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WHICH? SUBMISSION TO THE CALL FOR INFORMATION FROM THE DIGITAL MARKETS TASKFORCE

Which? welcomes this opportunity to share its views with the Digital Markets Taskforce. As the Taskforce will be aware, Which? called for the CMA to conduct a market study on digital advertising in 2018 because we were concerned that the concentration of market power in Google and Facebook was causing poor outcomes for consumers and that consumers were unable to exercise sufficient control over their personal data. We are therefore pleased that the CMA has so thoroughly set out the competitive failings of the markets for online search and social media, and we are pleased that the Taskforce will be building on this work in the coming months.

In this submission we set out our reaction to the findings and recommendations of the market study and the implications we believe these have for the work of the Taskforce. Of course, we are continuing to analyse the problems in digital markets, especially those that have platforms which are not funded by digital advertising, and we hope to be able to continue to engage with the Taskforce as our thinking develops.

The digital markets examined by the CMA play an integral part in the lives of most consumers, but it is clear that they are not competitive. The extensive evidence presented by the CMA makes an incontrovertible case that Google and Facebook are not subject to sufficient competitive pressure. Of the many striking findings in the CMA's Final Report, we note that a cautious estimate of the excess profits earned by these two platforms in the UK in 2018 is more than £2 billion.

The harms caused to consumers by this lack of competition are manifold, but include: higher prices, as higher advertising prices are passed through to the prices paid by consumers; a lack of competition on quality; reduced innovation; and consumers giving up more personal data than they would like. More generally, this uncompetitiveness leads to lower economic growth than could be achieved.

Intervention is needed to increase competition in these markets and ensure that digital sectors deliver better outcomes for consumers. However, as the CMA makes clear, the current competition regime does not have sufficient powers to do this, which means that these harms grow all the while and economic damage becomes entrenched. It is imperative that the competition regime be strengthened as soon as possible. The longer it takes to implement the proposed measures the greater the risk that the harms caused by the lack of competition will become irreversible and the UK's digital economy will be scarred by this.

We are therefore pleased that the CMA has identified sensible and proportionate remedies to address the sources of market power and their consequent harms in these markets. There will need to be interventions to address Google's market power in search (i.e. third-party access to click and query data, a restriction on default search engines and the introduction of choice screens, and possible separation of different parts of the business) and Facebook's market power in social media (i.e. increasing interoperability with other platforms).

We particularly support measures that give consumers more control over how their data is used. These remedies can both reduce privacy harm and reduce the market power of the largest platforms by restricting the amount of personal data they have access to. Our response to question 8 below sets out our thoughts on this in more detail.

Inevitably though, the nature of these markets means that some platforms will always have market power that will be open to abuse and so we agree with the CMA that there is a very compelling case for an enforceable code of conduct to manage their behaviour ex ante. We think clear ex-ante rules and guidance to provide clarity over what represents acceptable behaviour when interacting with consumers, other businesses and competitors will help to prevent and address harms to consumers and competition more rapidly.

We support the code as proposed with the three high-level objectives of fair trading, open choices, and trust and transparency as we think these are sufficiently broad to cover the anti-competitive effects in the digital markets analysed in the market study. As we set out below, we also think these principles will be appropriate to address anti-competitive behaviour in other digital markets.

For the ex-ante regulatory tools to work effectively, it is paramount that the DMU has appropriate powers to punish breaches of the code and the credibility that it will use these. We agree with the CMA's prescription of required powers. It will be necessary for these to be accompanied with the appropriate resource.

Building on the work of the CMA in the market study, we look forward to the Taskforce using the coming months to develop these recommendations further and determine where they might be relevant in other digital markets not covered by the market study.

We welcome that the expertise of the ICO, Ofcom and the CMA will be brought together by the Taskforce, and through the Digital Regulation Cooperation Forum. We also welcome the engagement of the CMA with other jurisdictions around the world looking at these issues. We hope and expect that the Taskforce will give clear and detailed advice to the government that will speed the design of legislation.

Answers to selected consultation questions

4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

It seems likely that the Covid-19 pandemic has led to a step-change in the UK's relationship with digital markets, hastening existing trends of adoption as people become more dependent on these markets for a wider range of purposes. At such times powerful incumbents may be best placed to take advantage in both their own markets and by moving into adjacent markets, as we are seeing, for example, with Amazon's development of its grocery delivery business. As



a consequence, the pandemic has reinforced the need for intervention in these markets to ensure effective competition and the speed at which this is done.

5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

The market study comprehensively sets out the many anti-competitive effects that can arise from the exercise of market power by platforms in the cases where platforms are funded by advertising revenue. However, analogous theories of harm could be proposed for platforms with alternative business models.

A concentration of market power at a single platform can cause consumer harm both directly and indirectly. Directly, it might lead to a consumer paying too much, which in the markets analysed by the CMA would result in consumers giving up too much personal data. Alternatively, it might result in the consumer receiving lower quality than in a competitive market. In the context of digital platforms the interpretation of lower quality could be broad. For example, the CMA indicates that a lack of consumer empowerment is related to the prevalence of online (content) harms on social media platforms. The implication being that consumers cannot make effective choices to protect themselves from these harms and there is insufficient competition to incentivize the platform to take action over such harms. This means the weakness of competition contributes to the scale of the social harm. A similar argument could be made about harms found at other platforms. For example, Amazon's failure to adequately protect consumers from unsafe products and fake customer reviews, which Which? has found to be pervasive across some product categories, may in part be a consequence of a lack of competition on quality. We would like the Taskforce to explore to what extent other online harms might result from a lack of competition at digital platforms, especially those consumer harms that are not currently covered by the Online Harms White Paper, such as the selling of unsafe products, the use of fake customer reviews and online scams.

Indirectly, the platform's power over suppliers or business users might lead to higher prices or lower innovation. This might be because suppliers or business users are subject to unfair terms, perhaps for example the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data. Alternatively, the platform may be able to extract excess profits from the suppliers or business users so that they are unable to invest to innovate. As the need for the creation of the Groceries Code Adjudicator has shown, such problems are not confined to digital markets, but they might be particularly acute where market power is concentrated in one or two platforms, for example Amazon Marketplace or the mobile app stores.

6. In relation to the code of conduct:

- *Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?*

- *To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?*

Yes, we believe that a code structure like that proposed by the market study could be of value in other digital markets, not just those in which platforms are funded by advertising, to tackle other types of harmful behaviour born out of a lack of competition.

There are two necessary conditions for this. First, that anti-competitive effects exist (or that there is a risk of them existing) in other digital platform markets, which we set out in our answer to question 5, and second that there is a case for a code because the existing regime cannot satisfactorily remedy the anti-competitive harms.

The CMA's reasons for a code include: the need for ex ante clarity on what represents acceptable behaviour for a SMS platform when interacting with customers, competitors and suppliers; the ability to intervene speedily in fast-moving markets, when the usual pace of ex post interventions allows irreparable harm to be done; to allow for action in respect of concerns that might not fit within existing competition law tests, but which do have an adverse effect on the market; the benefit of being able to focus on changing behaviour rather than penalising illegal conduct; and the ability to build trust through transparency where currently opaque algorithms influence market outcomes.

We believe these reasons are likely to be similarly persuasive in other digital markets where there is a platform with SMS, but which is not funded by advertising revenue. For example, if we consider the relationship between sellers and an online marketplace many of these reasons for a code remain valid. Sellers need clarity about how the platform will treat it, the usual pace of ex post interventions is likely to be too slow for small businesses to survive if they are suffering an abuse of market power, and prominence in search listings is determined by algorithms that might include such factors as customer reviews and platform endorsements, but which are highly opaque.

Considering the examples of anti-competitive effects suggested above, we believe that a code based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency' would be highly appropriate to tackle these.

We think the 'Trust and transparency' principle of the code has particular potential to be applied to a larger set of digital markets in the future. The CMA has identified the need for a 'Fairness by Design' duty to be part of the code and to cover the use of consumer data. Clearly though, the markets that the CMA examined and user engagement with privacy policies and settings are not the only examples in which platforms design their choice architecture or use dark patterns in such a way as to induce consumers to make choices that may not be in their best interests. The CMA's enforcement actions against hotel booking sites for misleading selling practices demonstrate that analogous issues can be found elsewhere.

8. What remedies are required to address the sources of market power held by digital platforms?

We support many of the remedies proposed by the CMA. In particular, we strongly support the recommendations to give consumers more control over their personal data. Namely, that the government legislates to give the DMU the power to require platforms to give consumers the choice to share their data for the purposes of personalised adverts (a 'choice requirement') and that the government empowers the DMU to require platforms to meet a 'Fairness by Design' duty.

The choice requirement

The evidence brought together and analysed by the CMA clearly demonstrates that consumers are concerned about the collection and use of their personal data, but that they cannot exercise meaningful control over this, for example the use of take-it-or-leave-it models that mean consumers cannot turn off personalised advertising. It is telling that throughout the market study no evidence has been provided to argue against this and we can think of no reason why a choice requirement should not be included in legislation.

It will be essential that the choice requirement is implemented in a manner that can best address both privacy and competition harms. This will require the DMU to make appropriate decisions about the conditionality of the choice and its presentation. With regard to conditionality, we support that all consumers, irrespective of whether or not they are receiving personalised advertising, should receive the same core service with only the nature of the advertising content being varied. Consumers cannot be expected to 'pay' for a level of service by giving up their right to privacy, while we think that any degradation of the core service for consumers who opt out of personalised advertising would represent a failure to provide genuine choice and control.

Further, we recognise that competition may be strengthened by the offering of incentives to consumers to share their personal data for the purposes of personalised advertising, but we agree with the CMA that further work needs to be carried out to determine what incentives platforms could legitimately offer. 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 a decision not in their best interests. Further, this may occur with greater likelihood for some groups of consumers, for example the young, the vulnerable or those on low incomes.

With regard to the presentation of the choice requirement, we believe that this should be a default opt out from digital advertising. This is the option that would maximise consumer protection, which is important given that consumer engagement with privacy settings and controls is especially low at sign up. Further, platforms have an incentive to persuade opted-out consumers to opt in, but no such incentive works the other way. Finally, our research shows that a default opt out is the preferred choice of consumers.

Beyond these considerations, we believe that the choice requirement could be developed further in a way that would improve consumer control over their personal data and reduce the market power of platforms.

Which? has carried out a number of pieces of research to understand exactly how consumers feel about the collection and use of their personal data. Our most recent work has focussed on the collection of data by platforms from third-party sources. Examples of these being data collected directly through tracking at third party sites or data that is actively shared by third parties uploading customer lists to the platform for the purpose of direct marketing.

As the CMA makes clear, the collection of data from third parties is a source of competitive advantage for Google and Facebook as no other platforms have similar reach with third-party sites and apps. Meanwhile, our research has found that consumers are generally less accepting of the use of data collected from third parties for personalised advertising. Our research found that there was a pronounced feeling of a lack of transparency related to third-party data collection methods and consumers wanted to choose whether or not this data was used to serve them personalised adverts.

This implies that there is potential to develop the recommendations of the CMA by allowing consumers not just to decide whether they want to receive personalised advertising, but also to choose the sources from which this data is collected. By giving consumers this greater level of control we would better address privacy harms, both for consumers who feel that too much data is collected and for consumers who might prefer to receive personalised advertising based on first-party data only, but who opt out if this option is not available and hence suffer a loss in welfare. Further, it could improve competition because it will reduce the amount of data held by SMS platforms and the value of data which they continue to hold, since this will not benefit from the gains that come from combining data from multiple sources.

The 'Fairness by Design' duty

We also strongly support the introduction of a 'Fairness by Design' duty as part of an enforceable code of conduct and to cover the use of consumer data. There is widespread evidence that consumers have little trust in social media companies, while our research finds that concerns about personal data are among the biggest worries that consumers have. Underpinning this dissatisfaction and unease is the lack of transparency by some platforms and a sense that they do not act in the best interests of their users. As such, we believe a Fairness by Design duty will help to build trust and consumer satisfaction.

Choice architecture undoubtedly matters to user engagement with privacy policies and settings. When making decisions that are more complex, infrequent or unexciting, consumers are likely to have greater inertia bias and favour choices that require less cognitive effort. Given this, it is important that platforms design choice architecture that do not exacerbate behavioural biases and worsen consumer outcomes. However, the evidence presented by the CMA shows that they currently do, for example adopting complex navigation and excessively long privacy notices. Given the resources devoted by platforms to understanding user experience, it can only be inferred that this is currently complexity by design.

We agree with the CMA that the Fairness by Design duty should take the form of high-level principles and the DMU needs to set out the high-level basis for compliance. This is necessary for the duty to stay relevant as markets mature and businesses innovate.

We also agree that the Fairness by Design duty must be accompanied by a requirement for SMS platforms to conduct trialling, testing and monitoring to demonstrate that they are compliant.

Other remedies

It is clear that other remedies set out by the CMA, beyond those intended to give consumers control of their personal data, will also be required to reduce and mitigate the effect of the market power held by digital platforms. We are not in a position to assess the efficacy of many of these measures, but we note that a number of remedies involve the sharing of data between parties, including third-party access to click and query data in the search market and user ID and data access interventions in the digital advertising market. These remedies raise potential issues of data protection and, as the final report of the market study clearly indicates, there remains much still to establish regarding the interaction between competition and data protection regulation in these markets. It is imperative that the Taskforce takes this forward in the coming months, but we feel in principle that where data can be shared in a non-identifiable manner then these remedies should be pursued.

Further, as a user-led form of data sharing, data mobility holds the tantalising promise of improving competition without causing privacy harms. However, there are many barriers to having effective data mobility. It seems likely that intermediaries such as Personal Information Management services (PIMs) and Personal Data Stores (PDS) will be required for user-led data mobility to become a common occurrence in these markets, but such businesses are currently unknown to most consumers and the benefits of data mobility may seem intangible. These factors point to slow adoption of such services and a weak demand side that will not provide competitive pressure. We think it will be important for the DMU, when it comes into being, to carry out work to better understand the barriers to user-led data mobility and to develop means to overcome these barriers. In the meantime, we would not want to see caution in adopting other remedies in the hope that user-led data mobility becomes widespread.

9. Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

In our response to the interim report we asked that the CMA set out more fully why it recommended that some elements of its remedies to give consumers greater control over their data should be applied to platforms with SMS only, specifically the default for receiving personalised advertising and testing choice architecture.

We recognise that the CMA did set out its reasoning in the final report, concluding that it would be proportionate to apply these to SMS platforms only. We find this to be a reasonable conclusion at the present time and are content that some remedies would initially apply to SMS



platforms only, but we continue to believe that since these remedies are largely intended to tackle inertia among consumers and privacy harms then they should apply to as many platforms as is reasonable. As understanding of these remedies develops and the cost of implementation falls then we would expect to see these being applied beyond SMS platforms.

10. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?

Yes. We expect the markets to evolve faster and more significantly than non-digital markets, so that speed and flexibility are particularly important.

Which? is the largest consumer organisation in the UK with more than 1.3 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

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