



Observations of Masimo on the Statement of Scope of the CMA's Mobile Ecosystems Market Study

I. Introduction

The Competition and Markets Authority (“CMA”) recently published its Statement of Scope for the mobile ecosystems market study (the “Market Study”).¹ Masimo commends the CMA for this important and timely initiative. In the present memorandum, Masimo shares with the CMA its comments on the Statement of Scope.

Masimo is a global medical technology company that revolutionized non-invasive monitoring of physiological parameters, such as pulse rate, arterial oxygen saturation, hemoglobin, and many others. Masimo invented modern day pulse oximetry and is the leading brand of hospital pulse oximeters because its devices provide accurate measurements when other pulse oximeters fail, by using the revolutionary Signal Extraction Technology® (SET®). Masimo sought and received numerous patents for many of its inventions. Today, Masimo is publicly traded and employs over 7,000 people worldwide.

While Masimo’s cutting-edge devices are used in thousands of leading hospitals, Masimo has also developed a line of products that can be used to monitor patients at home. These products use smartphone applications, with the smartphone providing functionality that is necessary to the functioning of these products. For example, Masimo SafetyNet is designed to continuously monitor patients at home using various Masimo sensors. The SafetyNet app records this data and transmits it to a hospital system where clinicians can review the data. Additionally, the SafetyNet app can alert patients if their vital signs drop below certain thresholds and can also send alerts to emergency contacts and emergency medical staff with a GPS location. To provide this service, the Masimo app must be loaded onto a device that is 1) always with the patient; 2) provides GPS functionality; and 3) provides a cellular data connection. Currently, an app on a smartphone is the only practical way to provide this type of functionality. This technology has been a life saver during the Covid pandemic.

While the Statement of Scope makes clear that the Market Study will look at a wide range of issues linked to Apple’s and Google’s policies regarding their mobile ecosystems, Masimo would like to draw the attention of the CMA to the importance of innovation, and the need

¹ CMA, Mobile ecosystems market study: Statement of scope, 15 June 2021.



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to prevent companies like Apple from appropriating innovations of smaller companies, such as Masimo, to then compete with them on an unlevel playing field with Apple's various ecosystem-related policies stacked against them. While the Apple and Google mobile ecosystems represent infrastructures that offer economic opportunities, most of the innovation found on these ecosystems comes from other companies, such as Masimo, who rely on these ecosystems to bring their products to consumers. Protecting and stimulating innovation should be included as one of the Market Study's core themes.

II. Looking at mobile ecosystems is a good focus

Masimo supports the CMA's decision to look at mobile **ecosystems**, which include not only app stores, but also mobile devices and mobile operating systems. This is a good approach as these products/services are tightly integrated, and Apple and Google leverage this vertical integration to cement and expand their market power across a range of relevant markets.

While regulators and competition authorities have so far largely focused on the Apple App Store, Apple's anticompetitive conduct is not limited to its App Store policies. Apple also copies innovations from rivals. In Masimo's case, Apple first met with Masimo, then hired executives, then hired many of its engineers and has now been sued by Masimo for theft of trade secrets and patent infringement. Once Apple has copied its rivals' innovations, Apple then uses the scale of its ecosystem and the dependencies of these rivals on its ecosystem to crush them. For instance, Apple can refuse to offer access to some functionalities on its iOS devices unless a third party accepts a variety of unfair terms and conditions such as those set out in the Apple Developer Program License Agreement and the MFi Agreement.

Masimo also emphasizes that the Market Study's focus should not be limited to smartphones and tablets but should adequately cover all the mobile devices that are part of the Apple/Google ecosystems, including wearables like smart watches. Wearables are an integral part of these ecosystems, especially as Apple and Google see healthcare and fitness amongst their most immediate commercial priorities. Indeed, flagship mobile device applications, like Apple Health and Google Fit, are integrated with companion applications on corresponding smart watches. As wearables receive an increased role within Apple's and Google's ecosystems because of widespread adoption, it is important that the CMA pays particular attention to the control by Apple and Google over these devices, including how any policies or conduct of Apple and Google may harm competition and innovation in wearables.

III. Apple's strategy of appropriating innovation from rivals

One of Apple's key advantages of controlling a mobile ecosystem is that it allows Apple to gather extremely valuable information on the technologies and innovative products/services developed by firms that need to rely on its ecosystem.

For instance, Apple can identify the product/services that are attractive to users and copy them shamelessly. This practice is very common. In September 2019, *The Washington Post* explained "How Apple uses its App Store to copy the best ideas,"² by mining its internal data to exploit the ideas of its developers:

"Developers have come to accept that, without warning, Apple can make their work obsolete by announcing a new app or feature that uses or incorporates their ideas. Some apps have simply buckled under the pressure, in some cases shutting down. They generally don't sue Apple because of the difficulty and expense in fighting the tech giant—and the consequences they might face from being dependent on the platform. [...]"

The misfortune of having an idea copied by Apple even has an industry term. "Getting Sherlocked" harks back to the time Apple's desktop search tool called "Sherlock" borrowed many of the features of a third-party companion tool called "Watson," which no longer exists.

Imitation is common in the tech industry. 'We have always been shameless about stealing great ideas,' Apple co-founder Steve Jobs once said. But what makes Apple's practice different is its access to a trove of data that nobody else has. The App Store, where the original apps were offered and competed for downloads, collects a vast amount of information on which kinds of apps are successful—even monitoring how much time users spend in them. That data is shared widely among leaders at the tech giant and could be used to make strategic decisions on product development, said Phillip Shoemaker, who served as Apple's director of App Store review from 2009 to 2016."³

The press has reported multiple stories of Apple taking other companies' innovations and leveraging its market power into these additional areas while crushing the innovator,⁴

2 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/>.

3 Ibid.

4 See, e.g., William Gallagher, "Apple strikes again: Which developers got 'Sherlocked' at WWDC", *Apple Insider*, 8 June 2021, available at <https://appleinsider.com/articles/21/06/08/apple-strikes-again-which->



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including stories about Apple's actions against Masimo.⁵

The CMA thus correctly recognizes that the Market Study should “*explore concerns that Apple or Google could be using their position as operators of app stores (and their position in mobile OSs) to facilitate their expansion into different app categories and favour their own services over competing ones (potentially leading to the foreclosure of actual or potential competitors)*”,⁶ including by looking at the “*collection and use of commercial information on rivals that would facilitate Apple or Google's expansion into different app categories – eg through their app review process or through their control over the in-app payments and the visibility it gives them over app-related transactions.*”⁷

But the control of the App Store is not the only way Apple can take advantage of other companies' innovation. For instance, Apple requires any company that wishes to create an accessory that connects to the iPhone over a wired connection to sign the MFi Agreement. [CONFIDENTIAL]

For companies whose devices need to rely on the Apple ecosystem to reach users, a refusal to sign the MFi Agreement entails severe consequences. For example, [CONFIDENTIAL]

Overall, it is important that the Market Study assesses all the ways in which Apple uses its control over the various components of its ecosystem to adopt policies and/or engage in conduct that harms other companies by taking advantage of their innovations (e.g., by obtaining and freely using commercially-sensitive information of third parties), consequently depriving consumers of valuable, innovative products.

IV. Consequences of Apple's appropriation of innovation

While, as noted above, imitation may occur in the tech industry, the consequences of copying by Apple are particularly severe:

[developers-got-sherlocked-at-wwdc](https://www.fox.com/story/developers-got-sherlocked-at-wwdc); John Patrick Pullen, “Why These People Are Upset About Apple's Latest Updates”, 21 June 2016, *Time*, available at <https://time.com/4372515/apple-app-developers-wwdc-sherlock-sherlocked/>.

5 Steve Brachmann “ITC and Trade Secret Cases Against Apple Over Pulse Oximetry Tech Highlight Need for Better Ways to Rein in Big Tech”, 21 July 2021, IPWatchdog, available at <https://www.ipwatchdog.com/2021/07/21/itc-trade-secret-cases-apple-pulse-oximetry-tech-highlight-need-better-ways-rein-big-tech/id=135836/>.

6 CMA, Mobile ecosystems market study: Statement of scope, paragraph 140.

7 Id., paragraph 138.



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- First, once Apple has copied another firm's innovation by embedding it in an application and/or a device (for example, embedding health monitoring functions into the Apple Watch), these apps or devices will automatically and immediately gain huge scale market power, dwarfing rivals.
- Second, Apple can use the control of its ecosystem to privilege its own apps and devices to the detriment of rivals. For instance, its apps are preinstalled and cannot be deleted; unlike rival apps, they cannot also be rated, hence preserving them against user criticism.

Thus, to add insult to injury, Apple can not only use its control of its ecosystem to take advantage of other firms' innovation, but once it has developed a competing app or product, it can use the same control of its ecosystem to privilege Apple at the expense of rivals.

These practices discourage companies that need to rely on Apple's ecosystem to reach users to innovate, as Apple can expropriate the companies' investments if Apple takes an interest in their innovation. This in turn harms consumers by depriving them of the benefits of such innovation.

V. The need for strict remedies

Apple has been given a free pass for too long, allowing it to operate unconstrained and turn itself into a private regulator. It is time for the CMA to ensure that Apple's ecosystem operates as a platform where all innovators can flourish, and Apple cannot simply copy to expand its monopoly and eliminate innovators. Pro-competitive interventions are necessary to level the playing field, including improving codes of conduct, strengthening inventors' patent rights and increasing the consequences of infringement with injunctions, treble damages, and attorneys fees.

Among the set of remedies contemplated by the CMA, separation remedies will be needed to address the fundamental conflict of interest between Apple managing its ecosystem and at the same time competing with firms that rely on its ecosystem.⁸

⁸ Sarah Perez, "Apple and Google pressed in antitrust hearing on whether app stores share data with product development teams", 21 April 2021, *Tech Crunch*, available at <https://techcrunch.com/2021/04/21/apple-and-goog-pressed-in-antitrust-hearing-on-whether-app-stores-share-data-with-product-development-teams/>.