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Competition and Markets Authority
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For the attention of:
browsersandcloud@cma.gov.uk

By email only

[redacted]
30th July 2024

Dear Sirs,

Re: Mobile browsers and cloud gaming – Working Paper 5 ("WP5") - Comment

1. As you know, we represent Movement for an Open Web ("MOW"). We are writing further to our submissions made on Working Papers 1, 2, 3 and 4, which should be read in conjunction with this letter.

The role of choice architecture in the supply of Mobile Browsers: the effects on markets suffering long term distortion are severe.

2. We note and agree that choice architecture is important, and shapes end users' choices over matters that can cause a substantive life impact. Users' freedom to choose can be curtailed and their ability to make a sensible and objective decision affected by misleading presentations.

3. We also agree that impeding the ease with which users can make choices is a factor that significantly affects competition. Hence, software choices where one route has less delay or fewer steps or lower latency than another will affect users' choices between competing products.

4. We also agree that the six choice architecture practices identified by the CMA affect users' ability to choose among different alternatives and are factors to be considered in an assessment of competing alternatives. However, there is an additional factor that should be considered by the CMA: browser vendors' control over how consumers share Personal Data when they navigate the web, gather Personal Data from these users and restrict the operations of rival apps via their operating systems and unilaterally dictated policies. This restricts media owners' (apps and websites) ability to set their own privacy policies and terms of engagement with their customers.

5. The CMA has noted that current terms are limiting the choices facing consumers:

"*people are less able to control how their personal data is used and may effectively be faced with a 'take it or leave it' offer when it comes to signing up to a platform's terms and conditions. For many, this means they have to provide more personal data to platforms than they would like.*"[1]

6. The terms on which consumers access platforms have been offered on a "One-size-fits -all" basis for many years by the platforms. The CMA also noted in its 2020 Report (at para 7.112) that a one-size-fits-all basis is inappropriate and the Bundeskartellamt decided that such terms are exploitative of the consumer under German competition law.[2] The misuse of clickwrap agreements that do not provide for sufficiently granular choices, because they inappropriately aggregate consent across different services can also harm consumers and limit competition.[3]

Additional choice architecture practice in browser: management of user data

7. As the CMA identified in its seminal 2020 Report, (Chapter 4 para 194 *et seq.* of the Final Report and Appendix G), choice architecture can be used anticompetitively. The browser vendors' ability to shape consumers' choices can affect the way that users share Personal Data and that can affect both the amount and type of data gathered by the platform and rival apps or websites. For example, Apple's App Tracking Transparency (ATT) prompt effectively uses dark patters to manipulate user choices in an anticompetitive way.[4] This has been investigated for some time by the French Autorité de la Concurrence, together with the French data protection agency the CNIL, who have recently issued Apple with a statement of objections.[5]

8. A browser's software can include other functions, which can restrict competition from substitutes on the web.[6] Google's recent announcement in the Privacy Sandbox case, dealing with the Google Browser settings, misleadingly refers to increasing user choice.[7] However, given Google's conduct to date and choice screens, Google is actually not providing consumers improved transparency or choices over their browsing experience, and instead is restricting options and competition over consent mechanisms to only those that it itself provides. We note that there are separate CMA teams handling these items, but we submit that this is highly relevant in this investigation too considering the browser's role in supplying this choice for the user and the fact that this choice contributes to competition between the browsers (the CMA admits privacy is a method of product differentiation (see the CMA's WP1)).

9. In principle, we suggest that choices made by people accessing websites regarding Personal Data should be made at the time they access each website. For example, someone looking for news could choose from among a range of different newspaper apps or websites, and then choose to read one or more of them, on the terms offered by each website.

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[1] See CMA Online platforms and digital advertising Market study final report (1 July 2020), p8 para 13 and 4.57 & 4.58 & 6.46
[2] See the Bundeskartellamt decision dated 6th October 2023 relating to Google's data processing terms found at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.html?nn=48888
[3] For example, the CMA has note that both Google and Microsoft aggregate consent across multiple product and combine all data across all products. Final Report 2020 4.161
[4] See https://www.authoritedelaconcurrence.fr/fr/communiques-de-presse/publicite-sur-applications-mobiles-ios-le-rapporteur-general-indique-avoir-notife-un-grief-au-groupe-Apple
[5] See fn4
[6] E.g. Googles' PAPPI product that is seeking to expand the browser to operate as an ad auction.
[7] https://privacysandbox.com/intl/en_us/news/privacy-sandbox-update/?s=09#:~:text=approach%20that%20elevates-,user%20choice,-.%20Instead%20of%20deprecating

10. We see little need for a browser to offer a pop-up mechanism that interferes with the terms on which each website trades. At present, platforms offer terms of use, which aggregate their own, and third-party products often on one-size-fits-all and take-it-or-leave-it terms. These aggregated terms deprive users of choice and prevent the user sharing Personal Data with each website or app offering content on bases that a competitive market could supply. These restrictive policies are part of the platforms' system of contractual and technical restrictions, which prevent interoperability among and between websites and apps. Through their contracts and technical measures, the platforms have created a subset of an enclosed internet, commonly called a "walled garden" of content. Within the walled garden, they make it technically easy to access the apps that they curate as well as facilitate the business-facing exchanges of data across their services. Even though browsers are designed to render web pages, the platforms make it difficult or impossible to use them to access websites with certain competing functionality on the open web. For example, Apple bundles payments and restricts interoperability with smartwatches, as well as limits the ability of rival websites or apps to use advertising as a funding model.[8]

11. The dominant search engine also hides the browser in its presentation and Apple sets Google Search as the default on all iOS computers in a way that we see is a deliberate architectural choice made by Google and Apple pursuant to their joint revenue sharing deal, which provides mutual benefits to both businesses.

12. As mentioned above, the current system for obtaining consent for use of Personal Data operates on a one-size-fits-all and a take-it-or leave-it-basis. Users are being misled in the choice that they make due to the use of dark patterns adopted by the browser vendors. Users are encouraged to click and block third party cookies. This was criticised by the CMA in its 2020 report.[9] Apple's ATT prompt was found by the CMA to restrict iOS users from making a meaningful choice,[10] which sees a mere 25% user opt in rate.[11] Furthermore, the one size fits all approach was found exploitative in the German authority's case against Google.[12]

13. The CMA could also, consistent with its previous observations and the more recent Bundeskartellamt and French Autorité positions, consider that the current systems through which choices are obtained are exploitative and unrelated to the specific use of the relevant product (i.e., the supply of a browser). Rather than operating as an overall clickwrap basis for using other's content on apps or websites.

14. The terms of use should in principle be related to the products offered by the distributor. Separate choices could then be made by users accessing and using different apps. A gaming app is likely to have different terms than a news app and the responsibility for terms could be left to the supplier of the content.

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[8] e.g., by blocking the use of cookies under their ITP and ATT updates.
[9] See CMA Online platforms and digital advertising Market study final report (1 July 2020)
[10] CMA Online Platforms and Digital Advertising market study Final Report, Chapter 4 and see paragraph 6.181 *et seq*. in the CMA's Mobile ecosystems Market study final report: Final report (publishing service.gov.uk).
[11] https://www.statista.com/statistics/1234634/app-tracking-transparency-opt-in-rate-worldwide/#:~:text=The%20latest%20Apple%20iOS%20version%20includes%20a%20new,is%20around%2025%20percent%2C%20as%20of%20April%202022.
[12] See the Bundeskartellamt decision dated 6th October 2023 relating to Google's data processing terms found at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.html?nn=48888

15. Most importantly, the terms should not be the province or under the monopoly control of the browser or platform owners who have a conflict of interest – but entered into by the end user directly with the app or website that the user wants to use. Google and Apple (via their respective browsers) should not disintermediate the consumer (the website or app visitor) from a direct relationship with each publisher's property (a website or app). The consumer could choose to have the option to signal a default option, but the browsers should not have the ability to arbitrarily disturb the relationship between the consumer and the website; browser engines should be limited to navigating, rendering website content and basic form competition only (browser definition as defined by the CMA in WP1). Allowing the current and highly distorted system to continue would involve the CMA in perpetuating a continuing abuse.

16. We note that there may be a general consumer consensus that privacy policies are long and burdensome, and that users have privacy policy fatigue. The provision of a common privacy policy and sign in could be delegated to a set of trusted intermediaries. Importantly, there should be more choice and interoperability for such a market to function, not less. A market for trusted identity management systems (as noted by the CMA in Annex Z to its 2020 Report) is currently being hindered from developing because of the way that platforms bundle their terms for use of products on entry into their walled gardens. Functions such as authentication have long been separate from browser functions and do not need to be bundled. Google's Project NERA was designed to facilitate users declaring their identity to Google's Chrome, given it previously operated at a disadvantage to Facebook in using individuals' identity as a match key to support its advertising. The bundling restricts authentication (sign in) to the platform owner, under one-size-fits-all, and take-it-or-leave-it terms is both anticompetitive and exploitative.

17. Delegation of the user's privacy preferences to one or more intermediaries would benefit society, as the CMA's Verian study highlights different segments in society have different preference when it comes to sharing their Personal Data. However, this delegation should not be to Google and Apple, since they have a conflict of interest, which arises from their data driven business models and joint venture (see further below). Instead, the delegation should be to independent organisations.

18. The CMA should also make note of the use of Sign-In by Google and Apple during the rendering of websites. Please see further in MOW's submission of 23rd February 2024 on issues of Sign-In whereby they are restricting user choice.

The distorted market context.

19. The architectural choice factors identified by the CMA should not be considered against the world as we find it, but against a counterfactual world that would exist without the distortions and abuses that have shaped it for many years.

20. The long-term abuses that markets have experienced have operated for at least 10 years. (We know from the *USA v Google (Search)* and *USA v Apple* that Google and Apple have operated an anticompetitive revenue sharing over Google's search ads under an agreement that has been in place since the early 2000s.)

21. The economic consequences of a new abuse against an already distorted market are very different from the consequences of abuse in a market where dominance has only recently been

achieved. Here, the additional abuse is thus likely to have more severe consequences for the remaining competition that still exists.

22. In its seminal *Hoffmann La Roche* decision on the Abuse of Dominance, the European Court of Justice identified the issue in terms of the weakening effect that a dominant position has on the market.[13] Since the position of dominance and long-term abuses has already weakened competition, that which remains is fragile.

23. Here, competition has been weakened for over a decade by the presence of players that control entire ecosystems. They have put in place revenue sharing agreements that provide incentives to further weaken competition for their mutual advantage. So, in these circumstances the marginal competition, which remains is struggling for survival and that survival is threatened by new abuses and changes to the mechanism through which users can make choices.

24. We have outlined in our response to WP1 & 2 that the entire edifice of competition between Apple and Google is driven by their revenue sharing agreement, which means Google is Apple's biggest customer, given Apple is paid $20bn per annum to be its distributor of Google Search.

25. In order to increase its revenue from Google's search ads Apple's system promotes Google Search products and, since Apple receives 36% of the ads revenue from Google's sale of search ads, the agreement creates a mutually reinforcing and anticompetitive incentive. Apple blocks the use of data across websites via its Safari browser under Intelligent Tracking Prevention (ITP) and across apps via its dark pattern ATT prompts. Apple has effectively restricted all alternative routes through which advertisers may sell their products to Apple users. Apple provides default placement to Google Search on every Apple Mac device and hides the browser to encourage users to use Google Search. This anticompetitive conduct is further reinforced by Google's systematic use of revenue sharing deals with device suppliers and telecoms services providers, under which a network of anticompetitive agreements has been implemented.[14]

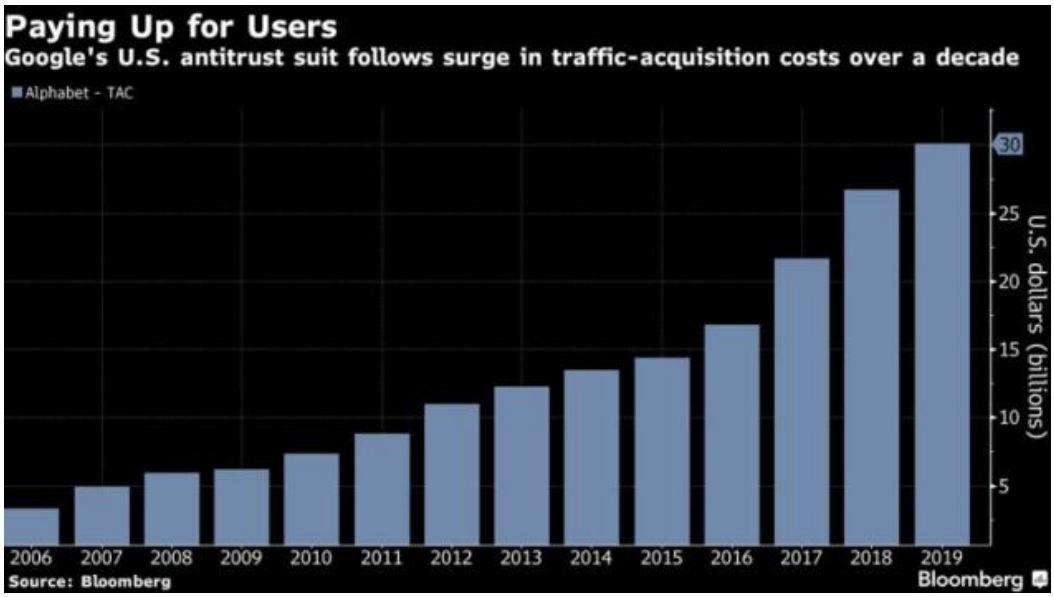
Preinstallations and default settings need to bear in mind their economic context and the incentives of Google and Apple under their revenue sharing agreement as well as the web of revenue sharing agreements with telecoms companies and OEMs.

26. Assessing technical settings outside of their economic context would tend to downplay their significance. When it comes to remedies, the banning of preinstallation or the amendment of an agreement to ban the default would be insufficient to remedy the effects on the market that are derived from the abuse, which consists in both the settings and the revenue sharing nature of the agreements which put them in place. The income and profit from these agreements drive the behaviour of those that may otherwise compete.

27. The Original Equipment Manufacturer (OEM) and other providers with which Google has put agreements in place are reported to also contain revenue sharing benefits for those that enter

[13] See para. 6 of the Decision: "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , as a result of the very presence of the undertaking in question , the degree of competition is weakened and which , through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."
[14] See *USA v Google* (Search) and the annex to Working Paper 5

into them. See for example, the telecoms agreement with AT&T as an example of a Traffic Acquisition Cost (or TAC agreements), whereby the service provider is paid a share of search revenues generated from the sale of handsets containing Google Search. We understand that TAC agreements, which are sharing revenues have been widely deployed by Google and they reinforce an anticompetitive effect of limiting the supplier's incentive to enter the market and compete with Google.[15] They have grown considerably over time[16]:



28. One of the sources of Google's considerable profits is its ability to guarantee its placement of Google products on end user devices. While the total expenditure on TAC numbers has been going up, the numbers have not been rising as fast as Google's revenues, so its profits have increased, driven by these revenue sharing deals. In 2023, Google spent 21.39% ($50.9 billion) of its total advertising revenues ($237.8 billion) to guarantee its traffic from all desktop and mobile devices worldwide.[17]

29. The Google business acquires traffic both by way of offering advertising products to end users and through its partnerships and distribution deals (like deals with a browser to have Google as the default search engine), which incentivise partners to bring as much traffic as possible to Google's properties for monetization.[18] As pointed out in "Why Google Success Was The Fruit Of Its Business Distribution Strategy" over the years, Google has executed an aggressive and successful distribution strategy that enabled it to control the Search market. Another aspect of Google's success was its Members' Networks. The Network Members traffic acquisition is based on Google Network Members (part of the AdSense program) to monetize those pages by displaying ads on their properties, generating revenues when site visitors view or click on the ads.

[15] See *USA v Google (Search)* such as the trial exhibit re. Android OEM Revenue Share at https://www.justice.gov/d9/2023-10/417458_0.pdf
[16] https://news.bloomberglaw.com/antitrust/googles-tac-increased-almost-fivefold-over-a-decade-chart
[17] https://fourweekmba.com/what-is-google-tac/
[18] https://fourweekmba.com/what-is-google-tac/

30. The CMA's WP5 Annex refers to these agreements but does not highlight or emphasise the very significant scale of the payments or the consequential anticompetitive outcome of the way that the incentives are tied to revenues generated by the sale of devices containing Google Search. For example: "RSAs allow manufacturers to earn revenue share through specific search access points on Android devices".[19] This means that the benefit of the agreements accrues to telecoms players that promote devices that contain Google Search and they do not get a benefit when they sell devices that do not contain Google Search. So, even if the defaults or choice architectures were removed, suppliers would be incentivised to sell devices containing Google Search products to the exclusion of rivals search products

31. Put another way, Google's network of revenue sharing deals incentivises its partners to promote Google at the expense of rivals to Google. It controls access to its walled garden and is the centre of its own web of anticompetitive agreements.

32. The impact on telecoms and other companies' incentives to promote rivals to Google will also depend on the relative income from Google by comparison with their other sources of income. CMA should investigate the scale of payments and the importance of these to OEMs and telecoms companies as a source of both income and relative profits to these Google partners.

33. Our understanding is that the "Google Bung" (as it is referred to by some telecom executives) are some of (if not the most) important low risk sources of payments that are available to them. Since the payments carry little risk in terms of cost of sales they are almost pure profit and are, as one telecoms provider put it, "the heroin that gets you hooked on the Google system".

Revenue sharing agreements and their importance for remedy design.

34. We refer to the CMA's annexes, which provide detail on the revenue sharing agreements that Google has put in place with OEM device suppliers and telecoms companies. We also refer the CMA to our responses to WP1 & 2 with relation to market definition and the revenue sharing agreements with Apple, which are not currently included in the CMA's analysis.

35. In relation to the six elements that affect users' choices considered by the CMA, we recognise their importance but consider that supply side factors also have a significant effect and truly limit the availability of browsers to such a great extent that consumer surveys are only now a record of the outcome of years of abuse.

36. To describe user choice in a consumer survey (see Verian report) where that choice has been so heavily constrained, is not easily likely to provide actual evidence of user preference, since preference cannot easily be exercised. Reliance on such evidence for that purpose should be treated with caution. Instead, that survey provides strong evidence as a matter of fact that users are locked into their respective ecosystems.

37. Our previous submissions to the CMA point to improve signals related to when exchanges among organisations contain Personal Data or only non-personal data, as well as metadata that would help warn consumers when interacting with sensitive content. These enhancements to user choice require neutral interoperable technologies to exist, such as web standards, reversing

[19] CMA Working Paper 5, A12.

both Apple and Google's continued interference with rivals' high-quality, real-time exchanges of data that without modification , which will continue to distort digital markets.

38. We therefore tend to agree with the CMA's thinking that "*choice architecture for mobile browsers on iOS and Android devices reduces user awareness, engagement and choice, and encourages the use of Safari and Chrome for browsing, increasing barriers to entry and expansion for third-party browser vendors*". [20] However, that conclusion is reinforced by other supply side factors that substantially constrain effective choices and need to be considered, especially when the CMA is thinking through the issues that affect the market and remedies that are needed.

39. If, for example, amendments were made by way of remedy to all the six factors that the CMA has identified as affecting choice, but if nothing were done about the revenue sharing agreements, we would expect the remedies to be ineffective. This may have been the outcome of the EU's Android investigation and remedies.

40. If remedies were limited to prohibition of technical limitations, such as defaults then Google and Apple and their revenue sharing ecosystems would have a significant economic incentive to put in place other technology restrictions to like effect and circumvent any remedy focused on the CMA's six issues.

41. As the CMA notes in WP5 A18 and A19, most of Google's revenue comes through Google Search based on advertising. One very significant mechanism to increase competition would be via **the search access points** but this is foreclosed by the terms of the Placement, Revenue Sharing Agreements and the Google Mobile Incentive Agreement (GMIA). This means that these agreements ensure that Google Search is highly visible and accessible to users compared to other search engines. Put another way, these agreements mean that Google's partners promote Google products, reinforce Google's dominance and foreclose rivals.

42. Google Chrome is a key access point for search and is listed as such in the Revenue Sharing Agreements (RSAs). This is also reflected in the structure of the RSAs. For example, the Chrome Browser is one of the 'Search Access Points' in some RSAs. As the CMA notes in WP5 A.28, Google makes very substantial payments to OEMs under these agreements (such as in 2023) and in WP5 A29, "**Several OEMs told the CMA that the financial incentives they receive from PAs and RSAs are key motivators for entering into and complying with the terms of these agreements.**" It is also noted in WP5 A32, that the agreements operate as barriers to entry and limit browser competition.

43. The scale of the payments (as we have described them above), which are made under these agreements should highlight their competitive significance. When considered with relation to the incentives of equipment makers and telecoms companies, they can be understood as creating tailored anticompetitive agreements that raise barriers to entry and foreclose competition. When taken together, they cumulatively reinforce dominance and dependency on a massive scale.

44. We therefore disagree with the conclusion at WP5 A65 that "*through the agreements detailed in this Appendix, Google has considerable influence over the choice architecture on Android*

[20] CMA Working Paper 5. section 5.1

devices and this leads to Chrome being prominently installed and placed on Android devices." The revenue sharing agreements give rise to the anticompetitive choice architecture; the anticompetitive revenue sharing incentive drives the outcome in terms of choice architecture and also need to be struck down.

45. We hope the above is helpful to the CMA and remain available should the CMA have any questions.

Yours faithfully,

[redacted]

Preiskel & Co LLP