

From: Edward Bowles
Director of Public Policy, Northern Europe, Facebook

Dear Sir / Madam

Re: Facebook response to the Competition and Markets Authority's interim market study report into online platforms and advertising

Facebook commends the UK Competition Markets Authority (**CMA**) for undertaking a broad review of the role of digital platforms and their role in the UK advertising ecosystem.

Facebook also welcomes the opportunity to address the core areas outlined in the CMA interim report and looks forward to building on the vision that our CEO laid out nearly a year ago calling for new regulations for the internet in four key areas - harmful content, election integrity, privacy, and data portability.

As a company, we are committed to working with policymakers and regulators, including the CMA, to build a regulatory framework that protects and enhances consumer choice, continues to spur innovation, creates opportunities for small and medium businesses to thrive, and provides more opportunities for consumer-driven choice.

Dynamism of platforms

Any potential regulatory framework for this age must factor in the dynamism of platforms. Consumer preferences change all the time, especially when it comes to technology. Fifteen years ago, three of the most popular internet companies were Yahoo, Myspace, and AOL.

Today, the investment and growth in the technology sector can be seen in companies like Chinese-owned TikTok that boasts 1 billion monthly active users, the advertising growth of popular connected streaming companies, and even in the constant growth, evolution, and innovation of existing companies such as Amazon that continues to build a rapidly expanding advertising offering.

People are ultimately the best judge of the value of a company's products and services and if we stop innovating people will simply spend more time on other services.

The value of platforms for small businesses

Technology and digitalisation are a source of new opportunities for small and medium businesses. To understand the role of Facebook in helping small businesses to grow, it commissioned a study by Copenhagen Economics which surveyed 7,000 businesses across Europe, including the UK. In the study, businesses emphasised, among other things, the role of technology in helping them reach markets abroad and more specifically the study flagged that:

- our services helped these businesses generate over 98 billion euros in exports last year;
- seven in ten businesses using our services export to other countries compared with five in ten for non-users; and
- six in ten of the businesses surveyed say that our services are helpful in entering new markets .

These are just a few of the benefits generated by our services. These benefits are significant and as the CMA considers regulatory intervention, it needs to weigh both the innovation in the digital sector and the benefits this innovation delivers to people and businesses; that innovation is both enabled and funded by advertising.

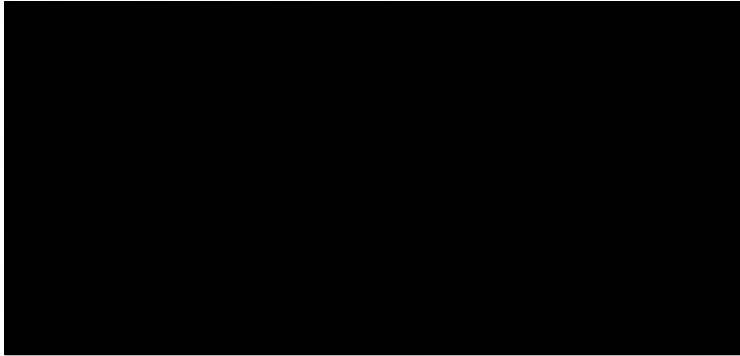
Promoting user-driven choice and innovation within a new regulatory framework

Building a new regulatory framework for the internet requires all stakeholders to work with government to outline a template that is resilient enough to provide strong rules for digital markets as a whole. Facebook's view is that new rules should give consumers more control of their information and more choice whilst also spurring growth and innovation.

In the next few pages, our submission aims to:

1. emphasise our commitment to more choice and transparency for consumers and advertisers, and its support for some of the CMA's initial policy proposals related to consumer and advertising tools, data portability solutions and privacy enhancement technologies;
2. clarify misunderstandings about the competitive dynamics of the industry and mischaracterisation of aspects of our services. In particular, we underscore the need for robust consideration of economic, legal and technical evidence to support some of the policy recommendations;
3. identify that some of the CMA's preliminary policy proposals risk undermining a business model which drives considerable innovation and creates benefits for consumers and small and medium businesses alike; and
4. set out our initial considerations on the CMA's proposed Code of Conduct to the extent there is evidence it is needed.

In short, we welcome the opportunity to engage with the CMA as it designs and implements well-evidenced regulation that is effective and pro-innovation, and which preserves the many benefits technology has and can deliver to people, advertisers and small businesses in the UK.



UK CMA Online Platforms and Digital Advertising Market Study

Facebook's response to the CMA's Interim Report

14 February 2020

1. Facebook welcomes the opportunity to address the preliminary impact assessment and policy proposals contained in the CMA’s Interim Report (the IR)

1.1 Recognising the “[i]nternet has entered a new phase”, Facebook understands that the oversight of technology’s role in our lives also needs to evolve. It is in this context that Mark Zuckerberg, Facebook’s CEO, has called for a “more active role for governments and regulators” so that “by updating the rules for the internet, we can preserve what’s best about it – the freedom for people to express themselves and for entrepreneurs to build new things – while also protecting society from broader harms”. Against this background, Facebook notes the broad economic, policy and legal frameworks set out in the IR; frameworks which necessarily extend beyond the parameters of competition law and policy.¹

1.2 Facebook looks forward to engaging with the CMA in its work to further develop the evidence base for proportionate, industry-wide, thought-leading policy proposals that balance the interests of all stakeholders and are workable in practice (whether as part of a Code of Conduct or otherwise). Consistent with the Government’s Better Regulation Framework,² there is a public interest in the CMA grounding any policy proposals for change on robust evidence of actual harm; and weighing any such harm against the substantial pro-consumer and business benefits that exist today. Such an approach provides legitimacy to any proposals for change and thus maximises the likelihood of success of any such proposals. Accordingly, Facebook sets out in more detail below its initial views on:

- (a) the substantial benefits and efficiencies that its services bring to consumers, advertisers, publishers and the wider UK economy (see **Section 2**);
- (b) certain of the CMA’s preliminary proposals that Facebook considers risk deteriorating the benefits of Facebook’s services and creating harm for all of its users, as well as the wider UK economy (see **Section 3**);
- (c) those of the CMA’s preliminary proposals that Facebook considers would best support and contribute to improving transparency and user-initiated choice (see **Section 4**); and
- (d) any new Code of Conduct, to the extent that there is robust evidence that it is necessary (see **Section 5**).

1.3 Ahead of its final report, Facebook urges the CMA to take account of the points set out in this submission in order to ensure that any final policy recommendations:

- (a) properly consider and reflect the substantial benefits and efficiencies that Facebook’s services bring to all of its users. Consumers, advertisers, publishers and the wider UK

¹ See for example, paras 5, 4.32 and 7.16 of the IR. See also the comments of the European Executive Vice President and Competition Commissioner Margrethe Vestager who has noted that “to tackle the challenges which the [sic] digital transformation creates for Europe, we also need to look beyond competition”: *Security and trust in a digital world*, Speech of 13 September 2019, available at: https://wayback.archive-it.org/12090/20191024034432/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/security-and-trust-digital-world_en.

² Department for Business, Energy and Industrial Strategy (**BEIS**), *Better Regulation: Government’s Annual Report 2018-2019*, November 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865807/hc-80-better-regulation-annual-report-2018-19-updated-february-2020.pdf; and BEIS, *Better Regulation Framework: Guidance*, August 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/735587/better-regulation-framework-guidance-2018.pdf.

economy all benefit from Facebook’s ad-supported business model. That model provides substantial surplus to consumers;³

- (b) are industry-wide, recognising the lack of any evidence of “market power” or causal link between any perceived market power and the alleged harms in the IR. After all, even based on an artificially narrow characterisation of the market in which Facebook competes,⁴ the CMA acknowledges Facebook’s market presence comprises less than half of all online “display” advertising.⁵ Such an approach will help to deliver forward-looking and meaningful change for all users;
- (c) avoid arbitrarily transposing frameworks from other industries (such as telecommunications and personal banking) to ad-funded platforms which operate in a significantly more competitive and innovative ecosystem.⁶ As recommended by BT (an experienced regulated entity), remedies must “*appropriately reflect the specific features of different sectors*” and be “*evidence-based, clear, limited to what is necessary and proportionate; there should be appropriate checks and balances; and the regime should be capable of adapting to a fast-moving sector*”. In particular, the CMA “*should apply the principles of good regulation – i.e. it should consider the cost and benefits of regulation to all affected players and consumers*”;⁷ and
- (d) recognise the inherent challenges involved in developing regulatory proposals that seek to balance competing policy objectives, namely: (i) differentiation and innovation between online platforms; (ii) standardisation and homogeneity resulting from interoperability between online platforms; and (iii) privacy of information shared with online platforms.⁸ Any proposals must be harmonious with the requirements of existing regulation and legislation including, in particular, the General Data Protection Regulation (**GDPR**) and the Data Protection Act 2018.

1.4 As the Interactive Advertising Bureau has also put it:

“it’s imperative that... the CMA protects the value our ad-funded digital economy delivers to users and the UK’s position as a world leading online ad market. The internet relies on digital advertising, underpinning business models that allow

³ For example, third party research notes that consumers “derive over \$1000 of value annually on average from Facebook”, see Jay Corrigan, Saleem Alhabash, Matthew Rousu and Sean Cash, *How much is social media worth? Estimating the value of Facebook by paying users to stop using it*, 19 December 2018, available at:

<https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0207101&type=printable>; and Erik Brynjolfsson, Avinash Collis and Felix Eggers, *Using massive online choice experiments to measure changes in well-being*, 9 April 2019, available at: <https://www.pnas.org/content/pnas/116/15/7250.full.pdf>.

⁴ See para 5.110 of the IR.

⁵ In particular, the CMA has maintained antiquated and artificial segmentations between: (i) search and display advertising; (ii) video and non-video advertising; and/or (iii) open and owned/operated display advertising, all of which are not reflective of market reality. See, for example, see Performance Market Insider, Pierre Kiciak, *The Where and Why of Convergence Between Display and Paid Search*, June 6, 2016, available at: <http://performancein.com/news/2016/06/06/where-and-why-convergence-between-display-and-paid-search/>; and Matt Maltby, *How Leading Advertisers Are Using Search for Brand Building*, June 2014, available at: <https://www.thinkwithgoogle.com/advertising-channels/search/how-advertisers-are-using-search-for-brand-building/>. Moreover, the CMA has also acknowledged that the internal documents of Google and Facebook each clearly identify the other as a competitor (see paras 5.119-5.120 of the IR).

⁶ See, for example, Competition Policy International, *UK: Telecom Regulator fears lack of competition*, 25 April 2019, available at: <https://www.competitionpolicyinternational.com/uk-telecom-regulator-fears-lack-of-competition/>; Business Insider, *UK regulators are aiming to increase banking competition*, 16 August 2018, available at: <https://www.businessinsider.com/uk-regulators-financial-comparison-rule-2018-8?r=US&IR=T>; and CMA, *Retail banking market investigation*, 26 February 2016, available at: <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.

⁷ Such notes of caution are particularly worth heeding when they are already emanating from regulated entities. See BT’s response to the CMA’s Statement of Scope, 31 July 2019, paras 8 and 54, available at: https://assets.publishing.service.gov.uk/media/5d762a43e5274a097be1f56b/190731_BT_-_Response_to_statement_of_scope_-_non-confidential_Redacted.pdf.

⁸ See para 4.158 of the IR.

*consumers to access information and services for free. It supports new business growth and has allowed for the evolution of traditional markets, particularly in the case of SMEs. Maintaining an open, robust and diverse digital ecosystem is essential to ensuring a healthy and sustainable marketplace that retains the many benefits that digital advertising delivers to both individuals and businesses”.*⁹

2. The CMA’s final policy proposals should fully take into account the substantial benefits that Facebook’s constantly innovating and personalised services bring to consumers, advertisers, publishers and the wider UK economy

- 2.1 Facebook welcomes the CMA’s acknowledgment of the widely recognised benefits and efficiencies of Facebook’s personalised user and advertising services and its acknowledgment that Facebook has grown by competing to offer a better product than its rivals.¹⁰
- 2.2 At its core, Facebook offers a personalised experience where all content, including ads, is tailored to its individual users. Indeed, advertising content is an integral part of the personalised user experience on Facebook; and Facebook constantly strives to ensure that the ads users see are as relevant and useful to them as non-paid content.
- 2.3 However, the full extent of the benefits of Facebook’s services are not recognised in the IR. This risks any well-meaning initiatives raising unforeseen challenges (or worse, creating harm for all of Facebook’s users) by focusing only on perceived downsides, without sufficiently counterbalancing these against the substantial pro-consumer benefits. As a result, Facebook urges the CMA to continue to engage in understanding the significant benefits and economic efficiencies generated by companies such as Facebook more fully. Such benefits and efficiencies are based on an ad-supported model that provides substantial surplus to consumers at no cost.
- 2.4 The CMA’s final impact assessment and policy proposals must therefore properly reflect the following substantial benefits that Facebook’s services – including the personalised experience which is inherent to those services – deliver to consumers, advertisers, publishers and the wider economy, and the impact that any change would imply.

UK businesses, particularly SMEs, benefit significantly from Facebook’s services

- 2.5 Facebook’s personalised advertising services have helped to democratise advertising in the UK. Even just a few years ago, effective advertising was simply not an option for large numbers of businesses in the UK: either because it was too expensive (for example, a commercial to air on prime-time TV) and/or too inefficient (for example, newspaper adverts which would likely only be relevant to a fraction of a newspaper’s readers).
- 2.6 Today, Facebook’s efficient and affordable advertising services have transformed and enhanced effective advertising options available to businesses – particularly to SMEs – thus spurring economic growth and opportunity in the UK. Now, advertisers of all kinds and sizes can advertise and benefit from the affordable, innovative and efficient advertising solutions that Facebook has driven and brought to the market. These have enabled advertisers (and particularly SMEs) to reach their target audience more efficiently and cost-effectively and thus achieve a greater return on their investment.

⁹ IAB UK’s response to CMA’s market study interim report, 18 December 2019, available at: <https://wzwww.iabuk.com/news-article/iab-uks-response-cmas-market-study-interim-report>.

¹⁰ See the summary box on p. 6 of the IR.

- 2.7 The effect is that UK SMEs can, for example, now advertise and grow their businesses in a manner that has simply not been possible before, as a result of advertising on Facebook. For example:
- (a) SMEs can now reach their target audiences more efficiently and compete with and challenge much larger, more established businesses more effectively, including in concentrated industries; and
 - (b) a recent study of SMEs using Facebook’s services in 15 countries across Europe, including the UK, noted that that:
 - (i) 47% find Facebook’s apps important for starting their business;
 - (ii) 59% find Facebook’s apps important to growing their revenues; and
 - (iii) 58% find Facebook’s apps important in lowering their marketing costs.¹¹
- 2.8 Demand for Facebook’s personalised ads reflects their value and quality. This is supported by advertisers benefitting from a greater degree of transparency and measurement of their return on investment when advertising on Facebook than was previously available. These efficiencies are important for enabling Facebook to continue to compete to win a greater proportion of all businesses’ advertising budgets, i.e. by continuing to demonstrate that the value of placing an ad on Facebook is better than that offered by other online and offline advertising channels.
- UK consumers also benefit significantly from Facebook’s services, all of which are only made possible from revenue generated by Facebook’s advertising services**
- 2.9 UK consumers derive substantial benefits from Facebook’s services. Indeed, there is a growing body of economic research supporting Facebook’s delivery of valuable services to users:
- (a) one recent research study shows, for example, that digital goods, and in particular Facebook, have created large gains in wellbeing and consumer surplus, noting that when confronted with the choice of either maintaining access to Facebook or giving up Facebook for one month, users would require a median compensation of \$40-50 per month for leaving the service,¹² and
 - (b) another research study used an experimental approach, based on the de-activation of Facebook accounts, to quantify the value that users place on Facebook. The results consistently show users would require more than \$1,000 annually to deactivate their Facebook account.¹³
- 2.10 But as users are aware, Facebook’s valuable services are funded entirely by advertising revenue. Accordingly, advertising (and in particular, personalised advertising) is not an “add-on” service for consumers. Rather, it is an integral foundation for the multi-sided economic

¹¹ Copenhagen Economics, *Empowering the European Business Ecosystem – an impact study of business using Facebook apps and technologies*, 2020, available at: https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/522/1579535391/empowering-the-european-business-ecosystem_copenhagen-economics.pdf

¹² Erik Brynjolfsson, Avinash Collis and Felix Eggers, *Using massive online choice experiments to measure changes in well-being*, 9 April 2019, p. 3, available at: <https://www.pnas.org/content/pnas/116/15/7250.full.pdf>.

¹³ Jay Corrigan, Saleem Alhabash, Matthew Rousu and Sean Cash, *How much is social media worth? Estimating the value of Facebook by paying users to stop using it*, December 2018, pp. 1, 7, available at: <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0207101&type=printable>.

business model which allows Facebook's services to be offered to consumers at all. These are services that are:

- (a) constantly being improved and updated, enabling users in all parts of the world to connect, share and engage in ways that were not possible just a few years ago; and
- (b) made available at no cost. As the survey evidence cited in the IR itself notes, most consumers accept that websites display adverts in return for being able to access them for free.¹⁴

2.11 Further, consumers benefit directly from personalised advertising¹⁵ as it:

- (a) enables them to discover relevant content (e.g. new brands, new travel destinations and new interest communities) and find products and services that are likely to be more meaningful and engaging to them. The importance of a positive user experience is further evidenced by the fact that the winner of a Facebook ad auction is the ad which offers the highest "total value" to a user, as opposed to simply the highest bidder; and
- (b) contributes towards lower prices for end consumers. When understood as a distribution cost for firms, more effective targeting of advertising helps to lower costs for firms (all other things being equal) which will (at least to some extent) be passed on to consumers.¹⁶ This is noted by the Developers Alliance in its response to the Statement of Scope, which states that: "*targeted advertising lowers the costs and increases the availability of goods and services to consumers*".¹⁷

2.12 Facebook's goal is thus to ensure that advertising content is as relevant and enhancing of a user's experience as non-paid content, both of which are surfaced to users on Facebook. Facebook uses the information that users choose to make available to rank and prioritise the (advertising and non-paid) content that a user sees every time they use the Facebook service. The effect of this is that no two users' experiences are ever the same. Absent such personalisation, users' experiences on Facebook would simply be a stream of any and all content with no filtering for relevance. Such a proposition would clearly be of far less value and interest to consumers (and advertisers).

Other publishers and the wider UK economy have also benefited from Facebook's services

2.13 Facebook notes that publishers' business models have been facing significant challenges with the advent of digitalisation. Those challenges pre-date Facebook's launch by some time. From this perspective, it is important that the CMA does not give undue weight to the commercial imperatives of only certain constituents. Such an approach risks stifling innovation and creating harm, especially for consumers and SMEs that have benefited the most from online

¹⁴ This is a key finding of the Harris Interactive poll cited by the CMA at paras. 4.19, 4.42 and footnote 162 of the IR (and throughout Appendix G), although the IR did not report this finding.

¹⁵ There is also evidence that users prefer personalised advertising to non-targeted advertising. For example, third-party research states that, in their target group, "*the high personalization ad was clearly preferred to the low personalization ad*" and users would "*rather share their clicking behaviour and receive behavioural targeted and therefore relevant ads, than random ads*" (see Walrave, Poels, Antheunis, Van den Broeck and van Noort, *Like or Dislike? Adolescents Responses to Personalized Social Network Site Advertising*, Journal of Marketing Communications, Vol. 24, No. 6, 2018, pp. 607, 609, available at: <https://www.tandfonline.com/doi/abs/10.1080/13527266.2016.1182938?journalCode=rjmc20>; see also, Sahni, Navdeep. S., Wheeler Christian S., and Chintagunta Pradeep, 'Personalization in Email Marketing: The Role of Noninformative Advertising Content,' Marketing Science, Vol. 37. No. 2, 2018, p. 241, available at: <https://pubsonline.informs.org/doi/10.1287/mksc.2017.1066>).

¹⁶ CERRE, *Big Data and Competition Policy - Market power, personalised pricing and advertising*, February 2017, p. 53, available at: https://cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf.

¹⁷ Developers Alliance's response to the CMA's Statement of Scope, p. 3, available at: https://assets.publishing.service.gov.uk/media/5d76286fe5274a09856f38cb/190730_Developers_Alliance_-_Response_to_SoS_-_non-confidential_Redacted.pdf. See also Shapiro, *Advertising and Welfare: A Comment*, 1980, pp. 1-2, available at: https://www.istor.org/stable/3003394?origin=crossref&seq=1#metadata_info_tab_contents.

platforms and digital advertising services. Rather, well-designed broader regulatory and public policy proposals can help to create a climate in which publishers are further encouraged to enhance the benefits of their own offerings to consumers and advertisers.

- 2.14 In relation to its solutions, Facebook notes that Instant Articles¹⁸ and Facebook Audience Network¹⁹ have helped publishers to increase their reach and target their audiences more effectively and to better measure audience engagement. Facebook's innovations have thus helped publishers to generate greater revenues from advertising than might otherwise have been the case.
- 2.15 More broadly, and with reference to the benefits of Facebook's services for the wider UK economy, Facebook welcomes the UK Department for Digital, Culture, Media and Sport's (DCMS') recent acknowledgment that:

"Online advertising is at the heart of the digital economy. As the primary source of revenue for major online platforms, it underpins the provision of key online services. These services are positively transforming people's lives. Online advertising can also help consumers to discover valuable new goods, interests and services, and is creating more accessible and low cost routes for businesses to engage with customers. Online advertising makes an important growing contribution to our economy, with the UK market now the third largest in the world. In 2018, it accounted for over half of UK advertising spend, contributing £13.4 billion to the economy – up from £3.5 billion in 2008. This reflects the significant shift in consumer consumption habits from traditional media, such as newspapers and TV, to online formats".²⁰

3. Any proposals to limit personalised advertising and/or mandate interoperability would reduce the benefits of personalised advertising and/or introduce increased homogeneity between services; this risks limiting innovation and deteriorating the benefits of Facebook's services which would in fact result in the creation of harm for users, advertisers, publishers and the wider UK economy

- 3.1 Facebook agrees with the CMA that a substantial amount of work still needs to be carried out (whether in the context of the remainder of the market study or otherwise),²¹ to ensure that its final policy proposals are well-evidenced, proportionate and do not produce side effects that cause significant detriment to users, advertisers, publishers and/or the wider UK economy.
- 3.2 Against this background, Facebook considers that any final proposals to: (a) limit its delivery of personalised advertising; and/or (b) mandate interoperability between online platforms risk stifling innovation and creating more homogenous services. Such an approach fundamentally misunderstands the economics of the multi-sided business model upon which the continued delivery of Facebook's services depends; and risks eroding, rather than enhancing, the widely acknowledged benefits of Facebook's services.
- 3.3 From this perspective, Facebook notes that any final policy proposals which serve to jeopardise and/or degrade Facebook's delivery of services that consumers and advertisers value highly – so that less competitive and less valuable offerings are insulated from competition – are unlikely to meet with widespread consensus or withstand the test of time.

¹⁸ See Facebook, *Instant Articles*, available at: <https://instantarticles.fb.com/>.

¹⁹ See Facebook, *Audience Network*, available at: <https://www.facebook.com/business/marketing/audience-network>.

²⁰ DCMS Policy Paper, *Online Advertising – call for evidence*, 27 January 2020, available at: <https://www.gov.uk/government/publications/online-advertising-call-for-evidence/online-advertising-call-for-evidence>.

²¹ See paras 92 and 7.18 of the IR.

Such an approach would also risk hampering the continued growth of the wider UK economy, of which advertising is a fast-growing segment.

The IR has not set out any compelling evidence that limiting Facebook’s ability to provide personalised advertising would be in the interests of consumers, advertisers, publishers or the wider UK economy

- 3.4 Facebook agrees with the CMA that “consumers value relevant advertising and the monetisation of platforms, often through targeted advertising, is key to the provision of free, innovative services, which are a significant benefit for consumers”.²² Given that approximately 98% of Facebook’s global revenue comes from advertising,²³ degrading the ability for Facebook to provide the personalised advertising service its advertisers and consumers value would critically undermine the multi-sided economic business model that enables Facebook to provide its constantly innovating services at no cost to consumers.
- 3.5 Facebook is therefore concerned that any proposal to remove or degrade its ability to provide personalised advertising will result in degrading the quality of the product Facebook offers. Such a proposal would result in a reduction in value and an increase in cost – for advertisers and consumers. Indeed, it is striking that none of the third-party responses to the CMA’s Statement of Scope appear to support the CMA’s initial proposals to provide consumers with the option of turning off personalised advertising.
- 3.6 Any policy proposals that seek to limit the ability of platforms to engage in personalised advertising would therefore need to be supported by compelling evidence that personalised advertising does, in fact, result in actual consumer harm. However, the IR has not evidenced any actual harm from personalised advertising or that consumers would be better off if Facebook’s ability to provide personalised advertising was limited. The IR seeks to rely on survey evidence to support its wider concerns about consumers’ sharing of data to support personalised advertising; but this survey evidence is far from clear and is insufficient to substantiate any such concerns.²⁴ In the highly competitive market in which Facebook operates, consumers are under no compulsion to either join Facebook or to continue to use its services; Facebook’s “Download Your Information” tool even enables consumers to take their Facebook data to its many rivals.²⁵

Evidence from the IR’s survey also supports the view that consumers prefer personalised advertising to non-personalised advertising

²² See para 4.155 of the IR.

²³ Facebook, Inc, Form 10-K 2019, p. 56, advertising revenue accounted for US\$ 69,655 million of a total revenue of US\$ 70,697 million for fiscal year ended 31 December 2019, p. 56, available at: <https://www.sec.gov/ix?doc=/Archives/edgar/data/1326801/000132680120000013/fb-12312019x10k.htm>.

²⁴ See, for example: (a) the Harris Interactive poll, on which the CMA relies, which suggests that only 6% of respondents did not think that sites used personal information in order to serve personalised ads, or did not know what information is used to do so; that, when shown examples, 82% recalled seeing ad preference messages when visiting websites; and that most felt that they had some or full control over the ads they were showed (see slides 11 and 7-8, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0023/141683/ico-adtech-research.pdf); (b) Ofcom’s Adults’ Media Use and Attitudes Report 2019, which found that “compared to 2017, internet users are more likely to say that they would be happy for companies to collect and use their personal information if they get access to a free or personalised service in return” (see slide 99, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0031/149872/Adults-media-use-and-attitudes-report-2019-chart-pack.pdf); and (c) although it is correct that the Which?/Britain Thinks poll relied on by the CMA identified some consumers’ concerns over data collection and their perceived level of control, it also found that: “Few consumers feel that they have experienced any detriment as a result of using these types of products and services to date, and most struggle to see how data collection and sharing could cause them any direct, tangible harm in future.” (see Which? / Britainthinks, Control, Alt or Delete?, p. 26, available at: <https://britainthinks.com/pdfs/Consumer-Data-Research-report.pdf>).

²⁵ Facebook is also constantly innovating to facilitate this transfer of data for consumer e.g. through its new tool, to be rolled out worldwide in the first half of 2020, to transfer photos directly to Google Photos (see The Verge, Facebook’s new tool lets you transfer pictures to Google Photos, available at: <https://www.theverge.com/2019/12/2/20991419/facebook-transfer-photos-google-photos-tool-new-details>).

- 3.7 As the CMA itself recognises, targeted ads are more likely to provide genuinely useful information to consumers and most consumers prefer ads that are relevant to them.²⁶ Indeed, as the Centre for Data Ethics and Innovation has also recently reported: “[p]eople do not want targeting to be stopped” and that most people see “the convenience of online targeting as a *desirable feature of using the internet*”.²⁷ The report notes that consumers’ concerns are instead focused on how systems can operate accountably and transparently. To that end, Facebook offers a number of market-leading privacy tools (see Section 4 below) that provide users with transparency and choice over the use of their data.
- 3.8 Further, Facebook notes that the IR’s survey evidence also supports the view that consumers prefer personalised advertising to non-personalised advertising. For example:
- (a) of those that responded with a preference (one way or another) in the Harris Interactive study, 73% stated a preference for personalised adverts,²⁸ and other third-party survey evidence also indicates that a strong majority of consumers prefer personalised adverts to non-personalised adverts;²⁹ and
 - (b) other submissions to the CMA highlighted that making ads less relevant to users risks reducing user engagement and increasing user dissatisfaction,³⁰ including the Computer and Communications Industry Association, which noted in its response to the Statement of Scope that personalised advertising: “creates higher efficiencies for advertisers in addition to increased consumer welfare, since consumers prefer personalized and relevant ads... [it] is now ubiquitous throughout the digital advertising space (and increasingly throughout advertising), offering businesses a more efficient channel for reaching out to interested customers. At the same time, individuals receive relevant advertising tailored to their own needs”.³¹
- 3.9 Limiting Facebook’s ability to serve personalised advertising would therefore:
- (a) result in advertisers and publishers suffering substantial harm: the CMA recognises that the value to advertisers and publishers from personalised advertising is significant.³² This is also supported by third party research and quantitative evidence,

²⁶ See paras 2.8 and 4.42 of the IR.

²⁷ Centre for Data Ethics and Innovation, *Review of online targeting: Final report and recommendations*, February 2020, pp. 6, 48, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864167/CDEJ7836-Review-of-Online-Targeting-05022020.pdf.

²⁸ The Harris Interactive study evidences that out of the respondents who responded with a preference in either direction (i.e. 74% of respondents), 73% stated a preference for personalised adverts over non-personalised adverts (i.e. 54% overall) (see Harris Interactive (2019), *Adtech – Market Research Report*, slide 8, available at:

https://www.ofcom.org.uk/data/assets/pdf_file/0023/141683/ico-adtech-research.pdf).

In addition, while the CMA cites an Ofcom report that says that “only 15% of respondents were happy for online companies to collect and use their data to show more relevant adverts or information”, the same report finds that 24% of respondents do not mind seeing any online ads, and this figure increases to 62% when the ads are relevant to the individual (due to a further 38% of respondents stating that they do not mind seeing relevant online ads) (see Ofcom’s Media Literacy Tracker 2018, p. 361, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0026/149840/adults-media-use-attitudes-2019-data-tables.pdf).

²⁹ See, for example, a 2017 Segment report found that 71% of consumers express some level of frustration when their shopping experience is impersonal, and that personalised advertisements and recommendations were found to have significant positive effects for both consumers and retailers, driving impulse purchases that shoppers welcome and increasing brand loyalty. See Segment, *The 2017 State of Personalisation Report, 2017*, pp. 2-3, available at: <http://grow.segment.com/Segment-2017-Personalization-Report.pdf>.

³⁰ See also the Developers Alliance’s response to the CMA’s Statement of Scope, p. 3, available at:

https://assets.publishing.service.gov.uk/media/5d76286fe5274a09856f38cb/190730_Developers_Alliance_-_Response_to_SoS_-_non-confidential_Redacted.pdf;

Lloyds Banking Group’s response to the CMA’s Statement of Scope, pp. 2-3, available at:

https://assets.publishing.service.gov.uk/media/5d76480140f0b62609dec5a9/190909_Lloyds_Banking_Group_-_Response_to_SoS_-_non-confidential_Redacted.pdf; and

Which?’s research among UK consumers which also notes that “most consumers tend to feel that the targeting and tailoring [of adverts and recommendations] is positive, [as they] enhance services by increasing the relevance of the content they are shown” (see Which? / Britainthinks, *Control, Alt or Delete?*, p. 72, available at: <https://britainthinks.com/pdfs/Consumer-Data-Research-report.pdf>).

³¹ The Computer and Communications Industry Association’s response to the CMA’s Statement of Scope, pp. 3-4, available at:

https://assets.publishing.service.gov.uk/media/5d7627c340f0b60924db6694/190730_CCIA_-_Response_to_SoS_-_non-confidential.pdf.

³² See the para 3.160a of the IR.

for example: (i) the IR refers to an experiment run by Google which showed that UK publishers earned 50-65% less revenue when advertisers could not target their advertising,³³ indicating a substantial detrimental impact; and (ii) third-party research suggests that advertisers without access to personalised advertising revert to more intrusive forms of advertising (such as unsolicited telemarketing telephone calls or emails), which is unlikely to be in the interests of consumers;³⁴ and

- (b) *undermine a well-understood and valuable business model for consumers*: providing a service that is personalised (at least to some degree) is not unique to Facebook or even online platforms. In every sector across the globe, from banking to healthcare, the drive to offer services which are in tune with consumers' growing demand for personalised services is central to the growth-plan of almost every consumer-focused business. Notably, a recent report by Accenture Interactive found that:

"[p]ersonalization has become the priority for nearly all businesses. As competition increases, businesses face even more pressure to create personally curated experiences that drive consumer engagement and differentiation in the market [...] Despite expectations outpacing efforts to create personal experiences, nearly all consumers (91 percent) are still more likely to shop with brands who recognize, remember, and provide them with relevant offers and recommendations".³⁵

3.10 Against this backdrop, policy proposals that single out and risk jeopardising the ability of just one or two companies from being able to continue to offer services that consumers value would be entirely disproportionate. This is particularly the case for Facebook's multi-sided platform business model where, as noted above, personalisation is at the very core of the consumer offering. Personalisation is not an "add-on" but rather is *the* service that consumers sign up for and that advertisers choose to pay for, generating revenue which in turn enables the delivery of Facebook's free, personalised and constantly innovating services for consumers. For this reason, the idea that *"irrespective of whether or not a consumer has turned off personalised advertising the core service they receive will be the same, with only the nature of the advertising content being varied"*³⁶ is not sustainable.

3.11 In light of the significant benefits to consumers and advertisers from personalised advertising and the lack of robust evidence of any detriment, Facebook should not be forced to offer an inferior experience to its customers – particularly for SME advertisers and consumers. Indeed, changing default settings *only* for platforms with SMS status (a categorisation discussed in Section 5 below) would result in an unlevel playing field and undermine Facebook's incentives to compete.³⁷ Therefore, policy proposals relating to personalised advertising should be re-considered.

Mandating interoperability between online platforms risks creating more homogenous services and stifling innovation and competition, both for online platforms and digital advertising

3.12 To the extent that the CMA's preliminary proposals are focused on fostering innovation, Facebook notes that it is already the case that digital platforms operate in a largely open environment which has served to enrich users' online experiences significantly. For example,

³³ See para 4.152 of the IR.

³⁴ Goldfarb, Avi and Catherine Tucker, "Online Display Advertising: Targeting and Obtrusiveness", February 2010, pp. 15-32, available at: https://www.researchgate.net/publication/227349678_Online_Display_Advertising_Targeting_and_Obtrusiveness.

³⁵ Accenture, *Personalisation Pulse Check*, 2018, p. 3, available at: <https://www.accenture.com/acnmedia/pdf-77/accenture-pulse-survey.pdf>.

³⁶ See para 6.96 of the IR.

³⁷ See para 6.105 of the IR.

Facebook already voluntarily makes a range of APIs available to a wide variety of third-party developers to help them build valuable experiences for the benefit of users in the UK and beyond. Further, Facebook's tools which implement GDPR-mandated rights of access and portability greatly assist consumers' use of other platform providers.

- 3.13 Facebook notes that the IR's references to "interoperability", on the other hand, are very broad and are used to describe a wide range of different situations ranging from mandated API access to full content interoperability between online platforms.³⁸
- 3.14 In this regard, Facebook is concerned that any sweeping calls to mandate full content "interoperability" between online platforms risks stifling global innovation and creating more homogenous services to the detriment of all users.
- 3.15 In the absence of any robust evidence to support the need for "interoperability" between services, Facebook urges the CMA to balance any perceived "benefits" of "interoperability" with the following significant costs for consumers, advertisers, publishers and the wider UK economy:
- (a) *the policy proposals relating to content interoperability (as illustrated in Figure 6.1 of the IR) risk a homogenisation of user-facing services for which there is no evidence of any consumer demand:* this would undermine the current high levels of competition and innovation that are benefiting consumers (and indeed, advertisers, publishers and the wider UK economy).³⁹ If content on platforms is consolidated in one place and/or mandated to be cross-posted across a number of different services, this would limit the ability of platforms to provide a differentiated and innovative service to consumers and raise barriers to entry. Indeed, it is the differentiation available to users through, for example, character-limited posts (such as on Twitter), ephemeral content (such as on Snapchat and Instagram) and video (such as on YouTube and TikTok), that has driven competition between online platforms for the benefit of all users;
 - (b) *the top-down imposition of interoperability and/or mandating Facebook to provide access to APIs (including to restore past API access) risks stifling innovation and deteriorating Facebook's (and others') incentives to compete:* while "interoperability" was not the focus of third-party responses to the Statement of Scope, Facebook notes that the Developers Alliance cautions against "[t]he imposition of data standards [which] would reduce data innovation" and states that "mandatory data transfers pose serious risks, with clear negative effects on innovation and growth".⁴⁰ TikTok also expresses concerns over mandatory interoperability and the associated risks to innovation and choice.⁴¹ Applying content interoperability only to platforms with SMS, as the CMA currently proposes,⁴² would not only undermine Facebook's ability

³⁸ Forms of interoperability which have been proposed include (i) transferring photos and files (paras 20-23 of Appendix K of the IR); (ii) the ability to identify and make contact with friends or other potential contacts from other social platforms (paras 24-29 of Appendix K of the IR); (iii) the ability to post content or view posts across several platforms (paras 30-34 of Appendix K of the IR); (iv) the ability to consolidate and view updates or search across social platforms, including interacting with the content by e.g. "liking" it (paras 35-40 of Appendix K of the IR). The Code of Conduct also includes a specific provision under principle 2 on open choices that "platforms should offer open APIs or interoperability with their core services" (see Table 6.1 on p. 241 of the IR and Principle 2 in Table I.1 of Appendix I of the IR).

³⁹ See para 16 of Appendix K of the IR, where it is noted that TikTok submitted that "such an intervention risked making platforms more homogeneous which could stifle, rather than increase consumer choice and welfare as consumers prefer multi-homing across several platforms because of their differentiated characteristics".

⁴⁰ Developers Alliance's response to the CMA's Statement of Scope, p. 4, available at: https://assets.publishing.service.gov.uk/media/5d76286fe5274a09856f38cb/190730_Developers_Alliance_-_Response_to_SoS_-_non-confidential_Redacted.pdf. See also para 14 of Appendix K of the IR where it is noted that Twitter indicated the potential counter-productivity of industry-wide interoperability due to the risk of disincentivising new entrants and innovation.

⁴¹ See paras 13-16 of Appendix K of the IR.

⁴² See para 38 of Appendix K of the IR.

to continue to invest in innovation, but also its incentives to do so by allowing Facebook's competitors to free-ride on its significant investments;⁴³ and

- (c) *the significant and related complex data privacy and security issues that Facebook grapples with on a daily basis*: all of which require careful thought and close collaboration with global stakeholders that have deep subject-matter expertise in these areas, particularly in light of regulators' and users' evolving expectations in this regard. Indeed, Facebook's decision to deprecate certain APIs has been driven, in large part, by these considerations and at the behest of regulators and stakeholders. The global pressure on Facebook and other platforms to take action to ensure that user information is protected from bad actors has intensified, in particular following revelations of the misuse of user data by Cambridge Analytica in December 2015,⁴⁴ as well as the introduction of the GDPR in 2016 (and entry into force in 2018). Policy proposals that ignore these wider issues, or are aimed at reversing the steps that Facebook has taken to protect and safeguard user information, are likely to face significant opposition from a broad range of stakeholders. In this context, Facebook notes the response to the Statement of Scope from Privacy International, which states that it is "*very concerned that the implementation of personal data sharing standards might pose grave risks for the security and integrity of consumers' personal data*".⁴⁵ Indeed, the potential risks of data sharing can already be seen in the "open banking" context.⁴⁶

3.16 For these reasons, Facebook considers that the policy proposals relating to mandated interoperability and access to APIs should be carefully re-considered. Moreover, it is not clear that such policy proposals are, in any event, necessary. Such proposals are also not the focus of the responses to the Statement of Scope. Furthermore:

- (a) *consumers can already share content from Facebook's services to other services*: consumers can already post, view and engage with content across platforms: either without having to switch service or by readily copying their content from one service to another (e.g. by posting a screenshot of their Twitter post on Instagram). Subject to the permissions granted by third-party apps themselves and system/format compatibility, users have the option of posting content from Facebook services to a number of third-party applications, including for example, Twitter and Tumblr.⁴⁷ As noted by the Developers Alliance in its response to the CMA's Statement of Scope: "*examples of inter-service compatibility exist throughout the digital economy – where there is a competitive advantage in doing so... there is no need to intervene unless there is a clear market failure and behaviour that is clearly beneficial to the ecosystem is prevented from occurring*";⁴⁸

⁴³ As noted in para 16 of Appendix K of the IR: "*TikTok submitted that such an intervention risked making platforms more homogeneous which could stifle, rather than increase consumer choice and welfare as consumers prefer multi-homing across several platforms because of their differentiated characteristics*".

⁴⁴ The Guardian, *Ted Cruz using firm that harvested data on millions of unwitting Facebook users*, 11 December 2015, available at: <https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data>.

⁴⁵ Privacy International's response to the CMA's Statement of Scope, p. 5, available at: https://assets.publishing.service.gov.uk/media/5d6e29c3ed915d53adcf51e2/190730_Privacy_International_-_Response_to_Statement_of_Scope_-_non-confidential.pdf.

⁴⁶ For example, JPMorgan has banned fintech apps from using customer passwords to access their bank accounts, enforcing tougher security standards three years after it first warned about the dangers of data-sharing (see The Financial Times, *JPMorgan to ban fintech apps from using customer passwords*, available at: <https://www.ft.com/content/93dcfc52-210b-11ea-b8a1-584213ee7b2b>).

⁴⁷ Facebook and Instagram offer ways to share posts to other social networks. See, for example, www.facebook.com/twitter; and <https://help.instagram.com/1173750949310136>.

⁴⁸ Developers Alliance's response to the CMA's Statement of Scope, p. 4, available at: https://assets.publishing.service.gov.uk/media/5d76286fe5274a09856f38cb/190730_Developers_Alliance_-_Response_to_SoS_-_non-confidential_Redacted.pdf.

- (b) *there does not appear to be good evidence of user demand for greater measures relating to content interoperability as suggested in the IR: this is illustrated by the fact that users currently multi-home across a range of platforms and services, rather than focusing their time only on one platform or service. Indeed, as explained in paragraph 3.17(c) below, given this extensive multi-homing, the low barriers to entry and expansion and the fact that network effects tend to be localised in scope, mandated interoperability requirements are unlikely to have any meaningful impact on the ability of platforms to enter and expand (either as online platform providers for consumers or digital advertising providers for advertisers); and*
- (c) *such an approach risks undermining the efforts which Facebook (and others) have made to enable users to have greater control over their posts, including where they appear and how long they appear for: as supported, for example, by the popularity of the ephemeral nature of Stories with users, many consumers are likely to prefer the choice of being able to share a piece of content and knowing it will stay within the confines of one platform and for only a certain period of time. The CMA should hesitate before suggesting proposals that could *de facto* remove these enhanced elements of consumer choice in relation to audience control which is made possible through greater controls at an individual platform level.*

The IR lacks any evidence that Facebook has “market power” and/or that such “market power” is causing any detriment to consumers or advertisers; any final policy proposals should reflect this

- 3.17 As part of any final impact assessment, it is important for the CMA to take into account the lack of robust evidence in the IR of Facebook having: (a) any “market power” on any side of its platform; (b) any perceived “market power” causing any actual harm to consumers or advertisers; and/or (c) any realistic, more competitive, counterfactual. In particular:
- (a) any market definition analysis on the advertiser side should take into account the clear evidence that advertisers continually re-allocate their budgets across different types of advertising media (including offline and online channels). This means any proposed segmentations between: (i) search and display advertising;⁴⁹ (ii) video and non-video advertising;⁵⁰ and/or (iii) open and owned / operated display advertising are artificial and not reflective of market reality;
 - (b) any market definition analysis on the user side that relies only (or mainly) on a platform’s “functional characteristics”⁵¹ is not consistent with the CMA’s guidelines. Facebook expects that the CMA will wish to engage in a fuller analysis, and Facebook is confident that this will demonstrate the wide range of platforms competing for users’ (and consequently, advertisers’) engagement. The evidence shows, for example, that contrary to the IR, YouTube competes with Facebook and other so-

⁴⁹ See, for example, Performance Market Insider, Pierre Kiciak, *The Where and Why of Convergence Between Display and Paid Search*, June 6, 2016, available at:

<http://performancein.com/news/2016/06/06/where-and-why-convergence-between-display-and-paid-search/>; Matt Maltby, *How Leading Advertisers Are Using Search for Brand Building*, June 2014, available at:

<https://www.thinkwithgoogle.com/advertising-channels/search/how-advertisers-are-using-search-for-brand-building/>. Moreover, the CMA acknowledged that the internal documents of Google and Facebook each clearly identify the other as a competitor (see paras 5.119-5.120 of the IR).

⁵⁰ For example, 6-second bumper ads were identified as a key trend in 2019 amongst brands, and 86% of marketers are using video content in their campaign outreach efforts. See Business2Community, *Digital Advertising – Key Trends Heading into 2020*, 30 October 2019, available at:

<https://www.business2community.com/digital-marketing/digital-advertising-key-trends-heading-into-2020-02253334>.

⁵¹ This is consistent with the CMA’s guidance: “[J]ust because products display similar physical characteristics, this does not necessarily mean that customers would view them to be close substitutes [...] products with very different physical characteristics may be close substitutes if, from a customer’s point of view, they have a very similar use” (see OFT, *Market definition*, 2004, para 3.7, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf).

called “social media” platforms.⁵² In fact, the IR itself shows a decrease in the share of users’ time spent on Facebook is associated with a gain in their time spent on YouTube,⁵³

- (c) the evidence shows that barriers to entry and expansion are low in light of the extensive multi-homing by consumers across online platforms⁵⁴ and the fact that network effects tend to be localised in scope (i.e. consumers are, at best, generally concerned only about the presence of their own social circles on an online platform and not of the size of a platform’s global user base). Moreover, the evidence shows that platforms do not require access to large volumes of data to enter and expand,⁵⁵ with any data needed being easily obtainable from consumers themselves (when they choose to engage with an online platform) or from a host of other third-party data aggregation providers.⁵⁶ This is supported by the fact that online platforms have not suggested to the CMA that access to data is an insurmountable barrier to entry.⁵⁷ The successful entry and rapid growth of competitors such as Snap and TikTok, who have attracted a large user base from scratch, provides clear evidence that there are no meaningful barriers to entry and expansion;⁵⁸ and
- (d) Facebook’s lack of market power is illustrated by its substantial and continuous investment in innovation in order to improve its services and remain competitive. For example, Facebook spends significantly more on R&D than many other large digital companies (including Google, Microsoft and Amazon).⁵⁹ Facebook considers that the profitability analysis of Facebook’s platform – as set out in the IR – requires further work and does not support any finding that Facebook has market power or is exploiting any alleged market power.

3.18 Moreover, the CMA has not presented any evidence that Facebook’s perceived “market power” has actually caused any detriment to consumers or advertisers.

3.19 In light of these factors, the CMA should carefully modulate any final policy proposals to reflect the fact that Facebook faces real competition on all sides of its platform.

3.20 As explained in Section 1 above, Facebook recognises that there may be a case for a broader approach to regulation in the digital space. However, in order to avoid developing unnecessary (and potentially harmful) regulation, policy proposals should be underpinned by robust evidence rather than perceived harms. Indeed such proposals should be focused on enhancing (rather than eroding) benefits for consumers and advertisers.

⁵² A recent study has shown that YouTube has the “highest reach of any site and has the most time spent per visitor per day” in the UK (see Ofcom, *Online Nation*, 30 May 2019, pp. 23-24, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0025/149146/online-nation-report.pdf).

⁵³ See Figure 3.7 of the IR.

⁵⁴ UK consumers, on average, have 7.1 social media accounts, with a skew toward younger consumers having more accounts than older consumers (see We are Social, *Digital in the UK: Data and Learnings for 2019*, available at: <https://wearesocial.com/uk/blog/2019/03/digital-in-the-uk-data-and-learnings-for-2019>; and GlobalWebIndex, *Flagship Report 2019*, p. 7, available at: <https://www.globalwebindex.com/hubfs/Downloads/2019%20Q1%20Social%20Flagship%20Report.pdf>).

⁵⁵ As acknowledged in the IR, “limited access to data does not seem prohibitive of entry” and, further, “access to data does not appear to be determinative of successful entry” (see para 3.160 of the IR).

⁵⁶ These include providers such as Acxiom, Experian, Equifax, Nielsen, DBS Data, Epsilon, KBMG, Dun & Bradstreet, LiveRamp, Sky Media, Merkle, Oracle, Salesforce, Quantcase and Tapad.

⁵⁷ See para 5.147 of the IR.

⁵⁸ See p. 91, Figure 3.6 of the IR, which highlights that Snapchat has grown to a network of around 25 million monthly active users; see also <https://www.oberlo.co.uk/blog/tiktok-statistics>, which states that TikTok has attracted around 500 million monthly active users worldwide.

⁵⁹ A recent report by the Italian Telecommunications Regulator (**AGCOM**) noted that Facebook’s R&D spend constituted 18% of its revenues for 2018, which was higher than Google (16%), Microsoft (13%), Amazon (12%) Netflix (8%) and Apple (5%). See Figure 1.9 of AGCOM’s report, available at: <https://www.agcom.it/documents/10179/17328538/Documento+generico+20-12-2019/0cfa28b1-1567-46c5-8ad7-70fa96174ff4?version=1.0>.

3.21 Facebook therefore set out below the areas where it supports the CMA’s policy proposals and considers that they could meaningfully enhance the consumer and advertiser experience. These are in line with almost all of the responses to the CMA’s Statement of Scope.

4. Facebook supports the CMA’s proposals to deliver increased transparency and control for consumers and advertisers to make well-informed choices about the online platforms and digital advertising solutions they choose to engage with

4.1 As explained above, Facebook recognises the importance of delivering services that provide people with the ability to communicate, discover and share content while maintaining a high level of privacy and data security. As its users’ preferences on how they would like to engage with one another have shifted towards a greater emphasis on “*the digital equivalent of the living room*”,⁶⁰ Facebook has continued to evolve its own approach towards delivering an increasingly privacy-focused vision in line with this shift.⁶¹ This includes, in particular, investing in market-leading controls to provide users with meaningful choices about how their data is used.

4.2 Facebook is, however, acutely aware that it cannot update “*the rules for the internet*” on its own.⁶² Facebook is therefore supportive of the CMA’s gathering of input from relevant stakeholders in order to mould effective policy proposals to promote further transparency and choice for both users and advertisers in a way that will deliver user value, protect user privacy and promote (rather than hinder) competition. However, it is critical that these rules also acknowledge existing transparency requirements and norms, and work in harmony with other existing and overlapping areas of regulation.⁶³

Facebook supports user-initiated data portability, to facilitate users’ ability to choose with which services they would like to share which of their information and when

4.3 Indeed, as emphasised repeatedly by Facebook’s CEO, Facebook supports the principle of user-initiated data portability;⁶⁴ and therefore welcomes the CMA’s conclusion that it is “*supportive of the principle of the DTP and the current use cases proposed by it, such as transferring photos from a social media platform to a photo book service or transferring music playlists, are likely to be valuable to consumers*”.⁶⁵ Facebook also welcomes the fact that most third-party responses to the Statement of Scope have also expressed their support for data

⁶⁰ Mark Zuckerberg, *A Privacy-Focused Vision for Social Networking*, 6 March 2019, available at:

<https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>

⁶¹ Mark Zuckerberg, *A Privacy-Focused Vision for Social Networking*, 6 March 2019, available at: <https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>; and Mark Zuckerberg’s op-ed for The Washington Post in March 2019 which notes that Facebook considers that one of the four key areas for regulation of the internet is privacy: “*New privacy regulation in the United States and around the world should build on the protections GDPR provides. It should protect your right to choose how your information is used — while enabling companies to use information for safety purposes and to provide services. It shouldn’t require data to be stored locally, which would make it more vulnerable to unwarranted access. And it should establish a way to hold companies such as Facebook accountable by imposing sanctions when we make mistakes.*” (see Washington Post, *Mark Zuckerberg: The Internet needs new rules. Let’s start in these four areas*, 30 March 2019, available at: https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html).

⁶² Mark Zuckerberg, *Four Ideas to Regulate the Internet*, 30 March 2019, available at: <https://about.fb.com/news/2019/03/four-ideas-regulate-internet/>.

⁶³ Such as, for instance, the overarching principle of transparency, as interpreted and defined in the GDPR. In particular, Articles 12-14 of the GDPR detail specific information disclosures that must be provided to data subjects in order for the processing of their personal data to be fair and transparent, and Facebook provides such information in its Data Policy and Legal Bases Information Page (available at: <https://www.facebook.com/policy.php>).

⁶⁴ Washington Post, *Mark Zuckerberg: The Internet Needs New Rules. Let’s Start in These Four Areas*, 30 March 2019, available at: https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

⁶⁵ See para 22 of Appendix K of the IR.

portability as being “key in fostering customer fluidity and hence demand-side competitive pressure among firms”.⁶⁶

- 4.4 As the CMA is aware, Facebook has developed a number of user-friendly tools which enable users to view and access the information they have chosen to share with Facebook, for example, through its “Access Your Information” and “Download Your Information” tools.⁶⁷ However, Facebook agrees with the CMA that more can be done in this regard.
- 4.5 That is why Facebook is playing a leading role in the Data Transfer Project (*DTP*),⁶⁸ to develop open source infrastructure which enables participating providers to develop systems that facilitate data portability for users. The DTP envisages that participating service providers will build something that is flexible and allows for user-initiated “interoperable” solutions for the relevant transfer of data between them. Importantly, the DTP is being developed around principles focused on transparency, security and privacy for users.
- 4.6 As set out in Facebook’s “Data Portability and Privacy” white paper, once the technical infrastructure of the DTP (or any other alternative proposal) has been developed, there still remain several critical questions as to how such a structure can be made operational while meeting the demands of privacy and data protection laws, such as the GDPR. Privacy regulators have made it clear that, at least in the context of some third-party relationships, platforms such as Facebook’s should have robust protections in place to protect users’ privacy in respect of data transfers and should enhance oversight over apps and services that receive information from Facebook. In order to build portability tools that users can trust and use effectively, there are important issues to be resolved in a collaborative manner by all stakeholders.⁶⁹
- 4.7 Facebook notes that (as highlighted by third-parties such as Which?) a substantial amount of work is required to ensure that the full benefits of data portability can be realised by consumers.⁷⁰ This is why, since publishing its white paper, Facebook has engaged with privacy regulators around the world and, even before the publication of the white paper, Facebook engaged with the DCMS in a sandbox exercise to explore the value of data portability.
- 4.8 Facebook welcomes the opportunity to work with the CMA to further develop the DTP, so as to be able to deliver these benefits to consumers in the UK. Given its grounding in user-initiated choice, Facebook sees considerable value in the DTP providing a solid foundation for a potentially workable industry-wide initiative to deliver the CMA’s vision of increased transparency and choice for users and other stakeholders in the advertising ecosystem, whilst also preserving businesses’ incentives to continue to innovate to offer differentiated and valuable services to users and advertisers.

⁶⁶ Behavioural Insights Team’s response to the CMA’s Statement of Scope, p. 5, available at:

https://assets.publishing.service.gov.uk/media/5d6906b2e5274a1717b10863/Behavioural_Insights_Team_-_Response_to_SoS.pdf.

⁶⁷ Instagram also offers a “Download data” tool within the Security settings screen. This allows users to download all photos, videos and Stories posted on their Instagram in a similar way as is described for DYI below (see Instagram, *Managing Your Account*, available at: <https://help.instagram.com/181231772500920>).

⁶⁸ Data Transfer Project, *About Us*, available at:

<https://datatransferproject.dev/> and *Why do we need the DTP*, available at: <https://datatransferproject.dev/why-dtp>. See also the Data Transfer Project white paper, available at: <https://datatransferproject.dev/dtp-overview.pdf>.

⁶⁹ Facebook, “*Charting a Way Forward on Privacy and Data Portability*”, 4 September 2019, available at:

<https://about.fb.com/news/2019/09/privacy-and-data-portability/>.

⁷⁰ Which?’s response to the CMA’s Statement of Scope, p. 2, available at:

https://assets.publishing.service.gov.uk/media/5d6e2b96e5274a170aad5791/190730_Which_-_Response_to_SoS_-_non-confidential.pdf.

Facebook supports the CMA’s efforts to deliver industry-wide improvements to consumer transparency and controls in order for consumers to make well-informed choices about the online platforms they choose to engage with

- 4.9 Facebook has developed a wide variety of tools to offer consumers greater control over how their data is used, and also empowers advertisers with tools and information so that they too can make well-informed decisions on whether, and how much, to advertise on Facebook.
- 4.10 By contrast, there is no convincing evidence that Facebook’s data collection practices and privacy tools are inconsistent with a competitive market or cause consumer detriment. Facebook notes in this regard the recent judgment of the German Court of Appeal, which stated that “[*there is no allegation that Facebook’s] Terms of Service (including the Data Policy) fails to provide users complete, understandable and accurate information on the content, scope and intended usage of the data processing in question. There is also no evidence to support the assumption that Facebook obtains the consent of users through compulsion, pressure, exploitation of a weakness of will or otherwise unfair means...*”.⁷¹
- 4.11 Nevertheless, Facebook supports initiatives that aim to ensure that platforms are designed in a clear and fair way, providing that such proposals complement, and do not frustrate, the existing transparency and information obligations placed upon companies by other legislation, including, in particular, the GDPR, which governs the processing of personal data in the EU as *lex specialis* to other European and national laws.
- 4.12 The CMA’s IR policy proposals include a “*fairness by design duty*” to be applicable to all platforms to complement the GDPR “*data protection by design*” duty. This would allow for ex ante intervention by a regulator.⁷² In addition, the CMA has proposed a requirement for SMS platforms (only) to trial and test choice architecture that they adopt as part of the Code of Conduct.⁷³ These proposals would sit alongside requirements for platforms to provide clear information to consumers about the services they receive and how their data is used in this regard.⁷⁴
- 4.13 Whilst Facebook acknowledges that long and detailed terms and policies are rarely an effective means of conveying information to consumers when used in isolation, they are nevertheless a necessary part of many companies’ compliance frameworks. For instance, the length of Facebook’s Data Policy is a direct function of the statutory disclosure requirements. All companies must therefore overcome the challenge of ensuring that information surfaced to users is accessible and concise, whilst at the same time ensuring that it is comprehensive. Facebook considers that this paradox can be best overcome by encouraging platforms to provide information to users in layers and in different times and contexts. The benefits of a layered approach are universally recognised, including in the European Data Protection Board (EDPB) endorsed Transparency Guidelines.⁷⁵ Accordingly, any proposed new transparency initiatives should acknowledge the differing objectives and requirements of different forms of user information and take into account how platforms communicate with users in a range of contexts, rather than an over-emphasis on terms and policies alone. Indeed, a good example

⁷¹ Dusseldorf Court of Appeal’s decision in *Facebook v FCO* (VI-Kart 1/19(V)), 26 August 2019 (English convenience translation), original available at: https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf.

⁷² See paras 6.109-6.116 of the IR.

⁷³ See para 6.185 of the IR.

⁷⁴ See para 6.46 of the IR.

⁷⁵ The EDPB’s Transparency Guidelines recommend that layered privacy notices “*should be used to link to the various categories of information which must be provided to the data subject, rather than displaying all such information in a single notice on the screen, in order to avoid information fatigue*” (see the EDPB’s Transparency Guidelines, para 35, available at: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227.)

of this is Facebook's introduction of the "Privacy Check-up Tool" which it introduced in September 2014 (see below).

4.14 Facebook understands that meaningful information to users should go hand-in-hand with providing effective tools and controls so that consumers can make informed choices over how they wish to engage with platforms, and how their data is used in this regard. Therefore, Facebook has made (and is continuing to make) significant investment in ensuring that its user experience is clear, fair and of a high standard. For example, Facebook has worked closely with the Irish Data Protection Commission (the **IDPC**) in its implementation of the GDPR; and has gone above and beyond the requirements of the GDPR to deliver powerful privacy tools which are clearly and easily accessible to its users, as well as contributing to the efforts of TTC Labs (a cross-industry effort dedicated to creating innovative design solutions that put people in control of their privacy).⁷⁶ Facebook's market-leading tools include:

- (a) **Privacy Basics:** Facebook's "Privacy Basics" pages were developed following consultation with the IDPC. The pages provide a clear, user-friendly explanation of all aspects of privacy on the Facebook Service. Privacy Basics is accessible in two clicks from any Facebook desktop page, and in the mobile app it is intuitively accessible from the first Privacy Shortcuts screen by clicking "Learn about your privacy on Facebook".
- (b) **Control Center:** Facebook offers many settings, including privacy settings, in a Control Center that allows users to easily find, in one convenient dashboard, the controls available to review and/or manage their privacy settings – which are grouped together in a "Privacy Shortcuts" menu. Users can utilise these controls to make their accounts more secure, manage their ad preferences, view or download their Facebook Service information, or delete their account at any time, in addition to learning about Facebook's practices and policies. The Control Center was designed based on feedback from policymakers, privacy experts and others around the world, in particular based on early feedback from the European Commission encouraging a centralisation of settings.
- (c) **Privacy Check-up Tool:** Since September 2014, Facebook has been prompting users to review and update their privacy settings. The "Privacy Check-up Tool" developed by Facebook is available from numerous places (the Quick Help drop down menu, Privacy Basics page, and through the Help Center) and is available to assist users in reviewing and adjusting their privacy settings in a simple and user-friendly flow and provides a link to the "Privacy Basics" page. In addition, Facebook sends prompts to remind users to review their privacy settings.⁷⁷
- (d) **Partner Data for Ads control:** Users can choose (on an opt-in basis) whether Facebook is permitted to use data it receives from advertisers and other partners about activity on non-Facebook service products for the purposes of displaying tailored ads.
- (e) **Ad Preferences:** Facebook provides users with the ability to see and control multiple aspects of their advertising experience. This includes enabling users to see: (i) their "interests," which are keywords associated with a user based on activities such as liking "Pages" and clicking ads; and (ii) the advertisers that are currently showing them ads based on information provided by the advertiser, including contact information the user may have previously provided to the advertisers (e.g. when visiting the advertiser's store), or previous use of the advertiser's website or app. The Ad

⁷⁶ TTC Labs, *About page*, available at: <https://www.ttlabs.net/>.

⁷⁷ Facebook, *Data privacy day 2020*, available at: <https://about.fb.com/news/2020/01/data-privacy-day-2020/>.

Preferences page allows users to update and edit these interests, influence what information Facebook uses to show them ads and adjust their general ad settings.

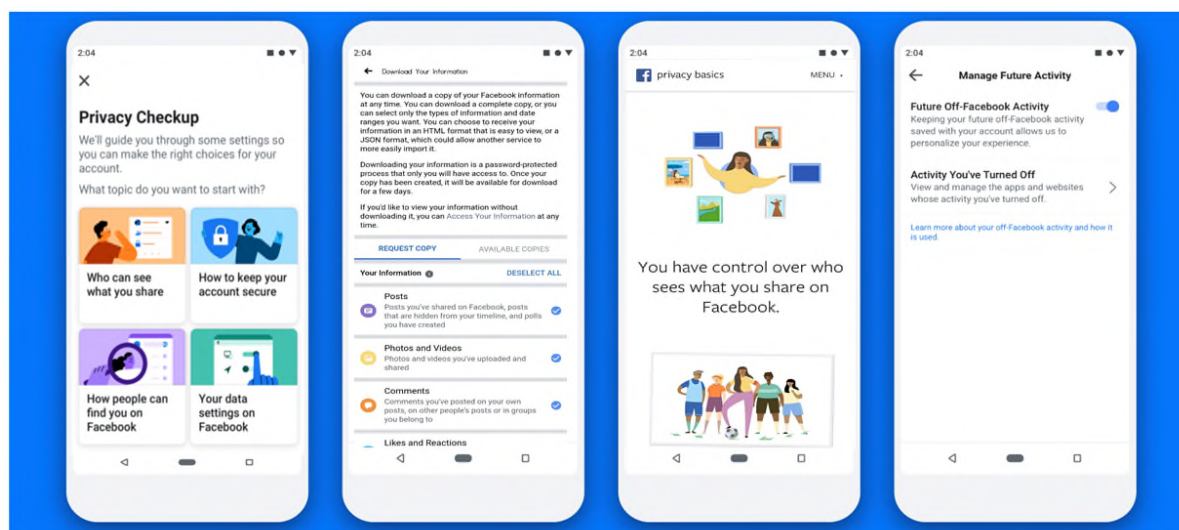
- (f) **Why Am I Seeing This Ad and Why Am I Seeing This Post?:** Facebook introduced “Why am I seeing this ad?” and “Why am I seeing this post?” to help users better understand and more easily control what content they see in their News Feed (both non-paid and advertising). This also includes providing explanations of the ad’s targeting criteria to users. They can also choose to hide particular posts, advertisements or content from particular people or advertisers. This goes beyond what is possible on many other ad-supported services.
- (g) **Access Your Information (AYI) and Download Your Information (DYI) tools:** Facebook’s AYI tool allows users to view what categories of personal data Facebook holds about them, while the DYI tool enables users to withdraw their data from the Facebook Service and take it elsewhere. In addition, the Facebook Service “Activity Log” tool allows users to delete information about activities they have engaged in on the Facebook Service (for example, by “unliking” specific posts or removing comments).
- (h) **Off-Facebook Activity:** On 28 January 2020, Facebook announced worldwide roll-out of its “Off Facebook Activity” (**OFA**) feature (previously known as “Clear History”).⁷⁸ The OFA feature was originally run as a test in Ireland, Spain and South Korea in August 2019, which was deemed to be a success. As part of the test phase, Facebook conducted months of research to get input from stakeholders, including privacy advocates, policymakers, advertisers and industry groups, and Facebook made important changes in response to what it learned. The OFA feature is a control that gives Facebook users the ability to see a summary of activity that businesses and organisations have shared with Facebook about a user’s interactions (such as visiting their apps or websites, viewing content, adding an item to a shopping cart) and to disconnect this activity from their Facebook account.⁷⁹
- (i) **Login Notifications:** In early January 2020, Facebook rolled-out “Login Notifications” which helps users track their activity.⁸⁰ The Login Notifications feature alerts a user when they use Facebook Login to interact with third party apps, reminding users that they have full control over the information they share with third party apps and providing a clear path to edit their settings.

⁷⁸ Facebook, *Data Privacy Day 2020*, available at: <https://about.fb.com/news/2020/01/data-privacy-day-2020/>.

⁷⁹ Facebook, *Off-Facebook activity*, available at: <https://en-gb.facebook.com/off-facebook-activity>.

⁸⁰ Facebook, *New Facebook Login feature with added controls*, available at: <https://developers.facebook.com/blog/post/2020/01/14/new-facebook-login-feature-with-added-controls/>.

Figure 1: examples of a selection of user-privacy tools



- 4.15 Facebook’s conduct to date is therefore aligned with the CMA sentiment that both competition and data protection issues should be considered when designing regulation.⁸¹ However, given the extent of the evidence gathering, stakeholder involvement and political balancing that underlies the legislative approach of the GDPR, the CMA should be cautious about re-evaluating that balance or even seeking to impose a different balance, whether by recommending additional requirements on Facebook specifically or across the industry, over and above the GDPR.⁸² Any failure to do so could result in a conflict of laws or, at the very least, confusion. For example, the CMA’s proposed reforms are largely based on the idea that user consent is the only lawful basis for processing personal data for the purpose of personalisation. This theory is fundamentally inconsistent with the framework adopted by the GDPR, which states six lawful grounds for processing data, one of which is consent.⁸³
- 4.16 Users demonstrate that they are sufficiently at ease with the terms and controls offered by Facebook – and its response to the balance struck by the GDPR – by continuing to use the Facebook Service. Users agree to Facebook’s terms because they consider that the exchange is acceptable in return for the value that they receive.⁸⁴ While the uptake of some of these controls by users has been limited, it would be flawed to treat this as proof of the ineffectiveness of what are industry-leading tools, or an inability for users to personalise their privacy choices. This logic would require an assumption that users are unhappy with their

⁸¹ CMA, *Regulation and Competition: a review of the evidence*, 10 January 2020, para 1.24, available at: <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

⁸² For example, as the CMA acknowledges, the GDPR provides data controllers with a choice of legal bases for processing data which are all of equal importance (see para 4.33 of the IR). This underscores the legislative intention that not all legal bases – including consent – will be appropriate in every instance.

⁸³ The potential for confusion can be seen in the context of PSD2 where an ‘explicit consent’ requirement was introduced for payment service providers (*PSPs*) to process personal data for the provision of their payment services. This resulted in significant uncertainty regarding the interaction between PSD2 and Article 6 GDPR. Industry dialogue culminated in a consensus that PSD2 is not *lex specialis* vis-à-vis the GDPR, and therefore PSPs must comply with *both* PSD2 and Article 6 GDPR (see EDPB Letter, 5 July 2018, pp. 3-4, available at: https://edpb.europa.eu/sites/edpb/files/news/psd2_letter_en.pdf).

⁸⁴ The German Court of Appeal judgment states that, for users, “it is necessary to weigh the advantages resulting from the use of an advertising-financed (and thus free) social network against the consequences associated with the use of the additional data by Facebook”, which, in the Court’s view, does not imply any compulsion and does not constitute a predicament for the user (see Dusseldorf Court of Appeal’s decision in *Facebook v FCO* (VI-Kart 1/19(V)), 26 August 2019 (English convenience translation), original available at: https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf).

choices and are motivated to change them, but do not have the requisite tools or know-how to do so – such an assumption lacks an evidential basis.

- 4.17 Indeed, Facebook welcomes such controls being offered across the industry, and therefore considers that this should not be targeted exclusively at SMS platforms. Therefore, with respect to the CMA’s specific policy proposals, Facebook would support such values being promoted throughout the industry (which could be possible with an industry-wide code, as discussed in Section 5 below) and therefore considers it both unnecessary and disproportionate to also propose a separate industry-wide “*fairness by design duty*”.
- 4.18 In the same spirit, Facebook does not think that the proposal for the requirement to test and trial choice architecture to only apply to companies with so-called “SMS” is good policy. Irrespective of the complexities raised around defining an SMS, as set out below, given that the perceived concerns raised apply across the whole industry, it seems counter-intuitive to only impose this requirement on a subset of companies. In any event, the CMA should recognise the value of allowing platforms to develop market-leading tools in an innovative and competitive manner, and act with significant caution before potentially undermining that dynamic.

Facebook welcomes the CMA’s interest in privacy-enhancing technologies (PETs)

- 4.19 Facebook welcomes the CMA’s proposal to seek views on the development and incorporation of PETs in online platforms.⁸⁵ Facebook follows the development of such technologies with interest, particularly as they could potentially be implemented without compromising the free ad-supported business model.
- 4.20 Facebook agrees with the CMA in its analysis that applications of PET technologies “*are still not widely in use at this stage – especially in digital advertising*”⁸⁶ and therefore it is “*hard to forecast upcoming improvements in PETs from a technical and commercial point of view*”.⁸⁷ In this respect, Facebook warns against any premature reliance on, or adoption of, PETs due to the potential negative impact to the user experience, especially in relation to surfacing relevant ads and flaws in technologies which could lead to unauthorised access to sensitive private information. For example, nascent PETs, such as Apple’s “Intelligent Tracking Prevention” feature, have been criticised as containing multiple security flaws allowing users’ browsing behaviour to be tracked.⁸⁸ In addition, Facebook notes that PETs may lead to the creation of structural conditions which favour certain market participants over others, establish gatekeepers at the network level and harm innovation at the application level.
- 4.21 Developing policy proposals that are not well-tested could end up harming consumers and competition. The CMA’s current policy proposals (including, but by no means limited to, PETs) span a range of highly technical and complex areas and require significant trial and testing before they are put forward to Government. Particularly given the high data protection and security risks, it is imperative that any proposal is entirely workable, scalable and meets the highest standards to protect UK consumers.
- 4.22 Facebook thus supports the CMA in its efforts to ensure any such remedy would need to be considered in light of “*the trade-offs between privacy, efficiency, and competition that seem to be inherent in digital advertising*” and that “[a]ny remedy intervention must consider these

⁸⁵ See para 6.149 of the IR.

⁸⁶ See para 123 of Appendix L of the IR.

⁸⁷ See para 123 of Appendix L of the IR.

⁸⁸ It has been reported that, in January 2020, Google discovered flaws in the Intelligent Tracking Prevention feature of Apple’s Safari web browser which allowed users’ browsing behaviour to be tracked (see Financial Times, *Apple’s privacy software allowed users to be tracked, says Google*, 23 January 2020, available at: <https://www.ft.com/content/916a766a-3d27-11ea-a01a-bae547046735>).

three dimensions jointly".⁸⁹ Although such policy proposals are too preliminary – and the technology too embryonic – at this stage to provide a view on their potential effectiveness, Facebook remains open to further discussions with the CMA as they continue to develop.

Facebook supports the CMA's proposals to deliver improvements in cross-platform measurement in order to empower advertisers to make well-informed choices about the digital advertising services they choose to engage with

- 4.23 In line with Facebook's drive to improve transparency for users of its platform, Facebook welcomes the CMA's proposals to improve standards in cross-platform measurement and third-party verification in order to enable advertisers to effectively measure the success of their campaigns across different advertising media, including online and offline channels.⁹⁰
- 4.24 Facebook currently devotes significant efforts to empowering advertisers through use of its tools and analytics to measure and manage performance of ads in real-time using its ads reporting metrics, insights metrics and conversion. For example, Facebook is enabling advertisers to move away from 'final click' metrics towards multi-touch attribution systems in order to create better advertising campaigns and assess effectiveness of advertising campaigns more accurately.⁹¹
- 4.25 These advertiser metrics can be accessed through Facebook's self-service tools – such as Ads Manager,⁹² Brand Lift⁹³ and Conversion Lift⁹⁴ – all of which are regularly updated to reflect the expectations of advertisers. For example, in October 2018, Facebook introduced Facebook Attribution to provide marketers with a more holistic view of the complex customer journey both on and off Facebook, providing measurement of the impact of ads across Facebook family applications and services and across publishers.⁹⁵ Facebook is therefore keen to share with the CMA its insights on applying Facebook's measurement across its own platforms more widely across online and offline channels.
- 4.26 As regards the CMA's policy proposal of enabling third-party verification of Facebook advertising inventory,⁹⁶ Facebook now engages with over 40 third-party measurement companies and entities worldwide to provide advertisers with independent metrics and comparisons, as well as third parties who perform regular checks on Facebook's ad viewability and other attention metrics. In addition, Facebook's measurement of impressions for ads on Facebook News Feed and Instagram is accredited by the Media Rating Council,⁹⁷ the same organisation that sets industry measurement standards for television and radio. In relation to

⁸⁹ See para 99 of Appendix L of the IR.

⁹⁰ Further examples of value-add products and services include (i) Facebook offers free courses to assist advertisers with measurement tools e.g. the 'Measurement Foundation' (see Facebook for Business, *Transform your business with smarter measurement*, available at: <https://www.facebook.com/business/measurement/measure-ads>); (ii) Facebook's sales teams provide advertisers with information and measurement tools, for example by means of presentations; (iii) Facebook offers Split (A/B) testing to help advertisers determine what strategies produce the best results and (iv) Facebook provides information to advertisers about what split testing is and how to use it most effectively on Facebook Business (see Facebook, *About A/B Testing*, available at: <https://www.facebook.com/business/help/1738164643098669>); and Facebook Blueprint (see Facebook Blueprint, *Split Testing*, available at: <https://www.facebookblueprint.com/student/path/187637-split-testing>), among other materials.

⁹¹ Facebook IQ, *The Last Days of Last Click Measurement*, 2 October 2017, available at:

<https://www.facebook.com/business/news/insights/the-last-days-of-last-click-measurement>.

⁹² Facebook for Business, *Ads Manager*, available at: <https://en-gb.facebook.com/business/tools/ads-manager>.

⁹³ For further information about Brand Lift, see Facebook for Business, *Brand Lift*, available at:

<https://www.facebook.com/business/help/1693381447650068>.

⁹⁴ For further information on Conversion Lift, see Facebook for Business, *Conversion Lift Measurement*, available at:

<https://www.facebook.com/business/news/conversion-lift-measurement>.

⁹⁵ Facebook for Business, *Facebook Attribution: A Measurement Tool for Today's Digital Advertising Landscape*, 19 October 2018, available at:

https://www.facebook.com/business/news/facebook-attribution-a-measurement-tool-for-todays-digital-advertising-landscape?ref=search_new_4.

⁹⁶ See para 69 of Appendix M of the IR.

⁹⁷ Media Rating Council, *Home page*, available at: <http://mediaratingcouncil.org/>.

visibility specifically, the Facebook service and Instagram were certified for the Internet Advertising Bureau’s UK Gold Standard – an initiative designed to reduce ad fraud, improve the experience of digital advertising, and increase brand safety.⁹⁸

- 4.27 Facebook would therefore consider that it is already operating in line with or above many of the CMA’s policy proposals but would welcome engagement with the CMA on measures to optimise industry confidence. Facebook would welcome these standards applying across the industry more generally in order to ensure that metrics are being applied consistently by industry players, thereby enabling advertisers to compare their return on investment more accurately across platforms – for example, through the introduction of common transaction IDs.⁹⁹
- 4.28 For completeness, in relation to the CMA’s additional policy proposals regarding information disclosure on bidding data to publishers,¹⁰⁰ auctions to a regulatory body¹⁰¹ and reporting on fees, Facebook considers that such proposals would need to be approached with a significant degree of caution given the potential for the sharing of competitively sensitive information, among other concerns.
- 4.29 Given the importance of effective measurement tools to advertisers, Facebook is happy to give whatever assistance it can to the CMA in developing policy proposals to advance cross-platform measurement tools and capabilities.

5. To the extent that a new Code of Conduct is taken forwards, Facebook urges the CMA to ensure that such a “Code” is industry-wide in order to deliver meaningful change in a fast-moving and competitive market and to maintain a level playing field

The Code of Conduct, as it is currently proposed, lacks clarity and does not constructively target the harms identified

- 5.1 The IR proposes a “Code of Conduct” for certain platforms, including Facebook. The proposals set out in the IR, however, suggest that the term “Code of Conduct” is a misnomer and a far cry from any framework capable of maintaining a level playing field:¹⁰² what is proposed in the IR is instead a bespoke mandatory regulatory scheme for two companies which fails to constructively target the broad industry-wide identified harms it seeks to address.
- 5.2 While, as noted above, Facebook recognises that the policy approach to regulating online platforms may merit change, the proposals set out in the IR require extensive further consideration, or risk being disproportionate.¹⁰³ To the extent that the CMA concludes that some formulation of a Code of Conduct would be the most effective way to solve any actual identified harm, Facebook would like to work with the CMA to develop a solution that is well-targeted, appropriately specific, non-distortive and workable.
- 5.3 Any policy shift in the UK in such fast-moving sectors should avoid recourse to interim or preliminary interventionist measures without strong evidential and legal grounds to avoid stifling innovation or competition by over-regulation. Indeed, third-party responses to the

⁹⁸ IAB UK Gold Standard, *About page*, available at: <https://iabuk.com/goldstandard>.

⁹⁹ See paras 6.178(a) and (b) of the IR and para 85 of Appendix M of the IR.

¹⁰⁰ See para 73 of Appendix M of the IR.

¹⁰¹ See para 73 of Appendix M of the IR.

¹⁰² *Unlocking Digital Competition – Report of the Digital Competition Expert Panel*, March 2019, Appendix D, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

¹⁰³ Facebook notes that in the EU’s impact assessment on the Platform-to-Business Regulation, the EU rejected “fully binding, mandatory rules without any voluntary components” as disproportionate; the EU instead adopted a more proportionate approach to balance the protection of companies and the safeguarding of platforms’ innovation potential (see the summary of the EU’s Impact Assessment, available at: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-proposal--promoting-fairness-transparency-online-platforms>).

market study, as well as the CMA's own report on Regulation and Competition,¹⁰⁴ highlight the risks of unintended consequences that can arise from the imposition of new (albeit well-meaning) regulation.¹⁰⁵

- 5.4 Therefore, before continuing with such a proposal, Facebook considers that there are some important questions of principle that the CMA would need to work through. In particular, at this stage, Facebook highlights three key issues for the CMA to consider: (i) the application of a code should map to the nature of the identified concerns i.e. industry-wide concerns should require an industry-wide code; (ii) a code should build in sufficient flexibility in order to be tailored to the fast-moving nature of the industry; and (iii) any workable proposal should protect regulated companies' rights of defence in line with good regulatory practice.

Any Code of Conduct should be industry-wide

- 5.5 The CMA's formulation of the Code of Conduct would apply to companies with so-called "SMS",¹⁰⁶ and yet the alleged harms the IR is seeking to alleviate with regards to choice and transparency are industry-wide.
- 5.6 While Facebook is, as set out above, supportive of the CMA's proposals to deliver increased choice and transparency, the proposed Code of Conduct's approach is incongruous with the principles of the UK Government's Better Regulation Framework and would result in regulation that is ineffective and not fit-for-purpose. For example, proposals such as a Trust and Transparency principle,¹⁰⁷ trialling and testing choice architecture¹⁰⁸ and requiring transparency over advertising fees¹⁰⁹ should apply to all industry participants, and not just SMS companies, if they are to comprise a viable solution to the identified harms. To make these proposals contingent on a determination of a form of market power-driven SMS designation would undermine their efficacy.
- 5.7 Notably, Philip Marsden, Member of the Furman Inquiry Panel, has stated: "*[a]ntitrust after all is law enforcement. It concerns conduct, not structure, and involves specific and serious allegations about likely or actual harm to competition. Alleging bigness doesn't cut it nor should it. What matters is deeds not size, let alone words. To focus only on big companies would miss many harms. Taking on infringements in small markets matters in itself, and as a read-across and compliance and deterrence message more broadly.*"¹¹⁰
- 5.8 Moreover, the CMA suggests that the SMS status would apply to a corporate group as a whole.¹¹¹ It is entirely out of line with regulatory best practice to apply the code to markets in which regulated companies do not have market power on the basis that – under the CMA's current formulation – they are in some way leveraging their market power in an adjacent market. It can clearly be the case that a company with alleged market power in one service could be a small, disruptive new entrant in another service. Conversely, a seemingly-small player may have considerable market power with respect to a particular product or set of consumers. The strength of competition law as a tool is that it is case-specific, which enables differentiated approaches based on the specifics of each platform and the context in which it

¹⁰⁴ CMA, *Regulation and Competition: a review of the evidence*, January 2020, para 3.13, available at: <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

¹⁰⁵ For example, see UKTV's response to the CMA's Statement of Scope, p. 12, available at: https://assets.publishing.service.gov.uk/media/5d6e2d2fed915d53aebba75c/190808_UKTV_-_Response_to_SoS_-_non-confidential.pdf.

¹⁰⁶ See para 5 of Appendix I of the IR.

¹⁰⁷ See p. 111 of Appendix I of the IR.

¹⁰⁸ See para 6.117 of the IR.

¹⁰⁹ See para 6.178(a) of the IR.

¹¹⁰ Philip Marsden, *Who should trust-bust? Hippocrates, Not Hipsters (feat. evidence led suggestions for how authorities could be more "progressive")*, April 2018, p. 6, available at: <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Marsden.pdf>.

¹¹¹ See para 14 of Appendix I of the IR.

operates. The more we move to a world of non-evidence based presumptions, the more the core strength of competition law is weakened.

- 5.9 The current formulation of SMS would mean that an as-yet unknown and untested regulator¹¹² could pick industry “winners” and “losers” via an arbitrary threshold, with no obvious recourse for challenge; such a model would severely dampen companies’ incentives to grow. The proposal, as currently framed, risks imputing a serious degree of regulatory uncertainty.¹¹³ First, it is unclear which companies would fall within the definition of SMS at any one time – for example, how would “*market power*” be proved in this context? And how would one determine which platforms constitute an “*important gateway for businesses*” or a “*significant portion of customers*”?¹¹⁴ These are terms which could be the subject of extensive debate in and of themselves. It is also unclear which sectors would be captured since there are many players from across sectors which are “digitising” (e.g. healthcare; financial services; or retail).¹¹⁵
- 5.10 In any event, the CMA’s own data indicates that only 10-13% of website traffic for online publishers came from Facebook¹¹⁶ – this is inconsistent with the CMA’s conclusions on Facebook’s SMS position or market power vis-a-vis publishers. The IR does not set out any clear case that such stringent regulatory obligations (going beyond those that apply to dominant companies) are warranted.¹¹⁷
- 5.11 Moreover, the currently proposed Code of Conduct appears to be based on non-specific concepts that are difficult for regulators to apply in practice and for companies to self-assess like “fairness”. Facebook encourages the CMA to consider how any proposals for regulation could be better aligned to regulatory good practice in order to give more legal certainty to regulators, the industry and consumers.

Any Code of Conduct needs to be fit for purpose

- 5.12 Any Code of Conduct regulating the digital industry will need to ensure it can evolve to keep pace with the fast-moving markets, where regulation can quickly become outdated. This is also in line with how a code of conduct has been described in the CMA’s recent Regulation and Competition report which described it as an example of “*more flexible forms of regulation to ensure that regulation is proportionate and not unduly restrictive*”¹¹⁸ – in particular, the following descriptions are associated with a code of conduct (emphasis added):
- (a) to “*give the regulated firms **some discretion** in how they comply with the code” and “can also **be changed** with industry agreement as circumstances change”*;¹¹⁹ and
 - (b) to “**complement** existing competition and regulatory frameworks and **to help to promote** competition in a market”.¹²⁰

¹¹² Third parties have raised the need to ensure that such a regulator does not introduce “*further complexity or tension between overlapping bodies*” or “*duplicate, undermine, hinder, or otherwise make unnecessarily complex the successful regulatory and supervisory activity that is already taking place*” (see para 110 of Appendix B of the IR).

¹¹³ See Table I.1 in Appendix I of the IR: concerns that could be investigated under each of the key principles, which includes a column for (i) consumers, (ii) advertising and intermediation and (iii) publishers (and other consumer facing services).

¹¹⁴ See broad proposed definition in paras 6.30-6.34 of the IR

¹¹⁵ Facebook also considers that the application of the SMS designation across its whole corporate group is both draconian and inappropriate (see para 6.35 of the IR).

¹¹⁶ See para 5.257 of the IR.

¹¹⁷ See para 6.33 of the IR.

¹¹⁸ CMA, *Regulation and Competition: a review of the evidence*, January 2020, para 7.13, available at: <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

¹¹⁹ CMA, *Regulation and Competition: a review of the evidence*, January 2020, para 1.35, available at: <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

¹²⁰ CMA, *Regulation and Competition: a review of the evidence*, January 2020, para 6.7, available at: <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

- 5.13 However, it is not at all clear that the CMA’s proposed Code of Conduct would fulfil these criteria. The Code of Conduct described in the IR contains ambiguous provisions over several specific forms of conduct which would be enforced by a regulator with broad powers.
- 5.14 A combination of high-level principles enforced by a powerful regulator could lead to legal uncertainty for businesses. Legal certainty is particularly important in innovation-driven industries. The absence of a predictable legal framework forces companies to seek a significant compliance margin. The more uncertain the rules, the higher the risk that desirable conduct is curtailed.
- 5.15 Moreover, some of the CMA’s proposals appear to shift the burden to companies to objectively justify their terms and conditions, including in relation to the prices charged. Such a proposal raises many questions, including:
- (a) the assessment of what may be objectively justifiable is in itself inherently subjective and it is unclear what kind of evidence would be required to meet this standard;
 - (b) it is not clear how such pricing standards would apply in the context of an auction given that prices are not fixed by Facebook (such as with the auction that runs Facebook’s Ads Manager) and therefore it is unclear how the CMA could ever conclude that this is not objectively justifiable; and
 - (c) where prices are zero (e.g. for users), would this allow the regulator to suggest that a positive charge must be levied and/or to set a level of charge to consumers?
- 5.16 The uncertainty behind such a proposal, coupled with the shifting of the burden to companies to demonstrate compliance, may curtail desirable conduct. If this proposal is designed to regulate pricing, then experience from other regulated industries suggests that the rules need to be prescriptive, detailed and inflexible. It is not clear that such a proposal would be fit for purpose in relation to digital platforms.
- 5.17 The complexities that could arise with this Code of Conduct should not be underestimated and Facebook therefore considers that a less granular code that leaves businesses with flexibility to innovate could help address some of these concerns. That flexibility could be coupled with a provision in a code of conduct to have ex ante reviews for certain arrangements or practices, with the possibility of seeking comfort letters.

Any Code of Conduct should be proportionate and enable fair process for enforcement

- 5.18 In line with the UK Government Better Regulation Framework Guidance, the principles governing any Code of Conduct must be proportionate, transparent and targeted at solving an evidenced harm.¹²¹ The proposed enforcement powers under the Code of Conduct¹²² are extensive and currently framed as more far-reaching, and offering the regulator greater discretion, than those available under competition and consumer protection laws.¹²³
- 5.19 Experienced regulated companies such as BT highlighted in their third party submissions that, in line with the principles of good regulation, any remedy should be evidenced-based, clear, predictable, transparent, and limited to what is necessary, proportionate and targeted at the problems identified – and additionally that institutional reforms should “ensure the

¹²¹ CMA, *Regulation and Competition: a review of the evidence*, January 2020, para 5.15, available at:

<https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>.

¹²² Which extend from compelling information, imposing interim measures, blocking / ceasing / unwinding decisions of SMS platforms, require ongoing reporting to demonstrate compliance, requiring compliance with audit requirements, appointing a monitoring trustee to oversee compliance, and imposing appropriate sanctions (see para 6.50 of the IR).

¹²³ It is noted, for example, that enhanced consumer measures under Part 8 EA02 can only be ordered by the court if they are just and reasonable, and proportionate (taking into account, among other things, the likely benefit of the measures to consumers and the likely costs to the trader).

independence of regulators and appropriate checks and balances (including rights of appeal)".¹²⁴ It is also noteworthy that the recent report published by the Centre for Data Ethics and Innovation states that, should there be a regulator for online targeting, their use of powers "should be subject to due process, with an established threshold for investigation, consultation with stakeholders, and a process under which the regulator's findings can be appealed".¹²⁵

- 5.20 With this in mind, it is crucial that there is an appropriate recourse to challenge decisions. However, the CMA expects any right of appeal would be applied "to a different standard than applies for competition enforcement"¹²⁶ in the interests of timely enforcement – a striking statement that appears to envisage limiting the rights of defence of regulated companies to a lower level than is the accepted norm and then would apply under UK competition and consumer protection law.¹²⁷ There is no basis for this. To ensure the credibility of the regime and to maintain the UK's hard-earned reputation in international antitrust enforcement, parties' rights of defence must be meaningfully protected, through access to information and reasoning, and robust procedures for appeal of regulators' decisions.

Next steps

- 5.21 Facebook welcomes the opportunity for further discussions with the CMA as to these issues in order to assist it in designing a solution which is workable and suitable for the industry as a whole. Indeed, the significance of the CMA's preliminary market study policy proposals cannot be overstated, particularly given that the same issues are also simultaneously being considered by a number of different regulators across the world. Facebook welcomes engagement to build a coherent multi-national framework that is fit for purpose and for the future.

¹²⁴ BT's response to the CMA's Statement of Scope, 31 July 2019, para 50, available at: [https://assets.publishing.service.gov.uk/media/5d762a43e5274a097be1f56b/190731_BT - Response to statement of scope - non-confidential_Redacted.pdf](https://assets.publishing.service.gov.uk/media/5d762a43e5274a097be1f56b/190731_BT_-_Response_to_statement_of_scope_-_non-confidential_Redacted.pdf).

¹²⁵ See also the Centre for Data Ethics and Innovation, *Review of online targeting: Final report and recommendations*, February 2020, p.7, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864167/CDEJ7836-Review-of-Online-Targeting-05022020.pdf.

¹²⁶ See para 6.52 of the IR.

¹²⁷ The merits of the CMA's decisions under the Competition Act 1998 can be appealed to the Competition Appeal Tribunal. Significantly, given that the CMA's proposal for a Code of Conduct would essentially result in a new sectoral regulator, the same is true where such decisions are made by regulators in the telecommunications, electricity, gas, water, railways, air traffic services, payment systems, healthcare services and financial services sectors (see Competition Appeal Tribunal, *About the Tribunal*, available at: <https://www.catribunal.org.uk/about>). The CMA's consumer protection powers under Part 8 EA02 are also subject to the control of the court (e.g. the CMA must apply to the court in order to obtain an enforcement order in relation to the Consumer Protection from Unfair Trading Regulations 2008).