

**DATE: 26 JULY 2021**

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**MARKETERS FOR AN OPEN WEB LIMITED  
RESPONSE TO CMA CONSULTATION ON  
MOBILE ECOSYSTEMS MARKET STUDY  
STATEMENT OF SCOPE**

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## I. INTRODUCTION

1. On 15 June 2021, the CMA published a Market Study Notice and a Statement of Scope on Mobile Ecosystems.<sup>1</sup> This is Marketers for an Open Web (“MOW”<sup>2</sup>)’s response to the request for comments and can be considered alongside our previous presentation in this case,<sup>3</sup> and broader submissions on coordination between the two companies.<sup>4</sup>

2. [REDACTED]

3. As set out in detail below, MOW considers that there are three preliminary issues that are not fully addressed in the Statement of Scope:

3.1 Apple is paid by Google for data used for Google’s advertising business and Apple and Google collaborate to support each-others’ businesses and are not competitors. [REDACTED]  
[REDACTED] We suggest that it should be considered as the basis for an additional theme or topic of investigation.

3.2 Content offered over the open web competes with that offered in apps available via app stores. Competition between web-based and app store-based apps is accepted by Google and disclosed to its shareholders.<sup>7</sup> It is also a central finding in the EU Commission’s Android Decision. The CMA should treat this as an uncontested fact and as a starting point for its investigation. This issue affects the CMA’s consideration of all themes, and it is therefore vital that the CMA understand these technical issues before it considers questions referred to in the Statement of Scope, such as the potential benefits and disbenefits of closed ecosystems and the parties walled garden strategies

<sup>1</sup> [https://assets.publishing.service.gov.uk/media/60c8683a8fa8f57cef61fc18/Mobile\\_ecosystems\\_-\\_statement\\_of\\_scope\\_.pdf](https://assets.publishing.service.gov.uk/media/60c8683a8fa8f57cef61fc18/Mobile_ecosystems_-_statement_of_scope_.pdf)

<sup>2</sup> MOW is familiar to the CMA from its submissions in the CMA’s investigation into Google’s Privacy Sandbox under Case No. 50972 [REDACTED]

<sup>3</sup> [REDACTED]

<sup>4</sup> [REDACTED]

<sup>5</sup> [REDACTED]

<sup>6</sup> [REDACTED]

<sup>7</sup> EU – Android Decision, recital 116 and fn 80.

- 3.3 The EU's formal findings in its Android Decision expressly reference the fact that, absent Google's anticompetitive behaviour, the alternatives available would include open web apps and substitutes.
4. These are considered in Section II below, before further comment on the CMA's proposed scope, themes, and approach to information-gathering. We then set out brief concluding remarks.

## II. FACTUAL ISSUES IN THE SECTOR DESCRIPTION

5. MOW generally agrees with the CMA's description of the sector, subject to the following comments.

*Apple's business depends on Google and advertising more than is appreciated*

6. The CMA states:<sup>8</sup>

*"The approach MOW will take to our analysis will be to seek to understand the differing business models adopted by Apple (which generates around 80% of its revenue from hardware sales) and Google (which generates around 80% of its revenue from digital advertising), and how the motivations and incentives of each company vary at different points of the value chain."*

7. We have submitted that Apple's business model is more heavily reliant on advertising given, as the CMA notes, Apple is reportedly paid up to \$12 billion per year by Google for default placement of Google Search (from which Google uses the data for *inter alia* advertising purposes). This is a substantial payment, amounting to 17.4% of Apple's net income,<sup>9</sup> and it underpins Apple's business and balance sheet as it represents a low-risk contribution to revenue, and one that has low directly incurred costs and is, when viewed by comparison with the higher risk and return on the sale of new devices, a strategically significant contribution to Apple's business. It is a regular and reliable low risk income stream from a strategically important and financially strong and long-term, committed business partner. It is highly likely to operate as a critical constraint on Apple's independent competitive strategy.<sup>10</sup>
8. Apple has made strategic decisions to avoid dependency on its devices business, and the CMA does reference the growing importance of Apple's services business:

*"The importance of services to Apple's revenues has increased in recent years, having grown from 9% of global revenues in 2015. Apple's services segment includes several categories, such as subscription-based streaming apps (Apple Music, Apple TV+)."*<sup>11</sup>

9. However, the impact of Apple's shift toward services is also under appreciated and may be a matter for further assessment in this Market Study, given the fact that it is using more web-based resources, and also given the impact of those services on broadcasting or news publishing more generally. These issues were matters of considerable concern in the CMA's Online

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<sup>8</sup> Paragraph 14, Statement of Scope.

<sup>9</sup> MOW analysis of Apple's Consolidated Financial Statements FY2020, [REDACTED] For a sense of scale, it is worth considering that the payment amounts to 17.2% of the entire U.S. search advertising market.

<sup>10</sup> [REDACTED] See MOW "Annex 1", available on MOW's website and provided to the CMA as part of the Mobile Ecosystems investigation - <https://secureservercdn.net/160.153.138.53/32t.f0e.myftpupload.com/wp-content/uploads/2021/06/CMA-Annex.pdf>

<sup>11</sup> Paragraph 57, Statement of Scope.

Advertising and Digital Markets Market Study and remain unremedied. Here again the business models of both companies are dependent on Apple's devices gathering data from users which is then used for advertising by Apple's default search engine and advertising partner: Google (as well as Apple's own services).

*Competition between content offered over the Open Web and from Google and Apple App Stores*

10. The CMA says:

*“Unlike most websites, mobile apps are designed specifically for mobile devices and typically deliver faster performance and a better user experience than by accessing sites via web browsers on mobile device.”<sup>12</sup>*

11. In plain language, MOW consider this statement and the reference to the Career Foundry site to be wrong. There is no intrinsic reason that would make apps supplied or installed by Google and Apple functionally better or worse for end users than apps supplied by third parties or accessed directly via browsers; both are software that can be accessed by end users.

12. Absent restrictive agreements and technical and operational practices, the Open Web is capable of providing users with services that compete with those provided by apps now enclosed within the walled gardens that are curated by Google and Apple. The fact that both Google and Apple have made it increasingly difficult for end users to access the Open Web's features and functionality, and denied many of us the experience, means that people often do not know what they are missing.

13. As a matter of fact, Google itself accepted that accessing web content via the browser was a substitute for access to content via apps. Google saw this as such a material risk that it was considered important enough to be disclosed to shareholders in its annual reports. As such the disclosure is a verified fact and one that would involve sanctions under securities laws if found to be untrue or inaccurate. This is noted in the Android Decision<sup>13</sup> and is the cornerstone of that Decision's assessment of the competition that would otherwise have occurred absent Google's anticompetitive tying of Google Search with Android and Chrome and the Google App store. Specifically, it is noted in Google's 2012 Form 10-K disclosure as:

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<sup>12</sup> In reference to Ofcom's 2020 survey Online Nation, and the issue is further compounded by reference at paragraph 81 to <https://careerfoundry.com/en/blog/web-development/what-is-the-difference-between-a-mobile-app-and-a-web-app/#:~:text=Native%20mobile%20apps%20are%20built,Android%20for%20a%20Samsung%20device.&text=Web%20apps%2C%20on%20the%20other,you're%20viewing%20them%20on>

<sup>13</sup> EU – Android Decision, recital 116 and fn 80.

*“Another risk was that users would use apps rather than web browsers to access content. Accessing content via apps rather than browsers meant that users would not use Google's general search service to discover content.”<sup>14</sup>*

14. The key difference between Google and Apple’s “native apps” and those supplied by others is that they are created under conditions where they are locked into their owners’ technology platforms.
15. Many examples can be provided where the innovation and original content was created by developers who were then acquired by one technology platform or another, giving away the lie that native applications need to be home grown; see for example the mapping apps that were all created by people outside of the tech platforms before they were acquired.<sup>15</sup>
16. It is also important that the CMA does not ignore the fact that there have been long term and unaddressed anticompetitive practices used by both Google and Apple that have created the market outcomes that we see today.<sup>16</sup> Not least of these is the anticompetitive tying of Google’s Search with Android and Chrome, and its practices concerning the preinstallation of its apps and Google App stores.
17. Many other examples can be provided where apps from developers other than Google and Apple work better in the web and provide increased functionality when supplied in a medium that is unconstrained by the mobile format. Computer games are frequently available on both. End users obtain greater functionality accessing games on desktops with bigger screens and

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<sup>14</sup> EU – Android, recital 116 and fn 80.

<sup>15</sup> See the Danish developers of “Where To?” for Google maps and TomTom who licenced their underlying maps software for use by Apple maps. In Google’s case the lack of internal innovation extends to all of its major software developments such as Android, You Tube, AdMob, and Double Click which were all acquired.

<sup>16</sup> One of Apple’s earliest anti-competitive moves, blocking Adobe’s Flash player, was investigated but not fully remedied by the EU Commission see press release at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_10\\_1175](https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1175). Apple and Google’s both took actions to limiting the Adobe’s Flash media content creation tools for web developers. At its height, the Flash plug-in had >90% user adoption. Flash was considered to be a rival offering by both Apple and Google. This rival was eliminated by removing interoperability to the benefit of both Apple’s iOS and Google’s own rich media solutions, including YouTube. (In 2007, YouTube offered videos in HTML5 format to support the iPhone and iPad, which did not support Flash Player.<sup>[13]</sup> By way of background, in April 2010, Apple announced changes to its iPhone Developer Agreement, with details on new app developer restrictions, particularly that only apps built using “approved” programming languages would be allowed on the Apple App Store. These impacted a number of companies that had developed tools for porting applications from their respective languages into native iPhone apps, with the most prominent example being Adobe’s “Packager for iPhone”, an iOS development tool in beta at the time.<sup>[16][17][18]</sup> The New York Times quoted an Adobe supporter alleging the policy to be anti-competitive.<sup>[19]</sup> On May 3, 2010, New York Post reported that the US Federal Trade Commission (FTC) and the United States Department of Justice (DOJ) were deciding which agency would launch an antitrust investigation into the matter.<sup>[20][21]</sup> In September 2010, the EU negotiated a settlement with Apple in which, Apple removed the restrictions on third-party tools, languages and frameworks, and again allowing the deployment of Flash applications on iOS using Adobe’s iOS Packager.<sup>[22][23]</sup> However, the founder of Apple, Steve Jobs was involved in an open letter and public dispute with the CEO of Adobe. The letter and Apple’s continued blocking of Flash on the IOS web browser was considered a “death blow” to flash and likely influenced the general decline of the use of Flash, epically as usage Smartphones and Tablets became more common as the 2010’s progressed with the usage rate of Flash on websites declining from 28.5% in 2011 to 12.1% in 2015 to 2.8% in 2020.<sup>[28]</sup> Later, after a further controversy with Apple, Adobe stopped developing Flash Player for Mobile, focusing its efforts on Adobe AIR applications and HTML5 animation.<sup>[3]</sup> In 2015, Google introduced Google Swiffy, a tool that converted Flash animation to HTML5, which Google used to automatically convert Flash web ads for mobile devices.<sup>[8]</sup> In 2016, Google discontinued Swiffy and its support.<sup>[9]</sup> [https://en.wikipedia.org/wiki/Adobe\\_Flash](https://en.wikipedia.org/wiki/Adobe_Flash) and [https://en.wikipedia.org/wiki/Thoughts\\_on\\_Flash](https://en.wikipedia.org/wiki/Thoughts_on_Flash) Note Adobe opensource initiative was potentially a basis for a further rival App Store. These are examples of the distortion to competition exercised by two mobile OS giants in killing of a viable rival.

peripherals than via smaller and less sophisticated mobile devices.<sup>17</sup> There are no technical or performance reasons to justify the restrictions on those apps being widely available via the worldwide web; the payment system restrictions and invisibility of customers to content suppliers is detrimental to consumer welfare and competition. This issue is at the heart of the various Epic and Spotify claims.

18. The CMA should thus approach with care the “*faster performance*” and “*better user experience*” purportedly offered by mobile apps, as set out at paragraph 71 of the Statement of Scope. MOW understands from its members that one reason apps can seem to offer a better experience than accessing the same content via a browser would be due to limitations the operating systems may place on browser functionality relative to its own apps.

18.1 Firstly, contrary to popular perception, an app is not a product that resides solely in a user’s handset. Apps operate as “headless browsers”, obtaining information from and with websites. Their performance is thus not independent of the performance of websites, nor can they be easily distinguished from content accessed on websites by browsers independently.<sup>18</sup>

18.2 Secondly, Apple limits the capability of its Safari browser and the functionality available to the browser that is made available to apps.<sup>19</sup> This is also done by Apple blocking rival browsers, such as Opera or Firefox, the ability to offer a similar or competing rendering function in competition with Apple’s own ability to render content on iOS devices.<sup>20</sup>

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<sup>17</sup> In-app purchasing on embedded mobile Apps such as offered by Apple also raises the additional issue of the exploitation of vulnerable people – in many cases where children are encouraged to make purchases on mobile apps being paid for by the bill payer not the person using the device.

<sup>18</sup> Google Patent US10009773B2: “As used herein, a “headless browser” is an instance of a web browser that is executed by a device without display of a graphical user interface (GUI). Thus, while the headless browser may be used to send and receive web data (e.g., via hypertext transfer protocol (HTTP) GET commands, POST commands, etc.), the headless browser itself may not display such web data. **Instead, as further described herein, a headless browser may serve as a web access mechanism for a native app on a mobile device.**” (emphasis added). <https://patents.google.com/patent/US10009773B2/en>

<sup>19</sup> See EPIC court case for multiple examples. MOW include a few references here: 1) Alex Russel, Google Chrome Engineer discussing the fact that Chrome and other Browsers allow progressive web apps but Apple’s does not, which prevents meaningful competition. <https://infrequently.org/2016/06/pwa-discovery-you-aint-seen-nothin-yet>. See also his post on each API restricted from standard browsers, but available to Apps. <https://infrequently.org/2021/04/progress-delayed> 2) “Native [iPhone] apps would have access to a far wider range of APIs than web apps,” explained Andrew Grant, engineering fellow at Epic Games, during the trial. “Access to things like push notifications, to Siri, to health data, and augmented reality features” are also limited to native apps, said Grant. Web apps also have to be far smaller than native apps, and are capped at about 50MB in size.” <https://www.theverge.com/2021/5/6/22421912/iphone-web-app-pwa-cloud-gaming-epic-v-apple-safari>

<sup>20</sup> “All Browsers Must Use Safari’s Rendering Engine. Apple’s App Store policies state: “Apps that browse the web must use the iOS WebKit framework and WebKit Javascript.... On traditional desktop operating systems, like Windows, Mac OS X, and Linux, each browser can provide its own rendering engine. This is why Mozilla Firefox was so much better than Internet Explorer 6, and why Google Chrome was so much faster than Mozilla Firefox 3.0. Each browser developer could create its own optimized rendering engine. If Mozilla Firefox was forced to render websites with Internet Explorer 6’s rendering engine, Firefox would never have taken off and MOW might still be stuck with Internet Explorer 6 today.” <https://www.howtogeek.com/184283/why-third-party-browsers-will-always-be-inferior-to-safari-on-iphone-and-ipad>

- 18.3 Thirdly, Apple may thus create the illusion of a better experience on its own system by limiting functionality available to competing browsers, and thereby making its App Store discovered versions of the identical web-provided content more attractive.<sup>21</sup>
19. Mobile apps thus provide web content which is only available via a mobile operating system supplier's "app store", walled off from the full functionality available on the worldwide web via the technology platform.
20. It should be noted that the operating system providers, Apple and Google, have an incentive to encourage the download of apps, as they each operate proprietary app stores from which they take a percentage cut of payments taken. Moreover, Apple, with its focus on device manufacture, has the added incentive that the more apps consumers use, the more storage and processing power they will require from their mobile device, meaning they are more likely to upgrade to device with more capacity.
21. We note that the CMA accepts that sideloading of content from other websites is possible to a greater degree on Google than Apple. This also inherently points to a restriction of equivalent content being supplied independently over the web.
22. The ability to obtain apps from app stores other than Google and Apple is also an indicator of the functionality that exists and existed on the Open Web before Google and Apple adopted the practice of preloading of certain apps onto their devices and combined them with their own apps and app stores. This is discussed in detail in the 2020 case brought against Apple by Cydia.<sup>22,23</sup>

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<sup>21</sup> "[G]enerally you'll find that the iOS based tools are not nearly as robust as comparable options are on the Mac, Linux, or Windows desktops, let alone with the Mac Wi-Fi Diagnostics wireless tool or airport command line tool." <https://osxdaily.com/2019/09/06/how-check-wifi-network-signal-strength-ios>

<sup>22</sup> [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjatNKL\\_vPxAhVMQMAKHWKYAHgQFjAEegQIDxAD&url=https%3A%2F%2Fappleinsider.com%2Farticles%2F20%2F12%2F10%2Fcydia-the-original-iphone-app-store-is-suing-apple-over-antitrust-claims&usg=AOvVaw0xCcfj7TUxyj8qZkUfiamB](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjatNKL_vPxAhVMQMAKHWKYAHgQFjAEegQIDxAD&url=https%3A%2F%2Fappleinsider.com%2Farticles%2F20%2F12%2F10%2Fcydia-the-original-iphone-app-store-is-suing-apple-over-antitrust-claims&usg=AOvVaw0xCcfj7TUxyj8qZkUfiamB)

<sup>23</sup> Many alternative "apps stores" and methods of distributing apps have been offered over time. In 1999, NTT DoCoMo launched i-mode, the first integrated online app store for mobile phones, gaining nationwide popularity. DoCoMo used a revenue-sharing business model, allowing content creators and app providers to keep up to 91% of revenue. Other operators outside Japan also made their own portals after this, such as Vodafone live! in 2002. At this time mobile phone manufacturer Nokia also introduced carrier-free downloadable content with Club Nokia. In December 2001, Sprint an apps store that allowed users to download ringtones, wallpaper, J2ME applications and later full music tracks to certain phones. The user interface worked through a web browser on the desktop computer, and a version was available through the handset. In 2003 Handango introduced the first on-device app store for finding, installing and buying software for smartphones. In 2005 Nokia 770 Internet Tablet has graphical frontend for its app repository to easily install app (its Maemo was based on Debian). Later Nokia also introduced Nokia Catalogs, later known as Nokia Download!, for Symbian smartphones which had access to downloadable apps—originally via third-parties like Handango or Jamba! but from mid-2006 Nokia were offering their own content via the Nokia Content Discoverer. The Ubuntu Software Center launched Ubuntu 10.10, in October 2010, the Software Center expanded beyond only offering existing software from its repositories by adding the ability to purchase certain apps (which, at launch, was limited to Fluendo's licensed DVD codecs). Apple released iPhone OS 2.0 in July 2008 for the iPhone, together with the App Store, officially introducing third-party app development and distribution to the platform. The service allowed users to purchase and download new apps for their device through either the App Store on the device, or through the iTunes Store on the iTunes desktop software. The app store is effectively an equivalent marketplaces from a competing mobile operating systems: the Android Market (later renamed to Google Play) launched alongside the release of the first Android smartphone (the HTC Dream) in September 2008, BlackBerry's App World launched in April 2009, as well as Nokia's Ovi Store and Microsoft's Windows Marketplace for Mobile both launching that year.



23. Moreover, for many years, web content was readily accessible via the world wide web using competing browsers and search engines. In 2008, Apple launched its app store and sought to control access to apps only available via its devices and only available via its browser and defined as being within its “store”. Apple thereby gave itself the role of storekeeper. Google followed with its commercial model harvesting and monetising data for advertising, and also offered an app store as part of its bundled offer. It is in the interest of each technology platform or storekeeper to provide access to apps within the app store for one simple reason: it can charge more money for access to that content.<sup>24</sup>

*Consistency with EU Commission vs Google (Android)*

24. In its Android Decision, the Commission found that restrictions in Google’s agreements were restrictive of competition that would otherwise occur. Indeed, it is unlikely that such restrictive agreements would exist if alternative apps were not competitive substitutes to Google’s so called “native” apps. The EU Commission made clear and unequivocal findings that they affected competition.<sup>25</sup>

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<sup>24</sup> Initial disagreements took place between Steve Jobs and Adobe were by Jobs would not enable the Apple system to operate using flash storage – which is many times cheaper than computer storage capacity available on devices made by computer manufacturers such as Apple and IBM. This has endured to the enormous detriment of consumers. The benefit to Apple was considerable – the issue of discriminatory access to the Apple App store was originally investigated by the EU Commission and addressed via changes that imposed non-discriminatory access for developers in 2011. [add ref]

<sup>25</sup> See further discussion of EU Android case with relation to the need to take into account the carrot and stick strategy Google employed toward MNOs. MOW also has concerns that the CMA position would not only contradict the position of the EU Commission, but that this matter is currently on appeal before the CJEU.

### III. PROPOSED SCOPE

*Scope should not be limited to mobile where it would be an arbitrary limitation*

25. It is essential that the scope of the Market Study should include desktop considerations where failure to do so would represent an arbitrary limitation on scope. The reality is that, with desktop browsers, the same issues recur and present inter-relationships with mobile uses (e.g. access to same service via a PC, tablet, or phone). For example, Spotify used browser-based payment solutions to try to deliver price cuts to consumers, and this was precisely the activity which prompted an Apple reprisal.<sup>26</sup> Microsoft has also recently announced that all Android apps will be available from all of its devices.<sup>27</sup>
26. Meanwhile, Safari and Google Chrome hold considerable market share on desktop computers, as they do with mobile; while Mozilla's Firefox has negligible share in either.
27. It is it always open to the CMA to address a subset of study scope, but not vice versa.<sup>28</sup> This could also thus be a powerful hostage to fortune introducing potential for debate over scope at a later stage.
28. Also, the following competition concerns arise across mobile and desktop settings:
  - 28.1 Ability of browser vendors to leverage their browser to favour their own products, and to gather data on consumers.
  - 28.2 Ability of operating system providers to leverage their operating system to encourage use of a particular browser.
  - 28.3 The use of defaults/pre-installation.
  - 28.4 The creation of walled gardens.
  - 28.5 Unnecessary inflation of processing requirements and related impacts on device price, device performance, and the environment.

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<sup>26</sup> *Saurikit, LLC v. Apple Inc.* Case 4:20-cv-08733 (N.D. Cal., 10 Dec. 2020) ("Cydia") \*19 provides a well-known example:

"One particularly notable example of Apple's dominance of this market is Spotify. In an attempt to get around Apple's burdensome commission for its app payment processing service, Spotify began directing iOS app users to its website when they wanted to purchase a subscription to its music streaming service. In exchange for the inconvenience of leaving the app to make a purchase (which greatly detracted from the user experience), Spotify offered a lower subscription fee. If users nevertheless purchased a subscription through the iOS app instead, Spotify charged a higher fee because of Apple's 30% tax. In response, Apple threatened to kick Spotify off the App Store if it did not use Apple's iOS payment processing service and did not charge a uniform (higher) fee across all types of devices. Spotify was forced to comply, although it complained to regulators, because it had no other option for iOS app payment processing."

<sup>27</sup> <https://blogs.windows.com/windowsexperience/2021/06/24/building-a-new-open-microsoft-store-on-windows-11/>

<sup>28</sup> For instance, could the CMA go after the Spotify example referred to above by Cydia if browser issues can be argued to be out of scope? Arguably yes: they are two sides of a two-sided market and UK law allows consideration of the whole. But the point is ripe for argument: consider e.g. *U.S. v. Amex*, which failed on this point (requirement to show net effects across two markets). It would be wise to expressly include related markets using catch-all language at this stage, to avoid storing up possible issues like these later.

## 28.6 Lack of interoperability.<sup>29</sup>

### *Focus on Mobile Advertising*

29. MOW understands that mobile advertising will fall within the scope of the Market Study, in particular in relation to the ability, incentive, and practice, of Apple and Google to leverage their position vis-à-vis mobile device operating systems and browsers to benefit their advertising businesses and to distort competition from rivals.
30. However, MOW considers that the investigation of this issue should be a specific theme of the Market Study. It is a relatively complex business area where conduct engaging several recognised categories of abuse has been taking place, for example:
- 30.1 Both Google and Apple unilaterally removing or proposing to remove pseudonymous IDs relied upon by mobile advertising companies, while Google and Apple's own advertising companies will remain able to access the same or equivalent data.
- 30.2 Apple removing access for rivals to their data while granting Google's advertising services privileged access to data on iOS devices vis-à-vis other mobile advertising competitors.<sup>30</sup> This amounts to a de facto technological tie between data running on those services and the design of the platform, promoting exclusivity and disintermediating third party/vendor relationships amongst third parties even where they have nothing to do with Apple (e.g. an ad tech company selling services to a content publisher).
- 30.3 Both Apple and Google have privileged access to consumer data, via their control of the operating system, app store, and browser, which they can use to optimise their advertising offerings (and other services) while excluding functionalities used by rivals to compete, in some cases through complete disintermediation between vendors and customers (e.g. Privacy Sandbox).

### *Consideration of the Distribution of Mobile Devices*

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<sup>29</sup> Alex Russell, Chrome Engineer: "Since day one, iOS has supported app affordances for websites with proprietary metadata, and Android has similar features. "Appiness" is an illusion, an arbitrary line drawn to include programs built on some platforms but not others, and all of today's OSes allow multiple platforms to expose "real apps"...Only Try To Realize The Truth: There Is No "App"... MOW didn't primarily achieve security on Windows by erecting software distribution choke points. Instead, MOW got protection by deciding not to download (unsafe) apps, moving computing to a safe-by-default platform: the web... The moat of proprietary APIs and distribution is sold on utility and protection, but it's primary roles is protect margins. A lack of app and data interoperability prevents users from leaving." <https://infrequently.org/2020/09/the-pursuit-of-appiness>

<sup>30</sup> A powerful example can be seen in data depreciation rules, limiting the scope to handle data over time (e.g. Apple ITP). This strongly favours websites with frequent touchpoints to consumers, e.g. Facebook; Google – despite not being obviously relevant to the consumer (*type* of data rather than 1 day vs 7 day wiping of data being the relevant consumer desideratum). Apple exempted Google from these depreciation rules via a "Google analytics" cookie in ITP 2.1 – this was a major privacy and competition loophole and must be in scope whether it appears on mobile or desktop applications.

31. Sales channels for devices, such as via MNOs (“Mobile Network Operators”), and device manufacturers or OS providers contribute to the market power Google and Apple have in relation to their respective mobile device ecosystems.
32. This is important because the business model for Android devices involves collecting data in exchange for discounted/free service (e.g. free use of Android). Aggressive data collection via Android, e.g. geolocation, is likely to distort competition for other free products which are also financed via data collection. It will be essential to consider all of the means by which the Android phone is promoted, including via device distribution, and Google’s internal and external cross promotion, to ensure that competing apps operate to a “competition on the merits” standard.
33. Mobile device distributors may receive payments from Apple and/or Google in relation to the number of devices sold. Such payments may be in the form of revenue sharing agreements. Moreover, the CMA should be aware of restrictive clauses in Apple and Google agreements with such distributors that also distort competition.<sup>31</sup>
34. In its Android Decision, the EU Commission revealed a series of “portfolio-based revenue share agreements with MNOs, such as household name telecoms operators.<sup>32</sup> Those agreements involved Google agreeing to share revenue streams of its app revenues made through the Play Store on the revenue share partner devices in return for a commitment that supported the restrictive practices that favoured Google’s Apps.
35. The scale of the payments made to MNOs were highly significant and material to the profitability of those businesses, creating an important degree of dependency, with the revenue

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<sup>31</sup> See from the disclosure in the Epic litigation, Steve Jobs internal email made license restrictions a core strategy to prevent competition:

Cc: Phil Schiller [REDACTED]  
From: Steve Jobs [REDACTED]  
To: Scott Forstall [REDACTED]  
Subject: Re: Google Friend Finder  
Received(Date): Mon, 30 Jun 2008 07:42:54 -0700  
Date: Mon, 30 Jun 2008 07:42:54 -0700

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When they have contacts in their app, these are only the contacts on the iPhone and not a merge of contacts from Google, right? I think it would be a really bad idea for something that looks like contacts to have contacts not on that iPhone, and could lead to people not using our contacts app at all. **We may want to limit this in the license.**

Steve

<https://venturebeat.com/2021/05/03/apple-v-epic-games-opening-statements-highlight-tech-antitrust-arguments/>

Google uses restrictive clauses in its agreements with device manufacturers, OEMs and both Google and Apple have similar clauses with carriers. These terms not only restrict direct downloading of applications (e.g., “sideloading”), but prevent them from modifying the OS to remove these restrictions. Moreover, Google relies on Revenue Sharing Agreements (RSAs) to incentivize said distribution partners from uninstalling specific software (e.g., Google Play Store) or preloading competing apps to those offered by Google.

Note: Google and Apple policies further distort competition via restrictive clauses imposed on rivals when integrating their software with the OS, whether via web browser or their apps.

<sup>32</sup> Paragraph 6.3.3.3.2 et seq.

share percentages lessening over time but nevertheless lessening the incentives of mobile operators to compete with Google and Apple.<sup>33</sup>

36. This is likely to be a vitally important factor to consider in relation to barriers to entry from a set of businesses that have looked to enter the app store business in the past. As noted in the Android Decision: *“For example, in 2010, a number of MNOs created the Android app store, WAC. This project was discontinued, after two years, in 2012, because it did not attract enough developers. As summarised by Orange “...no MNO or OEM has been able to launch a successful app store competing with Google play. They have made several attempts, but none of them has overcome Google.”*<sup>34</sup> This shows that, absent restrictive agreements, the MNOs are likely app store competitors.
37. This factor was significant in the EU’s formal finding of Google’s dominance over the Android App store and materially affected the ability of apps developers and alternative suppliers of apps to provide their services to end users.<sup>35</sup> It is thus likely to be relevant to the relevant market in any future designation of “Strategic Market Status” (“SMS”) in the UK, and to the Market Study, which is intended to inform the DMU and the assessment of SMS in due course.
38. Moreover, the different agreements that Google put in place were all interrelated and needed to be considered as integral elements of the infringement forming Google’s overall “carrot and stick” strategy:

*“The different forms of conduct described in Sections 11 to 13 constitute a single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement because they: (1) pursue an identical objective. They are part of an overall "carrot-and-stick" strategy vis-à-vis OEMs and MNOs to protect and strengthen Google's dominant position in general search services and thus its revenues via search advertisements. They ensure that Google acquires traffic and valuable user data that it can collect and combine; and (2) are complementary in that Google creates an interlocking interdependence between them. For example, in order to enter into a MADA, an OEM must enter into, and abide by the terms of an AFA and in order to enter into a revenue share agreement, an OEM must first enter into a MADA (and thus also an AFA). Also, if an OEM were to pre-install a competing general search service exclusively on one or more of its Android devices instead of Google Search, it would no longer be able to pre-install on those devices any of the mandatory GMS apps and services, including the Play Store.”*<sup>36</sup>

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<sup>33</sup> As referenced in The EU Commission’s Android Decision at paragraph 639

<sup>34</sup> Paragraph 639, Android Decision.

<sup>35</sup> See EU Commission Android Decision paras 9.52 et seq concerning barriers to entry and expansion and the evidence supplied by Microsoft, Duck Duck Go, Yahoo, Kosmix, Cuil, Blekko etc. and the evidence of infringement at 10.2. et seq.

<sup>36</sup> Paragraph 739(2), Android Decision.

39. On this basis, the EU Commission found that Google anticompetitively tied products together, foreclosed, and affected, the development of online and mobile app and app stores. This is significant and material to the scope of any enquiry of mobile ecosystems. Those findings could be treated as a matter of context and fact by the CMA and recorded as such; not doing so would be to ignore the explanation for the current operation of the market.
40. The CMA could request information from the MNOs active in the UK and assess whether the factors referenced in the Android Decision remain relevant, and whether the anticompetitive effect of Google's portfolio-based revenue share agreements and its anticompetitive tying and other practices are continuing. If MOW's understanding is confirmed, the CMA could also review the scope of the enquiry and ensure that it includes these matters.

#### IV. THE CMA'S FOUR THEMES

##### *Theme 1: Competition in supply of mobile devices and operating systems*

41. The Google and Apple model is to pre-install their operating system on consumer devices (some of which are also theirs), and treat the opening of the box and agreement to set up the device as valid consent for processing of personal data for various purposes including digital advertising.
42. This gives both monopolists an anti-competitive advantage over advertising rivals (and other competitors reliant on data, such as analytics providers). It is also doubtful that it is a data protection compliant approach to gathering consent for such processing. Theme 1 should include consideration of this issue.
43. Theme 1 should also consider interoperability between Open Web content and browsers and Google's and Apple's systems and how interoperability is restricted to favour their own apps within their own ecosystems as part of strategy of building a walled garden of content.

##### *Theme 2: Competition in the distribution of mobile apps*

44. In paragraph 117 of the Statement of Scope, the CMA references the need to consider restrictions that are put in place by, for example, Apple with relation to apps available on its app store. MOW assumes the CMA would also want to take into account similar or equivalent restrictions that the EU Commission identified as being anticompetitive with similar effects on access in relation to Android and the Google Play store, and whether they are continuing to have an effect on the market.

##### *Theme 3: Competition in the supply of mobile browser and browser engines*

45. As set out above, MOW considers that the CMA should investigate browsers and browser engines across both mobile and desktop. This is important given the increasing proportion of web access taking place from mobile devices and hence the increasing numbers of searches from mobile devices, the increasing importance of mobile browsers, and the increasing encroachment of captive walled gardens on access to content, whether from desktop or mobile devices.

##### *Theme 4: the role of Apple and Google in competition between app developers*

46. MOW welcomes the CMA's indication, at paragraph 55 of the Statement of Scope, that the CMA plans to investigate how elements of Apple and Google's ecosystems relate to each other. MOW has submitted that the two companies operate in symbiosis, rather than competing directly, a situation which dampens either party's incentives to compete head-to-head.

47. In line with previous submissions, MOW also thinks it important that the actual technical software history of Google and Apple be investigated in detail. That investigation should take place with a view to establishing whether the interlocking board history of Google and Apple and the common software history behind Chrome/Blink and Safari/WebKit operated and continues to operate to provide either or both of Google and Apple with continuing anticompetitive information sharing advantages and technology benefits, given their common source.
48. MOW considers that the CMA should specifically investigate this theme in relation not only to the role that Apple and Google play vis-à-vis app developers, in consideration of market power and potential abuse thereof, but also vis-à-vis each other, in consideration of potential collusion. For example, public documents disclose a wide range of meetings between Google, Apple, and other tech giants (e.g. Facebook) which were followed by major change to competitive strategy (e.g. data handling rules).<sup>37</sup>

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<sup>37</sup> See MOW Annex 1, available on MOW's website and provided to the CMA as part of the Mobile Ecosystems investigation - <https://secureservercdn.net/160.153.138.53/32t.f0e.myftpupload.com/wp-content/uploads/2021/06/CMA-Annex.pdf>



## V. POTENTIAL REMEDIES

50. MOW agrees with the CMA generally regarding the four categories of potential remedies, being (i) interventions to limit platform ability to exercise market power, (ii) interventions to promote interoperability and common standards, (iii) consumer choice remedies, and (iv) separation remedies.
51. MOW notes that the Biden administration in the USA is also likely to investigate mobile ecosystems. MOW considers it likely that there may be the need, in both jurisdictions, to implement separation remedies, as the network effects and barriers to entry are such that there is unlikely to be proper competition on the merits in some areas, such as in the development of mobile operating systems.
52. It will also be important to consider whether remedies need to address Google and Apple coming between the end customer and a chosen supplier i.e. disintermediation, for example as caused by technological tying, in addition to discrimination. It would be worth expressly considering unbundling interventions to lower barriers to entry, especially where these have interfered with the customer relationships of competing businesses.

## VI. APPROACH TO EVIDENCE GATHERING

53. MOW suggests that the CMA request the documentation, witness statements, and other evidence from Google and Apple that they have disclosed in the course of US and EU proceedings.
54. MOW considers that evidence from submissions or witness statements is good source material. However, requiring those investigated and others to provide accompanying statements of truth may be needed given their past history of non-compliance.<sup>38</sup>

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<sup>38</sup> For a recent example, see the recent fine imposed on Google by the French Autorité de la Concurrence due to non-compliance with interim measures.

## **VII. CONCLUDING COMMENTS**

55. MOW commends the CMA on recognising the issues inherent in Google and Apple holding such control over various areas of mobile ecosystems, and related business practices, and for committing resources to investigate this.
56. MOW hopes that the CMA will take a robust approach in order to address any adverse effects on competition identified.