

Response of Proton AG to the Competition & Markets Authority's consultation on the Mobile Ecosystems Market Study Interim Report

Proton AG ("Proton") is a technology company founded in 2014 by former CERN and MIT scientists who had the vision to build an internet that respects people's right to privacy. Proton is working towards its vision by developing free and secure tools, like email, calendar, drive, and VPN services, that empower people to control their data online.

We thank the Competition and Markets Authority ("CMA") for the opportunity to comment on the Mobile Ecosystems Market Study Interim Report ("Interim Report"). We would like to congratulate the CMA for the extremely thorough examination of mobile ecosystems it has undertaken during the first part of its market study and for the comprehensive Interim Report, whose findings we support.

Main findings of the Interim Report

Proton supports the very accurate description of mobile ecosystems provided in the Interim Report, as well as the analysis and findings regarding the current state of competition. We agree with the CMA's findings that Apple and Google have an "effective duopoly" in the provision of operating systems, that there is lack of competition in native app distribution and that both companies have engaged in conducts that are consistent with them having entrenched and durable market power. Apple's and Google's positions allow them to set the rules of the game for the millions of app developers that are dependent on them, affecting their competitive position vis-à-vis other apps (including Apple's and Google's own apps) and having a say over the way they conduct their business.

This is what Apple and Google have done by imposing the use of their in-app payment systems, In-App Purchase ("IAP") and Google Play's Billing system ("GPB"), on app developers whose apps offer "digital goods or services" and by charging a commission of up to 30% on transactions made through these in-app payment systems. Such requirements, as the CMA correctly observes, prevent app developers from "choos[ing], often bespoke payment solutions that better meet their needs and those of their users" and restrict payment service providers' incentives to innovate in payment solutions designed for in-app payments.¹ They also lead to the confiscation of the customer relationship by Apple and Google, reducing app

1 Competition & Markets Authority ("CMA"), "Mobile ecosystems: Market study interim report" ("Interim Report"), 14 December 2021, available at <https://www.gov.uk/cma-cases/mobile-ecosystems-market-study>, §6.194.

developers' control over pricing (as, e.g., app developers can only choose among the price tiers made available by Apple) and refunds, and depriving them of valuable user data, which could be used to improve their offering.² IAP and GPB also raise switching costs for consumers, as they make it more difficult for users to switch to a device with a different mobile operating system and especially to manage their subscriptions after switching.³ Finally, they raise the costs of app developers who are charged a supra-competitive 30% commission, while Apple's and Google's own apps are not subject to such a "tax".⁴

The anti-steering rules imposed by Apple and Google on app developers whose apps offer "digital goods or services" further aggravate the harm caused by the imposition of Apple's and Google's in-app payment systems, by restricting app developers' ability to inform users about alternative purchasing channels. As the CMA correctly points out, this means that users' ability to make informed choices is limited.⁵

Finally, we agree with the CMA's concerns about the app review process, which allows "Apple and Google [to] effectively dictate the terms that third-party app developers must agree to in order to access their app stores".⁶ We fully support the CMA's view that "Apple's operation of the app review process for the App Store, in particular its inconsistent interpretation of rules and lack of clear explanation of reasons for rejections, creates uncertainty, costs and delays for app developers. This in turn is liable to hinder innovation and may be used to the advantage of Apple's own apps. We do not see any reason that such concerns should necessarily arise from an app review process aimed at ensuring quality and security".⁷

Proton also welcomes the CMA's finding that Apple and Google would meet the proposed requirements for designation as firms with "Strategic Market Status" under the new pro-competition regulatory regime for digital markets for each of the key layers of their ecosystems, notably the operating system, the app store and the web browser / browser engine.

2 Interim Report, §6.202.

3 Interim Report, §6.215.

4 Interim Report, §6.203 et seq.

5 Interim Report, §6.216 et seq.

6 Interim Report, §6.54.

7 Interim Report, §6.77.

A serious concern: pre-installation and default settings

The Interim Report discusses practices of the two dominant digital gatekeepers of mobile ecosystems, such as Apple and Google, regarding the pre-installation and setting as default of their own apps, stating that:

“pre-installation and defaults can distort consumer choice and could lessen the competitive constraint faced by Apple and Google from third-party apps. We consider that the negative effects of pre-installation and defaults can vary across different app categories and are likely to be stronger for certain app categories, for instance, where users exhibit greater stickiness to pre-installed apps, or where the alternatives are lesser-known apps which rely more heavily on app store search to be discovered. Browser apps are a type of service that we have identified where this can have a significant impact (see Chapter 5 for more detail), but we will consider further whether there are any other app categories where the negative effects of pre-installation and defaults may outweigh the convenience benefits conferred by them”.⁸

We fully agree with the CMA’s finding that pre-installation and default setting “can have significant impacts on user behaviour and give an advantage to Apple’s and Google’s own apps”.⁹ We also welcome the CMA’s decision to investigate further in the second phase of the market study the effects of pre-installation and defaults on apps other than browsers. While the harmful effects of pre-installation and default settings have so far mostly been assessed in the context of browsers and search engines, we would like to emphasize that other apps / services, e.g., email apps, are equally affected by such practices.

The concerns that have been raised about the harmful effects of pre-installation and default setting apply in the context of email apps, for example:

- ***Status quo bias leading to consumer lock-in.*** Consumers have a tendency to stick to apps that come pre-installed on their devices, meaning that pre-installation is a powerful tool in creating consumer lock-in. This has also been acknowledged by the Netherlands Authority for Consumers and Markets (“ACM”), which in its report on the market study into mobile app stores (and referring to the *Google Android* decision of the European Commission), stated that “[c]onsumers are more likely to use the apps that are pre-installed on their smartphones. Only in the case where the pre-installed app is of a lower quality than a competing app, consumers will download the

8 Interim Report, §6.93 (emphasis added).

9 Interim Report, §53.

competing app. However, according to the European Commission, this will not completely offset the advantage the pre-installed app has”.¹⁰

- **Harm to competition and innovation.** Pre-installation and default settings benefit Apple’s and Google’s own apps, while creating an inherent disadvantage to third-party apps that are not pre-installed on iOS or Android devices. On Android devices, the pre-installation of Google’s apps reduces manufacturers’ incentives to pre-install rival apps, impeding the use by the latter of a channel that would allow the introduction of their products to Android users. This is liable to also harm innovation, as it makes it harder for companies that wish to enter the market by offering innovative / differentiated features (e.g., companies offering security- or privacy-focused products) to gain traction.
- **Higher switching costs.** Users of the Apple’s and Google’s default apps often have much higher switching costs and lower incentives – their data, contacts and often very sensitive information is locked within Apple’s and Google’s own services. This makes user acquisition for rival companies extremely challenging. Also, often the dominant digital gatekeepers’ services such as email serve as a “key” to their entire ecosystem thereby creating an additional burden to competition, as it increases the users’ switching costs for reasons of convenience.
- **Technical barriers for switching.** For example, in the case of email services, often the dominant digital gatekeepers create additional technical switching barriers and do not allow data portability or they significantly impede the process and user experience of such data portability. For example, users may often experience technical challenges while transferring their Gmail data to another email provider. Thereby, mainstream users will often opt out.
- **Harm to privacy.** The pre-installation and setting as default of Apple’s and Google’s own apps can hinder the wide adoption of apps offered by small and medium sized companies which are focused on privacy. This does not only harm privacy-focused companies (which are not funded through the collection and sale of users’ data but by subscriptions paid by users), but also harms UK consumers as it increases the chances of them using apps monetized through the collection and sale of personal data.

Many pre-installed / default apps do not have strict privacy policies in place; instead, users need to go deep into the settings of the device to change the default settings and choose the most privacy-preserving ones. In the case of Google, this is explained

10 Netherlands Authority for Consumers and Markets (“ACM”), “Report - Market study into mobile app stores”, 11 April 2019, available at <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>, page 84.

by the fact that its business model is based on the collection of personal data, which can then be monetized through personalized advertising. Thus, Google has no incentive to set by default strict privacy settings for its own pre-installed apps.

Appropriate remedies

We are broadly in agreement with the variety of interventions the CMA is considering to address the harms identified in its market study. We consider that interventions under remedy area 4 will be instrumental in restoring and fostering competition in mobile ecosystems. In this submission, we will focus on three types of interventions that we consider particularly important: (a) interventions to address concerns with in-app payment systems, (b) interventions related to requirements for a fair and transparent app review process, and (c) interventions related to pre-installation and default settings.

Interventions to address concerns with in-app payment systems. The CMA has extensively considered remedies that would address the harms it has identified as arising from the imposition by Apple and Google of the mandatory use of their in-app payment systems. Proton supports the CMA’s proposed remedies which include requirements to enable app developers whose apps offer “digital goods or services” to “choose their own payment service provider and have a direct selling relationship with the user, rather than require them to exclusively use Apple’s and Google’s own payment system”,¹¹ as well as requirements to “allow developers to refer users within an app to alternative ways to pay content and subscriptions outside of the app, for example allowing them to provide a link to where prices are lower on a website.”¹² We believe that, in combination, these requirements will effectively contribute to increasing (informed) consumer choice and addressing shortcomings associated with the use of the “one-size-fits-all” IAP and GPB, such as the lack of flexibility in pricing and billing, as well as the sub-par customer service (e.g., when it comes to refunds or cancellation requests) which results from the confiscation of customer relationship by Apple and Google. In addition, app developers would have access to valuable user data currently captured by Apple and Google and withheld from app developers, thus being able to improve their services to the benefit of consumers.

Requirements for a fair and transparent app review process. Proton agrees with the CMA’s consideration that it should be ensured that the app review process put in place by Apple and Google should be “clear and transparent, but also fairly designed and implemented”. We consider it necessary to require Apple and Google to ensure that their app developer guidelines are consistently applied, that the reasons for any rejection or requirement to make changes to an app or update are sufficiently transparent, and that they treat developers on

11 Interim Report, §7.99.

12 Interim Report, §7.102.

fair, reasonable and non-discriminatory terms.¹³ The app review process allows Apple and Google unfettered control over app developers, which must operate in a hostile business environment, facing uncertainty as to whether their apps or updates will be approved or rejected for no obvious reason.

Interventions related to pre-installation and default settings. The CMA is considering interventions “that could reduce the ability of Apple and Google to provide their own apps with a competitive advantage through pre-installation and being set as the default option”,¹⁴ such as a requirement that “where pre-installation is in place, that it should be accompanied by appropriate choice architecture to make it easy to choose and switch to an alternative as the default”.¹⁵

When considering such interventions, the CMA has examined arguments submitted by Apple and Google that “users expect their phones to provide certain functionalities, such as allowing them to make a phone call, browse the internet or send a text message, as soon as they are set up. Pre-installation allows [Apple and Google] to deliver fully functioning devices straight out of the box and also differentiate their devices from other competitors. Similarly, defaults allow users to experience a seamless, uninterrupted integration of different apps and services”.¹⁶

While it is true that some consumers would want their phones to be functional from the set-up, we believe that it is possible to strike a balance between preventing the harmful effects of pre-installation and default setting and allowing users to set-up their devices without being unreasonably burdened. Properly designed choice screens constitute such a solution. As the CMA found in its Final Report on the Online Platform and Digital Advertising Market Study, “[w]hile choice screens entail a small amount of additional effort for a consumer compared to simply being presented with a default, we consider that any time costs for consumers would be small and the potential competition benefits substantial”.¹⁷

Accordingly, we are in favor of the adoption of two interventions, in line with the CMA’s consideration, which we believe are necessary to foster competition between Apple’s and Google’s apps and rival third-party apps, to encourage innovation and to increase and facilitate the effective exercise of consumer choice, namely: (a) **oblige Apple and Google to**

13 Interim Report, §7.85.

14 Interim Report, §7.83.

15 Ibid.

16 Interim Report, §6.84.

17 CMA, “Online platforms and digital advertising: Market study final report”, 1 July 2020, available at https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf, §3.116.

proactively prompt users to select their default apps, combined with (b) the **introduction of easily accessible and properly designed preference menus / choice screens** so that users can efficiently and effortlessly choose the third party apps they would like to use.

Designing an effective choice screen remedy

Proton considers that an effective choice screen menu, including for the default email app, should, *inter alia*, have the following characteristics:

- It should include the **most common apps within each category**.
- It should display **at least 8 alternative app** options.
- It should be **free for alternative apps** (no pay-for-play conditions).
- It should **not allow the use of any “dark patterns”** which can steer users towards Apple’s or Google’s own apps or certain third-party apps.
- The regulator should be able to **mandate preference menus to all existing users at once**.

Having a proper choice screen architecture is indispensable to the effectiveness of such a remedy.

We believe that, in cooperation with stakeholders, the regulator would be well placed to design the right choice architecture to the benefit of UK consumers, whose choice is currently inhibited by the platforms’ own choice architecture aimed at nudging them to make choices that are in the best interests of the platforms. The regulator should monitor the implementation and effectiveness of any such remedies, adjusting them, if necessary, to achieve their full potential or to mitigate any inconvenience for users. We believe that the CMA and/or a duly empowered Digital Markets Unit (“DMU”) would be well-placed to design, test and revise such remedies.

In addition, a safeguard necessary to ensure that user choice will be respected and competition between apps will not be hindered is that **Apple and Google be prevented from nudging, prompting or incentivizing users to revert to their own apps** once they have chosen a rival app. The regulator’s continuous oversight will be instrumental also in this regard.

Conclusion

We applaud the CMA for the in-depth work it has carried out during the first half of the market study and we are grateful for the opportunity to share our thoughts as to what we consider a pertinent issue in relation to Google's and Apple's control over mobile ecosystems. We remain at the CMA's disposal for any information that would be useful during its second phase of the market study. We would be glad to assist with the further consideration and design of remedies related to the introduction of preference menus / choice screens.