



International Center for Law and Economics Submission to Digital Advertising Services Inquiry

*Sam Bowman and Geoffrey A. Manne**

ICLE Antitrust & Consumer Protection Research Program

2020-04-20

* Geoffrey A. Manne is President and founder of ICLE and a Distinguished Fellow at Northwestern University's Center on Law, Business, and Economics. Sam Bowman is Director of Competition Policy at ICLE and a Senior Fellow of the Adam Smith Institute.

ICLE is a nonprofit, nonpartisan research center based in Portland, OR. ICLE promotes the use of law & economics to inform public policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth. ICLE has received financial support from numerous companies and individuals, including firms with interests both supportive of and in opposition to the ideas expressed in this and other ICLE-supported works. Unless otherwise noted, all ICLE support is in the form of unrestricted, general support. The ideas expressed here are the author's own and do not necessarily reflect the views of ICLE's advisors, affiliates, or supporters. Please contact the author with questions or comments at icle@laweconcenter.org.

A. Introduction

The International Center for Law and Economics (ICLE) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission's (ACCC) Digital Advertising Services Inquiry. As a nonprofit, nonpartisan research center, ICLE works with academics around the world to promote scholarship into the intersection of law and economics.

The purpose of this submission is to highlight some of the findings of the relevant scholarship to help to inform the ACCC's work, and to highlight some of the problems that may arise during the course of the study, given the misconceptions about competition between advertising-funded digital platforms that are common in the media and popular debate today.

This submission will focus on three areas raised by the Issues Paper: concentration of market power in digital advertising, unequal access to data acting as a potentially anti-competitive barrier to entry, and the effect of vertical integration on competition and innovation.

B. Concentration of market power in digital advertising

1. Market definition in online and offline advertising

It is a mistake to think of advertising as a traditional, linear market in which a set of buyers (advertisers) purchase a product (advertising space) from a set of sellers (advertising platforms). Instead, advertisers seek to influence consumers, and platforms enable and intermediate the interaction between them. That interaction typically requires that consumers pay attention to the intermediary's platform.

Much of what advertising intermediaries sell to advertisers is the promise of access to consumers' attention. And while there is no shortage of advertising space, consumers' attention is finite and limited. Television, of course, has historically been successful at attracting a large share of consumers' time away from other, competing sources of entertainment or information. And today the Internet is just as successful at attracting consumers' attention, including some of it from traditional television. Both channels remain significant for advertising, and current advertising spending appears to reflect the relative success of each at attracting user attention.

There is little research showing conclusively the extent of advertiser substitution between alternative channels of distribution. But

[e]xisting work together with anecdotal information suggest that advertisers—and their agents—determine an overall advertising budget, allocate that budget among different methods (such as brand advertising on national television) for achieving the objectives of an advertising campaign, and then select advertising outlets for spending their dollars.... Advertisers base decisions about the level and allocation of their budgets on formal or informal analyses of the rate of return on investment. For these ad campaigns, the different advertising methods can be substitutes to the extent they provide alternative ways of delivering messages to an audience, and complements to the extent they can reinforce each other. Berndt, Arzaghi, Davis, and Silk find that 57 percent of the 28 pairs

of the cross-elasticities they estimated indicated the advertising methods were, on net, substitutes and the remainder were complements—although typically weak ones.¹

While there is considerable evidence to suggest that consumers are not, for the most part, substituting Internet time for television time (but rather are maintaining or even increasing television consumption and making time for the Internet by diverting their scarce attention from elsewhere), advertisers appear to view television and Internet advertising as close substitutes, and have embraced the latter at the increasing expense of the former.

But the reverse is also often true. Avi Goldfarb and Catherine Tucker demonstrate that display advertising pricing is sensitive to the availability of offline alternatives.² Firms have limited advertising budgets, and they distribute them across a broad range of media and promotional efforts, seeking the highest return on investment. Given historical trends and rates of advertising spending across channels, both online and off, it would be extremely surprising if companies did not adjust their marginal spending among channels in response to price (and quality) changes.

Although technology and supplier and consumption preferences continue to evolve, the weight of evidence seems to suggest a far more unified, integrated economically relevant market between offline and online advertising than their common semantic separation would suggest:

We believe our studies refute the hypothesis that online and offline advertising markets operate independently and suggest a default position of substitution. Online and offline advertising markets appear to be closely related. That said, it is important not to draw any firm conclusions based on historical behavior.³

Any study of market power in digital advertising should be mindful of this relationship.

2. Market definition within online advertising

If there is reason to believe that online and offline advertising markets are closely related, there is even more reason to doubt that either online *search* advertising or online *display* advertising constitute economically relevant, distinct markets. This question of market definition is crucial to the ACCC's Inquiry.

The sort of analysis that has thus far supported the idea that search and display advertising are separate markets is unconvincing and anecdotal. In its review of the Google/DoubleClick merger, for example, the US Federal Trade Commission (FTC) asserted that search and non-search

¹ David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 J. Econ. Persp. 37, 49 (2009).

² Avi Goldfarb & Catherine Tucker, *Search Engine Advertising: Channel Substitution When Pricing Ads to Context*, 57 Management Sci. 458 (2011) (determining the price of “ambulance chaser” lawyer ads was significantly more expensive in states prohibiting direct mail solicitation by attorneys and concluding that “online advertising substitutes for online advertising”).

³ Avi Goldfarb & Catherine Tucker, *Substitution Between Offline and Online Advertising Markets*, 7 J. Competition L. & Econ. 37, 43 (2011).

advertising were in different markets: “Thus, search engines provide a unique opportunity for advertisers to reach potential customers. Advertisers view online content providers differently.”⁴

But the FTC’s argument in support of this claim rests on the existence of the sort of superficial product differences that neglect the competitive dynamics of markets in exchange for semantic familiarity and ready observability:

Based on the publicly available evidence cited by the FTC, their conclusion that search and non-search do not compete is not compelling. In its essence, the FTC is suggesting that the two classes of ads do not compete because they have different characteristics and in particular are differentially targeted. However, the ultimate market definition question depends on whether the two products are sufficiently close economic substitutes so that each constrains the pricing of the other. This central question remains unanswered.⁵

The EU’s decision in *Google/DoubleClick* claimed that online and offline advertising markets were not in the same market, “primarily because the market investigation revealed that offline and online advertising *are perceived as separate markets* by the majority of respondents.”⁶ Again, this is a weak basis on which to base such a determination. It then argued that it is indeterminate whether search and non-search advertising are in the same market, noting that “[i]t can, therefore, be inferred that, from an advertiser’s point of view search and non-search ads can be considered substitutable to a certain extent.”⁷ In neither case were such market definitions the product of an economic analysis of the substitutability of the products.

The Competition and Markets Authority’s (CMA) ongoing Digital Advertising Market Study concludes that search and display advertising are not competitive constraints on one another on similar grounds.⁸ However, the CMA’s evidence is largely survey-based, while other anecdotal evidence cuts in the other direction:

One survey of 200 online retailers found that “online advertisers do in fact perceive the three channels of online advertising [search, display and contextual] as substitutes.” Among other things, the survey found that “[i]n weighted terms, respondents representing 83 percent of all ad spending view graphic ads and search ads as substitutes.” At least one court has likewise determined that all forms of at least online advertising are in the same relevant market for antitrust analysis.⁹

⁴ Fed. Trade Comm’n, Statement Concerning *Google/DoubleClick*, FTC File No. 071-0170, at 3 (Dec. 20, 2007), available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

⁵ Ratliff & Rubinfeld, *Online Advertising: Defining Relevant Markets*, *supra* note 9, at 17.

⁶ Case COMP/M.4731 *Google/DoubleClick*, 11 March 2008, ¶ 45 (emphasis added).

⁷ *Id.* at ¶ 53.

⁸ Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Interim Report*, at 157-8, available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf.

⁹ Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 *Harv. J. L. & Pub. Pol’y.* 1, 26-27 (2011) (citing, *inter alia*, *KinderStart.com LLC v. Google, Inc.*, No. C06-2057JF(RS), 2007 WL 831806 at *6 (N.D. Cal. Mar. 16, 2007) (noting that “there is no logical basis for distinguishing the Search Ad Market from the larger market for Internet advertising”).

Targeted online advertising of various forms—search advertising and social media advertising, for example—are significant competitors of each other. So, too, does organic search marketing compete with paid search. Firms spread their marketing budgets across these different sources of online marketing, and “search engine optimizers”—firms that help websites to maximize the likelihood of a valuable “top-of-list” organic search placement—attract significant revenue.¹⁰ At root, all of these different channels vie against each other for consumer attention and offer advertisers the ability to target their advertising based on data gleaned from consumers’ interactions with their platforms.

Meanwhile, new mechanisms for attracting consumers’ attention and for matching advertisers with consumers have the ability to siphon off the most valuable advertising from existing sources. Most obviously, Facebook rocketed to prominence on par with Google in online advertising by taking advantage of users’ far more extended engagement with the platform to assess relevance, and by enabling richer, more-engaged advertising than previously appeared on Google Search. This is an entirely different model than Google’s, but one that has turned Facebook into a comparable ad platform.¹¹ Twitter, Snapchat, TikTok, Yelp, and Amazon (among many others) also compete for the same eyeballs and advertising revenue, all of them employing different models to connect users with the most relevant—and the most valuable—advertising.

Indeed, for all the claims that Google and Facebook constitute an unassailable online advertising “duopoly,” no such position has ever actually been truly unassailable, least of all in online and high-tech markets. Not only is there intense competition between the two, but smaller players are increasingly drawing advertising dollars away:

There’s no one competitor snapping up the spending. Smaller players like Amazon and Snapchat are growing faster than expected, with Amazon singled out by industry leaders as the next big force in advertising.... Snapchat, which is expected to capture 82% more in ad spending than it did last year, is also projected to cross the \$1 billion mark in 2018.¹²

Not surprisingly, given its strong ability to match consumers with advertisements, and to do so when and where consumers are surely more likely to make a purchase, more than half of product searches now start on Amazon¹³—and advertisers have noticed.¹⁴

All of this means that the Inquiry should avoid assuming that digital advertising does not compete with offline advertising, or that just because the forms of advertising differ between search or display

¹⁰ See, e.g., Bo Xing & Zhanghi Lin, *The Impact of Search Optimization on Online Advertising Market*, in ICEC 2006 Proceedings of 8th International Conference on Electronic Commerce 519 (2006).

¹¹ See Haley Tsukayama, *Why Facebook is delivering great earnings when other big tech companies are not*, *The Washington Post* (Apr. 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/04/27/facebook-is-delivering-great-earnings-when-other-big-tech-companies-are-not/?utm_term=.c0774236cee5.

¹² Ashley Rodriguez, *Google and Facebook are losing their locks on digital advertising*, *Quartz* (Mar. 19, 2018), <https://qz.com/1232444/google-and-facebooks-digital-ad-lock-is-in-jeopardy/>.

¹³ Jason Del Ray, *55 percent of online shoppers start their product searches on Amazon*, *recode* (Sep. 27, 2016), <https://www.recode.net/2016/9/27/13078526/amazon-online-shopping-product-search-engine>.

¹⁴ Jeanine Poggi, *Google-Facebook Duopoly Set to Lose Some of Its Share of Ad Spend*, *AdAge* (Feb. 20, 2019), <https://adage.com/article/digital/duopoly-loses-share-ad-spend/316692> (noting that Amazon will more than double its share).

advertising, that these do not compete with each other for advertising spending. Similarly, it should avoid reliance on anecdotal or survey-based evidence when making judgements about market definitions, as opposed to econometric analysis of actual spending behavior, given the importance of this question to the rest of the Inquiry.

C. Data as a barrier to entry

Some have contended that access to data that allows for better product targeting and development confers an advantage on incumbents that new entrants cannot compete with, and the ACCC is concerned with issues arising from unequal access to data in digital advertising in Australia.

Of course, as with all economic inputs (e.g., capital, labor, intellectual property, etc.), access to data may represent a significant cost of doing business. But this does not render it special. And such costs are (properly) never treated as antitrust barriers to entry. The crucial question is whether the cost of accessing data reduces social welfare by artificially limiting entry. The presence of a cost borne by all entrants is not an artificial limitation.¹⁵

There are many well-known cases where new entrants have broken into markets where big data was supposed to have created an impenetrable moat, including WhatsApp in the communications market, King Digital Entertainment in the online gaming market, and Tinder in the online dating market.¹⁶ Even Google itself is a prime example. As Joshua Gans noted at a recent FTC hearing:

So just to put this in a historical context, we've had already a situation of significant entry by a startup into the search space starting from no data or market share, and that was Google. Google did it. And it did it because it scraped the web itself for information and was able to, you know, through page rank and other means, contextualize it.¹⁷

Indeed, data is typically generated by companies *after* they enter markets, as a by-product (or intended consequence) of their operations, or else in some case it is purchased beforehand.¹⁸

It cannot be the case that doing so in the abstract creates an entry barrier, or else every market would be marked by entry barriers and the risk of antitrust liability for incumbents—including offline markets. By definition, data produced as a consequence of ongoing market operations is something only incumbents will have—and incumbents will *always* have. Defining the possession of data in this context as an entry barrier would be tantamount to inviting antitrust challenges on the basis of a company's mere existence (and even more so, success).

Data in this respect is more like reputation. Nearly all new entrants suffer reputational disadvantages. And yet new entry happens all the time. Likewise, the more successful the incumbent—the larger its

¹⁵ See George Stigler, *The Organization of Industry* 67 (1968).

¹⁶ *FTC Hearing #3 Day 1*, *supra* note 126 at 65 (statement of Rohit Chopra, Comm'r, FTC).

¹⁷ *Competition and Consumer Protection in the 21st Century: FTC Hearing #7 Day 1: Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence and Predictive Analytics; Before the FTC*, FTC Transcript 159 (Nov. 13, 2018) (statement of Joshua Gans, Professor, University of Toronto).

¹⁸ See, e.g., Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 *Ariz. L. Rev.* 339, 357 (2017) ("More commonly, data are collected as a (valuable) side-effect of other productive activities.").

network, the stronger its reputation, the better its product—the more difficult is new entry. And yet this is competition, and reputation, for example, is not usually considered to be a barrier to entry.¹⁹

Facebook uses a very different method and different data than does Google to match advertisers and users—and yet it entered the online advertising market and became enormously successful without adopting Google’s model (and without obtaining Google’s or anyone else’s existing data).

A successful incumbent that has amassed advertising-relevant data may be able to offer a better advertising product than a start-up competitor. But it is also the case that the underlying information relevant to advertising—consumer preferences—is ascertainable from a plethora of sources. As noted above, Facebook and Google both vie for the same advertising dollars, and both are hugely successful—and yet neither relies on the other’s data in order to power its advertising service.

Amazon, meanwhile, has enormous potential for advertising success because it has access to still another source of data regarding people’s preferences—and it is arguably the most valuable: consumer’s actual consumption history. But, of course, that data is also held by myriad payment card networks, retailers, data brokers, and the like, as well. And still other relevant sources of data abound.

Just as not having access to user data does not prevent businesses from succeeding, having access to it does not guarantee success, either—what matters is how the data is used. It is difficult to distinguish between lack of access to “essential” data that might impede new entry and harm competition, and entry with an insufficiently innovative or low-quality product that would not succeed regardless of the data.

1. User data and privacy as it relates to competition

It must be noted that arguments that “we pay for online services with our data” and that large platforms impose supracompetitive “prices” on us by taking so much of our data are faulty. In truth, much of the information we share is shared because it is only by doing so that its value can be realized. Indeed, much of the data we share with platforms does not even exist (or is not known) separately from our interactions with these platforms.

In this sense it is not *data* that is the “price” users pay for platform services; it is *platform services* that are the “price” platforms pay for data. Looked at this way, it seems unsupportable to argue that the services we receive in exchange for our data are of anticompetitively low quality or in anticompetitively low supply—i.e., that we receive anticompetitively low compensation for the data we share. There is, in other words, no harm in the first place.

It is similarly unhelpful to try to generalize from this to argue that large agglomerations of data are concerning in and of themselves. Even if it were true that large online platforms collect “too much”

¹⁹ See, e.g., *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997) (“We agree with the unremarkable proposition that a competitor with a proven product and strong reputation is likely to enjoy success in the marketplace, but reject the notion that this is anticompetitive. It is the essence of competition.”).

data from each individual, the aggregation of those data do not inherently render them *more* problematic. This applies to concerns over data mergers, as well.

Some consumers may prefer not to share more data, but that is actually an implicit way of saying that the free service offered in exchange isn't valuable enough to the consumer to do so. But this isn't an antitrust problem. And, for consumers overall, if they do share more data and the data do enable the product to be improved, there is an *increase* in consumer welfare.

Unlike a merger that creates market power exercised through higher prices that harm all consumers, the decision to collect more consumer data comes with both benefits and costs. And these vary among consumers depending on their idiosyncratic preferences. "More" privacy is not something all consumers want: many prefer a better algorithm for search and social networks, and targeted ads with free content, for instance. The research in this area suggests both that many consumers *say* they want more privacy, but in practice give it up for a trivial payment,²⁰ and also that there is a huge variation across people, context, type of data, and use of data with respect to their privacy preferences.²¹

But, notably, this is not the same for price: Everyone prefers to pay as little as possible. But because data translates into higher quality products (or, in some cases, because of simple indifference), many consumers are willing to "pay" more data. And not only is each consumer's valuation of privacy totally subjective, but so is the assessment of harm. Giving data to a company isn't itself a unitary "harm." Data may either be immediately destroyed, anonymized and used only internally, saved for a very long time on an unprotected server, published, sold to others, or anything else. The risk of these imposes different levels of expected harm on different consumers, in different situations—even simultaneously.

Of course, this does mean that an important implication is that certain *uses* of data (regardless of the amount) may be problematic. But that is a consumer protection concern, not an antitrust problem, and it does not turn on the exercise of market power: For the same reason suggested above, a firm's collection and use of the data of a multitude of *other* people (because of its size or dominance) does not obviously affect its ability to impose harms on any particular user. To the extent that use of data falls within the scope of this Inquiry, it should be primarily as a consumer protection issue and not a competition issue, and treated with caution given the trade-offs described above.

D. Mergers and acquisitions in digital markets

The ACCC has been directed to consider the effects of mergers and acquisitions that have increased vertical integration along the ad tech supply chain. Most critics of vertical integration point to a few recent studies that cast some doubt on the ubiquity of benefits from vertical integration. But the

²⁰ See generally Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. Consumer Affairs 100 (2007).

²¹ See generally Spyros Kokolakis, *Privacy Attitudes and Privacy Behaviour: A Review of Current Research on the Privacy Paradox Phenomenon*, 64 Computers & Security 122 (2017).

findings of these few studies are regularly overstated, and, even taken at face value, they represent a miniscule fraction of the collected evidence supporting vertical integration.

There is longstanding and strong empirical evidence to support the view that vertical integration is competitively benign. Professors Francine Lafontaine and Margaret Slade famously catalogued and analyzed this literature, and they assess its meaning for antitrust policy:

As to what the data reveal in relation to public policy, . . . [w]e are . . . somewhat surprised at what the weight of the evidence is telling us. It says that, under most circumstances, profit-maximizing vertical integration decisions are efficient, not just from the firms' but also from the consumers' points of view. Although there are isolated studies that contradict this claim, the vast majority support it. Moreover, even in industries that are highly concentrated so that horizontal considerations assume substantial importance, the net effect of vertical integration appears to be positive in many instances. *We therefore conclude that, faced with a vertical arrangement, the burden of evidence should be placed on competition authorities to demonstrate that that arrangement is harmful before the practice is attacked.*²²

Recently, both Lafontaine and Slade have reiterated the relevance of their studies to vertical merger policy. Professor Lafontaine noted at one of last year's FTC hearings on Competition and Consumer Protection in the 21st Century that, despite some evidentiary limitations, "the empirical literature reveals consistent evidence of efficiencies associated with the use of vertical restraints (when chosen by market participants) and, similarly, with vertical integration decisions."²³ And Professor Slade noted in June 2019 at the OECD, that, even in light of further studies, "[t]he empirical evidence leads one to conclude that most vertical mergers are efficient."²⁴

In response, critics often dismiss the longstanding evidence as irrelevant or insufficient, and point instead to a few newer studies, claiming they demonstrate that vertical mergers tend to be harmful in "oligopoly" markets (like those in which digital platforms operate):

Surveys of earlier economic studies, relied upon by commenters who propose a procompetitive presumption, reference studies of vertical mergers in which the researchers sometimes identified competitive harm and sometimes did not. However,

²² Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 680 (2007) (emphasis added); see also James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 648, n. 25 (2005); see also Margaret E. Slade, *The Effects of Vertical Restraints: An Evidence Based Approach*, in Report: The Pros and Cons of Vertical Restraints 12, 22 (2008) ("[Table 1 in this paper] indicates that voluntarily adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of survival.").

²³ *Competition and Consumer Protection in the 21st Century: FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law; Before the FTC*, FTC Transcript 93 (Nov. 1, 2018) (statement of Francine Lafontaine, Professor, Michigan-Ross) https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf.

²⁴ Margaret E. Slade, *Vertical Integration and Mergers: Empirical Evidence and Evaluation Methods*, Organization for Econ. Cooperation & Dev. 9 (Jun. 7, 2019), [https://one.oecd.org/document/DAF/COMP/WD\(2019\)68/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)68/en/pdf).

recent empirical work using the most advanced empirical toolkit often finds evidence of anticompetitive effects.²⁵

But the reality is that the longstanding studies still constitute the overwhelming majority of the evidence we have—and many, if not most, of the papers they canvas are perfectly well done, even by modern standards.

Concerns that vertical integration harms competitors, thus harming innovation, are often based on an assumption that detriment to competitors is equivalent to a detriment to competition and consumers. For example, in the European Commission’s Google Shopping case decision, the Commission asserts that Google’s prioritization of its own shopping results harms competition because it reduces traffic to comparison shopping sites, potentially foreclosing them from minimum viable scale and causing them to under-innovate.²⁶ The decision does not identify actual consumer harm; it infers it from the reduction in traffic to comparison shopping sites, constituting an alleged impairment of an “effective competition structure.”

But the fact that any given complementor succeeded in the past is no reason to assume it “should” succeed in the future, especially against competition from a platform’s own, integrated product. Nor is it any reason to assume that, freed from the constraints of platform self-preferencing, it would provide any measure of innovation in the future.

While constraints on complementors’ access and use may look restrictive compared to an imaginary world where such restrictions were not allowed, in such a world the platform would not be built in the first place because it would not ensure enough revenue. Similarly, if platforms ever operated at the other extreme—full appropriation—the platform also would not be built because it would attract no complementors. Thus, platforms operate in a delicate middle ground in which some edge appropriation is, in fact, desirable. As Jonathan Barnett aptly sums it up:

The [platform] therefore faces a basic trade-off. On the one hand, it must forfeit control over a portion of the platform in order to elicit user adoption. On the other hand, it must exert control over some other portion of the platform, or some set of complementary goods or services, in order to accrue revenues to cover development and maintenance costs (and, in the case of a for-profit entity, in order to capture any remaining profits).²⁷

Thus, for example, Amazon’s access to third-party seller data—which may be useful information for finding product categories characterized by supranormal returns—is contingent on Amazon maintaining a healthy pool of competitive third-party sellers from which to derive this data. If third-party sellers cease to serve as an effective information discovery tool, Amazon loses this competitive

²⁵ See, e.g., Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, Georgetown Law Working Paper (Apr. 5, 2019) at 13, available at <https://scholarship.law.georgetown.edu/facpub/2148>; see also James C. Cooper, et al., *supra*, note 1 at 642–48 (discussing such “post-Chicago” scholarship).

²⁶ Commission Decision No. AT.39740 (*Google Search (Shopping)*) at ¶¶ 591-607.

²⁷ Barnett, *The Host’s Dilemma*, *supra* note 9191, at 1890.

advantage. Thus, in order to attract and keep quality third-party sellers, Amazon must refrain from appropriating value beyond what would be available to them elsewhere.

Finally, concerns about platform appropriation of edge innovations (or other advantages) simply discount to zero the benefits of platform innovation. But the consequence of policy based on such arguments would almost certainly be a reduction in overall innovation of the ecosystem, much to the cost of consumers and edge providers alike.

The appropriation of edge innovation and its incorporation into the platform (a commonly decried form of platform self-preferencing) greatly enhances the innovation's value by sharing it more broadly, ensuring its coherence with the platform, incentivizing optimal marketing and promotion, and the like. Consumers benefit when platforms innovate, at least as much as they benefit from edge innovation. And when a platform implements a new technology or business process, those benefits are conferred on all platform users; when an edge company does so the benefits are conferred only on the subset of platform users who interact with the particular edge provider. In other words, even if there is a cost in terms of reduced edge innovation, the immediate consumer welfare gains from platform appropriation may well outweigh those (speculative) losses.

Consider the familiar refrain that Facebook appropriates Snapchat's best innovations, undermining its ability to compete to the detriment of consumers.²⁸ If Snapchat implements a feature it potentially reaches 382 million users; when Facebook implements the same feature it potentially reaches 2.5 billion users.²⁹ Facebook is therefore capable of immediately reaching over 2 billion more users, thus leading to a significantly larger immediate increase in social welfare.

This does not mean that Facebook should be immune from antitrust laws, or that its behavior with respect to all smaller competitors is necessarily procompetitive. It does mean, however, that its "appropriation" has immediate and substantial procompetitive benefits, and these must be weighed against the alleged, speculative, future harms.

The same such argument applies to vertical integration by digital advertising platforms, which may be inconvenient competition for third party suppliers of services such as analytics tools, but are also likely to be convenient to users. Ultimately, without evidence or even rigorous theory demonstrating that the latter is substantially greater than the former (and neither has ever been offered), there is no valid basis for adopting an inhospitable stance toward such conduct.

E. Conclusion

There are some lessons for this Inquiry that can be drawn from the ongoing Digital Advertising Market Study being carried out by the UK's Competition and Markets Authority (CMA). That Study has assumed, on questionable grounds, that the markets for search and display advertising were separate, and, implicitly, that within display advertising that the markets for 'open display' and 'social display' advertising were also separate. By making such judgements, the CMA has been left with two

²⁸ See, e.g., Rani Molla, *Microsoft Might Crush Slack like Facebook Crushed Snapchat*, Vox.com (Jul. 9, 2019), <https://www.vox.com/2019/7/9/20686206/microsoft-teams-slack-facebook-snapchat-copy>.

²⁹ J. Clement, *Most Popular Social Networks Worldwide as of January 2020, Ranked by Number of Active Users*, Statista (Feb. 14, 2020), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>.

(or three) markets that are each dominated by a single platform, instead of a single market in which Google and Facebook compete with each other, as well as other smaller competitors online and offline.

The CMA's study has been hamstrung by its apparent pre-judgement of the outcomes of the study, as demonstrated by its unusually detailed discussion of remedies in the statement of scope released at the outset of the study.³⁰ Since the CMA's Market Study was intended to flesh out some of the proposals set out in the Furman Report into competition in digital markets, it is understandable that it would be interested in developing some of the proposals already made in that, but it does somewhat undermine the analytical value of the Study.

This focus on remedies such as the Code of Conduct for large platforms and presumption that digital advertising markets are highly segmented led the CMA to focusing intently on Google and Facebook. As a result, some of the competitive dynamics of the digital advertising market may have been missed.

In a market as complex as digital advertising, and particularly display advertising, these decisions may lead to misguided interventions. The desire to intervene is understandable, and some third parties would clearly benefit from it, but misguided interventions may bring considerable costs to consumers, advertisers and publishers.

³⁰ Competition and Markets Authority, *Online Platforms and Digital Advertising: Statement of Scope*, at 23, *available at* https://assets.publishing.service.gov.uk/media/5d11b297e40f0b609dba90d7a/Statement_of_Scope.pdf.