



## CMA CONSULTATION ON PROPOSED MARKET INVESTIGATION REFERENCE

### MOZILLA RESPONSE

22 July 2022

**Mozilla has welcomed and participated<sup>1</sup> in the CMA’s market study into mobile ecosystems. It is critical for UK consumers that the mobile browser competition issues highlighted in this detailed and well-researched study are acted upon. Given that legislation to create a new pro-competition regime for digital markets will not be brought forward in the next year, making a market investigation reference (“MIR”) into mobile browsers is a necessary step for the CMA to take. In order to be effective, a market investigation should be undertaken without delay and its conclusion reached well within the statutory timetable.**

#### **Legislative delay means that a market investigation is needed**

In 2021, the average UK adult spent almost four hours online - with three of those hours spent using a smartphone<sup>2</sup>; with each day that passes while digital markets fail to function properly, UK consumers face tangible harm in the form of lost innovation, inflated prices, lack of choice and lack of competition in privacy and security.<sup>3</sup> The delay in bringing legislation giving the Digital Markets Unit (“DMU”) statutory powers risks significantly prolonging this position.

The competition concerns which limit consumers from choosing and benefitting from the full range of browsers and browser functionality on mobile devices<sup>4</sup> are clear, and many of these issues have been identified in the Market Study.

As such, the CMA recognised in the Interim Report that the threshold set out in section 131(1) of the Enterprise Act 2002 (“EA02”) has been met on the basis that it has reasonable grounds for suspecting that features of mobile operating systems, app stores/distribution and browser/browser engine markets could be restricting or distorting competition in the UK. It was also considered that a market investigation would be a proportionate response and that many of the proposed interventions could be implemented through order making powers.<sup>5</sup> Ultimately, the decision not to make an MIR in the Interim Report was based on the view that the DMU would be best placed to tackle the relevant competition concerns. However, the CMA expressly

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<sup>1</sup> <https://assets.publishing.service.gov.uk/media/6229acf6e90e0747aa8eb698/Mozilla.pdf>

<sup>2</sup> Ofcom, Online Nation Report (1 June 2022), page 12

<sup>3</sup> Mobile Ecosystems Market Study, Interim Report (“Interim Report”), paragraphs 2.61 to 2.79

<sup>4</sup> Including pre-installation; default settings; dark patterns; barriers to web compatibility; bypassing open standards; access to APIs; and interoperability.

<sup>5</sup> Interim Report, page 438

recognised that the possibility of legislative delay being a reason for revisiting the decision not to make an MIR.<sup>6</sup>

Following the delay in bringing forward legislation to provide the DMU with statutory powers, the CMA has updated its decision and is consulting on making an MIR in relation to mobile browsers (as well as cloud gaming). Mozilla supports this decision. As noted above, the CMA has recognised the urgent need to address the competition issues that affect browser competition. A market investigation would allow the CMA to build on the work undertaken in the market study and elsewhere in order to develop carefully considered interventions to the benefit of UK consumers, developers and other businesses. However, the way in which a market investigation is conducted and, in particular, the time it takes to reach a conclusion, will be crucial. Mozilla hopes that the proposal for a well-targeted market investigation will mean that it can be conducted swiftly and efficiently. Our concern is that an investigation which lasts up to 18 months (or even extended to two years as is possible under s.137 E02) would risk further irretrievable harm to browser competition and ultimately to UK consumers and developers. This harm is likely to be heightened in the current economic climate.

Costs are significantly rising for consumers (as well as smaller competitors and developers).<sup>7</sup> As was recognised in the Market Study, operating system providers cross-subsidise many of their activities, such as browsers, through extremely high revenue and profitability from business lines including devices, app stores and search advertising.<sup>8</sup> As such, the ability of these powerful companies to weather any economic turbulence may mean that delay to action leaves fewer competitors able to challenge incumbents, enter markets, or create new ones through innovation. Meanwhile operating system providers can continue to raise barriers to entry and limit choice, to the detriment of UK consumers and developers.

### **Mozilla's views on specific features identified by the CMA**

We have set out in greater detail elsewhere<sup>9</sup> our views on various features of the browser market through the lens of (a lack of) effective competition. We briefly highlight below some key considerations and look forward to engaging with the CMA in greater detail on these and other issues.

#### *Browser pre-installation, default settings and choice architecture should be carefully considered*

Mozilla shares the CMA's concerns that practices from operating system providers in relation to pre-installation, default setting and choice architecture in favour of their own browsers restrict

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<sup>6</sup> Interim Report, paragraph 9.12

<sup>7</sup> See the Office for National Statistics' July 2022 CPI Report, <https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/latest>

<sup>8</sup> Mobile Ecosystems Market Study, Final Report ("Final Report"), paragraph 7.60

<sup>9</sup> See, for example, <https://www.accc.gov.au/system/files/Mozilla.pdf> and [https://blog.mozilla.org/netpolicy/files/2022/04/Mozilla-response-to-FTC\\_DOJ-merger-guidelines-RFI-1.pdf](https://blog.mozilla.org/netpolicy/files/2022/04/Mozilla-response-to-FTC_DOJ-merger-guidelines-RFI-1.pdf)

competition. We read with interest the CMA's recent work on choice architecture<sup>10</sup> and welcome the fact that the CMA is taking steps to understand the issues in detail and to think carefully about potential remedies with a focus on actual consumer experience. We hope that this should help to avoid the circumstances which in the past have led competition regulators to introduce ineffective or poorly designed browser solutions to remedy breaches of competition law. Not only should any remedies be carefully and transparently designed with input from third parties, but they must also be properly tested. Moreover, the data gathered by the operating system providers on their effectiveness should be shared with other market participants. In addition, we would advise the CMA to avoid limiting itself to choice screens interventions. They are not a panacea and, at worst, can distract or deflect from other choice architecture interventions that are required to address problematic operating system practices that undermine browser competition.

#### *The importance of open standards in addressing web compatibility issues and network effects*

We commend the CMA for recognising the issues that arise in relation to web compatibility as at least in part a result of the market power of Apple and Google, as well as the unilateral creation of de facto standards: “[t]here are a series of open standards that should, in principle, address any concerns about web compatibility. However, in practice, compatibility issues remain. This appears to be due to (i) certain browsers releasing features without going through formal standards development organisations and processes (see Appendix F) and (ii) web developers not developing against standards but for a specific browser or set of browsers”.<sup>11</sup> In the event that a market investigation is undertaken, we would encourage the CMA to follow through on this concern and explore interventions which mandate the use of formal standards development organisations (“SDOs”) to enhance interoperability and combat the network effects which are present.

Given the critical role of open standards and SDOs in the creation and maintenance of the open web, it is important that the CMA adopts a thoughtful and nuanced approach to interventions in this domain, and in particular, that any such interventions take into account the perspectives of the multi-stakeholder internet governance community.

#### *The mandatory use of WebKit on iOS*

As recognised in the Market Study, the requirement to use WebKit on iOS severely limits the ability of browser vendors to differentiate their products and offer alternative features to consumers which would otherwise be available.<sup>12</sup> Developers are also hampered by limited competition and choice in terms of features; they face reduced user-facing performance and capabilities, alongside less frequent bug fixes and updates.<sup>13</sup>

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<sup>10</sup> <https://www.gov.uk/government/publications/online-choice-architecture-how-digital-design-can-harm-competition-and-consumers>

<sup>11</sup> Final Report, paragraph 5.77

<sup>12</sup> Final Report, paragraph 5.42 onwards

<sup>13</sup> Final Report, paragraph 5.50

As consumers increasingly seek out privacy enhancing products (the CMA noted the ACCC's research which showed that privacy features were the most frequent reason for selecting Firefox on mobile<sup>14</sup>), the restriction on alternative browser engines hampers the ability of independent browsers to compete, including in relation to privacy.

*Browser competition should be considered on desktop as well as mobile*

Many of the browser competition issues identified by the CMA (such as pre-installation, default settings, deceptive choice architecture) are equally present on desktop operating systems. As noted in the Market Study: “[b]oth globally and at the UK level, Apple’s Safari and Google’s Chrome browser are the largest browsers on mobile devices (as well as desktop)”, with Safari having a 35% share on desktop and mobile combined in 2021 and Chrome representing 48%.<sup>15</sup> Although the connection between desktop and mobile issues were not considered in detail in the Market Study, we wish to highlight the importance of desktop computers and the far-reaching consequences of the competition issues in this area for browser vendors and ultimately UK consumers.

As noted in our response to the Interim Report, the CMA should consider the harm to competition arising from not only from Google and Apple, but also Microsoft, Meta and Amazon - each of which provide and gatekeep operating systems across a range of devices using browsers. Browser competition issues are clearly present on computers and smartphones, but they are also present on nascent technologies that are or may soon be prevalent in UK households. Scrutiny of competition in these technologies is vital as voice assistants, mixed reality, and self-driving experiences become more sophisticated and useful to daily life. Powerful operating system providers and their services are global in nature and there is increasingly seamless integration of connected products and services across mobile devices, desktop computers, and home devices. Thus, even where these companies’ activities are not strictly limited to the mobile ecosystem, they can have a material adverse effect on innovation and competition in this area.

## **Conclusion**

Mozilla wishes to reiterate its support for the CMA’s provisional decision to exercise its discretion to make an MIR in relation to mobile browsers. We hope that the provisional decision will quickly be confirmed and we look forward to engaging in more detail on the scope of the market investigation and the specific issues raised within it.

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<sup>14</sup> Final Report, paragraph 5.40

<sup>15</sup> Final Report, paragraphs 5.24 and 5.28