

Observations of the Coalition for App Fairness on the Statement of Scope of the CMA’s Mobile Ecosystems Market Study

I. Introduction

On 15 June 2021, the Competition and Markets Authority (“CMA”) published its Statement of Scope for the mobile ecosystems market study (the “Market Study”) launched on the same day. The Coalition for App Fairness (“CAF”) welcomes this Market Study, which will allow the CMA to acquire a comprehensive understanding of mobile ecosystems and their different components (mobile devices, mobile operating systems and applications), as well as consider areas where interventions might be appropriate to address any identified harms.

The Coalition for App Fairness (“CAF”) is an independent non-profit organization founded to advocate for freedom of choice for app developers and consumers and fair competition across the app ecosystem.¹ CAF’s vision is to ensure a level playing field for businesses relying on platforms like the Apple App Store to reach consumers, and a consistent standard of conduct across the app ecosystem. CAF comprises over 60 members, large and small, which have developed valuable apps to mobile device users.

The Statement of Scope correctly observes that “*mobile apps play an increasingly fundamental role in the operation of many UK businesses and in the lives of many UK consumers and are used to provide an increasingly wide variety of services.*”² While Apple and Google regularly claim that their app stores bring immense value to app developers and create millions of jobs, the reality is that app developers bring value to the app stores and consumers, and create millions of jobs, as these app developers are the ones providing an ever-growing array of products and services to consumers. Apple and Google in fact harm app developers and hinder their efforts to offer valuable products and services to mobile users, by taking advantage of their gatekeeper roles to impose unfair trading terms and conditions on app developers by, for instance, mandating the use of their in-app payment solutions and charging hefty commissions on the app developers’ revenues. App developers succeed not thanks to these companies’ app store policies, but despite them.

Given the gatekeeping role that app stores have, acting as gateways between app developers and end users, CAF emphasizes the importance of fair treatment by app store operators of all app developers – regardless of their size or the nature of their business. To this end, CAF has set out

1 See <https://appfairness.org>.

2 Competition and Markets Authority, “Mobile ecosystems market study: Statement of scope”, 15 June 2021, paragraph 1.

ten “App Store Principles”,³ laying out the rights app developers should be afforded by app store owners.

With these principles in mind, CAF is pleased to submit hereafter its observations on the Market Study’s Statement of Scope. [REDACTED]

While Google’s Play Store practices also raise a variety of concerns, CAF’s observations will focus on Apple’s problematic App Store practices, as we believe that they raise the most pressing issues. However, many of the observations made on the Apple’s App Store practices may also apply to the Play Store, at least to the extent that Google’s Play Store-related practices are similar to Apple’s App Store practices.

This submission is divided into six parts. **Part II** comments on the CMA’s decision to look at mobile ecosystems. **Part III** lays out CAF’s observations regarding the inter-related themes of the Market Study. **Part IV** refers to the CMA’s consideration of potential consumer harms, while **Part V** comments on the potential remedies. **Part VI**, finally, concludes.

II. The Market Study takes the right approach by looking at mobile ecosystems

While CAF’s focus is on mobile app stores, we support the CMA’s decision to look at mobile ecosystems as a whole, i.e., including not only app stores, but also mobile devices and mobile operating systems, as these products/services are tightly integrated, and Apple and Google’s vertical integration across these products/services contributes to their significant market power across the relevant markets. Thus, CAF agrees with the CMA’s decision to take a holistic perspective of how the different components of mobile ecosystems interrelate, contributing to these companies’ market power and allowing them to engage in anticompetitive conducts to the detriment of third parties and consumers.

Moreover, issues that some CAF members face with regards to Apple’s conducts are not limited to its App Store policies, but also relate to Apple’s decision to deprive them from access to some of the resources of its devices, as well as its refusal to offer adequate interoperability with some functionalities of the device, unless CAF members accept a variety of unfair terms and conditions. In this respect, we fully support the CMA’s plan to assess “*the strategic importance of each element of the mobile device value chain.*”⁴

We also consider that the scope of the Market Study should not be limited to smartphones and tablets but should cover all the mobile devices that are part of the Apple/Google ecosystems, including wearables, such as smart watches.⁵ The reason is that wearables represent an integral part

3 See <https://appfairness.org/our-vision/>.

4 Mobile ecosystems market study: Statement of scope, paragraph 96.

5 CAF notes that including wearable devices within the scope of the Market Study would not run contrary to the CMA’s approach towards the definition of “mobile devices” in the context of this Market Study. The CMA defines “mobile devices” as “*electronic devices that can be held easily in the hand and have been designed with portability in mind,*” a definition that “*excludes devices with larger display formats such as*

of these ecosystems and may raise a variety of competition concerns that are common across the various components of these ecosystems. For instance, applications that are developed for the Apple Watch are subject to the same unfair conditions as those that are developed for the iPhone or the iPad.

III. Inter-related themes of the study

The CMA proposes to organise its work under four themes:

- Theme 1: competition in the supply of mobile devices and operating systems.
- Theme 2: competition in the distribution of mobile apps.
- Theme 3: competition in the supply of mobile browsers and browser engines.
- Theme 4: the role of Apple and Google in competition between app developers.

We consider that the choice of these themes is appropriate, as they will allow the CMA to examine the main competition concerns raised in the context of mobile ecosystems. Themes 1, 2 and 4 are particularly relevant to CAF and its members, since all CAF members have no choice but to use the App Store to distribute their apps to iOS users, and many CAF members compete with Apple in the provision of apps (a competition that takes place on unequal terms, since Apple has a dual role as the operator of the App Store and a downstream competitor, competing with app developers that are dependent on the App Store to reach iOS users).⁶

CAF also supports the CMA's plan to explore cross-cutting issues, such as the presence of barriers to entry, the control by Apple and Google of key access points, and the fact that, by controlling these access points Apple and Google "*are able to set the rules within which they and other market participants must operate, determining the parameters of competition within their ecosystems.*"⁷ CAF and its members are particularly concerned that these companies, and Apple in particular, can operate as *de facto* regulators with a clear inclination to set rules in a manner that is favourable to them and harmful to the rest of the actors operating in their ecosystems, as well as consumers.

In Sections A to C below, we offer our comments on the Statement of Scope's discussion of themes 1, 2 and 4.

A. Theme 1: competition in the supply of mobile devices and operating systems

personal computers (PCs), both laptop and desktop [...] [and] gaming consoles and e-readers." (Mobile ecosystems market study: Statement of scope, footnote 37). Wearables are electronic devices with small display formats, that can be worn on the hand and have been designed with portability in mind.

6 The App Store is the only app distribution channel available on iOS, since it is the only app store allowed, and alternative distribution channels (e.g., sideloading or pre-installing) are not credible alternatives.

7 Mobile ecosystems market study; Statement of scope, paragraph 102.

We understand that the CMA will explore whether Apple and Google’s monopolistic positions on their respective ecosystems is explained by the presence of natural barriers to entry and expansion, as well as by consumer behaviour, with consumers possibly being reluctant to switch ecosystems.⁸

While these may be relevant factors to take into account, we consider that the CMA should pay particular attention to the extent to which Apple and Google “*enhance consumer lock-in through their actions.*”⁹ In this respect, we note that there is compelling evidence that Apple’s decision to mandate app developers offering digital products or services to use its in-app payment solution, In-App Purchase (“IAP”), was to make it harder for iOS users to switch to Android devices. For example, an email exchange between Apple’s founder and former CEO Steve Jobs and senior Apple executive Philip Schiller reveals that Apple considered that, by mandating the use of IAP, it could lock consumers within its ecosystem. Mr Schiller expressed its concern that a TV ad for the Amazon Kindle app showed how easy it was for users to switch from iPhone to Android:

“I just watched a new Amazon Kindle app ad on TV. It starts with a woman using an iPhone and buying and reading books with the Kindle app. The woman then switches to an Android phone and still can read all her books. While the primary message is that there are Kindle apps on lots of mobile devices, the secondary message that can’t be missed is that it is easy to switch from iPhone to Android. Not fun to watch.”¹⁰

Steve Jobs then proposed to mandate the use of IAP to lock consumers in the iOS ecosystem:

“What do you recommend we do? The first step might be to say they must use our payment system for everything, including books (triggered by the newspapers and magazines). If they want to compare us to Android, let's force them to use our far superior payment system. Thoughts?”¹¹

CAF also fully supports the CMA’s intention to explore whether “*Apple or Google take actions within their mobile ecosystems to favour their own mobile apps.*”¹² This includes “*pre-installation of their own mobile apps and the extent to which their own mobile apps can access functionality (in relation to hardware and software) that competing third-party mobile apps cannot.*”¹³ CAF believes that this is an important area to look into, in particular as some CAF members have been denied access to functionality available to Apple’s own apps, which, moreover, come pre-installed on the iPhone (and some cannot be deleted by the user).¹⁴

8 Id., paragraphs 107-109.

9 Id., paragraph 111.

10 Email exchange forming part of the public record in the *Apple eBook* litigation in the United States.

11 Ibid.

12 Mobile ecosystems market study: Statement of scope, paragraph 111.

13 Ibid.

14 The example of Tile, a company that helps people find lost or misplaced items, is representative of Apple’s practice of favoring its own (pre-installed) apps by giving them access to features of the device / functionalities that are not available to third-party apps. Apple’s Find My app – which competes with the Tile app – is pre-installed by default on all iOS devices and cannot be deleted by the user. While the Find My app (and Apple’s Tile-like Bluetooth finding hardware, the AirTag) can leverage the Ultra Wideband (“UWB”) chip in iPhone 11 devices, Apple prohibits Tile from using UWB (a non-proprietary technology that enhances the finding experience), as it does not allow it to access the chip. For a more detailed

B. Theme 2: competition in the distribution of mobile apps

We understand that under this theme, the Market Study will consider the following inter-related issues.

First, the CMA proposes to examine whether there are suitable alternatives “*through which consumers can download and app developers can distribute mobile apps.*”¹⁵ In the case of Apple, the answer is negative due to the simple fact that Apple does not allow the presence of third-party app stores on iOS devices and does not allow sideloading (i.e., downloading an app from a channel other than the app store, e.g., directly from the app developer’s website). Hence, the App Store is the only channel through which app developers can distribute their apps to iOS users and iOS users can download apps on their devices.

Second, the CMA proposes to examine whether there are suitable alternatives to “*mobile apps through which consumers can access content and app developers can distribute their content.*”¹⁶ In most instances, the answer is no. In particular, websites or web apps do not constitute substitutes to native apps, as performance and user experience are not equivalent to app versions (e.g., they are slower and less responsive), and certain features that can be offered through native apps (some of which are core to the app developer’s business and to user experience) are not supported on the web (either because of technical restrictions or because of deliberate decisions by browser and operating system providers to not provide support).

Third, the CMA proposes to examine “*some more specific concerns that have been raised around the extent to which Apple and Google can use their positions as owners of the main app stores, and thus controllers of these major access points, to exploit consumers/app developers and / or entrench their market power in the distribution of mobile apps.*”¹⁷ These concerns are of utmost importance for CAF members, as they are subject to unfair terms and conditions imposed unilaterally by Apple. The Statement of Scope’s reference to the obligation imposed by Apple on app developers whose apps offer “*digital goods or services*” to use IAP is the perfect illustration of Apple using its gatekeeper position to impose on app developers an obligation that they would never accept in a competitive market. This is due to the fact that the obligation to use IAP distorts competition, harms innovation, but also disintermediates app developers from their own users, hence impeding their ability to deliver optimal customer care.¹⁸

C. Theme 4: The role of Apple and Google in competition between app developers

discussion of the issues Tile faces due to Apple’s conduct, including restrictions on access to technology, see Coalition for App Fairness, “Case Study: Tile”, available at <https://appfairness.org/issues/anti-competition/>.

15 Mobile ecosystems market study: Statement of scope, paragraph 115.

16 Id., paragraph 119.

17 Id., paragraph 121.

18 For a detailed discussion on how the IAP obligation harms innovation, as well as an analysis of the harmful consequences of the disintermediation of app developers by Apple when IAP is used, see Coalition for App Fairness, “Apple’s In-App Purchase (“IAP”) as a Disintermediation Tool”, available at <https://appfairness.org/wp-content/uploads/2021/05/CAF-IAP-as-DisintermediationTool.pdf>; See also Coalition for App Fairness, ‘How Apple’s App Store practices are stifling innovation’, available at <https://appfairness.org/wp-content/uploads/2021/05/caf-stifling-innovation.pdf>.

The Statement of Scope makes the correct observation that the “dual role” played by Apple and Google, as operators of their respective mobile app stores and as developers of apps that compete with third-party apps relying on access to their app stores to reach mobile users, may be a source of conflicts of interests.¹⁹

There are indeed multiple instances in which Apple has used its position as the operator of the App Store and the provider of the iOS operating system to facilitate its expansion into different app categories and favour its own services over competing ones, hence harming competition, innovation and consumer choice. The various mechanisms through which Apple and Google might be favouring their own services to the detriment of third parties, consumers, competition and innovation listed in paragraph 140 are exactly on point and, if requested, CAF could provide numerous concrete examples of the use of such mechanisms:

- “pre-installation of their proprietary apps on their own mobile operating systems or default setting of their own services, which can be difficult to uninstall or change and which may affect usage patterns by consumers and encourage them to use Apple’s and Google’s apps for certain purposes as opposed to browsing and downloading third-party ones with a similar function”;
- “raising downstream rivals’ costs through the obligation on certain third-party app developers to use Apple’s and Google’s proprietary in-app payment systems for in-app purchases, in relation to which they charge a commission of up to 30%”;
- “prominent placement of their proprietary apps in the rankings of their app stores or prominent positioning in dedicated sections of their app store (e.g. ‘Featured’ or ‘Suggested for you’)”;
- “collection and use of commercial information on rivals that would facilitate Apple or Google’s expansion into different app categories – e.g. through their app review process or through their control over the in-app payments and the visibility it gives them over app-related transactions”;
- “intermediation of the relationship between consumers and developers and potential restrictions in the services developers are allowed to offer (e.g. discounts, cancellations, refunds, etc) or in the ways they can engage with consumers (e.g. via direct marketing communication)”;
- “restrictions on the ability of third-party developers to access software and hardware functionalities that are used by Apple and Google’s proprietary apps.”²⁰

19 Mobile ecosystems market study: Statement of scope, paragraph 137.

20 For some CAF members, in particular app developers offering parental control apps, this is the most pertinent issue. Parental control apps are not provided with the features made available to Apple’s own apps. In addition, Apple differentiates between app developers when it comes to allowing them access to

CAF notes that these different mechanisms are often used in combination, hence diminishing considerably the ability of third-party apps competing with Apple apps to thrive. With few exceptions, once Apple decides to compete with existing apps (in most instances by copying or even stealing their technology), the developers of these apps will struggle or even disappear given the unlevel playing field.

In addition to the mechanisms observed above, the Market Study should consider the following additional elements:

- First, we note that, according to a former senior Apple executive, there is no functional separation (or even Chinese walls) within Apple between the operation of the App Store and the development of apps, with executives working on apps and determining “*what kinds of apps [are] worth getting inspiration from and when*” having access to valuable data (e.g., how third-party apps are used and for how long) made available through the App Store.²¹ This is intolerable.
- Second, CAF notes that Apple does not allow users to rate Apple apps, hence sheltering those apps from criticism, whereas competing apps are exposed to user reviews and, therefore, criticism. This distorts competition, as it gives an undue advantage to Apple apps. It is also harmful for iOS users, as they cannot be warned of the real quality or defects of Apple’s apps.
- Third, the CMA should pay close attention to the terms of the non-negotiable Apple Developer Program License Agreement that all app developers wishing to have their apps distributed through the App Store need to sign. Many terms of this Agreement are exclusionary and/or exploitative, and the French Direction générale de la concurrence, de la consommation et de la répression des frauds (“DGCCRF”), a unit of the French Ministry of the Economy, has sued Apple before the Commercial Court of Paris on the ground that these terms violated French law.²² Anticompetitive terms can also be found in the MFi Agreement, which developers of products that need to interoperate with iOS devices must sign.

functionalities – deliberately placing some app developers in a worse position than others. For example, Apple offers more functionalities to the providers of enterprise applications than to providers of parental control apps. While the former have full visibility and control of app usage, the latter do not. The Market Study provides the right opportunity to examine how decisions taken by Apple may favour some app developers over others.

21 See Reed Albergotti, “How Apple uses its App Store to copy the best ideas”, *The Washington Post*, 5 September 2019, available at <https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/#comments-wrapper>.

22 See Mathieu Rosemain, “EXCLUSIVE-France sues Apple over developer contracts tied to App Store”, *Reuters*, 23 June 2021, available at <https://www.reuters.com/article/apple-france-lawsuit-idCNL2N2O51QT>.

Finally, CAF notes with satisfaction that the Market Study will also explore the impact of Apple and Google’s app review processes on competition between third-party developers.²³ Many CAF members have had dreadful experiences with the app review process, as their apps were (i) rejected for weeks or months without any clear explanation; (ii) rejected, whereas competing apps were accepted; (iii) initially accepted, then rejected for no clear reason; (iv) unable to offer features that would protect users against harm; etc. There is a lack of due process in the way app reviews are conducted, hence exposing app developers to rejection, delays, and various other issues that can hinder the operation of their business, ruin their investments, and delay or prevent consumers from accessing and using valuable products and services offered by app developers.

IV. Potential consumer harms from lack of competition

The Statement of Scope is entirely right to pay attention to potential consumer harms resulting from a lack of competition within mobile ecosystems.

CAF members are particularly concerned about the impact of Apple’s monopolistic power on app distribution on their iOS users. For instance:

- The obligation imposed on app developers whose apps offer “*digital goods or services*” to use IAP creates immediate harm to consumers in that they are deprived from (i) the innovation that would be brought by other in-app payment systems (either developed in-house by app developers or procured by specialised third-party vendors), (ii) the greater flexibility that these payment systems would bring, as they would be tailored to the needs and preferences of app developers and users, and (iii) the after-sale services (including discounts, special offers, etc.) and customer care iOS users would enjoy if app developers were not disintermediated and deprived of the customer relationship.
- The obligation imposed on app developers that must use IAP to pay Apple a 30% commission raises the price of apps, as illustrated by the fact that app developers generally offer lower prices to users when they do not have to pay this commission (e.g., when users purchase content/subscriptions on the web).²⁴ This 30% commission may also mean that some apps will never make it to the market, as it eats into the margins of the developers and may act as a disincentive for market entry (especially by start-ups or SMEs), which not only have to undertake research and development costs before bringing their product or service to the market, but also must anticipate lower profits once their product or service reaches the market. Some app developers may not be willing to undertake such a risk – meaning that consumers are deprived of a wider choice of products and services, and innovative apps.

23 Mobile ecosystems market study: Statement of scope, paragraph 147.

24 CAF would also like to note that the harmful consequences of the 30% commission are exacerbated by the fact that Apple imposes strict Anti-Circumvention Restrictions, prohibiting app developers from communicating with their users, e.g., about lower prices on the web.

- Finally, by distorting competition, Apple's self-preferencing of its own apps (or the imposition of different rules / restrictions on different categories of apps) may deprive consumers from a wider variety of better apps, and the innovation they would bring.

V. Potential remedies

In the Statement of Scope, the CMA indicates that it will explore a range of remedies that could be used to address any harms to competition within mobile ecosystems it may identify:²⁵

- Interventions that limit platforms' ability to exercise market power.
- Interventions to promote interoperability and common standards.
- Consumer choice remedies.
- Separation remedies.

CAF considers that, in many instances, a combination of these remedies may be needed to prevent Apple from engaging in exclusionary and/or exploitative tactics.

CAF believes that, in particular, separation remedies need to be considered to address the fundamental conflict of interest that arises, e.g., by Apple being at the same time the operator of the App Store and a downstream competitor of third-party apps that are distributed on the App Store. CAF and its members in principle do not take issue with Apple competing with third-party app developers. What we take issue with is Apple doing so on unfair terms and in a manner that distorts competition. Thus, CAF and its members consider that it is of utmost importance that Apple, to the extent that it competes with app developers, does so on equal terms, without using its position as the operator of the App Store (or, in a similar fashion, its control over the iOS or the mobile device) to, *inter alia*, use competitive and commercially sensitive information obtained by app developers whose apps are available on the App Store to develop competing apps, or to self-preference its own apps.

VI. Conclusion

CAF welcomes and fully supports the CMA's mobile ecosystems market study, which will allow the CMA to analyse (the various elements of) mobile ecosystems, to investigate competition concerns and to lay the ground for the adoption of appropriate remedies, to the benefit of competition and consumers. CAF remains at the CMA's disposal for any information required to inform the CMA's assessment during this market study.

25 Mobile ecosystems market study: Statement of scope, paragraph 155.