

Introduction

Founded in Sweden in 2006, Spotify has evolved over the last 18 years into an audio streaming service that offers users in the UK access to a comprehensive catalogue of music tracks, podcasts and audiobooks. We offer a premium subscription tier and an advertising supported free tier to our users.

Audio content in the UK is extremely important to Spotify. This is why we have made important investments in the country. Our UK office holds a wealth of talent in audio, tech, engineering, product, design, data, research, and insights, making it one of Spotify's biggest R&D hubs globally and the company's first major technology centre outside of Sweden and the USA. It's also why Spotify's founder and CEO, Daniel Ek, has long supported a strong digital competition regime in the UK, which Spotify believes is critically important to establishing an open, democratic and competitive digital sector.

As a company that depends upon accessing its customers through mobile ecosystems, Spotify has seen and experienced first hand the abusive, unfair and anticompetitive behavior Apple has increasingly engaged in as its market power over mobile ecosystems has grown - a form of market power that now extends across multiple levels of the chain, including the App Store and Operating System (iOS).

Despite more than a decade of dominance and abusive conduct, ambiguity and uncertainty surrounding the requirements and limits of traditional competition laws have meant that Apple's conduct has continued, and negatively impacted thousands of app developers and millions of consumers. This problem has been compounded by the persistent circumvention of regulations and subsequent enforcement decisions by dominant, entrenched services, such as those operated by Apple.

The DMCC gives the CMA more efficient tools with which to effectively address broken markets and offer more clarity and guidance to market participants who can then compete in an environment of clearer rules and expectations. These tools hold the promise to unleash innovations and consumer benefits from Spotify and thousands of other independent developers (many of whom are declining to speak out publicly about the abusive conduct for fear of what could be devastating retribution by Apple) that are currently blocked or impeded by dominant digital platforms.

Spotify submits the following observations and comments regarding the draft Guidance on the digital markets competition regime set out in the new Digital Markets, Competition and Consumers law. Spotify believes the Guidance provides a robust, necessary, and effective framework in which the CMA can swiftly address the power and conduct of dominant digital companies to prevent abuses and introduce competition where it is currently thwarted.

I. Strategic Market Status (Article 2)

The Strategic Market Status designation substance and process set forth in the draft guidance presents what Spotify believes will be a principled and effective means of addressing those companies, activities and products in the broad digital ecosystem which hold a unique and entrenched position in the marketplace that negatively impact competition, including by higher prices and diminished innovation, while not unnecessarily burdening or constraining companies that lack that power or position. Below, Spotify offers its thoughts and observations on those provisions in the draft guidance that it considers of particular importance.

Section 2.10 When identifying a digital activity, the CMA will focus on “factual information and will not require an assessment of the competitive constraints on the firm”, which is distinct from a formal market definition exercise. The CMA notes that a formal market investigation exercise often involves “drawing arbitrary bright lines indicating which products are ‘In’ and which products are ‘out’”. The CMA’s assessment will instead focus on “competitive constraints”.

Spotify agrees with this flexible approach, and it will be important to allow the CMA to address competition problems in fast moving digital markets. The traditional market definition process is insufficient for the interconnected ecosystems often present in firms with strategic market status.

Section 2.13 The CMA may treat two or more of the potential SMS firm’s digital activities and the products within those as a single digital activity where either of the following conditions is satisfied: (a) these have substantially the same or similar purposes or (b) these can be carried out in combination to fulfil a specific purpose. This grouping exercise is not a separate step but is rather embedded in the identification of a digital activity.

Spotify agrees with this approach and believes that it will be important for the CMA to address how different digital activities can be used to accomplish or amplify the same abusive or anticompetitive ends. For example, some attempts in other jurisdictions seeking to address abusive conduct by Apple with respect to its in-app payment processing or App Store have resulted in Apple simply proposing to shift the abuse to its mobile operating system, leaving consumers and developers without, as yet, effective relief. The ability for the CMA to address related digital activities together will avoid this piecemeal or “whack-a-mole” problem that has stymied other enforcers.

Footnote 31 However, the CMA may have regard to the underlying evidence and analysis from the CMA’s investigations under the CA98 (or the CMA’s other tools) to the extent it is relevant to the extent and persistence of the potential SMS firm’s market power (rather than any specific finding of ‘dominance’).

Spotify agrees that the CMA should consider its recent experience in industries like mobile ecosystems. The CMA has a deep body of knowledge, experience and understanding that it of course should draw upon for its work under the DMCC.

Section 2.40, Footnote 28 The CMA notes that market power is not limited to raising prices profitably but is also relevant to “worsening quality, service, business models and innovation, among others”. This means that “market power is relevant even where customers or users face a zero price.”

Spotify agrees that the CMA should take a broad and multi-faceted view of market power, that still includes the ability to charge supracompetitive rates but also considers other deleterious effects on the market. Spotify believes market power is most detrimental when it allows a dominant firm to price above market rates while at the same time stifling innovation and quality improvements from other market participants.

Section 2.49 When carrying out its assessment, the CMA will consider developments that may affect the firm’s market power, including: (a) market developments such as emerging technology, innovation or new entrants. Evidence may include, for example, a firm’s internal documents, business forecasts, or industry reports. Paragraphs 2.63 to 2.67 below describe how the CMA may assess such evidence.

In addition to a firm’s internal documents, Spotify would encourage the CMA to consult with and take and assess evidence from industry participants. It may frequently be the case that these companies may be the source for new competitive innovations that are being thwarted by an SMS firm (or potential SMS firm). In addition, as dominant firms become accustomed to new regimes like the DMCC, their ability to tailor (or eliminate) documents and communications to avoid regulatory scrutiny will increase.

2.50 In considering these developments, the CMA will not seek to make precise predictions about the likely development of the industry. Instead the CMA will consider whether relevant developments are likely to be sufficient in scope, timeliness and impact to eliminate the firm’s substantial market power.

Spotify agrees that it is not necessary to be absolutely precise in either predicting how an industry will develop or in defining the metes and bounds of traditional antitrust markets. The factors outlined in the Guidance are carefully explained and cover familiar concepts in assessing problems and opportunities in digital markets. It has often been the case that even the most extreme examples of the exercise of market power are defended by Big Tech advocates as being constrained by some “theoretical” potential for competition, despite, in reality, often many years of clearly abusive and exploitative conduct failing to trigger the emergence of the promised new competition. Apple has been exercising its substantial market power in abusive and exploitative ways for many years, but no alternative to its dominance has been able to emerge, despite the potential for significant margins, given the massive installed base and scope of anticompetitive conduct by Apple.

Section 2.52 As such, where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market

power is entrenched, where there is no clear and convincing evidence that relevant developments will be likely to dissipate the firm's market power.

Spotify agrees that “clear and convincing” is the right evidentiary standard for overcoming any finding of entrenched market power based on possible future dissipation of that power.

Section 2.64 The CMA will decide the weight it is appropriate to place on a particular piece of evidence, taking into account, for example, its relative quality. There is no set hierarchy between quantitative evidence, such as consumer surveys or econometric analysis, and qualitative evidence, such as internal documents or statements of relevant firms. Further, there are no quantitative thresholds for when the two SMS conditions are met. The CMA may use different methods and approaches depending on the specific circumstances and the form, depth or complexity of the analysis may vary across investigations, even in the same industry.

Spotify agrees that qualitative evidence can be very important and should be given all due consideration. Internal qualitative documents revealing anticipated impact and intent of particular actions or strategies are often more reliable indicators of reality than econometric models produced after the fact.

Section 2.65 During the SMS assessment, the CMA may rely on relevant evidence gathered and analysis carried out in other cases, including for example market studies involving potential SMS firms, or other cases under its digital markets functions or its other tools, where relevant. In doing so, the CMA will be mindful of when and for what purpose the evidence was initially gathered and consider the weight it should be given and the extent to which it should be updated or corroborated.

All relevant evidence gathered by the CMA (along with its analysis and experience), should be considered. It is frequently the case that similarities in exclusionary or abusive tactics are repeated or imitated by different dominant digital platforms, and, as mentioned above, sometimes abusive conduct by a dominant firm can be shifted to achieve the same anticompetitive ends, so it is likely that evidence gathered in other investigations could be relevant. Spotify also encourages the CMA to collect and consider, when appropriate, evidence from other jurisdictions, given that many governments have looked carefully at similar issues.

Section 2.69 The CMA will have regard to its Prioritisation Principles when considering which firms and digital activities to prioritise for SMS investigations.

Spotify agrees that the Prioritisation Principles are helpful in this context. Spotify notes that the firms that control the mobile app ecosystems directly and negatively impact thousands of businesses and nearly every UK consumer and clearly should be at the top of any priority list for CMA attention.

Section 2.71 The SMS investigation notice must state, in the case of an initial SMS investigation: (a) the reasonable grounds on which the CMA considers that it may be able to designate the firm as having SMS in respect of a digital activity

Spotify suggests clarifying this guidance to reflect “activity or activities” given the potential and likelihood for grouping digital activities under a single investigation.

II. Conduct Requirements (Article 3)

Determining and imposing comprehensive and effective conduct requirements on SMS firms will be the most complex and difficult aspect of enforcement for the CMA. There are examples from the last few decades of enforcement by various jurisdictions around the world where conduct requirements have been effective at achieving the goals (such as US and EU decisions and settlements with Microsoft that enabled companies like Apple and Google to freely build businesses serving Microsoft OS customers) and where they have been ineffective (such as some of the “choice screen” remedies imposed on Google by the EC). Development of effective conduct requirements often requires input and expertise from throughout the industry and either the willing or compelled cooperation of the dominant firm. The guidance provides a good framework within which the CMA will be able to work with the industry to find effective conduct remedies that address the conduct and power of SMS firms

Section 3.7 In addition, the CMA may only impose a CR which is of a permitted type. The Act specifies an exhaustive list of permitted types, which are: (a) Requirements for the purpose of obliging an SMS firm to: i. trade on fair and reasonable terms; ii. have effective processes for handling complaints by and disputes with users or potential users;

Spotify notes that Apple has a history of evading “fair and reasonable” requirements and urges the CMA to be as specific as possible in developing CRs in the mobile ecosystem, especially with regard to app stores. The highly profitable nature of many of the exploitative behavior of Apple gives Apple a great incentive to evade and take every liberty with any ambiguities. Delay or forcing iterative decisions has been a strategy for Apple. To the extent that the CMA can anticipate those iterative evasive moves, the sooner it can arrive at a clear CR that effectively enables fair competition.

Section 3.10 Before imposing a CR or combination of CRs on an SMS firm, the CMA must have regard to the benefits for consumers that it considers would likely result (directly or indirectly) from the CR or combination of CRs. A benefit may result indirectly from the CR or combination of CRs, for example where the CR(s) is likely to give rise to benefits for business users of a relevant digital activity and/or increase competition in a relevant digital activity, which may then result in benefits for consumers in the form of lower prices, higher quality goods and services and/or a greater range of products and services.

Spotify agrees that consumers benefit both directly and indirectly from competition and encourages the CMA to consider adding innovation gains from non-SMS firms to the list of enumerated consumer benefits.

Section 3.13 Section 20(3)(c) of the Act allows the CMA to impose a CR that applies to an SMS firm's conduct in an activity other than the relevant digital activity. Under this permitted type, the CMA may impose CRs for the purpose of preventing an SMS firm from carrying on activities other than the relevant digital activity in a way that is likely to materially increase the SMS firm's market power or materially strengthen its position of strategic significance in relation to the relevant digital activity. This would include requirements to prevent the SMS firm from carrying out non-designated activities in a way that is likely to reinforce or embed such market power and/or position of strategic significance.

This is a critical consideration that will contribute to the goal of reaching truly effective CRs. Spotify has seen digital giants like Apple try to respond to new legal obligations imposed by courts or regulators by moving fees and proposing new rules and restrictions that seek to thwart the purpose (and letter) of the imposed obligations. This has been the case in the US, the Netherlands, EU, South Korea, and elsewhere.

Section 3.17 In brief, the CMA's approach to imposing CRs will be as follows: (a) Step 1: The CMA will identify what the CR is intended to achieve. CRs must be imposed for the purpose of one or more of the objectives set out in legislation and will typically be intended to ensure that SMS firms do not take advantage of their powerful positions in ways that could exploit consumers or businesses or undermine fair competition.

Setting forth the clear purpose (for example, ending exploitative abuses, introducing and ensuring fairness and contestability to markets, and reducing market power) will help to constrain conduct and resolve any ambiguities in the specifics of any CR, and will make clearer when evasion of a particular order is deliberate versus unintentional.

Section 3.20 To provide an illustrative example, to address an SMS firm having an advantage over competitors and potential competitors due to its unique access to data, the CMA may decide to impose a CR or combination of CRs on the SMS firm intended to ensure that the SMS firm uses data fairly. This would be consistent with the 'fair trading' objective but more specifically targeted at the issue the CMA is seeking to address.

Spotify agrees. We would also suggest adding an additional example related specifically to well understood issues with respect to Apple's app store and its restrictions on developers designed to thwart competition and discriminatorily extract monopoly rents from the ecosystem.

Section 3.23 In considering what a CR or combination of CRs is intended to achieve, the CMA will have regard in particular to achieving benefits for consumers. As noted in paragraph 3.10

above, a CR may benefit consumers directly (eg by requiring an SMS firm to conduct itself in a certain way in relation to consumers) or indirectly (eg by giving rise to benefits for business users which are likely to be passed on to consumers, or requiring an SMS firm to conduct itself in a way which facilitates increased competition for the benefit of consumers).

Spotify agrees that indirect benefits to consumers are very important. Enabling competition often results in unanticipated benefits to consumers. Apple's success with iTunes on Windows in the early 2000s, after Microsoft's power to abuse and exploit its position on Windows was constrained, is a great example of this.

Section 3.26 (c) Principle 3: When setting action-focused CRs, the CMA will typically impose higher-level requirements, based on the permitted types set out in the legislation. Higher-level requirements will allow for greater flexibility in the specific steps the firm needs to take to comply, which may support innovation and involve less risk of unintended consequences.

Spotify agrees with this approach in some cases, but notes that Apple in particular has a history of noncompliance in other jurisdictions and would caution the CMA against "higher level requirements" that might serve as circumventing programs. Higher level requirements may be appropriate for firms that do not have a history of circumvention, in the UK or in other jurisdictions, and should be accompanied by clear statements of purpose and be used as a means, when appropriate, to identify deliberate circumvention.

Section 3.27 The CMA will apply these principles flexibly. In some cases, it may be that higher-level CRs need to be supplemented over time with more detailed requirements – depending on how effectively SMS firms comply with higher level requirements. Whilst in some cases it may be appropriate to move sequentially through the principles set out above, there may be situations where a more directive approach is merited from the outset.

In Spotify's experience, Apple in particular has a history of noncompliance and buying time for extremely profitable, exploitative conduct. Therefore, assuming that Apple's App Store and mobile operating system are designated as having SMS, Spotify recommends building lessons from circumvention in other jurisdictions and taking as specific and directive an approach as possible from the outset. Any place where the abusive or exploitative conduct is particularly and directly profitable, the incentive will always be for the SMS firm to evade until the orders are specific enough and the penalties severe enough to change the incentives.

Section 3.63 Where a CR has an implementation period, the CMA expects the SMS firm to work constructively with the CMA during this period to assist the CMA to understand the SMS firm's plans for compliance. During this period, the CMA also expects the SMS firm to engage with relevant third parties who may be impacted by the CR. The CMA may ask an SMS firm to

provide it with a written plan on how it intends to comply with a CR in advance of the CR coming into force.

SMS firms could certainly work constructively with the CMA on compliance plans, and Spotify hopes that they will do so. The reality is that the CMA will have to create the incentives, financial and otherwise, for SMS firms to do so. We've already seen in other jurisdictions a decided and determined lack of willingness by dominant firms to cooperate when any significant profits are implicated. And history bears this out. It took a decade of cases, penalties and the threat of corporate breakup to encourage Microsoft to ultimately cooperate with enforcers. And Apple has taken an openly defiant posture towards multiple enforcers and a US Federal Court. The CMA should be fully aware that it will have to provide the necessary incentives to get cooperation from SMS firms when power or profits are threatened.

III. Pro Competition Interventions (4)

The availability of Pro Competitive Interventions as a tool to be applied where appropriate (with broad discretion) by the CMA will be an important means by which the CMA can craft an appropriate outcome in any given case. In addition, as mentioned above, the threat of a PCI may prove to incentivize a firm with SMS to be more cooperative in crafting and complying with effective CRs.

Section 4.24 A PCI may implement the same remedy options as those available to the CMA where it carries out a Market Investigation using its existing powers under the EA02. These may include (but are not limited to): (a) general restrictions on conduct (eg a prohibition on combining user data collected from different activities that the SMS firm carries out); (b) general obligations to be performed (eg a requirement to make a service interoperable with a competitor's); (c) acquisitions and divisions (eg a requirement to divest an aspect of the business); (d) supply and publication of information (eg a requirement to supply a competitor with user data).

In Spotify's experience, it is frequently the case that anti competitive contracts (or terms within contracts) can create and maintain Adverse Competition Events; Spotify therefore suggests that PCI forms include eliminating contractual terms that are harmful to competition (or including terms that may encourage competition).

IV. Investigatory Powers (5)

Section 5.8 For example, the CMA may include in an information notice a requirement that a firm create, gather, aggregate or combine specific financial information in a way which may be different to its existing internal practices, should this be required to inform its investigations.

Spotify agrees that it can be helpful in both the investigative stage as well as in informing and crafting appropriate remedies to be able to request financial information in different ways and notes that Apple has testified multiple times under oath that it does not analyze the profitability of its App Store. As one of the factors in assessing SMS includes excess profits, the CMA may wish to require Apple to begin to collect and produce information about the costs, revenues and profitability of its App Store, as well as the profitability (or lack thereof) of any competing apps that Apple may offer.

V. Monitoring (6)

Section 6.24 It is the responsibility of SMS firms to comply with all requirements under the regime and the CMA expects firms to be able to demonstrate their compliance.

Spotify agrees that demonstrating compliance is a burden appropriately placed on SMS firms. It has already been the case with respect to compliance with the DMA that Apple in particular has disregarded the compliance reporting format requested by the European Commission, and declined to affirmatively demonstrate its compliance. Clearly placing this burden on the SMS firm and making it a part of the compliance obligation itself, combined with the management responsibility described above, is likely to drive more robust internal processes and teams to carry out this function inside the SMS firms.

Section 6.38 Consistent with the statutory functions of the nominated officer as set out in paragraph 6.30 above, the CMA's expectations of an individual appointed as a nominated officer in relation to a competition requirement include that they should: (a) Be responsive to requests by the CMA to discuss compliance issues in respect of the competition requirement, including ensuring the SMS firm responds comprehensively and in a timely manner to CMA requests for information regarding any compliance concerns. (b) Ensure the SMS firm complies with its obligations in relation to compliance reports, as set out in paragraphs 6.40 to 6.55 below, and be prepared to discuss the contents of compliance reports with the CMA. (c) Proactively inform the CMA of any issue(s) relating to the SMS firm's compliance with the competition requirement as soon as practicable after they become aware of any such issue(s) and explain the steps the SMS firm has taken or will take to address the compliance issue(s). (d) Engage as reasonably appropriate with relevant stakeholders (including users of the relevant digital activity to which the digital markets requirement relates) about the firm's compliance plans and any concerns about the SMS firm's compliance with the competition requirement.

Spotify supports: (a) imposing an obligation on the nominated officer to notify the CMA of any compliance issues proactively, and (b) the CMA's guidance that nominated officer should engage with relevant stakeholders and notes that there is a past history of certain firms, including Apple, being unwilling to follow that suggestion when it was made by the European Commission. Apple also testified recently in a US court that it did not

involve app developer stakeholders in its “compliance” planning associated with a permanent injunction. An imposition of this sort will drive powerful incentives within the SMS firm to make compliance a part of their internal process, rather than leaving it to chance.

Section 6.59 Where it is possible and appropriate to do so, the CMA will seek to achieve a participative resolution of compliance concerns identified by its monitoring activities through engagement with the relevant SMS firm. In considering whether participative resolution is appropriate, the CMA may, for example, take the following factors into account: (a) the extent to which the firm has engaged in good faith with its users and/or other stakeholders in relation to the concerns;

Spotify agrees that the extent of engagement with users and other stakeholders is a useful indicator when assessing an SMS firm’s compliance efforts but notes that many Big Tech firms have funded “trade associations” that often side with their funders in such matters. The views of such stakeholders should be weighed carefully given that conflict of interest.

VI. Enforcement (7)

Section 7.36 Where it finds that a firm is breaching or has breached a competition requirement, in addition to its powers to impose a financial penalty, ...

Spotify notes that in other jurisdictions, financial penalties have often been too small to incentivize compliance by SMS firms, especially where the profitability of the conduct at issue is great. Spotify urges the CMA to consider whether the SMS firm is likely to view the penalty as simply a cost of continuing to do business in an abusive, exploitative or anticompetitive manner, and consider what is necessary to incentivize compliance.

Section 7.64 Examples of benefits to users or potential users may include protecting user security or privacy, lower prices, higher quality goods or services, or greater innovation in relation to goods or services.

Several Big Tech firms have a history of overstating alleged benefits related to privacy or security, falsely attributing such benefits to conduct not necessary for their realization, ignoring more reasonable alternatives, and understating the incentives and benefits of increased competition. Spotify urges the CMA to scrutinize such claims accordingly. Spotify, and many other companies are in a position to assist the CMA in understanding the limits of such arguments when made by SMS firms or could direct the CMW to several experts that could be helpful to the CMA should these issues arise.

Section 7.68 The third condition of the CBE criteria requires that the benefits could not be realised without the conduct. This condition imposes a standard that is akin to the ‘indispensability’ test in section 9(1)(b) of the CA98. Therefore, the CMA will have regard to the interpretation of that test when applying condition 3.

Spotify believes that this “indispensability” test is the right way to approach any claims of benefits claimed by an SMS firm.

Section 7.96 The CMA may consult such persons as it considers appropriate before making an EO473 and will typically share with the firm any draft EO that it intends to impose in parallel with issuing a notice of findings in relation to the CR breach. This will enable a firm to provide any comments on the intended EO. The CMA will typically also consult third parties before making an EO, in particular where third parties are directly impacted by an EO, or where there are particular questions around design or compliance of the EO on which third party views may be useful.

Spotify supports the CMA’s efforts to consult third parties as it will help to ensure that any orders are effective and reduce the iteration period.

Section 7.113 The FOM seeks to resolve such breaches by obtaining final offers from each party, in relation to payment terms that each party regards as fair and reasonable for the transaction(s) in question. The CMA will choose one of those two offers and make an order to give effect to the terms of that preferred offer.

This sort of “baseball arbitration” is, in many instances, an effective tool in driving the parties to make more reasonable offers and demands at the outset, rather than negotiating to an acceptable middle from initially extreme positions. Spotify agrees with this approach as a means to bring debates to resolution more quickly.

VII. Penalties. (8)

Section 8.8 It is essential that all firms subject to the digital markets competition regime take their responsibilities seriously and comply fully with the requirements placed on them. The CMA’s powers to impose penalties play a critical role in ensuring this and avoiding harm to competition and consumers from noncompliance.

Spotify believes this statement is critical. Corporations do what they are incented to do. In other jurisdictions, thus far, the lack of sufficient incentive for Apple to comply with both the letter and spirit of orders and laws governing its conduct with respect to its App Store and mobile operating system has led not only to noncompliance, but defiant noncompliance by Apple. It will be critical, using its powers both with respect to the

corporation, but also individuals within that corporation, to put in place the proper and sufficient incentives to drive compliance to achieve the goals of the DMCC.

Conclusion

Spotify is grateful for the opportunity to comment on the draft guidelines. Spotify has been and remains a firm supporter of the DMCC and its goals for delivering fairness and contestability to digital markets and the benefits of increased innovation and competition to UK consumers and businesses. We look forward to working with the CMA as appropriate to achieve these ends.