

Competition and Markets Authority

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For the attention of:

browsersandcloud@cma.gov.uk

By email only

████████████████████
18th July 2024

Dear Sirs,

Re: Mobile browsers and cloud gaming – Working Paper 2 - Comment

1. We represent Movement for an Open Web (“MOW”) and we are writing further to our submission made on 16th July regarding our comment on Working Paper 1. We reference the points made with relation to WP1 in this letter. These consider Apple’s incentives to block data from iOS handsets, which have been put in place under a revenue sharing agreement with Google. That is an agreement that provides Apple with annual income of \$20 bn, which derives from 36% of the revenue from Google’s search advertising business. That agreement has been in place for many years. Apple thus has strong incentives to block rivals use of data from iOS devices that could be valuable to rivals to Google’s ads business.
2. We also refer to the *USA v Apple* [2024] case that details a set of other contractual and technical restrictions over interoperability in the use of functions such as smart watches and payments systems. We suggest that the CMA’s identification of the contractual restrictions outlined in WP2 should be analysed on the same basis as adopted by the DOJ. These restrictions limit competition between platforms, as well as between products or functions on platforms.
3. We also draw to the attention of the WP2 CMA team to comments made by the DOJ in *USA v Apple* [2024] pleadings with reference to the Apple claims concerning security and privacy. In particular, that they are a smokescreen. On security, we make further reference in response to WP1 Section 3 with a report on different browser functionality and that browsers with lighter usage requirements have inherently lower security vulnerability, contrary to Apple’s assertions.

Privacy as a non-price factor of competition

4. Businesses use data about everything all of the time. For a competition authority, any assertion by a digital monopoly about exceptions to the provision of information need to be given the closest scrutiny.

5. The CMA rightly highlights that views on privacy vary. It is a quality metric and that there is competition both between versions of privacy (horizontal competition) and levels of privacy (vertical competition). However, the assertion of “privacy protection” by the browser owners, (principally Apple and Google) is an unjustified and disproportionate claim for the blanket banning of information about users they interact with.¹ We have written about the issue of “Privacy Fixing”² which is a further example where Apple and Google have coordinated their independent positions and is currently at the centre of US litigation.
6. We were surprised to note that the CMA states that “Apple’s Intelligent Tracking Prevention (ITP) is a *successful example*”³ of privacy being implemented at browser level. What is actually happening is driven by Apple’s 35% revenue sharing agreement with Google: there is the blanket obscuring of information to rivals since that enhances the value of ads on Google search and Apple’s income from the sale of Google’s ads that use as much data as the two companies can share between them. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Apple and Google’s first party data mining operations.

7. Importantly, cookies on their own, whether used in a First Party or a Third-Party domain context, do not identify any specific individual. For there to be a legal issue arising under our data protection law,⁴ it is necessary to look to determine whether personal data⁵ is being stored in a cookie. Then there is a need to check whether there is meaningful consent to such use⁶, and whether that meaningful consent is for the specific use that has been agreed with the individual.
8. Where a cookie is being used to store unconsented Personal Data or data that tends to identify a single living individual, that may give rise to a data protection issue. Where a cookie is used by, say, a newspaper when a user visits a website, it is only dropped on a browser with the user’s consent once the user accepts the use of cookies. On a return visit, the newspaper can then promote a relevant ad based on the browser’s history of visiting websites. If a browser has been used to look at a string of previous websites selling lawnmowers, the newspaper can reasonably deduce that the user is interested in buying a lawnmower and serve an ad for a lawnmower. If that ad generates a successful sale, it is worth more than an ad that advertises something that is of no interest to the newspaper’s reader.
9. [🔗] cookies to match available inventory in regional and local newspapers and other publications so that people can be warned of emergencies – such as floods or storms. Warning people and finding lost children provides an invaluable service in times of emergency and depends on the widespread deployment of a standardised technology – short term storage files

¹ This is reflected in submissions from rival browser owners such as Brave and Vivaldi (see para 3.14 of WP2).

² T. Cowen (2021), ““Privacy Fixing” After Texas et al v. Google and CMA v. Google (Privacy Sandbox): Approaches to Antitrust Considerations of Privacy” available at: <https://www.pymnts.com/cpi-posts/privacy-fixing-after-texas-et-al-v-google-and-cma-v-google-privacy-sandbox-approaches-to-antitrust-considerations-of-privacy/>

³ Para 5.36 of WP2

⁴ See case T-557/20 [Single Resolution Board \(SRB\) v. EDPS](#)

⁵ Art. 4, GDPR

⁶ Art. 6, GDPR

or cookies.⁷ This socially beneficial use is impeded when browser owners block the use of data by misusing their power over the browser.

10. By contrast, Google and Apple continue to use cookies and build personal profiles of data about individuals. This is what they describe as “first party data”, which included personal data, obtained without meaningful consent. There is no legal meaning to the expression “First Party Data” – data protection law addresses the misuse of personal data. Whether the person misusing that data is the owner of the first domain that the user visits or the 50th makes no difference, the ownership of a domain is unrelated to data protection law. We consider that the parallel CMA case into Google’s misuse of the functioning of its browser (Privacy Sandbox), where the ICO’s views have been provided, is a helpful precedent and the ICO can be asked to assess Apple’s privacy position.
11. We welcome the CMA’s conclusion that there is not enough evidence to support Apple’s defence of privacy and security for the WebKit restriction (e.g., para 6.6 of WP2 – the evidence does not support Apple’s submission that WebKit restriction is necessary to ensure security privacy and performance of iOS (para 6.6 of WP2)). This is also supported by the DOJ in its recent complaint against Apple.⁸

The working papers should highlight the range of revenue sharing deals between Google and others and the risk to competition from Google’s “biting the hand that feeds” strategy.

12. Google has used revenue sharing deals widely. They are deployed with telecoms companies and other browser suppliers such as Apple and Mozilla to create dependency and undermine incentives for those browser owners to directly compete with Google.⁹ If they were to compete directly, the revenue sharing deals would dry up – and they are such a significant source of income that none are willing to take that risk.
13. Apple’s business model has historically involved its sale of devices and services, but its strategy changed in 2017 to services revenue with its revenue in services rising steadily. With its operating profit from products at 40% its growth in services is even more profitable, being described by Forbes as 73%¹⁰
14. The CMA has found that “At the global level the App Store is the largest contributor to services revenue (at [20-40]%) followed by Advertising (Third Party Licensing Arrangements) (at [20-40]%) in 2021.”¹¹ Third Party Licensing Arrangements include ones with search engine companies such as Google, Bing, Yahoo, etc. Similar to Google, Apple charges a commission for every in-app purchase.¹²

⁷ [🔍]

⁸ See [USA v Apple DOJ Complaint](#) (21 March 2024)

⁹ e.g., see [USA v Google](#) (Search) [2020] where the revenue sharing deals with telecoms companies limit their incentive to create their own apps stores or ad funded businesses.

¹⁰ <https://www.forbes.com/sites/johnkoetsier/2024/02/02/73-this-1-number-shows-why-apples-future-is-in-services-not-devices/>; https://assets.publishing.service.gov.uk/media/62a1e208e90e07039f799fed/Appendix_C_-_financial_analysis.pdf para 7 to 10

¹¹ https://assets.publishing.service.gov.uk/media/62a1e208e90e07039f799fed/Appendix_C_-_financial_analysis.pdf para 13 and 22

¹² <https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour#:~:text=These%20complaints%20also,buys%20their%20app.>

15. It is unclear to us where the \$20 billion that is derived from 36% of Google search ads revenue is in its accounts – presumably in its service revenue line. The costs of sales for that agreement would presumably be negligible, with profits closer to 100%.

The relevance of financial incentives on upgrading Browsers.

16. The way that such owners leverage their browser engines to increase their monetisation should be included in the analysis. Apple’s internal documents themselves stated that Google has “an alternate vision of privacy that is centred on its advertising business model” (see para 2.32 of WP1). To safeguard their revenue from commission fees charged through in-app purchases, it makes it no surprise that WebKit and web apps are not on functional par with native apps.
17. Web developers said that WebKit was slower to support new features, particularly in relation to web apps (see para 6.5 of WP2) and that Google was also not good at web apps (see para 4.18 of WP3). The Verian consumer research found that there was a preference for using the app rather than the browser to access content as apps “were considered a shortcut to content” (page 18 of Verian slide deck). It is also unclear how much Apple actually invests in the development of WebKit (para 5.49 and 5.50 in WP2).
18. When seen in the context of the Google/Apple revenue sharing deal, it becomes clear that Apple has no incentive to upgrade its browser to enable users to access content in the web that is being monetised by Google’s advertising competitors. It has no incentive to compete directly since it receives the \$20bn from search ads by Apple users.¹³ Apple therefore benefits from ITP removing the use of third-party cookies (since that benefits the value of Google ads), whilst it preserves for itself the use of cookies as a “first party” cookie user.
19. Apps may wish to monetise content by using ads. Newspapers, for example, have a different product when they can provide content freely to readers for sharing and public debate is enhanced. Readership increases and opportunities for attracting new readers is higher. By contrast newspapers, trapped behind a subscription paywall, have difficulty in attracting new users, and may be influenced in a choice of monetisation by the need to preserve and protect content and the lack of value in *advertising because of the lack of useful data with which to match advertising rivals*.
20. Apps and rival browser owners should have commercial freedom. They may wish to allow advertising based models that use cookie storage (to benefit businesses and publishers to be able to monetise their content better) but the restriction posed by Apple in WebKit (via ITP) and potentially Google (with its Privacy Sandbox changes) makes this impossible.

Apple and Google limiting access to certain software and functionality is a barrier to entry (WP1 and more in WP2).

21. One of the issues being considered in this investigation is whether Apple and Google are using their position in the supply of browser engines to restrict rival browsers’ access to functionality, which is available in the WebKit and Blink browser engines (para 1.3 of WP3). Access to

¹³ See [USA v Google](https://www.justice.gov/atr/case-document/file/1428271/dl?inline) (Search) [2020] Amended Complaint at <https://www.justice.gov/atr/case-document/file/1428271/dl?inline>, paras. 118 – 119

browser functionality is important in allowing browser vendors to innovate and implement features in their browser, including user-facing features, security features, and privacy features that enable browser vendors to innovate and improve their products (para 2.2 of WP3).

22. In WP2, the CMA explores Apple's restriction of developers to use WebKit as the browser engine. As a remedy, it seems the CMA might be minded to direct Apple to lift its restriction to WebKit so that like in Android, browser developers are free to use any browser engine. As previously submitted to the CMA, this remedy would ultimately be ineffective and somewhat of a red herring; Google offers an unrestricted browser engine selection on Android and Android does not see more competition.¹⁴ To improve competition in browsers, the creation of a greater incentive to compete is needed. We suggest the following steps should be taken:
- a. Remove the revenue sharing agreement between the two dominant players (Apple and Google). As mentioned above, for so long as such revenue sharing agreement exists, Apple has no incentive to compete and improve its browser engine. As a revenue sharing agreement between companies selling digital devices, data and advertising services to segments of more or less wealthy end users, it becomes clearer that both businesses are pursuing a joint enterprise. Apple's expensive devices are sold to people with higher disposable income¹⁵. Google gathers data from wealthier people indirectly through its deal with Apple and then directly from those further down the disposable income curve through its Android devices and ecosystem. Apple's higher income users generate more sales from search ads than the higher volume of people who buy cheaper handsets.¹⁶ The system benefits both Apple and Google because Google is Apple's biggest customer. Apple sells its customers' data to Google for ad based for \$20bn per annum.
 - b. Remove Google Search as the default search engine as such an agreement between the largest mobile browsers clearly limits the opportunity for competitors and competition.
 - c. Restrict Apple and Google's ability to block the use of data, including the use of cookies by others. The current position is a form of privacy fixing and restricts the opportunity for privacy to develop as a non- price factor of competition.

Additional points

23. **Joint sign in.** Para 2.9 WP1 references the mobile browser being responsible for user interface features such as *web favourites, browsing history, remembering passwords and payment details*. It also determines the layout of the navigation bar and settings. And features may be added that affect *the privacy, security, and compatibility of the browser*. In our submission of 20th January 2023, we highlighted the issue that coordination of sign-in is taking place and that is a key point where information about users is gathered jointly by the mail platforms for their benefit, and rivals do not get access to such data. This raises clear anticompetitive coordination risks and requires further investigation.

¹⁴ Blink's share of supply on Android is at least 97% (see para 4.11 of WP1).

¹⁵ DOJ Complaint against Apple [2024], para 181

¹⁶ See USA v Google (Search) [2020] [Amended Complaint](#), paras. 120, 121

24. **Embedding features in the browser that exclude competition elsewhere.** In para 2.10 WP1, the CMA notes that product differentiation can happen at both the browser engine and the browser level (i.e. within the browser code) sitting on top of the engine. The effect of products being embedded into the browser and then substituting for product that could be provided by many different businesses elsewhere in the supply chain is not addressed. We commend the CMA to the issue of the embedding of wallets into the browser and the problem created by standardisation supported by both browser vendors which eliminated competition among independent websites running different wallets.
25. We attach in Annex 1 a description of events that took place at the World Wide Web Consortium (“W3C”) concerning the development of a standard that would have enabled the use of decentralised wallets by all businesses operating over the Open Web. The standard was put forward by an entrepreneur (Manu Sporny) that demonstrated the forward and backwards compatibility of a standard (a serious engineering feat) and a mechanism for wallets to be used by all web businesses. That standard was blocked by a combination of major businesses, prominent among which were Google and Apple, instead preferring to put forward a proposal of their own. This demonstrates how payment system standards are not made respecting the principle of unrestricted participation, whilst also demonstrating how functionality is increased in the browser to the benefit of the browser owners.
26. **The browser snowball of functionality and the need to Quarantine the Browser.** The CMA has investigated browser compatibility. As noted by the US Commerce Commission Antitrust report¹⁷, the continuing upgrade by Chrome of compatibility may be valued by developers since any new development that they want to create appears to be accommodated. It also has the anticompetitive effect of excluding rivals’ engines from developing since the competitors’ inability to compete with constant upgrading appears to suggest that their browsers are a lower grade product. The practice was rightly called out as a type of predatory practice born of unlimited funds from monopoly profits. Both Apple and Mozilla receive lower levels of investment by comparison to Google’s Chromium. The CMA needs to consider whether opening the market to encourage competition recognises that fact and requires Google to be restrained, with entry encouraged. Or whether the market will inevitably be dominated by a single browser engine (Chromium) and hence, that it requires regulation. We have written to the CMA case team and elsewhere about the need to “Quarantine the browser”, to prevent it becoming a growing snowball of functionality and the need for Alphabet to continue to incur levels of investment currently seen.
27. We hope the above is helpful to the CMA and remain available should the CMA have any questions.

Yours faithfully,



Preiskel & Co LLP

¹⁷ https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

Annex 1: Chronology regarding the Payments API

Annex 1 Chronology regarding the Payments API

- 2010 – W3C created the [Web Payments Community Group](#).
- 2014 – W3C created the [Web Payments Interest Group](#)
- 2015 – W3C created the [Web Payments Working Group](#)
- 2016 – W3C was criticized for elevating the user agent (browser) to have primacy over user or merchant interests.
 - 2016 February – The months old Microsoft/Google specification is picked as the winner over the years old work that went into the Web Payments Community Group specification ([Approaching First Public Working Draft of Web Payments API | Web Payments Working Group \(w3.org\)](#)) – see, specifically, the first paragraph). Zero features from the Web Payments Community Group specification are merged with a suggestion to perform pull requests if the Web Payments Community Group would like modifications made to the Microsoft/Google specification.
 - Amongst the rejected proposals was a standard developed by an impartial and independent group of engineers including Manu Sporny (more below). Manu’s proposal was for a digital wallet that was browser agnostic, i.e., would work regardless of the version or type of browser used, and would give equal placement to all card offerings. See below for a video of the capability being demonstrated the full end user choice being enabled by the 2017 Digital Bazaar proposal.³⁵



- The delegates of Microsoft, Google and Apple, who were all at the time browser owners, did not consider it, preferring a proposal that embedded functionality in the browser.³⁷ In a [blog](#) posted in February 2017, Manu Sporny stated, “it became clear that the browser manufacturers wanted to execute upon a fairly monolithic design” in relation to web payments. This trend among browser manufacturers to degrade general purpose features of the web and advance monolithic designs for their benefit continues into advertising and identification, among others.

³⁵ <https://lists.w3.org/Archives/Public/public-payments-wg/2017Sep/0021.html>

³⁶ <https://www.youtube.com/embed/Yb-gWT1tRg?rel=0>

³⁷ With Microsoft being a browser engine owner and manufacturer at the time but which has since switched to using Google’s Chrome engine. The specifications of the W3C Payments API justifies Google and Apple granting their own payment solutions first place in the queue of payment cards that are put into every mobile phone browser. The lead editors were Google, Apple and Microsoft. See at <https://www.w3.org/TR/payment-request/>

- The sole purpose behind the design for a Payments API that was decided upon in 2017 and, eventually, approved in 2022, was to enable browsers to intermeditate in payments, allowing them to preference specific providers or, indeed, their own offerings. The lead editors were Google and Microsoft.³⁸
- **Complaints.** 2021. On the 31st of January, two complaints were made, one from 51Degrees, and another from Criteo. These were based on the observation that the current standards would disintermediate users from merchants and elevate the browser from a user agent to an active participant that can intervene in communication. Criteo and 51Degrees, moreover, complained that the specification would allow Google and Apple to self-preference their own payment solutions in the wallet that is pre-installed in all Android and Apple devices.
 - The formal objections identified a clear breach of the W3C Antitrust and Competition Guidance, which specifies that the “W3C does not play any role in the competitive decisions of W3C participants nor in any way restrict competition.”³⁹ The Payment Request API, many specifications of which only relate and confer advantage to two browser and OS owners, not only contradicts the W3C’s Antitrust Guidance but the consortium’s Priority of Constituencies too, according to which specifications should place the interests of authors and site owners ahead of user agents’ interests.⁴⁰
- Following a [call for consensus](#) on 2021-12-09, the Chairs announced a [Working Group decision to make changes](#) for three of the four elements of Criteo’s Formal Objection. These changes were non-substantive: they were either editorial in nature or had no impact on deployed solutions.
- Criteo restated its complaint on January 11th, 2022. [Re: Call for Consensus to Publish Payment Request API and Payment Method Identifiers as Recommendations - reply requested before 11 January 2022 from Lionel Basdevant on 2022-01-14 \(public-payments-wg@w3.org from January 2022\)](#)
- Formal Objections (FOs) are typically handled by the Director, Tim Berners-Lee, whose independence from commercial influence makes him an ideal mediator.⁴¹ This was not the case for Criteo’s FO on Payments. The complaint rather went to an employee of the W3C, who formed a Council to deal with the complaint.⁴² This was done on April 21st, 2022.⁴³ On September 6th the Advisory Council overruled Criteo’s objection (11 votes to overrule, 5 abstained, 4 not present).⁴⁴ It should be noted that the Council was not made up entirely of those with no interest in the outcome of the vote. The membership of the Council is only published for W3C members, but we can confirm contained delegates from Google and Apple.

On 8th September 2022 the Advisory Council, delegate, TAG and Advisory Board approved a new standard that enables browsers to become digital wallets. This standard is now being widely implemented.⁴⁵

It is typical in standards setting to define the problem that is being solved before working on a standard. W3C have now allowed a proposal whose sole justification is to enable the web browser owner to intermeditate in payments, rather than one that would have enabled end user choice and competition.

³⁸ See first paragraph of [Advisory Committee Review of Payment Request API and Payment Method Identifiers \(w3.org\)](#)

³⁹ [Antitrust and Competition Guidance \(w3.org\)](#)

⁴⁰ [Advisory Committee Review of Payment Request API and Payment Method Identifiers \(w3.org\)](#)

⁴¹ See paragraph 2.2 and 5.6 of the W3C’s process document: [W3C Process Document](#)

⁴² [Council decision on formal objection to Payment Request API by Criteo \(w3.org\)](#) and section 7 of the Advisory Committee Review of Payment request API - [Advisory Committee Review of Payment Request API and Payment Method Identifiers \(w3.org\)](#).

⁴³ [Convening a W3C Council on the Criteo Formal Objection to the Payment Request API Proposed Recommendation from Ralph Swick on 2022-04-21 \(w3c-ac-members@w3.org from April to June 2022\)](#)

⁴⁴ Ibid.

⁴⁵ [Payment Request API \(w3.org\)](#)