

TO:

Competition and Markets Authority - Online Platforms and Digital Advertising Market Study
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By email only: onlineplatforms@cma.gov.uk

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To whom it may concern

Response to the Competition and Market Authority ("CMA") interim report of the market study into online platforms and digital advertising ("Market Study")

Below Telefónica UK Limited ("**TUK**") provides its views on the CMA's interim report of the market study into online platforms and digital advertising of 18th December 2019 ("**Interim Report**"), which is focused on assessing the nature of competition in markets on both sides of online platforms.

Overall, the Interim Report focusses on the digital advertising markets, noting the importance of user data targeted for advertising purposes and the lack of effective transparency over privacy policies. Indeed, the CMA proposes several remedies to try and addresses such lack of transparency or fairness in these practices. However, TUK believes that two important aspects were only briefly addressed in the Interim Report, namely leveraging the market power from the digital advertising market into adjacent markets and the consequent tying of privacy policies between the dominant digital advertising market and the targeted adjacent market. TUK will further discuss both these aspects below.

Given TUK's response focus on the above matters, TUK will not be addressing all questions included in the Interim Report but only those which touch upon the concerns raised above and which could lead to relevant remedies being proposed.

As mentioned in its response to the market study consultation submitted on 30th July 2019 ("**Previous Response**") TUK believes that the CMA would benefit from a better understanding of the online platforms and digital advertising markets for future enforcement activity. While TUK welcomes the Market Study as a good instrument to gain the necessary knowledge [**CONFIDENTIAL**] TUK also supports a number of proposals and legislative changes to protect competition in the digital sector [**CONFIDENTIAL**].

Please note that the information provided below represents TUK commercially sensitive information. Therefore we kindly ask you that the full content of this letter be treated as confidential and not for publication. Please see enclosed a non-confidential version of the response for publication.

Please do not hesitate to contact us if you have any questions in relation to our response.

Yours sincerely,

[**CONFIDENTIAL**]

Question no. 5

Do you agree with our analysis and findings in relation to competition in search and social media, as set out in Chapter 3?

The Interim Report focusses on the digital advertising markets, finding two dominant players, respectively Google (search advertising) and Facebook (display advertising) despite the relative lack of transparency (with Google and Facebook providing their own performance data), the report also notes the importance of user data for targeted advertising purposes and the lack of effective transparency over privacy policies.

[CONFIDENTIAL]

In this broader context, TUK believes that two important aspects were only very briefly addressed by the Interim Report, namely:

- the platforms' ability to leverage the market power from the digital advertising market into adjacent markets; and
- the consequent tying of privacy policies between the dominant digital advertising market and the targeted adjacent market.

Leveraged dominance

A common feature exhibited by digital platforms is their conglomerate nature. The advertising platforms enter adjacent markets, often competing in those markets by offering services for free or combining services with products from markets where they are dominant. For example, [CONFIDENTIAL].

Whilst it might be ambiguous as to whether consumers are better off overall, the transparency problems with privacy policies outlined by the CMA suggest that the economic exchange between the user and the dominant data advertisers is even less clear in the adjacent markets, meaning that the choice between monetary and non-monetary remuneration for services is not clear at all to consumers.

Data collection from many different services feeds the advertising algorithms and facilitates the building of better consumer profiles, which allows precise targeting of customers and bundling of services on the platform, reinforcing in its turn market power across markets. This can be exacerbated when the platforms' own downstream arm competes with third parties in downstream markets, and they have the ability and the incentives to discriminate in favour of their own services in those markets, particularly with regard to information access and functionality, as well as self-preferencing of services.

Privacy policy tying

[CONFIDENTIAL] Ensuring that data from users of products in adjacent markets can be used to enhance the data obtained in the markets where they are dominant, reinforcing the dominance of the firm in the relevant digital advertising market. This behaviour creates further barriers to competition in digital advertising, as these additional data flows are not available to other digital advertisers. Indeed, as the CMA identifies [CONFIDENTIAL].

The behaviour of the dominant digital advertising firms reduces contestability in both the digital advertising markets (through superior and unmatchable access to user data from the search/social media in conjunction with data from product markets) and also in the adjacent product markets, where the terms of trade are radically altered with zero monetary prices making competition difficult or impossible for existing or new players.

Furthermore, one of the main concerns about the market power of a small number of digital firms is their ability to leverage market power from their core market into other markets, this can be achieved via a vertical merger, bundling own products and services or granting privileged access conditions to own downstream business on the upstream platform. Indeed, competition authorities have already identified problems in these markets including the bundling of own downstream products (apps) as part of the supply conditions

for the OS, requirements to pre-install own apps in devices, or position them in a privileged place (main screen), or even ban their removal¹.

At paragraphs 30-31 of its report (elaborated on later at 3.74-3.89) the CMA sets out a theory of harm caused by the default setting of search in browsers and mobile operating systems. Elsewhere in the report the CMA expresses concerns about the inertia of customers and the power of default settings to essentially foreclose competition from the market. It uses the large payments made by Google to Apple to be the default search engine for the Safari browser as a crucial evidence point. The use of commercial agreements or bundling by Google (in the case of the Chrome browser and Android operating system) are seen as creating a barrier to expansion for other search engines.

[CONFIDENTIAL]. Search is just one example, what the CMA describes as creating a barrier to expansion also reduces contestability for existing players in that market, if the bundled service is given away for free to the consumer.

At Box 3.4 on page 81, the CMA discusses the remedies in the European Commission's Android tying case against Google. From 1st March 2020 all new devices supporting Android in the EEA will be required to offer consumers a choice of default search engine on the device. TUK understands that these undertakings to the Commission will survive Brexit and will continue to apply in the UK market.

The CMA proposes two alternative remedies at paragraphs 80-81 (expanded upon in Section 3), namely:

- "some form of restriction on the ability of Google to enter into arrangements to be the default search engine on devices and browsers"; or
- "a requirement to offer choice screens to consumers on devices and browsers".

[CONFIDENTIAL]

[CONFIDENTIAL]. This would suggest that the CMA's alternative remedy of enforced search engine choice **[CONFIDENTIAL]**.

TUK notes that in the Android case the Commission defined two product markets, "licensable smart mobile operating systems" (ie. Google's Android) and "non-licensable smart mobile operating systems" (ie. Apple's iOS). The CMA's alternative remedy proposal is that the Government either legislates or tasks a new regulator to effectively impose the Google Android remedy into the Apple iOS market. **[CONFIDENTIAL]**.

Question no. 6

Do you agree with our analysis and findings in relation to consumer control over data, as set out in Chapter 4?

As mentioned in the Previous Response, TUK does not view "paying with data" as objectionable in and of itself.

TUK shares the concerns reflected in the Interim Report (section 4.4) on whether the terms of this trade on the consumer side of the market are sufficiently understood and consumers are being treated fairly by the platforms. In this sense, remedies focused on the demand side (such as obligations to educate consumers on privacy or technology related matters) should also be considered, beyond the usual supply side oriented remedies (transparency, etc.).

TUK notes that in certain situations companies can impose excessive collection of data on their customers who lack genuine choice as to whether to accept / require fair treatment by the platform. In these context, privacy and control afforded to data subjects, i.e. terms of service, can form an important parameter of

¹ Those practices have been identified in cases such as the Google cases before the European Commission -39740 Google Search (Shopping) (http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf) 40099 Google Android (http://europa.eu/rapid/press-release_IP-18-4581_en.htm)- as well as in reports such as the ARCEP report "Devices, the weak link in achieving an open internet", 2018 (https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf), analysing the risks for Internet openness coming from devices and equipment

competition. In a market where data is the form of remuneration, having sufficient “price setting power” that leads to excessive data being provided by customers must be a relevant factor in determining whether a firm can set “prices” without regard to the reaction of its users.

With reference to the concerns raised at 4.143, namely the use of privacy policy to prevent sharing data with third parties, please note TUK’s point raised in response to question 5.

Question no. 7

Do you agree with our analysis and findings in relation to competition in digital advertising, as set out in Chapter 5?

As noted by the CMA at points 5.198 and onwards, vertical integration can allow companies with market power at one stage of the value chain to leverage it in other part of the industry, potentially foreclosing competing providers. TUK has expressed its consolidated views in its response to question 5 above. In this context, competition authorities need to put forward comprehensive legal and economic tests to be used in order to support their conclusions and to weigh the pro-competitive effects of vertical integration against the shortcomings generated by the reinforcement of market power.

Questions no. 8 and 9

Do you agree with our assessment of the merits of a code of conduct for large online platforms funded by digital advertising?

Do you agree with the range of possible practices we have identified that could be considered under such a code of conduct?

As regards questions 8 and 9, the CMA notes the Furman Review proposed a code of conduct for large platforms with ‘Strategic Market Status’ (“**SMS**”) to address issues more quickly than through competition enforcement. The CMA considered an enforceable code of conduct may help address concerns, and that a code would be an effective complement to competition law. The code would take the form of high-level principles rather than detailed and prescriptive rules given the complex and rapidly changing nature of the markets. The CMA considers key areas of the code could be ‘fair trading’ open choices’ and ‘trust and transparency’. Nevertheless, whilst the CMA briefly refers to the recommendation in the Furman Review concerning merger control², the CMA concludes at point 6.55 that it will keep under review whether there is a case for requesting changes to the merger control tools for companies designated as having SMS, or whether a parallel regime for acquisitions undertaken by such companies would be appropriate.

TUK therefore believes that the initial views expressed by the CMA at point 6.30 in the Initial Report concerning the assessment of digital platforms having SMS, namely:

- (i) the platform has enduring market power over a relevant market;
- (ii) the platform acts as an important gateway for businesses to access a significant portion of consumers; and
- (iii) businesses depend on the platform to access users on ‘other’ side of the market,

should be based on clear and predictable thresholds. We are not confident that SMS is a sufficiently clear benchmark and [**CONFIDENTIAL**].

Overall, TUK believes there needs to be more clarity around how the “high level principles” provided by a code would apply in practice, respectively how will the CMA ensure enforceability against rules that aren’t prescriptive. We believe additional thoughts and consultations with the industry would be required before such code is made enforceable.

² NB the Furman Review makes reference to a mandatory merger control regime for digital companies with SMS

[CONFIDENTIAL].

Noting the Interim Report's proposed powers (as per section 6.50) of a regulator in relation to the enforceability of the code, namely,

- compelling information from SMS firms and other industry players;
- suspending decisions of SMS firms pending the result of an investigation, including the imposition of interim measures;
- blocking decisions of SMS firms at the end of an investigation; and
- appointing monitoring trustees to oversee compliance by SMS firms,

TUK believes that ensuring predictability and transparency over the rules provided by the code is paramount. **[CONFIDENTIAL].**

Furthermore, as regards the reference to Furman Review's call for a Digital Markets Unit to be created in the UK, TUK believes this is redundant – Chapter II CA 1998 (and, momentarily, Article 102 TFEU) already grants the CMA and other regulators the ability to require providers of essential facilities to grant supply. The proposed additions to this regime would create an unnecessarily complicated environment whereby companies may be arbitrarily required to transact against their wishes in circumstances where doing so generates no discernable benefit to the consumer.

At present, the UK already has an overabundance of competition regulators with overlapping jurisdiction. As TUK understands it, the Digital Markets Unit's responsibilities are not clearly defined, but they may include oversight of competition among providers of digital services. The CMA currently monitors competition among digital service providers according to well defined and tested competition law doctrine. TUK sees no reason for there to be an additional competition law enforcer in respect of digital markets – the CMA, the FCA, and Ofcom already have considerable experience with digital markets. To add another enforcer, whose jurisdiction is even more loosely defined, is very unlikely to benefit competition law enforcement in the UK, and will in all likelihood simply generate confusion amongst companies and consumers. TUK stresses that it is in favour of stronger enforcement in digital markets, but adding to an already crowded regulatory population will not aid this³.

Questions no. 10, 11 and 12

Have we identified the appropriate range of potential interventions to address the sources of market power for Google and Facebook?

Have we identified the appropriate range of remedies to improve consumers' control over their data?

Have we identified the appropriate range of remedies to address conflicts of interest and a lack of transparency in digital advertising markets?

In relation to questions 10, 11 and 12 and the CMA's proposed interventions, kindly refer to TUK's answers to questions above.

An important aspect to be noted is provided by points 72 and 6.94 in the Initial Report whereby the CMA proposes to facilitate informed choice and greater control for those consumers who wish to engage, including:

- (i) a rule that all platforms should be required to give consumers an option to use their services without requiring in return the use of consumers' data for personalised advertising;
- (ii) changes to default settings for SMS platforms to require a default opt-in to personalised advertising rather than the current default opt-out; and

³ The Belgian, Dutch and Luxembourg competition authorities also share this idea, which in a joint memorandum stated: "the ability to impose these remedies resembles the powers that the CMA has to impose remedies following market studies and the powers of the Member States' telecom authorities to impose remedies on companies with significant market power".

The German draft competition bill proposes to allow the German National Competition Authority (Bundeskartellamt) to impose ex-ante remedies on big platforms.

- (iii) a principle of fairness by design placing an ex-ante obligation on platforms to design consent and privacy policies in a way that facilitates informed consumer choice, with additional obligations to trial and test choice architecture for SMS platforms.

As regards point (i) above, TUK's understanding is that the SMS would explicitly show the consumer the price of their data in exchange for maintaining privacy. [**CONFIDENTIAL**].