Coalition for App Fairness - Position Paper on the Digital Markets, Competition and Consumers Bill

About the Coalition for App Fairness (CAF)

CAF represents a large number of SMEs, entrepreneurs, and app developers who are dependent on access to large mobile online platforms to distribute their innovative products and services to the benefit of smartphone users. CAF was originally formed by Basecamp, Blix, Blockchain.com, Deezer, Epic Games, the European Publishers Council, Match Group, News Media Europe, Prepear, Proton, Spotify, and Tile, including a number of UK based companies such as xigxag, Checkatrade, Olio, and Paddle. CAF has rapidly grown from 13 to over 70 members since launching in September 2020.

Our position on the proposed Digital Markets Regime

We welcome steps taken by the Government and the Competition and Markets Authority (CMA) to acknowledge the need for a pro-competitive digital markets regime. We believe the Digital Markets, Competition and Consumers Bill will give the Digital Markets Unit (DMU), the tools to address Apple and Google's market power over their mobile ecosystems. In its Mobile Ecosystems Final Report, the CMA found that "Apple and Google have substantial and entrenched market power in native app distribution, with limited constraints on either the App Store or the Play Store."[1] It further found that "Apple's and Google's control over their respective mobile ecosystems allows them to set the 'rules of the game' for app developers, who rely on their app stores to reach customers and have little or no ability to negotiate over terms."

As a coalition of app-based businesses, our members want every app developer to have an equal opportunity to innovate and engage with their customers, free from arbitrary policies, unfair transaction fees, or monopolistic control by app store owners.

Summary of CAF's recommendations to strengthen the DMCC Bill

1. A holistic mobile ecosystems approach - The 'leveraging principle' (clause 20(3)(c)) is critical to ensure the regime can handle anti-competitive activity across different parts of digital ecosystems that don't break down neatly into individual 'activities'. We need a comprehensive solution in the form of a stronger leveraging principle, to prevent Apple or Google simply moving its 30% fee from one location in its ecosystem to another - e.g. from app store 'service fee' to a new location like an operating system licence.

2. Deadline for implementation of conduct requirements - Although conduct requirements can be considered alongside SMS designation, there is no statutory deadline for the DMU to impose the first set of conduct requirements. Without this, the regime will take too long to tackle

[1] The Competition and Markets Authority, 'Mobile ecosystems: Market study final report', June 2022

anti-competitive practices deployed by Apple and Google. The deadline should only cover the first set of conduct requirements as the DMU should be free to add subsequent requirements.

3. Consultation rights and transparency for non-SMS firms - There are places where the DMU is only required to publish a summary of a given document, meaning that that SMS firm will be given greater detail than non-SMS firms. The non-SMS firms that are most directly affected should have equal consultation rights to the SMS firms.

4. Using market studies to inform the DMU's work from day 1 - We understand that the DMU will want to build upon its comprehensive market study reports, which is welcome, but the Bill does not explicitly state that they are able to do so. The DMU will face strong calls from the SMS firms to start with a blank piece of paper, despite the DMU operating in 'shadow form' for the past two years, therefore, a provision that enables the DMU to "take account of" recent analysis (e.g. within the last 5 years) would empower the DMU to act more quickly.

5. Judicial review approach to appeal - We strongly support the judicial review standard of appeal, which is the well-established standard in UK regulated sectors and which is flexible enough for the courts to exercise a very high level of oversight over DMU actions. A full merits appeal would undermine the new regime to such an extent that it may not fulfil the purpose it is designed to fulfil. It is imperative that SMS firms are not able to re-argue the merits of the case or ask the court to impose its own views on the substance of the case.

A lack of a proper competition in the mobile app economy is contributing to several issues including:

- **Artificially raising prices for consumers**. In 2021, the CMA found that Apple and Google were able to earn more than £4 billion of profits in 2021 from their mobile businesses in the UK over and above what was required to sufficiently reward investors with a fair return. This is an excess of £4 billion that both would most likely invest on innovating their services for consumers were they to face fair competition in the market. There are 27.8 million households in the UK, meaning an approximate cost of ~£148 per household.
- **Stifling UK start-ups' ability to scale and innovate by taxing 30% of most app purchases** restricting developers of much needed capital to invest in and grow their business. For most purchases made through an app, gatekeepers take a 30% fee from the purchase price for using its in-app payment system, which it requires as a condition to access their respective app stores. This "app tax" cuts deeply into consumer purchasing power and developer revenue, and it creates a steep barrier to entry for new developers, hurting their ability to innovate.
- **Restricting competition and freedoms through self-preferencing** gatekeepers unfairly promote their own apps. Google paid Apple £1-1.5 billion in ad revenue in the UK for being the default search engine on the Safari browser alone.

This behaviour not only restricts competition and freedoms but has even forced some developers out of business when they do not play by the gatekeepers' rigid rules. Therefore there is an urgent need to ensure this Bill is passed swiftly and is protected from undue influence from big tech.

CAF Recommendations

First and foremost, the Coalition for App Fairness believes that the Digital Markets, Competition and Consumers Bill provisions on Digital Markets are well designed and must not be watered down. The Bill as drafted, will give the DMU the ability to act quickly and effectively, and provide proportionate recourse for developers, consumers and SMS firms. That said, we believe there are several areas where the Bill could be improved to accomplish the principles of the regime.

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Strategic Market Status (SMS) and Pro-Competitive Interventions (PCIs)

CAF welcomes the legal test in the Bill for 'Strategic Market Status', which is based on substantial and entrenched market power and the presence of a strategic position. We also support the safe harbour threshold whereby a business is not eligible for SMS consideration if it has less than £25 billion of global revenues and £1 billion of UK revenues.

We therefore see it as inevitable that Apple and Google's mobile ecosystems are captured by the SMS designation criteria as written. In order to deploy enforcement resources efficiently, we call for SMS designation to focus on the handful of systemic gatekeepers like Apple and Google, who control global ecosystems and gateways to key markets for UK businesses.

We support the flexibility given to the DMU in writing the conduct requirements and the permitted types of conduct requirement in section 20.

We also support the PCI provisions, which will help the DMU to tackle the existence of market power in digital markets.

A holistic mobile ecosystems approach: Strengthening the 'Leveraging Principle' in section 20(3)(c)

The Bill states that conduct requirements may prevent the SMS firm from "carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity".

The leveraging principle is critical to the success of the pro-competition regime. Without it, the DMU will find itself unable to address harmful conduct and will meet arguments about "where" (i.e., in which activity) a piece of conduct occurs, because the DMU will be unable to touch conduct that occurs outside the SMS activity even if it is closely related to the SMS activity.

A stronger leveraging principle would prevent Apple or Google simply moving its 30% fee from one location in its ecosystem to another - e.g. from app store 'service fee' to a new location like an operating system licence. This will prevent a 'whack-a-mole' situation in which the regulator is always having to define new activities to catch up.

> **Recommendation 1**: At a minimum, the leveraging requirements should stay as they are in Section 20, clause 3.
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> However, we recommend the amendment could be amended as follows to strengthen it further: *"carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, ~~in relation to the relevant digital activity~~ provided its ability to carry on in that way is related to the relevant digital activity."*

Statutory deadline for conduct requirements

For swift implementation, we support the Bill's approach that conduct requirements can be written alongside an SMS designation investigation. However, we need a statutory time limit for the initial set of conduct requirements to be implemented. As it is likely the DMU will have considered the

conduct requirements before the SMS designation decision is made, we believe that the DMU should be required to impose the initial set of conduct requirements either at the same time as the SMS designation or within three months after that date. A central feature of the new regime is to enable the DMU to revise its rules as time goes on, so the deadline should apply only to the initial set of conduct requirements so as not to hinder the DMU in revising them or adding to them subsequently.

Without a deadline, Apple and Google's high commission rates could continue to artificially increase prices for consumers long after the SMS designation decision has been taken. We have seen this on numerous occasions, for example, Apple forced ProtonMail, the developers of a secure email app and service, to implement IAP and monetise what had been a free app, raising prices by nearly 26%. ProtonMail saw its app become less competitive with fewer purchases and downloads by iOS users. As ProtonMail's CEO told The Verge, it's very rare to find a business with a 30% percent profit margin that can absorb Apple's mandatory fees and succeed.[2] As Proton Mail's CEO pointed out, ""When Apple charges 30 percent extra ... we don't have a 30 percent margin! It's very odd to find a business with 30 percent profit margins," he explains. "We had to raise the prices, and we weren't even able to communicate to our customers that they could get it cheaper from our website."

Not all start-ups have the ability to withstand this financial pressure - which is why we need a statutory timeline to provide legal assurances as to how smaller developers can operate their business.

> **Recommendation 2**: *We need to see a timeline for enforcement of conduct requirements set out on the face of the Bill and in CMA Guidance. We recommend that 3 months after SMS designation is an appropriate window to ensure swift action on SMS firms.*

Consultation & transparency provisions

CAF has some concerns about the consultation and transparency provisions whereby the SMS firms may receive more rights than other affected parties. There is a risk that decisions are made without non-SMS firms' involvement and then only partially made public.

There are detailed consultation provisions of the SMS firm under investigation, but other affected parties may only see a "summary" of the proposed action. It is unclear how detailed this summary would be, but we assume it will mean that non-SMS firms will not be given access to the underlying analysis and data. This is a significant omission, especially if a non-SMS firm is seriously affected by a breach in conduct requirements. Small app developers do not have the same resources to volunteer themselves in every stage of CMA investigations as SMS firms. There should be a duty therefore, to notify and include them in the process with all the information they need to input meaningfully.

> **Recommendation 3**: *The Bill should be amended to ensure non-SMS firms are given equal status to the SMS firms and are therefore included in the SMS designation process (s.11-15) consultation process when collating evidence of harm in the investigation process, proposing and enforcing conduct requirements (s.19-24; 26-34), considering gatekeeper commitments (s.36); and Pro-Competitive Interventions (s.46-52).*

Insert a clause that the DMU can have regard to previous work on Day 1 of operation

[2] The Verge, 'Apple made ProtonMail add in-app purchases, even though it had been free for years', October 2020

The DMU has operated in 'shadow form' the past two years while waiting for legislation to come forward. It is vital that the work that it has produced in this period on Mobile Ecosystems can be used immediately so that the regulator can hit the ground running. We understand that the DMU intends to use its existing work to inform its work under the DMCC Bill, but there is no explicit provision that gives it the ability to do so. Legal arguments could be made by the SMS firms to obstruct the DMU and force them to re-run existing analysis. We therefore recommend that Section 2, Clause 4, is amended to make this clear:

> **Recommendation 4**: *"The CMA may only designate an undertaking as having SMS in respect of a digital activity after carrying out an SMS investigation in accordance with this Chapter, taking account of analysis undertaken by the CMA on similar issues within the previous five years that has been the subject of public consultation."*

Appeals

CAF strongly supports the judicial review standard applying in appeals to decisions of the CMA (Clause 101). It is imperative that SMS firms are not able to re-argue the merits of the case or ask the court to impose its own views on the substance of the case. The DMU is best-placed to take the relevant decisions as it will be staffed by experts in the field, including data scientists, and will have a strong governance process. The judicial review process is well-established and successful in UK regulatory regimes. It enables the courts to give detailed oversight of the DMU's actions, but without preventing the regime from functioning efficiently in these fast-moving digital markets. We believe this provision should be sustained in the Bill's final draft.

Apple has already sought to use legal loopholes to appeal regulatory actions on their market dominance, for example challenging the CMA's ability to launch a case into its mobile browsers and cloud gaming restrictions. A judicial review approach would prevent SMS firms from obstructing and lengthening the CMA decision process in the way that has been frequently witnessed under the existing competition law regime (which is one of the core reasons why the DMCC regime was proposed).

> **Recommendation 5**: *There should be sufficient guardrails on the appeals process to prevent a revision of the judicial review standard.*

The recommendations stated above are underpinned by the need for urgency for the DMU to be given its statutory powers. While app developers have to wait until the DMCC Bill passes, there is a real threat to start-ups' bottom line.

Contact

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