CMA consultation on its draft guidance *Administrative Penalties: Statement of Policy on the CMA's Approach (Draft CMA4)*

Response from the Coalition for App Fairness

23rd August 2024

The Coalition for App Fairness is an independent nonprofit organisation, representing over 80 companies including startups, independent and small developers, indie studios and popular apps, many of them based and operating in the UK. CAF members are unanimous in our support for a strong, effective use of the CMA's powers and particularly the digital markets regime under the DMCC Act. The future of UK tech depends on an open and competitive marketplace where business can innovate and scale up, driving growth, innovation and productivity; and ensuring UK businesses and consumers can reap the benefits of competitive markets such as lower prices and consumer choice.

General view

The Coalition welcomes the CMA's draft approach (CMA4) regarding its powers to impose administrative penalties with respect to breaches of Investigatory Requirements and Remedy Requirements under existing competition law.

We also welcome this updated approach in light of the recent passage of the Digital Markets, Competition and Consumers Act 2024 (DMCCA24), which we believe is a critical step in establishing a fairer and more competitive digital marketplace. We believe that the CMA was right to be given powers to impose strong penalties on those companies in breach of Investigatory and Remedy Requirements, and we welcome the confirmation in the draft CMA4 that the CMA will take the steps necessary to protect competition and tackle unfair behaviour.

Specific points

- We support the "in the round" approach to penalty calculation, whereby the CMA sets out the relevant factors in deciding the level of penalty but does not ascribe a figure to each factor. We agree that administrative penalties have different objectives to penalties for breaching the competition requirements, and that it is therefore less important for third parties to understand the precise figure for each relevant factor. For example, it is useful for a party that is being investigated for resale price maintenance to know what starting percentage has been used in previous resale price maintenance cases. That type of precedent setting is not as relevant or meaningful for administrative penalties, especially when a major part of their calculation will be the specific deterrence effect for the firm in question.

- We support an approach which streamlines the process of imposing administrative penalties when compared with the process of imposing penalties for breaches of

competition requirements. Administrative penalties must be imposed quickly to ensure that CMA investigations are not obstructed, and therefore a quick and agile process is required to ensure that the CMA can adequately prevent such obstruction and tackle unfair behaviour. This is less of a factor for breaches of competition requirements, which will often be investigated after the event.

- We welcome the clarification of what would be regarded as a "reasonable excuse" in paragraphs 2.4-2.8 of the draft CMA4. We support the use of an objective rather than subjective test, which is in line with the CAT's judgement in the Electro Rent case. We believe that a subjective test would be susceptible to circumvention by those trying to avoid accountability for their actions. We also agree that it is correct not to treat a forgotten or overlooked deadline as a reasonable excuse, and we welcome the confirmation that privacy or contractual reasons will also not be treated as a reasonable excuse.

- Whilst the guidance is correct to state that a potential breach of a foreign law could be considered as a valid "reasonable excuse," as mentioned in paragraph 2.9, we believe that the CMA should not accept an overly cautious interpretation of a foreign law as a reasonable excuse. As the CMA described in its mobile ecosystems market study report, we have seen certain firms using spurious interpretations of (e.g.) privacy laws to justify their anti-competitive conduct. The CMA should therefore only accept reasonable interpretations of foreign laws, in order to ensure that this excuse is not unfairly taken advantage of by those wishing to avoid penalties. The burden to prove a reasonable excuse on an objective basis should rest with the company seeking to rely on it.

- We agree with the proposed factors relating to the level of the penalty, and we believe that the most important of these will be the need for deterrence, as mentioned in paragraph 2.14 and paragraphs 2.26-2.27. We also agree with the general principle that a company should not profit from its infringements. However, the companies that are likely to be designated as having strategic market status under the new digital markets regime are among the largest and most profitable companies in history, and it is often difficult to grasp quite how large they are. For example, in 2023 Google settled an antitrust lawsuit regarding the Play Store in the US, where it paid a seemingly-large $700 million settlement[1]. However, that was in fact only three weeks' profits from the Play Store, which is itself a small part of Google's profitability. Google's overall profits were nearly $24 billion in its latest quarter (April to June 2024)[2]. In light of this, we query whether small administrative fines from the CMA will be sufficient to deter such a company from obstructing the CMA's work, when the benefits of obstruction are so high. For example, an administrative fine of $1 million would represent just 0.001% of Google's 2023 annual net profit of $74 billion, with those profits having grown by over 100% since 2019. Apple's annual gross profit for the year ended 30 June 2024 was $177 billion, meaning that a fine of $1 million equates to less than 0.0006% of its profits. This

[1] Google to pay $700m to settle antitrust lawsuit (December 2023)
[2] Google parent Alphabet beats Q2 revenue, profit estimates on strong ads, cloud (July 2024)

is a mere drop in the ocean for firms such as Google and Apple, and would be unlikely to deter them from further obstructing the CMA's work by infringing existing law.

- We welcome Example 6 in Annex 2, which suggests that a company must quickly change any auto-delete setting that has been set up prior to any legal obligation to preserve evidence being triggered. We similarly welcome the CMA's suggestion that this would extend to a senior executive's personal messages. For example, Google has been heavily criticised by a US Federal Court[3] and the Department of Justice[4] for allowing messages to be auto-deleted during an antitrust lawsuit, where the Court concluded that "Google intended to subvert the discovery process, and that Chat evidence was 'lost with the intent to prevent its use in litigation' and 'with the intent to deprive another party of the information's use in the litigation.'" We believe that these principles would apply to messenger apps such as WhatsApp, Telegram, Slack and Microsoft Teams, even where the messaging service has auto-delete as a default setting.

[3] Federal judge rules Google tried to 'hide the ball' by deleting chat logs in a big antitrust case (March 2023)
[4] DoJ accuses Google of deleting chats in its antitrust investigation, similar to Fortnite's case (February 2023)