September 5, 2024

Microsoft Response to Working Paper 7

I. Introduction

Microsoft respectfully submits the following comments on the CMA's Mobile Browsers and Cloud Gaming Market Investigation Working Paper 7.[1] Microsoft appreciates the work done by the CMA in this Market Investigation (and the earlier market study) and in developing potential remedies. Given the duration of this mobile ecosystem review,[2] it is important to avoid further prolonging the period in which the adverse effects on competition (AECs) identified go unremedied, and for the CMA to adopt remedies at the end of this Market Investigation.

II. General remarks on the proposed remedies

The CMA has commissioned independent studies, consulted extensively with relevant stakeholders and devoted significant resources to this investigation over a four year period. As a result, it has gathered information necessary to assess the anticompetitive conduct by Apple and Google, and its impact on the markets for web browsers and cloud gaming services. **[CONFIDENTIAL].**

III. Cross-cutting considerations

Section 3 of WP7 raises a number of cross-cutting considerations that the WP concludes support making recommendations for consideration in SMS designation reviews, rather than proposing remedies in the Final Report to address adverse effects on competition.

A. The CMA market investigation and the DMA

It is important that the Inquiry Group not lose sight of the need to address AECs identified by the Market Investigation. While the Digital Markets Act (DMA) has led Apple to amend some of its policies, it has not led to changes that have addressed all of the AECs. Indeed, it is important to recall that the European Commission (EC) has opened a number of non-compliance investigations of Apple.

That said, the EC's initial investigation of Apple's failure to allow effective "link outs" does not impact on the AECs that the CMA is considering in the Market Investigation. Similarly, the 'Core Technology Fee' and certain other elements of Apple's App Store policies impacting on cloud gaming that the EC recently began to investigate, are not relevant in the UK (since Apple has not yet implemented in the UK its Alternative Terms Addendum for Apps in the EU). The EU is currently informally considering the compliance of Apple's browser engine policies with the DMA.[3] As this makes clear, the policy and other changes adopted by Apple in the EU and the related DMA non-compliance reviews to date may address issues relating to browser engines and App Store restrictions on cloud gaming. Given the timing of the Market Investigation Final Report and likely timing of a subsequent remedies order, the timing of remedies adopted through the Market Investigation process could be coordinated with the EC's DMA non-compliance reviews.

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[1] CMA, 'WP7: Potential Remedies' (hereinafter: WP7), available at https://assets.publishing.service.gov.uk/media/66b484020808eaf43b50dea8/Working_paper_7_Potential_Remedies_8.8.24.pdf.

[2] The Market Study was launched in June 2021, and the Market Investigation reference was made in November 2022.

[3] 'Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act' (Press release – 24 June 2024), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_24_3433.

B. Geographic scope of potential remedies

The CMA is seeking views regarding the geographic scope of potential remedies, asking whether a remedy that it is limited to the UK would be effective and proportionate.[4]

Given the size of the addressable market in the UK, a remedy in the UK that conflicts with the approaches being taken in other jurisdictions may raise questions about the return on investment for third parties seeking to offer services facilitated by the remedy (if the development work could only be deployed in the UK). However, as noted above, the EC, for example, is currently investigating elements of Apple's App Store policies that impact on cloud gaming and is considering its browser engine requirements. While the application of Apple's Alternative Terms Addendum for Apps in the EU (but not the UK) would mean that the remedies in the UK and EU would differ, the CMA's proposed options do not conflict with the relevant requirements imposed by the DMA.

C. Product scope of potential remedies

While it is true that the issues under consideration in the Market Investigation cannot be viewed in isolation, given that remedies could involve OSs, APIs and other software in the stack (including browser engines), access to hardware functionality, and app stores, remedies to address identified AECs could clearly relate to these other products and services. It has never been the case that competition remedies in the technology sector can only relate to a specific service that is at the core of an AEC – remedies almost always include interoperability and/or access to other elements of the related stack.

D. User choice remedies

Finally, WP7 refers to the potential use of "user choice" remedies to address browser engine-related AECs.[5] It is important to recall that the "users" of browser engines are browser app (and web) developers, not end users. Because demand for browser engines comes from developers, the users choosing the browser engine would be developers. Even in the context of browsers (where end users do choose their browser), it is important to consider the potential that web apps will "break" if end user "choice" leads to a browser on which an app runs no longer being accessible to the app (rather than simply being "hidden" or not displayed to the end user).

IV. Proposed remedies

In the following section Microsoft provides initial reactions to certain potential remedies under consideration in connection with Issues 1, 9 and 10.

A. Issue 1: Remedies addressing the WebKit restriction

The CMA is considering three options[6]:

- Option A1: Requiring Apple to grant access to alternative browser engines to iOS. [7]
- Option A2: Requiring Apple to grant equivalent access to iOS to browsers using alternative browser engines.[8]

[4] WP7, at paras. 3.7-3.10.
[5] WP7, at paras. 3.20 to 3.22.
[6] WP7, at para. 5.18.
[7] WP7, at paras. 5.19 – 5.24.
[8] WP7, at paras. 5.25 – 5.28.

- Option A3: Requiring Apple to grant equivalent access to APIs used by WebKit and Safari to browsers using alternative browser engines.[9]

As already highlighted by the CMA, Option A1 sets out a 'high-level, principles-based requirement for Apple' such that it 'may lead to effectiveness risks'.[10] **[CONFIDENTIAL].** It will also be important to ensure that Option A2 requires that alternative browser engines themselves are granted access to iOS that is equivalent to that granted to WebKit, and that Option A3 requires that alternative browser engines are granted access to APIs and all other interfaces used by WebKit that is equivalent to that granted to WebKit.

When developing the details of Options A2 and A3 for implementation, it will be important to ensure that they are not inconsistent with remedies adopted in other jurisdictions. For example, under Article 6(7) (and Recital 57) of the DMA Apple is obliged to provide alternative browser engines on iOS (and iPadOS) with 'effective interoperability' with and access for interoperability with the hardware and software features accessed or controlled via iOS (and iPadOS). Further, Article 5(7) (and Recital 43) prohibit Apple from requiring business users to use or interoperate with a web browser engine in the context of services provided by business users using Apples core platform services. While the EC decision designating Apple as a gatekeeper in connection with iOS does not specify Apple's interoperability obligations or the restriction on requiring the use of WebKit in the level of detail contemplated by Options A2 and A3, the obligation to provide 'effective interoperability' with hardware and software features is entirely consistent with those Options (amended as proposed).

B. Issue 9: Remedies addressing restrictions on cloud gaming services

Based on the preliminary findings in WP6, particularly the restrictions that Apple's Guidelines impose on cloud gaming services, the CMA is considering adopting a remedy concerning Apple's App Store Guidelines,[11] namely Option D1 which proposes that Apple should (i) review and amend its Guidelines to remove guidelines that may restrict cloud gaming apps, (ii) be prohibited from introducing new restrictions with equivalent effects and, (iii) be obliged to report regularly to the CMA, explaining the circumstances of any rejection of a cloud gaming app in the UK App Store.

As already explained in Microsoft's previous submissions, a number of Apple's Guidelines have restricted and continue to restrict its cloud gaming app. **[CONFIDENTIAL].**

As with Options A2 and A3, it will be important to ensure that the details of Option D1 are not inconsistent with remedies adopted in other jurisdictions, including the EU. In that context, Article 6(4) of the DMA requires Apple to allow installation and effective user of third-party apps using or interoperating with iOS. Recital 50 elaborates, noting that the rules that a gatekeepers set for distribution can restrict the ability of end users to install and effectively use such apps. It goes on to state that such restrictions can limit the ability of end users to choose between apps and should be prohibited as unfair and liable to weaken the contestability of core platform services. Option D1 is entirely consistent with the obligation imposed on Apple by Article 6(4) of the DMA.

[9] WP7, at paras. 5.29 – 5.34.
[10] WP7, at para. 5.19 – 5.20.
[11] WP7, at paras. 8.3 -8.4. For a detailed overview of Microsoft's concerns over Apple's App Store Guidelines, Microsoft refers to its previous submissions.

C. Issue 10: Remedies addressing Apple and Google's restrictions on in-game purchases

To address the AECs resulting from the requirement that app developers use Apple's and Google's in-app payment systems for subscriptions and in-game purchases, the CMA is considering two options:

- Option D2: Apple be required to enable cloud gaming native apps to operate on a read-only basis, with no in-game purchases or subscriptions, so that games do not need to be recoded and no commission is payable to Apple.
- Option D3: Apple and Google be required to allow CGSPs to incorporate their own or third party in-app payment systems for in-game purchases.

[CONFIDENTIAL]. As correctly noted by the CMA in WP6, most, if not all, CGPSs adopt a subscription model.[12] As a result, end users wishing to subscribe on their iOS/iPadOS device would be unable to do so, potentially precluding a significant proportion of "new" potential gamers (who have not already subscribed using a console or gaming PC) from being able to access cloud gaming services. Further, many subscription services enable gamers to access games that require in-app-purchasing (IAP) to enable gamers to purchase consumables as they play (reflecting the fact that the developers of many games included in CGS catalogues adopt monetization models that include IAP). **[CONFIDENTIAL].**

[CONFIDENTIAL]. The remedy must permit the use of such in-app payment systems for subscriptions, as well as IAP, for example.

As with Options A2, A3 and D1, Option D3 should also not be inconsistent with remedies adopted in other jurisdictions, including the EU. Article 5(7) (and Recital 43) of the DMA prohibit Apple from requiring business users to use or interoperate with a payment service (or supporting technical service) in the context of services provided by business users using Apples core platform services. While the EC decision designating Apple as a gatekeeper in connection with iOS does not specify how Apple must implement this interoperability obligation, the restriction on Apple requiring use of Apple's payment service is entirely consistent with Option D3 (amended as proposed).

V. Conclusions

[CONFIDENTIAL].

[12] WP6, at para. 2.16.