, when considering a firm’s activities which are only indirectly linked to the source of the SMS (i.e. vertically related, complementary, or otherwise adjacent markets), interventions should be designed with integrative efficiencies and dynamic competition factors in mind.
35. It is widely recognised that vertical integration is generally pro-competitive.⁵⁵ The DMT should account for evidence of such efficiencies when designing rules that would prevent platforms from integrating new functionalities into their products or entering into adjacent markets via product integration. Most digital platforms consist of a wide variety of features and functionalities that compete on multiple dimensions to meet evolving consumer demands. Consider the wide range of features incorporated in an Apple phone, including a voice assistant (Siri), alarm, camera, and payment system (Apple Pay). These components are all fundamental aspects of the integrated phone and Apple iOS product, but could in theory be modularised. However, Apple’s incorporation of a camera should not be considered as the cause of anticompetitive foreclosure for camera manufacturers. Similarly, in software, the addition of new features and functionalities in a general search engine should not be seen as anticompetitively foreclosing existing suppliers of similar

⁵¹ See Case 7/97 *Oscar Bronner* [1998] ECR I-7791, available [here](#), paras 44-5; Communication from the Commission, “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (2009), available [here](#), para 83.

⁵² For example, Ofcom’s designation of “Significant Market Power” must be rerun with a market review every 3 years pursuant to Section 84A, Subsections 3 and 7 of the Communications Act 2003, available [here](#). CCIA agrees that a similar approach would be appropriate here. See e.g. Furman Report, para. 2.117 (“The ‘significant market power’ test in telecoms regulation provides a good starting point.”)

⁵³ Opinion of AG Jacobs in Case 7/97 *Oscar Bronner* [1998] ECR I-7791, available [here](#), para. 56; Case *Purple Parking Ltd & Anor v Heathrow Airport* [2011] EWHC 987 (Ch), available [here](#), para. 76 (“The authorities show that a high test is required before [a refusal to deal] can be said to be wrongful. That high test is founded in policy reasons of not allowing proprietary rights (and the consequential freedom to decide who has access to those rights) to be easily overridden in favour of (inter alia) a competitor.”)

⁵⁴ Call for Information, para. 2.9.

⁵⁵ P. Colomo “Self-Preferencing: Yet Another Epithet in Need of Limiting Principles” (SSRN, 17 July 2020), available [here](#), pg. 14.

services.⁵⁶ Such changes should only be considered anticompetitive where they constitute a degradation of the product or service.⁵⁷

36. The DMT should ensure that its regulatory proposals concerning expansion and leveraging should be addressed only to conduct that is clearly evidenced to cause anticompetitive foreclosure. Economic studies have shown an overall pro-competitive effect of market entry in the platform context.⁵⁸ Conduct related to such entry should be treated as abusive only if there is concrete evidence of harm to competition, i.e. anticompetitive foreclosure from the relevant downstream market, as is the case with anticompetitive tying and exclusivity.
37. Restricting ostensibly pro-competitive conduct absent such concrete evidence of harm would limit competition in related markets, leading to significant detriment to consumer welfare, and contradicting the CMA's founding principle to "*make markets work well for consumers, business and the economy*".⁵⁹

III. Insights on Digital Technologies and Market Dynamics

38. There are strong reasons to believe that in markets characterised by the presence of digital platforms, false positives of anticompetitive harm (so-called Type I errors) are more costly than false negatives.⁶⁰ In order to maximise effectiveness and minimise the risk of unintended consequences, CCIA recommends that the DMT closely consider the following factors related to (a) multi-sided markets more generally, and (b) digital advertising in particular.

A. Assessment of Competitive Dynamics in Multi-sided Markets Characterised by Digital Platforms

39. **Platform operators must balance interactions between the various sides of their multi-sided business models.** Multi-sided businesses operate under complex economic dynamics as they must consider the effects of their pricing and output decisions on both sets of customers, as well as the interrelationship among the customers on each side of

⁵⁶ *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February 2016), available [here](#) (rejecting claims that Google's introduction of map thumbnails was anticompetitive as against online maps providers on the grounds that "*the whole thrust of Google's initiative was to improve its general search engine*", at para. 79).

⁵⁷ In this case, product changes were described as "shams" in Decca's internal documents, and the goal of the changes was to foreclose rivals by unsettling interoperability and causing rivals' devices to malfunction. Commission Decision of 1 December 1988 (IV/30.979 and 31.394, *Decca Navigator System*), OJ [1989] L 43/27, available [here](#), paras. 27, 52.

⁵⁸ W. Wen, F. Zhu "Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market" (Strategic Management Journal, 2019), available [here](#); F. Zhu, Q. Liu "Competing with Complementors: An Empirical Look at Amazon.com" (Strategic Management Journal, 2018), available [here](#).

⁵⁹ CMA "New competition authority to make markets work well for consumers, business and the economy" (CMA press release, 1 April 2014), available [here](#).

⁶⁰ G. A. Manne, J.D. Wright "Innovation and the Limits of Antitrust" (George Mason Law & Economics Research Paper No. 09-54, 28 October 2009), available [here](#).

their business.⁶¹ One study of more than 250 platforms revealed that the single most important determinant of success was the correct balancing of the supply and demand-sides of the platforms.⁶² The right balance depends on a wide range of factors including competitive dynamics and constraints imposed by market participants outside the platform. The effect of any intervention will depend on the competitive dynamics of the wider market, and the particular products and services at issue. The difficulty that platform operators face in finding the right balance would be amplified by regulations that would impact this balancing exercise, and particular interventions may make certain platform business models uneconomical. For example, the DBEIS Report found that only 13% of Google's users would be willing to pay £5 a month to continue using Google search and 81% believed they would turn to a competitor if Google tried to charge even a small fee.⁶³ Making platforms less economical would primarily benefit existing legacy incumbents, who have the resources to reach the market without use of the platform, at the expense of SMEs. Such interventions would strengthen the existing market power of legacy incumbents, to the detriment of competition overall.

40. **Distinguishing competitive advantages and barriers to entry.** The Report discusses several innovations and services as creating further barriers to entry.⁶⁴ However, barriers to entry are typically understood as specific features of the market, which give incumbent firms advantages over potential competitors, such as preferential access to inputs, economies of scale or strong network effects.⁶⁵ In contrast, innovative functionalities and features are typically considered as pro-competitive "competition on the merits". All companies, especially successful ones, seek competitive advantage. Seeking competitive advantage through competition on the merits should be encouraged, and pro-competitive justifications should be properly assessed, particularly where multi-sided business models are concerned. For example, the Report suggests that Google and Facebook tags are widely available on advertiser websites and that this constitutes a competitive advantage

⁶¹ See *Ohio v. American Express Co. et al.*, Docket No. No. 16-1454 (25 June 2018). CCIA filed an amicus brief in this case, showing how antitrust analysis must account for the complexity of multi-sided markets. Enforcers should pursue enforcement actions only with a sound understanding of the business models at issue. See Brief of CCIA as Amicus Curiae, *Ohio v. American Express Co., et al.*, Docket No. 16-1454 (filed Jan. 23, 2018), available [here](#).

⁶² See D. Yoffie, et al. "A Study of More Than 250 Platforms Reveals Why Most Fail" (Harvard Business Review, 2019), available [here](#) ("[a] platform often requires underwriting one side of the market to encourage the other side to participate. But knowing which side should get charged and which side should get subsidized may be the single most important strategic decision for any platform.")

⁶³ DBEIS Report, pg. 57.

⁶⁴ See e.g. Report, para. 21 (listing unequal access to user data, the value of ecosystems, and vertical integration as examples); Report para. 5.112 ("Even if Google's behaviour is justified by the need to prioritise the integration of innovations according to the scale of advertiser demand, in our view this would still contribute to the scale advantages Google benefits from in search."). In any case, high entry barriers are a characteristic common to several industries, their existence alone does not warrant intervention. The relevant question should be whether a competitor with a superior business model or product could contest an incumbent, and/or whether the threat of such entry is sufficient pressure to ensure efficient market outcomes.

⁶⁵ There are broadly four categories of barriers to entry and expansion: (1) "Absolute advantages for current market players—including: legal (...) and technical advantages; such as preferential access to essential facilities (...) or intellectual property rights", (2) "Intrinsic/structural advantages—arising from the technology, production (...) necessary to establish an effective presence in the market", (3) "Economies of scale—which arise where average costs fall as the level of output rises", and (4) "Strategic advantages—which arise where incumbent firms have advantages • over new entrants because of their established position". OFT, "Merger Assessment Guidelines" (September 2010), available [here](#), para. 5.8.5.

and barrier to entry.⁶⁶ But the Report fails to consider that advertisers choose to put Google and Facebook tags on their websites to improve the quality of the advertising services they purchase from Facebook and Google (e.g. with audience matching). When looked at beyond the narrow perspective of the website user or competing media company, one can see that these tags serve a pro-competitive business purpose for advertisers who want to get users to return to their websites (e.g. to complete an aborted purchase). Similarly, the Report finds the existence of ecosystems as a barrier to entry,⁶⁷ failing to appreciate the benefit that users derive from a simple, accessible and functional solution to a wide range of needs.⁶⁸ Delivering value to users should be considered pro-competitive. Interventions that would treat such value-increasing pro-competitive conduct as anticompetitive are likely to reduce consumer welfare overall.

41. Understanding the extent of supply-side substitutability in software markets.

Supply-side substitution is an important element of market definition and the assessment of competitive constraints.⁶⁹ Supply-side substitution is particularly prevalent where products or services are software based. With software, it is comparably easy to add features or functionalities and compete with a wider range of substitutes. All this makes software-enabled markets particularly dynamic,⁷⁰ and is the reason that famed Silicon Valley investor Marc Andreessen has said that “software is eating the world”.⁷¹ Narrow market definitions that do not account for the ease with which software-based substitutes can emerge are prone to underappreciate competitive constraints. In this respect, and by way of example, the Report does not adequately account for supply-side substitutability between video and non-video display advertising.⁷² CCIA submits that any

⁶⁶ Report, para. 45, 5.61.

⁶⁷ Report, para. 2.38.

⁶⁸ The Report does appear to acknowledge these benefits. Report, para. 57 (“Integration of a wide range of products and services can deliver efficiency savings and can also improve the consumer experience overall, by increasing the ease with which a range of different services are accessed.”) However, it does not attempt to measure them. This unfortunate, particularly given that, in the digital environment “consumers have to deal with more information and face more decisions”. Report, para. 4.170.

⁶⁹ See OFT, “Market definition” (2004), available [here](#), para. 3.17, Commission notice, “on the definition of relevant market for the purposes Community competition law” (1997), available [here](#), paras. 20-23, OFT, “Merger Assessment Guidelines” (September 2010), available [here](#), paras. 5.2.17-5.2.19.

⁷⁰ See DBEIS Report, pg. 53 (“The extent to which new entrants not only enter the market but become among the largest players does seem distinctive. Other markets, e.g. trainers (see data above), cars, soft drinks, do not see this kind of regular change.”)

⁷¹ M. Andreessen “Why Software Is Eating the World” (August 2011), available [here](#) (“software programming tools and Internet-based services make it easy to launch new global software-powered start-ups in many industries — without the need to invest in new infrastructure and train new employees.”)

⁷² While the Report has an entire Appendix N looking at the demand side of digital advertising, it fails to consider supply-side substitution with regards to video and non-video display advertising. See Report paras. 5.120-5.125. This is despite contemporary evidence, such as Instagram’s seamless and rapid shift from displaying static images to video. Nevertheless, the Report’s only discussion of supply-side substitution appears to be with regards to ad-load. Report, para. 5.129 (“Suppliers of display advertising also have flexibility in the extent to which they monetise consumer attention through the creation of advertising inventory. They have direct control over the quantity of advertising shown or ad load.”) Given the dynamic nature of the markets and improving technology, including network speeds, much of ad-inventory could easily be switched from non-video to video and vice-versa. Indeed, the Interim Report noted that “there has been a **significant move** over the last three years towards video advertising”. Interim Report, para. 5.111 (emphasis added). This suggests that switching on the supply-side is easy and increasing. CCIA noted this point in CCIA’s Response to the Interim Report, at para. 17. It is curious that rather than revising its assessment or better accounting for this evidence, the Report instead revises its

recommendations from the DMT should closely consider the competitive constraint of supply-side substitution. For example, the Report on “Competition Policy for the Digital Era” (“Crémer Report”),⁷³ discusses as one possible solution to concerns around the efficacy of competition enforcement in the digital sector “a *broadening of the concept of potential competition to include all types of products and services that are, on the basis of their current functionalities, not yet close substitutes but could possibly expand in the future such as to become close competitors – e.g. because they serve similar user groups, the functionalities overlap and the markets are somewhat interlinked*”.⁷⁴ Failure to account for these competitive constraints is likely to result in overstating market power and increased risk of Type I errors.

42. **Engaging in a nuanced case-by-case assessment of conduct and market dynamics.**

The Call for Information notes that it will seek inspiration from European proposals to regulate large technology companies.⁷⁵ However, various European proposals appear to suggest that certain pro-competitive conduct is *per se* problematic.⁷⁶ In accordance with existing CMA Guidance,⁷⁷ the DMT should avoid such presumptions.⁷⁸ In particular:

- **“Tipping markets” are not problematic.** Many investments are made in start-ups on the basis that they can be recovered once sufficient scale is achieved. The characteristic of “tipping” is itself related to the increased value that users derive from the network effects. Where such characteristics are present, preventing tipping would mean worse outcomes for consumers. In this respect, CCIA agrees with the CMA that, with regard to tipping, “*pre-emptive action may be more likely to lead to unintended consequences and/or undue burdens on business.*”⁷⁹
- **“Network effects” are not necessarily a barrier.** While network effects are often cited as problematic, a more nuanced assessment is needed. According to the DBEIS Report network effects can encourage dynamic competition because their

evaluation of the evidence, stating that “[o]ur analysis also shows that there has been a **small shift** over the last three years towards video advertising.” Report, para 5.132 (emphasis added). Given improving technology including network speeds, much of ad-inventory could easily be switched from non-video to video and vice-versa.

⁷³ J. Crémer, Y.-A. de Montjoye, H. Schweitzer “Competition Policy for the Digital Era” (2019), available [here](#), (“Crémer Report”).

⁷⁴ Crémer Report, pg. 119.

⁷⁵ Call for Information, para. 1.4 (“In developing its advice, the Taskforce will also pay close attention to proposals for the regulation of digital markets being developed in other jurisdictions, including the Digital Services Act proposals put forward by the European Commission.”)

⁷⁶ K. Hazemi-Jebelli “The New Antitrust Revolution” (CPI, 7 July 2020), available [here](#).

⁷⁷ Office of Fair Trading “Abuse of a dominant position” (2004), available [here](#), para. 5.2 (“In general, the OFT considers that the likely **effect** of a dominant undertaking’s conduct on customers and on the process of competition is more important to the determination of an abuse than the specific **form** of the conduct in question.”)

⁷⁸ For example, both the Report (para. 58) and the Call for Information (fn. 19) mention the European Commission’s decision in Google Shopping as an example of the type of conduct they seek to prohibit. However, that case is on appeal, and when UK Courts looked at similar conduct, they found it legal. *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February 2016), available [here](#) (rejecting claims that Google’s introduction of map thumbnails was anticompetitive as against online maps providers on the grounds that “*the whole thrust of Google’s initiative was to improve its general search engine*”, at para. 79).

⁷⁹ Call for Information, para. 2.38.

high value and their frailty create a strong incentive to innovate.⁸⁰ Sometimes, network effects facilitate new entrant platforms to achieve critical mass against incumbents.⁸¹ Even where strong network effects are present, the DBEIS Report found several strategies that can effectively overcome them.⁸² Also the DBEIS Report found that in various circumstances, smaller networks can have a competitive advantage.⁸³ Furthermore, the prevalence of multi-homing makes a “winner takes all scenario” less likely,⁸⁴ and the absence of multi-homing creates the incentive for new entrants to allow multi-homing, to create a more attractive platform.⁸⁵ Network effects can also occur in either direction, causing firms to lose market share as quickly as they have gained it.⁸⁶

- **“Leveraging” into adjacent markets is not inherently problematic.** Where a firm has transferable skills and resources, leveraging those for market entry leads to increased efficient competition in those adjacent markets and hence better outcomes for users.

43. Imposing interoperability and modularity requirements can be costly, including the loss of integrative efficiencies, product differentiation, and incentives to innovate.

New interoperability requirements would impose a positive obligation on the dominant company to develop interoperability technologies, in other words to facilitate competition against itself. As indicated above, CCIA believes that except in extreme circumstances,

⁸⁰ UK Department for Business, Energy and Industrial Strategy “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 28 (“The value of network effects on the one hand and their fragility on the other might create an incentive to innovate and otherwise invest in growing networks.”)

⁸¹ *Ibid.*, pg. 52 (“Instagram, for example, could function for users as a means to post attractive photos to Twitter, before it attained critical mass as a social network itself. It is also telling that the most popular social network overall (Facebook) is often not the most popular download, reflecting that in some relatively mature markets the growth is in newer social networks (even in absolute terms).”)

⁸² *Ibid.*, pg. 47 (“Most social networks therefore face a challenge establishing critical mass initially, which they can overcome with strategies including: starting with a defined community where they can attain critical mass quickly (e.g. Facebook started in the Harvard campus); offering a service that is valued even without the network itself having critical mass (e.g. Instagram’s photo filters, which prepared pictures for posting to earlier social networks, e.g. Twitter); or convincing highly networked individuals to take part (the celebrities with very large numbers of followers who constitute a large part of the attraction of Twitter).”)

⁸³ *Ibid.*, pg. 47 (“For example, Exclusivity might be part of the attraction to some users. Facebook might be less cool among younger users than newer networks, because of its increasing reach among older users. This might explain the strong growth of platforms such as Snapchat. Larger social networks might be flooded with dubious content, making a user feel that an investment in creating high-quality content is less likely to be rewarded. The sheer volume of comments on a popular YouTube video, for example, might discourage someone adding real value, as their contribution is likely to be lost in the crowd, to the point that the network is only attractive to those who lack other outlets (for good reason). In turn, users might find it harder to find good quality content. This might explain the growth of Pinterest, for example. Manipulation of social networks, e.g. attempts to message large number of users in order to trap them in some dubious scheme, might be targeted at larger networks.”)

⁸⁴ *Ibid.*, pg. 73 (“If someone had to choose only one social network, they might go for the largest and a winner takes all or winner takes most market might result. However if they are able to use multiple platforms (e.g. installing multiple social networks, checking on multiple price comparison websites) then each platform needs to obtain critical mass but there is no reason to assume a tendency to monopoly.”)

⁸⁵ *Ibid.*, pg. 29 (“There is still the possibility that such an incumbent’s position is fragile, however, if a new entrant can make it easier to multi-home.”)

⁸⁶ *Ibid.*, pg. 29 (“After all, network effects cut both ways. If a platform starts to lose market share, the loss of network effects might turn a slow decline into a rapid collapse. Potential entry could overturn settled markets quickly.”)

forcing a private company to subsidise competition against itself is not an appropriate method of achieving a more competitive market. Even if the development of such interoperability solutions is economically and technically feasible, there's also a question of whether mandating such interoperability is the right policy from the perspective of users. The most open platform of all is arguably the Linux Operating System. It is open source, anyone can develop for it, anyone can take the kernel and modify it, anyone can implement their own interoperability solutions. But this also leads to massive fragmentation of the product, and it's not particularly user-friendly or popular. On the other hand, a company like Apple has succeeded in large part through its strategy of strict top-down quality control, and making things easy for the consumer, even though there is less choice and customisability. This carefully managed approach has led to dramatic growth in the market. It seems to be what consumers need, and indeed a lot of people who don't have the digital skills to quickly climb the learning curve of a new device prefer the efficiency of a one-stop-shop.⁸⁷ In that sense, there's a tradeoff that every company must decide on when determining how much value will come to their ecosystem from 3rd-parties as compared to from themselves. This decision is best made by the market, not by regulators. There is also a risk that companies that would otherwise be incentivised to compete directly with the platform by creating new innovative solutions will instead settle for a "remedy taker" business model, using platform inputs, and limiting their ability to differentiate their products and services.⁸⁸ Accordingly, CCIA submits that such interventions would have a significant negative impact on incentives to innovate, and may ultimately harm consumers.

44. Distinguishing privacy concerns and competition concerns with regards to data.

The Report appears to equate some privacy objectives with competition objectives, particularly with regards to personal data for advertising.⁸⁹ But assuming that increased competition necessarily results in increased privacy would result in Type I errors. Data protection laws pursue the protection of each individuals' fundamental rights; competition law is purely concerned with individual and collective restraints leading to inefficient market outcomes. While data protection and privacy are legitimate regulatory objectives, competition tools are ill-suited for that purpose and should not be used as cover to fill regulatory gaps. The Call for Information acknowledges that "*[a]ddressing these broader [consumer protection] policy issues is outside the scope of the Taskforce*".⁹⁰ However, as mentioned above,⁹¹ and given that different policy objectives are sometimes in tension, the DMT should be clear about how it would address such conflicts.

45. Consumer behaviour issues unrelated to market power require industry-wide remedies. Consumer focused interventions that address root causes, like lack of digital skills and learning costs, are likely more effective than industry-level interventions. In this respect, CCIA supports the CMA's exploration and consideration of "natural behavioural

⁸⁷ Report, para. 57 ("Integration of a wide range of products and services can deliver efficiency savings and can also improve the consumer experience overall, by increasing the ease with which a range of different services are accessed.")

⁸⁸ See e.g. Statement of Jerry Ellig to the House of Lords Select Committee on the European Union, EU Internal Market Sub-Committee (9 December 2015), available [here](#), pg. 6 ("If MySpace, for example, had been subjected to public utility regulation because of its temporary market dominance, it is quite possible that competitors like Facebook and LinkedIn would never have emerged, because the potential for regulation would have diminished the profit potential from successfully challenging MySpace.")

⁸⁹ See below, para. 48.

⁹⁰ Call for Information, para. 1.21.

⁹¹ See above, paras. 26-30.

biases”, and possible consumer protection legislation to address harms caused by such biases.⁹² Note, however, that where such concerns around behavioural biases are unrelated to market power (as is most often the case),⁹³ any such consumer protection legislation should apply equally to all market participants, as all would be equally capable of exploiting those biases and causing harm. For example, the Report seeks to empower and inform consumers by limiting personalised advertising in the form of a requirement that such advertising be opt-in rather than opt-out by default. Limiting such an obligation only to Google and Facebook, as the Report suggests,⁹⁴ would address only a portion of the perceived harm, while creating an uneven playing-field to advantage publishers and other platforms not bound by the obligation.

B. Acknowledging the Pro-Competitive Benefits of Digital Advertising

46. **Digital platforms are competitively constrained by legacy incumbents.** Any recommendations from the DMT should carefully assess the competitive constraint imposed by traditional advertising. The Report finds that such constraints are minimal.⁹⁵ However, the Report contains significant evidence of the opposite. Such evidence includes that digital advertising tools are improving in terms of quality (such as ad fraud)⁹⁶ and price (lower costs of entry),⁹⁷ all suggesting that digital advertising is under competitive pressure to improve. The Report also notes that “[s]ome large advertisers thought that video-on-demand is the next best alternative to Facebook for display.”⁹⁸ CCIA’s Supplemental Submission contained a number of additional data points.⁹⁹ Perhaps this shortcoming is in part because the Report, in places, appears to misattribute Facebook and Google’s activities across the entire advertising technology value chain to their market activities as digital advertising publishers.¹⁰⁰ CCIA believes that a better understanding of digital advertising in the wider economic context in which it operates will improve the efficacy of the DMT’s recommendations.
47. **Digital platform competition with legacy advertising incumbents lowers prices, increases output and incentivises innovation in publishing.** The Report fails to properly account for the positive pro-competition outcomes that digital advertising has brought about. For example, digital businesses which aggregate, organise or rank content force content providers to compete more aggressively with each other. This could explain why certain publishers are getting lower advertising revenues (because advertisers now have a whole world of more easily comparable content publishers to choose from, many of which are providing more engaging content for users). Furthermore, digital service providers also dramatically lower entry barriers for content producers to reach their audience (e.g. via blogging services, video sharing services, audio sharing services, etc.). This also increases competition on the supply side of the content market, which is another reason explaining why any particular publisher might be getting lower advertising revenue.

⁹² Call for Information, para. 2.41.

⁹³ See e.g. J. Savin “Strava users are calling out the app’s “creepy” privacy settings” (Cosmopolitan, 10 August 2020), available [here](#).

⁹⁴ Report, para. 8.82.

⁹⁵ Report paras. 5.23, 5.152; Report, Appendix N, available [here](#), paras. 58-66.

⁹⁶ See e.g. Report, para. 5.238

⁹⁷ See e.g. Report, para. 5.67.

⁹⁸ Report, Appendix N, available [here](#), para. 63.

⁹⁹ CCIA’s Supplemental Submission, available [here](#), pgs. 8-11.

¹⁰⁰ See *below*, fn. 132.

The Report appears to attribute an imbalance in bargaining power to digital platforms' market power,¹⁰¹ but a more accurate assessment would be that any individual publisher's content simply is not particularly valuable as compared to the universe of content which is now able to compete on equal terms thanks to digital distribution methods.¹⁰² Any action to artificially inflate the value of the content of a subset of publishers would distort the competition between publishers that digital advertising has facilitated.

48. Advertisers benefit from personalised advertising. The Report acknowledges that digital advertising has *“made it substantially easier for businesses to reach and serve adverts to consumers all around the world, in a way that was only previously possible for large companies”* and that *“[t]his has opened up greater advertising possibilities for a long tail of small businesses, and enabled large numbers of predominantly online businesses to thrive that may otherwise not have been viable”*.¹⁰³ However, it fails to understand that this is largely because of personalised advertising. Even though the Report estimates that for publishers, non-personalised advertising is worth 70% less than personalised advertising,¹⁰⁴ it does not attempt to measure the benefits that personalised advertising generates for the advertiser side of the market. The Report only has passing references to the benefit that advertisers receive either from the targeting of personalised advertising, or from the more accurate measurability.¹⁰⁵ The Report does acknowledge that digital advertising generally has lower transaction costs,¹⁰⁶ that it appears to be more accessible to smaller advertisers,¹⁰⁷ and that narrower targeting results in greater return on investment.¹⁰⁸ CCIA's Supplemental Submission went into great detail on the increase in consumer welfare generated by personalised advertising.¹⁰⁹ Despite CCIA's suggestions, the Report does not attempt to quantify the value of personalised advertising nor adequately assess the wider costs that limits to personalised advertising would entail.¹¹⁰ Furthermore, the Report acknowledges that some of the proposed interventions would *“have an impact on platforms' business models and would require careful design”*¹¹¹ and that *“there are some potential costs of such an intervention to consumers, advertisers and the platforms themselves.”*¹¹² But the Report fails to assess the costs itself. These gaps in

¹⁰¹ Report, para. 5.364.

¹⁰² Indeed, some of the Report's proposals appear to facilitate coordinated collective bargaining as between large publishers and digital platforms in a way that would exclude smaller (and less established) publishers. See *above*, fn. 38.

¹⁰³ Report, para. 2.9.

¹⁰⁴ Report, paras. 5.326, 6.42; Report, Appendix F, available [here](#), paras. 115-119.

¹⁰⁵ See e.g. paras. 2.542, 8.107.

¹⁰⁶ Report, para. 5.168.

¹⁰⁷ Report, paras. 2.56, 5.26, 5.267.

¹⁰⁸ Report, para 5.138. Appendix N summarises the reasons why advertisers choose Google and Facebook advertising as: (i) awareness and reputation; (ii) coverage and targeting; (iii) meets company objectives; (iv) easy to use; (v) value for money; (vi) ability to retarget and use sub-brands. Report, Appendix N, available [here](#), para. 41.

¹⁰⁹ CCIA's Supplemental Submission, available [here](#), pgs. 7-8.

¹¹⁰ The Report explicitly acknowledges this failure, recommending intervention despite leaving it for the DMT to make the assessment of costs and benefits. See e.g. Report, Appendix X, available [here](#), para. 46 (“Overall, we accept that there may be some reduction in value of advertising ... However, as we set out below, this would depend on the eventual choice model adopted, and would be subject in any case to trialling to assess the impacts and welfare gains.”)

¹¹¹ Report, para. 8.121.

¹¹² Report, para. 8.122.

assessment also contaminate its discussion of data gathering.¹¹³ For example, the Report assumes that a more competitive market would result in less data collection, stating that *“in a more competitive market, we would expect platforms to ... [meet] the targeting needs of advertisers using less consumer data, thus protecting consumers privacy to a greater extent.”*¹¹⁴ This assumption goes against common industry knowledge and experience. Aram Zucker-Scharff, the ad engineering director for The Washington Post’s research, experimentation, and development team recently said *“the nature of the marketplace is that, essentially, money flows to the most invasive option”*.¹¹⁵ Paradoxically, the Report itself appears to acknowledge this, stating *“access to valuable user data that enables more granular audience targeting is a key dimension of competition.”*¹¹⁶ The Report asserts that the use of consumer data to offer advertisers personalised advertising is evidence of abuse of market power, despite the competitive incentives that drive advertising suppliers to use “invasive”, i.e. personalised, advertising. These erroneous conclusion are based on the Report’s manifest failure to adequately account for the benefit that advertisers receive from such data collection practices,¹¹⁷ and the cost to advertisers if they were limited. In crafting its advice to the government, the DMT should better adjust its assessment of market realities if it seeks pro-competitive outcomes.

- 49. Digital advertising and personalised advertising are particularly beneficial to SMEs, both advertiser SMEs and publisher SMEs.** The Report’s failure to account for the benefits of digital advertising, and personalised advertising in particular, is particularly concerning given that personalised advertising disproportionately benefits SME advertisers and facilitates their competition with larger incumbents.¹¹⁸ With digital, and particularly programmatic advertising, SMEs are able to purchase their own advertising services at low cost (due to the elimination of wastage, better targeting, and larger inventory), and without the need to go through media agencies. At the same time, SME publishers benefit the most from personalised advertising. Personalised advertising allows

¹¹³ Note that the use of data for personalised advertising, and the implementation of privacy options are not mutually exclusive. Indeed, the Interim Report correctly found that search engines and social media platforms already compete on the privacy dimension of competition. CMA, “Market study interim report, Online platforms and digital advertising” (1 July 2020), available [here](#), paras. 3.12 (with respect to search engines), 3.107 (with respect to social media). Interestingly, the final Report softens the language saying only that companies “may” compete on this dimension. Report, paras. 3.12 (with respect to search engines) 3.158 (with respect to social media). The point is that digital advertising platforms must compete *on both sides* of the multi-sided market, giving users the option to limit data collection, *but also* using data to offer advertisers an improved personalised advertising service. These two points are complementary. Studies suggest that personalised advertising that is not transparent with respect to privacy is generally less effective for advertisers, and hence less profitable. See Kim, et al. “Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness” Journal of Consumer Research 45, no. 5 (Harvard Business School, February 2019), available [here](#).

¹¹⁴ Report, paras. 6.31-6.32.

¹¹⁵ G. Edelman “Can Killing Cookies Save Journalism?” (Wired, 8 August 2020), available [here](#).

¹¹⁶ Report, para. 5.127.

¹¹⁷ Report, Appendix X, available [here](#), para. 44, which refers only to the elimination of wastage when assessing benefits that advertisers accrue from digital advertising (ignoring lowered prices and increased advertising quality), in concluding that interventions to limit personalised advertising are unlikely to harm advertisers’ interests. The Report systematically fails to assess the benefits accruing to advertisers and instead focuses almost entirely on benefits accruing to digital media companies.

¹¹⁸ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018), available [here](#), pg. 28 (“Online platforms give SMEs access to a wider range of markets, locally, regionally and globally, in which to conduct their business. About 46% of the European Union’s SME retailers, for example, leverage online marketplaces to establish and expand a multi-channel presence.”)

these smaller publishers to monetise their advertising inventory at higher rates than they would if forced to rely on contextual advertising (because they are less likely to have the repeat traffic and user profiles available to larger publishers like newspapers websites that often require user login).¹¹⁹ As explained in CCIA's Supplemental Submission, intervention that would limit the efficacy of personalised advertising risks raising advertising costs for SME advertisers, lowering advertising rates for SME publishers, and entrenching and strengthening the existing competitive position of larger advertisers, publishers, and their media agency intermediaries.¹²⁰ This would invariably reduce competitive dynamics across the wider economy.

50. Advertisers exercise countervailing buyer-power on digital advertising platforms.

The Report acknowledges that *“for both Google and Facebook, a relatively small number of large advertisers account for a high proportion of overall revenues. The largest [5-10]% of advertisers account for over 85% of Google and Facebook’s advertising revenues.”*¹²¹ However, the Report fails to adequately consider buyer-power as a competitive constraint. The constraint and the exercise of buyer-power has become more apparent in recent times, as several advertisers have decided to boycott Facebook. This boycott caused Facebook’s market value to drop by \$56 billion.¹²²

51. Consumers also benefit from personalised advertising. When speaking of competition on advertising quality, the Report only has passing references to the increased quality and relevance of personalised advertising from the perspective of consumers of advertising content.¹²³ As mentioned in CCIA's Supplemental Submission, limits on personalised advertising are likely to reduce these benefits as well.¹²⁴ CCIA again submits that the use of data for personalised advertising increases the quality of advertising for consumers and the DMT should quantify the impact on this aspect of consumer welfare before making policy recommendations that would limit personalised advertising.

¹¹⁹ Larger publishers know this, and lobby actively against personalised advertising so as to attract advertising revenues away from SME publishers who they tend to characterise as lower quality. See G. Edelman “Can Killing Cookies Save Journalism?” (Wired, 8 August 2020), available [here](#) (“If advertisers start paying to appear in a certain context rather than to target a certain user, it will advantage publishers whose content is actually good—and put out of business the long tail of low-quality or outright fraudulent sites that currently soak up much of the money spent on automated programmatic advertising.”)

¹²⁰ This is also known as the “Alchian–Allen” effect, whereby increases in transaction costs shift consumption towards more expensive alternatives. Alchian, Armen Albert “Exchange & production: competition, coordination & control” (1983).

¹²¹ Report, para. 5.12.

¹²² S. Dato “Zuckerberg Loses \$7 Billion as Firms Boycott Facebook Ads” (Bloomberg, 27 June 2020), available [here](#); J. Swartz, “Facebook reverses policies as ad boycott sends stock down” (MarketWatch, 28 June 2020), available [here](#).

¹²³ See e.g. Report, paras. 2.8, 3.12, 4.34, 4.68, 8.113.

¹²⁴ CCIA's Supplemental Submission, pgs. 5-6.

IV. Shortcomings of the online platforms and digital advertising Report

52. In crafting its advice to the government, the DMT should be particularly aware of the following points which were not adequately appreciated in the Report.¹²⁵ These points are particularly concerning given the Report describes its detailed assessments as “*proof of concept*’ of the new regulatory approach that we are advocating.”¹²⁶ If these significant shortcomings can arise in the context of a market investigation, one would be justifiably concerned that similar flaws could contaminate the decision making of the DMT. Assuming the DMT is granted broad interventionist powers as proposed, such flaws in assessment could lead to significant unintended consequences.

53. **Digital advertising prices are set by competition:** The Report assumes that digital advertising prices are excessively high due to the market power of Google and Facebook.¹²⁷ However, as the Report acknowledges, the vast majority of digital advertising prices are set by auction.¹²⁸ Their price is a function of supply and demand, not individual negotiation. Accordingly, prices would be expected to drop only if advertising inventory increases more quickly than does demand for digital advertising. Fortunately this has been the case for the last years,¹²⁹ as competition in the digital advertising segment continues to grow.¹³⁰ The Report fails to adequately acknowledge that digital advertising competition exists not only from existing digital platforms.¹³¹ Traditional publishers also

¹²⁵ CCIA also pointed out other flaws in the way the CMA understood market dynamics in CCIA’s Response to the Interim Report, e.g. with regards to the concept of “paying with attention” (para. 10), and “paying with data” (para. 11). See CCIA’s Response to the Interim Report, available [here](#).

¹²⁶ Report, para. 8.4 (“In essence, our detailed assessments therefore serve to provide ‘proof of concept’ of the new regulatory approach that we are advocating.”)

¹²⁷ See e.g. Report, para. 10 (“Our analysis indicates that Google’s and Facebook’s market power has a significant impact on prices and revenues.”)

¹²⁸ Report, paras. 5.33-5.36.

¹²⁹ See PPI “The Declining Price of Advertising: Policy Implications” (2019), available [here](#); M. Mandel, “The UK Online Ad Market” (PPI, 7 January 2020), available [here](#) (“Given how many places ads appear these days, it’s reasonable that advertising in the UK has become much more intensive over time—that is, in real units advertising has grown faster than overall real UK GDP. If so, then the shift to digital advertising has coincided with a fall in the price of advertising relative to other UK goods and services. The easiest interpretation, at least for me, is that advertisers are consistently getting a bigger bang for their buck from digital advertising, without paying more in total.”)

¹³⁰ K. Hazemi-Jebelli “Evolution of Ad Spend and the Dynamics of Digital” (DisCo, 4 May 2020), available [here](#).

¹³¹ In this respect, the Report barely acknowledges the competitive constraints imposed by the likes of Twitter, Snapchat and Amazon, speaking only briefly of their “idiosyncratic relative advantages” (para. 5.139). There is tangible evidence that both Google and Facebook have been forced to respond competitively. See e.g. P. Dave “Google drops charges on shopping service to counter Amazon’s surging ad sales” (Reuters, 21 April 2020), available [here](#); H. Murphy “Facebook takes on Amazon with online shopping venture” (Financial Times, 19 May 2020), available [here](#). Even more surprisingly, the Report appears to dismiss Amazon as a constraint with regards to search advertising on the basis of misleading statistics (para. 3.50). It first minimises Amazon’s share of retail searches (citing reports indicating a share of between 28-55%). It then attempts to claim that revenue from retail searches is a minor portion of total search revenue. In doing so, it appears to cite statistics on the portion of search advertising purchased by the retail sector instead. See Report, fn. 103. The CMA does not explain how the amount of money spent by the retail sector on search advertising is relevant to the assessment of the amount of money search engines derive from product-related search queries, and yet the Report appears to equate the two.

compete for digital advertising spend.¹³² One could expect that, if implemented as proposed, the Report's recommendations to limit personalised advertising would reduce prices for Google and Facebook's advertising services (because it would reduce the quality of their digital advertising services and encourage demand to shift to competing publishers), while also potentially leading to higher overall digital advertising prices (through the reduction in total inventory of high quality personalised advertising). In other words, the proposals would benefit traditional advertising publishers at the expense of Google, Facebook, and more importantly, purchasers of advertising services (as well as media consumers who prefer personalised advertising, and SME publishers).

54. The Report's assessment of "reverse payments" misunderstands the multi-sided nature of the market. The Report asserts that "*[i]t's plausible that the price charged in more competitive circumstances would be negative, with consumers rewarded, financially or otherwise, for entering a search query or scrolling through their news feed.*"¹³³ In advertising-funded formats, where there is arguably less concentration, such as television, radio or newspapers, there are no reverse payments to consumers. The CMA fails to distinguish or explain why it thinks that such reverse payments would be "plausible" for digital advertising. Furthermore, the Report doesn't explain why digital advertising platform operators would choose to offer consumers reverse payments rather than simply using those funds to further improve services for advertisers.¹³⁴ This type of analytical shortcoming increases the risk of unintended consequences.

55. The Report's assessment of market definition for social media platforms is artificially narrow and ignores relevant competitive constraints.¹³⁵ The Report recognises that a social media platform encompasses a wide variety of functionalities.¹³⁶ However, the Report failed to address the competitive constraints imposed by services that include some of these functionalities but nevertheless would fall outside the 'Social Media Platform' market. In particular, the Report ignores the competitive constraint imposed by other popular social media platforms that include features falling within its description but which are not owned by Facebook or Google (Vimeo, Telegram, Viber, Skype, Apple iMessage), music focused networks (Spotify, SoundCloud), gaming-focused

¹³² In order to reinforce its findings of market power in digital advertising, the Report repeats, "we estimate that around 80% of all expenditure on search and display advertising in the UK in 2019 went to Google or Facebook." Report, pg. 42; Report, paras. 16, 2.63, 5.2. However, it finds that consumers spend only 37% of their total time online on Facebook and Google websites. Report, Appendix C, available [here](#), para. 21. It alludes that this mismatch has to do with the exploitation of market power. Report, para. 5.3 ("Google and Facebook's collective share of digital advertising revenues is significantly greater than the share of time spent by users on these platforms, suggesting that their ability to monetise through advertising is not simply a function of scale. digital advertising revenues in 2019. This chapter shows how a lack of competition ..."). However, that 80% share of digital advertising spend includes not only Google and Facebook revenues as publishers of digital advertising, but also the entire vertical value chain of the ad-tech stack and advertising intermediation, their operations as ad servers, supply-side platforms and demand-side platforms, etc.. This is only mentioned in passing however, not in the section on competition in digital advertising. Report, para. 2.63 ("This includes the revenue from advertising on each of their own platforms, as well as from intermediation services.")

¹³³ Report, para. 2.84.

¹³⁴ This appears in part to be due to the Report's failure to understand the important balancing exercise that digital platforms must engage in. See *above*, para. 39.

¹³⁵ Report, paras. 3.153-3.173.

¹³⁶ See e.g. para. 3.159 Table 3.1 listing profile management, content feed, private contacts and public followers, photo and video sharing, comments and messaging.

video sharing sites (like Twitch), adult-focused video sharing sites,¹³⁷ and gaming-focused networks (like the PlayStation Network, Xbox Live or Steam). Since the CMA's calculated share of consumer attention attributed to the different services is based on the total attention of the services chosen for inclusion, the failure to include these similar services means that the market shares presented for social media platforms are artificially inflated. The most egregious exclusion is the social media sharing platform TikTok. Even though the Report acknowledges that TikTok "*has grown quickly*"¹³⁸ it dismisses it as a constraint because (a) "[i]t seems to compete most closely with Facebook Watch"¹³⁹, and (b) it "*remains small with a share of 6% and only began displaying digital advertising in the UK in July 2018*".¹⁴⁰ This reasoning, based on a static view of competition, is mistaken, and fails to account for dynamic factors and potential future competition.¹⁴¹ Firstly, TikTok is already a direct rival to other social media platforms on multiple dimensions: it already has more user engagement than YouTube in important audience segments,¹⁴² it also competes directly with Facebook on features,¹⁴³ and for content creators.¹⁴⁴ Second, TikTok is not small: its parent company has posted a \$3 billion net profit in 2019,¹⁴⁵ and its estimated market value is approximately \$50 billion.¹⁴⁶ Failure to include TikTok and others in the Report's calculation of market shares overstates the competitive significance of particular market participants and understates the very real competitive constraints that they face. These constraints are further evidenced by the Report's finding that Facebook's share of time spent in social media has declined over the last five years.¹⁴⁷ Failure to consider these shortcomings greatly increases the risk of over-enforcement, and the unintended consequences of Type I errors.

56. The Report's findings on Google's market share in search overstate its competitive significance.¹⁴⁸ The Report assesses Google's market power in search on the basis of the share of search queries that take place on Google Search,¹⁴⁹ and the proportion of

¹³⁷ In this respect, see e.g. J. Alexander "PornHub is being touted as a real, possible YouTube alternative" (Polygon, 24 March 2018), available [here](#).

¹³⁸ Report, para. 3.209.

¹³⁹ Report, para. 3.191.

¹⁴⁰ Report, para. 3. 209.

¹⁴¹ This is particularly paradoxical given the CMA's forward looking approach taken in recent UK merger cases such as *Google/Looker*, *PayPal/iZettle* and *Experian/Clearscore*, where the CMA considered issues such as developing market dynamics and potential competition.

¹⁴² S. Perez "Kids now spend nearly as much time watching TikTok as YouTube in US, UK and Spain" (TechCrunch, 4 June 2020), available [here](#).

¹⁴³ J. Constone "Facebook launches Lasso, its music and video TikTok clone" (TechCrunch, 9 November 2018), available [here](#).

¹⁴⁴ E. Choi "Facebook Offers Money to Reel In TikTok Creators" (Wall Street Journal, 28 July 2020), available [here](#).

¹⁴⁵ K. Roof, Z. Huang "ByteDance Hit \$3 Billion in Net Profit Last Year" (Bloomberg, 27 May 2020), available [here](#).

¹⁴⁶ E. Wang, K. Wu, J. Zhu "Exclusive: ByteDance investors value TikTok at \$50 billion in takeover bid - sources" (Reuters, 29 July 2020), available [here](#).

¹⁴⁷ Report, para. 3.170.

¹⁴⁸ See e.g. Report, para. 3.47.

¹⁴⁹ Report, Appendix C, available [here](#), para. 25 ("We consider that the number of individual search queries entered into each search engine is the most appropriate metric for calculating shares amongst general search engines.")

traffic that websites derive from these searches.¹⁵⁰ However, the Report assumes all search queries are equally significant for the competitive assessment. This is not correct. In fact, lots of browsers interpret incomplete URLs as search queries, and many users use Google Search to navigate to webpages they already know. Searches with such navigational intent are less competitively significant because users' destination is already predetermined. Those websites would have gotten that traffic even absent the search query. If Google were to degrade the quality of its search results and try to direct users to different websites, it would lower the relevance of its search results, reduce its quality, and ultimately divert users to alternative search services. Failure to account for this distinction in search queries overstates Google's market power and understates the competitive constraints it faces.¹⁵¹

57. The Report's findings on ad load contradict its conclusions on market power in search. We appreciate that the final Report appears to have considered CCIA's suggestion to investigate and compare ad loads as a potential metric of market power.¹⁵² The Report correctly states that "*[i]n a competitive market, a search engine's incentive to increase ad load is constrained by the fact that this reduces quality of the search engine to users.*"¹⁵³ In other words, if Google were able to exercise market power, one would expect that it would have higher ad load, since it would not be under pressure to maintain the quality of its search engine to users. The Report found that "*compared to Bing, Google has a lower ad load both in terms of the number of search events which show an ad and the number of ads shown on each of these events.*"¹⁵⁴ The Report paradoxically concludes that this is because "*there is currently little competition between Google and Bing*",¹⁵⁵ instead of the more obvious conclusion, that Google is operating under competitive constraints.¹⁵⁶

58. Evidence on the cost of capital vs returns of capital is not appropriate as evidence of exploitation of market power. The Report analyses the degree of profits generated by Google and Facebook,¹⁵⁷ in order to assert that these profits would be expected to attract entry by potential competitors,¹⁵⁸ absent anticompetitive conduct or market power. However, the Report cites no evidence, academic literature or comparative cross-industry study supporting its assertion that, in this particular market context, high rates of return

¹⁵⁰ Report, para. 3.47 ("Google is an important source of traffic for these providers, with most providers relying on Google for at least 40% of their traffic.")

¹⁵¹ Similarly, the CMA's assessment of the significance of high placement in organic search results also overstates their importance and represents a particular form of "survivorship bias". In many cases, where a user does not find what they're looking for in the first page of organic results, they will change their search terms rather than go to the second page. This aspect of consumer behaviour is often underappreciated.

¹⁵² CCIA's Response to the Interim Report, available [here](#), para. 16. CCIA suggested that this comparison be done as against non-digital media as well, but the Report only includes a comparison as between Google and Bing, and as between Facebook and itself.

¹⁵³ Report, para. 5.68; see also Report, para. 5.104 ("In a more competitive market consumers would have greater ability to switch to alternative search engines based on quality, resulting in a constraint on Google from increasing ad load.")

¹⁵⁴ Report, para. 5.94.

¹⁵⁵ *Id.*

¹⁵⁶ The Report acknowledges this only in passing. Report, para. 5.69 ("it is still constrained to some extent by the need to maintain the quality of its search product")

¹⁵⁷ See e.g. Report, paras. 12, 2.74, 2.78, 6.28, 8.116.

¹⁵⁸ Report, Appendix D, available [here](#), para. 88.

are “consistent with the exploitation of market power.”¹⁵⁹ As pointed out by some commentators, many non-digital businesses have a return on capital which is higher than Google’s, even though they clearly do not have market power.¹⁶⁰ Courts have recognised these flaws as well. The CMA relied on the return on capital in its decision in *Phenytoin*,¹⁶¹ to argue that the prices charged there were excessive. Even if such an approach were theoretically suitable in specific industry circumstances where capital returns can be predicted in advance, the economics of digital markets are drastically different. Many digitally enabled markets are characterised by significant fixed costs, and nearly zero marginal costs. Investors recognise that there are risks that these fixed costs will be completely lost if the business is unsuccessful, but invest on the basis that some of their bets will be successful and achieve the scale necessary to become profitable.¹⁶² Cost of capital is based on this upside, even though future profits are uncertain and volatile.¹⁶³ The Competition Appeal Tribunal, found that “*it is clear that the CMA’s approach owes more to a theoretical concept of idealised or near perfect competition, than to the real world.*”¹⁶⁴ In fact, wider macro-economic factors suggest that competition is working in the digital economy.¹⁶⁵ The DMT should be cautious in following the Report’s approach to assessing whether digitally enabled markets “*sufficiently reward investors with a fair return.*”¹⁶⁶ CCIA would caution against granting regulators far-reaching powers to impose structural and behavioural remedies on private enterprises directly or indirectly designed to advance that regulator’s theoretical notions of fair investment returns and the appropriate distribution of profits in highly dynamic and competitive industries. The unintended consequences of such an approach would be significant.

V. Concluding Remarks

59. CCIA suggests that the DMT closely consider and explore the points raised above when advising the government on the potential design and implementation of pro-competitive measures for unlocking competition in digital platform markets. Regulation “*can stimulate ideas and can block their implementation. It can increase or reduce investment risk – and steer funding towards valuable R&D or tick-box compliance. It can influence consumer*

¹⁵⁹ Report, para. 2.78.

¹⁶⁰ J. Harkrider “Break up Denny’s” (CPI, 8 July 2020), available [here](#).

¹⁶¹ CMA Decision Case CE/9742-13 *Phenytoin* (7 December 2016), available [here](#).

¹⁶² As recently as 2013, Amazon was described in the press as “a charitable organization being run by elements of the investment community for the benefit of consumers.” M. Yglesias “Amazon Profits Fall 45 Percent, Still the Most Amazing Company in the World” (Slate, 29 January 2013), available [here](#).

¹⁶³ See e.g. D. Yoffie, et al. “A Study of More Than 250 Platforms Reveals Why Most Fail” (Harvard Business Review, 2019), available [here](#) (“A common misconception about platforms is that once the market tips in your favor, you will be the long-run winner. Often this is true. But there is a better way to think about tipped markets: it is the winner’s opportunity to lose.”)

¹⁶⁴ Competition Appeal Tribunal Case Nos: 1275-1276/1/12/17 *Flynn Pharma Ltd.* (7 June 2018), available [here](#), para. 318, upheld by the Court of Appeal Case No: C3/2018/1847 & 1874 *CMA v. Flynn Pharma Ltd.* (10 March 2020), available [here](#).

¹⁶⁵ M. Mandel “Taking Competition Policy Seriously: Macro Indicators for Regulators” (PPI, 15 August 2018), available [here](#) (finding that in the US economy, the tech, telecom and e-commerce sector has outperformed other industries with regards to a number of macro-economic indicators including real-value added, productivity, prices charged, gross margins, real annual pay per worker, and labour share).

¹⁶⁶ Report, para. 6.29.

*confidence and demand – and determine whether firms enter or exit a market.*¹⁶⁷ The UK is currently a global leader in innovation.¹⁶⁸ Failure to consider the points raised herein risks jeopardizing this position; it would increase the prevalence of Type I errors, consequently chill pro-competitive conduct, and ultimately reduce consumer welfare, innovation and investment in the UK.

60. It was not so long ago that the OECD recognised that digital platforms were key drivers of competition and innovation, enabling disruptors to bring new services to market to the benefit of consumers.¹⁶⁹ Unfortunately, this view appears to have fallen out of favour. In its place, competition authorities are racing to show they can be the first to “tame the dark side” of tech.¹⁷⁰ Doing so without a clear and objective assessment of the evidence, an understanding of the costs and trade-offs, or a transparent balancing of competing objectives, risks significant unintended consequences. CCIA fears that, in its efforts to “convince the government of the urgent case for significant new legislation”,¹⁷¹ the CMA has overestimated the benefits of its proposals and undervalued their wider costs.
61. Moving forward in this way without properly assessing the costs to investment, innovation, and wider incentives to vigorously compete on the merits would be tremendously counter-productive. It would also contradict “[t]he remit of the Taskforce [which] is to consider the practical application of the procompetitive measures”.¹⁷² This requires a proper assessment of the existing competitive dynamics and the impact that new measures would have.¹⁷³ As the CMA has said, “[i]n cases where competition is not sufficiently considered,

¹⁶⁷ Secretary of State for Business, Energy and Industrial Strategy “Regulation for the Fourth Industrial Revolution” (June 2019), available [here](#), pg. 8 (“Regulation has a powerful impact on innovation. It can stimulate ideas and can block their implementation. It can increase or reduce investment risk – and steer funding towards valuable R&D or tick-box compliance. It can influence consumer confidence and demand – and determine whether firms enter or exit a market.”)

¹⁶⁸ The UK currently ranks as the fifth most innovative country globally. See Cornell University “Global Innovation Index” (2019), available [here](#), pg. 9 figure 1.5.

¹⁶⁹ OECD “The Economic and Social Role of Internet Intermediaries” (2010), available [here](#), pg. 8 (“Internet intermediaries’ also stimulate employment and entrepreneurship by lowering the barriers to starting and operating small businesses and by creating opportunities for ‘long-tail’ economic transactions to occur that were not previously possible, whereby businesses can sell a large number of unique items, each in relatively small quantities. Internet intermediaries enable creativity and collaboration to flourish among individuals and enterprises and generate innovation. User empowerment and choice are considered to be very important and positive social side effects of the access to information that Internet intermediaries provide, as well as improving purchasing power with downward pressure on prices. A critical role of Internet intermediaries is to establish trust, including through protection of user privacy. By enabling individuality and self-expression, they also offer potential improvements to the quality of societies in terms of fundamental values such as freedom and democracy.”)

¹⁷⁰ L. Crofts “Vestager pledges to tame tech’s ‘dark side’ in second EU mandate” (Mlex, 27 November 2019), available [here](#).

¹⁷¹ Report, para. 8.4 (“First, we have aimed to convince the government of the urgent case for significant new legislation, by demonstrating that there is a range of practical interventions that could be introduced under a new regulatory regime which would significantly improve outcomes for consumers, and which could be designed in such a way as to minimise any potential adverse consequences.”)

¹⁷² Call for Information, para. 2.1.

¹⁷³ See above, fns. 131, 132, 141.

*there is a higher risk that a regulatory measure could have major unintended impacts on competition and innovation in a market.*¹⁷⁴

62. The Report explicitly chose to ignore any attempts to quantify the costs associated with its proposed interventions.¹⁷⁵ The Call for Information indicates that also the DMT will not attempt to gather such information, nor even give sufficient time for affected parties to provide it before submitting its proposals,¹⁷⁶ envisaging that such assessment will take place only at the enforcement stage after powers have been granted. Industry receives little solace from the consolation that any remedies imposed by the DMT can be modified *“in the event that revenue losses were higher than expected.”*¹⁷⁷ Unfortunately, the Call for Information doesn’t ask for input on the potential costs and side-effects of the interventions that it proposes. It would be concerning if such far-reaching new powers were granted without considering the direct and indirect costs, as outlined in this submission. CCIA hopes that the complete picture of competitive dynamics and market conditions are properly considered when the DMT gives its advice to the government.

Respectfully submitted,

Kayvan Hazemi-Jebelli
Competition & Regulatory Counsel for CCIA
kjebelli@ccianet.org

¹⁷⁴ CMA “Regulation and Competition. A Review of the Evidence” (January 2020), available [here](#), para. 1.21.

¹⁷⁵ See *above*, fns. 7, 42, 110.

¹⁷⁶ Call for Information, fn. 29 (“As this is not a market study, the Taskforce does not have compulsory information-gathering powers, and is providing its advice in around six months (whereas a market study has twelve months).”)

¹⁷⁷ Report, para. 8.116 (“Both Facebook (in its offer of incentives to users) and the DMU (in amending the design of the intervention) would be able to adjust their approach in the event that revenue losses were higher than expected.”)