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Date: 12 February 2020

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## **WHICH? RESPONSE TO THE COMPETITION AND MARKETS AUTHORITY'S ONLINE PLATFORMS AND DIGITAL ADVERTISING MARKET STUDY INTERIM REPORT**

### **1. Introduction**

We welcome the opportunity to respond to the Competition and Markets Authority (CMA)'s interim report on the market study on online platforms and digital advertising. Which? strongly supports the CMA looking into this sector and introducing effective solutions to address harms to consumers and competition.

The CMA has gathered a large amount of evidence and is proposing a number of interventions. We fully agree with the CMA that remedies are needed to give consumers control over their data and encourage competition and we support several of the remedies proposed. However, given the time allowed to respond and the complexity of the issues, we are not in a position to provide a firm view on all the areas. We will continue considering these issues in more detail over the next few months and will engage with the CMA accordingly.

The rest of this note describes our views on the evidence gathered so far and the proposed remedies.

### **2. Proposed interventions to give consumers greater control**

Which? agrees with the analysis and findings on consumer control over data and we are pleased that the CMA has taken into account our research<sup>1</sup> on consumer attitudes and behaviour in this area. We welcome the CMA's detailed research evaluating the current controls available to consumers on platforms, and the extent to which consumers engage with these. Similarly, we welcome their review of the potential effects of choice architecture, including dark patterns.

Our consumer research supports the findings that whilst consumers want to control their data, they feel that currently they are not able to and feel disempowered against dominant platforms. We agree that the choice architecture used by platforms affect consumers' ability to take control of their data and that consumers are unlikely to opt-out of personalised advertising which is set as a default on platforms.

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<sup>1</sup> Which? (2018) Control, Alt or Delete? Consumer research on attitudes to data collection and use  
<https://www.which.co.uk/policy/digitisation/2707/control-alt-or-delete-consumer-research-on-attitudes-to-data-collection-and-use>

Which? welcomes that the CMA is considering a wide range of remedies to improve consumers' control over their data and we broadly support many of these. We see them as complementary since they will provide varying levels of control and protection, and this is necessary since consumers vary in their preferences, level of engagement and ability to exercise control.

### *2.1 Giving consumers a choice over personalised advertising*

**We strongly support the proposal that all platforms be required to give consumers an option to use their services without requiring in return the use of consumers' data for personalised advertising (or any type of targeting outside the core service).**<sup>2</sup> This restriction on the use of consumer data should include both first party data collected at the platform and data collected from third parties (see sections 2.2 and 6).

Further, we support that all consumers, irrespective of whether or not they have turned off personalised advertising, should receive the same core service with only the nature of the advertising content being varied. Since privacy is a right, then a consumer cannot be expected to 'pay' for a level of service by giving up this right, and so a platform should have an obligation to provide its core service without collecting any data beyond that which is necessary for the performance of the contract with the consumer, i.e. Article 6(1)b of GDPR. Further, we think that any degradation of the core service for consumers who opt out of personalised advertising might represent a failure to provide genuine choice and control, and we would like the CMA to explore with the ICO whether this is the case.<sup>3</sup>

Clearly, these remedies will impact on platforms' business models since if consumers choose to restrict the amount of personal data that can be collected then platforms will have less data with which to generate revenue. We note that a recent experiment by Google, discussed in Appendix E, found that UK publishers who were unable to sell inventory using personalised advertising suffered a large reduction in revenue, but we also note that the experiment may not be an accurate indicator of the impact of the remedies discussed here, for the reasons given by the CMA (Annex E, paragraph 135). In particular, as it becomes more common for platforms to be unable to serve personalised advertising, then both the ratio of spending across personalised and contextual advertising and the relative price of these should change, so that the negative impact of being unable to sell personalised advertising would be expected to fall.<sup>4</sup>

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<sup>2</sup> We think there is a wider question than that covered by this market study of whether changes to empower consumers to control the use of their data should be extended to online targeting in general. Our consumer research found that people's desire for control was not limited to personalised adverts, in fact they were particularly concerned about targeted information and personalised pricing. Similarly, the Centre for Data Ethics and Innovation's recent consumer research found that consumers were concerned that online targeting systems could reduce the range or variety of information that people see and that people's behaviours or attitudes may be influenced through sustained exposure to particular perspectives. (CDEI, 2020, Review of online targeting: Final report and recommendations).

<sup>3</sup> See the ICO's letter to the Washington Post (case ref no: RFA0768934).

<sup>4</sup> The remedies may also have beneficial effects on competition since publishers will have to sell a combination of personalised and contextual advertising, with the mix depending on the proportion of consumers choosing to receive personal advertising at each publisher. This proportion may be a function of the level of trust that a platform engenders, in which case the remedy may promote competition.

When considering the implementation of such a remedy to give consumers choice to opt out of personalised advertising, we recommend that the CMA investigates what lessons can be learnt from the implementation of GDPR. For example, ensuring that dark patterns are not used when choices are presented to nudge consumers towards the lower privacy option.<sup>5</sup>

A particular question about which we have yet to come to a firm conclusion is whether platforms should be able to offer incentives to consumers to accept personalised advertising. We do not feel there is enough information to make an informed judgement about this yet and we would like the CMA to try to test its impact before making rules to permit it.

We agree that incentives to accept personalised advertising have the potential to enable consumers to benefit more fully in the value of their data, but we have concerns that incentivisation using offers, reward schemes or payments may have the potential to make the decision to give up privacy more complicated and that platforms will be able to use the salience of such incentives to manipulate consumers into making decisions not in their best interests. Further, this may occur with greater likelihood for vulnerable or low income consumers. We believe that the decision to trade privacy must be made in a context that allows consumers the best opportunity to make an unbiased choice. We therefore would like the CMA to explore this further, and in particular whether vulnerable or low income consumers are more likely than other consumers to be persuaded to accept personalisation as a result of incentivisation.

## 2.2 A 'fairness by design' duty

We welcome a "fairness by design" obligation on platforms to design consent and privacy policies in a way that facilitates informed consumer choice. We also support an obligation for SMS platforms to trial and test choice architecture, as they are best placed to do so given their data and analytical capabilities. This duty will complement the GDPR "data protection by design" duty.

We acknowledge that the 'best' way to facilitate informed consent is not yet known and that the 'fairness by design' duty is intended to set out high level principles. We broadly support this, but **we believe particular thought needs to be given to the use of first- and third-party data when designing consent processes.**

It seems likely that consumers may feel differently about the use of first- and third-party data. There is a paucity of evidence about this (see Section 6), but we note that Facebook have made changes recently to give users greater control over their data collected from third parties, in particular the ability to stop the data from some or all of these third parties being used to personalise advertising. Facebook has done this by rolling out the Off-Facebook Activity tool

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<sup>5</sup> The Norwegian Consumer Council conducted a review of the dark patterns used by Google, Facebook and Windows 10 post-GDPR. It concluded that "*default settings, dark patterns, techniques and features of interface design meant to manipulate users are used to nudge users towards privacy intrusive options*" (Norwegian Consumer Council, 2018, Deceived by Design).

and, although more needs to be done to make consumers aware of this tool, we welcome Facebook's decision to do this.

However, with regard to the remedies under consideration by the CMA, we think that platforms need to be clear on the lawful basis on which they are processing consumers' personal data for the purposes of personalised advertising and, where appropriate, if and when consent covers the use of linked data from third parties. Specifically, **we wonder whether consent ought to be given explicitly for third-party data to be used, so that a single consent cannot cover all personalised advertising. We would like the CMA to explore the possible implications of this.**

### *2.3 Changing default settings for personalised advertising*

As the CMA evidences, consumer engagement is low and most consumers follow the default settings set by platforms even if these do not match their preferences. This means that, while it is necessary for consumers to be given a choice over whether they want to receive personalised advertising, it is not sufficient to guarantee good consumer outcomes. The design of the choice to receive personalised advertising, specifically whether it is an opt-in or opt-out choice, is therefore important.

We think it is essential that a default be set that gives consumers sufficient protection and best supports them to exercise a choice. We think there are two particularly important factors here. First, as the CMA notes, consumer engagement with privacy settings and controls is especially low at sign up. Second, platforms have an incentive to persuade opted-out consumers to opt in, but no such incentive works the other way. Given this, **we therefore support the remedy that the default should be not to receive personalised advertising.**

However, we question why this default requirement should apply to platforms with strategic market status (SMS) only and we do not think the CMA have fully made the case for this yet.

The contention in the report is that since SMS platforms have market power they should be held to a higher standard in securing consent. However, this remedy is primarily aimed at tackling inertia among consumers, not to promote competition. Against this we recognise that businesses without name recognition may find it harder to persuade consumers to opt in, so we would want to understand how applying this to all business might affect the dynamics of competition and we would appreciate the CMA setting out its thinking on this in more detail.

## **3. Proposed pro-competitive ex-ante rules**

**We agree with the CMA and the Furman Review about the need to complement existing ex-post antitrust tools with pro-competitive regulatory rules (a code) to govern the behaviour of firms that enjoy a position of market power (i.e. Strategic Market Status platforms).** We think clear ex-ante rules and guidance to provide clarity over what represents acceptable behaviour when interacting with consumers and competitors will help to prevent harm and,

depending on the details of how this new regime is enforced, to address harms to consumers and competition more rapidly.

For the ex-ante regulatory tools to work effectively, it is paramount that the relevant regulator in charge of enforcing the ex-ante regime has effective powers. These should include powers to: request information from the relevant players in the industry, suspend decisions by the relevant platforms pending the results of any investigation, stop behaviours by the relevant platforms at the end of the investigation and enforce appropriate sanctions against platforms that breach the rules. The relevant regulator should also have the skills, tools and powers to monitor compliance with the rules and carry out own-initiative investigations (e.g. workings of algorithms, possible discrimination among customers).

We welcome the inclusion of measures to prevent direct harm to consumers as part of the ex-ante rules, in particular:

- A “fairness by design” obligation placing an ex ante obligation on platforms to design consent and privacy policies in a way that facilitates informed consumer choice with an obligation to trial and test choice architecture for Strategic Market Status platforms.
- Platforms should provide clear information to consumers about the services they receive and what data the platforms take in return for the service. This should be produced in a format which can realistically be read and understood.

#### **4. Proposed measures to address sources of market power and promote competition**

The CMA is considering additional interventions to address Google’s market power in search (e.g. third-party access to click and query data, mechanisms to determine the default search engine in search entry points and possible separation of different parts of the business), Facebook’s market power in social media (e.g. increasing interoperability with other platforms) and interventions to address the lack of transparency in digital advertising.

We are not in a position to assess whether those remedies will be effective in enabling competition by overcoming barriers to entry and expansion in the relevant. However, we note that **any additional measures to enable competition by sharing consumers’ personal data between multiple firms must be implemented in a way that will not result in negative impacts for consumers by increasing data privacy or data security risks.** We also believe that as far as possible, the design of any new measure that depends on consumer behaviour for its effectiveness (e.g. search engines choice screens) should be based on consumer behavioural testing.

#### **5. Provisional view on the case for a market investigation**

We note the rationale put forward by the CMA for not proposing a market investigation reference at this stage. In particular, the CMA preferred approach being to tackle the harms identified through recommendations to the Government for regulatory reform. According to the CMA's interim report this is based on Government commitment to the setting up of the Digital Markets Unit to ensure a long-term regulatory framework is put in place.

At this stage, we keep an open mind on the routes to introduce the remedies needed to tackle the consumer harms identified and evidenced in the CMA's interim report. What is clear to us is that there is a need for intervention to protect consumers and **we want to see rapid action in addressing consumer harm in the different markets covered by this market study**. We will continue engaging on this with the different authorities. If we subsequently reach the conclusion that the current approach will not deliver the right outcomes for consumers, we will consider all the routes available to protect consumers including competition and consumer enforcement action.

## 6. Recommendations for further work

With regard to the work to be done for the remainder of the Market Study, **we would like the CMA to further review the control that consumers have over their data that is collected by platforms from third parties, either directly or by these third parties sharing it.**<sup>6</sup> We have found the description of the sources of third-party data in Annex E helpful, but we have outstanding questions about the collection and use of such data, and consumer attitudes and behaviours towards this.

It seems unlikely to us that, given their overall level of engagement, many consumers will be aware of the extent to which this happens.<sup>7</sup> We would therefore like the CMA to further explore the impact of this sharing on the advertising served to consumers. **We would also like to understand how well the privacy policies of third parties make it clear to consumers that this sharing occurs.** Finally, **we would like to understand to what extent consumers have knowledge and understanding of this, and their attitudes towards it.**

Relatedly, we would like the CMA to go further in its review of the sharing of data between platforms owned by the same company. We are concerned that consumers are not always able to exercise control over their data between such platforms and we would like to better understand whether this is the case. In some cases, access to a service requires the consumer to allow data to be shared between sister platforms, for example the WhatsApp terms of service require that your phone number, "*some of your device information*" and "*some of your usage*

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<sup>6</sup> For example, Instagram Terms and Conditions state that "We [Facebook] connect information about your activities on different Facebook Products...For example, we can suggest that you join a group on Facebook that includes people you follow in Instagram..."

<sup>7</sup> Consumer research has found that consumers were unaware that data was collected across different platforms (e.g. Google links to YouTube) (Ipsos Mori for CDEI, 2020, *Public attitudes towards online targeting*).

*information*” are shared with Facebook Companies. Further, it is uncertain whether consumers can always access settings to control their data within the relevant platform. For example, Instagram users are encouraged to control their settings through a Facebook account, thus providing more data to Facebook.<sup>8,9</sup> We believe that consumers should be able to access settings within the relevant platform.

Given all this, **we would like the CMA to further examine what data is shared between platforms that are owned by the same organisation (e.g. Facebook and Instagram); consumer attitudes towards this; and, what controls are available to consumers to manage this.**

**Rocio Concha, Chief Economist, Which?  
February 2020**

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<sup>8</sup> Instagram settings: “Go to your Facebook ad preferences to control how we use information from partners to show you ads across Instagram and other Facebook Company Products. If we can determine you’ve made a choice on other Facebook Company accounts that you use we’ll apply your ad preferences to them as well. To make sure your ad preferences are applied, connect your Instagram account to your Facebook account.”

<sup>9</sup> We note that the CMA states that “it was unclear from [their] review whether Instagram consumers could ...manage these identified interests.” (pF43). Our understanding is that Instagram stipulates that consumers can either use their “device settings” - although it is not clear how this can be done- or can use their Facebook ad preferences. We also note that the CMA state in the main body of the report that “Facebook and Instagram users...[can] see what interest segments they are placed in and manually switch these off, such as removing ads based on a particular football team.” This appears to be contradictory to their statement on Instagram in Appendix F, as described above.