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Integrating Consumer Behaviour Insights in Competition Enforcement – Note by the United Kingdom

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This document reproduces a written contribution from the United Kingdom submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm

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1. While consumer behaviour has always been a central component of competition enforcement, the rise of digital markets has further reinforced its importance. Behavioural biases can be exacerbated in the online world, and businesses have an increasing understanding of how to take advantage of these biases, and more control over their interactions with consumers in online environments.

2. The Competition and Markets Authority (CMA) created its six-person Behavioural Hub in February 2019, to use knowledge and techniques from behavioural economics, psychology and related fields to analyse and understand human behaviour in markets. The team sits within, and complements, the wider Data, Technology and Analytics (DaTA) unit, which includes data scientists, data engineers, technology insights specialists and digital forensics experts, created to keep pace with technological developments in markets and improve the CMA's operations.

3. The Behavioural Hub provides cross-cutting specialist support for case teams across the CMA's consumer and competition remits, by providing rapid advice, compiling detailed evidence, drafting report sections and running behavioural experiments. To illustrate how the team has already contributed to the CMA's competition work, below we highlight a recent cross-cutting project on online choice architecture, and two examples where the team has provided in-depth behavioural analysis of competition issues as part of market studies into digital platforms.

1. Online Choice Architecture in markets

4. One of the primary ways businesses can influence consumer behaviour and, in turn, competition is through how they choose to design their interactions with consumers online – or their online choice architecture (OCA).

5. Design choices like the order of products in which search results are presented, the number of steps needed to cancel a subscription, or whether an option is selected by default, can all influence consumer behaviour and the resulting competitive dynamics. Often these practices benefit consumers and competition: a well-designed website, app or digital service built with consumers' interests in mind will help consumers choose between suitable products, make transactions faster, and recommend new relevant products or services. However, they can also weaken competition if they exploit consumers' biases to make it harder to shop around or to switch between providers. In addition, the online environment has given businesses far greater control to personalise and optimise nearly every aspect of their interactions with consumers, presenting new opportunities for them to powerfully influence consumer behaviour, as well as new challenges for competition and consumer protection agencies.

6. To tackle these challenges head on, the CMA's Behavioural Hub recently published a discussion paper and a large evidence review on the role of OCA in competition and consumer protection regulation and enforcement.[1] The papers are intended to complement

[1] CMA. (2022). Online Choice Architecture: How digital design can harm competition and consumers.

existing work, including the OECD's ongoing work on dark patterns, and to prompt further international discussion on the role OCA should play in competition enforcement.

1.1. An OCA taxonomy for consumer and competition regulation

7. In the papers, we outline how OCA practices can be categorised into three broad groups:

1. Choice structure: how choices are presented to consumers.
2. Choice information: the information provided to consumers when presenting choices.
3. Choice pressure: how consumers' choices may be indirectly influenced.

8. Under these three categories we identify 21 distinct OCA practices:

Table 1. Taxonomy of OCA practices

Choice structure	Choice information	Choice pressure
Defaults	Drip pricing*	Scarcity and popularity claims
Ranking	Reference pricing	Prompts and reminders
Partitioned pricing	Framing	Messengers
Bundling	Complex language*	Commitment
Choice overload and decoys*	Information overload*	Feedback
Sensory manipulation*		Personalisation
Sludge*		
Dark nudge*		
Virtual currencies in gaming		
Forced outcomes*		

Note: Practices that are usually or always considered harmful
Source: CMA, 2022, Online Choice Architecture: How digital design can harm competition and consumers

This taxonomy, and the underlying research gathered in our evidence review, are intended to help to generate more of a shared understanding and language for professions, agencies and other stakeholders who have an interest in identifying OCA practices and their impact across consumer and competition issues.

1.2. Types of harm caused by OCA

9. OCA can cause three types of harm to consumers and markets. The first harm is that OCA practices implemented by any business, regardless of market power, have the potential to distort consumer behaviour and decision making. Influenced by OCA, people may purchase unneeded or unsuitable products, spend more than they want to, receive poor value items or service, choose an inferior seller or platform, or search less for alternatives.

10. As well as their influence on purchasing decisions, OCA practices may also be designed to induce data disclosures, increase product engagement, and encourage sharing amongst social networks. This can lead to other non-financial types of harm, such as unwanted marketing advances, privacy invasion, reduced enjoyment or excessive use.

11. For example, false or misleading scarcity claims about a product (such as "only 2 left!" or "25 customers are looking at this product") can exert pressure on consumers to make quick decisions and reduce trust in markets by making it difficult to identify when products are actually scarce. In its online hotel booking sector investigation, the CMA had concerns that some platforms used untrue or misleading scarcity claims to create a false

impression of limited hotel availability and rush consumers into making a booking decision.[2]

12. Distorting consumer behaviour in turn can lead to a second harm: OCA can weaken or distort the competitive process. Certain harmful OCA practices can make it harder for consumer to notice when they are getting bad deal, to compare between products, or to switch away from existing providers. The ease and potential profitability of using these practices can mean competition rewards businesses on using those practices most effectively (a 'race to the bottom'), as opposed to improving product attributes that benefit the consumer, such as price, quality or innovative product features.

13. One practice that can weaken competition is drip pricing: showing the total price in increments, to take advantage of consumers' focus on headline prices when searching and comparing. Following the Advertising of Price market study[3], the Office for Fair Trading (OFT) – predecessor of the CMA – launched a number of cases against airlines that used drip pricing to charge additional fees for making a payment by debit card.[4]

14. The third and final harm is that OCA practices can help businesses that have market power to maintain their position unfairly, to leverage their power in other markets or to exploit their existing customers.

15. Digital markets often exhibit network externalities – the more users a platform has (be it a social media website, a peer-to-peer marketplace or a search engine), the more valuable that platform is to other users. Where OCA practices are used to unfairly acquire or retain consumers in markets with network externalities, they can make it harder for rivals or entrants to compete, potentially leading to poor outcomes for consumers.

16. OCA practices can also be used to leverage existing power from one market into other. For instance, the European Commission found that Google abused its dominance as a search engine to give its own comparison-shopping service prominent placement, while demoting rivals in the search results. As consumers click far more often on results that are more visible, the Commission concluded that Google had therefore given its own comparison service a significant advantage compared to rivals and imposed a fine of €2.4 billion.[5]

17. Investigating any of three of these harms requires an understanding of the impact of OCA on consumer behaviour, highlighting the importance of taking a behavioural approach to investigating both consumer protection and competition concerns.

2. Behavioural insights in competition cases

18. Behavioural insights are routinely integrated into the CMA's assessment of competition cases and market studies. This work involves embedding behavioural experts in case teams to investigate and understand how firms design interfaces, products and

[2] CMA. (2017). Online Hotel Booking; Fung, S. S., Haydock, J., Moore, A., Rutt, J., Ryan, R., Walker, M., & Windle, I. (2019). Recent Developments at the CMA: 2018–2019. Review of Industrial Organization, 55(4), 579-605.

[3] The Office of Fair Trading (OFT). (2009). Advertising of Prices.

[4] The Office of Fair Trading (OFT). (2012). Airlines: Payment Card Surcharges Investigation.

[5] European Commission (EC). (2017). CASE AT.39740 Google Search (Shopping); European Commission (EC). (2017). Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service.

transactions affect consumer behaviour. While all competition issues are unique and will require unique analysis, common behavioural themes in cases include how easy the market is to navigate when comparing providers and offers, how well consumers understand the future consequences of initial commitments and how defaults are designed.

19. To gauge those questions, we use a wide array of methods, including mapping user journeys, choice architecture analysis, surveys and desk research. We are also building capacity to run experiments, including online experiments, field trials and natural experiments using historical data when applicable, as well as in-depth qualitative methods, such as cognitive interviews, focus groups and eye tracking research.

2.1. Case 1: Mobile ecosystems market study

20. In June 2021, the CMA launched a market study over concerns that Apple and Google's duopoly over the supply of operating systems, app stores and web browsers, together forming the mobile ecosystems, is harming users and restricting competition in digital markets.[6] Behavioural insights and analysis played an important role in the CMA's interim report on the market study, published in December 2021, looking at a range of choice architecture practices that can affect users' decision making, such as defaults, framing and ordering of choice options.

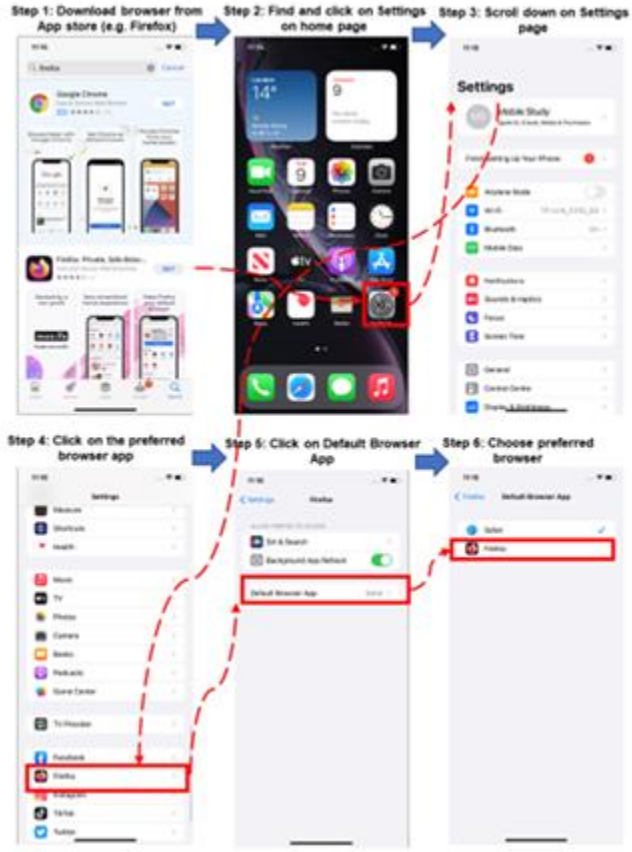
21. The report discussed how Apple and Google influence users' behaviour in terms of the mobile browser they use through choice architecture, including in particular pre-installation and default settings. Default in this regard means that the browser automatically opens and renders a webpage upon a user clicking a link to a website, for example, in an email, without the user needing to select the browser manually.

22. Evidence from consumer surveys discussed in the report showed that there can be several reasons why consumers stick to the default or pre-installed browser and do not switch. These reasons include a preference for maintaining the status quo and not knowing how to switch, but also showed that the pre-installed and/or default browser can be consumers' preferred browser.

23. The report noted that the user journey for changing default browsers on both iOS and Android devices involves a number of potentially complex steps. Further, the relevant option in device settings for switching defaults may not always have intuitive text labels, making it harder for users to search for them. For example, Figure 1 illustrates the user journey for changing default browser settings on an iPhone. The user journeys for changing default browsers on both an iPhone and an Android smartphone involve downloading an additional browser from the Apple App Store or the Google Play Store and navigating to the relevant option on device settings to choose the preferred browser.

[6] CMA. (2021). Mobile Ecosystems Market Study.

Figure 1. User journey for changing default browser setting on Samsung Galaxy smartphone



Source: CMA, 2021, Mobile ecosystems market study interim report, Appendix G

2.2. Case 2: Online platforms and digital advertisement market study

24. The CMA launched a market study into online platforms and the digital advertising market in the UK in July 2019.[7] The market study aimed to assess the market power of Google and Facebook in search and social media respectively, whether consumers have sufficient control over the use of their data by online platforms, and whether platforms' market power can distort competition in the digital advertising market.

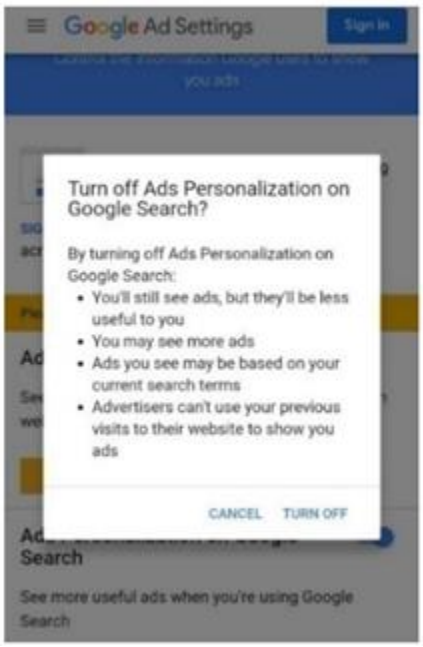
25. With regards to the implications of online choice architecture practices on consumer behaviour, the final report of the market study published in July 2020 noted the strong impact of pre-set defaults on consumers' choice of search engine. The study found Google was set as the default search engine for at least 94% of mobile devices manufactured and for over 99% of mobile browsers used, having paid just under £1.2 billion to mobile manufacturers in 2019 for that position. This default position was found to have negative effects on competition, helping Google to shore up its position as the largest and most revenue-generating search engine, while creating a feedback loop, making it more difficult for competitors to grow their user bases and improve their search quality, to become a more credible competitor to Google.

26. Further, the study found that default settings and the choice architecture of data privacy choices - including the difficulty in changing default settings, framing of choices,

[7] CMA. (2020). Online Platforms and Digital Advertising Market Study.

some information presented as more prominent than the rest, and lengthy and complex privacy policies and terms - impact consumers' ability to control the use of their data by online platforms. For example, Google presents a warning to users before they proceed with turning off personalised advertising that employs negative framing (eg that they will 'still see ads, but they'll be less useful', and they 'may see more ads') without referring to potential benefits (eg the platform no longer using the consumer's data for advertising) (see Figure 2 below).

Figure 2. Google warning page before turning off personalised advertising using negatively framed language



Source: CMA, 2020, Online platforms and digital advertising final report, Appendix Y

27. The market study proposed two choice architecture-related remedies to enhance consumer control over their data on platforms with Strategic Market Status (SMS), and for the Digital Markets Unit (DMU) to be empowered by government to review their implementation.[8] First, it proposed a "choice requirement" for platforms to give consumers the option to use services without requiring in return the use of their data for personalised advertising. Second, it proposed a "Fairness by Design" Duty for platforms "to ensure that choices and defaults provided by the platform are presented in a way that facilitates informed consumer choice over the use of their personal data".

3. Future work integrating behavioural insights into the CMA's competition enforcement

28. As illustrated above, behavioural insight already plays a central role in the CMA's competition enforcement work. Following the OCA papers' publication, we have already started to apply our improved understanding of OCA into ongoing casework, and we plan

[8] CMA. (2020). Online Platforms and Digital Advertising Market Study. Appendix Y: Choice Architecture and Fairness By Design.

to more actively investigate specific OCA practices that may harm consumers or competition using the full range of powers available to us.

29. The papers also mark the launch of further CMA research to build our understanding of the prevalence of harmful OCA practices and identifying in which sectors, industries and modalities they are concentrated. This will help to target efforts to investigate and tackle breaches of the law and harm to consumers and competition.

30. We also hope to build on the CMA's recent work on algorithms (both unilaterally and as part of the Digital Regulation Cooperation Forum [DRCF][9]) to understand more about how they interplay with consumer behaviour and OCA practices. The development of automated algorithms enables businesses to put data to use at speed and scale in ways that drive many elements of OCA and consumers' online experiences, such as in recommender systems or search engine ranking. Like OCA, while algorithms can bring significant benefits, they can also cause harm to consumers through privacy invasion, opaque personalised pricing, discrimination against personal characteristics, or reduced information diversity, as well as to competition through implicit collusion or unfair/self-preferenced ranking. Understanding the effects of algorithms remains a priority area for the CMA across our digital cases.

[9] CMA. (2021). Algorithms: How they can reduce competition and harm consumers; Digital Regulation Cooperation Forum (DRCF). (2022). Findings from the DRCF Algorithmic Processing workstream - Spring 2022.