February 2023

DIGITAL PLATFORMS: GOVERNMENT CONSULTATION ON ACCC'S REGULATORY REFORM RECOMMENDATIONS

Mozilla welcomes the Treasury's consideration of a new regulatory framework for digital platforms. Our response to its consultation covers:

- Our overarching support of the ACCC's proposals, including the rationale for introducing a new competition regulatory regime;
- Areas where we think focus and clarity is needed, including in relation to browser competition, desktop operating systems and ensuring that interventions do not inadvertently harm third parties; and
- Future challenges where we think careful consideration is necessary, including consultation with third parties, and information gathering and enforcement powers.

Contents

1. About Mozilla

Mozilla is a unique public benefit organisation and open source community formed as a non-profit foundation. It is guided by a set of principles recognising, among other things, that: the internet is integral to modern life; the internet must remain open and accessible; security and privacy are fundamental; and that a balance between commercial profit and public benefit is critical.[1] Mozilla is responsible for products including: the **Firefox** browser and the **Gecko** browser engine on which it is built; the content collection app **Pocket**; the virtual meeting space **Hubs;** and several privacy-protecting products such as **Firefox Monitor**, **Firefox Relay** and **Mozilla VPN**.

Mozilla has engaged with the ACCC's Digital Platform Services Inquiry ("DPSI") from the outset and has sought to provide insight into the areas where we have expertise. These include how to preserve consumer choice and competition on the open internet, particularly in relation to browsers and browser engines.[2] We have also sought to build on the insights gained by the ACCC through its inquiry. For example, we expanded the 2021 research commissioned by the ACCC in relation to how consumers use browsers, using the same methodology to assess the behaviour of consumers in other regions. This allowed us to develop upon the ACCC's work and to put it into context by creating comparisons across different countries.[3]

2. Overarching comments on the ACCC's assessment

Mozilla commends the ACCC for conducting a thorough inquiry to date. We welcome the opportunity to respond to the consultation the Treasury is conducting on the ACCC's fifth report. Our overall response to question 1 is that new regulatory frameworks are necessary to address the harms to consumers and businesses posed by the market power of digital platforms and, overall, we support the ACCC's proposals. We set out our view on specific aspects of the recommendations in the remainder of this response.

Effective browser competition is necessary for an effective internet ecosystem

As explained in Mozilla's 2022 report, browsers are a vital but sometimes overlooked part of the internet ecosystem: "*Browser engine technology is the most significant part of the web platform. It determines what is possible and is key for connectivity, productivity, creativity, commerce and entertainment over the internet. Millions of people spend significant portions of their working day and personal time using the internet, with the browser as the software agent helping them along the way.*"[4]

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[1] Mozilla's 10 Principles, https://www mozilla.org/about/manifesto
[2] https://www.accc.gov.au/system/files/Mozilla.pdf
https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202022%20report%20-%20Submission%20-%20Mozilla%20-%20Public.pdf
[3] Mozilla, Five Walled Gardens Report, September 2022 https://research.mozilla.org/browser-competition/
[4] Mozilla, Five Walled Gardens Report, September 2022, pages 6 and 7

The ACCC highlights several barriers to browser competition, including the undermining of consumer choice, access to APIs and functionality, and the restrictions imposed by Apple on rival browser engines on iOS.[5] The UK's Competition and Markets Authority has also conducted detailed analysis of the importance of browser engines in the web ecosystem.[6] This included assessing indirect network effects that incentivise developers to build their websites to ensure compatibility with engines that have the greatest number of users. This impacts the ability of smaller players (both browsers as well as service providers) to compete in the market due to web compatibility concerns. These concerns are further exacerbated by operating system level restrictions on browser engines that create significant barriers for browser developers and impede consumers from accessing and using the browser that best fits their needs. Without regulatory intervention we believe there will be no change to the status quo, harming competition in browser engines and browsers, and harming choice and innovation online. It is therefore vital that a new regulatory framework for digital platforms is enacted and that it is capable of addressing these harms to browser competition.

The ACCC's assessment of the issues caused by the market power of digital platforms is largely correct

The ACCC concluded that a number of economic characteristics of digital platforms contribute to market power and that substantial market power in turn creates a risk of anti-competitive conduct. The identified characteristics (strong network effects, significant economies of scale and sunk costs, advantages of scope and expansive ecosystems, barriers to switching, access to high-quality user data) are all exhibited by operating system providers in the context of browser competition - in both desktop/laptop and mobile ecosystems. This is consistent with the findings in digital market investigations in other jurisdictions.[7]

The market power wielded by Apple, Amazon, Google, Meta and Microsoft is enduring and highly unlikely to self-correct. As such, the ACCC is right to note the risk of harm to Australian businesses and consumers, through both exclusionary conduct and exploitative practices. As set out in Mozilla's recent report on browser competition[8], both of these types of conduct are present in browser markets; operating system providers preference their own browsers and other products and restrict consumer choice and switching to rivals. Exclusionary conduct from operating systems results in many harms for consumers including limited/frustrated choice, lower quality and less innovative products, poor privacy and unfair contracts.

Both desktop and mobile platforms should be addressed as a priority *[Question 17]*

Question 17 of the consultation asks which services should be prioritised when in the development of codes. As noted above, providers of apps (including browsers) and other digital

[5] ACCC, Digital Platform Services Inquiry, Interim report No. 5 – Regulatory reform, September 2022 ("Fifth Interim Report") page 159
[6] CMA, Mobile ecosystems market study, Appendix F
[7] See, for example, the George J. Stigler Center for the Study of the Economy and the State, Market Structure and Antitrust Subcommittee Report; Digital Competition Expert Panel, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*
[8] Mozilla, Five Walled Gardens Report, September 2022

services are dependent on the company which provides the operating system. This includes, for example, Apple for iOS and Mac OS, Google for Android, Microsoft for Windows, Amazon for Fire OS and Meta for virtual/augmented/mixed reality. Such operating systems should be prioritised in the legislation given their importance to digital markets and the power afforded operating system developers to distort and restrict competition across other digital services.

The provision of operating systems more generally (e.g. on desktop/laptop computers as well as mobile devices, televisions and other smart devices) is rightly being addressed by ex-ante regulation proposals in other jurisdictions.[9]

While mobile devices are increasingly important as a means for accessing the internet and online services, particularly for new internet users, the importance of competition on desktop/laptop computers when considering operating systems should not be ignored - they accounted for between 50% and 60% of web use in Australia in the past 12 months.[10] Moreover, we note that recent wide-scale research confirmed that desktop and mobile devices tend to have different use cases (for example, desktop devices are more widely used for work, education and e-commerce).[11]

The distinction drawn between mobile devices and desktop/laptop devices notwithstanding, operating systems across device types can form part of a wider ecosystem and market power in one or both can be unfairly exploited. Companies such as Apple are able to leverage their position on desktop to mobile and vice versa. For example, synchronising their own applications across devices (e.g. for Safari) whilst implementing restrictions that prevent or limit the performance of third party companies to do the same. Accordingly, the harms to consumers cannot be addressed only through the regulation of mobile operating systems; equal consideration must be given to desktop/laptop operating systems in order to protect and enhance consumer welfare.

Targeting unilateral conduct will help to avoid unintended consequences *[Question 17]*

In regard to the harms that should be targeted (**Question 17**), interventions need to be designed so as to address the abuse of market power and this will invariably require a careful assessment of market power and adjacent digital services. As explained in previous Mozilla submissions to the DPSI, the integration of search is an important part of the consumer experience of browsers.[12] This value proposition created a monetisable market opportunity between independent browsers and search providers and eventually became a sustainable business model for independent browsers. Search integrations are the primary revenue source for many independent browsers, including Firefox. These integrations include which search

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[9] Including the EU, UK and Japan

[10] https://gs.statcounter.com/platform-market-share/desktop-mobile-tablet/australia/2022

[11] Ruth et al. 2022. *A World Wide View of Browsing the World Wide Web*. In ACM Internet Measurement Conference (IMC '22), October 25–27, 2022, Nice, France. ACM, New York, NY, USA, 18 pages. https://doi.org/10.1145/3517745.3561418

[12] https://www.accc.gov.au/system/files/Mozilla.pdf
https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202022%20report%20-%20Submission%20-%20Mozilla%20-%20Public.pdf

provider is set as the default, as well as secondary and alternative search offerings across languages and locations. The default placement drives the majority of funding necessary to cover browser operations, product development, and investments into new features and technologies. As choice and control are core values to Mozilla's mission, consumers have always had multiple and easy ways to access and change their search options.[13]

Against this background, Mozilla has advised the ACCC and other regulators of the risk of unintended consequences when considering broad measures to address default search default agreements entered into by Designated Digital Platforms. **Any measure which harms the commercial or product freedom of independent browsers would be counter to the intentions of a new regulatory regime. These include, for example, search choice screens or restrictions on default search "access points" which apply *at the level of the device*. Such interventions should apply only to Designated Digital Platform apps and not reach into the products of non-gatekeeper browser companies, like Mozilla.** This is consistent with the ACCC's overarching recommendation that "competition measures should only apply to Designated Digital Platforms".[14] **It is necessary to ensure that competition regulation does not have disproportionate financial and product implications on non-regulated entities and their products, potentially reducing quality and/or choice for consumers.**

Mozilla notes that the CMA assessed Google's search revenue-sharing agreements in detail both in the context of the Digital platforms and online advertising market study[15] and the Mobile ecosystems market study.[16] In doing so, the CMA recognised the importance of search revenue to independent browsers, including in funding Mozilla's non-profit objectives.[17] The CMA has accordingly proposed to limit the scope of this part of its in-depth market investigation in mobile browsers by prioritising "c*ontractual or revenue sharing agreements whose primary purpose and/or effect appears to be to limit the ability or incentives for browser vendors to compete with one another*."[18]

Competition in browsers (which is primarily funded through search revenue) benefits competition amongst search engines. Intervention that harms independent browsers (e.g. the imposition of outright bans on all default agreements for search engines in browsers) inadvertently undermines search engine competition. Search providers can compete for default placements in independent browsers - in contrast to the position in vertically integrated search and browser providers. Therefore, without a variety of independent browsers, alternative search engines will have fewer opportunities for default and secondary distribution and use. Due to this connection between the search and browser markets, enhancing competition in the browser market is also essential for independent search competition.

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[13] Mozilla, Five Walled Gardens Report, pages 31 to 34
[14] Fifth Interim Report, page 114
[15] CMA Online platforms and digital advertising market study, Final Report; See also Appendix H: default positions in search
[16] CMA Mobile browsers and cloud gaming market investigation, Statement of Issues, paragraph 48
[17] CMA Mobile ecosystems market study, Final Report, paragraph 5.15
[18] CMA Mobile browsers and cloud gaming market investigation, Statement of Issues: "*We also propose to investigate certain agreements between Apple and Google, in relation to browser search revenue sharing."*

Consumer protection and digital competition are complementary goals *[Questions 4 to 6]*

Questions 4, 5 and 6 of the consultation relate to the coherence of the recommendations. Mozilla's view is that the ACCC is right to have assessed together consumer protection and competition tools in relation to platforms. This will allow the Treasury to consider the impact on consumers as a whole and ensure that the proposals support and reinforce (rather than undermine or conflict with) each other. We have considered privacy and deceptive patterns as two key examples of areas where such coordination is welcome.

Enhancing competition in digital markets and the protection of consumer privacy are often painted by large platforms as necessary trade-offs. However, the ACCC noted in its fifth report that:

> *"Effective competition, in combination with effective regulation of privacy and data collection, may encourage platforms to compete based on the level of privacy and data protection they offer. This may become a catalyst for the introduction and adoption of more privacy-focused and security-focused business models that reflect consumers' data preferences, rather than the preferences of a large platform. However, where competition between digital platforms is driven by extracting more individual-level consumer data and using that data to more effectively target advertising, this can have the opposite effect on privacy, and may further reduce trust in digital markets."*[19]

Mozilla fully supports this assessment. Privacy and security have been fundamental to our work and a core tenet of our guiding principles[20]; Mozilla has not only introduced innovative privacy and security enhancing features in our products but we have also influenced major companies to adopt better privacy practices - such as browser anti-tracking measures - and influenced consumers directly - including with tools to improve digital literacy and better understand third party data collection.[21] Effective browser competition is an important part of ensuring consumer privacy online. For example, Mozilla's ability to use our Gecko browser engine gives us the freedom to implement our innovations in privacy and security for consumers.[22] Where this is prohibited (such as on iOS), Mozilla is unable to bring those benefits in full to Firefox users and privacy as a parameter of competition is weakened.

The ACCC also rightly highlighted the role of dark patterns (also referred to as "deceptive patterns" or "negative choice architecture") as a cause of consumer harm, both in its fifth report and its discussion paper. The use of negative choice architecture by operating systems to undermine consumer choice is explained in more detail in Part II of Mozilla's 2022 report.
While not a tool used exclusively by digital platforms with market power, we would note that such practices are deployed by operating systems to (among other things) direct consumers to their own browsers, to make it difficult to switch away from the operating system default and, in

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[19] Fifth Interim Report, page 43
[20] Mozilla Manifesto, Principle 4, https://www.mozilla.org/about/manifesto/
[21] See Apple, ("w*e would like to thank Mozilla for their anti-tracking policy which served as inspiration for ours*."), https://webkit.org/blog/9507/announcing-the-webkit-tracking-prevention-policy/
[22] https://blog.mozilla.org/press/2019/06/reinventing-firefox-for-android-a-preview/

some cases, even to force users to switch back to the operating system's browser. This results in tangible harm to consumers.

As such, deceptive patterns should be considered holistically rather purely from the point of view of consumer protection, reflecting the experience of Mozilla and others that they can also be used as a method of unfair competition by digital platforms. In fact, some of the more subtle deceptive patterns, such as those used to undermine consumer browser choice, can be more effective than the seemingly more egregious examples currently being investigated by regulators[23] and they should be subject to regulation. We therefore advise the Treasury to consider deceptive patterns from this perspective and ensure that any new regime is properly set-up to address this important source of consumer harm.

3. Proposals for competition regulation

Flexible, robust and timely rules are required for digital markets *[Questions 13 and 25]*

Generally, but also in relation to **Question 25,** Mozilla notes that various different approaches have been adopted in a variety of jurisdictions, and it is important for lawmakers and regulators to create regulation which is consistent with the characteristics of their own market and its existing legal and regulatory framework. Nevertheless, in order to be effective in regulating products and services which are cross-border in nature, coordination between authorities and alignment between regulatory frameworks is necessary. This does not mean that Australia has to accept the position put forward in other jurisdictions. Where alignment is likely to be most important is in relation to the key principles underpinning various regulatory regimes. In order to preserve genuine consumer choice in browsers and competition on the internet across the mobile and desktop ecosystems, regulatory interventions should seek to:

1. Empower consumers to use software they want;
2. Protect and expand the standards-based open web;
3. Create the right incentives today for digital competition; and
4. Enable the horizon of independent innovation.

Question 13 asks whether respondents agree with the designation and code of conduct model proposed by the ACCC. Subject to the comments made in this response and Mozilla's previous responses to ACCC consultations, a regime based on designation and codes of conduct is capable of achieving the objectives outlined above. The ACCC has rightly focused on promoting competition, *informed and effective* consumer choice and fair trading and transparency. However, given the nature of the harms identified by the ACCC, including that "*[d]igital platform markets have a tendency to tip (leaving one or 2 firms dominating a market) and feature high barriers to entry and expansion*"[24], it is crucial that the relevant regulator has the appropriate powers to enforce the regime, as detailed further below.

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[23] Luguri, Jamie and Strahilevitz, Lior, Shining a Light on Dark Patterns (March 29, 2021). 13 Journal of Legal Analysis 43 (2021) "*…aggressive dark patterns generate a powerful customer backlash whereas mild dark patterns usually do not. Therefore, counterintuitively, the strongest case for regulation and other legal interventions concern subtle uses of dark patterns*."

[24] Fifth Interim Report, page 7

The ACCC's proposal for a code of conduct model is justified and Mozilla agrees that the development of such codes of conduct should, as a minimum, be informed by analysis and assessment of competition related to the particular type of service (as noted below, Mozilla considers it important that the regulator has scope to tailor codes to individual companies). However, it should be noted that the more 'bespoke' each code is, the greater the burden on the regulator to designate the relevant platforms and then develop different codes of conduct for each service. The effectiveness of the entire regime may then depend on the prioritisation decisions of the regulator. Even if the regulator is equipped with sufficient resources to develop codes simultaneously, it is vital that platforms which are widely-used and harming competition and consumer choice are swiftly regulated. As noted below in more detail, the role of consultation and the involvement of third parties in the development of codes of conduct and any accompanying guidance will be an important factor in their success or failure in meeting the stated objectives.

Effective designation is critical *[Question 15]*

Central to the success of any Australian competition regulatory regime will be ensuring that relevant platforms and services fall within the scope of the regulation. We have already noted above that a regime which focused only on mobile operating systems and ignored desktop operating systems would have serious deficiencies in the outcomes it could achieve for Australian consumers.

Effective regulation will require a holistic approach and the regime must ensure that relevant services are defined widely enough so that either: (a) it can address the wider ecosystem of a particular company; and/or (b) allow interventions and actions that can take into account situations where firms are designated for multiple services.

In terms of creating legal certainty as to which firms will be designated and to minimise the burden on the regulator, automatic designation where certain quantitative criteria are met will be preferable. One of the biggest challenges to the UK proposals is likely to be the proposed designation process, i.e. that the CMA must investigate each company and activity before it can be designated. However, qualitative criteria should also play an important role to underpinning the quantitative criteria and, importantly, the regime should allow the regulator to designate firms and services who do not meet quantitative thresholds but do meet the qualitative criteria.

Any qualitative criteria should, as suggested by the ACCC, consider whether the platform occupies an important intermediary position and/or is an unavoidable trading partner for business users. For firms who meet the relevant thresholds, there should not be space to lobby their way out of designation – loopholes or firm-specific carve-outs would undermine the integrity of the whole framework.

Obligations and Codes will need to provide for differences in the business models of different designated services while company/service specific codes would require effective prioritisation *[Questions 14, 17, 17.1, 18]*

In relation to **Question 14**, Mozilla considers that it is essential that any regime and regulation allows the flexibility to address differences between the business models underpinning designated services. For example, as identified in the CMA's mobile ecosystems market study, Apple and Google provide many of the same services but operate business models that are distinct (albeit with important overlaps).[25] Accordingly, implementing identical codes for reference to the same service may be less effective, less targeted or unnecessarily burdensome where codes:

- Are not capable of being sufficiently specified to address differences between companies operating the same services;
- Include obligations and requirements which do not have any application to a particular company thus resulting in many more obligations that are strictly necessary.

Notwithstanding this, in practice, it is likely that certain obligations will be universally applicable to either all designated digital platforms or specific services. Where this is the case Mozilla can see the benefit of prescribing general obligations in legislation and service specific codes. To this end, Mozilla supports prescription of general obligations and/or principles in legislation (which could create legal certainty and reduce scope for challenge) and setting specific requirements in codes. What is critical is that between any general obligations and specific codes, the regulator has sufficient scope to address all harms.

Relatedly, and in response to **Question 17.1**, Mozilla notes the ACCC's unique approach of applying codes of conduct which are specific to each service has the potential to be a powerful tool and could facilitate more efficient implementation. For example, this may allow the regulator to designate more companies and services more efficiently and circumvent issues of prioritisation. However, the most effective regulation will be that which is capable of being specified to address a particular company's position and conduct. Accordingly, where codes are targeted at a specific service, Mozilla believes that the regulator should have discretion to further specify a code to individual companies both at the point of designation *and* through subsequent amendment.

In response to **Question 18** Mozilla notes that it is crucial that any codes of conduct are mandatory; voluntary codes have been shown not to be effective in other industries and would serve little purpose in the context of regulating digital platforms.[26] Moreover, the reasons for

[25] See for example, para 4.22 and 4.23 of CMA Final Report
[26] For example in Financial Services (https://www.fca.org.uk/publication/policy/ps18-18.pdf) and mining (Sethi, S.P. and Emelianova, O. (2006), "A failed strategy of using voluntary codes of conduct by the global mining industry", *Corporate Governance*, Vol. 6 No. 3, pp. 226-238. https://doi.org/10.1108/14720700610671837)

adopting voluntary codes and the conditions in the ACCC's guidelines are not present in the context of powerful digital platforms.[27]

Targeted obligations to promote competition should address all forms of anti-competitive leveraging, including in relation to browser and desktop competition *[Question 16]*

Question 16 asks for feedback on the types of conduct set out by the ACCC in Recommendation 4. The list of principles and the examples set out to illustrate the obligations have accurately identified many of the issues. However, Mozilla notes that not all conduct involving leveraging is sufficiently captured. For example, whilst tying is a form of leveraging, it is not clear that, for example, the regulator could address harm arising from use of data collected by a Designated Digital Platform from third parties as an intermediary in one service to its unfair advantage in another service.

By not clearly calling out anti-competitive leveraging, the proposals risk excluding conduct between different products and services which may not be sufficiently caught by self-preferencing and which, for example, occur on desktop and other operating systems. They also do not consider the specific conduct which limits browser competition which have been identified elsewhere in the ACCC's report. Examples of such conduct can be found in Mozilla's recent report and include the operating system provider granting themselves preferential access to APIs and functionality, data, app stores, in-app browsers and even prohibiting rival browsers from the platform.[28] To the extent that anti-competitive leveraging is intended to be caught by anti-competitive self-preferencing and anti-competitive tying, this should be clear in the legislation.

In addition, Mozilla would note that interoperability is an important principle for overcoming some of the network effects the ACCC has identified. As set out in more detail in previous submissions, effective participation in open standards can be a powerful tool to address the centralisation of power in digital platforms. As stated in Mozilla's Manifesto: "*The effectiveness of the internet as a public resource depends upon interoperability (protocols, data formats, content), innovation and decentralized participation worldwide*." Accordingly, any ex-ante competition regulation should encourage gatekeeper platforms to share the responsibility of maintaining an open internet.

4. Effective implementation and enforcement

The ACCC is well-placed to be the relevant regulator *[Questions 19 to 21]*

Questions 19 to 21 ask who should be responsible for various parts of the regime, including enforcement. In our view, the ACCC is particularly well-placed to design the codes of conduct, designate platforms and enforce the obligations. Having dedicated much resource and time to in-depth investigations into digital platforms, the ACCC understands these markets relatively

[27] https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf
[28] Mozilla, Five Walled Gardens Report, September 2022

well and would therefore start from a position of strength. However, it must be equipped with the staff, technical expertise and resources to enable it to carry out this job fully and swiftly.

It is important that the ACCC has sufficient ability to design codes of conduct, including, where appropriate to specify and/or approve remedies. To this end, Mozilla notes historic challenges in relation to consumer switching.

The ACCC's fifth report is rightly cautious in its consideration of choice screens. If, as suggested by the ACCC, they are to be one of the tools deployed by regulators to improve search competition, they should also be considered in the context of browsers. However, we note that choice screens have proved an attractive solution for competition authorities in the past but with unsuccessful results. We therefore urge careful consideration to the timing, design, level of oversight and assessment in partnership with oversight bodies, browser developers, and others. This includes knowing relevant details on timing to give consumers advance notice and support with public communications.

Given that Designated Digital Platforms will have little incentive to implement effective choice screens, it would also be helpful to invite public opinion, for example from academics, consumer advocates, researchers and impacted browser stakeholders to offer insights that can improve the consumer experience and intended impact to competition. For example, ethical design theorists can help ensure the resulting choice screen does not have deceptive design patterns that can strongly influence behaviour in one direction and instead present options that are equal in parallel, with consideration to cognitive load, and add to meaningful choice with additional information.

Market testing of choice screens and similar remedies is essential, with sufficient attribution metrics available to browser developers to understand the impact of the choice screen on installation and retention. We also believe a public report with transparent metrics should be made available and that this should include progress on removing operating system controls over independent browsers, improving web interoperability on dominant platform services, and prohibiting platform induced consumer friction.

Question 22 asks what checks and balances should be in place on decision-makers. Particularly important in this regard will be: (1) transparency of the regulator's dealings with potential Designated Digital Platforms; and (2) proper consultation with third parties.

Consultation with third parties and transparency will be important checks and balances *[Questions 22 and 23]*

In terms of transparency, the regulator should provide frequent updates of decision points and interactions with potential regulated entities. We have also called for the establishment of a safe harbour allowing researchers, journalists, and others to access relevant datasets, free from threats of legal action in the context of the ACCC's consumer protection proposals; such transparency should also be considered here.

Transparency and third party participation will be aided if a "regulatory relationship" as seen in sectoral/economic regulation is adopted. The most successful relationships with regulated entities take an entirely different approach from the adversarial nature of antitrust enforcement proceedings and seek engagement with stakeholders.[29] In order to work, not only must there be regular dialogue between the regulator and the entity, but there must also be regular and open interaction and consultation with stakeholders, including competitors and consumers of the regulated entity. As such, our view is that the regulator will only be properly equipped to enforce the regime if they benefit from the input of interested parties, not only competitors and consumers, but also academics and civil society actors.

In addition, and in response to **Question 23**, it is right that avenues of dispute exist but they must be *proportionate.* To this end, where the relevant regulator has the expertise, the availability of full merits review of regulator decisions should be carefully considered and is unlikely to be appropriate to the proposed regime.

Strong information gathering and enforcement powers are necessary for compliance *[Question 24]*

Connected to establishing a "regulatory relationship" is the importance of strong powers both to request information from potential Designated Digital Platforms and to enforce the rules which apply to them. **Question 24** relates to the information gathering powers that should be granted to the regulator. In order to regulate entities in telecommunications, energy and other similar sectors, agencies have wide-ranging powers to request information and to direct the entity to act. Such powers have long been recognised as essential for an effective regime and should similarly be granted to the regulator tasked with enforcing a new competition regime.

As stated by the UK Government, the Digital Markets Unit will have effective information gathering tools and be able to interrogate the impact of algorithms on competition and require platforms to carry out field experiments or A/B testing. Such powers should similarly be granted to the regulator enforcing Australia's regime to ensure they have the information necessary to make precise and well-targeted interventions.

Further, it is essential that the regulator has sufficient powers to obtain relevant information even where it is controlled or held in another jurisdiction.

Alignment with other jurisdictions is important but should not prevent regulatory action *[Questions 25 to 27]*

Questions 25 to 27 the place of an Australian regime relative to other regimes internationally. In developing its Interim Report No. 5, the ACCC has carefully considered the proposals for

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[29] See, for example, International Insights for the Better Economic Regulation of Infrastructure, Rob Albon and Chris Decker, Working Paper No. 10, March 2015, Australian Competition and Consumer Commission (ACCC)/Australian Energy Regulator (AER) Working Paper Series, section 3 http://regulatoryeconomics.co.uk/wp-content/uploads/2019/09/International-Insights-for-the-Better-Economic-Regulation-of-Infrastructure-1.pdf

competition regulation put forward in other jurisdictions, notably the EU and the UK. This has allowed it to create well thought-out proposals which draw on some aspects of other regimes. Mozilla supports this approach and the continued coordination of the ACCC with other international regulators. It is important that regulators share information and best practices when establishing and enforcing new regimes to regulate multinational technology companies with market values larger than the GDP of many countries.[30] This will be particularly important when developing the codes of conduct and deciding how platforms must comply; to avoid unintended consequences, regulators should ensure that there is not excessive burden on smaller companies which rely on Designated Digital Platforms and subsequently are forced to implement their products in different ways in different jurisdictions to take into account different regulatory approaches to those powerful platforms.

On the other hand, Mozilla would note that the need for international alignment should not prevent a regulator taking up a competition issue where it is well-founded. For example, in the Google Privacy Sandbox case, the CMA was the first to act and Google provided commitments which it agreed to apply on a global basis.[31] Further, it is not the case that harmful practices affect all jurisdictions and consumers equally and regulatory divergence may be appropriate, provided it does not harm or create excessive burden for independent competitors.

5. Proposals for consumer protection

Mozilla supports the ACCC's focus on deceptive patterns and excessive data collection and use in its proposals for consumer protection.

The ACCC is right to consider privacy alongside competition and consumer protection

The internet is powered by consumer data. While that data has brought remarkable innovation and services, it has also put internet consumers, and trust online, at substantial risk. We believe that everyone should have control over their personal data, understand how it is obtained and used, and be able to access, modify, or delete it. As noted by the ACCC, most Australian consumers are uncomfortable with how their personal information is handled by digital platforms, and expect the government to provide protections that allow them to participate in the digital economy without excessive tracking and surveillance. They are also concerned about profiling, discrimination and data being used in ways they did not anticipate.[32] Consumers should be protected from particularly egregious practices (such as third party tracking) by default, both in the form of technical measures but also strong legal protections.

The current state of advertising online is full of risks for both consumers and innovation. It is a hostile place for consumer privacy, and is effectively an arms race between browser anti-tracking technologies and trackers. It is opaque by design, rife with fraud, and does not

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[30] Fifth Interim Report, page 30

[31] https://blog.google/around-the-globe/google-europe/path-forward-privacy-sandbox "*We will apply the commitments globally because we believe that they provide a roadmap for how to address both privacy and competition concerns in this evolving sector*."

[32] Fifth Interim Report, page 57

serve the vast majority of those which depend on it - from publishers, to advertisers, and of course, the people who use the open web. It is also important to note that many critical aspects of internet architecture were not created with privacy in mind.[33]

At the same time, there is nothing inherently wrong with digital advertising; it supports a large section of services provided on the web. However, the ways in which advertising is conducted today - through pervasive tracking, serial privacy violations, market consolidation and lack of transparency - are not working and cause more harm than good. In particular, the linkage of data collected by advertisers leading to harmful decisions in other high consequence contexts (such as hiring, for example) is a growing concern.

Governments, regulators and technology companies together have an opportunity to improve the privacy properties of online advertising - an industry that has not seen privacy advancement in many years. In an ideal state, a combination of new research, technical solutions, increased public awareness, and effective regulatory enforcement will reform advertising for the future of the web.

Researchers can help to understand the harms a new regime is seeking to address

A large amount of harm happens on major platforms outside the view of regulators and the public. These platforms offer highly sophisticated targeting tools that allow content producers to narrowly segment their audience, tailor content accordingly, and reach people most susceptible to their messages. Each consumer has their own individualised, potentially misleading or deceptive experience. This highly personalised experience means that harm enabled by platforms through their targeting systems is not easily identified by regulators, watchdog groups, or researchers. Because the experience is so personalised, harm can sometimes only be shown anecdotally, when a particular piece of content appears to be harmful and when the regulator is somehow made aware of that content. There is dangerously little insight into what people experience, what adverts are presented to them and why, and what content is recommended and why. This creates an asymmetry of information between those who produce harmful content and those seeking to understand it.

Accordingly, Mozilla supports creating a legal safe harbour for public-interest research and journalism that respects user privacy. This is key to shedding light on hidden harms and disinformation. Such a safe harbour should protect research in the public interest as long as researchers handle data responsibly and adhere to professional and ethical standards. We know there is enormous value this can provide to the public. Mozilla has one of the earliest Bug Bounty[34] programs in software; we make clear that we will not threaten or bring any legal action against anyone who makes a good faith effort to comply with our vulnerability notification policy

[33] Mozilla notes that the Google Privacy Sandbox case raises both privacy and competition concerns. We have advised the CMA to avoid oversimplified trade-offs between privacy and competition and not to sacrifice privacy in this context: https://blog.mozilla.org/netpolicy/2021/12/17/privacy-sandbox-cma-dec2021/

[34] https://www.mozilla.org/en-US/security/bug-bounty/

because this encourages security researchers to investigate and disclose security issues. Their research helps make the internet a safer place.

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