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Online Platforms Market Study
UK Competition and Markets Authority
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We appreciate the opportunity afforded to the public by the United Kingdom Competition and Markets Authority (**CMA**) to comment on the Online Platforms and Digital Advertising Market Study Interim Report (**Interim Report**). Microsoft believes that digital advertising – as the Interim Report acknowledges – enables innovative and popular services to be made available to consumers. These services have transformed the way consumers communicate with each other, access news and information, interact with businesses, and more. But, as the Interim Report also recognizes, two online platforms have persistently controlled most digital advertising, leading to a host of complex questions about how to enable better competition and ensure that users receive the full benefits of their valuable attention and, increasingly, data that they provide to these platforms for advertising purposes.

Microsoft supports the CMA's work to explore the complex business models, dynamics, and impact of digital advertising. In Microsoft's view, the Interim Report provides a thorough explanation and analysis of digital advertising and related search and social networking markets. It builds upon similar work done in by the Digital Competition Expert Panel (**Furman Review**)¹ as well as work by other regulatory bodies like the Australian Competition and Consumer Commission² and various European data protection authorities,³ to offer new and important insights. Microsoft looks forward to engaging cooperatively with the CMA as its work in this area continues. In the spirit of such cooperation, Microsoft offers a few observations about the Interim Report and some of its key points and questions.

A. Code of Conduct.

A key question raised by the Interim Report is whether “a code of conduct for large online platforms funded by digital advertising” should be created and if so, what the core aspects of such a code should be. Microsoft believes that such a code should be created and agrees with the CMA that “an enforceable code of conduct may help address a number of concerns that [it has] identified in digital advertising markets.”⁴ While traditional competition law enforcement could be used to address potential abuses by online platforms, a code of conduct could serve as an effective complement to competition law. Unlike

¹ See Report of the Digital Competition Expert Panel, “Unlocking Digital Competition” (March 2019) (available at <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>).

² See Australian Competition & Consumer Commission, “Digital Platforms Inquiry Final Report” (26 July 2019) (available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>).

³ For instance, in France: <https://www.cnil.fr/en/cnil-launches-public-consultation-its-draft-recommendation-cookies-and-other-trackers>, and in the UK: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/12/adtech-and-the-data-protection-debate-where-next/>.

⁴ Interim Report at 67.

competition law enforcement, a code can be based on competition law principles but apply in a forward-looking manner providing increased clarity and certainty over what represents acceptable (and unacceptable) behavior by platforms with Strategic Market Status (SMS).⁵ Such a code would enable more rapid regulatory intervention to avoid lasting competitive harm, and with that, harm to consumers. In our view, there are three key questions related to such a code: who do the new code obligations apply to; what are those obligations, and how and by whom are the obligations enforced?

1. Who does the code apply to?

Microsoft believes that the most crucial issue related to the creation of a code of conduct will be to determine the platforms to which such a code will apply. While applying new obligations to the incumbent players with SMS can serve to increase competition, applying the same obligations to firms that might challenge that dominance can have the opposite effect. Additional burdens placed on firms that are already at a competitive disadvantage to the dominant incumbent firms could undermine those challenger firms' abilities to continue to operate. For this reason, other studies, such as the Furman Review, have concluded that a new code should only apply to platforms with SMS in "order to avoid creating new burdens or barriers for smaller firms."⁶ Even if the burdens of specific obligations are not so significant as to undermine the smaller/challenger firms' profitability, new obligations placed on smaller/challenger firms might be misused by dominant firms to further their dominance. For example, if not formulated carefully, new interoperability obligations, beyond portability obligations that apply to all data controllers under GDPR and similar laws, could be used by dominant firms in ways to migrate users from emerging platforms or keep users more engaged in existing platforms. Thus, Microsoft agrees with the Interim Report that any new substantive obligations should apply only to platforms that have SMS.

In addition, Microsoft believes that the three-pronged test for determining when a platform should be identified as having SMS set out in the Interim Report is appropriate.⁷ The three prongs are:

- the platform has enduring market power over a relevant market;
- the platform acts as an important gateway for businesses to access a significant portion of consumers; and
- businesses depend on the platform to access users on the "other" side of the market.

As explained above, requiring in the definition of SMS that a platform has enduring market power in a relevant market will be critical to ensuring that smaller/challenger competing platforms, even successful ones, are not covered by new obligations in a code: without that condition, such a code, instead of increasing competition, could actually limit it. If the smaller/challenger firms are successful and erode existing competitive barriers, then the code should allow for periodic review and assessment to reconsider SMS designations.

Equally important to the concept of market power, however, is the concept that the platform also operates as a gateway through which businesses must attempt to access consumers. With respect to the

⁵ See below, in the text, for the three-pronged test for determining whether a platform has SMS.

⁶ Furman Review at 5.

⁷ Interim Report at 6.30.

concept of a gateway, it is important to distinguish situations where platforms may be merely attractive, versus where they serve as an unavoidable trading partner for which intervention is warranted.

Platforms like Facebook and Google each serve as an essential gateway to a massive universe of users for digital advertising purposes that cannot be replicated or achieved in any other way. Their size and user engagement advantages mean that the only way to practically run display and, in the case of Google, search advertising campaigns that reach users online in a targeted way, is to include those platforms. That is the very definition of an “essential gateway”. Put differently, major brand owners seeking to reach millions of users could not substitute other platforms to achieve advertising campaigns of similar scale to a targeted audience. Thus, Facebook and Google serve as essential gateways with which advertisers have no choice but to engage with if they seek to reach a mass audience in any targeted manner.

We note that a recently leaked copy of the European Commission’s forthcoming digital strategy emphasizes this point, and observes that: “Where competition policy alone fails to address some of the more systemic problems of the platform economy, notably where certain platforms have acquired a scale that effectively allows them to act as large private gatekeepers and rule-setters to markets and information, additional *ex ante* regulatory responses may be needed to ensure contestability and protect the interests of smaller players.”⁸

One of the leading thinkers in this area is Ben Thompson, who has done extensive work studying the idea of gateways and their attendant gatekeepers. He looks at these issues in the context of what he has termed “aggregation theory.”⁹ One of the core ideas behind this theory is that unlike past platforms, aggregators do not get market power based on access to some scarce resource, but rather from aggregating massive audiences on both sides of a particular market and then enabling and controlling interactions between each side. These aggregator platforms essentially serve as gateways, and their operators as gatekeepers. And within this set of aggregators, there are two – Facebook and Google – that he identifies as “super aggregators” because of their ability to control access to not just two sides of a market, but three sides (users, content suppliers, and advertisers) with effectively no marginal costs on any of them. Thus, Microsoft agrees with the Interim Report’s conclusion that both Google and Facebook likely have SMS.

2. *What are the substantive core principles?*

The Interim Report sets forth three high level core principles for digital platforms: fair trading; open choices; and trust and transparency. Microsoft agrees that these are good principles to guide a code of conduct. In creating the code, it will be important that the rules are established by an expert and independent body, in consultation with broader industry stakeholders, to minimize potential biases and misconceptions due to asymmetry of information and the complexity of the relevant technologies. In addition, the technologies used in digital advertising and online platforms are constantly evolving. It is critical that there be timely action and ongoing oversight, which will not be possible if the process involves industry consensus building instead of informed yet bold regulatory action.

⁸ <https://www.euractiv.com/wp-content/uploads/sites/2/2020/02/Europe-fit-for-the-digital-age-LEAK.pdf>.

⁹ <https://stratechery.com/2017/defining-aggregators/>.

In addition to principles, it will also be important for any code of conduct to provide guidance as to specific obligations with which platforms with SMS must comply. When defining the substantive rules with more precision, Microsoft agrees with the Interim Report that provisions preventing self-preferencing behavior by platforms with SMS will be among the most important aspects to the code. Self-preferencing can have a negative impact on both the potential for competition within the market where the platform currently has significant market power and SMS, but also it can impact competition in adjacent and other markets resulting in further distortions of competition in new and emerging markets. For example, complements to an SMS platform may become horizontal competitors when they develop the ability to form a relationship with the end user that is sufficiently free-standing and valuable to take the user off the platform and into a separate relationship with the complement. The platform has an incentive to foreclose the complement to prevent this loss of market power and profit. Second, when a platform observes that a complement is earning strong profits, it may seek to enter that complementary market, becoming a horizontal competitor. Again, the platform has the incentive – and often the ability – to foreclose those competitors. In both circumstances, when the platform is an aggregator, its power over complements may be amplified and disproportionate, enabling foreclosure.¹⁰ The code of conduct should be designed to prevent this type of preferencing in other areas.

3. How is the code enforced?

A final, but critical aspect to any code, will be having a mechanism to enforce the substantive obligations. A purely voluntary code will have little to no impact. Moreover, any obligations imposed in these markets will involve complex technical issues. Having a well-funded specialist entity dedicated to these complex issues and that can develop the substantive and technical expertise to oversee, develop and enforce the code is the only way the code is likely to be effective. For that reason, Microsoft believes the creation of a “Digital Markets Unit” with ongoing authority for enforcement and interpretation of any code of conduct is appropriate.

B. Potential regulatory interventions to address market power in general search.

In Microsoft’s view, the Interim Report provides a thorough explanation and analysis of general internet search and search advertising, including the significant impediments to increased competition in these areas. The potential regulatory interventions are well conceived and have the potential to increase competition. That said, Microsoft remains of the view that the single most important aspect to competition in the search and search advertising markets is to facilitate other search providers (without SMS) to be distributed as the default solution in the most popular browsers and mobile devices.

Search is a scale business; more users lead to improved relevance, and most importantly, attract more advertisers. A competing search engine cannot compete effectively if it does not have access to users at sufficient scale. Because search defaults are such an effective and efficient distribution mechanism, especially on mobile devices where search default configuration is more difficult than on PCs, enabling competing solutions to become the default is critical. Today, Google has secured default placement distribution on essentially all smartphones and tablets. Google is also the search default in the most used

¹⁰ See Stigler Center for the Study of the Economy and the States, “Stigler Committee on Digital Platforms Final Report,” (September 2019) (available at <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>) (“Stigler Report”) for a discussion of foreclosure of complements on platforms.

web browser, Google Chrome, which is promoted continuously on Google.com (and its domain variants). Opening up search default distribution is, in Microsoft's view, the single biggest opportunity to enable competition in search and search advertising.

The Interim Report considers whether instead of addressing the ability of other search providers to bid for default distribution directly, the presentation of a search engine choice screen may be sufficient to enable competition in internet search. While choice screens can be helpful when used in conjunction with opening up the ability for rivals to achieve default distribution, Microsoft does not believe that choice screens alone will be effective. First, with any choice screen, brand recognition plays a significant role in determining what will be selected. Given Google's decades' long domination of internet search, its name has become a colloquialism synonymous with internet search. In such circumstances, one would expect users to overwhelmingly choose Google Search through any choice screen. On the other hand, if a device comes with Bing, DuckDuckGo, Yandex or some other solution as the preset default, the user may try that solution and determine that it meets their needs. The ability to be set as the default therefore has greater potential to more effectively overcome user inertia to stick with Google Search.

Second, if a search engine choice screen applies to all devices and browsers regardless of whether a competing search solution is set as the current default, the choice screen will further entrench dominant companies' SMS by interfering with the distribution opportunities secured by smaller competing search providers. For example, Bing is often the default search engine in Microsoft's Edge browser. This distribution gives Microsoft access to much needed user searches. However, prompting these Bing users on Microsoft Edge to select a search engine through a choice screen will undermine the limited default distribution Bing achieves today. For that reason, any choice screen should be shown only if the existing default search provider is Google Search as only it currently has SMS in that market. If designed in this way, a choice screen could be an effective complement to efforts to enable other search engines to compete for default distribution opportunities for the leading devices and browsers. This design is also consistent with the Browser Choice Screen shown by Microsoft on Windows PCs from 2009 through 2014 as part of the EU's Internet Explorer Commitments Decision.¹¹ In that case, the browser choice screen only displayed if Microsoft's Internet Explorer was the user's default browser.

C. Potential regulatory interventions to address market power in social media

The Interim Report provides an overview of stakeholder views and existing and potential features for varying degrees of interoperability across social media platforms (from data portability to "full protocol interoperability") as a form of intervention. Microsoft supports data portability across digital platforms to enable individual users to control and transfer their own personal data to a platform of their choice. As noted in the Interim Report, Microsoft, along with others, launched the Data Transfer Project (DTP) to create an open-source framework that enables a seamless, direct, and user-initiated data portability between any two online platforms.

While Microsoft also supports platform interoperability, it will be important to take a measured approach considering the negative ripple effects such requirements might have on consumer welfare and competition if they were to go too far. The Interim Report correctly recognizes the heightened need for caution when imposing extensive interoperability requirements across platforms due to their potential

¹¹ https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_5.pdf

costs to competition, innovation, and consumer welfare—namely, (i) increased homogenization and reduced consumer choice, (ii) reduced innovation and variety in the standardized functionality, and (iii) increased user privacy concerns.

The Interim Report notes some respondents' preference for "truly interoperable platforms" purportedly to reduce switching costs and facilitate consumer choice between online platforms. A "full protocol interoperability" across platforms will likely result in the opposite. Switching costs between social media platforms are, in fact, relatively low—the need to sign up for a new platform does not create significant burden or barrier for users, as demonstrated by the fast rise and success of a new social media platform, TikTok. As the Interim Report notes, even a new entrant TikTok raised concerns that such interoperability would stifle, rather than increase, consumer choice as consumers prefer multi-homing across multiple platforms due to their differentiated characteristics (e.g., varying focus on audience, purpose, and the way content gets delivered). To the extent that interoperability requirements effectively mandated standardization across platforms, it might reduce incentives for companies to further innovate and improve existing platforms or develop new ones, deterring the type of innovation that gave rise to the differentiated social media services that are available today.

Finally, it is Microsoft's view that interoperability requirements that go beyond enabling users to access and transfer their own personal data (as currently mandated by GDPR and other similar laws) should be approached cautiously. From a privacy perspective, the UK CMA should consider whether such obligations make it more challenging for users to protect their privacy interests. For example, if one user cross-posted on Facebook and other social media platforms, and interoperability was set up such that her Facebook friends' comments on the Facebook post could be seen on other platforms, her friends might lose control they expect to have. Further, depending on the specific obligations, it could be complex for multiple platforms to build a complete interoperability framework that (1) maintains standardized user settings, controls, and privacy expectations, (2) maintains each network's unique style and interface, (3) accommodates different platforms' approaches to monetization, and (4) is readily transparent and navigable for users.

Microsoft thus urges the CMA to further investigate and consider any potential unforeseen harms to users, competition and innovation, in formulating potential interoperability requirements that would apply across social media platforms. This further highlights the importance of ensuring that any obligations placed on SMS providers, including interoperability, should be asymmetrical and not explicitly be imposed on all platforms.

D. The Role of Data.

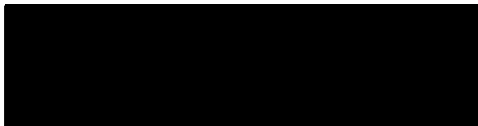
The Interim Report also does an excellent job at analyzing and discussing the role that data, and specifically "personal data", as defined in the General Data Protection Regulation (GDPR)¹², plays in both search and display advertising. It rightfully highlights the challenges of meeting the statutory obligation (under GDPR) of providing users with complete and necessary information to make informed choices while not overwhelming them with too much information. Microsoft agrees that it is critical that users have control of their data and understand how it is being used. For Microsoft's own consumer services, ensuring this understanding is our goal, and is an area in which we strive to continuously improve. We

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1581172919299&uri=CELEX:02016R0679-20160504>

look forward to continuing to work with the CMA and data protection/privacy regulators to continue to provide users with complete and comprehensible information related to the collection and use of data. Indeed, 'privacy by design' is something which we recognize as a statutory obligation under GDPR, and to which we are committed.

E. Conclusion

Microsoft applauds the CMA's efforts at tackling these complex issues and we look forward to continuing to cooperate with any information or views that will be helpful to your process.



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